

**214. QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF  
BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES  
FROM THE NICARAGUAN COAST (NICARAGUA v. COLOMBIA)**

**Judgment of 17 March 2016**

On 17 March 2016, the International Court of Justice delivered its Judgment in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Brower, Skotnikov; Registrar Couvreur.

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The operative paragraph of the Judgment (para. 126) reads as follows:

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THE COURT,

(1) (a) Unanimously,

*Rejects* the first preliminary objection raised by the Republic of Colombia;

(b) By eight votes to eight, by the President’s casting vote,

*Rejects* the third preliminary objection raised by the Republic of Colombia;

IN FAVOUR: *President* Abraham; *Judges* Owada, Tomka, Bennouna, Greenwood, Sebutinde, Gevorgian; *Judge ad hoc* Skotnikov;

AGAINST: *Vice-President* Yusuf; *Judges* Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson; *Judge ad hoc* Brower;

(c) Unanimously,

*Rejects* the fourth preliminary objection raised by the Republic of Colombia;

(d) Unanimously,

*Finds* that there is no ground to rule upon the second preliminary objection raised by the Republic of Colombia;

(e) By eleven votes to five,

*Rejects* the fifth preliminary objection raised by the Republic of Colombia in so far as it concerns the First Request put forward by Nicaragua in its Application;

IN FAVOUR: *President* Abraham; *Judges* Owada, Tomka, Bennouna, Greenwood, Donoghue, Gaja, Sebutinde, Gevorgian; *Judges ad hoc* Brower, Skotnikov;

AGAINST: *Vice-President* Yusuf; *Judges* Cançado Trindade, Xue, Bhandari, Robinson;

(f) Unanimously,

*Upholds* the fifth preliminary objection raised by the Republic of Colombia in so far as it concerns the Second Request put forward by Nicaragua in its Application;

(2) (a) Unanimously,

*Finds* that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the First Request put forward by the Republic of Nicaragua;

(b) By eight votes to eight, by the President's casting vote,

*Finds* that the First Request put forward by the Republic of Nicaragua in its Application is admissible.

IN FAVOUR: *President* Abraham; *Judges* Owada, Tomka, Bennouna, Greenwood, Sebutinde, Gevorgian; *Judge ad hoc* Skotnikov;

AGAINST: *Vice-President* Yusuf; *Judges* Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson; *Judge ad hoc* Brower.

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Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower appended a joint dissenting opinion to the Judgment of the Court; Judges Owada and Greenwood appended separate opinions to the Judgment of the Court; Judge Donoghue appended a dissenting opinion to the Judgment of the Court; Judges Gaja, Bhandari, Robinson and Judge *ad hoc* Brower appended declarations to the Judgment of the Court.

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## I. INTRODUCTION

The Court recalls that in the present proceedings, Nicaragua seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. According to this provision, the parties to the Pact recognize the Court's jurisdiction as compulsory in "all disputes of a juridical nature". In addition, Nicaragua maintains that the subject-matter of its Application remains within the jurisdiction of the Court, as established in the case concerning the

*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, since, in its 2012 Judgment (*I.C.J. Reports 2012 (II)*), p. 624) (hereinafter the “2012 Judgment”), the Court did not definitively determine the question – of which it had been seised – of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles of the Nicaraguan coast.

The Court notes that Colombia has raised five preliminary objections to the jurisdiction of the Court. Nicaragua requested the Court to reject Colombia’s preliminary objections in their entirety.

Since Colombia’s second preliminary objection is concerned exclusively with the additional basis for jurisdiction suggested by Nicaragua, the Court will address it after it has considered the first, third and fourth objections. The fifth preliminary objection, which concerns the admissibility of Nicaragua’s claims, will be considered last.

## II. FIRST PRELIMINARY OBJECTION

In its first preliminary objection, Colombia claims that the Court lacks jurisdiction *ratione temporis* under the Pact of Bogotá, because the proceedings were instituted by Nicaragua on 16 September 2013, after Colombia’s notice of denunciation of the Pact on 27 November 2012.

The Court recalls that Colombia stated in its notification that its denunciation of the Pact of Bogotá “takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with [the] second paragraph of Article LVI”. Under that provision, the denunciation would have no effect with respect to pending procedures initiated prior to the transmission of the notification. The Court notes that Nicaragua’s Application was submitted to it after the transmission of Colombia’s notification of denunciation, but before the expiry of the one-year period referred to in the first paragraph of Article LVI, according to which, at the end of that period, the Pact would cease to be in force in respect of the party denouncing it, and would continue in force for the remaining signatories.

Colombia contends that the natural implication of the express provision in the second paragraph of Article LVI of the Pact is that denunciation is effective with regard to procedures initiated after transmission of the notification of denunciation. It refutes the suggestion that its interpretation of the second paragraph of Article LVI would deny *effet utile* to the first paragraph of that provision. Even though Colombia accepts that its interpretation would mean that none of the different procedures provided for in Chapters Two to Five of the Pact could be initiated by, or against, a State which had given notification of denunciation during the year that the treaty remained in force, in accordance with the first paragraph of Article LVI, it maintains that important substantive obligations contained in the other Chapters of the Pact would nevertheless remain in force during the one-year period, so that the first paragraph of Article LVI would have a clear effect. Colombia argues that its interpretation of Article LVI is confirmed by the fact that if the parties to the Pact had wanted to provide that denunciation would not affect any procedures initiated during the one-year period of notice, they could easily have said so expressly, namely by adopting a wording similar to provisions in other treaties. Finally, Colombia maintains that its interpretation is “also consistent with the State practice of the parties to the Pact” and the *travaux préparatoires*.

Nicaragua contends that the jurisdiction of the Court is determined by Article XXXI of the Pact of Bogotá, according to which Colombia and Nicaragua had each recognized the jurisdiction of the Court “so long as the present Treaty is in force”. How long the treaty remains in force is determined by the first paragraph of Article LVI, which provides that the Pact remains in force for a State which has given notification of denunciation for one year from the date of that notification. Since the date on which the jurisdiction of the Court has to be established is that on which the Application is filed, and since Nicaragua’s Application was filed less than one year after Colombia gave notification of its denunciation of the Pact, it follows – in Nicaragua’s view – that the Court has jurisdiction in the present case. Nicaragua further contends that the Colombian interpretation would remove from the effect of the first paragraph of Article LVI all of the procedures for good offices and mediation (Chapter Two of the Pact), investigation and conciliation (Chapter Three), judicial settlement (Chapter Four) and arbitration (Chapter Five), which together comprise forty-one of the sixty articles of the Pact. Of the remaining provisions, several are provisions which have entirely served their purpose and would fulfil no function during the one-year period of notice, while others are inextricably linked to the procedures in Chapters Two to Five and impose no obligations independent of those procedures. Finally, Nicaragua denies that the practice of the parties to the Pact of Bogotá or the *travaux préparatoires* support Colombia’s interpretation.

The Court recalls that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court. By Article XXXI, the parties to the Pact of Bogotá recognize as compulsory the jurisdiction of the Court, “so long as the present Treaty is in force”. The first paragraph of Article LVI provides that, following the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation. In the Court’s view, it is not disputed that, if these provisions stood alone, they would be sufficient to confer jurisdiction in the present case. The Pact was still in force between Colombia and Nicaragua on the date that the Application was filed and the fact that the Pact subsequently ceased to be in force between them would not affect that jurisdiction. The only question raised by Colombia’s first preliminary objection, therefore, is whether an *a contrario* interpretation can be applied to the second paragraph of Article LVI, which states that “[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification”, so altering what would otherwise have been the effect of the first paragraph as to require the conclusion that the Court lacks jurisdiction in respect of the proceedings, notwithstanding that those proceedings were instituted while the Pact was still in force between Nicaragua and Colombia. That question has to be answered by the application to the relevant provisions of the Pact of Bogotá of the rules on treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention, which reflect rules of customary international law.

The Court observes that it is not the denunciation *per se* that is capable of having an effect upon the jurisdiction of the Court under Article XXXI of the Pact, but the termination of the treaty (as between the denouncing State and the other parties) which results from the denunciation. That follows both from the terms of Article XXXI and from the ordinary meaning of the words used in Article LVI. The first paragraph of Article LVI provides that the treaty may be terminated by denunciation, but that termination will occur only after a period of one year from the notification of denunciation. It is, therefore, this first paragraph which determines the effects of denunciation. The second paragraph of Article LVI confirms that procedures instituted before the transmission of the notification of denunciation can

continue irrespective of the denunciation and thus that their continuation is ensured irrespective of the provisions of the first paragraph on the effects of denunciation as a whole.

The Court considers that Colombia's interpretation of the second paragraph of Article LVI runs counter to the language of Article XXXI. In the Court's view, a different interpretation, which is compatible with the language of Article XXXI, is that, whereas proceedings instituted before transmission of notification of denunciation can continue in any event and are thus not subject to the first paragraph of Article LVI, the effect of denunciation on proceedings instituted after that date is governed by the first paragraph. Since the first paragraph provides that denunciation terminates the treaty for the denouncing State only after a period of one year has elapsed, proceedings instituted during that year are instituted while the Pact is still in force. They are thus within the scope of the jurisdiction conferred by Article XXXI. The Court adds that the result of Colombia's proposed interpretation of the second paragraph of Article LVI would be that, during the year following notification of denunciation, most of the Articles of the Pact, containing its most important provisions, would not apply between the denouncing State and the other parties. Such a result is difficult to reconcile with the express terms of the first paragraph of Article LVI, which provides that "the present Treaty" shall remain in force during the one-year period without distinguishing between different parts of the Pact as Colombia seeks to do. The Court notes, moreover, that Colombia's interpretation is inconsistent with the object and purpose of the Pact of Bogotá, which is to further the peaceful settlement of disputes through the procedures provided for in the Pact. Although Colombia argues that the reference to "regional ... procedures" in the first paragraph of Article II is not confined to the procedures set out in the Pact, Article II has to be interpreted as a whole. It is clear from the use of the word "consequently" at the beginning of the second paragraph of Article II that the obligation to resort to regional procedures, which the parties "recognize" in the first paragraph, is to be given effect by employing the procedures laid down in Chapters Two to Five of the Pact.

Finally, the Court is not persuaded by Colombia's argument that, had the parties to the Pact of Bogotá wished to provide that proceedings instituted at any time before the expiry of the one-year period stipulated by the first paragraph of Article LVI would be unaffected, they could easily have made express provision to that effect. Colombia's argument regarding the State practice in the form of the denunciation of the Pact by El Salvador in 1973 and Colombia itself in 2012, together with what Colombia describes as the absence of any reaction to the notification of those denunciations, sheds no light on the question before the Court. As regards the *travaux préparatoires*, they give no indication as to the precise purpose behind the addition of what became the second paragraph of Article LVI.

For all of the foregoing reasons the Court considers that Colombia's interpretation of Article LVI cannot be accepted. Taking Article LVI as a whole, and in light of its context and the object and purpose of the Pact, it concludes that Article XXXI conferring jurisdiction upon the Court remained in force between the Parties on the date that the Application in the present case was filed. The subsequent termination of the Pact as between Nicaragua and Colombia does not affect the jurisdiction which existed on the date that the proceedings were instituted. Colombia's first preliminary objection must therefore be rejected.

### III. THIRD PRELIMINARY OBJECTION

Colombia contends in its third objection that the issues raised in Nicaragua's Application of 16 September 2013 were "explicitly decided" by the Court in its 2012

Judgment; the Court therefore lacks jurisdiction because Nicaragua's claim is barred by the principle of *res judicata*.

The Court first observes that Colombia's third preliminary objection has the characteristics of an objection to admissibility, which "consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein". It will therefore deal with this objection as such.

The Court then examines the *res judicata* principle and its application to subparagraph 3 of the operative clause of the 2012 Judgment, in which the Court found "that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)". In its final submission I (3), Nicaragua requested the Court to adjudge and declare that:

"[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties".

The Court described this submission as a request "to define 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'".

Colombia considers that Nicaragua's First Request, in its Application of 16 September 2013 instituting the present proceedings, "is no more than a reincarnation of Nicaragua's claim contained in its final submission I (3)" of 2012, in so far as it asks the Court to declare "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012". It adds that the Court, in its 2012 Judgment, decided that the claim by Nicaragua contained in final submission I (3) was admissible, but it did not uphold it on the merits. That fact is said to prevent the Court, by virtue of *res judicata*, from entertaining it in the present case.

Colombia argues that the fate of the Second Request contained in the Application of 16 September 2013 is entirely linked to that of the first. In its Second Request, Nicaragua asks the Court to adjudge and declare

"[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast".

The Court notes that the question as to the effect of the *res judicata* principle relates to the admissibility of Nicaragua's First Request. The Second Request forms the subject, as such, of the fifth objection by Colombia, so the Court will examine it under that heading. It holds that even if their views converge on the elements that constitute the principle of *res judicata*, the Parties disagree on the meaning of the decision adopted by the Court in subparagraph 3 of the operative clause of its 2012 Judgment, and hence on what falls within the scope of *res judicata* in that decision.

## 1. The *res judicata* principle

The Parties agree that the principle of *res judicata* requires an identity between the parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*). They likewise accept that this principle is reflected in Articles 59 and 60 of the Statute of the Court.

For Colombia, there must be an identity between the parties, the object and the legal ground in order for the principle of *res judicata* to apply. Colombia adds that it is not possible for the Court, having found in the operative clause of the 2012 Judgment, which possesses the force of *res judicata*, that it “cannot uphold” Nicaragua’s claim for lack of evidence, then to decide in a subsequent judgment to uphold an identical claim.

Nicaragua considers that an identity between the *personae*, the *petitum* and the *causa petendi*, though necessary for the application of the *res judicata* principle, is not sufficient. It is also necessary that the question raised in a subsequent case should previously have been disposed of by the Court finally and definitively. Consequently, Nicaragua considers that, in order to determine whether the 2012 Judgment has the force of *res judicata* in respect of its First Request in the present case, the central question is whether the Court, in that Judgment, made a decision on the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast.

The Court recalls that the principle of *res judicata* is a general principle of law which establishes the finality of the decision adopted in a particular case. It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled. It notes that the decision of the Court is contained in the operative clause of the judgment. However, in order to ascertain what is covered by *res judicata*, it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question. The Court is faced with such a situation in the present case, since the Parties disagree as to the content and scope of the decision that was adopted in subparagraph 3 of the operative clause of the 2012 Judgment.

## 2. The decision adopted by the Court in its Judgment of 19 November 2012

The Parties have presented divergent readings of the decision adopted in subparagraph 3 of the operative clause of the 2012 Judgment, and of the reasons underpinning it. They draw opposing conclusions as to precisely what that decision covers and which issues the Court has definitively settled.

Colombia attempts to show, in essence, that the grounds of Nicaragua’s First Request had already been put forward in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. It further argues that, since the Court did not uphold the arguments made by Nicaragua in its 2012 Judgment, it is barred by the effect of the *res judicata* principle from dealing with Nicaragua’s Application in the present case.

Colombia contends that, in the written and oral proceedings which preceded the 2012 Judgment, Nicaragua developed arguments identical to those that it puts forward in the present case. Relying on the Preliminary Information provided by it to the Commission on

the Limits of the Continental Shelf (hereinafter the “CLCS”), it had claimed an extended continental shelf on the basis of Article 76 of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”) by virtue of geological and geomorphological criteria. In Colombia’s view, Nicaragua had not demonstrated, as it was obliged to do, that its continental margin extended sufficiently far to overlap with the continental shelf that Colombia was entitled to claim up to 200 nautical miles from its mainland coast. It maintains that the Court, having found Nicaragua’s claim to be admissible, settled it on the merits in 2012 by deciding not to uphold it. According to Colombia, that decision, whereby the Court effected a full delimitation of the maritime boundary between the Parties, was both expressly and by necessary implication a final one. Hence, when the Court held that it “[was] not in a position to delimit the continental shelf boundary between Nicaragua and Colombia” (paragraph 129 of the 2012 Judgment), what it meant was that its examination of the facts and arguments presented by Nicaragua impelled it to reject the latter’s claim.

For its part, Nicaragua contends that the Court’s decision, in subparagraph 3 of the operative clause of the 2012 Judgment, not to uphold its claim did not amount to a rejection of that claim on the merits. The Court expressly refused to rule on the issue because Nicaragua had not completed its submission to the CLCS. Nicaragua considers that, on 24 June 2013, it discharged the procedural obligation imposed upon it under Article 76, paragraph 8, of UNCLOS to provide the CLCS with information on the limits of its continental shelf beyond 200 nautical miles, and that the Court now has all the necessary information to carry out the delimitation and settle the dispute.

Nicaragua admits that the phrase “cannot uphold” might appear “ambiguous” from a reading of subparagraph 3 of the operative clause alone, but it contends that such ambiguity is dispelled if one looks at the reasoning of the decision. Moreover, Nicaragua continues, the reasoning is inseparable from the operative clause, for which it provides the necessary underpinning, and must be taken into account in order to determine the scope of the operative clause of the Judgment. It follows from the reasoning of the Judgment that the operative clause takes no position on the delimitation beyond 200 nautical miles. Nicaragua is therefore of the view that the Court is not prevented, in the present case, from entertaining its claim relating to the delimitation of the continental shelf beyond 200 nautical miles.

The Court first notes that, although in its 2012 Judgment it declared Nicaragua’s submission to be admissible, it did so only in response to the objection to admissibility raised by Colombia that this submission was new and changed the subject-matter of the dispute. However, it does not follow that the Court ruled on the merits of the claim relating to the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast.

The Court takes the view that it must now examine the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment. As a result of the disagreement between the Parties on the matter, the Court must determine the content of the decision adopted by it in response to Nicaragua’s request for delimitation of “a continental shelf boundary dividing ... the overlapping entitlements ... of both Parties”.

The Court begins by saying that it will not linger over the meaning of the phrase “cannot uphold”, taken in isolation, in the way the Parties have done. It will examine this phrase in its context, in order to determine the meaning of the decision not to uphold Nicaragua’s request for the Court to delimit the continental shelf between the Parties. In particular, the Court will determine whether subparagraph 3 of the operative clause of its 2012 Judgment must be understood as a straightforward dismissal of Nicaragua’s request for

lack of evidence, as Colombia claims, or a refusal to rule on the request because a procedural and institutional requirement had not been fulfilled, as Nicaragua argues. In order to do this, the Court will examine subparagraph 3 of the operative clause of the 2012 Judgment in its context, namely by reference to the reasoning which underpins its adoption and accordingly serves to clarify its meaning.

The Court devoted section IV of its 2012 Judgment to the “[c]onsideration of Nicaragua’s claim for delimitation of a continental shelf extending beyond 200 nautical miles”. That section consists of paragraphs 113 to 131 of the Judgment.

Paragraph 113 defines the question examined by the Court as whether “it [the Court] is in a position to determine ‘a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties’”. In paragraphs 114 to 118, the Court then concludes that the law applicable in the case, which is between a State party to UNCLOS (Nicaragua) and a non-party State (Colombia), is customary international law relating to the definition of the continental shelf, as reflected in Article 76, paragraph 1, of that Convention. Paragraphs 119 to 121 summarize Nicaragua’s arguments regarding the criteria for determining the existence of a continental shelf and the procedural conditions, laid down in Article 76, paragraph 8, of UNCLOS, for a State to be able to establish the outer limits of the continental shelf beyond 200 nautical miles and the steps which Nicaragua had taken to that end. Paragraphs 122 to 124 set out Colombia’s arguments opposing Nicaragua’s request for delimitation of the continental shelf. In paragraphs 126 and 127 respectively, the Court points out that the fact that Colombia is not a party to UNCLOS “does not relieve Nicaragua of its obligations under Article 76 of that Convention”, and it observes that, at the time of the 2012 Judgment, Nicaragua had only submitted to the CLCS “Preliminary Information”, which, by its own admission, “falls short of meeting the requirements” under paragraph 8 of Article 76 of UNCLOS.

At the close of this section of its reasoning, the Court reaches the following conclusion at paragraph 129:

“However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it.”

The Court considers that this paragraph must be read in the light of those preceding it in the reasoning of the 2012 Judgment. Three features of that reasoning stand out. First, although the Parties made extensive submissions regarding the geological and geomorphological evidence of an extension of the continental shelf beyond 200 nautical miles submitted by Nicaragua, the Judgment contains no analysis by the Court of that evidence. Secondly, the Court considered that, in view of the limited nature of the task before it, there was no need to consider whether the provisions of Article 76 of UNCLOS, which lay down the criteria which a State must meet if it is to establish continental shelf limits more than 200 nautical miles from its coast, reflected customary international law, which it had already determined was the applicable law in the case. The Court did not, therefore, consider it necessary to decide the substantive legal standards which Nicaragua had to meet if it was to prove vis-à-vis Colombia that it had an entitlement to a continental shelf beyond 200 nautical miles from its coast. Thirdly, what the Court did emphasize was the obligation on Nicaragua, as a party to

UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS, to the CLCS. It is because, at the time of the 2012 Judgment, Nicaragua had not yet submitted such information that the Court concluded, in paragraph 129, that “Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast”.

The Court considers that its conclusions in paragraph 129 can only be understood in the light of those features of its reasoning. They indicate that the Court did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200 nautical miles from its coast. The Court there speaks only of a continental margin which overlaps with the 200-nautical-mile entitlement from the Colombian mainland. The Judgment says nothing about the maritime areas located to the east of the line lying 200 nautical miles from the islands fringing the Nicaraguan coast, beyond which the Court did not continue its delimitation exercise, and to the west of the line lying 200 nautical miles from Colombia’s mainland. Yet, the Court was, as regards these areas, faced with competing claims by the Parties concerning the continental shelf: Nicaragua, on the one hand, claimed an extended continental shelf in these areas, and Colombia, on the other, maintained that it had rights in the same areas generated by the islands over which it claimed sovereignty, and that the Court indeed declared to be under its sovereignty. It therefore follows that while the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua’s claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the “final” information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS.

### **3. Application of the *res judicata* principle in the case**

The Court has clarified the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment, taking into account the differing views expressed by the Parties on the subject. It has found that delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of “final” information on the limits of its continental shelf beyond 200 nautical miles, provided for in paragraph 8 of Article 76 of UNCLOS, to the CLCS. The Court thus did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so. The Court recalls that, in its Application of 16 September 2013, Nicaragua states that on 24 June 2013 it provided the CLCS with “final” information. The Court accordingly considers that the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua contained in final submission I (3) has been fulfilled in the present case. It concludes that it is not precluded by the *res judicata* principle from ruling on the Application submitted by Nicaragua on 16 September 2013. In light of the foregoing, the Court finds that Colombia’s third preliminary objection must be rejected.

## **IV. FOURTH PRELIMINARY OBJECTION**

The Court observes that Colombia bases its fourth preliminary objection on the assertion that, in its 2012 Judgment, the Court rejected Nicaragua’s request for delimitation of the continental shelf between the Parties beyond 200 nautical miles, and fixed the boundary between each Party’s maritime spaces. According to Colombia, that decision was “final and without appeal” pursuant to Article 60 of the Statute, so that, through its

Application of 16 September 2013, Nicaragua was seeking to “appeal” the previous Judgment, or to have it revised.

The Court is of the view that Nicaragua does not request it to revise the 2012 Judgment, nor does it frame its Application as an “appeal”. Accordingly, the Court finds that the fourth preliminary objection is not founded.

## **V. SECOND PRELIMINARY OBJECTION**

The Court notes that Colombia’s second preliminary objection concerns Nicaragua’s argument that, independent of the applicability of Article XXXI of the Pact of Bogotá between Colombia and Nicaragua, the Court possesses continuing jurisdiction over the subject-matter of the Application. According to Nicaragua, this continuing jurisdiction is based on the Court’s jurisdiction in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, given that the Court, in its 2012 Judgment, did not definitively determine the question of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles from the Nicaraguan coast.

Colombia denies that any such continuing jurisdiction exists in the present case. In Colombia’s view, unless the Court expressly reserves its jurisdiction, which it did not do in the 2012 Judgment, there is no basis on which the Court can exercise continuing jurisdiction once it has delivered its judgment on the merits. According to Colombia, the Statute provides only two procedures by which the Court can act, without an independent basis of jurisdiction, in respect of matters which have previously been the subject of a judgment of the Court in a case between the same parties: requests under Article 60 of the Statute for interpretation of the earlier judgment and requests under Article 61 for revision of the earlier judgment. Since the present case falls within neither Article 60, nor Article 61, Colombia contends that the Court lacks jurisdiction on the additional basis advanced by Nicaragua.

Nicaragua rejects Colombia’s analysis. According to Nicaragua, the Court has an obligation to exercise to the full its jurisdiction in any case properly submitted to it. The Court declined, in its 2012 Judgment, to exercise its jurisdiction in respect of the part of Nicaragua’s case that is the subject of the current proceedings for reasons which, according to Nicaragua, no longer appertain. Nicaragua maintains that the Court must now exercise the jurisdiction which it possessed at the time of the 2012 Judgment. Accordingly, Nicaragua argues that the Court possesses continuing jurisdiction over the issues raised by its present Application, irrespective of whether it expressly reserved that jurisdiction in its earlier judgment. Nicaragua maintains that this basis of jurisdiction is additional to the jurisdiction conferred by Article XXXI of the Pact of Bogotá.

The Court recalls that it has already held that Article XXXI confers jurisdiction upon it in respect of the present proceedings since Nicaragua’s Application was filed before the Pact of Bogotá ceased to be in force between Nicaragua and Colombia. It is therefore unnecessary to consider whether an additional basis of jurisdiction exists. Consequently, there is no ground for the Court to rule upon the second preliminary objection raised by Colombia.

## **VI. FIFTH PRELIMINARY OBJECTION**

The Court observes that Colombia contends, in the alternative, on the hypothesis that the four other objections raised by it were to be rejected, that neither of the two requests put

forward in Nicaragua's Application is admissible. Colombia considers that the First Request is inadmissible due to the fact that Nicaragua has not secured the requisite recommendation on the establishment of the outer limits of its continental shelf from the CLCS, and that the Second Request is inadmissible because, if it were to be granted, the decision of the Court would be inapplicable and would concern a non-existent dispute.

### **1. The preliminary objection to the admissibility of Nicaragua's First Request**

In its First Request, Nicaragua asks the Court to determine "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012". Colombia maintains that "the [Court] cannot consider the Application by Nicaragua because the CLCS has not ascertained that the conditions for determining the extension of the outer edge of Nicaragua's continental shelf beyond the 200-nautical-mile line are satisfied and, consequently, has not made a recommendation".

Nicaragua responds that a coastal State has inherent rights over the continental shelf, which exist *ipso facto* and *ab initio*, and that its own rights over its continental shelf vest in it automatically, *ipso jure*, by operation of law. Furthermore, the CLCS is concerned only with the precise location of the outer limits of the continental shelf; it does not grant or recognize the rights of a coastal State over its shelf and is not empowered to delimit boundaries in the shelf. Nicaragua adds that, in the event of a dispute over its extended continental shelf beyond 200 nautical miles, the CLCS, in accordance with its own rules and established practice, would not address a recommendation to Nicaragua. And if the Court were to refuse to act because the CLCS had not issued such a recommendation, the result would be an impasse.

The Court has already established that Nicaragua was under an obligation, pursuant to paragraph 8 of Article 76 of UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles to the CLCS. The Court held, in its 2012 Judgment, that Nicaragua had to submit such information as a prerequisite for the delimitation of the continental shelf beyond 200 nautical miles by the Court. The Court must now determine whether a recommendation made by the CLCS is a prerequisite in order for the Court to be able to entertain the Application filed by Nicaragua in 2013.

The Court notes that Nicaragua, as a State party to UNCLOS, is under an obligation to communicate to the CLCS the information on the limits of its continental shelf beyond 200 nautical miles, whereas the making of a recommendation, following examination of that information, is a prerogative of the CLCS. When the CLCS addresses its recommendations on questions concerning the outer limits of its continental shelf to coastal States, those States establish, on that basis, limits which are "final and binding" upon the States parties to that instrument.

The Court observes that the procedure before the CLCS relates to the delineation of the outer limits of the continental shelf, and hence to the determination of the extent of the sea-bed under national jurisdiction. It is distinct from the delimitation of the continental shelf, which is governed by Article 83 of UNCLOS and effected by agreement between the States concerned, or by recourse to dispute resolution procedures.

The Court accordingly considers that, since the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the

CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation. The Court finds that the preliminary objection to the admissibility of Nicaragua's First Request must be rejected.

## **2. The preliminary objection to the admissibility of Nicaragua's Second Request**

In its Second Request, Nicaragua asks the Court to determine

“[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast”.

Colombia contends that Nicaragua's Second Request invites the Court to make a ruling pending its decision on the First Request, and that, since the Court would have to rule on both requests simultaneously, it could not accept the Second Request, because it would be without object. Colombia is also of the view that Nicaragua's Second Request is a disguised request for provisional measures and that it should therefore be dismissed. Finally, Colombia argues that there is no dispute between the Parties concerning a hypothetical legal régime to be applied pending the decision on the maritime boundary beyond 200 nautical miles of Nicaragua's coast.

Nicaragua considers that the relevance of the Second Request depends on the Court's decision on the merits in respect of the question of the delimitation of the continental shelf beyond 200 nautical miles from Nicaragua's coast between the Parties. Nicaragua disagrees with Colombia that its Second Request is a disguised request for provisional measures. It asserts that there is indeed a dispute between the Parties, since Colombia denies that Nicaragua has any legal rights – or even any claims – beyond 200 nautical miles from its coast.

The Court notes that, in its Second Request, Nicaragua invites it to determine the principles and rules of international law governing a situation that will be clarified and settled only at the merits stage of the case. However, it is not for the Court to determine the applicable law with regard to a hypothetical situation. It recalls that its function is “to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties”. This is not the case, at this stage of the proceedings, in respect of Nicaragua's Second Request. This Request does not relate to an actual dispute between the Parties, that is, “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”, nor does it specify what exactly the Court is being asked to decide. Accordingly, the Court finds that the preliminary objection to the admissibility of Nicaragua's Second Request must be upheld.

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**Joint dissenting opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower**

**Introduction**

1. The seven judges who authored the joint dissenting opinion regret that the Court was evenly split regarding the content and scope of a decision that was unanimously adopted by the Court only four years ago. They are of the view that Colombia's objection based on the principle of *res judicata* should have been upheld and Nicaragua's Application dismissed as inadmissible, being barred by the principle of *res judicata*.

**The principle of *res judicata* in the jurisprudence of the Court and its application to the present case**

2. The joint dissenting opinion outlines its authors' understanding of *res judicata*. This conception views *res judicata* as a general principle, which is reflected in Articles 59 and 60 of the Statute of the Court, according to which "the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined". It is a principle which acts as a bar to a subsequent claim if there is identity of parties, identity of cause and identity of object with a previous claim that has been adjudicated upon.

3. The seven judges are, however, aware of the fact that although the Parties agree on these elements, they disagree on what the Court finally decided in its 2012 Judgment in the *Territorial and Maritime Dispute case (Nicaragua v. Colombia)*. They are of the view that this is to be found in the *dispositif* of the Judgment, which is endowed with *res judicata*, as well as the elements of the Court's reasoning that are "inseparable" from the operative clause of a judgment or which constitute a "condition essential to the Court's decision".

**The *dispositif* of the 2012 *Territorial and Maritime Dispute* Judgment**

4. The joint dissenting opinion recalls that the Court stated in the *dispositif* of the 2012 Judgment: "The Court ... *[f]inds* that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)" (*I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)). Nicaragua had requested the Court to adjudge and declare that "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties" (*ibid.*, p. 636, para. 17).

5. The joint dissenting opinion, after having surveyed judgments of the Court in which the phrase "cannot uphold" was used, concludes that the Court has consistently used that phrase to reject the submission or request of a party. Thus, its authors are of the view that the Court rejected Nicaragua's final submission I (3) in 2012. Consequently, since the Court rejected this submission in the operative paragraph of the Judgment, it took a decision to which *res judicata* attaches.

6. In the present case, Nicaragua's first request to the Court is to adjudge and declare "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012" (Application of Nicaragua, hereinafter

“AN”, para. 12). Paragraph 11 of Nicaragua’s Application states that Nicaragua’s claimed extended continental shelf “includes an area beyond Nicaragua’s 200-nautical-mile maritime zone and in part overlaps with the area that lies within 200 nautical miles of Colombia’s coast” (AN, para. 11 (c)), and that this entitlement to an extended continental shelf exists under both customary international law and the provisions of UNCLOS (AN, para. 11 (a)).

7. The seven judges are of the opinion that the final submission I (3) of Nicaragua in the *Territorial and Maritime Dispute* case and the first request in Nicaragua’s Application in the present case have both the same object (the delimitation of an extended continental shelf entitlement that overlaps with Colombia’s 200-nautical-mile entitlement, measured from the latter’s mainland coast), the same legal ground (that such an entitlement exists as a matter of customary international law and under UNCLOS), and involve the same Parties. Nicaragua is therefore attempting to bring the same claim against the same Party on the same legal grounds. As the joint dissenting opinion’s survey of the Court’s use of the phrase “cannot uphold” demonstrates, the Court rejected Nicaragua’s final submission I (3) in the 2012 Judgment. Nicaragua’s first request in the present Application is thus an exemplary case of a claim precluded by *res judicata*.

### **The reasoning of the Court in the 2012 *Territorial and Maritime Dispute* Judgment**

8. The seven judges of the joint dissenting opinion regret that the majority does not examine the use of the phrase “cannot uphold” and thus does not give effect to the words contained in the *dispositif* of the 2012 Judgment. The approach of the majority is based on an examination of the reasoning of the Court in that Judgment, instead of its *dispositif*. However, the seven judges maintain that even that reasoning supports the view that the Court rejected Nicaragua’s claim in 2012 because it failed to establish the existence of an extended continental shelf that overlaps with Colombia’s 200-nautical-mile entitlement, measured from the latter’s coast.

9. The language used by the Court in paragraph 129 of the 2012 Judgment makes clear that the Court rejected Nicaragua’s claim because it had “*not established* that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement” (emphasis added) (in the French text: “le Nicaragua n’ayant pas ... *apporté la preuve* que sa marge ...”).

10. This conclusion is also supported by the Court’s rejection of Nicaragua’s proposed “general formulation” in the 2012 Judgment, according to which it requested the Court delimit the overlapping continental shelf entitlements in general terms, such as “the boundary is the median line between the outer edge of Nicaragua’s continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia’s 200-mile zone” (*I.C.J. Reports 2012 (II)*, p. 669, para. 128). The Court found that “*even* using the general formulation proposed” by Nicaragua (*ibid.*, p. 669, para. 129; emphasis added), it was not in a position to effect a delimitation between the Parties. The only reason that the Court had to recall and reject the “general formulation” as distinct from Nicaragua’s final submission I (3) was that the former claim relied solely on the existence of an extended continental shelf that overlapped with Colombia’s 200-nautical-mile entitlement, and not on the delineation of its outer limits.

11. Thus the Court’s rejection of Nicaragua’s request was not, as contended by the majority, based on the failure of Nicaragua to deposit information with the CLCS pursuant to

Article 76 (8) of UNCLOS. Indeed, even Nicaragua itself in oral proceedings in the present case admitted that the Court decided in 2012 that Nicaragua had not established the existence of an extended continental shelf that overlapped with Colombia's 200-nautical-mile entitlement, measured from the latter's coastline.

12. Moreover, contrary to the conclusion of the majority, the Court never indicated that there was a procedural requirement incumbent on Nicaragua to submit information to the CLCS before the Court could proceed with delimitation, nor did the Court suggest that Nicaragua would be able to return to the Court once it had made its submission to the CLCS.

13. The seven judges must therefore conclude that the failure of Nicaragua to prove the existence of an extended continental shelf that overlaps with Colombia's 200-nautical-mile entitlement constituted the very basis of the decision adopted by the Court in 2012 concerning delimitation. This is a major element of the Court's reasoning which laid the foundation for the operative clause to which *res judicata* attaches.

14. Nicaragua's second request in the present case asks the Court to adjudge and declare "[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast" (AN, para. 12). This is a reformulation of the "general formulation" proposed to the Court by Nicaragua in the *Territorial and Maritime Dispute* proceedings. As with Nicaragua's first request in the present case, the second request is barred by *res judicata*.

### **The incoherence of the procedural requirement introduced by the majority**

15. The majority has read a procedural requirement into the 2012 Judgment according to which a coastal State is obliged to submit information to the CLCS under Article 76 (8) of UNCLOS as a prerequisite for the delimitation of extended continental shelf entitlements between Nicaragua and Colombia. It therefore frames submission of information to the CLCS under Article 76 (8) as a condition of admissibility; in other words, as a "contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2008, p. 456, para. 120).

16. However, in the 2012 Judgment, the question of admissibility of Nicaragua's final submission I (3) was expressly raised by Colombia, which argued that the request to delimit an extended continental shelf was neither implicit in the Application of Nicaragua nor was it an issue that arose directly out of the subject-matter of the dispute (*I.C.J. Reports* 2012 (II), p. 664, para. 107). The Court rejected Colombia's objection, and declared Nicaragua's final submission I (3) admissible.

17. The majority's line of reasoning in the present case thus leaves the Court in a strange position. If one accepts the view of the majority in the current case, the Court should not, in the 2012 proceedings, have accepted Nicaragua's I (3) submission as admissible and should not have proceeded to address the claim on the merits. On the other hand, if one accepts – as the Court did in 2012 – that Nicaragua's I (3) submission was admissible, then

logic dictates that a submission to the CLCS under Article 76 (8) of UNCLOS cannot be a prerequisite to adjudicate upon a request for delimitation of the extended continental shelf.

18. Not only is the majority's position inconsistent with the 2012 Judgment, but it is also inconsistent with the text of Article 76 (8) of UNCLOS. This provision may be divided into three limbs, each with the imperative *shall* in the English version of the Convention: information *shall* be submitted by the coastal State; the Commission *shall* make recommendations; and the limits established upon the basis of CLCS recommendations *shall* be final and binding. It is unclear why the majority considers that the first limb of this Article constitutes a prerequisite to delimitation whereas the other two limbs do not; clearly, there is no textual support for such a reading.

### **The purposes of submission of information under Article 76 of UNCLOS and Article 4 of its Annex II**

19. Under the provisions of UNCLOS, there are two purposes for submitting information to the CLCS. The first purpose of submitting information to the CLCS, under paragraph 76 (8), is to obtain recommendations from the CLCS regarding the outer limits of the continental shelf, should a coastal State wish to do so. Such recommendations shall then be used as the basis for delineation of the continental shelf and the resulting determination shall be opposable to other States.

20. The second purpose is to allow States that intend to claim an extended continental shelf to comply with the "sunset clause" under Article 4 of Annex II of UNCLOS, which requires States to submit "particulars" of prospective continental shelf claims to the CLCS within ten years of the entry into force of the Convention for that State.

21. By virtue of the Decision of States Parties to UNCLOS of 20 June 2008 (SPLOS/183), States may submit "preliminary information" to the CLCS as a means of complying with their obligation under Article 4 of Annex II. This was a means of allowing States, in particular developing ones, which may lack the necessary technical capabilities, the possibility of complying with the "sunset clause" for claiming an extended continental shelf under UNCLOS, whilst providing them with the extra time required to complete the requisite geological and geomorphological surveys to prove the existence of an extended continental shelf. The majority is wrong to conflate the purposes served by these two different provisions of the UNCLOS.

### ***Ne bis in idem* and the exhaustion of treaty processes**

22. The seven judges of the joint dissenting opinion argue that, even if one were to accept the majority's interpretation of the 2012 Judgment, Nicaragua should not now be able to come before the Court for a second time to attempt to remedy the procedural flaw which supposedly precluded the Court from delimiting its allegedly overlapping extended continental shelf entitlement in 2012. Allowing such an action would violate the principle of *ne bis in idem*, according to which a repeat claim is inadmissible whether or not the issue is covered by the principle of *res judicata*.

23. Moreover, the renewed presentation of a claim previously examined by the Court may be considered inadmissible if that claim relies on the same treaty process as the basis of

jurisdiction of the Court. Nicaragua's Application in the present case is thus barred as a result of the exhaustion of treaty processes.

**Conclusion: the authority of *res judicata* and the protection of the judicial function**

24. The seven judges conclude their joint dissenting opinion by highlighting the importance of protecting the finality of judgments of the Court, both for the efficient operation of the inter-State dispute settlement system and the protection of respondent States from repeat litigation. In their view, a scenario in which the purposes of *res judicata* are no longer served undermines the judicial function as well as the sound administration of justice.

25. Nicaragua and Colombia have been embroiled in a long-running dispute for many years regarding their respective maritime entitlements. As the principal judicial organ of the United Nations, the Court is well placed to settle such disputes. But if it is to continue to be regarded as such, it cannot afford to be seen to allow States to bring the same disputes over and over again. Such a scenario would undercut the certainty, stability, and finality that judgments of this Court should provide.

**Separate opinion of Judge Owada**

1. Judge Owada has appended a separate opinion to discuss two separate points. The first point relates to the issue of *res judicata*, which was raised by Colombia in its third preliminary objection. Judge Owada concurs with the decision of the Court that Nicaragua's claim of an extended continental shelf and request for delimitation was not decided by the Court in the 2012 Judgment, but has appended a separate opinion to clarify his own reasoning on the issue of *res judicata*. The prerequisite for the application of the principle of *res judicata*, namely the identity of *persona*, *petitum*, and *causa petendi*, has not been raised by the Parties and is not at issue, however, the more intrinsically important issue in the present case is whether the decision reached in the 2012 Judgment contains a final and definitive determination by the Court to which the effect of *res judicata* should attach. In other words, the issue relates to the scope of the *res judicata*. In order to determine whether the claim of Nicaragua was finally and definitively determined in the 2012 Judgment, one must examine the context in which the operative part of the 2012 Judgment was developed, as well as the reasoning of the Court and the overall structure of the Judgment. An examination of these factors, which were not adequately addressed in the Judgment of the Court, leads to the conclusion that Nicaragua's request for delimitation on the basis of its claim of an extended continental shelf was not finally and definitively determined in the 2012 Judgment and therefore does not fall within the scope of *res judicata*. As a result, the third preliminary objection of Colombia should be rejected.

2. The second point concerns the opposability of UNCLOS by Colombia, a non-party, to Nicaragua, a party. As Judge Owada concurs with the reasoning of the Judgment in rejecting the fifth preliminary objection, this issue is only raised as a matter of principle because it pertains to the applicable law. It is well established that a treaty does not create obligations or rights for a third State without its consent, or *res inter alios acta*. As such, as affirmed by the 2012 Judgment, the applicable law in this dispute is not UNCLOS – which Colombia has not ratified – but is instead customary international law. Colombia has not established that the relevant provision of Article 76 of UNCLOS concerning the requirement of recommendations by the CLCS is a rule of customary international law, yet Colombia still attempts to invoke this obligation against Nicaragua, a party to UNCLOS. While Judge

Owada concurs with the reasoning of the Court in rejecting the fifth preliminary objection, it thus appears as though there is an additional reason to reject this objection.

### **Separate opinion of Judge Greenwood**

*Res judicata* has substantive, not merely procedural, effects. If, as Colombia maintains, the 2012 Judgment decided that Nicaragua had failed to prove that it had a continental margin which extended beyond 200 nautical miles from its baselines, that decision would have been *res judicata* and would have precluded Nicaragua from asserting a legal entitlement to an outer continental shelf vis-à-vis Colombia not only in these proceedings but in any forum. However, the 2012 Judgment did not decide that. Since the Judgment said nothing at all about Nicaragua's claims in respect of the area more than 200 nautical miles from Colombia's mainland coast and more than 200 nautical miles from Nicaragua's mainland coast, no question of *res judicata* could arise in respect of that area. Even in respect of the area within 200 nautical miles of the Colombian mainland coast, a study of the 2012 Judgment shows that the Court did not decide what Nicaragua had to prove, nor does the Judgment disclose any analysis by the Court of the strengths and weaknesses of the evidence adduced by Nicaragua. In these circumstances, the Judgment cannot be regarded as a ruling that Nicaragua had failed to discharge its burden of proof. Nevertheless, since the arguments in respect of *res judicata* in relation to the two areas differ, it would have been preferable for the Court to have dealt with them separately in the present Judgment.

### **Dissenting opinion of Judge Donoghue**

Judge Donoghue does not agree with the Court's interpretation of dispositive subparagraph (3) of the Judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (*I.C.J. Reports 2012 (II)*), p. 719, para. 251 (3)). As a consequence, she disagrees with the conclusion that the Court reaches today as to Colombia's third preliminary objection, pursuant to which Colombia asserted that the doctrine of *res judicata* rendered the present Application inadmissible.

The Court today states that it decided in 2012 that Nicaragua's delimitation claim could not be upheld because Nicaragua had not yet made a submission to the Commission on the Limits of the Continental Shelf with respect to the limits of its continental shelf beyond 200 nautical miles. Because Nicaragua has now made such a submission, the Court concludes that the doctrine of *res judicata* does not preclude it from ruling on Nicaragua's first request in the present case.

According to Judge Donoghue, however, the Court in 2012 took a decision on the merits of Nicaragua's claim. In particular, it determined that Nicaragua had failed to prove that its continental shelf entitlement extended far enough to overlap with the entitlement generated by Colombia's mainland and thus was not in a position to delimit as requested by Nicaragua. This determination was essential to the Court's decision that it could not uphold Nicaragua's claim. She therefore considers that the doctrine of *res judicata* denies Nicaragua the opportunity to prove the same facts for a second time in a second case against the same respondent, and that Nicaragua's first request is inadmissible to that extent.

However, Judge Donoghue notes that the 2012 Judgment did not address the question of the existence of an overlap between Nicaragua's entitlement and the entitlement generated by Colombia's islands in the area located beyond 200 nautical miles from Nicaragua's coast.

The doctrine of *res judicata* does not apply to this matter and Nicaragua's first request is admissible to that extent.

Finally, Judge Donoghue states the reasons why she disagrees with the Court's interpretation of dispositive subparagraph (3) of the 2012 Judgment.

### **Declaration of Judge Gaja**

Delimiting the continental shelf between States with opposite or adjacent coasts is often difficult in the absence of the delineation of the outer limits of an extended continental shelf, which, under Article 76, paragraph 8, of UNCLOS, has to be effected on the basis of a recommendation of the Commission on the Limits of the Continental Shelf. Under Article 76, paragraph 10, of UNCLOS a recommendation concerning the establishment of the outer limits of the continental shelf does not prejudice the question of delimitation and may therefore be adopted irrespective of the existence of a dispute on delimitation. The Commission should modify its Rules of Procedure and consider submissions also when the delimitation is under dispute.

### **Declaration of Judge Bhandari**

In his declaration Judge Bhandari recalls that he has joined the dissenting opinion that deals with Colombia's third preliminary objection on the issue of *res judicata*. The purpose of the present declaration is to provide some additional comments on the fifth preliminary objection dealing with the failure of Nicaragua to obtain a binding recommendation from the Commission on the Limits of the Continental Shelf ("CLCS"). In concluding that he would uphold Colombia's fifth preliminary objection, Judge Bhandari makes eight brief points. Firstly, there is no proof on record that Nicaragua has furnished all relevant information to the CLCS, which seems to be the premise of the conclusion of the majority on this issue. Secondly, since the CLCS has not yet issued a recommendation, the Court is not in a position to speculate when the CLCS might do so. Thirdly, the principle of interinstitutional comity requires deference to the CLCS. Fourthly, the CLCS is a specialized body with experts who have practical experience, tasked with making binding recommendations on continental shelf matters. Fifthly, to allow this case to proceed to the merits phase without waiting for a recommendation by the CLCS goes against the reasoning provided in the 2012 Judgment. Sixthly, as Nicaragua is a signatory of the United Nations Convention on the Law of the Sea ("UNCLOS") it is bound by its provisions. Seventhly, a nation should not be allowed to pursue a *de facto* appeal or review of a judgment that is final and binding between the parties in violation of the Statute of the Court. Lastly, allowing Nicaragua to approach this Court without a binding recommendation from the CLCS would render that body without any true authority.

### **Declaration of Judge Robinson**

Judge Robinson has signed the joint dissent because, for the reasons set out therein, he is of the opinion that Colombia's third preliminary objection should be upheld. Judge Robinson wrote this declaration to elaborate further upon a particular concern that arises from today's Judgment, in which the majority embraces and applies *dicta* contained within the 2012 Judgment in such a way as to override an elementary principle of the Law of Treaties.

Treaties are binding on States because they have so consented. This consent is an expression of the principles of sovereignty and equality between States. The obligations and

rights under a treaty do not apply to non-States parties unless either the States parties intend this to be the case and the non-States parties consent, or the relevant provisions also form part of customary international law. These principles seem to have been overlooked in the majority's conclusion today.

The Court stated quite directly in paragraph 118 of the 2012 Judgment that the applicable law in the case was customary international law, as Colombia was not a State party to UNCLOS. Article 76 (8) of UNCLOS and the procedure of the CLCS set out in Annex 2 are obviously special, contractual and confined to States parties to UNCLOS.

The majority reads the 2012 Judgment as imposing a "prerequisite" or a "condition", pursuant to Article 76 (8) of UNCLOS, for the delimitation of extended continental shelf entitlements between Nicaragua and Colombia. In paragraphs 86 and 87 of today's Judgment, the majority finds that, as "Nicaragua states that on 24 June 2013 it provided the CLCS with 'final' information", the majority "accordingly considers that the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua contained in the final submission I (3) has been fulfilled in the present case".

The disjointed logic of this interpretation is fully discussed in the joint dissent. Further, the result of the majority's interpretation is the application of law that is, in fact, inapplicable between the two Parties. Colombia, a non-State party, has consequently been accorded something that, in my view, is akin to a benefit under UNCLOS, since Article 76 (8) of UNCLOS, which does not mirror a rule of customary international law, has been enforced against Nicaragua in its relations with Colombia. This raises questions about the compatibility of the Court's approach with the regime envisaged by Articles 34 to 36 of the Vienna Convention on the Law of Treaties (Treaties and Third States).

### **Declaration of Judge *ad hoc* Brower**

In his declaration, Judge *ad hoc* Brower agrees with all of the other Members of the Court in concluding that, on balance, the Court does have jurisdiction over Nicaragua's Application under the Pact of Bogotá. He has issued a declaration to explain the difficulties the Court necessarily has had in accepting Colombia's interpretation of the second paragraph of Article LVI of the Pact, particularly given the absence of useful guidance from any *travaux préparatoires*.

Judge *ad hoc* Brower notes that Nicaragua's counsel conceded in the oral proceedings that the second paragraph of Article LVI of the Pact is "superfluous, but ... not ineffective". Nicaragua's alternative to acceptance of Colombia's interpretation of that paragraph is that it has no meaning whatsoever other than to make clear out of an abundance of caution what in any event would be true. The Court has agreed with Nicaragua, even though it is generally driven to attribute a meaning to each and every provision of a treaty, as required by the principle of *effet utile*.

Judge *ad hoc* Brower observes that Articles LVIII and LIX of the Pact, put alongside the entirety of Article LVI, could collectively reflect an intention of the parties to the Pact that once the Pact would be denounced by a party, then no new proceedings could be commenced. It could also be argued that the second paragraph of Article LVI had the *effet utile* of making clear what had not yet been definitively established by *Nottebohm* ((*Liechtenstein v. Guatemala*), *Preliminary Objection, Judgment*, I.C.J. Reports 1953, p. 111), that the Court's jurisdiction attaches upon the submission of an application and endures

thereafter irrespective of the subsequent termination of the instrument on which such jurisdiction was based. The Court has not found any of this persuasive because of the complete absence of any indication in the very limited *travaux préparatoires* as to why that second paragraph was included.

All the Court could derive from the drafting history was that the same language was retained throughout various relevant conferences and versions of the Pact as it progressed to its conclusion. Nowhere is there any record indicating why what became the second paragraph of the Pact's Article LVI was introduced and repeatedly accepted over the course of ten years. It clearly is due to the absence of any such guidance that the Court has felt constrained to prefer the interpretation of the paragraph in question as having the, albeit superfluous, *effet utile* of an abundance of caution to the rather more difficult *a contrario* inference.

Judge *ad hoc* Brower finds that the Court's conclusion is not unreasonable and therefore he has found himself unable to dissent from it.

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