

## The *Nicaragua v. Colombia* Continental Shelf Judgment: Short but Significant

### Introduction

On July 13, 2023, the International Court of Justice announced its judgment in the continental shelf delimitation case of *Nicaragua v. Colombia*.<sup>1</sup> The decision is the latest—and probably last—in a series of maritime disputes between the two countries dating back over two decades. In the decision, the Court clarified an area of persistent ambiguity in the law of the sea. Under both treaty and customary international law, states are entitled to exploit resources in the continental shelf (the seabed and subsoil) in the natural prolongation of their land territory up to the edge of the continental margin *or* up to 200 nautical miles from their baselines where the natural prolongation does not extend that far.<sup>2</sup> But, until now, it has been unclear what happens when states claim overlapping entitlements under the two delineation methods. Here, the Court set out to answer this question: under customary international law, may a state’s entitlement to a continental shelf beyond 200 nautical miles from that state’s baselines (an “outer continental shelf”) extend within 200 nautical miles of the baselines of another state? The Court answered with a categorical no.<sup>3</sup> In other words, continental shelf entitlements within 200 nautical miles trump those further at sea.

Although short—twelve operative paragraphs, one of which contains most of the Court’s reasoning—and logically straightforward, the decision is significant. The way the Court identified the relevant customary rule, seeming to rely almost exclusively on state practice, sheds light on its modern approach in this area. And the bright-line rule that the Court declared could reshape maritime disputes and reignite old flashpoints. This *Insight* builds on existing commentaries on the case to explore these aspects of the decision.

## The Judgment: Announcing a New Rule

This case began in 2013, when Nicaragua filed an application against Colombia, asking the Court to determine the continental shelf boundary between the two countries. A year before, the Court had delivered a judgment in a related case between the countries that had begun in 2001.<sup>4</sup> In that judgment, the Court traced out the maritime boundary between the countries but declined to address the outer continental shelf boundary claimed by Nicaragua.<sup>5</sup> It reasoned that Nicaragua had not submitted its claim to the Commission on the Limits of the Continental Shelf (CLCS) as required by Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS), and therefore had not established that it had a plausible claim.<sup>6</sup> So, Nicaragua sent a full submission to the CLCS later that year, then resubmitted its case to the Court.

After nine years of procedural wrangling and submissions, in 2022 the Court asked the parties to address two legal questions: under customary international law, (1) whether states are entitled to an outer continental shelf within 200 nautical miles of another state's baselines, and (2) what the rules are for determining the limits of the outer continental shelf.<sup>7</sup>

On the first question, the Court started by noting the close relationship between the legal regimes governing exclusive economic zone (EEZ) and continental shelf entitlements within 200 nautical miles under UNCLOS.<sup>8</sup> It acknowledged the possibility of “grey areas”—regions where one state is entitled to the continental shelf while another has EEZ rights over the water column above—as found in the *Bay of Bengal* cases and *Somalia v. Kenya*, but it distinguished the facts in those cases.<sup>9</sup> It then turned to the history and logic of the UNCLOS Article 76 treaty regime governing the definition of the continental shelf. The Court noted that the Article's text and the obligation to deposit information with the CLCS demonstrated the assumption that outer continental shelf claims would extend only into regions beyond national jurisdiction (the “Area” or the “common heritage of mankind”), not within 200 nautical miles of other states' baselines. Otherwise, UNCLOS Article 82, providing for payments to the International Seabed Authority for resource exploitation in the “Area,” would not serve its intended purpose.<sup>10</sup>

With the stage thus set, the Court turned to the crux of the matter: state practice and *opinio juris*. In the critical paragraph of the judgment, paragraph 77, the Court found that the “vast majority” of states that have made submissions to the CLCS have refrained from claiming continental shelf entitlements within 200 nautical miles of other states' baselines. And, while acknowledging that “such practice may have been motivated in part by

considerations other than a sense of legal obligation,” the Court held that the practice was sufficiently extensive “over a long period of time” to constitute *opinio juris*.

The Court declined to address the second question given its answer to the first. And despite having postponed consideration of Nicaragua’s maritime claims to a later phase, it dismissed those claims based on its conclusion that Nicaragua was not entitled to an outer continental shelf.<sup>11</sup> Thus, the Court finally answered the last question in this 22-year maritime dispute.

### **“Finding” Custom: Taking Shortcuts, or a Hybrid Approach?**

The focus of attention since the judgment came down has been the Court’s approach to customary international law. Judge Tomka wrote perhaps the most sharply critical dissent. In it, he began by asking why the Court did not dismiss Nicaragua’s claims to the outer continental shelf back in 2012 based on the customary rule it now identified.<sup>12</sup> After all, under the doctrine of *iura novit curia*, the Court is assumed to know the law, and the customary rule that the Court identified, based on the state practice evidence provided, probably already existed a decade ago.

This argument, while technically correct, is somewhat unfair to the Court. Most courts, both international and domestic, prefer to avoid difficult legal questions where possible to limit mistakes, prevent overreach, and conserve court resources. These considerations are especially powerful for an international court asked to opine on the existence of a customary rule. Unlike treaty provisions, custom must be “discovered” through an empirical process that is time-intensive and inherently prone to error. *iura novit curia*, a concept from civil law, glosses over these complexities. It was understandable—and perhaps even prudent—for the Court to defer its judgment on the merits for as long as it did.

However, the main thrust of the dissents focused on the way the Court found the customary rule in this case. (Judges Tomka, Xue, and Robinson all made similar arguments in their dissents.) First, both Judges Tomka and Xue questioned the sufficiency of the state practice accepted by the Court. Although the Court did not break down the state practice of the “vast majority” of states that it identified, that practice presumably consists of the 51 out of 55 CLCS submissions identified by Colombia that did not claim an outer continental shelf within 200 nautical miles of another state’s baselines, despite the opportunity to do so. In dissent, Judge Tomka identified “up to 20 states” with contrary practice. Yet he acknowledged that this contrary practice is “not necessarily fatal,” especially as not all state practice is given equal weight.

Flaws with state practice notwithstanding, it is the Court's holding on *opinio juris* that has proved the most controversial of all. The problem stems from most relevant states' silence about what motivated their practice. Silence is not an issue where there is no plausible explanation but legal obligation. But here there *is* an obvious alternative rationale: states have a practical incentive to limit their CLCS submission claims to avoid triggering objections from other states, which can delay or derail the whole claims process.

The Court got around the lack of evidence of *opinio juris* by invoking the extended duration of the state practice it identified. Citing to its *Gulf of Maine* judgment, it noted that “sufficiently extensive and convincing practice” can essentially substitute for *opinio juris*.<sup>13</sup> This argument was not new: this “sliding scale” approach to customary international law dates back to *The SS Wimbledon* case a century ago.<sup>14</sup> Yet this approach is less than convincing where, as here, there is evidence of contrary *opinio juris* and a straightforward alternative explanation for why states behave the way they do.

Perhaps something else was afoot here methodologically. Scholars have long recognized two approaches to identifying customary international law: an inductive method, whereby courts start from specific instances of state practice to construct a customary rule, and a deductive method, in which courts look to general rules first and then test for the existence of a customary rule.<sup>15</sup> While the Court has virtually always followed the inductive approach, it has hinted that the deductive method may be appropriate in some cases. For example, in its provisional measures order in *Timor Leste v. Australia*, the Court suggested that a state right to confidential communications with counsel might be derived from the principle of sovereign equality of states.<sup>16</sup> Conceptually, this raises the possibility of a hybrid approach, where the Court would use *both* deductive and inductive reasoning to “find” a customary rule. It could do this sequentially, deploying deduction to identify a candidate rule and induction to test whether it has solidified into custom.<sup>17</sup> Or it could work through both methods simultaneously, essentially using another “sliding scale” approach.

On closer inspection, the Court appears to have applied just such a hybrid approach of induction and deduction here. Before its single paragraph on state practice and *opinio juris*, it spent nine paragraphs discussing the relationship between the UNCLOS regimes for EEZs and the continental shelf, the “single continental shelf” under customary international law, and the history and logic behind the regime governing the outer shelf. Although this section has received far less attention from the dissents and scholarly commentary, it appears to be essential to the Court's holding. The Court was marshalling a range of deductive tools—treaty logic, negotiation history, and general rules of customary international law—to identify a rule of customary international law.<sup>18</sup> Having

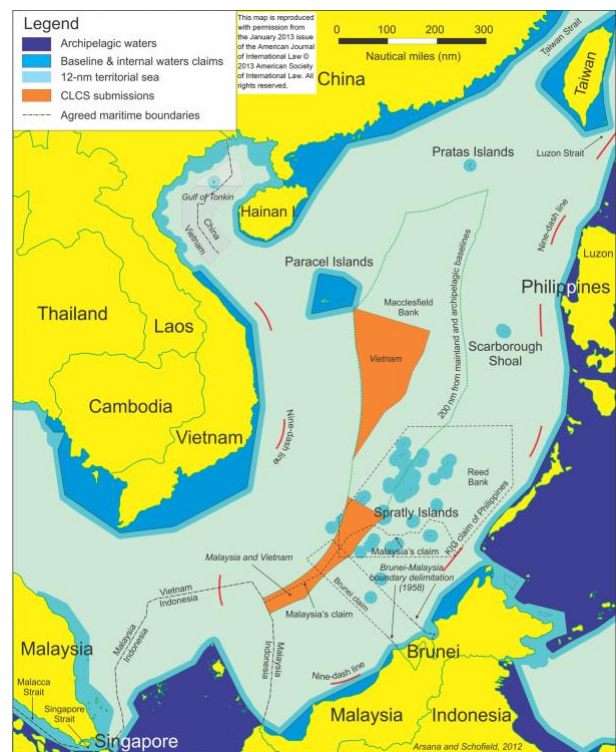
(arguably) established that the treaty structure supported its conclusion, the Court was less troubled by the dearth of *opinio juris* during its inductive analysis.

Given the judgment’s methodological vagueness, the evaluation offered here is somewhat speculative. Future cases will bear out whether the Court is moving towards a hybrid approach to customary international law, or if this was a one-off case of a majority of judges willing to gloss over an *opinio juris* wrinkle.

### Potential Repercussions: Upping the Ante for Certain Maritime Claims

Doctrinal considerations aside, the judgment may also have practical effects. The decision is likely to resurrect old debates given the new stakes associated with some maritime claims. Take China’s claims in the South China Sea. In this area, China proclaims its so-called “Nine Dashed Line” claim, asserting maritime entitlements based on four sets of islands: the Spratly, Paracel, and Pratas Islands, and Scarborough Shoal.<sup>19</sup> For each of these island groups, China claims a surrounding EEZ and continental shelf entitlement. In the *Philippines v. China* South China Sea Arbitration, the tribunal held that neither the Spratlys nor Scarborough Shoal generate EEZ or continental shelf entitlements.<sup>20</sup> But the tribunal was silent on the Paracels, and China vehemently disputes the decision’s validity.

Figure 1 hints at the implications of the *Nicaragua v. Colombia* judgment for maritime claims in the South China Sea. Focusing on China’s Paracel Islands claims, which survived the South China Sea arbitration: even if China were to redraw its straight baselines to follow the natural contours of the islands in the archipelago, its claimed continental shelf would clearly overlap with Vietnam’s claimed outer continental shelf (the orange triangular shape). Prior to this year’s judgment, China and Vietnam would have competing claims to this overlapping area. Now, under the customary rule identified by the Court, Vietnam no longer has an entitlement to any portion of the continental shelf within 200 nautical miles of China’s baselines in the Paracels. The same would



South China Sea (Arsana & Schofield 2012)

apply to Malaysia and Vietnam’s continental shelf claims within 200 nautical miles of the Spratly Islands, although China would face an uphill broader legal battle in the Spratlys case.

But winners in one context can be losers in another. This judgment weakens China’s continental shelf claims to the northeast, in the East China Sea. There, China has claimed an entitlement to an outer continental shelf extending 350 nautical miles east of its mainland baselines and overlapping with the maritime entitlements of Japan.<sup>21</sup> To the extent that China’s continental shelf claim beyond 200nm overlaps with Japan’s own claims within that distance—for example, Japan’s shelf entitlements based on the Ryuku Islands—China’s claims are now meritless under the customary rule announced by the Court.

It is too early to gauge whether these new considerations will impel coastal states to revive old maritime claims, or even make new ones. But given the political and economic interests at stake, we should not be surprised if this happens in the coming months and years.

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<sup>1</sup> Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Judgment (Int’l Ct. Justice, July 23, 2023), <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-00-en.pdf> [hereinafter *Nicar. v. Colom. II*].

<sup>2</sup> U.N. Convention on the Law of the Sea, art. 76, ¶ 1, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 76; Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, ¶ 118 (Nov. 19) [hereinafter *Nicar. v. Colom. I*] (holding that UNCLOS Article 76(1) is “part of customary international law).

<sup>3</sup> *Nicar. v. Colom. II*, *supra* note i, at ¶ 79.

<sup>4</sup> *Nicar. v. Colom. I*, *supra* note ii.

<sup>5</sup> *Id.* ¶ 251.

<sup>6</sup> *Id.* ¶¶ 129-30.

<sup>7</sup> *Nicar. v. Colom. II*, *supra* note i, at ¶ 14.

<sup>8</sup> *Id.* ¶¶ 69-70.

<sup>9</sup> *Id.* ¶¶ 71-73.

<sup>10</sup> *Id.* ¶ 76.

<sup>11</sup> *Id.* ¶ 104.

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<sup>12</sup> *Id.* (separate opinion by Tomka, J.).

<sup>13</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. 246, 299 (Oct. 12).

<sup>14</sup> See Frederic L. Kirgis, *Custom On A Sliding Scale*, 81 AM. J. INT'L L. 146 (1987); *The S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1.

<sup>15</sup> See William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEO. J. INT'L L. 445 (2014).

<sup>16</sup> Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Provisional Measures, 2014 I.C.J. 147, 153 (Mar. 3).

<sup>17</sup> Worster, *supra* note xv, at 520.

<sup>18</sup> The Court seems to confirm this when it explains that its reasoning “is *premised* on the relationship between . . . the extended continental shelf of a State and . . . the exclusive economic zone” of that State.” *Nicar. v. Colom. II*, *supra* note i, at ¶ 78.

<sup>19</sup> See, e.g., U.S. DEP'T OF STATE, LIMITS IN THE SEAS: PEOPLE'S REPUBLIC OF CHINA MARITIME CLAIMS IN THE SOUTH CHINA SEA (2022), <https://www.state.gov/wpcontent/uploads/2022/01/LIS150-SCS.pdf>.

<sup>20</sup> South China Sea Arbitration (Phil. v China), Case No. 2013-19, PCA Case Repository, Award, (Perm. Ct. Arb. 2016), <https://pca-cpa.org/en/cases/7/>.

<sup>21</sup> *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea*, [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/chn63\\_12/executive%20summary\\_EN.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf).