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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2012

Public sitting

held on Tuesday 24 April 2012, at 3 p.m., at the Peace Palace,

President Tomka presiding,

***in the case concerning the* Territorial and Maritime Dispute (Nicaragua *v.* Colombia)**

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le mardi 24 avril 2012, à 15 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

***en l'affaire du* Différend territorial et maritime (Nicaragua c. Colombie)**

COMPTE RENDU

Present:	President	Tomka
	Vice-President	Sepúlveda-Amor
	Judges	Owada
		Abraham
		Keith
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
		Sebutinde
	Judges *ad hoc*	Mensah
		Cot
	Registrar	Couvreur

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
Sebutinde, juges
MM. Mensah
Cot, juges *ad hoc*

M. Couvreur, greffier

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comme assistant administratif.

Le PRESIDENT : Veuillez vous asseoir. Cet après-midi, le Nicaragua va compléter le premier tour de ses plaidoiries. Je passe maintenant la parole à M. le professeur Alain Pellet. Vous avez la parole, Monsieur.

M. PELLET : Merci, Monsieur le président. Je ne pense pas qu'il faille que je dise «thank you very much».

LE NÉCESSAIRE ENCLAVEMENT DES ÎLES COLOMBIENNES

1. Monsieur le président, Mesdames et Messieurs les juges, il me revient aujourd'hui d'expliquer les raisons pour lesquelles les îles, îlots et récifs sur lesquels vous reconnaîtriez la souveraineté de la Colombie ne peuvent pas recevoir un plein effet compte tenu des circonstances de notre affaire. (La question se pose différemment si, comme nous le pensons, les cayes en question relèvent du Nicaragua.)

2. Deux précisions préliminaires sont de mise :

— en premier lieu, cette présentation est faite «sans préjudice» de la décision que vous prendrez sur la souveraineté — étant rappelé que le Nicaragua ne conteste pas celle de la Colombie sur l'archipel de San Andrés aux fins de la présente instance, mais que nous n'admettons nullement qu'il en aille de même s'agissant des îlots, cayes et récifs situés au nord de l'archipel ;

— en second lieu, je ne vais pas évoquer le cas particulier de Quitasueño dont Alex Oude Elferink vous a entretenu ce matin.

3. Au bénéfice de ces remarques, je procéderai en trois temps :

— je résumerai d'abord brièvement les principes généraux s'appliquant à la délimitation maritime autour des îles ;

je montrerai ensuite, un peu plus longuement :

— que, dans les circonstances de l'espèce, l'archipel de San Andrés (dont j'ai défini l'étendue hier) ne peut prétendre à davantage qu'une mer territoriale de 12 milles marins, puis

— que les petites cayes dont la Colombie revendique la souveraineté au nord de l'archipel devraient, si elles lui appartenaient — *quod non* — être enclavées et ne bénéficier que d'une zone maritime restreinte à trois milles marins.

Section 1
Les îles dans le droit de la délimitation des espaces marins (rappel sommaire)

4. Monsieur le président, je n'aime pas «faire cours» à la haute juridiction et elle n'en a assurément pas besoin — mais je crains qu'un rappel des principes élémentaires applicables à la délimitation des espaces marins autour des îles soit nécessaire à l'intention de nos contradicteurs et amis, car ils les ignorent avec une très grande constance.

5. En fait, j'ai l'impression qu'à ce stade pourtant avancé de la procédure, les Parties ne sont d'accord à cet égard que sur un point : l'article 121 de la convention de Montego Bay reflète le droit coutumier[1] et doit donc, en principe trouver application. Mais elles diffèrent sur deux points fondamentaux :

— selon la Colombie, les îlets qu'elle revendique comme siens au nord de l'archipel ont droit, conformément au paragraphe 2, à une mer territoriale, une zone contiguë, une zone économique exclusive et un plateau continental, alors que ces rochers en réalité ne se prêtent pas à l'habitation humaine ou à une vie économique propre — comme le professeur Oude Elferink l'a montré ce matin — et qu'ils relèvent, par conséquent, du paragraphe 3 de l'article 121 ; c'est une question de fait sur laquelle je reviendrai brièvement tout à l'heure — mais une question qui n'a pas beaucoup importance puisque, de toute manière, — et c'est le second point —,

— la délimitation autour de ces formations insulaires doit être faite, aux termes mêmes du paragraphe 2 de l'article 121, «conformément aux dispositions de la Convention applicables aux autres territoires terrestres» ; or les circonstances très, très particulières de l'espèce conduisent, conformément à une jurisprudence bien établie, à ne leur donner qu'un effet très limité, contrairement à ce que prétend la Partie colombienne.

6. Monsieur le président, il est certainement exact que, comme l'a observé le Tribunal international du droit de la mer,

> «l'effet à attribuer à une île dans la délimitation d'une frontière maritime dans la zone économique exclusive et sur le plateau continental dépend des *réalités géographiques* et des circonstances de l'espèce. Il n'existe pas de règle générale sur ce point.

[1] RN, p. 104, par. 4.5 ; p. 124, par. 4.45 ; DC, p. 88-100, par. 3.10 ; p. 168, par. 5.24 ; voir aussi CMC, p. 329-330, par. 7.40-7.41.

> Chaque cas est unique et appelle un traitement spécifique, l'objectif final étant d'*aboutir à une solution équitable*.»[2] (Les italiques sont de nous.)

7. Il n'en reste pas moins que le rôle des îles dans la délimitation maritime (indépendamment de leur qualification) a fait l'objet d'une jurisprudence abondante et globalement ferme, dont il résulte que des îles (même au sens du paragraphe 2 de l'article 121) n'engendrent de droits au profit de l'Etat dont elles relèvent que sur des étendues très limitées. Je me permets, Monsieur le président, d'utiliser à nouveau, après les avoir mis à jour, les tableaux que la Roumanie avait établis dans l'affaire de la *Délimitation maritime en mer Noire*. Ils sont reproduits sous l'onglet n° 80 du dossier des juges et sont fort instructifs.

8. Ils établissent, sous une forme synthétique :

— que les îles non côtières n'ont, dans *aucune* affaire comparable de délimitation maritime tranchée jusqu'à présent par la Cour ou par un tribunal arbitral, été prises en compte au stade du tracé de la ligne provisoire de délimitation (qui est, en général, une ligne d'équidistance) — c'est-à-dire lors de la première étape de toute délimitation maritime entre Etats adjacents ou se faisant face[3] ; et ces tableaux établissent aussi

— que, lors de la deuxième étape, celle dans laquelle la cour ou le tribunal international saisi doit se prononcer sur l'existence et l'effet de circonstances pertinentes «appelant un ajustement ou un déplacement de la ligne d'équidistance provisoire afin de parvenir à un résultat équitable» (*Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt, C.I.J. Recueil 2009*, p. 101, par. 120), ces îles se voient attribuer un effet toujours limité lorsqu'elles sont prises en compte en tant que circonstances pertinentes.

9. Je reviendrai sur les plus frappants de ces exemples lorsque je discuterai l'application concrète de ces principes à nos îles ou rochers. En tout cas, comme nous l'avons aussi montré dans nos écritures[4], ces principes sont fortement ancrés dans la jurisprudence, quoiqu'en écrive la Colombie.

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[2] *Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale, (Bangladesh/Myanmar)*, T.I.D.M., arrêt du 14 mars 2012, p. 101, par. 317.

[3] Voir DC, chap. 6 «Application of the principles and rules of delimitation : establishing the provisional equidistance line as the first step in the delimitation», p. 197, p. 198-199, par. 6.3-6.7 ; RN, p. 168-169, par. 6.55-6.57.

[4] RN, p. 132-137, par. 5.18-5.26 ; p. 182, par. 6.79 ; p. 187-199, par. 6.91-6.110 ; voir aussi MN, p. 241-246, par. 3.104-3.110.

10. Il reste cependant une question générale, abordée hier par Alex Oude Elferink, mais sous un angle différent, et sur laquelle je crains de devoir m'arrêter à nouveau quelques instants. C'est celle de savoir quel est, dans le cas présent, le rôle respectif des côtes continentales des Parties d'une part, et des îles en question d'autre part. La Colombie, d'une part, dénie toute pertinence à sa propre côte continentale et, d'autre part, réduit comme peau de chagrin l'effet de la côte du Nicaragua en donnant, au contraire, une importance démesurée — pour ne pas dire extravagante — aux côtes de la poussière d'îles sur lesquelles elle revendique la souveraineté.

11. Selon la Partie colombienne : «Colombia's mainland coast is not relevant due to its remoteness»[5]. The reason for this would be that

> «Nicaragua has not demonstrated any legal entitlement to continental shelf rights situated more than 200 nautical miles from its coast, there are no areas of outer continental shelf in this part of the Caribbean, and natural prolongation is irrelevant to Colombia's 200 nautical mile entitlements measured from its mainland and its islands.»[6]

Monsieur le président, c'est là une pure pétition de principe !

12. En réalité, la Colombie postule que les îles dont elle revendique la souveraineté constituent une sorte d'écran — que dis-je un écran ? un mur, un rempart formidable ! — entre elle et le Nicaragua, empêchant ainsi les plateaux continentaux des deux pays de se rencontrer et, dès lors, leurs revendications de se chevaucher. Mais, Monsieur le président, c'est prendre le problème à l'envers ; l'ordre normal des choses consiste :

— d'abord, à déterminer à qui appartient la souveraineté sur les îles — mais, je le rappelle, j'admets ici, pour les besoins de la démonstration, qu'elles sont colombiennes (s'agissant des cayes, pas de problème pour l'archipel) ;

— ensuite, il faut déterminer quel peut être l'effet des îles et rochers en question sur la délimitation ; et

— ce n'est *qu'après cela* que des chevauchements peuvent apparaître entre les prétentions des deux Etats à un plateau continental.

[Projection n° 1.]

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[5] DC, p. 225, par. 6.56 ; voir aussi, par exemple, p. 221, par. 6.48 ; p. 240, par. 7.11, ou p. 252, par. 7.32. Voir surtout CMC, p. 311-312, par. 7.5-7.7.

[6] DN, p. 161, par. 5.6.

13. Le croquis qui est projeté à l'écran en ce moment illustre la manière qu'a la Partie colombienne de mettre la charrue avant les bœufs :

— elle commence par décider, arbitrairement, que les îles éparpillées qu'elle revendique forment un chapelet continu constituant une sorte de mur infranchissable s'opposant à tout accès du Nicaragua à son plateau continental ;

— le tour est joué : le Nicaragua ne peut revendiquer aucun plateau continental au-delà de cette ligne ; donc, aucun chevauchement n'est possible ; et donc «Colombia's mainland coast . . . has no role to play in the present delimitation dispute»[7] («la côte continentale de la Colombie … n'a … aucun rôle à jouer dans le cadre du présent différend portant sur la délimitation»).

14. Mais ce n'est pas ainsi qu'il faut raisonner :

— la première question à se poser (une fois résolue celle de la souveraineté) est de savoir, comme je l'ai rappelé il y a un instant, quel rôle peuvent jouer les îles et récifs dans la délimitation ;

— comme je le montrerai, il ne peut être que limité : conformément à la jurisprudence synthétisée sous l'onglet n° 80 de vos dossiers, ils ne doivent pas être pris en considération pour tracer la ligne provisoire d'équidistance ;

— cela laisse largement au plateau continental du Nicaragua la possibilité de se déployer au-delà des îles dont la Colombie lui dénie la souveraineté.

15. En d'autres termes, ce n'est pas par une opération divine que les îles contestées se trouvent sur le plateau continental du Nicaragua — or indiscutablement elles s'y trouvent[8] : ceci résulte de l'application normale des règles applicables en matière de délimitation maritime dans les circonstances de l'espèce. C'est *pour cela*, même si ceci déplaît à la Colombie[9], que les îles — *toutes* les îles en cause : celles de «l'archipel» comme les cayes septentrionales — se trouvent «du mauvais côté» de la ligne provisoire tracée au titre du premier temps de la méthode-standard ; c'est cette ligne qui, sauf circonstance pertinente allant en sens contraire, ou disproportionnalité manifeste, constitue la frontière maritime entre les deux pays conformément

[7] DC, p. 161, par. 5.6.

[8] RN, p. 12-13, par. 27 ; p. 89-90, par. 3.37-3.40 («B. The Geological Evidence of the Outer Limits of the Continental Shelf Areas Attributable to Nicaragua») ; p. 99, par. 3.63 ; p. 126, par. 5.4 ; p. 138, par. 5.27).

[9] DC, p. 166, par. 5.18 et p. 241-242, par. 7.13 ; voir aussi CMC, p. 331-332, par. 7.47.

aux règles unanimement admises par le droit international contemporain de la délimitation maritime.

[Fin de la projection n° 1.]

16. Il n'en reste pas moins que, si les îles en question étaient colombiennes, ces îles pourraient revendiquer une mer territoriale — mais une mer territoriale, et rien de plus, comme je vais m'employer à le montrer maintenant. Et d'abord en ce qui concerne l'archipel de San Andrés.

Section 2
L'archipel de San Andrés

17. Je parle de «l'archipel de San Andrés», Monsieur le président, parce que, comme je l'ai dit dans ma présentation d'hier, celui-ci a une certaine existence juridique — pas dans la conception, très abusivement extensive, que la Colombie prétend lui conférer ; mais il est mentionné sous ce nom dans l'article premier du traité de 1928 (applicable aux fins de la présente affaire) et le protocole de 1930 en fixe la limite occidentale au 82e méridien. Mais — et ce sont de très grands «mais» :

— mais, il s'agit uniquement de la limite au-delà de laquelle les îles de la région ne peuvent pas être revendiquées par la Colombie ; et,

— autre «mais», conséquence du précédent et tout aussi dirimant, le 82e méridien ne constitue nullement une frontière maritime entre les deux pays — or c'est cette frontière que la Cour est priée de bien vouloir fixer dans la présente affaire.

[Projection n° 2.]

18. Monsieur le président, nous ne contestons pas que, fussent-elles au milieu de l'océan, ces îles eussent eu droit à un plateau continental et à une zone économique exclusive délimitée conformément aux règles, maintenant coutumières, reflétées par la convention de Montego Bay. Mais, Monsieur le président, elles ne sont pas au milieu de l'océan : situées l'une et l'autre à plus de 350 milles marins de la côte colombienne, San Andrés et Providencia se trouvent à un peu plus de 100 milles de celle du Nicaragua et à 80 milles des Corn Islands[10]. Dès lors, elles sont placées sans aucun doute sur le plateau continental du Nicaragua (et dans sa zone économique exclusive) :

[10] MN, p. 169, par. 2.240 ; et p. 190, par. 3.11-3.12, ou RN, p. 67, par. 2.12 ; CMC, p. 338, point 6 ; DC, p. 238, par. 7.8.

à moins qu'elles aient été purement et simplement mises hors-jeu dès la première étape. La question de la prise en compte des îles ne se pose que durant la deuxième phase de la délimitation et, comme nous l'avons vu[11], la ligne provisoire résultant de la première étape, laisse, quel que soit son tracé exact, la zone dans laquelle est située l'archipel au Nicaragua. N'en déplaise à nos contradicteurs, il s'agit là d'une circonstance pertinente et tout à fait particulière qui doit conduire à limiter drastiquement la zone maritime bordant les îles composant «l'archipel de San Andrés».

[Fin de la projection n° 2.]

19. La Colombie s'en offusque et tente — mais en vain — de nier la pertinence des précédents invoqués par le Nicaragua, qui trouvent ici à s'appliquer par analogie — étant évidemment entendu qu'aucune de ces situations n'est identique à cent pour cent à celle qui nous occupe. Mais la Partie colombienne a beau le contester, elles sont suffisamment comparables pour que les principes appliqués par les cours et tribunaux internationaux — et d'abord par la CIJ elle-même — soient parfaitement transposables à notre espèce. Je m'en tiendrai aux précédents discutés par la Colombie dans sa duplique[12]. En revanche, je ne m'attarderai pas sur les exemples de «pratique étatique» qu'elle y invoque[13] : ils sont peu probants, comme nous l'avions déjà montré dans notre réplique[14] et comme M^e^ Reichler le redira tout à l'heure : rien n'empêche que, par voie d'accord, deux Etats dérogent aux règles généralement applicables en l'absence de traité — que je viens de décrire brièvement sur la base de la jurisprudence reflétée dans les tableaux de l'onglet n° 80 du dossier des juges. Ces règles ne sont évidemment pas impératives ; mais cette jurisprudence conduit à penser qu'en l'absence d'exception conventionnelle l'enclavement de chacune des petites îles composant l'archipel de San Andrés s'impose dans la présente affaire.

[Projection n° 3.]

20. Jan Mayen d'abord. La Colombie souligne que : «As for the mainland coast of Norway, it was ignored because it was too far away, just as the mainland coast of Colombia is too far away in this case.»[15] Non, non, Monsieur le président, pas «just as...» («tout comme...») : Jan Mayen est

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[11] Voir *supra*, par. 13-15.

[12] DC, p. 241-254, par. 7.12-7.35.

[13] *Ibid.*, p. 254-267, par. 7.36-7.51.

[14] RN, p. 132-137, par. 5.18-5.26 ; p. 185-199, par. 6.85-6.110.

[15] DC, p. 202, par. 6.15.

situé à 875 kilomètres des côtes de la Norvège et à 460 kilomètres de celles du Groënland qui lui-même se trouve à plus de 1300 kilomètres des côtes norvégiennes, ce qui constitue quand même une belle différence ; au surplus : comme l'avait montré la Norvège dans ses écritures, de l'époque, «Jan Mayen . . . occupies a position of geographical and geological independence. It forms part of no region or sub-region»[16], tandis que l'archipel de San Andrés est situé lui sur le «seuil nicaraguayen» — *the Nicaraguan rise*. Voilà une différence considérable. Par ailleurs, dans l'arrêt de 1993, la Cour a entendu assurer aux deux Parties «un accès équitable aux ressources halieutiques»[17], problème qui ne se pose pas dans notre espèce ; comme la Colombie le souligne elle-même avec vigueur : «In the present case, similar factors are not at work»[18], «Des facteurs similaires n'entrent pas en ligne de compte dans la présente affaire.» En outre et surtout, la Cour a retenu que la différence entre les longueurs des côtes constituait une circonstance pertinente qui l'a conduite à procéder à un ajustement de la ligne au profit du Danemark[19] ; or, la côte pertinente de Jan Majen est plus de deux fois et demie plus étendue que celles de l'ensemble des côtes de l'archipel et le rapport des côtes pertinentes était de 1 à 9[20] ; dans notre affaire il est de 1 à 20[21].

[Fin de la projection n° 3. Projection n° 4.]

21. Monsieur le président, malgré les embrouillaminis auxquels s'emploie la Colombie[22], on peut tirer les mêmes conclusions de *Libye/Malte*. Bien que Malte fût une «île-Etat» bien plus grande et peuplée que l'archipel de San Andrés, la Cour a jugé que la différence entre les longueurs des côtes des Parties est «si grande qu'elle appelle un ajustement de la ligne médiane, afin d'attribuer à la Libye une plus grande étendue de plateau continental»[23] ; le rapport entre les côtes libyennes et maltaises était de 1 à 8 ; il est, je le rappelle, dans notre affaire de 1 à 20 ; la côte

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[16] *C.I.J. Mémoires, Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège)*, contre-mémoire de la Norvège, vol. I, p. 144, par. 484.

[17] *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt, C.I.J. Recueil 1993*, p. 79, par. 91.

[18] CMC, p. 409, par. 9.75.

[19] *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt, C.I.J. Recueil 1993*, p. 68-69, par. 67-69.

[20] *Ibid.*, p. 65, par. 61.

[21] RN, p. 148, par. 6.12.

[22] DC, p. 243-245, par. 7.16-7.17.

[23] *Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 50, par. 68.

pertinente de Malte mesure 44 kilomètres, soit plus de deux fois celle de l'archipel de San Andrés en comptant large. Quant aux arguments que la Colombie tente de tirer de l'intervention de l'Italie dans *Libye/Malte*, ils sont un rideau de fumée sans pertinence ici.

[Fin de la projection n° 4. Projection n° 5.]

22. Saint-Pierre-et-Miquelon maintenant. De même que l'archipel de San Andrés est situé sur le plateau continental du Nicaragua, de même les deux îles françaises se trouvent sur celui du Canada — avec deux différences il est vrai : elles sont plus proches de la côte canadienne que ne l'est l'archipel de la côte nicaraguayenne mais — et ceci, d'une certaine manière, «équilibre» cela — contrairement à ce qui est le cas dans notre affaire pour la côte colombienne, la côte française n'avait évidemment aucune pertinence. Compte tenu de cette situation, le Tribunal aurait pu se borner à enclaver le petit archipel français. Il ne l'a pas fait, il a considéré que,

> «[c]omme elle dispose d'une ... ouverture côtière [à laquelle ne fait obstacle aucune côte canadienne opposée ou alignée latéralement], la France a pleinement droit à une projection frontale en mer, vers le sud, jusqu'à ce qu'elle atteigne la limite extérieure de 200 milles marins, aussi loin que tout autre segment de la côte méridionale adjacente de Terre-Neuve»[24].

[Fin de la projection n° 5. Projection n° 6.]

23. On peut s'interroger sur le fondement juridique de cette solution en forme de poêle à frire. La transposition de celle-ci à l'archipel de San Andrés accroît en tout cas les doutes que l'on peut avoir à cet égard : le corridor qui viendrait à être décidé aboutirait non pas au vaste océan (comme dans l'arbitrage de 1992), mais à une étroite bande de haute mer cernée par des zones soumises à la juridiction nationale des Etats riverains de la mer des Caraïbes ; cette solution n'a guère de sens s'agissant du plateau continental et, pour ce qui est de la zone économique exclusive nicaraguayenne, les droits appartenant à la Colombie en vertu de l'article 56 de la convention de Montego Bay (qui reflète le droit coutumier) paraissent de nature à rendre cette solution inutile et à rassurer la Colombie.

[Fin de la projection n°°6. Projection n°°7.]

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[24] *Délimitation des espaces maritimes entre le Canada et la République française*, décision du 10 juin 1992, Nations Unies, *RSA*, vol. XXI, p. 290, par. 70.

24. Nos amis colombiens n'aiment pas non plus le sort réservé à l'île d'Abu Musa par la sentence rendue le 19 octobre 1981 dans l'affaire de délimitation maritime qui opposait les émirats de Dubaï et de Sharjah. On peut les comprendre : certes, Abu Musa n'est pas San Andrés, mais la sentence n'en est pas moins fort instructive aux fins du règlement de l'affaire qui nous occupe en ce que

1) tout en admettant que les deux questions sont liées, le Tribunal arbitral distingue celle des côtes des deux Etats à prendre en considération (peu importe qu'elles soient adjacentes ou se fassent face : les règles applicables sont les mêmes) et celle de l'effet à reconnaître à Abu Musa. Il convient également de faire cette distinction dans notre affaire et de procéder en deux temps : détermination des côtes pertinentes d'abord ; effet à reconnaître à l'archipel ensuite ;
2) le Tribunal arbitral de 1981 a conclu de son examen des circonstances pertinentes que «to allow to the island of Abu Musa any entitlement to an area of the continental shelf of the Gulf beyond the extent of its belt of territorial sea would indeed produce a distorting effect upon neighbouring shelf areas»[25] ; or
3) cet effet de distorsion *(distorting effect)* serait tout aussi marqué — quoique différemment — dans la présente espèce ; et
4) la Colombie souligne, dans sa duplique, qu'Abu Musa n'a pas été pleinement enclavée[26], puisque le Tribunal s'est borné à tracer un arc de cercle de 12 milles marins dans la seule zone faisant face à Dubaï, donc à l'est. Mais la Colombie omet de préciser que la zone marine de la partie d'Abu Musa faisant face à l'autre émirat de Oumm al Qaïwaïn avait, pour sa part, déjà été délimitée par un arc de cercle équivalent à la suite d'un accord cette fois conclu entre Sharjah et Oumm al Qaïwaïn en 1964[27]. Le Tribunal arbitral n'a fait que compléter cet enclavement dans sa sentence de 1981.

[Fin de la projection n° 7. Projection n° 8.]

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[25] *Différend frontalier entre Dubaï et Sharjah (Emirat de Dubaï c. Emirat de Sharjah)*, décision du 19 octobre 1981, *ILR*, vol. 91, p. 677.

[26] DC, p. 52-253, par. 7.33.

[27] Seabed Boundary Agreement between the Rulers of Sharjah and Umm al Qaywayn of 1964 in J.Charney and L.M. Alexander (eds.), *International Maritime Boundaries (1993, 1996)*, vol. II, p. 1549-1555.

25. Monsieur le président, la Colombie déploie des trésors d'ingéniosité pour s'affranchir du précédent de l'arbitrage franco-britannique de 1977 et éviter à l'archipel de San Andrés le traitement réservé aux îles Anglo-Normandes dans cette importante sentence arbitrale. On comprend bien son souci : dans cette affaire, des îles — bien plus considérables que celles formant l'archipel tant par leur taille (environ quatre fois celle de San Andrés et Providencia) que par leur population (plus de 160 000 habitants) et leur importance économique (un PNB de plusieurs milliards d'euros… ah, non, c'est des livres sterling, probablement… plusieurs milliards de livres, ça marche aussi)[28] — ont été entièrement enclavées dans les eaux de l'Etat côtier. Et, de tous les précédents invoqués dans notre affaire, c'est assurément celui qui s'en rapproche le plus.

26. Pour tenter de l'en distinguer, la Colombie avance trois arguments (qui se recouvrent d'ailleurs assez largement) :

— en premier lieu, l'archipel est plus éloigné des côtes nicaraguayennes que les îles Anglo-Normandes ne le sont des côtes françaises ;

— en deuxième lieu, contrairement aux îles Anglo-Normandes, il ne se trouverait pas «du mauvais côté» de la ligne médiane, pour la bonne raison que,

— troisièmement, il n'y aurait pas de ligne médiane dans notre affaire[29].

27. Sur le premier point — la distance des îles aux côtes — on ne saurait nier que San Andrés est plus éloigné des côtes du Nicaragua que les Ecréhous ne le sont de celles de la Normandie : 12 kilomètres (un peu plus de six milles et demi) pour les îles Anglo-Normandes «contre» 150 kilomètres (soit 80 milles) pour ce qui est de la distance entre Little Corn Island et San Andrés. Mais il y a aussi l'autre distance à prendre en compte, celle des îles concernées avec les côtes de la mère patrie ;

— s'agissant des îles Anglo-Normandes, elles sont situées à environ — je prends à nouveau des chiffres ronds — entre 90 et 150 kilomètres (soit entre 50 et 80 milles) des côtes anglaises du Dorset ;

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[28] Voir MN, p. 247, par. 3.112 ; DC, p. 132, par. 5.19.

[29] Voir surtout DC, p. 162-164, par. 5.9-12 ; p. 241-242, par. 7.12-7.13. Voir aussi CMC, p. 331-332, par. 7.43-7.48.

— pour sa part, San Andrés est éloigné des côtes colombiennes de 710 kilomètres (environ 385 milles).

Ceci est intéressant à un double titre.

28. En premier lieu, il faut mettre ces chiffres en relation les uns avec les autres. Si l'on s'en tient à des distances «moyennes» calculées en fonction d'un «centre» virtuel des deux groupes d'îles («l'archipel de San Andrés», d'une part, les îles Anglo-Normandes, d'autre part), celles-ci sont environ quatre fois et demi plus proches de la côte française que l'archipel de San Andrés l'est de Little Corn Island ; mais l'archipel est aussi environ six fois plus éloigné de la Colombie que les îles Anglo-Normandes le sont de l'Angleterre. En termes de proximité et d'appartenance, toutes proportions gardées, les choses se présentent à peu près de la même manière.

[Fin de la projection n° 8. Projection n° 9]

29. En second lieu, ces distances établissent avec la clarté de l'évidence que l'archipel de San Andrés se trouve, assurément, du mauvais côté ... du plateau continental — je le dis de cette manière puisque la Colombie s'irrite que l'on parle de ligne médiane. Et pourtant, Monsieur le président ...

30. Pourtant, le plateau continental n'est nullement borné par la limite des 200 milles marins comme le professeur Vaughan Lowe l'a montré ce matin. Aux termes de l'article 76 de la convention des Nations Unies sur le droit de la mer, c'est le rebord externe de sa marge continentale qui en constitue la limite dans une situation comme la nôtre et, sans que j'aie besoin d'entrer dans la géomorphologie des fonds marins de la région — MM. Cleverly et Lowe l'ont décrite en tant que de besoin — il est clair que les îles formant l'archipel de San Andrés sont situées sur le plateau continental *du Nicaragua*, alors qu'elles n'entretiennent aucun rapport avec celui de la Colombie.

31. Je sais, Monsieur le président, que nos amis de l'autre côté de la barre n'aiment pas non plus cette manière de présenter les choses car, disent-ils, les îles en question ont, elles aussi, droit à un plateau continental en vertu de l'article 121 de la convention de 1982. Comme l'a expliqué justement la Cour d'arbitrage qui a tranché le différend franco-britannique sur le *Plateau continental*,

> «le principe du prolongement naturel du territoire ne saurait être interprété comme obligeant à considérer que le plateau continental situé au nord et au nord-ouest des îles Anglo-Normandes relève automatiquement et nécessairement de ces îles plutôt que de la République française»[30].

Il en va de même dans notre espèce : rien n'oblige à considérer que le plateau continental situé à l'est de l'archipel de San Andrés relève, automatiquement et nécessairement, des îles qui le composent plutôt que du Nicaragua. Et, comme je l'ai dit tout à l'heure, le principe posé à l'article 121, paragraphe 2, ne trouve application que si les règles applicables en matière de délimitation le permettent. En l'espèce, il convient d'abord de tracer la limite provisoire de l'extension du plateau continental du Nicaragua — ce qui doit être fait en faisant abstraction des îles et rochers dont la Colombie revendique la souveraineté conformément à la jurisprudence constante des cours et tribunaux internationaux. Et ce n'est qu'une fois ceci acquis que les îles entrent en jeu à titre de circonstances pertinentes ; et c'est à ce stade qu'il convient de s'interroger sur les caractéristiques qu'elles présentent et sur l'effet à leur reconnaître.

32. En l'espèce, il s'agit de deux groupes de petites îles, toutes très éloignées des côtes colombiennes mais se trouvant en plein dans la zone des 200 milles au large des côtes nicaraguayennes auxquelles elles font face. Les côtes pertinentes des trois plus grandes d'entre elles ont respectivement treize, huit et un demi-kilomètre de longueur (les autres étant négligeables — moins d'un kilomètre au total) ; pour sa part, la côte nicaraguayenne opposée est longue de 450 kilomètres. Et de plus ces îles n'ont aucun lien avec la Colombie continentale.

33. Dès lors, les raisons fondamentales qui ont conduit la Cour d'arbitrage de 1977 à enclaver les îles Anglo-Normandes, en ne les dotant que d'une mer territoriale d'une largeur maximale de 12 milles marins, sont pleinement transposables en l'espèce :

> «Si la présence des îles Anglo-Normandes auprès de la côte française permettait de faire dévier le tracé de cette ligne médiane du milieu de la Manche, le résultat serait une distorsion radicale de la délimitation, créatrice d'inéquité ... Non seulement les îles Anglo-Normandes sont «du mauvais côté» de la ligne médiane passant au milieu de la Manche, mais elles sont aussi totalement détachées géographiquement du Royaume-Uni.»[31]

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[30] *Délimitation du plateau continental entre le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et la République française*, 30 juin 1977, Nations Unies, *RSA*, vol. XVIII, p. 227, par. 192.

[31] *Ibid.*, p. 226, par. 199.

Elles sont aussi totalement détachées géographiquement du Royaume–Uni, comme le sont les îles de l'archipel de la Colombie.

34. De même, dans l'affaire qui a opposé récemment le Bangladesh au Myanmar, le Tribunal de Hambourg a reconnu que l'île de Saint-Martin est une «formation maritime importante du fait de sa superficie, de sa population et de l'ampleur des activités économiques et autres»[32]. Il n'en a pas moins estimé qu'

> «en raison de sa localisation, donner à l'île de Saint Martin un effet dans la délimitation de la zone économique exclusive et du plateau continental produirait une ligne qui bloquerait la projection de la côte du Myanmar vers le large de telle manière qu'il en résulterait une distorsion injustifiée de la ligne de délimitation. L'effet de distorsion que produit une île peut s'accroître de façon sensible à mesure que la ligne s'éloigne de la côte, au-delà de 12 milles marins.
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> 319. Pour ces motifs, le Tribunal décide que l'île de Saint-Martin ne constitue pas une circonstance pertinente et que, par conséquent, il ne donnera aucun effet à cette île dans le tracé de la ligne de délimitation de la zone économique exclusive et du plateau continental.»[33]

35. Même si la localisation de l'archipel de San Andrés par rapport aux Parties qui s'opposent dans notre espèce est évidemment différente de celle des îles Anglo-Normandes par rapport à la France et au Royaume-Uni ou de l'île de Saint-Martin par rapport au Bangladesh et au Myanmar, ces considérations dans leur principe n'en sont pas moins, en tous points, transposables à notre espèce. J'ai expliqué pourquoi l'archipel de San Andrés ne se trouve en tout cas pas «du bon côté» du plateau continental si l'on se place dans la perspective de la Colombie. Il est en outre «totalement détaché géographiquement» de la Colombie. Et il est tout à fait apparent que si la présence de l'archipel face à la côte nicaraguayenne permettait de faire dévier le tracé de la ligne provisoire — qui doit l'être entre les plateaux continentaux des deux Etats —, le résultat serait une distorsion radicale de la délimitation, créatrice d'iniquité.

36. Comme l'a noté la Cour unanime dans *Roumanie contre Ukraine*, il lui appartient en effet, lors de la deuxième phase de la délimitation — celle à laquelle nous nous intéressons en ce moment, Monsieur le président —, d'examiner «s'il existe des facteurs appelant un ajustement ou

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[32] *Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale, (Bangladesh/Myanmar)*, T.I.D.M., arrêt du 14 mars 2012, p. 53, par. 151.

[33] *Ibid.*, p. 101, par. 318-319.

un déplacement de la ligne … provisoire afin de parvenir à un résultat équitable» (*Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt, C.I.J. Recueil 2009*, p. 101, par. 120)[34]. Et, faisant application de ce principe, la Cour a précisé qu'«[e]n cas de disparités particulièrement marquées entre les longueurs des côtes, la Cour peut choisir de traiter cette réalité géographique comme une circonstance pertinente qui exigerait de procéder à quelques ajustements de la ligne d'équidistance provisoire» (*ibid.*, p. 116, par. 164)[35]. Tel est assurément le cas en la présente espèce, dans laquelle le rapport des côtes additionnées des îles de l'archipel de San Andrés à celui de la côte du Nicaragua est, je le rappelle encore une fois, de un à vingt. Il paraît donc équitable et raisonnable de procéder avec l'archipel de la même manière que la Cour d'arbitrage de 1977 à l'égard des (beaucoup plus importantes) îles Anglo-Normandes[36] et d'enfermer les différentes îles constituant l'archipel de San Andrés dans des enclaves s'étendant à 12 milles marins de leurs lignes de base respectives. A cet égard, il n'existe aucune raison que l'équité de 2012 diffère de l'équité de 1977 — et la solution est d'autant plus généreuse que, je le répète, les îles Anglo-Normandes avaient alors, et conservent aujourd'hui, une importance démographique, géographique et économique bien plus considérable que celle des trois petites îles et des petits îlots composant l'archipel de San Andrés.

[Fin de la projection n° 9.]

Section 3
Les cayes septentrionales

37. Cette importance est, bien sûr, sans commune mesure avec celle des petites cayes situées au nord de l'archipel de San Andrés. Je serai plus concis en ce qui les concerne, Monsieur le président, pour trois raisons :

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[34]Voir aussi *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 441, par. 288.

[35]Voir aussi *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 313, par. 157 ; *Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 45, par. 58 ; *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt, C.I.J. Recueil 1993*, p. 69, par. 69 ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 446, par. 301.

[36] Voir la sentence du 30 juin 1977, Nations Unies, *RSA*, vol. XVIII, p. 231, par. 202.

1) comme l'a montré le professeur Remiro Brotóns hier, la Colombie ne peut se prévaloir d'aucun titre de souveraineté sur ces formations maritimes ; ce que je vais dire à leur propos n'a donc qu'un caractère subsidiaire ;
2) le raisonnement juridique qui s'applique à la délimitation des zones maritimes entourant l'archipel de San Andrés s'applique *a fortiori* à ces très petits îlets ; et
3) les prétentions de la Colombie à leur égard sont encore plus saugrenues que ses revendications d'espaces maritimes autour des îles composant l'archipel.

38. M. Oude Elferink a décrit ce matin, au point de vue géographique, l'ensemble des cayes sur lesquelles la Colombie prétend exercer sa souveraineté — et qu'elle affecte aussi de considérer comme un tout (prolongeant l'archipel de San Andrés sans solution de continuité)[37]. Plusieurs conclusions peuvent être tirées de cette description :

1) il n'existe aucune espèce de continuité géographique entre ces cayes ou groupes de cayes, ni entre eux, ni avec l'archipel ;

[Projection n° 10.]

2) il s'agit en réalité de quelques petits îlots isolés sans lien les uns avec les autres si ce n'est leur présence sur le plateau continental du Nicaragua ; et les adroites représentations qu'en ont données les cartographes de la Colombie n'y peuvent rien changer : ce n'est pas en entourant ces cayes de cercles bleu foncé que l'on modifie la réalité : il s'agit de toute petites formations insulaires isolées dans la mer des Caraïbes et très éloignées les unes des autres[38] ; et
3) il est difficile de ne pas considérer ces îlots comme des rochers au sens du paragraphe 3 de l'article 121 de la convention de Montego Bay.

[Fin de la projection n° 10.]

La Colombie ne s'embarrasse pas d'une trop longue démonstration sur ce point : elle écrit dans sa duplique : «A mere glance at the photographs that Colombia included in its Counter-Memorial shows unequivocally that the islands [in question] cannot possibly be considered to be mere «rocks»»[39]. Je me contenterai donc de dire, tout aussi

[37] Voir aussi RC, p. 105-110, par. 4.6-4.14 ; MN, p. 248-251, par. 3.115-3.122.

[38] DC, p. 110, par. 4.14 ; MN, p. 248-251, par. 3.115-3.122.

[39] DC, p. 171, par. 5.27.

cavalièrement[40], que c'est le contraire qui est vrai : un simple coup d'œil aux photographies jointes par la Colombie à ses écritures suffit à établir que ces très petites formations insulaires ne se prêtent ni à l'habitation humaine (je veux dire à une occupation humaine durable et continue), ni à une vie économique propre :

— Roncador... [Projection n° 11.]

— Serrana... [Projection n° 12.]

— Serranilla... [Projection n° 13.]

— Bajo Nuevo... [Projection n° 14.]

[Projection n° 15.]

39. Mais outre la réponse légitime du berger à la bergère, il y a une autre raison pour laquelle il me paraît inutile de refaire une longue démonstration : quand bien même ces cayes appartiendraient à la Colombie *(quod non)*, quand bien même elle devraient être considérées comme des îles au sens du paragraphe 2 de l'article 121 (*quod non* à nouveau), ceci ne changerait strictement rien au fait que, dans les circonstances de l'espèce, elles ne devraient être dotées que d'un espace *circum*-insulaire minimal : même s'ils appartenaient à la Colombie, ces îlots minuscules ne sauraient priver le Nicaragua d'une part très considérable de son plateau continental. Et je me permets de rappeler à cet égard, Monsieur le président, que, comme nous l'avons montré plus en détail dans notre réplique, la reconnaissance de la souveraineté de la Colombie et d'une mer territoriale de 12 milles marins entraînerait *dans chaque cas* la perte de 450 milles marins carrés (833 km²) ; il faut plus de 37 milles marins de longueur de côte du Nicaragua pour produire la même superficie de mer territoriale[41]. Au vu de la jurisprudence dans des cas comparables — et je pense en particulier au sort réservé à Qit'at Jaradah dans *Qatar/Bahreïn*[42] (dont on a parlé ce matin), et à Alcatraz dans *Guinée/Guinée Bissau*[43] (qui se sont vu reconnaître l'une et l'autre une

[40] Mais voir RN, p. 105-110, par. 4.6-4.14, ou p. 158, par. 6.29.

[41] Voir MN, p. 254-255, par. 3.129 ; et MN, vol. I, figure IV.

[42] *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 108-109, par. 219, 220, 222 ; voir aussi RN, par. 6.64-6.65.

[43] *Délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau*, sentence arbitrale du 14 février 1985, Nations Unies, *RSA*, vol. XX, p. 190, par. 111, point *a)* ; voir aussi MN, p. 257-258, par. 3.133 ; et RN, p. 214, par. 6.146.

mer territoriale large de deux milles marins et demi), une zone de trois milles marins autour de chacune de ces cayes constituerait une concession plutôt généreuse.

40. Monsieur le président, il me faut conclure et récapituler :

1) la première phase de la délimitation du plateau continental entre les Parties consiste à tracer une ligne provisoire déterminant leurs droits souverains respectifs sans tenir compte des petites formations insulaires se trouvant dans cette zone ;
2) l'ensemble des îles, îlots, cayes et récifs sur lesquels la Colombie revendique sa souveraineté sont situés du «mauvais côté» de cette ligne, sur la partie du plateau continental du Nicaragua dans la mer des Caraïbes, quelle que soit la façon dont on trace la ligne ;
3) l'attribution de la zone maritime à laquelle chacune de ces formations insulaires peut prétendre doit se faire île par île, rocher par rocher et non globalement comme le prétend la Partie colombienne qui veut faire croire à l'existence d'un chapelet d'îles là où, en réalité, existent des petits îlets éparpillés dans la mer des Caraïbes ;
4) compte tenu des circonstances de l'espèce, il serait totalement inéquitable de reconnaître à l'une quelconque de ces formations davantage qu'une mer territoriale ; étant donnée leur importance relative, les trois îles principales de l'archipel de San Andrés peuvent bénéficier, peut-être, d'une mer territoriale de 12 milles marins. En revanche, une telle largeur en faveur des cayes septentrionales aurait pour conséquence une amputation tout à fait excessive des droits du Nicaragua sur le plateau continental environnant.

Merci, Mesdames et Messieurs les juges, de m'avoir à nouveau écouté avec attention et bienveillance. Puis-je vous demander, Monsieur le président, de bien vouloir appeler M^{e} Reichler à la barre.

Le PRESIDENT : Je vous remercie, Monsieur Pellet. I give the floor to Dr. Reichler after a short coffee break of 10 minutes. The hearing is suspended.

The Court adjourned from 3.50 to 4.10 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. Mr. Reichler, this is now your moment, please take the floor.

Mr. REICHLER:

COLOMBIA'S ERRONEOUS APPLICATION OF DELIMITATION METHODOLOGY AND THE INEQUITABLE SOLUTION IT PRODUCES

1. Mr. President, Members of the Court, good afternoon. It is, as always, an honour for me to appear before you.

2. I will address you on what is wrong with Colombia's delimitation methodology and the resulting delimitation line that Colombia asks you to adopt. This is a daunting challenge. Not because it is difficult to point out the errors in Colombia's approach. But because there are so many of them that it is difficult to point them all out in the time allotted to me by the Agent of Nicaragua.

3. So I will get right into it. What is wrong with Colombia's approach to maritime delimitation between it and Nicaragua? Literally, everything.

4. Colombia purports to apply equidistance methodology to delimit an EEZ and a continental shelf boundary between the islands it claims, and those of Nicaragua. This is their first mistake. This is not a proper case for equidistance. An equidistance line — *any* equidistance line — will inevitably fail to produce an equitable result in that area. This is because the delimitation in the western sector of the Caribbean Sea is between Nicaragua's extensive mainland coast, which is the dominant geographic feature in the area, and several small islands claimed by Colombia which lie in front of Nicaragua's coast, geographically detached and very far removed from Colombia's mainland, and which, according to the case law adopted by this Court and other international tribunals, are entitled to no weight in the delimitation of any maritime zones beyond the territorial sea. For these reasons, as Professor Pellet has explained, the equitable solution called for by international law, as applied to the particular geographic circumstances of this case, is to draw territorial sea enclaves around each of the islands over which, in the Court's view, Colombia is sovereign.

A. Colombia's flawed approach to maritime delimitation

5. Mr. President, Colombia has not only used the wrong delimitation methodology; they have also wrongly applied the equidistance formula they claim to be following.

6. The Court has made it clear in several cases that maritime delimitation involves a three-step process.

7. The first step is the drawing of a provisional delimitation line. The second step is to consider whether there are any relevant circumstances that require an adjustment to the provisional line, in order to achieve the equitable solution that international law requires. And the third step is to conduct a proportionality/disproportionality test to determine whether the line equitably divides the relevant maritime area between the two parties. This three-step approach has been endorsed repeatedly by the Court, by arbitral tribunals and, most recently, by the International Tribunal for the Law of the Sea in the *Bangladesh* v. *Myanmar* case[44].

8. Colombia purports to follow this three-step process. But do they? For their first step, they draw an equidistance line between the small islands that they claim, which are geographically detached and far removed from the Colombian mainland, and the Nicaraguan islands lying just off Nicaragua's mainland coast. For their second step, they conclude that there are no relevant circumstances justifying an adjustment of their provisional equidistance line.

9. For their *third step* . . . wait a minute! There is no third step by Colombia, only the first two. They completely ignore the third step in the application of well-established delimitation methodology.

10. The third step, as I have said, is to conduct a proportionality/disproportionality analysis to determine whether the line resulting from the first two steps is equitable. This involves, as the Court has repeatedly explained, and ITLOS has summarized in its recent judgment in *Bangladesh* v. *Myanmar*, a comparison "between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each Party"[45]. This chart shows how ITLOS, relying strictly on this Court's precedents, applied the proportionality/disproportionality test in *Bangladesh* v. *Myanmar*. As you can see, the Tribunal measured the parties' relevant coasts and determined that the ratio between them was 1:1.42 in favour of Myanmar. Then it determined the

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[44] *Continental Shelf (Libyan Arab Jamahiriya* v. *Malta), Judgment, I.C.J. Reports 1985* (hereinafter "*Libya* v. *Malta*"), p. 46, para. 60; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009* (hereinafter "*Romania* v. *Ukraine*" or "the *Black Sea* case"), pp. 101-103, paras. 116-122; ***Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)***, Judgment, ITLOS, 14 March 2012 (hereinafter "*Bangladesh* v. *Myanmar*"), para. 240.

[45] *Bangladesh* v. *Myanmar*, para. 240.

ratio between the relevant maritime areas that were allocated to each party by its proposed delimitation line. This was 1:1.54 in favour of Myanmar. Since the difference between the two ratios was not disproportionate, the Tribunal concluded that the delimitation line was equitable to both parties.

11. Colombia's failure to *mention*, let alone apply, the third element of delimitation methodology — the proportionality/disproportionality test — could not have been a simple oversight. My friends on the other side are learned and experienced counsel. It is not credible that every one of them just happened to forget to apply the required test to determine whether Colombia's proposed delimitation line is equitable. Why did they not perform a proportionality/disproportionality test? Or *did* they? And if they *did*, why did they not show you the results? Why did they omit them from both their Counter-Memorial and their Rejoinder? Are they trying to hide them from you, or divert your attention from them? If the answers to those questions are not already blindingly obvious, I trust that they will be by the time I conclude my remarks.

12. But let me proceed step by step. Not only has Colombia failed to apply the required third step in the delimitation process. It has applied the first two steps in a completely wrong manner.

B. Colombia's delimitation line is wrong

13. Colombia has got the first step — the drawing of a provisional delimitation line — terribly wrong. This step has four parts: first, the determination of the parties' relevant coasts; second, the determination of the area to be delimited, the so-called relevant area; and if, as Colombia proposes, equidistance is the methodology to be used, the third part is the placement of appropriate base points along each party's relevant coast; and then part four is the mathematical construction of the provisional equidistance line using these base points. Because, as you will see, Colombia got the first three parts wrong, the line resulting from the mathematical process in the fourth part is necessarily wrong as well.

C. Relevant coasts

14. The analysis always begins with the identification of the relevant coasts. This is true, regardless of which delimitation methodology is ultimately employed, whether equidistance, angle

bisectors, parallels or meridians, or enclavement. Let us take a look at what Colombia considers the relevant coasts, through a series of graphics assembled at tabs 85 and 86 of your judges' folders. For Colombia, these are the relevant coasts: the west-facing coasts of its claimed insular features, shown in red — Albuquerque Cay, San Andrés, Providencia, and Quitasueño — and the east-facing coasts of Nicaragua's coastal islands, shown in blue: the Corn Islands, Roca Tyra, Ned Thomas Cay, the Miskito Cays, and Edinburgh Cay. The problem here is that this is not a full or an accurate picture of Nicaragua's relevant coast. There is something missing from Colombia's picture. And here it is. What Colombia excludes from its picture is Nicaragua's extensive mainland coast, which is 453 km long. Colombia pretends that Nicaragua's mainland coast does not exist. It wants Nicaragua's mainland coast to disappear from the map. It wants the Court to treat this case as if it were a delimitation solely between the small mid-sea islands of one State and the small, fringing islands of another, which might appear, without more, to balance each other out. But that is not this case. Here, Nicaragua's fringing islands, rocks and cays are closely backed up by a very prominent coast, of which some of these features form an integral part, lying within Nicaragua's 12-mile territorial sea limit. For Colombia, Nicaragua's relevant coast consists only of the east-facing coasts of these small, coastal islands, and does not include Nicaragua's extensive east-facing mainland coast. There is no justification for this in geography or in law.

15. Now, there is no mystery here, Mr. President, in regard to why Colombia has taken this approach. Its reason for denying the relevance of Nicaragua's mainland coast is quite obvious. If only Nicaragua's islands are considered part of its relevant coast, the length of that coast is the sum of the islands' east-facing sides, a mere 24 km. This is roughly equivalent to the length of the relevant coast Colombia claims for itself; the sum of the west-facing coasts of Colombia's insular features is 21 km. But if Nicaragua's mainland coast is counted — as it surely must be — the equities change dramatically. Nicaragua's relevant coast is 453 km, as compared to Colombia's 21 km, a ratio of more than 21:1.

16. Colombia struggles to explain its exclusion of Nicaragua's mainland coast. Their core argument is that, because Nicaragua and Colombia's mainland coasts are separated by more than 400 miles, neither is relevant to this delimitation. That is both wrong and a *non sequitur*. It is wrong because both mainland coasts are necessarily relevant to the delimitation of the two States'

overlapping continental shelves, as Professor Lowe has explained. And it is a *non sequitur*, because, even if Colombia's mainland coast is irrelevant to any delimitation within 200 miles of Nicaragua's coast (since any areas lying within 200 miles of Nicaragua are necessarily more than 200 miles from Colombia), it does not follow that Nicaragua's mainland coast is irrelevant to a delimitation within 200 miles of itself. To the contrary, Nicaragua's mainland coast generates a potential entitlement to an exclusive economic zone out to a distance of 200 miles from the baselines from which its territorial sea is measured, and to a continental shelf extending at least that far. That is indisputable under the Law of the Sea Convention and general international law applicable to all States[46].

17. Colombia is wrong, therefore, to disregard Nicaragua's mainland coast in its identification of Nicaragua's relevant coast for the purpose of drawing a provisional delimitation line.

D. Relevant area

18. Colombia is not only wrong about the relevant coasts. It is also wrong about the relevant area: the area to be delimited in this case. Here again, the relevant area is to be identified prior to and independently of the delimitation methodology later to be employed. As the Court has made clear on numerous occasions, the relevant area is the area where the seaward projections of the relevant coasts overlap[47]. This is illustrated in the next series of graphics, which appear together at tab 87 of your judges' folders. It is indisputable that Nicaragua's mainland coast, including the adjacent islands that form an integral part of it, generates a potential exclusive economic zone entitlement out to a distance of 200 miles, as shown on your screens now, in the first graphic of this series. So do the coasts of Colombia's islands — namely, San Andrés and Providencia — that qualify as true islands and are not mere "rocks", as defined by Article 121, paragraph 3, of the Law of the Sea Convention. This is the 200 mile potential entitlement of San Andrés and Providencia, subtracting the areas that Colombia recognizes as pertaining to third States. Entitlement, of course,

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[46] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, (hereinafter "*Gulf of Maine*"), p. 294, para. 94; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, (hereinafter "*Jan Mayen*"), p. 59, para. 48.

[47] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, (hereinafter "*Tunisia/Libya*"), pp. 61-62, para. 75; *Jan Mayen*, p. 64, para. 59; *Romania* v. *Ukrain*e, p. 97, para. 99.

is not title. It is for the Court to determine title, by dividing the area of overlapping potential entitlements equitably between the Parties.

19. This is the area of overlapping potential entitlements, where Nicaragua's and Colombia's potential entitlements within 200 miles of Nicaragua's mainland coast overlap. The purple area is thus the relevant area where any delimitation within 200 miles of Nicaragua's coast would have to take place. Defining the relevant area in this manner is entirely consistent with the Court's prior jurisprudence. It follows the approach repeatedly taken by the Court and arbitral tribunals (*Jan Mayen*, p. 64, para. 59; *Romania* v. *Ukraine*, p. 99, para. 110). But it is not Colombia's approach. This is how Colombia defines the relevant area. What is wrong with this picture? For Colombia, the relevant area, the area in dispute, does not extend westward of Nicaragua's coastal and fringing islands towards Nicaragua's mainland coast; nor, more importantly, does it extend eastward of its own insular features to the outer limit of Nicaragua's 200-mile EEZ entitlement. For Colombia, this area, now highlighted — to the east of San Andrés and Providencia -- is not in dispute because it all belongs to Colombia, and Nicaragua has no entitlement. According to Colombia's Rejoinder: "The maritime areas lying east of the islands of San Andrés, Providencia, Santa Catalina, Albuquerque and Quitasueño *have nothing to do with Nicaragua.*" (Emphasis added.)[48] Why not? The area east of those features that Colombia has excluded from the relevant area is within 200 miles of Nicaragua's mainland coast, which means that Nicaragua by law has a potential entitlement to it. Colombia cannot nullify Nicaragua's potential entitlement to the area east of San Andrés Island simply by assuming its own conclusion that the area has nothing to do with Nicaragua, any more than Nicaragua can nullify Colombia's potential entitlement by claiming that it has nothing to do with Colombia.

20. Colombia argues that its so-called "chain" of unconnected islands, stretching from Quitasueño in the north to Albuquerque Cay in the south, is "equivalent to a mainland coast"[49], and therefore functions as though it were a continuous landmass, the brick wall depicted by Professor Pellet earlier this afternoon, that blocks and shuts off the extension of Nicaragua's coastally-generated maritime entitlements approximately 150 miles short of their 200-mile EEZ

[48]RC, para. 5.48.

[49]RC, para. 5.46.

limit under Article 57 of the Law of the Sea Convention, and more than 350 miles short of the limit of Nicaragua's continental margin under Article 76. There is no precedent for such a drastic cut-off of Nicaragua's maritime entitlements, either in the case law or in State practice, both of which I will address later in this speech.

21. To treat all of the disputed area where the Parties' potential entitlements overlap as the area to be delimited in this case is not, of course, to decide whether it belongs to Nicaragua or Colombia. The equitable division of the area in dispute comes at the end of the delimitation process, not the beginning. Colombia seeks to reverse this well-established process, by arbitrarily defining out of the relevant area everything east of its so-called "chain" of islands, leaving all of this area to Colombia by default. That is not a proper application of equidistance or any other delimitation methodology. Here again, Colombia has got it wrong.

22. Colombia is also wrong in arguing that the relevant area as defined by Nicaragua "disregards the rights of third States"[50]. In fact, the relevant area, as defined by Nicaragua, excludes those areas claimed by Costa Rica and Panama as a result of their delimitation agreements with Colombia, and it excludes the area belonging to Honduras under the Court's 2007 Judgment in the case between Nicaragua and Honduras. Moreover, any delimitation between Nicaragua and Colombia would necessarily be without prejudice to the rights of third States under Article 59 of the Court's Statute[51], and, as both Nicaragua and Colombia agree, and the Court has already observed in regard to Costa Rica, the interests of third States can be protected by terminating the delimitation line with a directional arrow short of any area claimed by a non-party State[52].

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[50]RC, para. 5.67.

[51]Statute of the International Court of Justice, Art. 59. See also *Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, p. 554, paras. 46, 49; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, paras. 17, 63; *Delimitation of the Continental Shelf between France and the United Kingdom*, (hereinafter "*Anglo-French Continental Shelf Case*"), Decision, 30 June 1977, reprinted in United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. 18, p. 3 , para. 28; *Bangladesh* v. *Myanmar*, para. 367.

[52] "In the present case, Costa Rica's interest of a legal nature may only be affected if the maritime boundary that the Court has been asked to draw between Nicaragua and Colombia were to be extended beyond a certain latitude southwards. The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved (see *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 112)." (*Application by Costa Rica for Permission to Intervene, Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 4 May 2011, para. 89.)

23. In any event, in the *Black Sea* case, the Court was not troubled by the inclusion of some third party entitlements in the description of the relevant area, because

> "where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected" (*Romania* v. *Ukraine*, p. 100, para. 114).

24. Applying the methodology employed by the Court in the *Black Sea* and other cases, the area where the potential entitlements of Nicaragua and Colombia overlap measures 214,000 sq km. That is the relevant area that must be equitably delimited by the Court.

E. Base points

25. This brings me to the matter of base points. These are only relevant if equidistance is the delimitation methodology to be employed. For Nicaragua, which considers equidistance inappropriate to the circumstances of any delimitation within 200 miles of its mainland coast, the issue of base points, whose only function is to plot the equidistance line, does not arise. Colombia advocates equidistance, and because of that, it needs to use base points. But, here again, Colombia has erred. There is no justification for placing base points, as Colombia does, on Albuquerque Cay, which we say is a rock but in any case is too insignificant to justify a base point, or on Quitasueño, which is under water. The jurisprudence of this Court and other international tribunals does not support the placement of base points on such insignificant features. Nor is it appropriate, in the geographic circumstances present here, for Colombia to place base points on the islands of San Andrés and Providencia.

26. The two most recent judicial decisions demonstrate this. In *Bangladesh* v. *Myanmar*, where ITLOS expressly followed ICJ precedents, the tribunal decided that Bangladesh's St. Martin's Island did not warrant a base point in the construction of the provisional equidistance line beyond the territorial sea. The tribunal explained that if St. Martin's Island were given a base point, the island would have blocked the seaward projection of Myanmar's coast, and the resulting delimitation would be inequitable to Myanmar[53]. As shown on the screen, and at tab 88 of your judges' folders, St. Martin's Island is a coastal island, located only 4.5 miles from the Bangladesh

[53] *Bangladesh* v. *Myanmar*, para. 265.

mainland coast, and forming an integral part of it. It measures 8 sq km, which is much larger than all of the insular features claimed by Colombia except San Andrés and Providencia. In fact, St. Martin's is more than four times larger than all the other alleged Colombian features put together. As you can see from these photographs, also found at tab 88, it is a substantial island with an economic life of its own; it has more than 7,000 permanent inhabitants, and hosts more than 300,000 tourists annually. If St. Martin's did not get a base point, because in the Tribunal's view "it would result in an unwarranted distortion of the delimitation line"[54], then neither should Colombia's insular features.

27. ITLOS cited and relied upon this Court's Judgment in the *Black Sea* case, among others, in its decision not to place a base point on St. Martin's Island, and not to give it any effect on the delimitation line in the EEZ and continental shelf. In the *Black Sea* case, the Court likewise refused to place a base point on Ukraine's Serpents' Island, because of the island's small size and its distance from the mainland coast. Serpents' Island has a surface area of 0.17 sq km and a circumference of approximately 2,000 m. But, small as it is, it is still larger than two of the insular features where Colombia would place a base point**.** Serpents' Island has a detachment of border guards and a lighthouse. Yet, these factors were not sufficient, in the view of the Court, to merit placement of a base point on that island. Distance from the mainland coast also counted against placement of a base point. Serpents' Island, the Court found, could not be considered a coastal or fringing island because it was located 20 miles offshore. Colombia's insular features, including San Andrés and Providencia, likewise are not coastal or fringing islands; they are geographically detached from Colombia and located hundreds of miles from its mainland.

28. A list of cases in which such non-coastal islands — some with permanent human habitation and economic life — have been ruled ineligible for the placement of base points in the construction of the delimitation line has already been provided by Professor Pellet.

29. Based on these judicial and arbitral precedents, Colombia is wrong to place base points on any of the features where it purports to place them — Albuquerque Cay, San Andrés, Providencia and Quitasueño — and, if these were eliminated, it would be unable, for the same

[54] *Bangladesh* v. *Myanmar*, para. 265.

reasons, to place any base points on East Cay, Southeast Cay, Roncador, Serrano, Serranilla or Bajo Nuevo. With the exception of San Andrés and Providencia, all of these could be classified as "rocks" under Article 121, paragraph 3, but in any event they are tiny, insignificant and uninhabitable features, except Quitasueño, which is under water. Under the applicable case law, none of them is a suitable location for placement of a base point in the construction of a provisional delimitation line.

30. To summarize the discussion thus far, we have seen that Colombia has got the relevant coasts wrong, most significantly in regard to the exclusion of Nicaragua's mainland coast; it has got the relevant area wrong, because it has excluded the area of overlapping entitlements — and disputed claims — east of its claimed insular features and within 200 miles of Nicaragua's coast; and it has placed base points on features where they do not belong. Thus, Colombia has erred in regard to the first step of maritime delimitation methodology: it has got the provisional delimitation line wrong. It has put it in the wrong place.

31. There is no Colombian mainland coast, or brick wall of Colombian islands opposite Nicaragua's mainland coast, capable of blocking its seaward projection to a distance of 200 miles; and there is accordingly no justification for placing a provisional delimitation line — whose distorting effects are all too obvious — in a location that would produce these blocking effects.

F. Relevant circumstances and the adjustment of the provisional delimitation line

32. Mr. President, Colombia fares no better in regard to the second step of the delimitation process: adjustment of the provisional line based on relevant circumstances in order to achieve an equitable solution. Colombia's thesis is that it got the provisional delimitation line so perfectly right that no adjustment is required, that there are no relevant circumstances, and that, therefore, the provisional line constructed by Colombia should be adopted as the final delimitation line by the Court. This is not a sustainable view. In the first place, as I have said, Colombia's provisional delimitation line is wrongly constructed and located in the wrong place. But even if, *quod non*, that were not the case, the line is severely distorted by Colombia's islands in a manner highly prejudicial to Nicaragua, such that relevant circumstances exist sufficient to require rejection of Colombia's line in order to achieve an equitable solution.

33. In assessing the distorting effects of minor maritime features, there is a dichotomy in methodology, but a harmony in objective and result. In most cases, this Court and other tribunals had determined *a priori* that minor features should not be taken into account in constructing even a provisional delimitation line. I have already given two examples of this: *Bangladesh* v. *Myanmar* and the *Black Sea* case. In the opinions of some commentators, however, the approach should be to take into account, in the first instance, every maritime feature — regardless of its small size or location — and use it in the plotting of the provisional line; and then, after assessing whether these minor features exert disproportionate effects on the line, to treat them as relevant circumstances, exclude them from consideration, and adjust the line accordingly. Under either approach, the same effect is achieved: the exclusion of the minor feature, and the removal of its influence on the course of the final delimitation line.

34. Regardless of which approach is followed, it is a question of judgment for the Court to determine whether the impact of an island on the delimitation line is so distorting — and inequitable to the other party — as to warrant an adjustment to the line, either by excluding the feature altogether, or by giving it substantially reduced weight in the construction of the final line. And this judgment can only be made in the context of the specific geographical circumstances of a particular case[55]. This point was very ably made by Sir Derek Bowett, in his article on *Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations*: "The notion of 'distortion' is always linked to a perception of what the line would otherwise be, if the island did not exist. A variation caused by the island which appears inequitable, given the location and size of the island, will be regarded as a 'distortion'."[56]

35. With Sir Derek's sensible approach in mind, let us look at examples from the case law. A review of these cases demonstrates that they all have a very important common element: in each case where an island was found to cause the delimitation line to block or cut off the seaward projection of the other State's coast, the remedy was to ignore the island altogether, or, in rarer cases, to give it such reduced weight so that its effect on the line would not be to block or cut off

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[55] *Bangladesh* v. *Myanmar*, para. 317.

[56] D. Bowett, "Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations" in J. Charney and L. M. Alexander (eds.), *International Maritime Boundaries* (1993), Vol. I, p. 144.

the seaward projection of the other State's coast. As I review the cases, this theme — common to all of them — will stand out.

1. Distorting effects of small islands opposite mainland coasts

(a) ***Bangladesh* v. *Myanmar***

36. We start with the most recent case, *Bangladesh* v. *Myanmar,* using graphics that can be found at tab 89 of your judges' folders. Here is ITLOS's explanation of why St. Martin's Island was given no weight at all in determining the maritime boundary beyond a 12-mile territorial sea: "St. Martin's Island is an important feature", but

> "because of its location, giving effect to St. Martin's Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line"[57].

Here is what the Tribunal was referring to. You can see on your screens how an equidistance line giving effect to St. Martin's Island would have blocked and cut off the seaward projection of part of Myanmar's coast, represented by the red arrows. This is what the Tribunal called the "blocking [of] the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line". And this is what the Tribunal found necessary to avoid, in order to achieve an equitable solution. You can now see on your screens how the Tribunal avoided it. It enclaved St. Martin's within a 12-mile territorial sea, and gave it no weight at all in determining the portion of the boundary that was based on equidistance, beyond 12 miles, or in the remainder of the boundary which was based on a constant azimuth.

37. Here, and at tab 90 of your judges' folders, by way of comparison, is the effect of Colombia's proposed delimitation line, which is derived from its base points on Albuquerque Cay, San Andrés, Providencia and Quitasueño, on the seaward projection of Nicaragua's coast. It is obvious from these graphics that the blocking or cut-off effect of Colombia's islands on Nicaragua's seaward projection is far more severe than the blocking effect of St. Martin's Island on Myanmar's seaward projection. By basing its delimitation line on these insular features, Colombia has produced a line that not only cuts across Nicaragua's coastal front, but runs almost perfectly

[57] *Bangladesh* v. *Myanmar*, para. 318.

perpendicular to the seaward projection of that coast for its entire length. Mr. President, this is the ultimate in cut-off effect. It does not get any worse than this.

38. The blocking effect on the seaward projection of Nicaragua's coast is just as severe if, as in this graphic now on your screens, Albuquerque Cay and Quitasueño are ignored, as they must be. What this graphic shows is the "distortion" produced solely by San Andrés and Providencia. It is still a very severe cut-off of the seaward projection of Nicaragua's coast. It is scarcely different from the line Colombia has proposed, and just as inequitable. As you will see from the other delimitation cases involving islands, to which I will soon come, in every one of those cases islands that produced this kind of blocking or cut-off effect were ignored, and were not allowed to influence the delimitation line, because of the inequitable result they would have produced, like this one.

39. Colombia does not deny that its islands and cays block the seaward projection of Nicaragua's mainland coast. Indeed, this is Colombia's central thesis: that its so-called "chain" of islands along what it calls a north/south "axis" blocks Nicaragua's extension eastward, depriving it of any entitlement east of this alleged "chain". Colombia's argument can be summarized by paraphrasing the immortal Jean-Jacques Rousseau: Nicaragua's mainland coast is born free, but is everywhere enchained. For Colombia, Nicaragua's mainland coast has nothing to lose, *except* for its chains — from which Nicaragua can never break free. We might refer to this perversion of the classic exhortation by two eminent German philosophers as the "Colombianist Manifesto". As a legal concept, it is truly revolutionary. In fact, it is dialectically and materially opposed to what this Court and other international tribunals have said the law is: islands are not allowed to block or cut off the seaward projection of other States' mainland coasts; when they have this effect, they are discounted in the delimitation process.

(b) ***The Anglo-French arbitration***

40. Let's look at some other pertinent cases. Perhaps the most pertinent is the *Anglo-French Arbitration*, also known as the *Channel Islands* case. Since Professor Pellet has already discussed the significance of that case, there is no need for me to dwell on it, except to say that it illustrates the point I have been making: when the islands of one State, "wholly detached geographically"

from its coast — those are the words of the Court of Arbitration in that case[58] — when the islands of one State stand in a relationship of oppositeness to the mainland of another State, it is inevitable that those islands will have a blocking effect on the seaward projection of the other State's mainland coast, and thus render inequitable any delimitation line that is drawn between the mainland and the islands. In those circumstances, the equitable solution is to enclave the islands. As Professor Pellet pointed out, the Channel Islands — especially Jersey and Guernsey — dwarf Colombia's islands of San Andrés and Providencia in terms of size, population, and economic importance. And they are not nearly as detached geographically from the United Kingdom mainland as San Andrés and Providencia are from Colombia.

(c) *Qatar* v. *Bahrain*

41. In *Qatar* v. *Bahrain*, the effect of the small Bahraini island of Qit'at Jaradah, lying between the two States, and both opposite and in close proximity to the Qatar coast, was to push the equidistance line toward that coast, blocking Qatar's seaward projection. This is at tab 91 of your judges' folders. The Court found that this feature distorted the delimitation line, and that the cut-off of Qatar's seaward projection was inequitable to Qatar, requiring that Qit'at Jaradah be disregarded in the delimitation.

(d) *Eritrea/Yemen* arbitration

42. In the *Eritrea/Yemen* arbitration, two Yemeni islands were given no weight in the drawing of the line that was adopted as the boundary between the two States in the Red Sea. This is depicted at tab 92 of your folders. The island of Jabal al-Ta'ir is located 62 miles off Yemen's coast, almost halfway between Yemen and Eritrea. The island of al-Zubayr is located more than 26 miles from Yemen's coast. In terms of size, al-Zubayr is comparable to San Andrés and Providencia. Nevertheless, both Yemeni islands were disregarded because of what was seen as their distorting effects on the median line; they pushed it toward the Eritrean coast, cutting off the seaward projection of that coast; this was inevitable because the median line was generally perpendicular to Eritrea's coastal projection for its entire length. The distance of the excluded

[58] *Anglo-French Continental Shelf Case*, para. 199.

islands from Yemen's coast was a significant factor. Equally small islands within Yemen's 12-mile territorial sea were treated as coastal islands, integral to the mainland coast, and given full weight in the delimitation[59]. Unlike Colombia's islands, the excluded Yemeni islands were on the right side of the median line between the two mainland coasts. But they were far enough from Yemen's coast and close enough to the median line to exert a significant effect on it, pushing it in the direction of Eritrea's mainland coast and blocking its seaward projection.

43. As these cases make clear, when small islands, removed from a State's mainland coast, are in a relationship of oppositeness to the mainland coast of another State, they will inevitably push an equidistance line toward the other State's coast, blocking its seaward projection. This illustration of the point is located at tab 93 of your folders. The central question becomes, how significant are the islands in relation to the blocking or cut-off effect that results from their influence on the delimitation line? As the jurisprudence shows, the smaller the island — or cay, or rock, or reef — and the farther it is from the mainland coast of the State to which it belongs, the more likely it is to be ignored in the delimitation process. All of Colombia's scattered, minor features should be disregarded on this basis. But even larger and more important islands, like the Channel Islands and St. Martin's Island, have been found to have a distorting effect on the equidistance or median line, resulting in their being enclaved, and otherwise given no weight in the construction of the delimitation line. These cases have a particular application to San Andrés and Providencia.

44. Geographic circumstances similar to those presented by San Andrés and Providencia were analysed by Dr. Hiran Jayewardene in his study of *The Regime of Islands in International Law*. "It is apparent that the introduction of an island in a delimitation situation otherwise between two broadly equal mainland coasts, causes an appreciable deflection of an equidistance boundary."[60] He continues: "As distances from the two coasts increase, the potential for inequity also increases." The inequity arises because, when islands are permitted to influence the

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[59]*Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation),* 17 Dec. 1999, *RIAA*, Vol. XXII, 2001, (hereinafter "*Eritrea/Yemen"*), para.151 (the islands in point are Tiqfash, Kutama and Uqban).

[60]H. Jayewardene, *The Regime of Islands in International Law*, 1990, p. 350.

equidistance line, "their effect is magnified in direct proportion to the distance from the coastline"[61].

45. This is how Dr. Jayewardene illustrates the increasing inequity produced by an island belonging to one State, as it moves farther from that State's coast, and closer to the coast of the opposite State. You can find the illustration at tab 94 of your judges' folders. We have coloured it here for clarity. The significance of Dr. Jayewardene's point is easier to grasp when the figure is rotated in this manner. Does this geographic situation look familiar? It is almost as if Dr. Jayewardene had San Andrés in mind. His illustration demonstrates the inequity produced by both San Andrés and Providencia, like other islands that are far removed from their mainland State and located in closer proximity to the coast of another State. Dr. Jayewardene calls this situation a "well-known example of special circumstances warranting an amelioration of the inequities which may result from an equidistance line"[62].

2. Distorting effects of small islands adjacent to mainland coasts

46. Islands have also been disregarded for their distorting effects in geographic situations where they lie adjacent to, rather than opposite, the mainland coast of another State. As shown here, and at tab 95, Ukraine's Serpents' Island lies as much in a relationship of adjacency to, as oppositeness from, Romania's coast. The chart on your screens depicts the distorting effects Serpents' Island would have had on an equidistance line if it had been taken into account. It would have distorted the line — shown in red dashes — by deflecting it across Romania's coast, partially blocking Romania's seaward projection. Because of what the Court viewed as Serpents' Island's relative insignificance and its distance from the coast, it was not allowed to produce this effect. As you can see, the blocking effect produced by Serpents' Island is not nearly as severe as the effects of Colombia's islands on the provisional equidistance line Colombia has drawn between those islands and Nicaragua's mainland coast.

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[61]H. Jayewardene, *The Regime of Islands in International Law*, 1990, p. 349.

[62]*Ibid.*, p. 350.

(a) *Nova Scotia/Newfoundland* arbitration

47. Another case dealing with the distorting effects of a mid-sea island is *Newfoundland/Nova Scotia*. This is at tab 96 of your judges' folders. In that arbitration, Nova Scotia's Sable Island, lying 88 miles off its coast, was given no effect. The graphic shows how Sable Island would have deflected the equidistance line across the seaward projection of Newfoundland's coast. As the graphic shows, the blocking effect was far from absolute. Nevertheless, especially because of what the arbitral tribunal called the "remote location" of this island detached from Nova Scotia's coast, the tribunal called attention to "the cut-off effect that the provisional line has on the southwest coast of Newfoundland"[63]. As this case illustrates, the farther islands are situated from the mainland coast of the State exercising sovereignty over them, the greater the distortion they are likely to cause to a delimitation line that takes them into account. If 88 miles off the Nova Scotia coast is a "remote location", likely to cause a distorting effect on a delimitation line, then that would perforce apply to all of Colombia's insular features, including San Andrés, which range between 320 and 400 miles from Colombia's mainland coast.

(b) *Dubai/Sharjah* arbitration

48. The common element in all of these cases involving islands — the need to prevent the blocking or cut-off effects on the mainland coasts of neighbouring States — is also evident in the *Dubai/Sharjah* arbitration. As Professor Pellet said, the Tribunal gave no weight to Sharjah's island of Abu Musa in the delimitation line, and instead enclaved the island within a 12-mile territorial sea. Abu Musa measures 12 sq km — several times larger than most of Colombia's claimed features. Its effect on the equidistance line, had it been taken into account, is shown on the graphic, which can also be found at tab 97. Abu Musa would have caused the equidistance line to cut in front of Dubai's coast, blocking Dubai's seaward projection. Because of this distortion, Abu Musa was given no effect in the delimitation. The case follows the same pattern as the others I have mentioned: where islands cause the delimitation line to cut off the seaward projection of another State's mainland coast, they are given no weight in the construction of the delimitation line.

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[63] *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Second Phase*, Award of 26 March 2002, *ILR*, Vol. 128, (hereinafter "*Newfoundland/Nova Scotia*"), paras. 5.14-5.15.

3. Conclusion to be drawn from the case law

49. The conclusion to be drawn from the case law is this: whether they are characterized as lying opposite or adjacent to Nicaragua's mainland coast, the islands, cays, rocks, reefs and shoals claimed by Colombia should be given no weight in the delimitation of the maritime boundary between Colombia and Nicaragua. The only equidistance line they can produce is one that is irreparably distorted, because it blocks the seaward projection of Nicaragua's mainland coast, cutting it off about one quarter of the way out to the limit of Nicaragua's lawful EEZ entitlement, and leaving Nicaragua with an even smaller fraction of its lawful continental shelf entitlement. Given the sizes and locations of these insular features, and the distorting effects they have on the delimitation line, they must either be ignored *a priori* in the plotting of the provisional line, or treated as relevant circumstances and given no weight in determining the final delimitation line.

50. In sum, in addition to misapplying the first element of delimitation methodology and getting the provisional line wrong because it used the wrong relevant coasts and the wrong relevant area, Colombia has also misapplied the second element, and failed to properly adjust the provisional line to remove the distorting influences of insular features. For these reasons, Colombia's proposed delimitation line cannot represent an equitable solution in this case. In fact, as we shall now confirm, it comes nowhere close to an equitable solution.

4. The proportionality/disproportionality test

51. Colombia's failure to propose an equitable solution is especially demonstrated when we move to the third step of the delimitation process, the proportionality/disproportionality test, which Colombia so completely and conspicuously avoids performing. Colombia's failure to apply this element is a dead giveaway. It tells us in no uncertain terms that they are fully aware that their delimitation line fails the test, and cannot represent an equitable solution. Why else do they not perform the test?

52. Mr. President, here is what Colombia does not tell you, and hopes you will not ask about. This is at tab 99 of your judges' folders. It shows the relevant coasts, and the relevant area where the potential entitlements of the Parties overlap. The ratio of the relevant coastal lengths is 453 km for Nicaragua to 21 km for Colombia. That is a ratio of more than 21:1 in favour of Nicaragua. The relevant area — the area of overlapping entitlements — measures 214,000 sq km. Colombia's

delimitation line divides this area by giving 154,000 sq km to Colombia, and 60,000 sq km to Nicaragua, a ratio of 2.6:1 *in favour of Colombia.* This distribution not only fails the disproportionality test, it *insults* it. This must be the most egregious case of disproportionality ever put forward. In *Jan Mayen* and *Barbados/Trinidad & Tobago*, adjustments to the delimitation line were required when the ratios of relevant coastal lengths were 9:1 and 8:1, respectively[64]. Here, the coastal length ratio is more than 21:1, while Colombia's equidistance line gives a preponderant share of the relevant area *not* to Nicaragua but to *itself*. Colombia gives itself more than two and a half times the maritime area it gives to Nicaragua, despite having a relevant coast that is 21 times smaller! Colombia's line simply cannot be taken seriously under the jurisprudence of this Court.

(a) ***Colombia's arguments on proportionality***

53. In its Counter-Memorial, Colombia spends all of four pages on "The Equitableness of the Delimitation," the main point of which is to excuse itself from conducting a proportionality/disproportionality test. Rather astonishingly, Colombia says "proportionality, in terms of a correlation between the lengths of the relevant coasts of parties to a delimitation dispute and the maritime areas appertaining to those coasts, has actually been employed *very rarely* and with considerable caution"[65]. Can they really be serious about dispensing with the proportionality/disproportionality test in so cavalier a manner? This Court and other tribunals have repeatedly stated that the final and indispensable element of delimitation methodology is a proportionality/disproportionality test, to determine whether the delimitation line produces an equitable solution[66]. Following these ICJ precedents, ITLOS, in its recent judgment in *Bangladesh* v. *Myanmar*, performed just such a test[67].

54. The Counter-Memorial recognizes, at least in principle, that: "Any application of the proportionality test in this case would hinge on a general appreciation whether an equidistance

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[64] *Jan Mayen*, paras, 61, 68; *Libya* v. *Malta*, para. 68; *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award of 11 April 2006, *RIAA*, Vol. XXVII, p. 214, (hereinafter "*Barbados/Trinidad & Tobago*"), para. 352.

[65] CMC, p. 414, para 9.88.

[66] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, (hereinafter, "*Cameroon* v. *Nigeria")*, para. 165; *Jan Mayen*, paras, 61, 68; *Libya* v. *Malta*, para. 68; *Barbados/Trinidad & Tobago*, paras. 334, 335, 350, 352; *Romania* v. *Ukraine*, paras. 110, 164.

[67] *Bangladesh* v. *Myanmar*, paras. 240, 489-499.

boundary produces a result which is manifestly disproportionate."[68] Sounds good. But then they fail to run the test. Instead, they simply conclude — without any calculations whatsoever — that their proposed boundary line "cannot be said to produce a disproportionate result calling for any adjustment"[69]. On what basis do they reach this conclusion? None is provided. Of course, any party can *say* its delimitation line is not disproportionate. But what do the numbers show? Colombia does not tell you.

55. One might think that Colombia was reserving its proportionality/disproportionality analysis for the Rejoinder. Well, one would be wrong for thinking that. They did not address it in the Rejoinder either. The Rejoinder devotes five pages to a subsection entitled "Geographic Factors and Proportionality" but it mentions "proportionality" in only two paragraphs, one of which states the truism that "maritime delimitation is not an exercise in distributive justice or in drawing lines according to 'nice calculations of proportionality'"[70]. This, apparently, is Colombia's excuse for not conducting the proportionality/disproportionality test that the case law requires. Colombia's only other reference to proportionality is to cite Nicaragua's Reply for the proposition that "proportionality as such cannot produce a delimitation"[71]. This is another truism and an even weaker excuse for not conducting a proportionality/disproportionality test. Of course, proportionality cannot produce a delimitation. But that does not mean it has no role in the delimitation process. Still less, does it mean that a proportionality/disproportionality test can be avoided altogether. The case law makes clear it cannot be.

56. But the issue now of Colombia's non-performance of the test is moot. We have subjected Colombia's equidistance line to a proper proportionality/disproportionality test, and it has failed miserably. The test shows, as you will have seen, that Colombia's line is manifestly and egregiously inequitable. It does not and cannot constitute the equitable solution that international law requires.

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[68]CMC, p. 415, para. 9.90.

[69]CMC, p. 415, para. 9.91.

[70]RC, p. 310, para. 8.72.

[71]RC, p. 310, para. 8.73.

57. The question necessarily arises: does Nicaragua's proposed delimitation constitute an equitable solution? The answer is: Yes, it does. As Professor Pellet explained, Nicaragua's proposed solution for the maritime areas within 200 miles of Nicaragua's mainland coast is to enclave San Andrés and Providencia within 12-mile territorial seas, and to enclave within 3 miles any other features — all of them uninhabitable and incapable of economic life — that may be found by the Court to belong to Colombia. This graphic is at tab 99 of your folders. This solution passes the proportionality/disproportionality test. As the Court is now well aware, the relevant coasts are 453 km for Nicaragua and 21 km for Colombia, a ratio of approximately 21:1. The enclaves proposed by Nicaragua would divide the relevant area as follows: 208,000 sq km for Nicaragua, and 6,000 for Colombia. The ratio is 35:1. While this allocation of maritime space is somewhat more favourable to Nicaragua than the ratio of relevant coasts, it is nevertheless close enough not to be considered disproportionate under the guidelines previously established by the Court and other international tribunals. Absolute parity is not required but, if the Court wanted to achieve it, it could do so easily simply by making minor adjustments to the sizes of the smaller enclaves.

58. The bottom line is this. Colombia's proposed delimitation is grossly disproportionate and inequitable. Nicaragua's proposal passes the proportionality/disproportionality test.

(b) ***Colombia's reliance on State practice***

59. In its Rejoinder, Colombia attempts to derive support from what it considers State practice in regard to maritime delimitations involving islands. From the many delimitation agreements States have reached, Colombia cherry picks a few that it says support the thesis that small islands should be taken into account. But State practice is replete with examples where such islands have been disregarded entirely, enclaved, or given substantially reduced weight. Based on his review of the State practice, here is what Sir Derek Bowett concluded from it, in the article to which I referred earlier:

> "There can be no obligation on parties to use islands, or low-tide elevations. If, in fact, the parties consider the islands to distort the true geographical relationship,

> either because they are so small, or located in a position which makes them capable of distorting an equidistance line, they are free to ignore them."[72]

As an alternative, according to Sir Derek: "the parties can choose a quite different method of delimitation which is not influenced by the islands as such"[73]. One of these methods, identified by Sir Derek, is enclavement[74].

60. Sir Derek's study of State practice demonstrates that islands have been allowed to influence delimitations where

> "they are closely linked to the coastal façade so as to in effect form part of it (for example, the screen of islands off the Norwegian or Dutch coasts) *or* where islands simply continue the line of coast already established by a mainland (for example, the Orkneys and the Shetlands lying to the north of the United Kingdom) *or* where islands balance each other so as to eliminate distortion (for example, the islands lying off the coasts of New Caledonia and Australia)"[75].

61. But, Sir Derek continues:

> "Conceptually, this leaves us with a set of circumstances which are different, where there is no agreement to treat the islands as part of the coastal façade, essentially unified with the mainland, and where the islands lie on one side only, thus favouring the one party if equidistance is used. *It is here that, taking the two mainlands as the units which establish the basic geographical relationship, the islands may be viewed as a potential 'distortion'*."[76]

62. This describes the situation before us in these proceedings. Colombia's insular features are not connected to or unified with the Colombian mainland. Colombia does not argue otherwise. To the contrary, Colombia admits that the islands are geographically detached from it and lie on one side only, favouring Colombia. That is precisely why they exercise such a "distorting" effect.

63. All of the examples from State practice cited by Colombia in its written pleadings reflect the particular geographic circumstances that pertained in those situations, and are distinguishable from those that are present here. Of greater interest is Sir Derek's conclusion drawn from his analysis of State practice involving situations similar to ours:

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[72] D. Bowett, "Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations" in J.Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, 1993, Vol. I, pp. 136-137.

[73] *Ibid.*, p. 137.

[74] *Ibid.*, p. 151.

[75] *Ibid.*, p. 139.

[76] *Ibid.*, p. 139.

> "The phenomenon of an island 'straddling' an equidistant line is not unknown. More commonly it occurs between opposite coasts, but occasionally an island will lie on or near a lateral boundary between adjacent coasts. *In either case the potential for distortion is considerable, if any form of equidistance is used."*[77]

64. Colombia does not contest this conclusion. What it does, rather remarkably, is to deny that its insular features straddle or lie on Nicaragua's side of the median line between the two States. Here are their exact words: "The plain fact is that Colombia's islands do not straddle, or lie on the wrong side of, *any* median line."[78] Mr. President, I think the "plain fact" about the location of Colombia's islands is shown very clearly on this graphic. They quite obviously lie on Nicaragua's side of the line. That is why the distortion they produce is so considerable. This is at tab 100.

65. There is still another problem with Colombia's reliance on State practice to derive legal principles different from the case law and it is obvious. Boundary agreements do not always or necessarily reflect either party's view of their respective legal entitlements. States negotiate boundary agreements based on a variety of factors, including diplomatic and political ones.

66. Colombia persists, however, in invoking so-called State practice. It even cites what it characterizes as a "regional practice", based on its own agreements with Costa Rica, Panama, and other States, notably not including Nicaragua. According to Colombia, these agreements reflect a "regional practice" to accept equidistance boundaries giving full weight to Colombia's small insular features.

67. There are several reasons why this putative practice is inapposite here. First is the general observation that it is dangerous to attempt to derive legal precedents from negotiated agreements, which do not explain what legal principles were applied, or whether they were even taken into account at all by the Parties. Second, it should go without saying, and Colombia does not deny this, that any agreement between Colombia and any third State is *res inter alios acta* in

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[77]D. Bowett, "Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations" in J.Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, 1993, Vol. I, p.141.

[78]RC, para. 5.18.

regard to Nicaragua[79]. But beyond these general precautions, a few other observations are in order about Colombia's agreements with other States.

68. Costa Rica still has not ratified its agreement with Colombia. As it made clear when it attempted to intervene in these proceedings, it will not ratify that agreement until the Court rules in this case. Costa Rica hopes that if the Court determines that Nicaragua, not Colombia, is Costa Rica's maritime neighbour, it will then be relieved of what it has come to view as the bad bargain it made with Colombia, and will be free to negotiate a new agreement with Nicaragua.

69. Still less does Colombia's agreement with Panama evidence a regional State practice to accord full weight to Colombia's minor insular features. To the contrary, the agreed line appears to give no weight at all to the nearest insular feature, claimed by Colombia, Roncador Cay. Moreover, both Costa Rica and Panama negotiated boundary agreements with Colombia in regard to the Pacific Ocean, as well as the Caribbean Sea. It cannot be discounted that trade-offs were made in one negotiation to secure better terms in the other. Again, no regional State practice emerges from these facts.

70. Finally, Colombia says that Nicaragua never protested its agreement with Panama. So fond of this argument is Colombia that it repeats it several times in its written pleadings. But repetition cannot substitute for relevance. The Colombia/Panama agreement was, and is, *res inter alios acta* in regard to Nicaragua, whether or not Nicaragua chose to publicly condemn it. Nicaragua cannot be prejudiced by that agreement. Its silence cannot be interpreted as acquiescence.

71. I come now to my conclusions. There are eight:

1. Colombia has got the relevant coasts wrong. In particular, it has deliberately ignored Nicaragua's extensive mainland coast, comprising 453 km. It pretends this is a delimitation exclusively between small islands on both sides, when it is not. Nicaragua's relevant coast is more than 21 times longer than Colombia's, and must be taken into account.

[79] "[B]ilateral treaties, under the principle *res inter alios acta*, neither confer any rights upon a third State, nor impose any duties on it. Whatever concessions one State party has made to the other shall remain bilateral and bilateral only, and will not affect the entitlements of the third State." (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia) Application by Honduras for Permission to Intervene*, Judgment of 4 May 2011, para. 72.)

2. Colombia has got the relevant area wrong. It has arbitrarily excluded the area east of its insular features and within 200 miles of Nicaragua's mainland coast, where both Nicaragua and Colombia have overlapping potential entitlements. The relevant area covers 214,000 square miles, and does not include areas claimed by third States.
3. Colombia has got the base points wrong. It has placed them on insignificant features that do not merit base points under the well-established jurisprudence of this Court, and other international tribunals.
4. Colombia's provisional delimitation line severely blocks and cuts off the seaward projection of Nicaragua's coast, far short of its full 200-mile extension. By running parallel to the coast, and perpendicular to its seaward projection, for its entire length, it creates a complete and total blockage of that coast: an effect that is even more severe than those that have consistently been regarded as distorting, disproportionate and inequitable in other delimitation cases involving small islands on the one hand, and mainland coasts on the other.
5. Colombia's proposed delimitation is manifestly inequitable to Nicaragua. The result is so obviously unacceptable that Colombia cannot even bring itself to perform the required proportionality/disproportionality test.
6. Colombia's proposal and its flawed delimitation methodology must be rejected outright.
7. State practice does not support Colombia's proposal. This is true generally, *and* with respect to the so-called regional State practice that Colombia attempts to tease out of its own agreements with neighbouring States. There is no established regional practice, and the cited agreements do not support Colombia's argument that neighbouring States have agreed to give full weight to insignificant insular features as against an extensive mainland coast.
8. Finally, what Colombia has succeeded in demonstrating is that equidistance methodology, even if correctly applied — which Colombia has failed to do — cannot lead to an equitable solution in this geographic area, which involves an extensive mainland coast on the one hand, and small islands, far removed and geographically detached from the State that is sovereign over them, on the other. The equitable solution that is called for by international law in this geographical situation, within 200 miles of Nicaragua's mainland coast, is the enclavement of Colombia's islands, within 12 miles for San Andrés and Providencia, and with 3 miles for the rest.

72. Mr. President, Members of the Court, this concludes my remarks, together with the first round of pleadings of Nicaragua. I thank you for your kind and courteous attention, and wish you all a good evening.

The PRESIDENT: Thank you, Mr. Reichler. This concludes the first round of oral argument of Nicaragua. The Court will meet again on Thursday to hear the first round of oral argument of Colombia. The sitting is closed.

The Court rose at 5.35 p.m.