INTERNATIONAL COURT OF JUSTICE

TERRITORIAL AND MARITIME DISPUTE
(NICARAGUA v. COLOMBIA)

REPLY OF THE
GOVERNMENT OF NICARAGUA

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REPLY OF THE
GOVERNMENT OF NICARAGUA

INTRODUCTION

1. This *Reply* is filed pursuant to the Order of the Court of 18 December 2008 that directed the Republic of Nicaragua to submit a *Reply* in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* and fixed 18 September 2009 as the time limit for the filing of this pleading.

I. Procedural History

2. The Republic of Nicaragua brought this case before the Court against the Republic of Colombia by means of an Application filed on 6 December 2001 with an indication of the subject of the dispute that was subsequently expounded in the *Memorial* filed on 28 April 2003. In substance, Nicaragua asked the Court to adjudge and declare that she had sovereignty over certain islands and maritime features lying off her Caribbean Coast and, furthermore, requested a maritime delimitation between the Caribbean mainland coasts of Nicaragua and Colombia.

3. The Republic of Colombia filed Preliminary Objections to the jurisdiction of the Court on 21 July 2003 which included a request that the Court adjudge and declare the controversy ended.

4. After hearing the Parties, the Court gave its decision by means of the *Judgment of 13 December 2007* by which it found:

> "(3) As *regards* the jurisdiction of the Court,
>
> *(a)* Unanimously,

> *Finds* that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning sovereignty over the maritime features claimed by the Parties other than the islands of San Andrés, Providencia and Santa Catalina;
>
> *(b) Unanimously*,
> *Finds* that it has *jurisdiction*, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning the maritime delimitation between the Parties."[1]

5. After the Judgment on Preliminary Objections, Colombia filed a *Counter-Memorial* on 11 November 2008 pursuant to the Court's order of 11 February 2008.

II. The Question of Sovereignty

6. The Application filed by Nicaragua on 6 December 2001 and her *Memorial* of 28 April 2003 were in considerable measure based on Nicaragua's claim that "the Barcenas-Esguerra Treaty signed in Managua on 24 March 1928 was not legally valid and, in particular did not provide a legal basis for Colombian claims to San Andrés and Providencia"[2].

7. On this question the *Judgment of the Court of 2007* determined "that the 1928 Treaty was valid and in force at the date of the conclusion of the Pact of Bogotá in 1948"[3] and "that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina has been

[1] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, operative clause, pp. 41-42, para. 142.
[2] NM, Vol. I, Submission 4, p. 266.
[3] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 27, para. 81.

settled by the 1928 Treaty".[4] On this basis the Court decided that it lacked jurisdiction on the basis of Articles VI and XXXIV of the Pact of Bogotá and under the optional clause declarations "in so far as it concerns sovereignty over the islands of San Andrés, Providencia and Santa Catalina," but that it had jurisdiction "in so far as it concerns sovereignty over the other maritime features in dispute between the Parties"[5].

8. With respect to the question of sovereignty, Nicaragua's understanding is that the effects of the *Judgment of 13 December 2007* are limited to the preliminary question of jurisdiction that was before the Court and is not a Judgment on the merits of the case filed by Nicaragua on 6 December 2001.

9. Nicaragua also understands that the jurisdiction of the Court is only available on the basis that the 1928 Treaty is valid. Nicaragua accepts the decision of the Court and the conditions under which jurisdiction has been recognized and will accordingly adapt and adjust her petitions and submissions within the limits set in the *13 December 2007 Judgment*.

10. Nicaragua's acceptance of the conditions under which jurisdiction has been recognized does not imply that she has changed or renounced her historical claim that the 1928 Treaty was imposed on Nicaragua and lacks any legal or moral authority. To the full extent that it is legally permissible in the present circumstances, Nicaragua will continue to reserve her position on all these issues.

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[4] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 28, para. 88.
[5] *Ibid*, p. 42, para. 142.

11. The position of Nicaragua on these questions has been amply explained in her *Memorial* and, whatever the jurisdictional limits under which this case will proceed, the arguments and evidence already filed by Nicaragua in this case will form part of the legal and historical record of these proceedings.

12. Per the understanding explained in the preceding paragraphs, the position of Nicaragua on the question of sovereignty will be based on the stipulations of the 1928 Treaty. By this treaty Colombia in substance recognized "the full and entire sovereignty" of Nicaragua over the Mosquito Coast (the Caribbean or Atlantic Coast of Nicaragua) and over the Corn Islands. Nicaragua for her part recognized "the full and entire sovereignty" of Colombia over the San Andrés Archipelago. The Treaty also stipulated that it "does not apply to the reefs of Roncador, Quitasueño and Serrana"[6].

13. On the basis of the 1928 Treaty, the position of Nicaragua is that the recognition of sovereignty over the Mosquito Coast includes all the appurtenant rights of that Coast to its off-shore maritime features. These maritime features include all those not proven to be part of the "San Andrés Archipelago" which is recognized in that Treaty to appertain to Colombia. Colombia herself has explicitly recognized this. In her *Counter-Memorial* she states:

> "(T)he Court acknowledged that the whole Archipelago belongs to Colombia. All that Colombia needs to show at the merits stage is that those cays do belong to the Archipelago."[7]

[6] See full text in NM, Vol. II, pp. 55-59, Annex 19, and below Chap. II.
[7] CCM, Vol. I, p. 6, para. 1.9.

14. Although the burden of proof lies with Colombia to show what the "San Andrés Archipelago" comprises, Nicaragua has offered evidence both in her *Memorial*[8] and in this *Reply* in Chapter I below, that at the moment of independence, when title over territory was determined on the basis of the well-known principle of *uti possidetis iuris*, the "San Andrés Archipelago" was comprised only of the Islands of Providencia (and Santa Catalina), San Andrés and the Corn Islands[9]. In fact these are the only five islands mentioned by name in the 1928 Treaty.

15. Colombia attempts to interpret the stipulation of the 1928 Treaty which provides that it "does not apply" to three reefs (Serrana, Roncador and Quitasueño) as meaning that Nicaragua recognizes that she has no sovereignty over these features. As explained below in Chapter I, Section III this is not what the Treaty says or means to say. If that had been the intention of the Treaty, it would have said so in words as clear as it used in recognizing the sovereignty of Colombia over the "San Andrés Archipelago". Furthermore, as also pointed out below[10], the only reason why Serrana, Roncador and Quitasueño were mentioned in the Treaty is because the United States was also claiming them. Lastly, it should also be pointed out that if the Treaty had disposed of the sovereignty over these three maritime features, the *Judgment of the Court of 13 December 2007* would have also disposed of this Nicaraguan claim in the same way as it did with the

[8] NM, Vol. I, Chap. I, pp. 15-57, and 125-126, paras. 1.1-1.122 and 2.141.
[9] The Corn Islands are Big and Little Corn Island and are known by their Spanish name of Islas del Maiz and also, specially by Colombia, as the Mangle Islands.
[10] At pp. 50-55, paras. 1.79-1.96.

question of sovereignty over the Islands of San Andrés, Providencia and Santa Catalina.

16. With respect to the other maritime features in dispute, including the cays of Serranilla and Bajo Nuevo, which are not mentioned by name in the Treaty, it should be pointed out that these features are entirely equivalent to the other three which are identified by name. If they were thought to be part of the "San Andrés Archipelago" they would naturally have been mentioned. On the other hand, if Serrana, Roncador and Quitasueño are themselves completely detached from and located well to the north and the east of the islands of Providencia and San Andrés, the two cays of Serranilla and Bajo Nuevo are even further detached and quite distant even from Serrana, Roncador and Quitasueño. The only connection of all these features is that they are located off the mainland coast of Nicaragua and on her continental shelf.

17. The Protocol of Ratification of the 1928 Treaty stipulated that "the San Andrés and Providencia Archipelago mentioned in the first clause of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwhich". Colombia has attempted to interpret this meridian as a line of delimitation of maritime areas. In its *13 December 2007 Judgment* the Court considered that,

> "contrary to Colombia's claims, the terms of the Protocol, in their plain and ordinary meaning, cannot be interpreted as effecting a delimitation of the maritime boundary between Colombia and Nicaragua. That language is more consistent with the contention that the provision in the Protocol was intended to fix

> the western limit of the San Andrés Archipelago at the 82nd meridian."[11]

18. In spite of the clear language in the Protocol of Ratification that the "Archipelago" does not extend westward of the 82nd meridian, Colombia attempts to read into those words that the maritime areas of Nicaragua do not extend eastward of that meridian. This is a nonexistent limit that cannot curtail the rights over maritime areas generated by the continental coast of Nicaragua. But what is even worse than this capricious and self-serving addition to the wording of the Protocol is Colombia's persistent use of force and the threat of the use of force and intimidation against Nicaraguan vessels in order to impose the 82nd meridian as a line of delimitation in clear disregard of the *Judgment of the Court of 13 December 2007*. This last situation is further explained below in Section IV of this chapter.

19. The Colombian *Counter-Memorial* highlights the main points of her arguments as follows:

> "At the end of the colonial period the Archipelago was part of the Viceroyalty of Santa Fe (New Granada).
>
> Since independence Colombia has always exercised sovereignty over the Archipelago, including all the islands, islets and cays."[12]

And

> "The Nicaraguan claim is based primarily on an implausible interpretation of the *uti possidetis juris*, an interpretation already

[11] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 34, para. 115.
[12] CCM, Vol. I, Chap. 1, p. 4, para. 1.6.

> practically denied by the Court in the *Nicaragua v. Honduras* case."[13]

20. Since, as explained above, the position of Nicaragua has been adjusted to fit the jurisdictional limits determined by the Court, these assertions could in principle be ignored as irrelevant to the questions over which the Court has determined it has jurisdiction. In all events, the position of Nicaragua on these questions is clearly stated and documented in her *Memorial* which is part of the record of this case. But, to be precise about the factual situation that existed at the time of independence of both Parties, and which serves as the basis for application of the principle of *uti possidetis iuris*, the following brief summary is offered.

21. Colombia refers to the Royal Order of 1803 as if it were a definitive and undisputed document demonstrating that at the time of independence the Caribbean Coast of Nicaragua and its appurtenant off-shore islands were part of the colonial territorial division of which Colombia is a successor State. This question is of course no longer at issue in these proceedings, but for the record it is useful to recall the following basic points:

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[13] CCM, Vol. I, pp. 1-3, para. 1.3. Colombia quotes literally (CCM, Vol. I, pp. 84 and 85, para. 3.10), and repeatedly uses in her arguments (CCM, Vol. I, pp. 287-290, paras. 6.14-6.16), the assertion that the Court made *en passant* in pp. 45-46, para. 161 of its *Judgment of 8 October 2007 (Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea, (Nicaragua v Honduras))*. With all due respect, Nicaragua considers particularly unfortunate the introduction of the *obiter dictum* of the Court related to the Royal Order of 20/30 November 1803 in a Judgment concerning another issue where the Royal Order was not relevant for deciding that case and at a moment when the Court was precisley deliberating on the question of the Preliminary Objections raised by Colombia in this case. In any event, whatever the appearances of prejudgment this reference might have on the present case, the position of Nicaragua is that this *obiter dictum* does not have the effect of *res iudicata.*

1. Europe and its American Colonies were in the midst of the Napoleonic upheaval and the colonies were taking their first steps towards independence at the beginning of the XIX century.

2. The Royal Order of 1803 was only a transfer of the military defense of the area to the Vice Royalty of New Granada. The only way to affect a total transfer was by means of a Royal Decree (Cedula Real) which emanated directly from the King.[14]

3. In all events, this Royal Order was repealed by another Royal Order of equal rank in 1806 confirming the total dependence of this area to the Captaincy General of Guatemala of which Nicaragua is a successor State.[15]

4. The last law of the Kingdom of Spain that provided for the territorial division of the American Colonies is contained in the Constitution of Spain that was approved in the Parliament called "General and Extraordinary *Cortes*" that convened in Cadiz, Spain from 1810 to 1812 during the so-called Peninsular War to expel the Napoleonic armies. The *Corte* or Parliament had representatives from the colonies including from what is present day Nicaragua and Colombia. Article 10 of this Constitution (1812) divided the territories of America from Mexico to the Strait of Magellan in two parts: America Septentrional (Northern America) that reached from Mexico to the southern limit of the Audiencia de Guatemala at the present day border between Costa Rica and Panama; and America Meridional (Southern America) that reached from this Costa Rica/Panama border to the Strait of Magellan. Each hemispheric half included its coasts and adjacent islands. The Vice Royalty of New Granada, of which Colombia is a successor state, was in the southern half and hence could have

[14] See NM, Vol. I, pp. 31-35, paras. 1.48-1.58.
[15] NM, Vol. I, pp. 39-43, paras. 1.69-1.79.

no coasts or adjacent islands in the America Septentrional that began on the border of present day Costa Rica/Panama.[16]

22. There are at least two important moments in which third parties analyzed the validity of the Colombian claims based on the Royal Order of 1803.

1. The first is a note from Mr. Frederick Chatfield, the British Charge d'Affaires to Central America, dated 15 April 1847 and addressed to Viscount Palmerston at the Foreign Office. This lengthy note provides a careful analysis of the claims of Colombia at the time based on her alleged titles as successor of the Viceroyalty of Santa Fe (New Granada). His conclusions are basically those stated above: that the Royal Order of 1803 did not transfer and was not the adequate instrument for transferring the Caribbean Coast and its adjacent islands to Colombia.[17]

2. Since Colombia's claim on the basis of the Royal Order of 1803 was over the Mosquito Coast which included not only the present day Nicaraguan Caribbean Coast but also the Caribbean Coast of Costa Rica, this territorial dispute was submitted to arbitration by the President of France, Emile Loubet, who in his Award decided that the Caribbean Coast appertained to Costa Rica.[18]

23. Colombia must naturally be aware that further discussion on these points in the present case is largely academic[19] and presumably

[16] See the *Memorandum Explanatory of the Controversy between Nicaragua and Colombia*, dated 1924, and reedited by the Ministry of Foreign Affairs of Nicaragua in 1981, pp. 97-102, deposited with the Registry as Doc. 5.
[17] See NM, Vol. II, pp. 247-250, Annex 77.
[18] See NM, Vol. I, pp. 52-54, paras. 1.106-1.111 and NM, Vol. II, p. 65, Annex 21 and p. 251, Annex 78.
[19] Colombia dismissively asserts that she "responds to the positions taken in Nicaragua's *Memorial* of 28 April 2003, to the extent these positions may have

highlights them for what she considers might be their impressionistic effect. In that same vein, the following facts might be recalled:

1. The negotiations and basic provisions of the agreement that culminated with the 1928 Treaty were proposed by Colombia. Nicaragua was unwilling to enter into this Treaty and proposed arbitration. It was the intervention of the United States that was occupying Nicaragua at the time that led to the signing and ratification of the 1928 Treaty[20].

2. With the 1928 Treaty Colombia "relinquished" her claims to the extensive Nicaraguan Caribbean Coast in exchange for receiving a few off-shore islands which, in 1928-1930, were entirely irrelevant to any claims to maritime spaces beyond their 3-nautical-mile territorial sea.

24. The common sense question is: If Colombia's colonial titles based on *uti possidetis iuris* were legally sustainable why would Colombia be willing (and anxious) to enter into a Treaty which would give her much less than the famous 1803 Royal Order purported to do? Due to the limits of the jurisdiction in this case, that question will go unanswered. But, of course, Nicaragua knows the answer. And Colombia also knows it very well.

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survived the Court's *Judgment on Preliminary Objections of 13 December 2007*." CCM, p. 1, para. 1.1.

[20] See, generally, NM, Vol. I, Chap. II.

III. Maritime Delimitation

25. Although the Court's Judgment did not directly affect Nicaragua's request for a maritime delimitation, it provoked her to review her general position and to undertake a more detailed analysis of the question of delimitation, including additional geological and hydrographic studies of the area. Nicaragua's original position on maritime delimitation as expressed in her *Memorial* requested the Court to adjudge and declare that:

> "the appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a single maritime boundary in the form of a median line between these mainland coasts."[21]

26. After a review of the situation Nicaragua has decided that her request to the Court should be for a continental shelf delimitation. As will be explained in the course of this pleading, the result of this delimitation will be to completely delimit the maritime areas appertaining to Nicaragua and to Colombia and, hence, in this respect it will be the only pertinent or single maritime boundary affecting the Parties.

27. The extent of the natural prolongation of the Nicaraguan continental shelf in the area of the delimitation is a physical fact that can be verified scientifically with data that are in the public domain. Even a superficial review of any map with contours of the floor of the Caribbean Sea (see *e.g.* Figure 1[22]) would show to the even inexperienced eye that the Nicaraguan continental shelf is very

[21] NM, Vol. I, Submission (9), pp. 266-267.
[22] The Figures presented are for illustration purposes only, except where coordinates are indicated.

extensive, and reaches eastward well beyond 200 nautical miles from Nicaragua's more than 450 kilometers long Caribbean coast.

28. Although the continental shelf of Colombia, which projects northwestward from her Caribbean Coast, is considerably less extensive than Nicaragua's, it nevertheless meets and overlaps with Nicaragua's continental shelf, such that there is need of delimitation.

29. On the continental shelf of Nicaragua are located a few islands and several cays the sovereignty over which is in dispute between Nicaragua and Colombia but which, in whatever way this issue is determined, do not significantly affect a delimitation involving the mainland coasts of Nicaragua and Colombia. In her *Memorial*, Nicaragua had indicated that if these features are found to appertain to Nicaragua, then they should simply be considered as located on her continental shelf for the effects of a delimitation, and if any of these features were found to be Colombian, they should be enclaved, and in respect of San Andrés and Providencia be "accorded a territorial sea entitlement of twelve [nautical] miles"[23] and any other features found to be Colombian should be accorded an enclavement area of three nautical miles. This request is maintained and reiterated in this *Reply*.

30. The "San Andrés Archipelago" including all the features claimed by Colombia and disputed by Nicaragua has a total area of about 17 square miles (44 km²), according to the *Encyclopedia Britannica*[24]. Apart from the minor features over which sovereignty is still an issue, the fundamental question that is before the Court by virtue of

[23] NM, Vol. I, Submission 7, p. 266.
[24] http://www.britannica.com/EBchecked/topic/520947/San-Andres-y-Pr. See Chap. II below.

Colombia's *Counter-Memorial* is Colombia's claim, based on her putative sovereignty over these few square kilometers of islands and cays located off the extensive mainland coast of Nicaragua and situated on her continental shelf, to over 100,000 square kilometers of maritime areas that otherwise would indisputably be universally recognized to be Nicaraguan.

31. The position of Colombia in her *Counter-Memorial* is that the maritime delimitation does not involve the mainland coasts of Nicaragua and Colombia but consists of an equidistance line drawn between the islands fringing the mainland coast of Nicaragua and located west of the 82nd meridian with the "San Andrés Archipelago", which she understands to comprise any rock cropping its head out of the waters off the mainland coast of Nicaragua and located east of the 82nd meridian. On the basis of this exercise of wishful thinking, Colombia presumes that Nicaragua's maritime areas are limited to an area of approximately 50 miles off her mainland coast, whilst Colombia's "archipelago" will absorb all the rest which, even in this restricted delimitation area, would imply that Colombia would receive approximately 75% of all the maritime areas to be delimited. This Colombian scenario would confine the maritime delimitation to a restricted area and would totally ignore Nicaragua's mainland coast and continental shelf, on which are located, according to Colombia's claim, the innumerable pieces of the "archipelago".

32. The Colombian *Counter-Memorial* has been true to form with respect to her blown up ambitions on questions of maritime delimitation. The position of Colombia, which she has for decades imposed by force on Nicaragua, is that the 82nd meridian West was a line of maritime

delimitation between the Colombian "San Andrés Archipelago"[25] and the Caribbean Coast of Nicaragua. With the *Judgment of 13 December 2007* having determined that this meridian was not a line of maritime delimitation, Colombia has now considered that her claim to the 82nd meridian was in reality a concession that benefited Nicaragua and that based on her interpretation of the law, the line of delimitation should extend even further west of this meridian, cutting even more deeply into Nicaragua's maritime areas.

33. The evident truth is that Colombia is well aware that even if she could maintain her claim of sovereignty over San Andrés and Providencia, it would be unthinkable that any Tribunal would determine that an equitable delimitation between these islands and the mainland coast of Nicaragua could possibly be based on an equidistance line between these two areas. That is why she chose to claim the 82nd meridian as a line of delimitation. And that is why Colombia's present attempt to even go beyond this preposterous claim, is beyond any words that could properly be used in this *Reply*.

IV. Colombia's Continued Imposition of the 82nd Meridian

34. The legal analysis of the implications, if any, of the 82nd meridian to the present case is developed in Chapter VII below. At this point, the review is limited to a summary description of the way this meridian has been imposed on Nicaragua as a line of delimitation.

[25] Nicaragua's position is that the so called "San Andrés Archipelago" refers only to the island of San Andrés and the island of Providencia. When reference is made to the island of Providencia, this will generally include the very small island of Santa Catalina which is separated from it by a narrow channel. See below Chap. II, Sec. B.

35. Colombia confidently asserts that she "has consistently exercised maritime jurisdiction over the waters of the Archipelago up to the 82º W meridian, the limit established by the 1928/1930 Treaty."[26] What is undeniably true is that Colombia has consistently used her enormously superior military forces to impose this meridian as a limit on Nicaraguan vessels. It is certainly undeniable that Colombia has been successful in blocking any possibility for Nicaragua to enter these maritime areas for any purpose including exploration.

36. The Nicaraguan *Memorial* documents the events that led to Colombia's first claim that this meridian was a line of delimitation of maritime areas by a note of 4 June 1969.[27] The Colombian claim was made in reaction to certain concessions for oil exploration that Nicaragua had granted in areas east of the 82nd meridian. This claim was enforced by the Colombian navy. There are two diplomatic notes dated 7 October 1972 sent by the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs of Colombia and the Secretary of State of the United States, respectively, complaining of the use of force by Colombia in order to impose her claim over all maritime areas east of the 82nd meridian.[28] The note to the Secretary of State is particularly telling in expressing "the profound surprise caused by the news it has received regarding the utilization by the Colombian Government, through the use of warships recently obtained from Your Excellency's Government, is engaging the use of

[26] CCM, Vol. I, p. 5, para. 1.6.
[27] NM, Vol. I, pp. 153-155, paras. 2.203-2.205, and Vol. II, pp. 101-110, Annexes 28 and 29.
[28] NM, Vol. II, pp. 125-132, Annexes 34 and 35.

force to resolve a difference that should be resolved according to the principles recognized by International Law."[29]

37. As could be expected, no other attempts by Nicaragua were made regarding the exploration for oil since the time these concessions were granted in the 1960s. No responsible oil company was willing to accept the risk to their vessels and employees of being captured by the Colombian navy. Since then, the more adventurous or needier fisherman and other workers of the sea have occasionally ventured into this area and been accosted or captured by Colombian military forces. Some of these incidents are listed in the Nicaraguan *Memorial*.[30]

38. These examples could be brought up to date with another list of incidents that have occurred whilst this case has been before the Court, but their only purpose would be to prove what is already evident: that Colombia effectively has imposed a naval blockade restricting the navigation of Nicaraguan vessels east of the 82nd meridian[31].

39. The point that must be emphasized is that after the *Judgment of 13 December 2007* in which the Court concluded "that the 1928 Treaty and 1930 Protocol did not effect a general delimitation of the maritime boundary between Colombia and Nicaragua" and that the Treaty's language was "more consistent with the contention that the provision

[29] NM, Vol. II, p. 131, Annex 35.
[30] NM, Vol. I, pp. 159-162, paras. 2.216-2.222.
[31] Complying with the Court's Practice Directions III regarding the excessive tendency towards the proliferation and protraction of annexes to written pleadings, Nicaragua will limit herself to highlighting some of the recent incidents. See NR, Vol. II, Annexes 7-10.

in the Protocol was intended to fix the western limit of the San Andrés Archipelago at the 82nd meridian"[32], Colombia has continued to impose this meridian as if it were a line of delimitation.

40. This prompted the Nicaraguan Government to send a communication on 14 February 2008 addressed to the Secretary-General of the United Nations informing him and all the Member States of the Organization that in spite of the Judgment of the Court, Colombia had announced that she would continue and in fact had continued enforcing the 82nd meridian as a line of delimitation. The letter indicated that "[a]s well as making public declarations, the Colombian authorities have used force to prevent Nicaraguan vessels from going about their business to the east of the 82nd meridian."[33]

41. Colombia for her part responded with a letter dated 29 February 2008 addressed to the Secretary-General of the United Nations in which she unambiguously recognized that Colombia was continuing to impose the 82nd meridian. In pertinent part it states that "Colombia has made every effort to ensure that ships flying its flag do not engage in fishing or other activities west of the 82nd meridian. In turn, it has continued to take routine measures designed to ensure that any fishing vessel that engages in activities to the east of that line has been licensed to do so by the competent Colombian authorities."[34]

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[32] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, respectively p. 36 para. 120 and p. 34, para. 115.
[33] See NR, Vol. II, Annex 5.
[34] See NR, Vol. II, Annex 6.

42. It is at the very least ironic that Colombia should presume to evince the existence of a "practice" by the Parties, that is by Nicaragua, attesting to the acceptance of this meridian as a line of delimitation. As is eminently obvious, Nicaragua has always responded by all means short of the use of force, against this Colombian imposition since it was first initiated.

43. Colombia's imposition by force of the 82nd meridian as a maritime boundary is in breach of her obligations under the rules of customary International Law. Nicaragua is therefore requesting a declaration to this effect and claiming compensation for the damages suffered (see below pages 235 to 239).

V. Summary of the Reply

44. The *Reply* is divided in two parts: Part I will address the issue of sovereignty (Chapter I) and Part II (Chapters II through VII) will address maritime delimitation. Chapter II contains the legal framework including the criteria and principles involved in the delimitation. Chapter III addresses the legal and technical considerations for a continental shelf delimitation. Subsequently, Chapter IV analyzes the physical and certain legal aspects of the maritime features located on the continental shelf of Nicaragua. Chapter V justifies the enclaving of these maritime features as the only way of producing an equitable delimitation. Chapter VI analyzes the errors and inequities of the maritime delimitation proposed by Colombia that would give full effect to all her claimed maritime features on the Nicaraguan continental shelf, and the inequitable results of even giving partial effect to any of these features. Finally, Chapter VII addresses the irrelevance of the 82° W meridian to the

delimitation of a maritime boundary between Colombia and Nicaragua.

PART I

THE ISSUE OF SOVEREIGNTY

CHAPTER I

THE ISSUE OF SOVEREIGNTY

I. Introduction

1.1. The *Judgment of the Court of 13 December 2007* on the Preliminary Objections raised by Colombia determined that its jurisdiction is only available for certain aspects of the territorial dispute between the Parties. Nicaragua has explained above in the Introduction to this *Reply* that with the reservations therein made[35] she will adapt the original Application filed in the Court on 6 December 2001 and the arguments and submissions in her *Memorial* of 28 April 2003 to the limits of the jurisdiction determined by the Court in its Judgment.

1.2. Therefore the questions of sovereignty dealt with in this *Reply* will be based on the declaration by the Court that the 1928 Treaty[36] is valid and settled the territorial dispute in accordance with its terms at the time of the conclusion of the Pact of Bogotá.

1.3. The conclusion reached by Nicaragua is that based on the text and objectives of the Treaty as stated in its Preamble, it "put[s] an end to the territorial dispute pending between" the Parties. That is, all questions relating to the territorial dispute can be resolved by reference to this Treaty.

1.4. The other issues raised in the Nicaraguan *Memorial* and addressed in the Colombian *Counter-Memorial* with respect to questions of *uti*

[35] See above p. 3, paras. 8-10.
[36] For the full text of the Treaty and the Protocol of Ratification, see NM, Vol. II, pp. 55-59, Annex 19.

possidetis iuris and the validity of the 1928 Treaty are not relevant to the claims extant within the limits of the jurisdiction afforded by the Court.

II. History of the Dispute on Sovereignty

1.5. The territorial dispute between Nicaragua and Colombia dates back to the period of independence of both Parties from Spain in the early XIX century. A brief history of the dispute may be reviewed in the Nicaraguan *Memorial*[37].

1.6. The position of Nicaragua in her *Memorial* was to assert her traditional claim of sovereignty over the Mosquito Coast and over all features lying offshore of it including the adjacent islands of San Andrés and Providencia, based on the *uti possidetis iuris* at the moment of independence from Spain[38].

1.7. The position of Colombia, disputed by Nicaragua, was that at the time of independence from Spain, by a Royal Order dating from 30 November 1803[39] the King had segregated from the territory, that later was to become Nicaragua, the Mosquito Coast and the "Islands of San Andrés" and incorporated them into the colonial dependency of which Colombia was a part and became the successor State at independence.

1.8. On 24 March 1928 a Treaty was signed by Nicaragua and Colombia with the stated purpose of putting an end to this dispute. The Treaty stipulated in Article I that,

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[37] NM, Vol. I, pp. 2-9, paras. 4-21.
[38] NM, Vol. I, Chap. pp. 15-58.
[39] CCM, Vol. II-A, p. 121, Annex 22.

> "The Republic of Colombia recognizes the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between Cape Gracias a Dios and the San Juan River, and over Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago.
>
> The present Treaty does not apply to the reefs of Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America"[40].

1.9. The Ratification of the 1928 Treaty on 5 May 1930, included the signature of a special Protocol to the effect that:

> "The undersigned, in virtue of the full powers which have been granted to them and on the instructions of their respective Governments, hereby declare that the San Andrés and Providencia Archipelago mentioned in the first clause of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich"[41].

1.10. The position of Nicaragua as explained in her *Memorial* was that the 1928 Treaty was not valid[42] and that sovereignty had remained with Nicaragua on the basis of the *uti possidetis iuris* at the moment of

[40] NM, Vol. II, p. 56, Annex 19.
[41] NM, Vol. II, p. 59, Annex 19. *Ibid* at p. 59.
[42] NM, Chap. II, Sec. II: The invalidity of the Treaty, pp.108-124, paras. 2.102-2.138.

independence since the Royal Order of 1803 did not have the necessary legal requirements to effect a complete transfer of the administration of those areas during the colonial period, but only for its military protection. Colombia disagreed on both counts.

1.11. In its *Judgment of 13 December 2007* on the Preliminary Objections raised by Colombia, the Court considered:

> "that the 1928 Treaty was valid and in force on the date of the conclusion of the Pact of Bogotá in 1948, the date by reference to which the Court must decide on the applicability of the provisions of Article VI of the Pact of Bogotá setting out an exception to the Court's jurisdiction under Article XXXI thereof."[43]

And

> "that it is clear on the face of the text of Article I that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina has been settled by the 1928 Treaty within the meaning of Article VI of the Pact of Bogotá."[44]

1.12. And on this basis the Court found unanimously:

> "that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning sovereignty over the maritime features claimed by the Parties other than the islands of San Andrés, Providencia and Santa Catalina."[45]

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[43] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 27, para. 81.
[44] *Ibid,* p. 28, para. 88.
[45] *Ibid,* p. 42, para. 142.

III. Consequences of the Validity of the 1928 Treaty

1.13. By the 1928 Treaty Colombia recognized "the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between Cape Gracias a Dios and the San Juan River"[46]. The result of this recognition is that Nicaragua is the undisputed title holder of any and all rights that she could claim to the Mosquito Coast at the date of signature of the Treaty in 1928, including those rights devolving on her as successor State of the colonial power at independence in 1821. Furthermore, based on this recognition by Colombia, Nicaragua could also claim any and all rights Colombia had at the moment of signature of the Treaty including her purported rights of *uti possidetis iuris* over the Mosquito Coast based on the Royal Order of 1803. In sum, Nicaragua has original and derivative rights of sovereignty over the Mosquito Coast and its appurtenant maritime features.

1.14. Nicaragua for her part recognized "the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago."[47] The result is that Colombia also acquired similar rights over whatever was understood to comprise the "San Andrés Archipelago" at the time of independence.

1.15. Since both Parties can lay claim to original title over their respective areas based on the *uti possidetis iuris* at the moment of Independence, the consequence of the 1928 Treaty is that both parties can claim an original or derived title based on the *uti possidetis iuris* at the time of the independence of Nicaragua in 1821 or at the time of the

[46] NM, Vol. II, p. 56, Annex. 19.
[47] *Ibid.*

independence of Colombia in 1810. This means that it is necessary to define what was understood to be comprehended within the concept of "Costa de Mosquito" and of "San Andrés Archipelago" at the time of independence in order to determine what one Party recognized to the other. The analysis of these questions is developed in Sections B and C below.

1.16. The practical effect is that it is not necessary for Nicaragua or Colombia to seek to prove the better original title over the Mosquito Coast and over the "San Andrés Archipelago" since each Party acquired through the 1928 Treaty any title the other Party had in 1928, which included any title based on *uti possidetis iuris* over these areas at independence. If Colombia had the better title over the Mosquito Coast and all it comprehended at the moment of independence, then this title was transferred to Nicaragua at the moment the 1928 Treaty was ratified. This eliminates the need for a substantial amount of argument that was presented in the Nicaraguan *Memorial*[48] and in the Colombian *Counter-Memorial*[49].

1.17. Therefore, the arguments and evidence in this Part of the *Reply* dealing with questions of sovereignty and title over territory will be addressed to interpretation of the 1928 Treaty in order to determine what area was being recognized by each Party as pertaining to the other, and specifically of establishing what was considered to be part of the Mosquito Coast in 1821 or 1810 and what was understood to conform the "San Andrés Archipelago" in those dates.

[48] See NM, Chap. I, pp. 15-58, paras. 1.1-1.122.
[49] See CCM, Chap. 3, pp. 79-147, paras. 3.1-3.156 and Chap. 4, pp. 149-239, paras. 4.1-4.189.

A. INTERPRETATION OF THE 1928 TREATY

1.18. Article I of the 1928 Treaty contains two paragraphs[50]. The first deals with the question of sovereignty over the Mosquito Coast and over the San Andrés Archipelago, and the second stipulates that the Treaty does not apply to the reefs of Roncador, Serrana and Quitasueño.

1.19. With respect to the meaning of the first paragraph, in its *Judgment of 13 December 2007* the Court considered

> "that it is clear on the face of the text of the first paragraph of Article I of the 1928 Treaty that its terms do not provide the answer to the question as to which maritime features apart from the islands of San Andrés, Providencia and Santa Catalina form part of the San Andrés Archipelago over which Colombia has sovereignty. That being so, this matter has not been settled within the meaning of Article VI of the Pact of Bogotá and the Court has jurisdiction under Article XXXI of the act of Bogotá"[51].

1.20. The Court thus considered that the Treaty did not identify what maritime features were being attributed to Colombia apart from the three specifically mentioned by name in the Treaty, but the other side of this question was not spelled out; that is, what features apart from those explicitly forming part of the San Andrés Archipelago are appurtenances of the Mosquito Coast and the Corn Islands? From Nicaragua's point of view, the only logical answer to this question is that all features that are not proven to be part of the "San Andrés Archipelago" of necessity are appurtenances of the Mosquito Coast.

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[50] See pp. 24-25, below, para. 1.8.

[51] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007,* pp. 30-31, para. 97.

1.21. In Colombia's view, the San Andrés Archipelago is formed by all the maritime features that she claims to the east of the 82nd meridian, no matter their latitude or distance from each other. They are enumerated in paragraph 2.5 of her *Counter-Memorial* and described in paragraphs 2.6 to 2.32, with the support of some maps[52]. According to Colombia all these features formed a group throughout the colonial and postcolonial era[53].

1.22. As will be seen below[54] the "San Andrés Archipelago" was not a Caribbean Hydra with numberless heads stretching from Cartagena (Colombia) to Havana (Cuba) as the Colombian *Counter-Memorial* tries to bring to life[55]. Nor was the Mosquito Coast only a beach head from which to observe this endless and unique "Archipelago" of two small islands that according to Colombia generated rights in the greater part of the extensive western Caribbean superseding those rights of the mainland coast over any feature that might show its head above water at low tide.

1.23. Interpretation of the Treaty requires attention to two other points. The first point concerns to the second paragraph of the Treaty. The Court has already determined that:

> "the meaning of the second paragraph of Article I of the 1928 Treaty is clear: this treaty does not apply to the three maritime features in question. Therefore, the limitations contained in Article VI of the Pact of Bogotá do not

[52] CCM, Vol. I, pp. 17, 19, 21, 23, 25, 27, 29, 31, Figures 2.1-2.8; full size: Vol. III Maps, pp. 3-15.
[53] CCM, Vol. I, pp. 36-60, paras. 2.33-2.77.
[54] See below pp. 44-50, paras. 1.64-1.78.
[55] CCM, Vol. I, pp. 39-40, para. 2.41.

> apply to the question of sovereignty over Roncador, Quitasueño and Serrana"[56].

1.24. Colombia claims that the wording of this second paragraph of Article I implies that Nicaragua was recognizing that these cays were not Nicaraguan but that they either appertained to Colombia or to the United States of America[57]. Nicaragua's position on the other hand, is that this is not what the words of the Treaty plainly say; nor is it a correct interpretation of their intention or meaning as will be explained below[58].

1.25. The second point relates to the 5 May 1930 Act of Ratification of the 1928 Treaty. This affords another important element for determining what features appertained or did not appertain to the "San Andrés Archipelago". The Protocol declared that:

> "the San Andrés and Providencia Archipelago mentioned in the first clause of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich."[59]

1.26. It is clear from the wording that this Protocol was not setting any special limits to Nicaragua and her Mosquito Coast but only to the "San Andrés Archipelago". This language made it clear that there were no Colombian islands or other features west of this 82nd meridian but it set no limit to any Nicaraguan territory east of that meridian.

1.27. On the general question of interpretation Nicaragua considers that special attention should be paid to the political, economic and military

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[56] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 32, para. 104.
[57] CCM, Vol. I, p. 254, paras. 5.27-5.28.
[58] See below pp. 50-55, paras. 1.79-1.96.
[59] NM, Vol. II, p. 59, Annex 19.

situation Nicaragua was subjected to at the time of the negotiation and signature of the 1928 Treaty. The Court has found that the validity of the Treaty cannot be considered in these proceedings but that does not erase the past or eliminate the need to take into consideration the context in which the Treaty was signed in order to properly interpret it.

1.28. The Nicaraguan *Memorial* contains a detailed description of the process of negotiation of the 1928 Treaty and the conditions under which Nicaragua functioned during that period.[60] Nicaragua considers that the *13 December 2007 Judgment* of the Court does not make irrelevant these facts for the proper interpretation of the Treaty.

B. What Maritime Features Form Part of the San Andrés Archipelago over which the Sovereignty of Colombia Was Recognized by Nicaragua in Paragraph 1 of Article I of the 1928 Treaty?

1. Uti possidetis iuris

a. International Law principle binding on the Parties

1.29. The doctrine of the *uti possidetis juris* (*uti possidetis ita possideatis*) has been described as conflating "boundary and territorial questions by assuming as a governing principle that boundaries must be as they were in law at the declaration of independence; viz 1810 for former Spanish colonies in South America and 1822 [sic] for those in Central

[60] See NM, Vol. I, Chap. II, especially pp. 59-124.

America. It is a necessary part of this doctrine that there could have been no *terra nullius* in those parts at those times."[61]

1.30. This doctrine or principle of international law is also treaty law for the Parties on the basis of the Treaty of "Perpetual Union, League and Confederation" signed in Bogota on 15 March 1825 by Colombia and the United Provinces of Central America. Article VII of the treaty embodied this doctrine in the following words: "the Republic of Colombia and the United Provinces of Central America, oblige and bind themselves to respect their boundaries as they exist at present…"[62].

1.31. This position reflected the international practice and the internal legal systems of the Parties at independence. Thus, shortly after independence, on 19 June 1824 the Foreign Minister of the Republic of Colombia, Pedro Gual, addressed a letter to the Commander-in-Chief of the British Naval Forces in the West Indies, Vice-Admiral Sir Lawrence Halstead. In this, he expressed that "in our primitive constitution, as well as in the one promulgated in a more solemn manner on 18 July 1821, it was stipulated that the limits of the Republic (of Colombia) would be those that Venezuela and New Granada would have when they were subject to the jurisdiction of the King of Spain." [63]

1.32. In this communication Minister Gual directly applied the principle of *uti possidetis iuris* to Colombia's claim over the Mosquito Coast and the islands of San Andrés. Minister Gual indicated to Admiral

[61] Oppenheim's International Law, 9th Ed, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman, Vol. I, Part 2, p. 669.
[62] NM, Vol I, p. 21, para. 1.23.
[63] CCM, Vol. II-A, p. 127, Annex 24.

Halstead that the limits of New Granada (of which Colombia was a successor State), "reached the coasts neighboring the island of Jamaica until, and including, Cape Gracias a Dios, with the islands of San Andrés, Vieja Providencia and other adjacent ones. The stretch of coast comprised between Cape Gracias a Dios and the Chagres River belonged to the Captaincy-General of Guatemala for a while, but all this territory was definitely ascribed to the New Granada, on 30 November 1803."[64]

1.33. The first Constitution of Central America (of which Nicaragua is a successor State) dates from 22 November 1824 and provides that "The territory of the Republic is that which formerly comprised the Ancient Kingdom of Guatemala."[65]

1.34. Therefore, any determination as to sovereignty over the territory located off the coast of Nicaragua, or as to the extent of any part of that territory including territorial components of the "islands of San Andrés" or of the "Archipelago of San Andrés", has to be effectuated on the basis of the colonial titles to which the Parties succeeded at independence.

1.35. This was the practice followed when Colombia and Costa Rica submitted to the arbitration of President Loubet of France in 1900, the question of sovereignty over that part of the Mosquito Coast that is the present day Caribbean Coast of Costa Rica. The legal questions decided by the Arbitrator where based on the colonial titles of both

[64] CCM, Vol. II-A, p. 127, Annex 24. Some years after this note, the British Representative to Central America gave his own opinion of the lack of merits of this 1803 document. See this reference above Intro. p. 10, para. 22 and in NM, Vol. II, p. 247, Annex 77.
[65] NM, Vol. I, p. 19, para. 1.16.

Parties and in particular on the Royal Order of 1803 which was the basis of Colombia's claim to sovereignty over that coast.[66]

1.36. Any claims of acquisition by any other title than that based on *uti possidetis iuris* would be a direct violation of this doctrine and of the 1825 Treaty.

b. *Uti possidetis iuris* and small maritime features

1.37. It is also true, as pointed out in the Oppenheim edition cited above, that this doctrine "owing to the uncertainty of many of the Spanish colonial administrative boundaries at that time, especially in remote and often unexplored areas, has not always led to a ready and certain answer."[67] But this uncertainty is not relevant in the present circumstances. Uncertainty might occur in determining sovereignty over maritime features not easily attributable because they were located near two adjacent States or they were located between States facing each other at a relatively close distance in which it was difficult to determine the respective sovereignty of either one based strictly on colonial documentation. In such situations, the effective possession of one or the other as demonstrated by means of *effectivités* has been a means of resolving these disputes.

1.38. In the present circumstances, apart from the presumption implicit in the doctrine of *uti possidetis iuris* against the existence of *terra nullius* in the Americas, the maritime features in dispute were known and had been surveyed by the Spanish authorities during the colonial period. Without going into unnecessary lengths of investigation and burdening the issue with numerous records, it is enough to cite the

[66] See NM, Vol. I, pp. 52-54, paras. 1.106-1.110.
[67] *Op cit.*, p. 670.

document annexed by Colombia in her *Counter-Memorial* which contains the sailing directions (*derrotero*) of the Spanish Navy in 1820[68]. This document describes most of the cays at issue in this case: the cays of Albuquerque, East-Southeast, Roncador, Serrana, Serranilla and Bajo Nuevo. There is no dispute that the maritime features described were known during colonial times and had been surveyed by the colonial sovereign shortly before the independence of Central America in 1821.

1.39. The question then is whether these maritime features during the colonial times and at independence would have been considered appurtenances of the mainland coast or separate territorial entities. In the present case, we are not dealing with an important island like Hispaniola or Jamaica that naturally has its own separate territorial existence. Here we are dealing with respect to minor features like San Andrés, Providencia and the Corn Islands, with a small area and a population during colonial times and at independence that would not have exceeded a few hundred inhabitants.[69] It would seem illogical that the Spanish colonial Empire would have treated these small features independently of the mainland coasts to which they were naturally attached. In fact this was the case, as explained below.

1.40. During the colonial period the islands and other maritime features off the mainland coasts were considered as appertaining to these coasts. Thus the limits of the Audiencia de Guatemala (to which Nicaragua is a successor State) were fixed by Royal Decree (Cédula Real) of 28

[68] CCM, Vol. II-A, p. 615, Annex 172, see also below pp. 43-44, paras. 1.60-1.62.
[69] The recognizance made by Lieutenant del Río in 1793 indicated that the population with the then recent influx of English amounted to "including all the islands to 556 individuals". See NM, Vol. II, p. 6, Annex 3.

June 1568 and confirmed in 1680 by Statute VI, Title XV, Book II of the Compilation of the Indies which stipulated:

> "And let said Province of Guatemala as well as those of Nicaragua, Chiapas, Higueras, Cabo de Honduras, Vera-Paz and Soconusco, with the *islands adjacent to the coast*, bounded on the east by the Audiencia of Tierra Firme…"[70]

1.41. The Royal Order of 1803 on which Colombia so heavily relies does not purport to separate the islands by themselves from the jurisdiction of the Captaincy General of Guatemala or from the Mosquito Coast. [71] The Constitution of Spain of 1812, which is the last law of the Spanish Empire that provided for territorial division in America, stipulated that the area corresponding to the Captaincy General of Guatemala included "all the adjacent islands on the Pacific and the Atlantic" (*todas las islas adyacentes sobre el Pacifico y el Atlantico*)[72].

1.42. In the note sent by the Colombian Minister Gual in 1824 to the British Admiral, quoted above in paragraph 1.32, he refers to "the islands of San Andrés, Vieja Providencia and other adjacent ones"; that is, he precisely identifies them as adjacent to the present day Nicaraguan coast which was also claimed by Colombia at that time.

1.43. The understanding that the Spanish sovereign recognized the territorial attachment of the islands to the mainland coast is confirmed in the Treaty of 25 July 1850 in which Spain recognized the independence of Nicaragua and her sovereignty over the "territories

[70] See NM, Vol. I, pp. 26-27, para. 1.38.
[71] See NM, Vol. II, p. 25, Annex 6.
[72] See NM, Vol. I, pp. 43-45, paras. 1.80-1.83.

situated between the Atlantic Ocean and the Pacific, with its adjacent islands…"[73].

1.44. Thus it is incontrovertible that all the islands off the Caribbean coast of Nicaragua at independence appertained to this coast. If the Treaty of 1928 had not divided between Nicaragua and Colombia title over this territory (that is, attributed the coast to Nicaragua and certain islands to Colombia) it would simply be a question of determining the sovereign of the coast in order to determine the sovereign over the whole territory including all the islands.

2. Colonial era

1.45. Colombia asserts that all the claimed maritime features "traditionally have been considered as a unit"[74] and that "since the time of the Viceroyalty of Santa Fe (New Granada) … were considered as parts of a whole, closely interrelated with the islands of San Andrés, Providencia and Santa Catalina"[75]. But, where is that *tradition*? What *documents* support this tradition?

1.46. The Royal Order of 30 November 1803 on which Colombia based her colonial titles (*uti possidetis iuris*) over the territories in dispute, stipulated that the King had

> "resolved that the Islands of San Andrés and the part of the Mosquito Coast from the Cape Gracias a Dios, included, towards the Chagres River be segregated from the General Captaincy of Guatemala (colonial predecessor of Nicaragua and other Central American States) and dependent upon the Viceroyalty of

[73] NM, Vol. II, p. 43, Annex 13.
[74] CCM, Vol. I, pp. 38-39, para. 2.39.
[75] *Ibid*, p. 39, para. 2.40.

> Santa Fe (colonial predecessor of Colombia and other States)" [76].

1.47. One preliminary observation is that the Royal Order does not mention any other features that supposedly comprise the plural expression of "islands" the Order uses when referring to San Andrés. It does not mention the only other comparable islands in the area namely Providencia or the Corn Islands.

1.48. Another observation would be that the Order does not refer to the "San Andrés Archipelago" but only to the "Islands of San Andrés". This is the name used in all the colonial documents submitted by Colombia[77].

1.49. A final conclusion that might be deduced from this Royal Order is that all of the two territories which are being segregated are segregated indivisibly, as a whole; that is, the Mosquito Coast and the islands of San Andrés are segregated, respectively, as a unit with all their respective appurtenances. In fact, this is what was understood to be the case by the Colombian Minister Gual in the note quoted in paragraph 1.32 above. Nothing more can be read from this Royal Order or from any other colonial documents that would support any conclusion to the effect that all the maritime features off the Mosquito Coast were independent from this Coast and formed a separate "unit" with the island of San Andrés. It would take an enormous leap of faith to believe that the unmentioned minor cays were an accessory to the small island of San Andrés instead of to the extensive Mosquito Coast, or that the Mosquito Coast was only an accessory to the small island of San Andrés.

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[76] CCM, Vol. II-A, p.121, Annex 22.
[77] See *Ibid*, pp. 109-124, Annexes 19-23.

1.50. Juan de Solórzano y Pereira, citing ample authority, expressed a common opinion, when referring to islands: "*dominium quidem occupantibus quaeri, superioritatem vero et iurisdictionem huiusmodi locorum ad eum pertiere, qui in illo mari imperium habet; mari autem imperare videri qui in continente próxima imperat, ut argumento legis* Venditor (fundi) (…Digesto 1,1.5) *aperte scribit Glossa* (In VI 1.2.16)"- "The property is given to the inhabitants, but the authority and jurisdiction over those places belongs to whomever has the dominion over the mainland, as is clearly written in the Glosa using the *Venditor* Law argument"[78].

1.51. The idea that the sovereignty over the mainland attracts or allows a presumption of sovereignty of the continental sovereign over adjacent islands is widely accepted, together with that of their contiguity or greater proximity. It is a basic principle of logic that what is accessory follows the principal.

1.52. When it came to identifying the maritime features that composed the "San Andrés Archipelago", the first governor of the Islands, Tomás O'Neille, reported that the islands were "five in number, to wit: San Andrés, Providencia, Santa Catalina, San Luis of Mangle Grande, (or) Alto or Corn Island, and Mangle Chico, surrounded by several islets and cays of the same type"[79].

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[78] "La propiedad se asigna a los ocupantes, pero la autoridad y la jurisdicción de tales lugares pertenecen a aquél que tiene dominio en ese mar. Y tiene, al parecer, dominio sobre el mar quien lo tiene sobre la tierra firme que está en sus proximidades, como claramente escribe la Glosa usando el argumento de la ley *Venditor*" [J. de Solórzano Pereira, *De Indiarum iure*, Liber II: De adquisitione Indiarum (Chaps. 1-15). Ed. And translation into Spanish by J.M. García Añoveros *et al.*, Madrid, 1999 (II.6, n. 19-22, pp. 186-188)].

[79] NM,Vol. I, pp. 125-126, para. 2.141.

1.53. Colombia presumes that O'Neille's description according to which these islands are "surrounded" by other features "cannot be taken literally, as meaning immediate proximity, but as a reference to the general area where all these features are located"[80].

1.54. The least one can say about the interpretation that Colombia makes of O'Neille's description is that it is extravagant enough. Looking at a map of the area (Figure 1-1) and considering the distances between the different maritime features and their exiguous dimensions, a certain kind of fantasy is necessary in order to imagine that Roncador, Serrana and, still more, Serranilla or Bajo Nuevo, "surround" the islands aforementioned by O'Neille. They do only in the sense that Haiti, Jamaica, Cuba and Grand Cayman can be said to "surround" San Andrés.

1.55. For any objective observer, it is obvious that when O'Neille mentions the "several islets and cays" surrounding San Andrés, Providencia, Santa Catalina and the Corn Islands, he is referring to those in their close environment particularly since all of these islands have costal reefs.

1.56. Colombia refers, without citing any source, to the exploration of Juan (*sic*) Francisco de Fidalgo[81] who, at the beginning of the XIX century executed the Crown order to survey "the cays and banks located between Cartagena and Havana". Colombia states: "All the islands and cays that were covered by the reconnaissance are part of the San Andrés Archipelago"[82]. How does Colombia draw that conclusion?

[80] CCM, Vol. I, p. 38, para. 2.37.
[81] Nicaragua believes Colombia refers to *Joaquín* Francisco de Fidalgo. In the *Résumé Chronologique des Titres Territoriaux de la République de Colombie*, Paris, 1899, p. 97, there is a mention of a report by this captain dated 20 February 1805.
[82] CCM, Vol. I, pp. 39-40, para. 2.41.

Fidalgo's mission was to explore islands and cays located "between Cartagena and Havana", not to identify the islands pertaining to the "San Andrés Archipelago".

1.57. Colombia then refers to the exploration of the Frigate Captain Manuel del Castillo y Armenta[83]. In the performance of his mission, Del Castillo sighted Bajo Nuevo, which incidentally he describes as a "shoal", then located Serranilla, Serrana (after having looked for it for four days due to, he says, its wrongly described location), Roncador, Santa Catalina and San Andrés. Colombia contends that "Del Castillo's reconnaissance was carried out over islands and cays that are part of the San Andrés Archipelago. It did not cover any other islands or cays in the vicinity, including the islets and cays close to the Jamaican and Nicaraguan coasts"[84].

1.58. If we confine ourselves to the logic employed by Colombia, neither Quitasueño (which, understandably, was not sighted by Del Castillo because it is a submerged bank), nor Albuquerque, nor the cays of the East-Southeast, nor the Corn Islands, would form part of the "San Andrés Archipelago", since Del Castillo does not mention them in the report of his Caribbean tour. Providencia would not be part of the Archipelago either.

1.59. But the real point is that Del Castillo was just obeying the orders of the Crown to locate and describe its insular possessions from its two main stations in the Caribbean Sea: Havana and Cartagena. Neither Del Castillo nor Fidalgo before him talked about or referred to any Archipelago and much less to a "San Andrés Archipelago".

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[83] CCM, Vol. I, pp. 40-42, paras. 2.42-2.44 and Vol. II-A, pp.123-124, Annex 23.
[84] *Ibid*, p. 42, para. 2.44.

1.60. Colombia reproduces, finally[85], the *Derrotero de las islas antillanas, de las costas de tierra firme, y de las del seno mexicano,* published by the Hydrographic Office of the Spanish Navy in 1820, which, naturally, includes all the maritime features we have been mentioning (with the exception of Quitasueño[86]) and Serranilla and Bajo Nuevo which are described as "shoals". Since the document is a *derrotero* (Sailing Directions) of the "islas antillanas" it is only natural that it should refer to these features. What else could be expected? But at no time does the *derrotero* describe these features as a group, or as part of a single archipelago as Colombia claims.

1.61. What is interesting to note about the *derrotero* is its title which is not translated in the text of the Colombian *Counter-Memorial* or in Annex 172 "Sailing Directions of the Antillean islands, *of the mainland coasts* and of the Mexican coasts (concavity)". The section of the *derrotero* annexed by Colombia is the "Description of the Mainland". It is under this latter title in which the *derrotero* deals with the features selected by Colombia and states: "we will now say something about the *islands and shoal bordering* vis-à-vis *that coast* that are beyond sounding depth."[87] Naturally, the coast that is being bordered is the Mosquito Coast off which these features are located. Quite naturally also, these features are described in relation to the mainland coast and not to any artificial and unknown archipelago of which, according to Colombia's claims, they would form a part.

[85] CCM, Vol. I, pp. 42-46, para. 2.45 and Vol. II-A, p. 615-617, Annex 172.
[86] A *Derrotero* or sailing directions would have been careful to indicate the location of the dangerous submerged bank of Quitasueño- the fact that it is not mentioned only highlights that it was not visible and therefore not included.
[87] CCM, Vol. II-A, pp. 615-617, Annex 172.

1.62. The date of this *Derrotero* –1820– would be interesting for the question of the *uti possidetis* if this were an issue before the Court. This document implies that 10 years after the independence of Colombia, from the Kingdom of Spain –in spite of the supposedly all powerful 1803 Royal Order– Spain still considered the Mosquito Coast and adjacent maritime features as part of her domains, that is, as part of a Nicaragua which had not yet gained independence in 1820.

1.63. In conclusion, during the colonial era the islands identified as forming part of the "San Andrés Archipelago" are the aforementioned five identified by governor O'Neille. This does not support the assertions of Colombia, but quite the opposite, it refutes them.

3. What was understood by the reference to the "islands of San Andrés"?

1.64. In this section the issue is not whether Nicaragua or Colombia had the better title over the territories in dispute at independence, since it must be accepted in the framework of this proceeding that each had a perfect title as from the 1928 Treaty. The question is what was understood to comprise the territories over which sovereignty was recognized by the Parties respectively in that treaty. Concretely, what maritime features where understood to be appurtenant to the Caribbean coast of Nicaragua and what features were understood to comprise the "San Andrés Archipelago" at the time of independence which is the moment of determination of title.

1.65. It has been demonstrated that during the colonial period the islands appertained to the sovereign of the coast. In the case of San Andrés there is no question that the title claimed by Colombia over the islands was based on and included the title over the Mosquito Coast.

Nonetheless, this does not negate the fact that if reference was made to the "islands of San Andrés" this reference had some specific meaning that could identify these islands as a specific and distinct part of the general territory even if not as a distinct legal or administrative entity. Thus, the group of islands identified in the Royal Order of 1803 as the "islands of San Andrés" referred to a geographical entity with at least an approximate limit in number and location. It is a legal and historical absurdity to claim that this group of small islands with few inhabitants could have been meant to identify all the maritime features located between Cartagena in Colombia to Havana in Cuba, as the Colombian *Counter-Memorial* attempts to portray.[88] In this wishful Colombian scenario the Mosquito Coast would be transformed simply into a coast line with no off shore features.[89] This result flies in the face of common sense as well as colonial practice.

1.66. During the colonial period the references to the group of inhabited islands identified as the "islands of San Andrés" encompass five specific islands: San Andrés, Providencia, Santa Catalina, and Big and Little Corn islands.

1.67. Thus, for example, the reconnaisance made of the coast and the islands on 25 August 1773 by ship lieutenant of the Royal Navy José del Río. In his letter to the Secretary of War he states: "I have the satisfaction to enclose the four maps of the islands of San Andrés, Providencia, Santa Catalina, Mangles (the two Corn Islands) and geographic chart of the Mosquito Coast up to Trujillo, rectified of many errors and views of the highest interesting lands."[90] There is no

[88] See CCM, Vol. I, pp. 39-40, para. 2.41.
[89] CCM also attempts to make the Nicaraguan mainland coast disappear and play no role in the delimitation. See below Chap. VI.
[90] NM, Vol. II, p. 8. Annex 3.

suggestion of additional islands forming part of this group. Futhermore, it is clear that these islands were surveyed as part of the mainland coast.

1.68. At the beginning of the XIX century, the Spanish governor of the islands Tomas O'Neille, enumerated the islands under his governorship in exactly the same way. [91]

1.69. A glance at any map of the area (see Figure 1-1) will indicate that this group, which –it should not be forgotten– includes the Corn Islands which are under undisputed Nicaraguan sovereignty, is located more or less in a compact area between latitudes 12º N and 13º 30′ N. There was never any indication that it reached beyond this area. No reference was ever made to any other islands and cays as being considered part of this island group, as distinguished from being part of the rest of the Mosquito Coast.

1.70. The suggestion might be made that no reference was made to these other features because they were very small maritime features. But this would completely ignore the geography of the area. The island known as Cayo Miskito is located at approximately latitude 14º 20′ N. It is a similar distance from San Andrés as are the cays of Serrana and Roncador, and is certainly much closer to the shoal of Quitasueño. Furthermore, it is much closer than San Andrés to the distant cays of Serranilla and Bajo Nuevo. In any case, it is by far the largest island North of the 14º North parallel where the cays of Serrana, Serranilla, Bajo Nuevo and the submerged reef of Quitasueño are located.

1.71. And, Cayo Miskito is an island that is of similar size to San Andrés itself, and it is surrounded by a very extensive chain of islands that

[91] See above p. 40, para. 1.52.

dwarf any sporadic rocks surrounding San Andrés. Why is it not mentioned in any of the records as part of the "islands of San Andrés"? The answer is evident: because the group of San Andrés had a geographical circumscription that did not extend beyond the other four islands, located nearby, that were repeatedly mentioned as being part of this group.

1.72. Nicaragua in her *Memorial* has claimed sovereignty over the following cays: the Cayos de Albuquerque; the Cayos del Este Sudeste; the Cay of Roncador; North Cay, Southwest Cay and any other cays on the bank of Serrana; East Cay, Beacon Cay and any other cays on the bank of Serranilla; and Low Cay and any other cays on the bank of Bajo Nuevo. The contention of Colombia is that all these features are part of her "San Andrés Archipelago". A look at this claim (Figure 1-2) means that the Mosquito Coast of Nicaragua has disappeared from the map. According to Colombia, the small and insignificant island group of San Andrés has superseded the sovereignty of this coast over the maritime features located off its shores.

1.73. These cays are located in three separate areas that are quite distant from each other and do not form a uniform whole.

1.74. The first group is the only one with a certain proximity and possible connection with the group of "islands of San Andrés". This group is comprised of Cayos de Albuquerque and Cayos del Este Sudeste. This first group lies between 19 and 15 nautical miles from the island of San Andrés.

1.75. This does not signify that these two cays are of necessity part of the "islands of San Andrés" that now appertain to Colombia and are

referred to as the "San Andrés Archipelago". The two islands of Big and Little Corn were also a substantial part of this original island group and there is equal reason to consider that these cays or any one of them are part of the Corn Island group that appertains to Nicaragua. For example, the cays of Albuquerque are also relatively near to the Corn Islands.[92]

1.76. The second group is Roncador and Serrana. These cays are completely detached from the area and are located 110 and 130 nautical miles respectively from San Andrés. This distance and their lack of any real connection to the island group of San Andrés is the reason, for example, why the United States was able to lay claim to them in the XIX century, and it was only 20 years after they had been occupied and the claim of sovereignty over them by the United States published in a list by the Department of the Treasury on 12 October 1871 that Colombia protested. It might be pointed out that Nicaragua for her part filed no protest on these measures. The fact is that Nicaragua was not in a capacity to take effective actions with relation to matters of her Mosquito Coast since this area was still in dispute and *de facto* controlled by Great Britain.[93] In this regard, it is appropriate to point to the delayed response to the occupation by the Colombian Chargé d'Affaires in Washington. He addressed a letter to the Secretary of State on 18 January 1893, stating that the Government of Colombia was ignorant of the situation but that its silence "could in no case prejudice its rights since prescription does not concede a title of

[92] Another question is that according to the figures in the CCM the Cays of Albuquerque are also located partially to the west of the 82nd meridian. See for example CCM, Vol. I, p. 345, fig. 8.1.
[93] NM, Vol. I, p. 49, para. 1.96.

dominion under international law and the acts or the rights of a nation are exercisable at any time." [94]

1.77. The third group is that of Bajo Nuevo and Serranilla. These are respectively 260 and 220 nautical miles distant from San Andrés and were not effectively claimed by Colombia before the XX century. These two cays were also considered by Honduras to be part of her territory since they were located in an area off what she claimed to be her coast until the *Judgment of 8 October 2007* decided this issue. Before the Judgment of the Court, Colombia and Honduras had signed a Treaty on 2 August 1986 whereby they divided between themselves the Cay of Serranilla. It is important to note that the claim by Honduras was also based on the fact that these cays were off what she considered to be her coasts and used this title to negotiate the 1986 Treaty with Colombia.

1.78. In conclusion,

i. The only maritime features that could have any historical and geographic connection with the island group of San Andrés are the only relatively near cays of Albuquerque and East South East. The Corn Islands were also part of this island group of San Andrés and have an equal right to claim sovereignty over these two cays.

ii. The cays of Serrana and Roncador and the shoal of Quitasueño have no geographical or colonial connection with the island group of San Andrés. They were never effectively occupied by Colombia in the XIX century precisely because of the distance and lack of economic, social or political connection with the islands of the group.

[94] CCM, Vol. II-A, p. 147, Annex 27.

iii. *A fortiori* the even more distantly located cays of Bajo Nuevo and Serranilla have no connection with San Andrés.

C. THE SPECIAL QUESTION OF RONCADOR, SERRANA (AND QUITASUEÑO)

1. The second paragraph of Article I of the 1928 Treaty: the text

1.79. The second paragraph of Article I of the 1928 Treaty states that: "The present Treaty does not apply to Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America"[95].

1.80. The Court, in the *Judgment of 13 December 2007*, after summing up the conflicting positions of the Parties concerning the interpretation of this provision[96], observed that it had jurisdiction over the question of sovereignty of these maritime features, since the 1928 Treaty, according to the clear meaning of the second paragraph of Article I, "does not apply"[97] to them.

1.81. Colombia tries to obtain an advantage[98] in the wording of the original Spanish text: "*No se consideran incluidos en este tratado…*", which according to Colombia is not adequately reflected in the translated version used by the Court in its 2007 Judgment. The text used by the Court is taken from the translation into English and French made by the Secretariat of the League of Nations that renders the Spanish

[95] *Territorial and Maritime Dispute (Nicaragua v. Colombia*), *Preliminary Objections*, *Judgment of 13 December* 2007 p. 11, para. 18.
[96] *Ibid,* pp. 31-32, paras. 99-103.
[97] *Ibid,* p. 32, para. 104.
[98] CCM, Vol. I, pp. 249-252, paras. 5.15-5.22.

phrase of the Treaty into English as "The present Treaty does not apply…" and into French as "Le présent traité ne s'applique pas..."

1.82. In Colombia's opinion, the right translation should have been: "The Roncador, Quitasueño and Serrana cays *are not considered to be included*…)"[99]. According to Colombia this was the way it was understood by her and the United States, and the intention of these words was:

> "not that the Treaty did not apply – but that the cays were not considered to be included in the Treaty by reason of the dispute between the two States [*i.e.* Colombia and United States]. The phrase 'are not considered to be' is in effect a deeming clause: its subject is the three cays. It implies that, but for the dispute, the three cays would have been considered as included in the Treaty; in other words, that they were included in the phrase 'all the other islands, islets and cays that form part of the said Archipelago de San Andrés'"[100].

1.83. Nicaragua considers, in any case, that the conclusion drawn by Colombia from the literal meaning of the second paragraph of Article I of the 1928 Treaty is unwarranted, whether one stands by the Spanish text, or adopts the English or French translations proposed by Colombia. If Roncador, Quitasueño and Serrana "*no se consideran incluidos*" ("are not considered to be included") in the Treaty it is because they are excluded, they are ruled out, they are beyond its limits or, as translated by the experts of the Secretariat of the League of Nations, the Treaty "does not apply" to them.

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[99] CCM, Vol. I, p. 251, para. 5.20. Emphasis added.
[100] *Ibid*, pp. 251-252, para. 5.21.

1.84. There is absolutely no way to infer from the text that, but for the dispute referred to in the second paragraph of Article I, Roncador, Quitasueño and Serrana would have been considered as part of the "San Andrés Archipelago", as Colombia claims[101].

1.85. On the contrary, if any inference is to be drawn from the text it is to point out that if the understanding had been that these features were part of the "San Andrés Archipelago", then the text of the Treaty (following the preferred version of Colombia) would have said: "The Roncador, Quitasueño and Serrana cays are not considered to be included…" *in the San Andrés Archipelago* and not as the Treaty states, that they would not be considered to be included *in the Treaty*.

1.86. As explained in Nicaragua's *Memorial*, the only reason for singling out these three cays was because the United States was interested in them. Colombia for her part had no special interest in them and even proposed at one point in the negotiation of 1928 that the treaty should specifically indicate that,

> "Colombia acknowledges Nicaragua's absolute domain over the Mosquitia, the Mangles Islands and the cays of Roncador, Quitasueño and Serranilla (sic)"[102].

1.87. Therefore, the only correct conclusion is that if the United States had not forced the inclusion[103] of this provision, Roncador, Quitasueño and Serrana would be in the same position as the other maritime features which are not mentioned *eo nomine*, in respect to which the question is whether they are covered by the reference of the first

[101] CCM, Vol. I, pp. 2.51-2.52 para. 5.21; p. 254, paras. 5.27-5.28.
[102] NM, Vol. I, p. 131, para. 2.155.
[103] See, generally, NM, Vol. I, Chap. II.

paragraph of Article I to the "San Andrés Archipelago" or they are appurtenances of the Mosquito Coast.

1.88. Nicaragua contends that based on the text of the Treaty, the cays of Roncador and Serrana (Quitasueño is a submerged bank) do not form part of the San Andrés Archipelago[104].

2. The second paragraph of Article I of the Treaty: not an implicit relinquishment by Nicaragua

1.89. Colombia claims that the wording of the second paragraph of Article I of the 1928 Treaty implies that Nicaragua was recognizing that these cays were not Nicaraguan but that they either appertained to Colombia or the United States[105]. This is not correct.

1.90. In the first place, paragraph 1 of Article I of the Treaty uses the very clear wording "recognizes the full and entire sovereignty of" when the intention is to recognize the sovereignty of the other party. There is no such indication in paragraph 2 of any recognition of sovereignty over these cays by Nicaragua either on behalf of Colombia or of the United States.

1.91. In the second place, the text does not state that Nicaragua is renouncing her claims to title over these three features. Any relinquishment of title would have to be explicit, as explicitly worded as the recognition accorded to the other Party in the first paragraph of Article I.

[104] Colombia herself is ambiguous on this question and has even referred to them as being part of the Archipelago of Providencia. See CCM, Vol. I, pp. 49-50, para. 2.55.
[105] CCM, Vol. I, pp. 420-421, para.10.7.

1.92. Therefore, the 1928 Treaty provides no basis for sustaining that Nicaragua relinquished her claims to Roncador, Serrana and Quitasueño.

3. The second paragraph of Article I of the 1928 Treaty: basis of title to the three features

1.93. As indicated above, the wording of the 1928 Treaty does not imply any relinquishment of Nicaragua's claim of sovereignty, or any recognition of sovereignty of the United States or of Colombia, over those features.

1.94. Further, the words cannot be read to mean that the explicit recognition by Colombia of "the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast"[106] (including of necessity all rights emanating from *uti possidetis iuris*) excluded any rights to claim these three features as part of that coast based on the *uti possidetis iuris* at the time of independence or that, conversely, the Treaty excluded the right of Colombia to claim these three features as part of the "San Andrés Archipelago" on the same basis. Neither Nicaragua nor Colombia made any reservation to the recognition of the "full and entire sovereignty"[107] of the other Party. The fact that the three features were not considered to be included in the Treaty or that it does not apply to them, does not mean that either the Mosquito Coast or the "San Andrés Archipelago" was being in any way reduced in size or diminished in appurtenances.

1.95. In other words, the effect of the treaty was not to convert these three cays into *terra nullius* where the sovereignty would be open to question by other means different from that of the original title based

[106] NM, Vol. II, p. 56, Annex 19.
[107] *Ibid.*

on the *uti possidetis iuris* at the time of independence. In fact, Colombia's claim vis-à-vis the United States was based precisely on the *uti possidetis iuris* of the "San Andrés Archipelago". Likewise, Nicaragua's claim is based on the *uti possidetis iuris* of the Mosquito Coast, and the fact that the three features do not constitute part of the San Andrés Archipelago legally, historically or geographically[108].

1.96. Thus, the question is reduced to whether Colombia can prove that these cays were part of the "San Andrés Archipelago" at the time of Independence. If this is not sufficiently proven, then the only logical conclusion is that these cays –like any other maritime features off the Mosquito Coast– appertained to that coast, and belonged to the State with sovereignty over that coast.

IV. Conclusions

1.97. In the 1928 Treaty, Colombia recognized the sovereignty of Nicaragua over her Caribbean Coast (Mosquito Coast) with all appurtenant rights over the maritime features located off this Coast with the exception of those features that can be established to have been considered part of the "San Andrés Archipelago". In accordance with the evidence, the archipelago consisted of the islands of San Andrés, Providencia (and Santa Catalina) and the smaller maritime features in their immediate vicinity. The archipelago does not include: Cayos de Albuquerque, Cayos del Este Sudeste, the Cay of Roncador, North Cay, Southwest Cay and any other cays on the bank of Serrana, East Cay, Beacon Cay and any other cays on the bank of Serranilla, and Low Cay and any other cays on the Bank of Bajo Nuevo.

[108] See above pp. 32-49, paras. 1.29-1.77.

PART II

MARITIME DELIMITATION

MARITIME DELIMITATION

General Introduction

1. The second part of the case involves the maritime delimitation between Nicaragua and Colombia. As will be explained in Chapter III below, the only delimitation that is necessitated by the geographic circumstances attendant to this case is a delimitation of the overlapping continental shelves of the two States. There is no need for a delimitation of exclusive economic zones claimed respectively by Nicaragua and Colombia because the mainland coasts of the two States are separated by a distance of more than 400 nautical miles.

2. It is Nicaragua's position that the three islands identified in the 1928 Treaty as part of the "Archipelago of San Andrés", that is, San Andrés, Santa Catalina and Providencia, should each be enclaved, within a 12-nautical-mile radius, and any other minor feature proven by Colombia to be part of this Archipelago should, in accordance with its physical characteristics and location, be enclaved within a 3-nautical-mile radius.

3. The jurisprudence of the Court and arbitral tribunals, reviewed in Chapters V and VI, unequivocally shows that geographical features of this nature (even if they are not rocks but real islands as San Andrés) are enclaved and do not generate rights to an exclusive economic zone or a continental shelf, especially when they are located on the opposite party's side of the delimitation line. As will be shown in Chapter IV, the "San Andrés Archipelago" lies squarely on the physical and legal continental shelf of Nicaragua, and thus falls on Nicaragua's side of

the delimitation line separating Nicaragua's and Colombia's continental shelves.

4. Enclaving the three islands identified as comprising the "San Andrés Archipelago", and any minor features that the Court might determine to be under Colombian sovereignty, would not affect the delimitation of the continental shelf. The result is the same if any of the disputed geographic features are found, by the Court, to be Nicaraguan. The only difference is that features found to be Nicaraguan would not need to be enclaved, since they are already situated on Nicaragua's continental shelf and within Nicaragua's 200-nautical-mile exclusive economic zone.

5. In Chapter VI, Nicaragua shows that there is no merit to the claims of Colombia to a delimitation –including a 200-nautical-mile exclusive economic zone and a continental shelf– giving full and unprecedented effect to the three islands that the 1928 Treaty accorded her by name as comprising the "San Andrés Archipelago", or any effect to the other minor features she claims are under her sovereignty.

CHAPTER II

LEGAL AND GEOGRAPHICAL FRAMEWORK

I. Legal Framework

A. Nicaragua's Claims to the Resources of the Continental Shelf, a National Fishing Zone, and an Exclusive Economic Zone

2.1. Nicaragua ratified the 1982 Law of the Sea Convention on 3 May 2000. However, the consequences of this ratification involved the consolidation of long-standing claims to the natural resources of adjacent maritime areas. The relevant legislation prior to ratification of the Convention is as follows:

- General Law on the Exploitation of Natural Resources, 12 March 1958[109].
- Limits Established for National Fishing Zone, 8 April 1965[110].
- Law on the Continental Shelf and Adjacent Sea, 20 November 1979[111].

2.2. The position of Nicaragua was confirmed by the Law on Maritime Areas adopted on 22 March 2002. This is the current legislation, and the text is as follows (in material part):

[109] NM, Vol. II, pp. 191-193, Annex 63.
[110] *Ibid*, pp. 201-202, Annex 65.
[111] *Ibid*, pp. 203-205, Annex 66.

‘LAW ON MARITIME AREAS OF NICARAGUA

“Art. 1. – The maritime areas of Nicaragua include all the zones currently allowed by International Law.

Art. 2 – The maritime areas of Nicaragua correspond to those referred to in International Law as:

1. The Territorial Sea;

2. The Interior Waters;

3. The Contiguous Zone;

4. The Exclusive Economic Zone;

5. The Continental Shelf.

Art.3 – The breadth of the Territorial Sea is 12 marine miles, measured from the straight base line or low tide established along the length of the coasts.

……

Art.7. – The Exclusive Economic Zone of the Republic of Nicaragua extends 200 marine miles from the base line from which the territorial sea is measured.

Art. 8. – The Continental Shelf of Nicaragua covers the bed and subsoil of the submarine areas that extend beyond its territorial sea as an extension and natural projection of its territory under the sea to the minimum distance of 200 marine miles and a maximum of 350 marine miles, as recognised by International Law.

Art.9. – In processes of maritime delimitation, the interests of the Nation shall be upheld, in

agreement with the provisions of International Law." [112]

B. COLOMBIA'S CLAIMS REPRESENTED IN LEGISLATION

2.3. The relevant legislation of Colombia takes the form of the Law No. 10 adopted in 1978[113]. This provides for an exclusive economic zone to an outer limit of 200 nautical miles, together with a provision on the shelf as follows:

> "Article 10. The sovereignty of the Nation extends to its continental shelf for the purpose of exploring and exploiting the natural resources."[114]

C. THE APPLICABLE LAW

2.4. For Nicaragua, the applicable law is determined by her ratification of the 1982 Law of the Sea Convention on 3 May 2000. The position of Colombia is expressed in the *Counter-Memorial* as follows:

> "3. As a preliminary matter, it is appropriate to address briefly the question of the applicable law. Nicaragua is a party to the 1982 Convention which it ratified on 3 May 2000. Colombia signed the Convention in 1982, but has not ratified it and is therefore not a party to it. On the other hand, Colombia is a party to the 1958 Geneva Continental Shelf Convention and Nicaragua is not. Moreover, in 1978 Colombia established a twelve-mile territorial sea, a two-hundred mile exclusive economic zone and sovereign rights over its continental shelf measured from its baselines.

[112] NM, Vol. II, pp. 207-209, Annex 67.
[113] CCM, Vol. II-A, pp. 495-497, Annex 142.
[114] *Ibid*, p. 496, Annex 142.

> 4. In these circumstances, the applicable law in the present case with respect to maritime delimitation is customary international law as mainly developed by the jurisprudence of the Court and by international arbitral tribunals. While the provisions of the 1982 Convention are not applicable as a source of conventional law per se, *the relevant provisions of the Convention dealing with a coastal State's baselines and its entitlement to maritime areas, as well as the provisions of Articles 74 and 83 dealing with the delimitation of the exclusive economic zone and continental shelf respectively, reflect well-established principles of customary international law.*"[115] (Emphasis added)

2.5. These passages are of obvious legal significance and show that Colombia accepts that the 'relevant provisions of the Convention' reflect 'well-established principles of customary international law'. The terms of paragraph 4 quoted above clearly encompass the provisions of Article 76 when reference is made to the 'relevant provisions of the Convention dealing with a coastal State's baselines and its entitlement to maritime areas ...' It is obvious that Article 76 reflects 'well-established principles of customary international law'.

2.6. In any case, the Colombian pleading refers explicitly to Article 83 concerning delimitation of the continental shelf between States with opposite or adjacent coasts, and this reference must assume the relevance of the definition of the continental shelf in Article 76, not least because entitlement is logically anterior to delimitation.

[115] CCM, Vol. I, pp. 305-306, paras. 3-4.

II. The General Geographical Framework and the Delimitation Area

A. The Relevant Coasts of Nicaragua and Colombia

2.7. In the *Memorial*, Nicaragua defined the relevant coasts for the delimitation as:

> (a) The mainland coast of Nicaragua from the terminus of the land boundary with Honduras (in the north) to the terminus of the land boundary with Costa Rica (in the south).
>
> (b) The mainland coast of Colombia opposite the coast of Nicaragua, and fronting on the same maritime areas[116].

2.8. Colombia in the *Counter-Memorial* rejects that the mainland coasts of Nicaragua and Colombia are the relevant coasts for the maritime delimitation between Nicaragua and Colombia. In the first place, the *Counter-Memorial* submits that:

> "the geographic situation does not give rise on the legal plane to an issue of delimitation as between the mainland coasts of the Parties."[117]

2.9. To reach this conclusion the *Counter-Memorial* first of all observes that the mainland coasts are more than 400 nautical miles apart.[118] According to Colombia, this implies that:

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[116] NM, Vol. I, p. 191, para. 3.15.
[117] CCM, Vol. I, p. 314, para. 7.12.
[118] *Ibid*, p. 313, para. 7.12.

> "because of the distances involved, neither mainland coast generates maritime rights to an exclusive economic zone or continental shelf which meet or overlap with the entitlements generated by the other mainland coast, whether under the 1982 Law of the Sea Convention to which Nicaragua is a party, or under the 1958 Geneva Continental Shelf Convention to which Colombia is a party, or under customary international law, or indeed under the domestic legislation of the Parties"[119].

2.10. Colombia is correct in observing that the mainland coasts of Nicaragua and Colombia are more than 400 nautical miles apart. At the same time, Colombia ignores that the continental shelf of Nicaragua extends beyond 200 nautical miles. This results in an overlap of the continental shelves of the mainland coasts of Nicaragua and Colombia. The *Counter-Memorial* confirms that Colombia is well aware of the implications of these overlapping continental shelf entitlements. How else to explain the argument in the *Counter-Memorial* that the Court should not consider the delimitation of the continental shelf beyond 200 nautical miles?[120] If there is no entitlement beyond 200 nautical miles to start with, as the *Counter-Memorial* suggests in paragraph 7.12, which is quoted above, why bother arguing that the Court should not consider its delimitation? As a matter of fact, and as demonstrated below in Chapter III, there exists a continental shelf entitlement of Nicaragua extending beyond 200 nautical miles from her mainland coast and the argument of Colombia that it cannot be delimited is not sustainable.

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[119] CCM, Vol. I, pp. 313-314, para. 7.12 (footnote omitted).
[120] *Ibid*, pp. 312-321, paras. 7.8-7.20.

B. ISLANDS

2.11. There are a number of islands and cays located off the mainland coast of Nicaragua. Many of these islands and cays are fringing to the coast in the sense that they are within the range of the territorial sea claims of Nicaragua such as the extensive chain of cays to the north called Cayos Miskitos which centers around the main island of the group, Miskito Cay, which has an area of some 21 square kilometers. Further to the south is the island group of which the most significant are the two Corn Islands (Islas del Maiz) which are located 26 nautical miles from the mainland coast and have an area, respectively, of 9.6 square kilometers and 3 square kilometers.

2.12. Further off are located the islands of San Andrés and Providencia (and its appendix Santa Catalina[121]) at a distance from the mainland coast of Nicaragua of about 105 and 125 nautical miles and an area of some 25 square kilometers and some 17 square kilometers, respectively. These islands are located at a distance of approximately 380 nautical miles from the mainland of Colombia. As explained above[122], the *13 December 2007 Judgment* determined that the Court had no jurisdiction to consider the dispute over the sovereignty over these features. Hence, Nicaragua is proceeding in this case within the limits of the jurisdiction granted by the Court; that is, for the purposes of this case these islands will be considered under the sovereignty of Colombia.

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[121] Santa Catalina is separated from Providencia by a narrow channel of 140 metres. It has an area of slightly over 1 km^2, as indicated in the Intro. to this *Reply*. When reference is made in the text to Providencia, it will usually be understood to be also a reference to Santa Catalina.

[122] See above pp. 2-3, para. 7.

2.13. Apart from the islands mentioned above, the continental shelf of Nicaragua is relatively shallow and is strewn with numerous banks. As described in the Nicaraguan *Memorial* in paragraphs 3.115 to 3.126, some of these features are close to the surface and in some of them a small cay protrudes above the waters. A description of the banks where cays have emerged is found in the passages of the *Memorial* just mentioned, and is further elaborated in Chapter IV of this *Reply*.

2.14. In Colombia's view, all banks and cays located east of the 82nd meridian of longitude west are part of an immense "San Andrés Archipelago" that would block most of the maritime areas generated by the mainland of Nicaragua.

2.15. In view of the importance the *Counter-Memorial* attaches to this artificially magnified "San Andrés Archipelago", in its blown up incarnation, it is necessary to address this matter in some detail in the *Reply.* Chapter IV looks at the geography of the islands and the cays and Chapters V and VI at the consequences which flow from it for the delimitation of maritime zones between Nicaragua and Colombia. The main findings of that exercise can be summarized as follows. There is no single archipelago that encompasses all the disputed islands and cays. In particular, the following individual features are not part of the "Archipelago of San Andrés": Cayos de Albuquerque, Cayos del Este Sudeste, the Cay of Roncador, North Cay, Southwest Cay and any other cays on the bank of Serrana, East Cay, Beacon Cay and any other cays on the bank of Serranilla, and Low Cay and any other cays on the Bank of Bajo Nuevo. Each of these features has to be considered separately in the assessment of the maritime delimitation.

That assessment indicates that all of these features lie in the middle of Nicaragua's continental shelf and exclusive economic zone, and that they are minute in comparison to the mainland coasts. One of the features concerned, Quitasueño, is permanently submerged and has to be disregarded completely in the delimitation since it is simply part of Nicaragua's continental shelf. The other features, due to their size and other characteristics, are rocks in the sense of Article 121(3) of the 1982 Law of the Sea Convention.

C. MARITIME DELIMITATION

2.16. In the *Counter-Memorial,* Colombia not only takes issue with Nicaragua's approach to maritime delimitation in light of the relevant geographical framework, but also seeks to completely refashion the relevant coastal geography. In that regard, the following aspects can be noted.

2.17. First, in the *Counter-Memorial* the Colombian mainland coast has gone missing. As Nicaragua submitted in the *Memorial*, the coast of Colombia facing the delimitation area is located between the point at which Colombia's land boundary with Panama reaches the Caribbean Sea and the northern extremity of the Peninsula of Guajira.[123] This relevant mainland coast of Colombia measures around 740 kilometers. The present case in all likelihood is the first instance of a Party which not only seeks to shorten its relevant coast, but to ignore it completely.

[123] NM, Vol. I, after p. 278, Figure I.

2.18. Colombia submits that her "San Andrés Archipelago" constitutes the only relevant coast for the purposes of maritime delimitation with Nicaragua[124].

2.19. Second, Colombia also ignores Nicaragua's mainland coast, which is by far the dominant geographical feature of the Western Caribbean that is the focus of this proceeding. Instead of juxtaposing the two mainland coasts, which she chooses to ignore altogether, she sets up an artificial comparison between islands and insignificant cays and rocks situated on either side of the 82nd meridian. Colombia myopically focuses her approach to the delimitation on the islands, cays and rocks lying to the east of that meridian –all of which she claims as part of an inflated "San Andrés Archipelago"– and those lying to the west of the meridian nearer to and accepted by Colombia as appurtenant to Nicaragua's coast. The only two Colombian features in this "archipelago" of some significance are the islands of San Andrés and Providencia, which have a combined coast facing the Nicaraguan mainland coast of approximately 21 kilometers. In other words, their combined coastal length is less than 1/20 of Nicaragua's 450 kilometers coastline. It is no wonder that Colombia chooses to ignore the latter.

2.20. Third, Colombia refuses to face the simple truth that the continental shelf of Nicaragua extends beyond 200 nautical miles. On the one hand, Colombia ignores the readily available facts which demonstrate beyond doubt that the outer edge of the continental margin of Nicaragua extends beyond 200 nautical miles, and that Nicaragua as a

[124] CCM, Vol. I, pp. 341-343, paras. 8.6-8.9.

consequence is entitled to this extended continental shelf. That this oversight is quite deliberate is evidenced by Colombia's attempt to deny that the entitlement to the continental shelf beyond 200 nautical miles is inherent in its being a natural prolongation of the land territory of the coastal State[125], in contradiction of Article 76 of the 1982 Law of the Sea Convention. These matters are further discussed in Chapter III below.

2.21. The principal conclusion from the coastal geography is that the maritime delimitation between Nicaragua and Colombia requires the delimitation of their overlapping continental shelves lying between their opposite mainland coasts. The islands of Colombia's "archipelago" do not constitute the opposite coast facing Nicaragua's mainland coast, but are located on Nicaragua's side of the line separating the two Parties' continental shelves, and should be enclaved in order to obtain an equitable delimitation. This is consistent with the jurisprudence of the Court and various distinguished arbitral tribunals.

[125] CCM, Vol. I, p. 402, paras. 9.57-9.58.

CHAPTER III

THE DELIMITATION OF THE CONTINENTAL SHELF AREA

I. Introduction

3.1. The Nicaraguan position on the delimitation area is shown in Figure 3-1. The geographical framework of the continental shelf area consists of coasts which are clearly opposite rather than adjacent. The predominant relationship is one of oppositeness. Thus, in accordance with the principles of customary or general international law, the delimitation area consists of the area between the mainland coasts of Nicaragua and Colombia. The delimitation area stretches in the north from Cape Gracias a Dios on the Nicaraguan coast, through the cays of Serranilla and Bajo Nuevo to Punta Gallinas on the Colombian coast, and in the south from Punta Castilla at the southern end of the Nicaraguan coast to the western edge of the Colombian coast in the Golfo de Uraba.

3.2. The position of Nicaragua is that the natural prolongation of the mainland territory of both Parties meets and overlaps and hence that there is a need for a delimitation of these maritime areas as will be explained below.

3.3. In the view of Nicaragua, this assessment is unaffected by the presence of various small islands positioned in the western sector of the delimitation area[126]. Nor is the assessment affected by the

[126] See below Chaps. V and VI.

presence of claims by third States: see Nicaraguan *Memorial,* Volume I, Figure II. For present purposes the coastal relationship of the Parties must be assessed independently of third state claims. It is to be recalled that the incidence, to the south of Malta, of claims by Italy, in the *Libya/Malta* case, did not inhibit the Court from determining which of the coasts of Libya were opposite Malta and therefore constituted relevant coasts for the purposes of delimitation: see the Judgment in the *Libya/Malta* case:

> "Within the bounds set by the Court *having regard to the existence of claims of third States, explained above, no question arises of any limit, set by those claims, to the relevant coasts of Malta to be taken into consideration*. On the Libyan side, Ras Ajdir, the terminus of the frontier with Tunisia, must clearly be the starting point; the meridian 15º 10′ E which has been found by the Court to define the limits of the area in which the Judgment can operate crosses the coast of Libya not far from Ras Zarruq, which is regarded by Libya as the limit of the extent of its relevant coast. If the coasts of Malta and the coast of Libya from Ras Ajdir to Ras Zarruq are compared, it is evident that there is a considerable disparity between the lengths, to a degree which, in the view of the Court, constitutes a relevant circumstance which should be reflected in the drawing of the delimitation line. The coast of Libya from Ras Ajdir to Ras Zarruq, measured following its general direction, is 192 miles long, and the coast of Malta from Ras il-Wardija to Delimara Point, following straight baselines but excluding the islet of Filfla, is 24 miles long. In the view of the Court, this difference is so great as to justify the adjustment of the median line so as to attribute a larger shelf area to Libya: the degree of such adjustment does not

> depend upon a mathematical operation and remains to be examined."[127] (emphasis added).

3.4. The coasts of Nicaragua and Colombia are essentially opposite: see Nicaraguan *Memorial,* Volume I, Figure I and *Reply*, Volume II, Figure 3-1. However, it is not necessary, for legal purposes, that coasts should be precisely parallel or 'directly' opposite. The position was explained by the Chamber in the *Gulf of Maine* case in terms of a relationship of 'frontal opposition'. In the words of the Chamber:

> "But in putting forward its proposals for the delimitation, Canada has failed to take account of the fact that, as one moves away from the international boundary terminus, and approaches the outer openings of the Gulf, the geographical situation changes radically from that described in the previous paragraph. The quasi-right-angle lateral adjacency relationship between part of the Nova Scotia coasts, and especially between their extension across the opening of the Bay of Fundy and Grand Manan Island, and the Maine coasts, gives way to a *frontal opposition relationship between the remaining coasts of Nova Scotia and those of Massachusetts which now face them.* It is this new relationship that is the most characteristic feature of the objective situation in the context of which the delimitation is being effected. Moreover, when the geographical characteristics of the delimitation area were described it was shown that the relationship between the lines that can be drawn, between the elbow of Cape Cod and Cape Ann (on the United States side), and between Cape Sable and Brier Island (on the Canadian side), is *one of marked quasi-parallelism*. In this situation,

[127] *Continental Shelf (Lybian Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 49-50, para. 68.

> even a delimitation line on the basis of the equidistance method would have to be drawn taking into account the change in the geographical situation, which Canada did not do when it was necessary. In any event what had to be avoided was to draw, the whole way to the opening of the Gulf, a diagonal line dominated solely by the relationship between Maine and Nova Scotia, even where the relationship between Massachusetts and Nova Scotia should have predominated"[128]. (emphasis added)

3.5. Both in the passage quoted and in later passages the Chamber used the description of the 'quasi-parallelism' of the two coasts[129].

3.6. The relationship of the coasts of the Parties is of particular significance, as the Chamber explained in the *Gulf of Maine* case:

> "The Chamber has already considered this aspect in Section VI, paragraphs 188-189, in commenting on the delimitation line proposed by Canada. It then expressed its disagreement precisely in relation to the fact that the Party in question had proposed a delimitation that failed to take account of the fact that a change in the geographical perspective of the Gulf is to be noted at a certain point. Given the importance of this aspect, the Chamber considers that it will here be apposite, by way of reminder, to repeat its observation that it is only in the northeastern sector of the Gulf that the prevailing relationship of the coasts of the United States and Canada is part of lateral adjacency as between part of the coast of Maine and part of the Nova Scotian coast. In the sector closest to the closing line, the

[128] *Delimitation of the Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 325, para. 189.
[129] See *ibid*, pp. 333-334, para. 216; and p. 331, para. 206.

> prevailing relationship is, on the contrary, one of oppositeness as between the facing stretches of the Nova Scotian and Massachusetts coasts. Accordingly, in the first sector, geography itself demands that, whatever the practical method selected, the boundary should be a lateral delimitation line. *In the second, it is once again geography which prescribes that the delimitation line should rather be a median line (whether strict or corrected remains to be determined) for delimitation as between opposite coasts, and it is moreover geography yet again_which requires that this line, given the almost perfect parallelism of the two facing coasts involved, should also follow a direction practically parallel to theirs*"[130]. (emphasis added)

3.7. The delimitation area in the present case consists of the figure shown in Figure 3-1. It can be seen that the frontal opposition between Nicaragua and Colombia consists of coasts which are not parallel, but which are nonetheless opposite rather than adjacent. In the *Tunisia/Libya* case the Court, in relation to the second sector of the boundary, emphasized the predominant relationship of the coasts[131]. In the present case the predominant relationship is one of oppositeness.

II. Applicable Law

3.8. This subject has been examined above in Chapter II. For present purposes it is assumed that the provisions of the 1982 Law of the Sea

[130] *Delimitation of the Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 331, para. 206.
[131] See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 88, para. 126.

Convention constitute the best available evidence of generally accepted principles of customary international law.

III. The Claims to Continental Shelf Area

3.9. Nicaragua ratified the 1982 Law of the Sea Convention on 3 May 2000. The current legislation on the continental shelf of Nicaragua is as follows (Law N° 420 on Maritime Areas, 22 March 2002):

> "Art.8. – The Continental Shelf of Nicaragua covers the bed and subsoil of the submarine areas that extend beyond its territorial sea as an extension and natural projection of its territory under the sea to the minimum distance of 200 marine miles and a maximum of 350 marine miles, as recognised by International Law."[132]

3.10. Colombia has not ratified the 1982 Law of the Sea Convention. The current legislation is Law N° 10 on Marine Spaces, 4 August 1978, which provides in material part as follows:

> "Article 10. The sovereignty of the Nation extends to its continental shelf for the purpose of exploring and exploiting the natural resources."[133]

IV. The Criterion of the Natural Prolongation of the Land Territory of the Coastal State to the Outer Edge of the Continental Margin (Entitlement to Continental Shelf Areas)

3.11. The delimitation for present purposes is a line dividing the areas *where the coastal projections of Nicaragua and Colombia converge*

[132] NM, Vol. II, pp. 207-209, Annex 67.
[133] CCM, Vol. II-A, pp. 495-497, Annex 142.

and overlap in order to achieve an equitable result. The response of Colombia is to assert that Nicaragua claims a boundary "where it has no legal entitlement"[134]. The basis for this assertion, which is that the Nicaraguan claim line lies more than 200 nautical miles from the mainland coasts of the parties, has no legal foundation.

3.12. The achievement of an equitable solution is subordinate to the legal basis of entitlement, which is the principle of entitlement of the coastal state *to the entire continental margin* as defined in the provisions of Article 76 of the 1982 Law of the Sea Convention.

3.13. These provisions are generally recognized as declaratory of general international law. This would seem to be the position of Colombia as elaborated in the *Counter-Memorial:*

> "While the provisions of the 1982 Convention are not applicable as a source of conventional law per se, the relevant provisions of the Convention dealing with a coastal State's baselines and its entitlement to maritime areas, as well as the provisions of Articles 74 and 83 dealing with the delimitation of the exclusive economic zone and continental shelf respectively, reflect well-established principles of customary international law."[135]

3.14. Article 76 of the Convention establishes the basis of entitlement to the continental margin *and entitlement is logically anterior to the process of delimitation.* It must follow that, when Colombia asserts that Nicaragua has no entitlement beyond 200 nautical miles from the

[134] CCM, Vol. I, pp. 312-318, paras. 7.8-7.16.
[135] CCM, Vol. I, p. 306, para. 4.

mainland coasts, this assertion has no foundation in law in respect of the continental margin.

3.15. This analysis will be developed on the basis of the evidence of the location of the outer limit of the continental margin of Nicaragua. At this stage it is necessary to point out that the pleading of Colombia has no adequate appreciation either of the geomorphology of the seabed in the delimitation area or of the law relating to entitlement to shelf areas.

3.16. The legal anomalies in the Colombian *Counter-Memorial* appear both in the text of the pleading and in the graphics provided. The flawed approach to the applicable law is apparent in paragraph 7.12, which reads as follows:

> "The 'geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia', referred to in Nicaragua's Submissions, lends no support to Nicaragua's methodology. Geographically, this is because the two mainland coasts lie more than 400 nautical miles apart in the area covered by Nicaragua's claim. *Legally, because of the distances involved, neither mainland coast generates maritime rights to an exclusive economic zone or continental shelf which meet or overlap with the entitlements generated by the other mainland coast, whether under the 1982 Law of the Sea Convention to which Nicaragua is a party, or under the 1958 Geneva Continental Shelf Convention to which Colombia is a party, or under customary international law*, or indeed under the domestic legislation of the Parties. Thus, the geographical situation does not give rise on the legal plane to an issue of

> delimitation as between the mainland coasts of the Parties."[136] (emphasis added)

3.17. The question of the applicable law has been examined in Chapter II above. It was then indicated that in paragraphs 3 and 4 of the *Counter-Memorial* Colombia accepts 'the well-established principles of customary international law.' Moreover, in the context of these principles Colombia also accepts 'the relevant principles of the Convention' of 1982, including the provisions of Article 76.

3.18. Even if, for the sake of argument, the Colombian shelf claim is limited to a zone of 200 nautical miles, this fact can have no limiting effect on the application of the principles embodied in the 1982 Law of the Sea Convention reflecting customary international law to the natural prolongation of the land territory of Nicaragua. The reasoning of the Colombian pleading seeks to excise the continental margin from the universe of maritime delimitation.

3.19. In addition, the graphics contained in the Colombian *Counter-Memorial* confirm the policy of ignoring the entitlement of Nicaragua to continental shelf areas in accordance with the 1982 Law of the Sea Convention[137].

V. The Continental Shelf in the Western Caribbean: the Geological and Geomorphological Evidence

3.20. The principles of maritime delimitation must operate within the framework based upon geological and other evidence determining the outer limit of the respective continental margins of Nicaragua and

[136] CCM, Vol. I, pp. 313-314 para. 7.12.
[137] See CCM, Vol. III Maps, pp. 81 and 83.

Colombia. The geomorphology of the western Caribbean is shown on a bathymetric map in Figures 3-2 and 3-3. Shallow water areas are shown in green, deeper water in blue, grading to abyssal depths in purple.

A. NICARAGUA'S NATURAL PROLONGATION

3.21. The dominant feature in the southwest Caribbean is the Nicaraguan Rise. This is a large area of relatively shallow water stretching over 500 nautical miles from the Nicaraguan-Honduran landmass in the southwest to Jamaica in the northeast. The Rise is separated from the oceanic abyssal plain of the Colombian Basin to the south by a linear feature: the Hess Escarpment. This Escarpment and hence the southern limit of the Nicaraguan Rise is aligned approximately with the southern border of Nicaragua with Costa Rica. The northern edge of the Nicaraguan Rise is formed by the Cayman Trough, a deep ocean trench lying to the north of Honduras, between Guatemala and the north coast of Jamaica.

3.22. The Nicaraguan Rise is divided into two halves: to the north the Nicaraguan Rise proper, and to the south, separated by the Pedro Bank Fracture Zone – the Lower Nicaraguan Rise[138]. The Nicaraguan Rise proper is about 150 nautical miles wide and extends from Cabo Gracias a Dios to Jamaica. Water depths are generally less than 1000 meters and large areas have water depths no more than 50 meters. The Lower Nicaraguan Rise is about 120 nautical miles wide and has water depths generally between 2000 and 2500 meters. Figure 3-4

[138] Sometimes also referred to as the Northern Nicaraguan Rise and the Southern Nicaraguan Rise.

shows a regional bathymetric profile from the Nicaraguan Rise to the Colombian mainland.

3.23. The Hess Escarpment marks a sharp transition between the Lower Nicaraguan Rise and the abyssal Colombian Plain. It is a 600 nautical miles long underwater cliff corresponding to a major geological fault or fracture zone. In the southwest, an area of thickened crust corresponding to the Mono Rise and the Zipa Seamount provide an extension of the Lower Nicaraguan Rise across the line of the Hess Escarpment into the abyssal plain to the south.

B. COLOMBIA'S NATURAL PROLONGATION

3.24. The Colombian Basin lies between the Hess Escarpment and the continental slope of Colombia and South America. It slopes gently downwards to the north with a maximum depth in the north of about 4200 meters. The oceanic crust of the Colombian Basin is being subducted beneath the South American Plate along the north coast of Colombia forming a deep ocean trench. The normally sharp junction between continental and oceanic crust is modified by the South Caribbean Deformed Belt in the east and is overlain by the Magdalena Fan in the west. This latter feature is a thick wedge of sediments derived from the continent forming a deep-sea fan.

3.25. Any discussion of the geology of the Nicaragua-Colombia part of the southwest Caribbean requires an understanding of the disposition of the tectonic plates of the area. The Caribbean Plate comprises virtually all the Caribbean Sea. It is approximately rectangular in shape and separates the North American Plate (including the Gulf of Mexico) from the South American Plate (and smaller plates that form

northern Colombia and Panama). It is bounded on the west by the deep ocean trench west of Central America, to the north by the Cayman Trough running just north of Honduras through Jamaica, Hispaniola and Puerto Rico, to the east by the Lesser Antilles arc, and to the south by the Caribbean and Panama foldbelts (Figure 3-5).

3.26. The southern margin of the Caribbean Plate is formed by subduction zones as it is overridden by the South American Plate. The northern, leading, edge of South America (the Colombian margin) has been buckled into the South Caribbean Deformed Belt. Like all tectonic plates, deformation within the plate is relatively limited. Several major strike-slip faults cross the plate, for example forming the Hess Escarpment.

3.27. The Caribbean Plate is formed separately from its neighboring areas. Its composition and internal structure are distinct from the immediately adjacent area. Thus there is no geological continuity between Colombia and the Caribbean Plate.

3.28. In summary:

a) For Nicaragua, there is clear topographical and geological continuity between the Nicaraguan land mass and the Nicaraguan Rise which is a shallow area of continental crust extending from Nicaragua to Jamaica. Its southern limit is sharply defined by the Hess escarpment, separating the lower Nicaraguan Rise from the deep Colombian Basin. This therefore

represents the natural prolongation of the Nicaraguan landmass.

b) For Colombia, there is a sharp geological discontinuity between the Colombian landmass situated on the South American Plate and the oceanic crust of the Caribbean Plate. This continent-ocean boundary is overlain in party by the thick sediments of the Magdalena Rise. The natural prolongation of the Colombian landmass, in contrast, is therefore limited to a narrow zone on the southern margin of the Colombian Basin.

C. APPLICATION OF THE PRINCIPLES REFLECTED IN ARTICLE 76

3.29. Paragraphs 3.21 to 3.28 above have presented the geological evidence for the natural prolongation of the land territories of Nicaragua and Colombia. Once this natural prolongation is proven, the appropriate provisions of Article 76, in particular paragraphs 4 to 7, can be applied to delineate the outer edge of the continental margins which comprise the submerged prolongation of the land mass of the coastal State, and consist of the seabed and subsoil of the shelf, the slope and the rise, but not the deep ocean floor.

3.30. It is useful to set out the provisions of Article 76 of the 1982 Law of the Sea Convention in full:

"*Definition of the continental shelf*

1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its

territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

> 5. The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4(a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.
>
> 6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.
>
> 7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by co-ordinates of latitude and longitude."

3.31. These provisions define the principal features of the continental shelf and in doing so employ the concept of the natural prolongation of the land territory to include the continental margin. It thus becomes clear that the legal concept of the continental shelf extends to the outer limits of the continental margin, as defined in paragraphs 3 and 4.

3.32. The provisions of paragraph 3 give prominence to the distinction between the continental margin and the deep ocean floor. It is

stipulated that the continental margin 'does not include the ocean floor.'

3.33. The provisions of paragraph 4 involve criteria of a legal character in order to 'establish the outer edge of the continental margin' for the purposes of the Convention. The nature of this exercise is emphasised by the language used in paragraphs 5 and 6. Paragraph 5 refers to 'the line of the outer limits of the continental shelf' and paragraph 6 refers 'the outer limit of the continental shelf'.

VI. The Entitlement to Continental Shelf and the Achievement of a Delimitation in Accordance with Article 83 of the 1982 Law of the Sea Convention

A. The Application Of the Principle of Equal Division

3.34. In accordance with the provisions of Article 76 of the 1982 Law of the Sea Convention, Nicaragua has an entitlement extending to the outer limits of the continental margin. In the case of an overlap with the continental margin of Colombia, then the principle of equal division of the areas of overlap should be the basis of the maritime delimitation.

3.35. The delimitation for present purposes is a line dividing the areas *where the coastal projections of Nicaragua and Colombia converge and overlap* in order to achieve an equitable result. In this context the evidence of convergence and overlap determines the way in which the principle of equal division of the areas of overlap becomes operative.

3.36. The principle of equal division must operate within the framework of the geological and other evidence determining the outer limit of the respective continental margins of Nicaragua and Colombia. This evidence will now be presented.

B. The Geological Evidence of the Outer Limits of the Continental Shelf Areas Attributable to Nicaragua

3.37. Public domain datasets have been used to define the edge of the continental margin for both Nicaragua and Colombia. These data are freely and widely available and provide an initial estimate of the outer limits of the continental shelf. The software CARIS LOTS was used for the detailed calculations. The principal datasets used were:

1) 2-Minute Gridded Global Relief Data (ETOPO2v2) June, 2006 obtainable from the World Data Center for Geophysics & Marine Geology, Boulder, Colorado, (NGDC).

   This has been used for the regional illustrative maps and for bathymetric profiles where more detailed GEODAS profiles (see 3 below) are not available.

2) Total Sediment Thickness of the World's Oceans & Marginal Seas also obtainable from NGDC (http://www.ngdc.noaa.gov/mgg/sedthick/sedthick.html)

   This has been used for the sediment thickness calculations off the Colombian margin.

3) Marine Geophysical Trackline Data (GEODAS database) Also obtainable from NGDC (http://www.ngdc.noaa.gov/mgg/geodas/trackline.html)

   These detailed bathymetric profiles have been used as the primary source of bathymetric data for foot-of-slope calculations.

3.38. Preliminary information indicative of the outer limits of Nicaragua's continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and a description of the status of preparation and intended date of making a full submission to the Commission on the Limits of the Continental Shelf will be submitted to the United Nations Secretary General within the next months. The technical information for this submission is annexed to this *Reply*[139].

3.39. For Nicaragua, the outer limit of the continental margin is defined by the provisions of paragraph 4(a)ii of Article 76 which defines it as a line not more than 60 nautical miles from the foot of the continental slope. The foot of the continental slope runs along the Hess Escarpment in the eastern section, and around the outer edge of the Mono Rise farther west. Figure 3-6 shows the detail of one of the foot of the slope picks. Further details are included in Annex 18.

3.40. The extent of the Nicaraguan continental shelf is marked by the blue dashed line on Figure 3-7. The outer limit is based on a line measured 60 nautical miles from the foot of the slope. All points are either within 100 nautical miles from the 2,500 meters isobath or 350 nautical miles from the territorial sea baseline and so satisfy the constraints in paragraph 5 of Article 76. The coordinates for the outer limit of the Nicaraguan continental shelf are contained in Annex 16.

[139] See NR, Vol. II, Annex 18.

C. THE COLOMBIAN CONTINENTAL SHELF

3.41. The analysis of the Colombian continental margin here has been done in a similar way to that for Nicaragua using the easily available public domain information, in particular the global bathymetry and sediment thickness datasets compiled by the NGDC referenced above[140].

3.42. For Colombia both the provisions of paragraph 4 of Article 76 are used, that is, the outer edge of the continental margin is either a line where the thickness of sedimentary rocks is at least one per cent of the distance from the foot of the slope (Article 76.4a(i)) or a line 60 nautical miles from the foot of the continental slope (Article 76.4a(ii)).

3.43. The Colombian foot of the slope has been buried in this area by thick sediments of the Magdalena Rise. As discussed in paragraphs 3.27 to 3.31 and illustrated in Figures 3-2, 3-3 and 3-4, the continent-ocean boundary is formed by the subduction zone that runs along the northern edge of the Caribbean Deformed Belt. As the zone where the lower part of the slope merges into the top of the rise has been obscured, the foot of slope along this margin has been picked along the 1º gradient line that separates the continental slope with typical gradient line that separates the continental slope with typical gradients of 1.5º, and the continental rise with gradients of 0.5º or less[141] Figure 3-8 provides a representative example of the foot-of-slope and sediment thickness calculations.

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[140] See above para. 3.37.

[141] This follows the definition in the Manual on Technical Aspects of the United Convention on the Law of the Sea published by the International Hydrographic Bureau, IHO Special Publication 51, 4th Edition March 2006, (http://www.iho.shom.fr/publicat/free/files/S-51_Ed4-EN.pdf)

3.44. The extent of the Colombian continental shelf is marked by the red dashed line on Figure 3-9; this shows the outer limit measured either 60 nautical miles from the foot of the slope or using the 1% sediment thickness criterion. All points are within 350 nautical miles from the baselines from which the breadth of the territorial sea is measured and thus satisfy the constraints in Article 76.5[142]. The coordinates for the outer limit of the Colombian continental shelf are contained in Annex 17.

D. OVERLAPPING CONTINENTAL MARGINS

3.45. The outer limits for Nicaragua and Colombia are combined in Figure 3-10. Geologically and physically these margins are distinct, but the provisions of Article 76 whereby the juridical outer limit is measured 60 nautical miles from the foot of slope or using the sediment thickness criterion has as a result that these continental margins overlap.

3.46. On this basis, and bearing in mind the requirement in Article 83 of the Convention that the delimitation process should 'achieve an equitable solution', the appropriate method is as follows. The area of delimitation is the area on Figure 3-10 described as the 'area of overlapping continental margins'. The continental margins are based on geological and geomorphological factors where the two States' territorial sea baselines are largely irrelevant. Here a line of equal division of the area of overlapping margins has been drawn that is equidistant from the nearest point on the respective continental margins. This has resulted in a line that equitably divides the area of

[142] *Ibid.*

overlapping margins (Figure 3-11). The coordinates for this line of delimitation are as follows:

1. 13º 33′ 18″N 76º 30′ 53″W
2. 13º 31′ 12″N 76º 33′ 47″W;
3. 13º 08′ 33″N 77º 00′ 33″W;
4. 12º 49′ 52″N 77º 13′ 14″W;
5. 12º 30′ 36″N 77º 19′ 49″W;
6. 12º 11′ 00″N 77º 25′ 14″W;
7. 11º 43′ 38″N 77º 30′ 33″W;
8. 11º 38′ 40″N 77º 32′ 19″W;
9. 11º 34′ 05″N 77º 35′ 55″W

(All coordinates are referred to WGS84).

VII. The Relation of the Nicaraguan Claim to the Areas of the Continental Shelf and the Outer Limit of the Exclusive Economic Zone of the Colombian Mainland

3.47. As the relevant graphic shows, both the continental margins fall within the outer limit of Colombia's exclusive economic zone. Thus, not only the continental margin of Colombia but also her exclusive economic zone overlaps with the continental margin of Nicaragua, such that the final section of the continental shelf of Nicaragua is subjacent to the exclusive economic zone of Colombia. This no doubt exceptional situation must now be brought into account. Colombia has an entitlement based upon the principle of distance to an exclusive economic zone of 200 nautical miles. Nicaragua has an entitlement to the full extent of the continental margin. These areas of entitlement intersect and there is no criterion which would indicate a legal

priority. It is for this reason that two distinct lines of delimitation are appropriate.

3.48. At this stage it must be pointed out that there is no reason of law or equity why Nicaragua should renounce her rights to the areas of continental margin of her natural prolongation which are subjacent to parts of the 200-nautical-mile exclusive economic zone proclaimed by Colombia in 1978. Any unilateral concession of this type would lack legal foundations.

3.49. A more legally cogent approach would involve the determination of a single boundary line of equal division within the areas of overlap of the respective continental margins.

3.50. Such an approach would reflect both the geological and geomorphological architecture and the consequent legal entitlements. By way of clarification it is necessary to emphasise that, *if there were no geological interaction or overlapping with the continental margin of Nicaragua*, then Colombia would have a claim to the margin of her natural prolongation and then further to the limit of 200 nautical miles from the baselines.

3.51. At this point it is necessary to reckon with the application of the distance principle in the provisions of Article 76 of the Law of the Sea Convention. Article 76, paragraph 1, provides:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural

> prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

3.52. The question then must be, does this legal extent of the continental shelf appertaining to the Colombian coast exclude the claim of Nicaragua to her continental margin falling within the distance of 200 nautical miles from the coast?

3.53. The possible responses must be reviewed. The first candidate response might be that Article 76, paragraph 1, produces an outcome based on the principle of distance. This entitlement would depend upon the status of Colombia as a coastal State, and would create a shelf *which is not conditioned as to extent by the principle of natural prolongation to the outer edge of the continental margin*. In the result the situation would remain one characterized by the intersection of areas of entitlement with distinct legal foundations.

3.54. The difficulty which then emerges is the determination of criteria which would establish a legal priority. In this context, and this is the second consideration, there is no assumption that the provisions of Article 76 were intended to cover the type of situation presented to the Court. No reference to this type of situation can be found in the University of Virginia *Commentary*, Volume II, edited by Nandan and Rosenne, pages 825 to 992. The literature in general is silent on the problem.

3.55. And there are further considerations. There are no *a priori* reasons for giving priority to claims based exclusively upon the distance principle. The rationale of 'the natural prolongation of [the] land territory' of the coastal State is not evidently less significant than the distance principle. Moreover, the coastal state does not obtain rights over an exclusive economic zone without a specific claim. These rights do not exist by operation of law. In strong contrast the rights of the coastal state over the continental shelf do not depend on occupation or any express proclamation: 1982 Law of the Sea Convention, Article 77.

3.56. In conclusion Nicaragua submits that the provisions of Article 76 should be applied but not on the basis that Colombia is allowed to override the entitlement of Nicaragua to her continental shelf by reason of the '200-nautical-mile zone' aspect of Article 76, paragraph 1. In other words, in the context of continental shelf claims, Nicaragua and Colombia should *both* have the benefit of their natural prolongations of their respective land territories. To allow Colombia to rely on Article 76 for the purpose of curtailing the natural prolongation of Nicaragua would be to rule out an equitable solution of the kind envisaged in the provisions of Article 83.

VIII. The Relevance of Proportionality and the Delimitation of Continental Shelf Areas

A. INTRODUCTION

3.57. The 'Factor of Proportionality' has been addressed in the *Memorial*, pages 226 to 236, but only 'on a preliminary basis'. There it is emphasised that the principal feature of proportionality is that it

relates to space but not to location. In other words, proportionality as such cannot produce a delimitation.

B. The Relevance Of Proportionality to the Delimitation of the Areas of Continental Slope and Continental Margin

3.58. The role of proportionality is not as a method of delimitation but a fairly flexible vehicle for assisting in the task of ensuring that the outcome of delimitation is the achievement of an equitable solution: see Articles 74 and 83 of the 1982 Law of the Sea Convention. Its primary role has been to place limits upon the distorting effects of geographical anomalies resulting from coastal configurations or the presence of small islands.

3.59. There is no evidence, either in judicial practice or in the doctrine, that the factor of proportionality can affect entitlement as such, and much less entitlement based upon the concepts of natural prolongation and the continental margin.

3.60. In any event, proportionality is not a source of title to the continental shelf. In this respect the following passages from the Award in the *Anglo-French Continental Shelf* case are emphatic and helpful:

> "101. In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning – sharing out– the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines; for

> to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares. *Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality*. As was emphasised in the *North Sea Continental Shelf cases* (*I.C.J. Reports 1969*, paragraph 91), there can never be a question of completely refashioning nature, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts. *Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights of continental shelf*."[143] (emphasis added)

3.61. In this general context, it would be particularly bizarre if a factor related to coasts and coastal lengths (as Colombia recognizes in the *Counter-Memorial*) were to be used *ab extra* to impose a limit upon continental shelf entitlement as represented in the concepts of the continental margin and of the outer limits of the shelf as defined in Article 76 of the 1982 Law of the Sea Convention.

[143] *Case concerning the Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic, Decision of 20 June 1977, RIAA,* Vol. XVIII, UN, p. 58, para. 101.

IX. The Entitlement to Continental Shelf and the Effect of Islands in the Achievement of a Delimitation in Accordance with Article 83 of the 1982 Law of the Sea Convention

3.62. For present purposes, the focus is exclusively upon the particular element constituted by the presence of small islands and cays in the area of the delimitation of the continental shelf.

3.63. As shown in (Figures 1-2, 3-2 and 3-7) the various island features form part of the natural prolongation of Nicaragua. Moreover, these features are located on the main part of the continental platform, and therefore precede the area of the continental slope. The framework of the delimitation is thus the existence *in principle* of 'overlapping' shelf areas of Nicaragua, and the areas of shelf appurtenant to certain islands, including San Andrés and Providencia.

3.64. As indicated in the Submissions appended to the *Memorial*, and also in the conclusions of Chapter V and the Submissions of this *Reply*, the equitable solution, in case of such a finding by the Court, can be obtained by a process of enclaving (see Chapters 5 and 6 and Figures 5-1, 5-2, 6-9 and 6-10 below), which is simply a mode of drawing an appropriate boundary.

X. Conclusions

3.65. The entitlements to continental shelf areas in accordance with Article 76 of the 1982 Law of the Sea Convention depend upon the geological and geomorphological evidence. The principle of equal division must operate within the framework based upon this evidence determining

the outer limit of the respective continental margins of Nicaragua and Colombia.

3.66. Geologically and physically these margins are distinct, but the provisions of Article 76 whereby the juridical outer limit is measured 60 nautical miles from the foot of slope or using the sediment thickness criterion has as a result that these continental shelves overlap. On this basis, and bearing in mind the requirement in Article 83 of the 1982 Law of the Sea Convention that the delimitation process should "achieve an equitable solution", the appropriate method is as follows: The area of delimitation in the eastern sector is the area on the Figure 3-11 described as the "area of overlapping continental margins".

3.67. As the evidence shows, both continental margins fall within the outer limit of the exclusive economic zone based upon Colombia's mainland coast. Nicaragua has an entitlement to the full extent of the continental margin. These areas of entitlement intersect and there is no criterion which would indicate a legal priority.

3.68. In this context the legally appropriate solution involves the determination of a single boundary line of equal division within the areas of overlap of the respective continental margins.

3.69. The coordinates for the line that equitably divides the area of overlapping margins of delimitation are as follows:

10. 13º 33′ 18″N	76º 30′ 53″W
11. 13º 31′ 12″N	76º 33′ 47″W;

12. 13º 08′ 33″N 77º 00′ 33″W;

13. 12º 49′ 52″N 77º 13′ 14″W;

14. 12º 30′ 36″N 77º 19′ 49″W;

15. 12º 11′ 00″N 77º 25′ 14″W;

16. 11º 43′ 38″N 77º 30′ 33″W;

17. 11º 38′ 40″N 77º 32′ 19″W;

18. 11º 34′ 05″N 77º 35′ 55″W

(All coordinates are referred to WGS84).

CHAPTER IV

PHYSICAL AND LEGAL ASPECTS OF THE MARITIME FEATURES LOCATED ON THE CONTINENTAL SHELF OF NICARAGUA

I. Introduction

4.1. The position of Nicaragua is in principle that all maritime features located off her mainland coast and on her continental shelf appertain to Nicaragua. Since the *Judgment of the Court of 13 December 2007* has determined that the 1928 Treaty recognized the sovereignty of Colombia over San Andrés and Providencia (and its appendix, Santa Catalina), the claims to sovereignty presently made in this *Reply* are limited to all the other features that are sited off the mainland coast of Nicaragua.

4.2. The analysis of this chapter is not addressed to the question of sovereignty but to the physical and legal aspects of these features in order to better evaluate their possible relevance in the delimitation of the maritime areas that are dealt with in this *Reply*.

II. Maritime Features claimed by Colombia

A. COLOMBIA'S ARCHIPELAGO ARGUMENT

4.3. The *Counter-Memorial* devotes an entire chapter (Chapter 2) of more than 60 pages to a description of the "San Andrés Archipelago". Despite its length, Chapter 2 fails to answer the question why the fact that in Colombia's view there is one archipelago which forms "a geographical and economic unit historically known as the San Andrés

Archipelago",[144] has any consequences for the maritime delimitation between Nicaragua and Colombia.

4.4. In Chapter 8, Section B of the *Counter-Memorial*, dealing with the relevant area within which the maritime delimitation between Nicaragua and Colombia is to be carried out, Colombia again puts much emphasis on her "San Andrés Archipelago". For instance, paragraph 8.6 asserts that the relevant coast of Colombia is the coast of the "San Andrés Archipelago". In what is no doubt an attempt to suggest the extent of the "archipelago", paragraph 8.7 then gives an overview of more than one page of the different features Colombia considers to be a part of the "archipelago". And again, this is followed by paragraph 8.8, which stresses that "the San Andrés Archipelago generates maritime entitlements on a 360º basis throughout this part of the Caribbean Sea."

4.5. Colombia, which purports to accept the applicability of the provisions of the 1982 Law of the Sea Convention in respect of baselines, should be fully aware that it is not the "San Andrés Archipelago", which generates maritime entitlements, but the individual features scattered over the Caribbean Sea which do so. And this is only the case to the extent they do not fall under Article 121(3) of the 1982 Law of the Sea Convention.

[144] CCM, Vol. I, p. 74, para. 2.98.

4.6. Before turning to a review of what these minor islands, cays and banks really consist of, it is necessary to make clear that the analysis that follows in no way signifies that Nicaragua accepts the self-serving charts and surveys Colombia has produced. The intention of this analysis is to demonstrate that even the information presented in these Colombian documents does not support the consequences she attempts to draw from them.

4.7. Figure 2.1 of the *Counter-Memorial* depicts the features Colombia claims to be part of her "archipelago" of San Andrés with a shaded 12-nautical-mile area around them. Possibly this was done because the features otherwise are so tiny as to not be visible to the naked eye. However, to establish the extent of the coasts of these features, that 12-nautical-mile limit is wholly irrelevant. Colombia does not cite any example from the case law to support its relevance, and it is of course well known that it is the actual coast that provides the starting point for the Court and arbitral tribunals to identify the relevant coasts of the parties not the circles drawn around the actual coasts. This was most recently confirmed in the Judgment of the Court in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, which observes:

> "The title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts"[145].

[145] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009*, p. 26, para. 77.

4.8. In accordance with the jurisprudence, Figure 4-1 depicts the coasts of Nicaragua and Colombia without artificially inflating them by a 12-nautical-mile straight or circular limit. This provides a vastly different picture of the significance, or rather lack thereof, of Colombia's "archipelago" than the figures Colombia has included in the *Counter-Memorial*. Without the 12-nautical-mile zones added to them in the Colombian figures, the islands and cays are hardly visible except for their names, and are dwarfed in comparison with the mainland coast of Nicaragua.

4.9. Other figures included in the *Counter-Memorial* also illustrate that Colombia seeks to stretch the significance of her "archipelago". Figures 2.3 to 2.10,[146] depicting individual features, which make up the "archipelago", and the various figures depicting the entire "archipelago" (see e.g. figure 2.1[147]) show a blue dotted line around the features and an area of a lighter shade of blue than the surrounding area. The legend attached to the figures does not indicate what this line and shading represent. A comparison with the relevant nautical charts of Colombia indicates that these aspects of the figures do not have any relevance for establishing either baselines or the relevant coasts of the features concerned. Figures 4-2 to 4-4 in this *Reply* compare the *Counter-Memorial*'s graphical illustrations and the Colombian charts for the features of Quitasueño, Serranilla and Bajo Nuevo. Apart from the *Counter-Memorial*'s graphic illustrations and the charts, Figures 4-2 to 4-4 also contain a figure identifying those features on the Colombian nautical charts, which qualify as part of the

[146] CCM, Vol. III Maps, pp. 5-19.
[147] *Ibid*, p. 1.

baseline in accordance with the relevant provisions of the 1982 Law of the Sea Convention.

4.10. Another aspect of figure 2.10 in the *Counter-Memorial*, which depicts the bank of Bajo Nuevo, is plainly misleading. The figure depicts two reef areas, East Reef and West Reef, in green. On nautical charts this coloring is used to indicate areas which are above water at low-tide. However, the relevant Colombian nautical chart, Chart 046, shows that, rather than a drying reef as depicted on figure 2.10 of the *Counter-Memorial*, in fact there is only a line or zone of breakers and no solid land at all. There is only one insignificant sand cay, on which a light is located. The 12-nautical-mile limit drawn from this single point is shown on Chart 046, which confirms that the Colombian authorities acknowledge that East Reef and West Reef do not generate a territorial sea. Figure 4-4 compares Bajo Nuevo as depicted on figure 2.10 of the *Counter-Memorial* to Chart 046. The third inset in figure identifies the single point, which qualifies as part of the baseline in accordance with the relevant provisions of the 1982 Law of the Sea Convention.

4.11. The text of the *Counter-Memorial* attempts a similar blowup of the relevant coasts of the features included in Colombia's "archipelago". At no point in the *Counter-Memorial* are the lengths of the relevant *coasts* of the individual features identified. On the other hand, the *Counter-Memorial* abounds with references to the length and width of the *banks* on which these features are located. One example is sufficient to illustrate the predicament in which the authors of the *Counter-Memorial* no doubt saw themselves placed. Paragraph 2.31 of the *Counter-Memorial* describes Bajo Nuevo:

> "Bajo Nuevo is located 69 nm east of Serranilla and 138 nm NNE of Serrana on a bank of the same name, of an approximate length of 33 km and width of 11 km. There are three cays the largest of which, Low Cay, is at the northern end of West Reef, about 1.55 metres above sea level, with a lighthouse operated by the Colombian Navy. The bank is visited by fishing vessels – subject to the national fishing regulations – from the islands of San Andrés and Providencia in March and April".[148]

4.12. The description contains a reference to width and length of the *bank* of Bajo Nuevo, but this is wholly irrelevant to identifying the relevant *coasts* of the features on Bajo Nuevo. The only coastal information on the cays on Bajo Nuevo is that they are three in number. That meager information is not even correct. The relevant Colombian nautical chart, Chart 046, only shows one feature on Bajo Nuevo, which is above water at high tide (Cayo Bajo Nuevo), not three. A comparison of the depiction of Cayo Bajo Nuevo and Cayo Serranilla on Chart 046 shows that the former is even smaller than the latter. On Chart 046, Cayo Bajo Nuevo is totally obscured by the cartographical symbol for the light at that location. Considering the figures the *Counter-Memorial* provides for Cayo Serranilla, Cayo Bajo Nuevo measures less than 100 meters across. To describe Bajo Nuevo as having "an approximate length of 33 km and width of 11 km" [149] is misleading to say the least.

[148] CCM, Vol. I, p. 33 and 36, para. 2.31. Footnote omitted.
[149] See CCM, Vol. I, p. 33, para. 2.30.

4.13. A further example of Colombia's attempts to make more out of the small cays than they actually are is provided by paragraph 2.30 of the *Counter-Memorial*, which describes the Serranilla cays. Again, the information on the length of the *bank* on which these cays are located is put up front. After this it is observed that "[t]here is a chain of coral reefs and several cays"[150]. There is a serious risk that this cavalier description of the area could be misconstrued as implying the presence of a significant coastal front. The relevant Colombian nautical charts of Serranilla show that the opposite is true. Colombian charts 046 and 208 indicate the existence of three cays on Serranilla: Cayo Serranilla, Middle Cay and East Cay. Far from forming a chain, as is suggested by the *Counter-Memorial*, these cays are far apart. The distance from Cayo Serranilla to Middle Cay is 5.5 nautical miles (10 km) and the distance from the latter to East Cay is 1.6 nautical miles (3 km). Paragraph 2.30 provides figures for the length (650 meters) and width (300 meters) of the largest of the cays, Serranilla Cay. Colombian nautical chart 208 points out that the length of the coast of Serranilla facing the coast of Nicaragua is only around 400 meters. Colombian Chart 046 also provides another interesting insight into the views of the Colombian authorities dealing with nautical charts. Chart 046 shows the outer limit of the territorial sea as a 12-nautical-mile arc centered on Cayo Serranilla (see Figure 4-3). The other two cays depicted on Chart 046 on Serranilla have been ignored. Apparently, the Colombian authorities did not consider that these other features qualified as part of the normal baselines under Article 5 of the 1982 Law of the Sea Convention to establish the extent of the territorial sea. This is in stark contrast with the *Counter-Memorial*, which goes as far as listing these features on Serranilla not only as territorial sea

[150] CCM, Vol. I, p. 33, para. 2.30.

basepoints, but also as part of the relevant coast of Colombia for the delimitation of the continental shelf and the exclusive economic zone[151].

4.14. A similar assessment can be made for the length of the other features Colombia submits to be part of her relevant coast. That calculation shows that Colombia's "single island chain"[152] stretching for hundreds of kilometers across the Caribbean is reduced to three small islands: San Andrés which has a length of 13 kilometers, Providencia, which has a length of 8 kilometers and its appendix, Santa Catalina which has a length of 0.5 kilometer. The west facing coasts of the other features in their totality does not add up to more than 0.9 kilometer, though this is hard to measure as the features are very small. In comparison, the distance between these individual features is enormous. For instance, the islands of San Andrés and Providencia are 47 nautical miles (83 km) apart and the distance between Providencia Island and the first cay to the north of Providencia, Cayo Serrana (Southwest Cay), is about 80 nautical miles (126 km).

III. Nicaragua's Undisputed Islands and Maritime Features

4.15. Where Colombia's *Counter-Memorial* is excessively and unrealistically generous in dealing with the features it considers to be under her sovereignty –going as far as giving full weight in the maritime delimitation to the submerged bank of Quitasueño–[153] it completely fails to appreciate the character and significance of the islands along Nicaragua's mainland coast. Nicaragua's *Memorial*

[151] CCM, Vol. I, p. 342, para. 8.7.
[152] CPO, Vol. I, p. 84, para. 2.26.
[153] CCM, Vol. I, p. 391, para. 9.27 and p. 395, para. 9.37.

described these islands in paragraphs 3.9 and 3.10. The *Counter-Memorial* makes it necessary to look at this matter in more detail. The present section of the *Reply* will deal with the islands in the immediate vicinity of the coast of Nicaragua, including the Corn (Maiz) Islands.

4.16. Nicaragua does not seek to artificially boost the significance of the islands along her mainland coast, as Colombia is doing for her "archipelago" of San Andrés and Providencia. At the same time, Nicaragua does want to provide the Court with an accurate description of the relevant geography. The truth of the matter is that there are numerous islands along the mainland coast of Nicaragua, but only three of them have a significant size: Great and Little Corn Island and Cayo Miskito. Most of the other numerous islands along the coast of Nicaragua are similar in size to the cays and rocks, that Colombia considers to be part of her "archipelago" of San Andrés and Providencia. However, what distinguishes these small islands and rocks along the coast of Nicaragua from the latter features is that they are not scattered far and wide, but, as will be demonstrated further below, they form an integral part of the mainland coast of Nicaragua.

1. Corn Islands

4.17. Big and Little Corn Island, which together constitute the Corn (Maiz) Islands are respectively 12 and 6 square kilometers in size and have a significant population. According to the 2005 census, the islands had a combined population of over 6,600. A 2009 estimate puts this figure around 7,400. During the 1960s and 1970s, fishing became the economic mainstay of the islands, but more recently tourism on the islands has grown considerably, with their many surrounding coral reefs making them a popular destination for scuba diving and

snorkeling. The Corn Islands are approximately 26 nautical miles from the Nicaraguan mainland, but due to numerous small islands, reefs and rocks fringing Nicaragua's mainland, the territorial seas of the mainland and the Corn Islands merge.

4.18. Big and Little Corn Islands are islands in the sense of Article 121 of the 1982 Law of the Sea Convention and are entitled to a continental shelf and exclusive economic zone. Although they are a little smaller than the island of San Andrés, they clearly fall in the same category. Unlike the cays scattered along the banks which make up Colombia's "archipelago", Big and Little Corn Island are not rocks in the sense of Article 121, paragraph 3[154]. Colombia in the *Counter-Memorial*, in indicating the location of various 200-nautical-mile limits, takes the opposite view. Figure 7.1 of the *Counter-Memorial*, which depicts a 200-nautical-mile limit for Nicaragua, ignores Big and Little Corn Island, as well as Cayo Miskito[155]. The outer limit of Nicaragua taking into account the baselines of Nicaragua established in accordance with the relevant provisions of the 1982 Law of the Sea Convention is depicted in Figure 4-5.

4.19. The significance of Big and Little Corn Island entails the question of what effect the maritime entitlement they potentially generate could have for the delimitation between Nicaragua and Colombia. As will be discussed in Chapter V, the applicable law indicates that relatively minor islands like Big and Little Corn Island and San Andrés and Providencia in a continental shelf delimitation involving the mainland

[154] The status of these cays under the international law applicable to the entitlement of islands to maritime zones is discussed in section V and VI of the *Reply*.
[155] For further information on Cayo Miskito see further below pp. 113 and 115, paras. 4.20 and 4.24.

coasts of Nicaragua and Colombia should not receive any weight. The same conclusion would apply to any delimitation of the exclusive economic zone involving the mainland coast of Nicaragua.

2. Cayo Miskito Island

4.20. The third significant island off the mainland coast of Nicaragua is Cayo Miskito. Cayo Miskito is part of the Miskito Cays and is by far the largest island of that group. It measures approximately 21 square kilometers. The Miskito Cays were declared a protected area in 1991. The Miskito Cays Biological Reserve is one of 78 protected areas in Nicaragua. Miskito Cay is not detached from the mainland coast of Nicaragua since there is a continuous chain of islands stretching from the Nicaraguan mainland coast up to and beyond Miskito Cay. A similar chain of small islands fringing Nicaragua's mainland coast is found in the area between the Rio Grande and Punta de Perlas, known as Cayos Perlas and Cayos Man of War. These various groups constitute a part of the mainland coastline of Nicaragua. In assessing the delimitation between Nicaragua and Colombia they have to be treated as an integral part of the mainland coast of Nicaragua.

4.21. The distinction between islands fringing a mainland coast and isolated offshore islands is well known in the jurisprudence of the Court and arbitral tribunals. In the recent Judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, the Court observed that:

> "in one maritime delimitation arbitration, an international tribunal placed base points lying on the low water line of certain fringe islands considered to constitute part of the very coastline of one of the parties (*Award of the*

> *Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), 17 December 1999, RIAA,* Vol. XXII (2001), pp. 367-368, paras. 139-146). However, Serpents' Island, lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting "the coast" of Ukraine."[156]

4.22. The *Award of the Arbitral Tribunal in the Second Stage* of the Proceedings between *Eritrea and Yemen (Maritime Delimitation)*, to which the Court referred in the Judgment in the case concerning *Maritime Delimitation in the Black Sea*, observes in respect of the Dahlak islands of Eritrea:

> "This tightly knit group of islands and islets, or "carpet" of islands and islets as Eritrea preferred to call it, of which the larger islands have a considerable population, is a typical example of a group of islands that forms an integral part of the general coastal configuration. It seems in practice always to have been treated as such. It follows that the waters inside the island system will be internal or national waters and that the baseline of the territorial sea will be found somewhere at the external fringe of the island system"[157] .

4.23. The Tribunal's treatment of the Dahlak islands can be distinguished from its findings on Jabal al-Tayr and the Zubayr Group of Yemen:

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[156] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *I.C.J., Judgment of 3 February 2009,* p. 45, para. 149.

[157] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), 17 December 1999, ILR,* Vol. 119, (2002), p. 459, para. 139.

> "Yemen employed both the small single island of al-Tayr and the group of islands called al-Zubayr as controlling base points, so that the Yemen-claimed median line boundary is "median" only in the area of sea west of these islands. These islands do not constitute a part of Yemen's mainland coast. Moreover, their barren and inhospitable nature and their position well out to sea, which have already been described in the Award on Sovereignty, mean that they should not be taken into consideration in computing the boundary line between Yemen and Eritrea."[158]

4.24. The preceding analysis indicates that the *Counter-Memorial* does not characterize the islands and cays off Nicaragua's mainland coast properly. The features over which Colombia claims sovereignty are located over 300 nautical miles from her mainland but this is not the case with the features under uncontested sovereignty of Nicaragua. All these islands and cays are fringing the mainland coast of Nicaragua. The jurisprudence indicates that such islands are an integral part of the mainland coast. The Corn Islands and Cayo Miskito are in all other respects comparable to the islands of San Andrés and Providencia. In fact, the sum of the land areas of these three islands is roughly equal to the sum of the land area of San Andrés and Providencia/Santa Catalina.

IV. The Special Case of the Submerged Bank of Quitasueño

4.25. The most egregious claim by Colombia with respect to the physical aspects and legal consequences of the features she claims off the

[158] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), 17 December 1999, ILR,* Vol. 119, (2002), p. 461, para. 147.

mainland coast of Nicaragua is that regarding the bank of Quitasueño (see Figure 4-6). With the exception of a survey made by the Colombian navy last year, in 2008, all the information available for nearly two hundred years indicates that this feature is a bank with no rocks or cays emerging at high tide. The emphasis Colombia makes in converting this bank into a cay and then claiming sovereignty over it is because its location nearer to the Nicaraguan mainland coast makes it most attractive. For this reason, this section will devote a more complete analysis to this feature in order to evince the spuriousness of Colombia's claims.

4.26. The *Counter-Memorial* goes to great length to show that there are islands that have entitlement to a continental shelf and exclusive economic zone on the submerged bank of Quitasueño[159]. An analysis of the material which has been presented by Colombia points in an altogether different direction. The surveys carried out by the United Kingdom in the first half of the nineteenth century and by Colombia in 1937 both showed that there were no islands on the bank of Quitasueño. This same conclusion follows from the nautical charts of Colombia covering the area of Quitasueño. This conclusion also follows from the practice of the United States in her dealings with Colombia and others over the bank of Quitasueño. Nonetheless, the *Counter-Memorial*, by manipulating the available information, tries to create the impression that there always has been a "Cay of Quitasueño" over which Colombia has exercised sovereignty.[160] The *Reply* will deal with these three issues in the following sections and draw the pertinent conclusions from that analysis. In brief, the main

[159] CCM, Vol. I, pp. 348-349, paras. 8.21-8.23.
[160] *Ibid*, pp. 91-147, paras. 3.24-3.156.

conclusion is that Quitasueño is a submerged bank located on the continental shelf and within the exclusive economic zone of Nicaragua and should be treated as part of these areas.

A. SURVEYS OF THE BANK OF QUITASUEÑO

4.27. A first detailed survey of the bank of Quitasueño was carried out in the 1830s by Captain Richard Owen of the Royal Navy. Before that time this part of the western Caribbean had already been surveyed by Spain. The *Counter-Memorial* of Colombia produces two documents relating to those survey activities of Spain.[161] Neither document provides any information on the bank of Quitasueño. The 1820 Sailing Directions of the Spanish Navy indicate that they were only able to provide detailed information on Bajo Nuevo:

> "Of all the other shoals and islands drawn on the chart, we are only able to provide detailed information on Bajo Nuevo, given that, although those of Serranilla, Serrana and Roncador were recognized and located, we have no additional data other than their situation; and although their positions have been rectified on the chart, we include the data on them for further information for sailors."[162]

4.28. The detailed survey of the bank of Quitasueño carried out in the 1830s by Captain Richard Owen of the Royal Navy did not find any cays on the bank.[163] The survey does observe that one part of the reef "appeared to be accumulating different substances so as to render it probable that a cay will be formed there at no very remote period".

[161] CCM, Vol. II-A, pp. 123-124 and pp. 615-617, Annex 23 and 172.
[162] *Ibid*, p. 616, Annex 172.
[163] NR, Vol. II, Annex 12.

The 1861 edition of the West India Pilot (Vol. I) published by the British Admiralty contains the same information on Quitasueño[164].

4.29. A further detailed survey of the bank of Quitasueño was carried out by the Colombian authorities in 1937. A report of that survey is contained in Annex 120 of the *Counter-Memorial*. The English translation of the report included in Annex 120 does not reproduce the information on the bank of Quitasueño in its entirety. The original Spanish text of the report is, however, very explicit, as it observes:

> "QUITASUEÑO.- No existe el cayo de Quitasueño. Es apenas un bajo muy peligroso para la navegación […]

Or translated in English:

> QUITASUEÑO.- The cay of Quitasueño does not exist. It hardly is a shoal, which is very dangerous to navigation."

4.30. The Colombian report further notes:

> "In the northern extremity of the reef of this extensive shoal, above the rock, is the artificial base of armored concrete [of the light erected by the United States], which is the only thing which emerges from the waters in the entire bank of Quitasueño".[165]

4.31. Finally, the report observes that:

> "There is no guano or eggs in Quitasueño because there is no firm land…".[166]

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[164] NR, Vol. II, Annex 13.
[165] This is also indicated by two photographs of the light on p. 6 of report (see NR, Vol. II, Annex 14). The caption of these photographs reads: "the concrete base is the only part of the bank which emerges from the waters".
[166] NR, Vol. II, Annex 14.

4.32. The General Maritime Directorate of the Colombian Navy has published four large scale charts of the bank of Quitasueño:

COL 215	Cayo Quitasueño (N)	1:25,000
COL 416	Banco Quitasueño	1:100,000
COL 630	Banco Quitasueño (S)	1:50,000
COL 631	Banco Quitasueño (N)	1:50,000

4.33. These charts are in conformity with the findings of the XIX century British and 1937 Colombian surveys of the bank of Quitasueño. They do not indicate the presence of any island on the bank of Quitasueño.

4.34. Notwithstanding this conclusive evidence to the contrary, the *Counter-Memorial* maintains that there always has been a cay on the bank of Quitasueño.[167] The *Counter-Memorial* refers to "[e]ight unnamed cays" and "islands" on Quitasueño.[168] As is apparent from the *Counter-Memorial*, these "islands" where only "discovered" in July 2008, when the Colombian authorities carried out a study of Quitasueño.[169] The technical report of that study is contained in Annex 171 of the *Counter-Memorial*. Although this belated discovery of "islands" on the bank of Quitasueño cannot change the conclusions on the status of Quitasueño as it appears from information and the practice of the Parties spanning almost two centuries[170], it is of interest to note that the technical report contained in Annex 171 of the *Counter-Memorial* tends to confirm that information and practice

[167] See *e.g.* CCM, Vol. I, p. 178, para. 4.58.
[168] See CCM, Vol. I, respectively p. 15, para. 2.5 and p. 348, para. 8.21.
[169] CCM, Vol. II-A, p. 603, Annex 171.
[170] See below Sec. B, pp. 120-122.

rather than the *Counter-Memorial*'s suggestions that there are "islands" on the bank of Quitasueño.

4.35. In fact, the technical report prepared by the Colombian Navy in September 2008 confirms that there are not even small cays on Quitasueño. If anything, this shows the enormity of Colombia's attempt to unjustifiably accord this feature weight in the maritime delimitation with Nicaragua.

B. THE PRACTICE OF THE UNITED STATES IN RESPECT OF THE BANK OF QUITASUEÑO

4.36. The *Counter-Memorial* extensively discusses the 1972 Treaty between the United States and Colombia concerning the status of Quitasueño, Roncador, and Serrana and subsequent agreements in the execution of this Treaty.[171] The first observation with respect to this Treaty is that all the negotiations were careful to avoid any recognition by the United States of sovereignty of Colombia over these features.[172]

4.37. On a number of occasions, the *Counter-Memorial* suggests that the 1972 Treaty and these subsequent agreements were concerned with the "cays of Roncador, Quitasueño and Serrana".[173] A review of the 1972 Treaty and subsequent agreements in respect of fisheries in the area of the banks of Roncador, *Quitasueño* and Serrana shows that the position of the United States to the contrary indicates that she recognized that there were cays on the banks of Roncador and Serrana, but not on the bank of Quitasueño.

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[171] CCM, Vol. I, pp. 174-188, paras. 4.51-4.77.
[172] See NM, Vol. I, pp. 132-136, paras. 2.157-2.166.
[173] See e.g. CCM, Vol. I, p. 181, para. 4.62.

4.38. First, the 1972 Treaty deals separately with Quitasueño on the one hand, and Roncador and Serrana, on the other.[174] Article 2 refers to "fishing in the waters of Quitasueño", whereas Article 3 concerning Roncador and Serrana refers to "fishing in the waters adjacent to these cays". This same distinction between Quitasueño, on the one hand, and Roncador and Serrana on the other, is made in the 1983 Agreement on regulation of fishing rights of nationals and vessels of the United States under the 1972 Treaty.[175] Paragraph 5 of these notes observes:

> "The Parties agree that the adjacent waters to Quita Sueño described in Article 2 [of the 1972 Treaty] cover the area enclosed by coordinates 13 degrees 55 minutes north by 14 degrees 43 minutes north and 80 degrees 55 minutes west by 81 degrees 28 minutes west and the waters adjacent described in Article 3 are the areas within 12 nautical miles of Roncador and Serrana measured from the baselines from which the breadth of the territorial sea is measured."[176]

4.39. All subsequent documents related to the 1983 Agreement, which are included in Annexes 11 to 14 and 15 to 16 of the *Counter-Memorial,* use this area of application, which indicates that on Roncador and

[174] For the text of the 1972 Treaty, see CCM, Vol. II-A, pp. 9-23, Annex 3.
[175] Agreement between Colombia and the United States of America on certain fishing rights in implementation of the Treaty between Colombia and the United States of America of 8 September 1972, concerning the status of Quitasueño, Roncador and Serrana: Diplomatic Note Nº 711 from the Embassy of the United States of America to the Colombian Foreign Ministry, 24 October 1983; and Diplomatic Note Nº DM 01763 from the Colombian Foreign Ministry to the Embassy of the United States of America, 6 December 1983 (reproduced in CCM, Vol. II-A, pp. 45-49, Annex 8).
[176] CCM, Vol. II-A, pp. 45-49, Annex 8.

Serrana there is a low-water line from which to measure this area, but that this is not the case for the submerged bank of Quitasueño.

4.40. Two final examples of the Colombia's apparent embarrassment concerning the facts about Quitasueño emerge from the cartography of Quitasueño. First, although the *Counter-Memorial* makes numerous references to Colombia's own nautical charts, the only nautical chart that is actually included in the *Counter-Memorial*, is Chart 1601, reproduced in figure 9.3. This Chart is at such a small scale that it does not allow any assessment of the situation of Quitasueño. As was demonstrated earlier (paragraphs 4.32 to 4.35), the four large scale Colombian charts of the area of Quitasueño reveal that there are no features on Quitasueño above water at high tide. This latter fact also renders incorrect, if not utterly misleading, the information contained in the legend of figure 2.8 of the *Counter-Memorial* depicting the area of Quitasueño. The caption of figure 2.8 reads "Coastal information sources: Colombian nautical charts: 215, 630 and 631, supplemented with information collected by the Colombian Navy in 2008"[177].

4.41. As these Colombian charts indicate that there is no area above water at high tide, the information collected by the Colombian Navy in 2008 is the only "coastal" information source of this figure.

C. Conclusions on the Status of Quitasueño

4.42. Quitasueño is a submerged bank. This is confirmed by surveys from the United Kingdom in the 1830s and Colombia herself in 1937. This is also confirmed by Colombia's nautical charts. The "discovery" of

[177] CCM. Vol. III Maps, p. 15.

"islands" on the bank of Quitasueño in 2008 cannot change this situation. The date of preparation of the report of the 2008 study of Colombia is telling. It was drawn up in September 2008: only a couple of months before Colombia had to file her *Counter-Memorial*. Apparently, the drafters of the *Counter-Memorial* realized that the materials which were already at their disposal did not advance Colombia's case at all. The belated preparation of the 2008 report does not change the situation. Up to the preparation of the 2008 report, all surveys and nautical charts indicated that there were no islands on the bank of Quitasueño. The applicable law on baselines as discussed in Chapter II Section I indicates that as a consequence there are no features on Quitasueño, that are entitled to a territorial sea, let alone a continental shelf or exclusive economic zone.

4.43. Nicaragua has consistently claimed that the bank of Quitasueño is part of her continental shelf and exclusive economic zone[178]. Colombia cannot at this late stage of the proceedings seek to convert what has always been recognized to be a submerged bank into an "island". Consequently, the area of Quitasueño has to be treated as any other part of the continental shelf.

V. Conclusions

4.44. For the delimitation of the maritime boundaries between Nicaragua and Colombia, Colombia's islands and cays do not have a role to play in view of the broader geographical framework involving mainland coasts as described in Chapter V of the *Reply*. These islands and cays do not constitute a single coastal front and all the individual features

[178] NM, Vol. I, p. 146, para. 2.187 and CCM, Vol. I, pp. 30-32, paras. 2.25-2.29.

have to be assessed separately in the light of the applicable law. The jurisprudence indicates that such features do not block the seaward projection of a much larger mainland coast. In the present case, this implies that the seaward projection of Nicaragua's mainland coast extends up to the outer limit of Nicaragua's maritime zones.

4.45. Apart from San Andrés and Providencia, the other features included in Colombia's "archipelago" do not have even a potential continental shelf or exclusive economic zone entitlement. They are rocks in the sense of paragraph 3 of Article 121 of the 1982 Law of the Sea Convention, which, as is recognized by the *Counter-Memorial*, constitutes customary international law. The interpretation of Article 121(3) of the 1982 Law of the Sea Convention Colombia herself has provided inescapably leads to this conclusion.

4.46. The *Counter-Memorial* does not characterize the islands and cays off Nicaragua's mainland coast properly. These islands and cays are islands fringing the mainland coast of Nicaragua. The jurisprudence indicates that such islands are an integral part of the mainland coast.

4.47. The *Counter-Memorial* repeatedly misrepresents the facts to create the impression that the "archipelago" is much more significant than it actually is. A comparison with other information and Colombian nautical charts exposes these attempts and confirms the true nature of these features. The *Counter-Memorial*'s misrepresentation of the facts is particularly egregious in the case of the bank of Quitasueño. Colombia's various attempts to suggest that there are islands on the bank are not borne out by the evidence. Quitasueño is only a submerged bank.

CHAPTER V

ENCLAVING ISLANDS AND CAYS

I. Introduction

5.1. Nicaragua's request has been limited in this *Reply* to a continental shelf delimitation since this is the only area where the entitlements of the Parties emanating from their mainland coasts meet and overlap and has need of a delimitation. Chapter VI below will deal with the Colombian proposition that the delimitation should only involve the maritime features of both Parties and not their mainland coasts and that full effect should be given in the delimitation to all the features over which Colombia claims sovereignty, without any attention given either to Nicaragua's mainland coast or her own.

5.2. The present chapter will deal with the treatment of the maritime features over which Colombia claims sovereignty and have the potential for generating shelf rights in the delimitation of the maritime boundary between the two Parties. If, as will be demonstrated in this chapter, the islands of San Andrés and Providencia/Santa Catalina with potential entitlements beyond a territorial sea should be limited within a 12 nautical-mile radius, then *a fortiori* the even more minor features should be enclaved within an even more restricted area.

II. Islands and Rocks

5.3. Chapter IV demonstrated that of all the features claimed by Colombia, the only ones that meet the criteria to potentially generate entitlements to other areas beyond a territorial sea are the three islands identified

by name in the 1928 Treaty; that is, the islands of San Andrés, Providencia and its small appendix, Santa Catalina. These are the only features of those over which Colombia claims sovereignty that could in principle fill the generally accepted criteria to potentially generate rights to a continental shelf of their own or an exclusive economic zone. The rest of the cays at issue are "rocks" under Article 121(3) of the 1982 Law of the Sea Convention with no human habitation or economic life of their own.

5.4. The islands of San Andrés and Providencia are not only sited on the natural prolongation of the mainland territory of Nicaragua that reaches beyond 300 nautical miles in this area, but are also well within her 200-nautical-mile exclusive economic zone based on the distance principle.

5.5. It is clear from the Judgments of the Court and the awards of arbitration tribunals that islands such as these have never (not sometimes, but emphatically never) been given full effect in a delimitation involving an extensive mainland coast.

5.6. Substantial island states, like Malta, have been attributed curtailed maritime areas, and densely populated largely autonomous islands like the Channel Islands have been enclaved. Smaller islands have been either ignored (e.g. Fifla) or attributed very limited effects. Usually this reduced effect given to these smaller islands and features (like Seal Island in the *Gulf of Maine* case) has been with the intention of correcting an inadequate result and not based on any intrinsic need to attribute maritime areas of their own to these features.

III. Maritime Areas Involved

5.7. This is a case in which, due to the extensive physical shelf of one of the parties (Nicaragua), the boundary to be delimited would lie beyond the maximum exclusive economic zone entitlement of 200 nautical miles. This circumstance does not affect the legal logic that has been used in previous cases in which similar circumstances have occurred within a smaller delimitation area.

5.8. Nicaragua's request is for a delimitation of the continental shelves of both Parties since this is the only area generated by the mainland territory of the Parties where their entitlements meet and overlap. Because the delimitation area lies more than 200 nautical miles from Nicaragua's baselines along its mainland coast, there is no need, in Nicaragua's view, for delimitation of a boundary separating the Parties' respective exclusive economic zones. The only way that an exclusive economic zone delimitation would be required in this case is if the Court considered that the small islands off Nicaragua's coast, San Andrés and Providencia (including Santa Catalina), should be entitled to maritime areas beyond the 12 nautical-mile radius that legal logic and equity would accord them. If they are limited to an area equivalent to their maximum territorial sea allowed by customary international law as reflected in the 1982 Law of the Sea Convention, then there is no need of any other delimitation between the maritime areas of the Parties. Figure 5-1 shows the result of allocating 12-nautical-mile territorial sea enclaves to the main islands of San Andrés and Providencia/Santa Catalina.

5.9. It could be argued that the question of an enclave itself involves a discussion of a delimitation of the exclusive economic zone and other areas between these islands and the mainland coast of Nicaragua. The reality is that if these islands are enclaved, any discussion on delimitation of continental shelf areas or exclusive economic zones of these islands would be academic. The precedent and, more than precedent, the legal logic used by the Court of Arbitration in the *Channel Islands* case -which has never been questioned- resulted in the enclavement of these very important islands. There is no reason whatsoever for this case to be different.

IV. Enclavement Is Necessary to Obtain an Equitable Result

5.10. According to Colombia, "Nicaragua's attempt to enclave Colombia's islands has no legal support"[179]. This emphatic assertion must be discussed in context:

- the whole area to be delimitated must be taken into consideration and not only the area between the islands of San Andrés and Providencia and Nicaragua's undisputed islands located nearer the mainland coast[180];
- contrary to Colombia's assertions[181], the primary features to be taken into account are the respective mainland coasts of the Parties[182];
- in any case, the so called "San Andrés Archipelago" is certainly not as extensive as Colombia claims,[183] and it does not constitute a

[179] CCM, Vol. I, Sec. D. (see pp. 326-336, paras. 7.35-7.57).
[180] See above, Sec. III, pp. 127-128, paras. 5.7-5.9.
[181] See CCM, Vol. I, p. 327, para. 7.37.
[182] See above, Chap. II. Sec. I. pp. 65-66, paras. 2.7-2.10.
[183] See above, pp. 32-55, paras. 1.29-1.97. See also CCM, Vol. I, p. 343, para. 8.8.

"defensive wall"[184] built between herself and Nicaragua's rights over maritime areas adjacent to her mainland coast.

5.11. Colombia puts forward two main arguments in order to rebut Nicaragua's position that all Colombian islands situated on Nicaragua's continental shelf should be enclaved. First, she asserts that "the Colombian islands still possess coasts and thus constitute, both individually and collectively, coastal fronts."[185] Second, and "[m]ore importantly, however, under international law a State's entitlement to maritime areas – whether continental shelf or exclusive economic zone – is based on the projection of its coast out to a distance of 200 nautical miles from the State's baselines."[186]

5.12. In respect to the first argument, there can, indeed be no doubt that islands possess coasts and can constitute coastal fronts but their effect is, in principle, individual, not collective. In any case, this is not the present issue: that islands generate entitlements to maritime areas is one thing, but the extension of the maritime area they are entitled to in a delimitation is quite another. The fact that islands "constitute … coastal fronts" and generate maritime areas, does not mean that in a delimitation the coastal fronts of these islands should supersede those of the much larger coastal front of the mainland involved in such a delimitation or be attributed an inequitable portion of those areas.

5.13. The second assertion is also not correct with respect to the limits it indicates for continental shelf entitlement. The continental shelf entitlement is not limited by law or by nature to 200 nautical miles but

[184] See also, Chap. VI, pp. 145-156, paras. 6.9-6.24.
[185] CCM, Vol. I, p. 329, para. 7.39.
[186] *Ibid*.

up to the limits reflected in Article 76 of 1982 Law of the Sea Convention.

5.14. Without going into this question in detail, since this will be dealt extensively in Chapter VI below, the elementary fact must be recalled that certain maritime features, in particular "rocks which cannot sustain human habitation or economic life of their own … have no exclusive economic zone or continental shelf", by virtue of Article 121(3) of 1982 Law of the Sea Convention. In the present case, it must be noted that the *Counter-Memorial* completely ignores this provision. This is remarkable on two counts. First, the *Counter-Memorial* recognizes that "the relevant provisions of the Convention dealing with a coastal State's baselines and its entitlement to maritime areas […] reflect well established principles of customary international law".[187] The *Counter-Memorial* does not make an exception for Article 121(3) of the 1982 Law of the Sea Convention.

5.15. Second, the fact that the *Counter-Memorial* ignores paragraph 3 of Article 121 of the 1982 Law of the Sea Convention becomes even more perplexing in view of Colombia's observation that "[t]here is no minimum size for an island provided it meets the criteria stated on Article 121(1) of being 'naturally formed' and 'above water at high tide'"[188]. Colombia is, of course, well aware that size does matter in establishing whether or not a feature qualifies as a "rock" under Article 121(3) of the 1982 Law of the Sea Convention. On 8 December 1982, at the closing session of the Third United Nations Conference on the Law of the Sea, the delegation of Colombia made

[187] CCM, Vol. I, p. 306, para. 4.
[188] *Ibid*, p. 349, para. 8.22.

the following statement on Article 121 of the 1982 Law of the Sea Convention:

> "Article 121 defines what constitutes an island and the difference between islands and rocks. Islands have a right to a territorial sea, a continental shelf and an exclusive economic zone. Rocks are entitled only to a territorial sea since they cannot sustain human habitation or economic life of their own. This is logical. It is a "package" which results from the view that these maritime spaces have been granted to the benefit of the inhabitants, with an economic concept. Any other interpretation would distort the concept."[189]

5.16. However, it is exactly such a distortion of the applicable law Colombia is now seeking to her own advantage. As will be demonstrated further in the present chapter, the *Counter-Memorial* is not only trying to get a recognition that certain features, which under Colombia's statement at the closing session of the Third Conference are rocks, should have an exclusive economic zone and continental shelf but is also seeking to give these features full weight in the delimitation of these zones between Nicaragua and Colombia. The *Counter-Memorial* does not even stop at that, but also seeks to accord this treatment to the submerged bank of Quitasueño[190].

5.17. As shown in Chapter IV above, there can be no doubt that the cays located on Roncador and Bajo Nuevo as well as the other small features claimed by Colombia in the area are at most rocks in the sense of Article 121(3) of the 1982 Law of the Sea Convention. It

[189] Third United Nations Conference on the Law of the Sea; *Official Records*, Vol. XVII, p. 83, para. 251.
[190] CCM, Vol. I, p. 342, para. 8.7; pp. 348-349, paras. 8.21-8.23.

follows that with the only exceptions of the islands of San Andrés, Providencia and its contiguous appendix, Santa Catalina, all other maritime features in the area claimed by Colombia – even supposing the Colombian claims to sovereignty over these features are founded – "have no exclusive economic zone or continental shelf"[191]. Figure 5-2 shows the results of awarding 3-nautical-mile enclaves to the minor cays and rocks, in addition to the 12-nautical-mile enclaves allocated to the main islands of San Andrés and Providencia.

V. Channel Islands Arbitration

5.18. The treatment of the Channel Islands in the *Anglo-French arbitration* provides the classic example that international courts and tribunals hold that offshore islands do not block the frontal projection of a longer opposite mainland coast. The *Counter-Memorial* is quite aware of this and while not daring to question the reasoning behind that decision, attempts to differentiate the situation of the Channel Islands with that of the three islands under consideration.

5.19. In certain respects the situations are not exactly comparable. The Channel Islands are an autonomous political entity which is not an integral part of the United Kingdom; they have a substantial population; a long historical record as an international actor; and an economic activity that possibly even surpasses that of either of the Parties to this case and certainly that of Nicaragua. If these were the only points of comparison, then it would be very difficult to sustain that the "San Andrés Archipelago" should receive even the enclave of 12 nautical miles that was accorded to the Channel Islands. In fact, in

[191] Art. 121(3) of the UNCLOS.

the *Channel Islands arbitration*, France was requesting that the islands be enclaved within 6 nautical miles, and the Court of Arbitration took into consideration some of the relevant aspects of the Channel Islands listed above in arriving at its decision.

5.20. However the reasoning of the distinguished arbitral tribunal was not based on these special characteristics of the *Channel Islands* but rather on their location in the area of delimitation. The Colombian *Counter-Memorial* accepts that geographical reality matters and affirms:

> "It was because the Channel Islands were situated 'on the wrong side' of the mid-channel median line just off the French mainland coast that they were enclaved"[192].

5.21. What Colombia tries to brush aside is that the situation of the three islands in the present case is entirely similar. As stated in the Nicaraguan *Memorial,* this Archipelago "is not only 'on the wrong side' of the median line but wholly detached from Colombia."[193] The islands of this Archipelago are located slightly under 400 nautical miles from the Colombian mainland and around 100 nautical miles from the Nicaraguan mainland. Chapter III above has demonstrated that the continental shelf of Colombia, allowance made for all the possibilities envisioned in Article 76 of the 1982 Law of the Sea Convention, only extends up to maximum distance of 200 nautical miles from her mainland coast whilst the Nicaraguan continental shelf reaches well beyond 350 nautical miles from her mainland coast. This

[192] CCM. Vol. I, p. 332, para. 7.46.
[193] NM, Vol. I, pp. 242-243, para. 3.105.

is simply a statement of a fact, a physical fact that is perfectly demonstrable and is in the public domain.

5.22. Applying to the present situation this well-established precedent that islands located "on the wrong side" of the median line will be enclaved, the result would be that the "San Andrés Archipelago" is located not just 'on the wrong side' of the line dividing the continental shelf of the two Parties, but far inside the wrong side of that line. Furthermore, these islands are not only located on the wrong side of the dividing line, but on an entirely separate geological formation -the continental shelf of Nicaragua- which is a separate and distinct formation from that of the Colombian continental shelf.

5.23. Colombia also attempts to distinguish the situation of the Channel Islands with that of the three islands by stating that "[t]he present case is entirely different. The mainland coasts of the Parties are more than 400 nautical miles apart..."[194] Yes, it is undeniable that the distances involved are different. But this does not negate the physical reality that the natural prolongation of the mainland territory of Nicaragua reaches well beyond 200 nautical miles, and meets the much less massive prolongation of Colombia. The mainland coasts of the United Kingdom and France are closer to each other, to be sure, but it was not due to their relative closeness that a delimitation became necessary but because these shelves met and overlapped within the distances and in the way recognized at the time by customary international law. This is no different from the present case.

[194] CCM, Vol. I, p. 332, para. 7.47.

5.24. If the question of distance were to have any significance it would be to emphasize the need to enclave the islands of the "San Andrés Archipelago". It is a simple mathematical reality that the longer the distance from the coast of an island or other such feature, the greater the impact it will have on a delimitation if it is given any effect beyond an enclave. If Colombia's views were to be accepted, France would have been excluded from a significant part of the English Channel (Figure 5-3). Had the Court of Arbitration taken into account the proposition of Colombia's *Counter-Memorial* that islands block the frontal coastal projection of mainland coast, it could never have effected the delimitation it actually did. In the present case, and due precisely to the greater distance, the effect would be to totally exclude Nicaragua from close to 90% of her continental shelf areas. In fact, the blockage would be so complete as to only leave to Nicaragua what would amount to a beach front.

5.25. The security questions raised by the proximity of the Channel Islands to the French coast were also an issue. This situation also has similarities with that of the "San Andrés Archipelago". The fact that these three islands lie much closer to the Nicaraguan mainland than to that of the Colombian mainland militates in favour of their being enclaved since any activities or regulations around them could affect the traffic to and from Nicaraguan ports. The effects of this proximity to the Nicaraguan ports, that is, the Nicaraguan mainland, have been pointed out and taken into consideration in international organizations[195].

[195] See e.g. Report to the Maritime Safety Committee, of the Sub-Committee on Safety of Navigation, 51st session, Agenda item 19, IMO Docs. NAV 51/19 of 4 July

VI. Other Precedents

5.26. The precedents invoked by Colombia of cases in which islands have received a more generous treatment than an enclave[196] do not help her:

1. In *Jan Mayen*, the main coast of Norway was irrelevant (contrary to what is the case here for the coasts of both countries) and the Court accepted the position of the Parties[197] to provisionally draw the median line between Greenland and Jan Mayen taking into consideration the whole coast of the latter; however, the Court considered that "[t]he disparity between the lengths of coasts thus constitutes a special circumstance" and, "in view of the great disparity of the lengths of the coasts, that the application of the median line leads to manifestly inequitable results. It follows that, in the light of the disparity of coastal lengths, the median line should be adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan Mayen"[198]. To a much greater degree, the same holds in the present case if one compares the length of the coasts of Nicaragua on the one hand and of the islands claimed by Colombia on the other hand. Two other considerations are relevant. The distance involved between Greenland and Jan Mayen implied that the dispute in reality centered around an area beyond 150 nautical miles from the

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2005, para. 3.31: "The Sub-Committee noted that the proposed TSS (Traffic Separation Schemes) for the port of San Andrés Island was close to Nicaragua and as such Colombia should have consulted Nicaragua when submitting this proposal as it could affect the traffic to and from Nicaraguan ports." (NR, Vol. II, Annex 15).

[196] See CCM, Vol. I, p. 329, para. 7.40.

[197] See *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 47 and 79, paras. 18-20.

[198] *Ibid,* pp. 68-69, paras. 68-69.

mainland coast of Greenland out of a total maximum claim to a 200-nautical-mile exclusive economic zone. In the present case, the claims of Colombia (which will be analyzed below in Chapter VI) would only leave for Nicaragua an area of less than 70 nautical miles from her mainland coast out of a claim that reaches beyond a distance of 300 nautical miles. Furthermore, the *Jan Mayen* case substantially hinged around a very special circumstance: that the fundamental resource in the area was the capelin fisheries which the Court attempted to distribute in the most equitable fashion. In the present case, there are no resources of this nature pointing to anything like the need for this type of solution. Finally, in spite of these special considerations Jan Mayen was awarded only partial effects.

2. In *Cameroon v. Nigeria*, the issue of the very large Bioko Island was different; as the Court noted, "Bioko Island is subject to the sovereignty of Equatorial Guinea, a State which is not a party to the proceedings. Consequently the effect of Bioko Island on the seaward projection of the Cameroonian coastal front is an issue between Cameroon and Equatorial Guinea and not between Cameroon and Nigeria, and is not relevant to the issue of delimitation before the Court"[199]. That situation has nothing in common with the present case where no third State's island is concerned and the "San Andrés Archipelago" clearly faces part – but only part– of the coast of Nicaragua's mainland relevant for the delimitation requested of the Court.

[199] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), I.C.J. Reports 2002*, p. 446, para. 299.

VII. Conclusions

5.27. From the above explanations, the following points are clear:

- Chapter III above leaves no doubt that physically and legally the continental shelves of Nicaragua and Colombia meet and overlap in an area roughly more than 300 nautical miles from the Nicaraguan mainland coast and around 100 nautical miles from the Colombian mainland coast.

- The islands and other maritime features claimed by Colombia are located under 150 nautical miles from the Nicaraguan mainland coast and over 300 nautical miles from the Colombian coast.

- The islands and other maritime features claimed by Colombia are located on the continental shelf of Nicaragua and approximately 200 nautical miles distant from the area where the continental shelf of Colombia terminates.

- If any of these features are found to be Colombian they are under any definition located on the wrong side of the delimitation line and wholly detached geographically from Colombia.

- The only way of obtaining an equitable delimitation in these circumstances is to enclave these three small islands, San Andrés, Providencia and its appendix, Santa Catalina, within a 12-nautical-mile radius. Any other even more minor features

that might be attributed to Colombia as part of the island group of San Andrés should, *a fortiori*, be enclaved within a more restricted area.

CHAPTER VI

COLOMBIA'S DELIMITATION CLAIM

I. Introduction

6.1. Chapter III demonstrated that, in light of the applicable law and the geography of the delimitation area, the present case concerns a continental shelf delimitation involving the opposite mainland coasts of Nicaragua and Colombia. Chapter IV described the physical and legal aspects of the maritime features located on the continental shelf of Nicaragua, and Chapter V explained that in accordance with the applicable law these small islands and other minor features should be enclaved and not be given any weight in determining the continental shelf boundaries between the mainland coasts.

6.2. Part III of the Colombian *Counter-Memorial* takes a totally different approach which completely ignores the area where the Parties' continental shelf entitlements overlap, and where a delimitation of the continental shelf boundary is therefore required, and instead requests a delimitation in an entirely separate location, which is located within the area encompassed by Nicaragua's 200-nautical-mile exclusive economic zone entitlement. Even within this area appurtenant to Nicaragua's mainland coast, Colombia attempts to further limit the maritime delimitation to the narrow band of maritime space located between her claimed insular possessions and the Nicaraguan islands fringing the mainland coast. In this manner, Colombia seeks to base a maritime delimitation, within Nicaragua's 200-nautical-mile exclusive economic zone entitlement, entirely on minor geographic features – small islands, cays and rocks– without taking into account the

mainland coast of either Party, excluding entirely from the delimitation process the dominant geographic feature in that area: Nicaragua's 450 kilometer mainland coast.

6.3. The purpose of this Chapter is not to offer an alternative position to the delimitation claimed by Colombia in her *Counter-Memorial* since Nicaragua's request is limited to a continental shelf delimitation as is explained in Chapter III above. The purpose of this Chapter is to demonstrate that the approach of the *Counter-Memorial* to maritime delimitation, even on its own terms, is fundamentally flawed. This analysis will also demonstrate that even a delimitation of the maritime areas restricted to the 200-nautical-mile exclusive economic zone of Nicaragua and that would not encompass the total area of continental shelf described in Chapter III, would also result in a delimitation that would enclave the islands claimed by Colombia.

6.4. In this respect, three issues are of critical importance. First, as indicated above, Colombia completely ignores the only area where a maritime delimitation is truly required: the area where Nicaragua's and Colombia's continental shelves overlap. Colombia is wrong to blithely dismiss the need for a delimitation in this area based on its distance of more than 200 nautical miles from Nicaragua's mainland coast, because Nicaragua's entitlement is not based on the distance principle but on the natural prolongation of her land territory and the principles of customary international law reflected in Article 76 of the 1982 Law of the Sea Convention relating to continental shelf entitlements beyond 200 nautical miles. The *Counter-Memorial* completely ignores the law as well as the geographical facts in this regard.

6.5. Second, the *Counter-Memorial* submits, contrary to both law and common sense, that only the area between the islands fringing the mainland coast of Nicaragua and the islands of San Andrés and Providencia and other minor features claimed by Colombia is in need of a maritime delimitation. By confining the delimitation area in this manner, Colombia seeks to erase Nicaragua's 450 kilometre-long mainland coast from the map. Deprived of its very existence, Nicaragua's mainland coast is thereby prevented from generating maritime entitlements not only to a continental shelf extending to the outer limit of the continental margin, as provided in Article 76 but also to a 200-nautical-mile exclusive economic zone, as provided in Article 57 of the 1982 Law of the Sea Convention. Compounding her peculiar contention that the principal mainland coast should be ignored, Colombia insists that the islands of San Andrés and Providencia and the small cays on a number of isolated banks, and the submerged bank of Quitasueño, form an archipelago that completely blocks the seaward projection of Nicaragua's maritime entitlement which, according to Colombia, is only generated by a few fringing islands and not the mainland coast.[200] Unsurprisingly, Colombia fails to present any credible argument why her small insular features, which in her view form an archipelago, should block Nicaragua from the maritime zones to the east of them.[201]

6.6. From the figures which Colombia has included in the *Counter-Memorial*, it is evident that Colombia's "archipelago" consists mainly

[200] CCM, Vol. I, Chap. 2, pp.13-74.
[201] *Ibid*, pp. 395-416, paras. 9.38-9.92.

of water and not coasts.[202] Colombia fails to explain how these open expanses of sea between isolated dots on the map, which Colombia claims as her "archipelago", can completely cut-off Nicaragua's maritime projection from her 450 kilometers mainland coast out to the 200-nautical-mile limit of her exclusive economic zone, and out to the limit of her continental shelf at the outer edge of the continental margin, which extends beyond 200 nautical miles from her mainland coast.

6.7. The third fundamental flaw of the *Counter-Memorial*'s approach is its submission that, even within this limited setting, the starting and ending point of this delimitation has to be a provisional equidistance line between the small insular features of Nicaragua and Colombia. As will be demonstrated below, this is based on a mistaken reading of the jurisprudence of the Court and arbitral tribunals on the establishment of a provisional delimitation line. In the first place, Colombia errs by ignoring Nicaragua's mainland coast in the construction of her provisional equidistance line. By opposing San Andrés and Providencia only against Nicaragua's similarly small, fringing islands – instead of her long mainland coast – Colombia enables herself to argue for a seemingly equal treatment of her and Nicaragua's geographical features. Colombia then compounds the error by giving *full* weight in the construction of the provisional equidistance line not only to San Andrés and Providencia, but also to the even more minor features that she uses to develop the direction of the line. As will be demonstrated below in Section V, the Court's jurisprudence indicates that when appropriate to establish a provisional delimitation line, small islands and uninhabited cays and rocks do not receive the same

[202] See *e.g.* CCM, Vol. III Maps, pp. 25-39, 45-57, Figures 2.13-2.20, 2.23-2.29.

treatment as mainland coasts, and are generally ignored or at most given very little weight in the construction of the provisional line. As demonstrated in Chapter V, and as further discussed in Section VI of this chapter, enclaving all of Colombia's islands lying on Nicaragua's continental margin is the most equitable solution in the present case.

6.8. It should also be noted that much of the maritime area falling on the Colombian side of her putative equidistance line actually lies *west* of the 82° meridian that, at least until now, Colombia herself has always (wrongly) claimed constitutes her maritime boundary with Nicaragua and, even as of this writing, Colombia still maintains as the boundary by force and the threat of force.[203] In other words, with her newly fashioned "median line", Colombia seeks to acquire more maritime space than she has ever claimed before, including in her earlier pleadings before this Court. As will be discussed in Chapter VII, there is no legal or equitable basis for Colombia's new position.

II. The Island of San Andrés and other Minor Insular Features do not Block the Maritime Projection of Nicaragua's Coast

6.9. The small and far apart features that Colombia wants to turn into an extensive archipelago do not form a single unit blocking Nicaragua's entitlement to an exclusive economic zone up to 200 nautical miles from her mainland coast or a continental shelf extending beyond 200 nautical miles. This is clearly visible from the figures Colombia has herself included in the *Counter-Memorial*. Figure 9.2 from the *Counter-Memorial* shows that there simply is no coastal front to speak

[203] See NR, Vol. II, Annexes: 7, 8, 9 and 11. See above Intro. pp. 7, 16 and 18-19, paras. 18, 35 and 41-42.

of opposite the Nicaraguan mainland coast in the area of Colombia's claimed maritime features. Figure 6-1 of this *Reply* shows the frontal projection of Nicaragua up to the outer limits of her exclusive economic zone and indicates the actual coastal front of the maritime features concerned. Figure 6-1 does not include any feature on the bank of Quitasueño since, as demonstrated above in Chapter IV, there is no coastline on any part of that submerged bank. Figure 6-1 shows that the frontal projection of the maritime zones of Nicaragua extending from her coast is, except for some minute sectors, not interrupted by the coastal front Colombia presents in her *Counter-Memorial* before this projection reaches the outer limits of Nicaragua's exclusive economic zone.

6.10. The *Counter-Memorial* denies that the delimitation area includes any area to the east of San Andrés and Providencia[204]. Colombia denies that Nicaragua's exclusive economic zone extends up to the 200 nautical miles recognized by International Law. Instead, Colombia maintains that only the area between Nicaragua's coastal islands and the features of her "archipelago" are relevant. The effect of this argument is to allow the so-called "archipelago" to serve as an impenetrable wall blocking the seaward projection of Nicaragua's mainland coastline to some 100 nautical miles offshore, and denying Nicaragua any entitlements east of the Colombian "wall". However, the jurisprudence Colombia invokes is in evident contradiction with this conclusion. Paragraph 7.25 of the *Counter-Memorial* is worth quoting in full:

[204] CCM, Vol. I, pp. 339-379, paras. 8.1-8.94.

> "With respect to the area within which the delimitation is to be carried out by the Court – sometimes referred to as the "relevant area" or, in Nicaragua's case, the "delimitation area" – it is axiomatic that that area is defined by reference to the relevant coasts of the Parties. *For a coast of a party to be a "relevant coast", however, it must be capable of generating maritime rights that overlap with the rights generated by the coast of the other party.* As the Court observed in the *Tunisia-Libya* case – a case which Nicaragua curiously asserts "is the most similar in geographical terms" to the present case:
> 'Nonetheless, for the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court'"[205].

6.11. As the italicized part of paragraph 7.25 of the *Counter-Memorial*, as well as the quotation from the Judgment in the *Tunisia/Libya* case show, the delimitation area is defined by reference to the area of overlapping maritime entitlements. In the present case, this area is defined by the overlapping continental shelf entitlements of Nicaragua and Colombia generated by the natural prolongation of their respective mainland coasts, as is clearly explained and documented in Chapter III above.

6.12. In Colombia's scenario presently dealt with, which ignores the two mainland coasts and the overlapping entitlements that they generate, the only area to be delimited is a narrow band of sea lying between her

[205] CCM, Vol. I, pp. 322-323, para. 7.25. Footnotes omitted; emphasis provided.

claimed island possessions and those of Nicaragua. However, the only thing Colombia achieves with this contrived shrinkage of the delimitation area is to highlight the inequity of the maritime delimitation she is requesting the Court to effect. It should be undisputed that, by virtue of the 1982 Law of the Sea Convention, Nicaragua enjoys an entitlement to an exclusive economic zone extending to the 200-nautical-mile limit measured from the relevant basepoints along her mainland coast (including her fringing islands). Yet Colombia disputes this by requesting that the Court ignore all but the first 100 nautical miles from the coast of Nicaragua (that is, only the half of Nicaragua's 200-nautical-mile exclusive economic zone entitlement lying west of Colombia's impenetrable "wall"), which half Colombia would then divide "evenly" between the Parties. Colombia seeks to convince the Court to automatically attribute the remaining 100 nautical miles of sea to Colombia, on the sole ground that they lie beyond the "wall" of small islands claimed by Colombia. That solution would be grossly inequitable even in a situation where the relevant coasts of the parties were similar in length. In the present case, no such similarity exists. Instead, the Court is faced with the most glaring disproportion ever between the coasts of the Parties before it. Nicaragua's mainland coast facing the delimitation area measures 450 kilometers while the combined coastal length of the features which Colombia claims as her own facing Nicaragua's coast amounts to some 22 kilometers. This results in a ratio of more than 20:1 in Nicaragua's favour between her coasts and Colombia's. Yet, Colombia's methodology would distribute the 200 nautical miles of sea adjacent to Nicaragua's mainland coast (all of which is more than 200 nautical miles from Colombia's mainland coast) in a proportion of 3:1 in Colombia's favor. An equitable solution it is not. Far from it.

6.13. There are many examples in the jurisprudence of the Court and arbitral tribunals which illustrate that small insular features, such as San Andrés and Providencia, do not block the maritime projection of a larger coastal front. For instance, in the *Libya/Malta* case the Court, in contemplating what constituted an equitable solution between the parties before it, took into account the coast of the Italian island of Sicily and the fact that the continental shelf entitlements of Sicily and Libya overlapped to the south of Malta[206]. This finding of the Court implies that the entitlement of Sicily, which lies to the north of Malta, is not blocked by the coast of Malta, but extends beyond Malta. If the proposition of Colombia's *Counter-Memorial* were valid, the Court could never have made this finding as there would only have been overlapping entitlements of Sicily and Malta to the north of Malta and no overlapping continental shelf entitlement of Sicily and Libya.

6.14. The treatment of the Channel Islands in the *Anglo-French arbitration* provides another example where the jurisprudence holds that islands do not block the frontal projection of a longer opposite mainland coast. The *Counter-Memorial* suggests that the treatment of the Channel Islands in the *Anglo-French arbitration* does not have any relevance for enclaving San Andrés and Providencia.[207] This question has been considered in Chapter V above and, thus, for present purposes the following observations suffice. In the *Anglo-French arbitration*, the Court of Arbitration established two continental shelf boundaries. In this regard the Court of Arbitration observed:

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[206] *Continental Shelf (Lybian Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985* pp. 51-53, paras. 71-73.
[207] CCM, Vol. I, pp. 330-333, paras. 7.42-7.48.

> "In the actual circumstances of the Channel Islands region, where the extent of the continental shelf is comparatively modest and the scope for adjusting the equities correspondingly small, the Court considers that the situation demands a twofold solution. First, in order to maintain the appropriate balance between the two States in relation to the continental shelf as riparian States of the Channel with approximately equal coastlines, the Court decides that the primary boundary between them shall be a median line, linking Point D of the agreed eastern segment to Point E of the western agreed segment. In the light of the Court's previous decisions regarding the course of the boundary in the English Channel, this means that throughout the whole length of the Channel comprised within the arbitration area the primary boundary of the continental shelf will be a mid-Channel median line. In delimiting its course in the Channel Islands region, that is between Points D and E, the Channel Islands themselves are to be disregarded, since their continental shelf must be the subject of a second and separate delimitation."[208]

6.15. If the Court of Arbitration had taken into account the proposition of Colombia's *Counter-Memorial* that islands block the frontal coastal projection of mainland coast, it could not have effected the delimitation it actually did. If Colombia's interpretation of the law were valid, France would have been excluded from a significant part of the English Channel. The Court of Arbitration held to the contrary, and established a median line between France and the southern coast of England in an area to the north of (and beyond) the Channel

[208] *Case concerning the Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 20 June 1977. RIAA*, Vol. XVIII, UN, pp. 94-95, para. 201.

Islands. This is illustrated by Figure 6-2, which indicates the location of the mid-Channel median line established by the Court of Arbitration. Figure 6-2 also shows the effects of Colombia's position on coastal projections. Under that view, the frontal projection of the French mainland is blocked by the Channel Islands and their 12-nautical-mile zone. France's coastal projection would not reach up to the middle of the English Channel. As the location of the continental shelf boundary in that area shows, the Court of Arbitration considered, contrary to Colombia's claims, that the seaward projection of the French mainland coast extends beyond the Channel Islands and their 12-nautical-mile zone up to the middle of the Channel.

6.16. For the present proceedings, it is of interest that the Court of Arbitration in the *Anglo-French arbitration* also looked at the situation of the French islands of Saint Pierre and Miquelon, which are near the coast of Canada's Newfoundland. In paragraph 200 of its Award of 30 June 1977 the Court of Arbitration observed:

> "The case of St. Pierre et Miquelon, although it clearly presents some analogies with the present case, also differs from it in important respects. First, that case is not one of islands situated in a channel between the coasts of opposite States, so that no question arises there of a delimitation between States, whose coastlines are in an approximately equal relation to the continental shelf to be delimited. Secondly, *there being nothing to the east of St. Pierre et Miquelon except the open waters of the Atlantic Ocean, there is more scope for*

> *redressing inequities than in the narrow waters of the English Channel.*"[209]

6.17. The Court of Arbitration's observation in respect of the "open waters of the Atlantic Ocean" is of course directly relevant in this setting, where the mainland coast of Colombia (like that of France in the arbitration with Canada) plays no role, and where beyond Colombia's small islands (like St. Pierre and Miquelon) there would be nothing but the open waters of the Caribbean Sea up to the outer limit of Nicaragua's maritime zones.

6.18. The view of the Court of Arbitration in the *Anglo-French arbitration* on the seaward projection of Canada's coast beyond the islands of Saint Pierre and Miquelon (instead of being blocked by their impenetrable "wall") is consistent with that of the Court of Arbitration, which handed down its award in the *Delimitation of Maritime Areas between Canada and France* on 10 June 1992.

6.19. The Court of Arbitration in that case took as a starting point that:

> "The delimitation process begins, as a rule, by identifying what the International Court of Justice has called 'the geographical context of the dispute before the Court, that is to say the general area in which' the 'delimitation which is the subject of the proceedings, has to be effected'" [*Plateau continental (Tunisie/Libye), C.I.J. Recueil 1982,* p. 34, par. 17]".[210]

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[209] Emphasis provided. *Case concerning the Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 20 June 1977. RIAA,* Vol. XVIII, UN, p. 94, para. 200.

[210] *Case concerning Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon) (1992), ILR*, Vol. 95, p. 660, para. 25.

6.20. In identifying the relevant area for the delimitation it was to effect,[211] the Court of Arbitration then observed:

> "But the coastlines that France wants to exclude form the concavity of the Gulf approaches and all of them face the area where the delimitation is required, *generating projections that meet and overlap, either laterally or in opposition*."[212]

6.21. This finding contradicts Colombia's position on the implications of the applicable law for the present proceedings. Colombia submits that there is only a situation of oppositeness between the relevant coast of Nicaragua and Colombia's "archipelago". However, paragraph 30 of the Award of the Court of Arbitration in the *Delimitation of maritime areas between Canada and France* confirms that in a case such as between France and Canada, which in this regard is geographically similar, within the settings of this chapter, to the case between Nicaragua and Colombia, the area of delimitation is not only formed by the maritime area between the two coasts, but that it also extends beyond the small islands concerned.

6.22. The delimitation line adopted in the *Delimitation of Maritime Areas between Canada and France* illustrates the practical effects of the Court of Arbitration's finding in respect of the relevant area for the delimitation. In effecting the delimitation in the area seaward of Saint Pierre and Miquelon, the Court of Arbitration observed:

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[211] *Case concerning Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon) (1992), ILR,* Vol. 95, pp. 660-662, paras. 26-35.
[212] *Ibid,* p. 661, para. 29, (emphasis provided).

"70. In the second sector, towards the south and the southeast the geographical situation is completely different. The French islands have a coastal opening towards the south which is unobstructed by any opposite or laterally aligned Canadian coast. Having such a coastal opening, France is fully entitled to a frontal seaward projection towards the south until it reaches the outer limit of 200 nautical miles, as far as any other segment of the adjacent southern coast of Newfoundland. There is no foundation for claiming that St Pierre and Miquelon frontal projection in this area should end at the 12 mile limit of the territorial sea. On the other hand, such a seaward projection must not be allowed to encroach upon or cut off a parallel frontal projection of the adjacent segments of the Newfoundland southern coast.

71. In order to achieve this result the projection towards the south must be measured by the breadth of the coastal opening of the French islands toward the south. Thus, a balanced application of the principles and criteria invoked by the Parties leads to the solution of a second maritime area for St Pierre and Miquelon, in the southern sector extending to a distance of 188 nautical miles from a 12 nautical miles limit measured fro the baselines already described, with its axis extending due south along the meridian half way between the two meridians described below, its eastern and western limits being formed by lines parallel to that axis and its width being determined by the distance between the meridians passing through the easternmost point of the island of St Pierre and the westernmost point of Miquelon respectively and measured at the mean latitude of those two points, or approximately 10.5 nautical miles. From the northeastern point of the limit thus described, as far as point 1 referred to in the 1972 Agreement, the delimitation shall be a twelve

nautical miles limit measured from the nearest points on the baseline of the French islands"[213].

6.23. Figure 6-3 depicts the delimitation effected by the Court of Arbitration. In accordance with the observations contained in paragraphs 70 and 71 of the Court's Award, the French maritime zones extend southward to the 200-nautical-mile limit through a corridor which has the same breadth as the southward coastal projection of the islands. The delimitation effected by the Court of Arbitration belies the suggestion contained in the *Counter-Memorial*[214] that the 12-nautical-mile territorial sea of Colombia's "archipelago" blocks the frontal projection of Nicaragua. As was observed previously, that same approach was applied in the *Anglo-French arbitration* in respect of the French continental shelf in the region to the north of the Channel Islands. To the east of Saint Pierre and Miquelon, the Canadian continental shelf and exclusive economic zone "wrap around" the territorial sea of the islands and to the west around the territorial sea and some additional maritime area. Figure 6-4 shows the French continental shelf surrounded by that of Canada.

6.24. In sum, there is no support in the jurisprudence of the Court and arbitral tribunals for Colombia's proposition that her small islands and cays serve as a kind of defensive wall blocking the seaward projection of Nicaragua's mainland coast, and limiting the delimitation area to the area between Nicaragua's coast and the islands of San Andrés and Providencia. To the contrary, the jurisprudence shows that Nicaragua's maritime entitlements are not cut off by Colombia's

[213] *Case concerning Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon) (1992), ILR,* Vol. 95. pp. 671-672, paras. 70-71.
[214] CCM, Vol. I, p. 393, Figure 9.2.

minor insular features, but extend beyond them to the full extent of Nicaragua's 200-nautical-mile exclusive economic zone and even longer continental shelf.

III. The Relevant Coasts and Relevant Area for the Delimitation under Colombia's Scenario

A. The Relevant Coasts

6.25. It is, of course, axiomatic that the land dominates the sea, and does so through the projection seaward of the coast[215]. "[T]he land is the legal source of the power which a State may exercise over territorial extensions to seaward"[216]. Accordingly, it is essential to determine the "relevant coasts" before turning to the task of analyzing the delimitation proposed by Colombia. As the Court recently put it in the *Black Sea* case:

> "It is therefore important to determine the coasts of [the parties] which generate the rights of these countries to the continental shelf and the exclusive economic zone, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned."[217]

[215] *Case concerning Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), *Judgment, I.C.J. Judgment of 3 February 2009,* p. 26, para. 77.
[216] *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), *Judgment*, *I.C.J. Reports 1969*, p. 51, para. 96.
[217] *Case concerning Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), *Judgment of 3 February 2009,* p. 26, para. 77.

6.26. In theory at least, Colombia acknowledges that the relevant coasts are "those coasts the projections of which overlap".[218] At paragraph 8.4 of the *Counter-Memorial*, for example, Colombia states: "The relevant coasts of the parties to a delimitation dispute are those coasts whose projections seaward generate entitlements to maritime areas that meet and overlap"[219] Exactly the same point is repeated in the next paragraph where Colombia again states: "[T]he relevant coasts are those coasts which do give rise to overlapping legal entitlements."[220] Notwithstanding her nominal agreement, however, Colombia promptly forsakes these principles when it comes time to apply them in the circumstances of this case.

6.27. As explained above, Colombia completely ignores the fact that the Parties' mainland coasts generate overlapping continental shelf entitlements. That they do so renders both of them "relevant coasts." Yet Colombia treats neither of them as relevant to the delimitation in this case. In fact, as Nicaragua has shown, the only area in this case that requires a delimitation is where the Parties' continental shelf entitlements overlap, so the only relevant coasts are the two mainland coasts.

6.28. Colombia entirely avoids this area of overlapping entitlements as well as the coasts that are relevant to them, choosing to focus instead only on the narrow band of sea to the west of her putative "archipelago." By so limiting the area of focus, Colombia argues in the first instance that her relevant coast consists of the coasts of *all* of her claimed

[218] *Case concerning Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), *Judgment of 3 February 2009,* p. 26, para. 77.
[219] CCM, Vol. I, p. 340, para. 8.4.
[220] *Ibid*, p. 341, para. 8.5.

insular features, including each and every one of the minor cays and rocks, which should be aggregated together for purposes of defining her relevant coast.[221] At the same time, she applies a different standard for Nicaragua. She entirely ignores the single most dominant geographic feature in this scenario, Nicaragua's mainland coast, and adopts the extraordinary view that Nicaragua's relevant coast consists only of the Corn Islands and miscellaneous rocks and cays, including the Miskito Cays.[222]

6.29. Colombia's purpose in including each and every one of her claimed incidental maritime features in the calculation of her own relevant coast is obvious. She seeks to inflate the otherwise miniscule extent of her own relevant coast, and thereby minimize the disparity between the lengths of the Parties' relevant coasts. As discussed in Chapter IV of this *Reply*, however, the truth is that none of the Cays of Bajo Nuevo, Serranilla, Serrana, Roncador, the East-Southeast or Albuquerque is capable of supporting human habitation or having an economic life of its own. Under Article 121(3) of the 1982 Law of the Sea Convention, they must therefore be qualified as rocks that can generate no continental shelf or exclusive economic zone entitlement. For its part, Quitasueño, being entirely submerged at high tide, does not even merit the label of a rock. That being the case, none of the features mentioned has a potential coastal projection beyond a territorial sea that can overlap with Nicaragua's coastal projection, and so cannot, even under Colombia's own definition and setting, constitute part of Colombia's relevant coast for a delimitation between the Parties.

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[221] *See* CCM, Vol. I, pp. 341-343, and pp. 344-350, paras. 8.7 and 8.12-8.8.28.
[222] *Ibid*, Vol. I, p. 351, paras. 8.30-8.32.

6.30. It is only the islands of San Andrés and Providencia/Santa Catalina that can be said to constitute islands capable of generating an exclusive economic zone entitlement under Article 121 of the 1982 Law of the Sea Convention. Accordingly, only these features can constitute Colombia's relevant coast for these purposes. Measured as coastal façades in the north-south direction (the direction in which they face Nicaragua which is also their longest extent) the length of San Andrés is 13 kilometers and the length of Providencia is 8 kilometers. They total 21 kilometers.

6.31. On the other side of the equation, Colombia nowhere even bothers to rationalize her complete exclusion of Nicaragua's entire mainland coast from her depiction of Nicaragua's relevant coast. Without explanation, Colombia says merely that it is only to the west of San Andrés and Providencia/Santa Catalina that her maritime entitlements "meet and overlap with the entitlements generated by *Nicaragua's offshore islands*".[223] This claim is not correct even if the relevant coasts were limited to those generated by these "offshore islands" of Nicaragua since these would have just as much rights as "Colombia's islands" to a full 200 exclusive economic zone. But more importantly, this does not explain why Colombia considers it appropriate to disregard the existence of the Nicaraguan mainland. It is in fact entirely inappropriate to do so. When Nicaragua's mainland coast is taken into account, as must be the case, it is readily apparent that there is, in fact, substantial overlap between the Parties' 200-nautical-mile zones both to the west *and* east of Colombia's islands.

[223] CCM, Vol. I, p. 343 para. 8.9, (emphasis added).

6.32. The reason Colombia tries to diminish the length of Nicaragua's relevant coast by substituting it with that of minor features is precisely the same reason she seeks to exaggerate her own: to minimize the glaring disparity in the lengths of the Parties' relevant coasts. Yet, under any serious view, even in the setting proposed by Colombia, the Nicaraguan mainland coast is the dominant geographic reality in the region. Accordingly, there is no possible justification for excluding it from the "relevant coasts" for the purposes of this case.

6.33. Nicaragua agrees with Colombia's statement of principle: the relevant coasts "are those coasts whose projections seaward generate entitlements to maritime areas that meet and overlap."[224] For the reasons discussed, however, she disagrees with the manner in which Colombia has identified those coasts. Within the area encompassed by Nicaragua's 200-nautical-mile exclusive economic zone entitlement, the only coasts that even potentially generate overlapping entitlements are:

- For Nicaragua: the entire coastal front of the Caribbean mainland, measuring a total of 450 kilometers[225]; and
- For Colombia: the coastal fronts of the individual islands of San Andrés and Providencia, measuring a total of 21 kilometers.

6.34. The ratio of Nicaragua's mainland coastal front and the coastal fronts of the islands of San Andrés and Providencia is more than 20:1 in Nicaragua's favor.

[224] CCM, Vol. I, p. 340, para. 8.4.

[225] The coastal fronts of the Corn Islands and Cayo Miskito (Mayor) (the largest single feature of the Miskito Cays measuring over 21 km^2) since by themselves they are entirely similar to San Andrés and Providencia could also be -but are not- included in this figure because their comparative size pales in relation to Nicaragua's mainland coast.

B. THE RELEVANT AREA

6.35. In addition to the relevant coasts, it is necessary also to define the relevant area in which the delimitation is effected[226].

6.36. As stated, Nicaragua and Colombia agree -in theory at least- that the relevant coasts are "those coasts the projections of which overlap"[227]. Conversely, the "relevant area" must be that area where the Parties' coastal projections meet and overlap. Here too, there is no disagreement as to basic principles[228].

6.37. To determine the area of overlapping projections with accuracy, it is thus necessary to define and draw (a) each Party's coastal projection, and (b) the area(s) where these coastal projections overlap. Colombia nowhere bothers to undertake the requisite analysis, however. Instead, the *Counter-Memorial* proceeds straight to its predetermined conclusion:

> "It is only to the west of the San Andrés Archipelago that the maritime entitlements of the Archipelago meet and overlap with the entitlements generated by Nicaragua's offshore islands and cays."[229]

6.38. On this ostensible basis, Colombia claims that,

> "broadly speaking the relevant area comprises the area lying between the Colombian San

[226] *Case concerning Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), *Judgment of 3 February 2009,* p. 36, paras. 110-111.
[227] *Ibid*, p. 26, para. 77.
[228] *See* CCM, Vol. I, pp. 340-341, paras. 8.4 and 8.5.
[229] CCM, Vol. I, p. 343, para. 8.9.

> Andrés Archipelago on the east, and the Nicaraguan islands and cays on the west"[230].

6.39. The reason Colombia attempts to limit the relevant area to the narrow band of sea lying between her claimed insular possessions and Nicaragua's off-shore islands and cays is as obvious as it is unsupportable. By limiting the extent of the relevant area to the maritime space lying west of her insular possessions, Colombia hopes to mask the inequity of the median line she proffers as the boundary between the two States. But Colombia's conclusory assertion that "it is only to the west" of San Andrés and Providencia/Santa Catalina that the Parties' potential maritime entitlements meet and overlap is plainly false. In fact, within the area encompassed by Nicaragua's 200-nautical-mile exclusive economic zone entitlement, there are areas of overlap both to the *west* of "Nicaragua's offshore islands and cays" and, more significantly, to the *east* of San Andrés and Providencia/Santa Catalina. Fidelity to Colombia's own definition requires that all of these areas of overlap be included as part of the "relevant area" in this setting.

6.40. As noted, to properly identify the area of overlapping projections, it is necessary to do the work Colombia eschews; that is, to define and draw (a) the Parties' coastal projections, and (b) the areas where those projections overlap. It is to those tasks that Nicaragua now turns.

6.41. The Parties' "coastal projections" are most usefully determined by reference to their areas of potential legal entitlement. In the *Jan Mayen* case, for example, the Court determined what it called the

[230] CCM, Vol. I, p. 344, para. 8.11.

"area relevant to the delimitation dispute" by reference to the "area of overlapping potential entitlements"[231].

6.42. Here once more, the Parties appear to be in substantial agreement about the applicable principles, even if in practice Colombia refrains from applying them. At paragraph 8.4 of the *Counter-Memorial*, for instance, Colombia expressly acknowledges that the relevant area corresponds to the area of overlapping potential entitlements. She states:

> "It is only where the legal entitlements generated by one State's coasts meet and overlap with the legal entitlements of a neighbouring State that such area of overlap falls to be delimited."[232]

6.43. In fact, the same point is made repeatedly throughout the *Counter-Memorial*. Citing *Tunisia-Libya* at paragraph 8.4, for instance, Colombia similarly observes that the relevant coasts "are those coasts whose projections seaward generate *entitlements* that meet and overlap."[233]

6.44. Accordingly, there is no meaningful dispute between the Parties on this point of principle. The task then is to define the extent of each Party's area of potential entitlement and identify where they overlap.

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[231] *Case concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen* (*Denmark v. Norway*), *Judgment*, *I.C.J. Reports 1993*, pp. 47-48, paras. 18-21.
[232] CCM,Vol. I, p. 329, para. 7.39 (emphasis added).
[233] *Ibid*, p. 340, para. 8.4, (emphasis added). See also *ibid*, Vol. I, p. 341, para. 8.5: "[T]he 'relevant coast' are those coasts which do give rise to overlapping legal entitlements"; and CCM, Vol. I, p. 322, para. 7.25: "For a coast of a party to be a 'relevant coast', however, it must be capable of generating maritime rights that overlap with the rights generated by the coasts of the other party."

6.45. Even if this case were to involve only an exclusive economic zone delimitation, as sought by Colombia, and not the continental shelf delimitation Nicaragua is requesting, the scope of Nicaragua's 200-nautical-mile zone is easily defined. It constitutes the area embraced within 200 nautical miles of the baselines used for measuring the breadth of Nicaragua's territorial sea. This area is depicted in Figure 6-5.

6.46. The same exercise can be applied to determine the extent of any theoretical or potential 200-nautical-mile zone of the islands of San Andrés and Providencia as islands under Article 121(1) of the 1982 Law of the Sea Convention within the International limits recognized by Colombia. This area is depicted in Figure 6-6.

6.47. The area of overlapping potential entitlements, which results from superimposing Figures 6-5 and 6-6 on top of one another, is shown in Figure 6-7. This would be, by Colombia's own definition, the relevant area for any delimitation of maritime entitlements generated by Nicaragua's mainland coast on the one hand, and Colombia's islands and disputed cays appurtenant to that coast, on the other. The contrast between this properly-drawn relevant area and that presented by Colombia is stark. By attempting to limit the Court's vision to the band of sea lying between approximately 25 nautical miles (the location of the Miskito Cays and the Corn Islands) and 110 nautical miles (the location of San Andrés) from Nicaragua's mainland coast, Colombia hopes she can persuade the Court to ignore more than 50% of the true area of overlapping entitlements. As Figure 6-7 shows, the truth is that there are substantial areas of overlapping potential exclusive economic zone entitlements to the east of San Andrés and

Providencia. The portions of the relevant area Colombia none too subtly seeks to ignore are depicted on Figure 6-8.

6.48. Colombia's forced geographical myopia is inconsistent with logic, with the law and, as noted, with Colombia's own argument. Fidelity to the law and to the geographical realities requires that the entire area of overlap be taken into account for any delimitation between Nicaragua's mainland coast and Colombia's islands and cays lying offshore.

IV. Colombia's Placement, Construction and Use of Her Provisional Equidistance Line are Erroneous in her own Scenario

6.49. A major point of disagreement between the Parties involves Colombia's placement, construction and use of a provisional equidistance line in her purported delimitation of the area encompassed by Nicaragua's 200-nautical-mile exclusive economic zone entitlement. The position of Nicaragua, as explained in Chapter III above, is that in a delimitation of the continental shelf, such as has been requested by Nicaragua, where the distance principle is not involved but only the natural prolongation of the land territory, the question of a provisional equidistance line has no role to play. The analysis of this question in this section is addressed to the partial delimitation scenario posited by Colombia involving an exclusive economic zone delimitation in which the distance principle is an element to be considered.

6.50. The first serious flaw in Colombia's approach concerns the placement of the line. As previously discussed, Colombia's delimitation methodology ignores both mainland coasts -her own and Nicaragua's-

even though the latter is by far the predominant geographic feature with regard to the area the Colombia seeks to have delimited. Colombia arbitrarily decided to place a median line between her claimed insular possessions and those of Nicaragua, as if neither her own nor Nicaragua's extensive mainland coasts existed. As can be noted from a review of Section B of Chapter 9 of the *Counter-Memorial*, which is concerned with the applicable principles and rules of international law, Colombia pays some attention to the procedure that the jurisprudence has applied to effect a delimitation that will result in an equitable solution.[234] However, the *Counter-Memorial* passes in silence on the reasoning the Court and arbitral tribunals have applied to select the equidistance line as the provisional starting point for maritime delimitations. Instead, the *Counter-Memorial* limits itself to noting that the jurisprudence in general has concluded that the equidistance line forms an appropriate starting point for the delimitation of maritime zones between States with opposite coasts.[235]

6.51. Colombia's second serious flaw concerns the construction and use of her arbitrarily-placed median line. In constructing this line Colombia has chosen to give no weight to Nicaragua's 450 kilometre-long mainland coast, and to give full weight to her small islands and cays. Colombia is wrong on both counts. It is indefensible for Colombia to ignore Nicaragua's mainland coast in the construction of the provisional delimitation line. And it is equally indefensible to give weight to small islands and uninhabited cays in the construction of the line. The Court's jurisprudence is entirely to the contrary as shown below.

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[234] CCM, Vol. I, Sec. B, pp. 382-386, paras. 9.6-9.13.
[235] *Ibid*, pp. 382-386, paras. 9.9-9.13.

6.52. Finally. Colombia's use of her ill-placed and ill-constructed 'median line' as the final line of delimitation is also in conflict with the Court's jurisprudence, because it is grossly inequitable and fails to take account of the most significant geographic factors, namely: (i) Nicaragua's 450 kilometer mainland coast; (ii) Nicaragua's entitlements, based on the seaward projection of her coast, to the maritime areas to the east of Colombia's insular possessions; and (iii) the small and insignificant nature of those insular possessions, as well as their location adjacent to Nicaragua, on the Nicaraguan continental shelf, and more than 300 nautical miles from the Colombian mainland.

6.53. As regards the applicable law and the role of the equidistance method in the delimitation process, the first paragraph of Section B of Chapter 9 of the *Counter-Memorial* immediately sets the tone in this respect. That paragraph observes that:

> "While the law of maritime delimitation has undergone a certain evolution over recent years, *one principle* that has remained a constant is that, in situations involving delimitation between opposite coasts, an equidistance or median line boundary will normally produce an equal division of the parties' overlapping entitlements and an equitable result"[236].

This is, of course, a wholly inappropriate use of the term "principle" in the context of a discussion of the applicable principles and rules of international law. To be fair, Colombia admits that between opposite coasts an equidistance or median line will *normally* produce an equal

[236] CCM, Vol. I, pp. 382-383, para. 9.6 (emphasis provided)

division of the parties' overlapping entitlements. Of course, that is not the case in the present situation. Rather than confirming the appropriateness of the equidistance method, Colombia's submission that the equidistance line normally produces an equal division indicates that the delimitation involving Nicaragua and the islands of San Andrés and Providencia is not a standard case of opposite coasts.

6.54. In the *Counter-Memorial*'s rendering of the maritime delimitation, only a fraction of Nicaragua 200-nautical-mile zone is taken into consideration. However, it is evident that this 200-nautical-mile zone extends to the east of the islands of San Andrés and Providencia up to the outer limit of Nicaragua's 200-nautical-mile zone. Colombia's supposedly "equal" division of the area of overlapping entitlements only attributes approximately 25% of that area to Nicaragua and the remaining 75% to those islands. Clearly, the equidistance method applied by Colombia does not have the merits it normally has in situations involving opposite coasts.

6.55. Before analyzing the jurisprudence on this question, it is useful to look at it from the perspective of normal legal common sense. It is logical that, in the case of a delimitation of an area lying mainly between two similar coasts, a provisional equidistance line could serve as a starting point for the delimitation. In the present case, however, less than 50% of the area of delimitation lies between the two "coasts" arbitrarily selected by Colombia in this scenario. In these circumstances, any provisional equidistance line would completely ignore the other 50% of the area to the benefit of Colombia. The use of a provisional equidistance line is not a principle of maritime delimitation but simply a method used in the appropriate circumstances. The real principle of

maritime delimitation is that any method used to effectuate such a delimitation should lead to an equitable solution.

6.56. Contrary to what is suggested by the *Counter-Memorial*'s superficial rendering of the applicable law, the jurisprudence of the Court and arbitral tribunals does show an acute awareness that the equidistance line is not a *panacea* either at the stage of identifying a provisional starting point or at the second stage of the delimitation process in which the equitableness of that provisional starting point has to be assessed against the relevant circumstances of the case at hand. Thus, the selection of a provisional delimitation line does not imply that it must be a provisional equidistance line.

6.57. In normal circumstances, the first s*tage of the delimitation* process -the selection of a provisional delimitation line- perhaps is even more critical to the outcome of a delimitation than the second stage in which the *provi*sional line is checked against the relevant circumstances to establish if that provisional line needs to be adjusted to arrive at the final boundary. The provisional line provides, so to speak, a yardstick against which to measure the relevant circumstances. As observed by the Court in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* it found it first had to establish "a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place".[237] In that case, the Court established an equidistance line, which however, did not take into account certain points along the coasts of the two parties, including Serpents' Island

[237] *Case concerning Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), *Judgment of 3 February 2009,* p. 37, para. 116.

of Ukraine.[238] The Court could take that approach because it took into account the relevant mainland coasts of both parties. In those circumstances, the coastal projections of the mainland coasts met and overlapped in the area between them and the provisional equidistance line provided an appropriate starting point that could produce, as is also observed by the *Counter-Memorial*, "an equal division of the parties' overlapping entitlements and an equitable result"[239].

6.58. However, in the present case an equidistance line does not achieve that result. Because the opposite mainland coasts of Nicaragua and Colombia are more than 400 nautical miles apart, the line of delimitation of the exclusive economic zone does not lie between them and no purpose would be served by using an equidistance line as a starting point for any such delimitation. Nor does it make sense to arbitrarily place an equidistance line halfway between minor features, such as the islands claimed by each of the Parties adjacent to Nicaragua's coast. This points to the obvious conclusion that it has to be questioned whether there could be an equidistance line in the present case that might serve as a starting point that is "appropriate for the geography of the area in which the delimitation is to take place".

6.59. The *Counter-Memorial* suggests that in the case of opposite coasts, the jurisprudence has generally concluded that equidistance is an appropriate starting point[240]. That may be true when the areas to be delimited are located between these opposite coasts. If the areas to be

[238] *Case concerning Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), *Judgment of 3 February 2009,* pp. 37 and 39-47, paras. 117 and 123-154. For a further discussion of the approach of the Court in this case in respect of the provisional delimitation see *infra* Sec. V.
[239] CCM, Vol. I, p. 383, para. 9.6.
[240] *Ibid*, pp. 382-383, para. 9.6.

delimited are not located between these opposite coasts, the concept of equidistance itself loses all meaning.

6.60. The Jan Mayen case involved a delimitation between two coasts that were more than 200 nautical miles apart. Since the maximum area of entitlement claimed by each of the Parties was to an exclusive economic zone of 200 nautical miles, the area of overlapping claims lay entirely between their opposite coasts. There were no claim to areas as between the Parties that was not located between these coasts. The Court with all logic considered:

> "64. Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. When, as in the present case, delimitation is required between opposite coasts which are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits, and may prima facie be regarded as effecting an equitable division of the overlapping area."[241]

6.61. In the Colombian scenario presently under consideration, the opposite coasts are "insufficiently far apart" for Nicaragua "to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law". The "median line" drawn between these coasts will not "be equidistant from the two 200-mile limits" but rather this "median line" would be located approximately

[241] *Case concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen* (*Denmark v. Norway*), *Judgment*, *I.C.J. Reports 1993*, p. 66, para. 64.

150 miles from the 200-nautical-mile limit of Nicaragua's exclusive economic zone. Therefore, the "median line" cannot "be regarded as effecting an equitable division of the overlapping area."

6.62. In discussing the appropriateness of the equidistance line as a provisional starting point for the delimitation between Nicaragua and the islands of San Andrés and Providencia, the *Counter-Memorial* makes mention of the *Libya/Malta* case. However, the *Counter-Memorial* only refers to a part of the 1985 Judgment of the Court in that case. Before indicating that the median line between opposite coasts "by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result" - the passage quoted by the *Counter-Memorial*- the Court referred to paragraphs 57 and 58 of the Judgment in the *North Sea Continental Shelf* cases. What these paragraphs indicate is that there are differences between a case of truly opposite coastal states, and one which calls for "ignoring the presence of islets, rocks and minor coastal; projections, the disproportionally distorting effect of which can be eliminated…"

6.63. The *Counter-Memorial* also ignores that the Judgment of the Court in the *Libya/Malta* case confirms that the establishment of a provisional equidistance line in any case is not a mechanical process. Paragraph 43 of the Judgment observes:

> "43. The Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used, or that the Court is "required, as a first step, to examine the effects of a delimitation by application of

> the equidistance method" *(I.C.J. Reports 1982,* p. 79, para. 110). Such a rule would come near to an espousal of the idea of "absolute proximity", which was rejected by the Court in 1969 (see *I.C.J. Reports 1969,* p. 30, para. 41), and which has since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea. That a coastal State may be entitled to continental shelf rights by reason of distance from the coast, and irrespective of the physical characteristics of the intervening sea-bed and subsoil, does not entai1 that equidistance is the only appropriate method of delimitation, even between opposite or quasi-opposite coasts, nor even the only permissible point of departure. The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation, even from the outset."[242]

6.64. The *Counter-Memorial* next refers to the Judgment on the merits in the *Qatar* v. *Bahrain* case[243]. In that case the Court effected a delimitation between the continental shelf and exclusive economic zone entitlements of the parties in what the Court designated as the northern sector[244]. The *Counter-Memorial* is correct in observing that the Court in that delimitation took the equidistance line as a starting point[245]. What the *Counter-Memorial* fails to mention is the characterization of the relevant coasts of the parties in the northern sector. Again, it is worth quoting from the Judgment as it serves to

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[242] *Continental Shelf (Lybian Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 48, para. 64.
[243] CCM, Vol. I, pp. 383-384, paras. 9.9-9.11.
[244] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 115, para. 250.
[245] See CCM, Vol. I, p. 383, para. 9.9.

underline the importance the Court has always attached to the context of the specific case:

> "246. The Court recalls that in the *Libyan Arab Jamahiriya/Malta* case, referred to above, it stated:
>
> 'the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain 'islets, rocks and minor coastal projections', to use the language of the Court in its 1969 Judgment [(*case concerning North Sea Continental Shelf*)] (*I.C.J. Reports 1985*, p. 48, para. 64)'.
>
> 247. The Court further recalls that in the northern sector the coasts of the Parties are comparable to adjacent coasts abutting on the same maritime areas extending seawards into the Gulf. The northern coasts of the territories belonging to the Parties are not markedly different in character or extent; both are flat and have a very gentle slope. The only noticeable element is Fasht al Jarim as a remote projection of Bahrain's coastline in the Gulf area, which, if given full effect, would "distort the boundary and have disproportionate effects" (*Continental Shelf case (France/United Kingdom), United Nations, Reports of International Arbitral Awards,* Vol. XVIII, p. 114, para. 244).
>
> 248. In the view of the Court, such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord

> with all other relevant factors referred to above"[246].

6.65. The context in which the Court effected the delimitation in the northern sector in the *Qatar/Bahrain* case is plainly different from a delimitation between Nicaragua and Colombia in the area encompassed by Nicaragua's 200-nautical-mile exclusive economic zone. The Court in the former case observed that the pertinent coasts of the territories of the parties were not markedly different in character or extent. The opposite is true for the mainland coast of Nicaragua and the islands of San Andrés and Providencia. More analogous to the present case, the Judgment of the Court in the *Qatar v Bahrain* (paragraphs 246 to 248) case also confirms that an equidistance line between comparable coasts of the parties should not be influenced by minor remote features, and accordingly no effect was given to the feature of Fasht al Jarim[247].

6.66. In its discussion of the *Qatar v. Bahrain* case, the *Counter-Memorial* seems to suggest that the similarity between the rules contained in Article 15 of the 1982 Law of the Sea Convention and the rules for the delimitation of the continental shelf and the exclusive economic zone is relevant in considering the delimitation of the latter zone. The *Counter-Memorial* submits that:

> "It is clear from the wording of Article 15 of the 1982 Convention that there is a presumption in favour of an equidistance or median line boundary for territorial sea delimitation.

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[246] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* pp. 114-115, paras. 246-248.
[247] *Ibid,* p. 115, paras. 249.

[…]

> Given the close relationship between the "equidistance/special circumstances" rule and the "equitable principles/relevant circumstances", the same priority accorded to the equidistance line for territorial sea delimitation applies to the delimitation of maritime areas lying beyond the territorial sea"[248].

The *Counter-Memorial* then quotes from the *Cameroon v. Nigeria* case to argue the similarity between the two rules. That similarity, of course, does not prove a presumption in favor of the equidistance method. To the contrary, it only highlights the fact that mention of equidistance was carefully avoided when dealing with the delimitation of the more extensive maritime areas.

6.67. The absence of a presumption in favor of an equidistance line was expressed as follows by the Court of Arbitration in the *Anglo-French arbitration*:

> "Consequently, even under Article 6 [of the Convention on the Continental Shelf] the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances. In other words, even under Article 6 it is the geographical and other circumstances of any given case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the

[248] CCM, Vol. I, p. 385, para. 9.12.

inherent quality of the method as a legal norm of delimitation[249]".

Article 6 of the Convention on the Continental Shelf, like Article 15 of the 1982 Law of the Sea Convention, also refers to the equidistance method and special circumstances, and unlike Article 15 of the 1982 Law of the Sea Convention is concerned with the delimitation of the continental shelf between neighboring States.

6.68. The preceding analysis indicates that the fundamental problem with the *Counter-Memorial*'s approach is that it is premised on the presumption that the equidistance line always has to form the starting point of the delimitation process. The most recent Judgment of the Court on maritime delimitation in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* points out that the first step in the delimitation is not the establishment of a provisional equidistance line, but the establishment of a "*provisional delimitation line*, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place"[250].

6.69. In light of the jurisprudence of the Court and international tribunals, Nicaragua finds that the conclusion of the *Counter-Memorial* that the basic rule of maritime delimitation law as a first step requires the plotting of an equidistance line[251] is not correct. Nor is it correct to place an equidistance line between minor geographical features in a

[249] *Case concerning the Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 20 June 1977. RIAA*, Vol. XVIII, UN, pp. 45-46, para. 70.
[250] *Ibid,* p. 37, para. 116. Emphasis provided.
[251] CCM, Vol. I, pp. 385-386, para. 9.13.

manner that ignores the mainland coasts of both parties, or to construct the line without taking an extensive and adjacent coastline into account while giving full weight to minor and insignificant islets and rocks. As the Court has repeatedly observed, the provisional delimitation line has to be geometrically objective and appropriate for the geography of the delimitation area. Only after an assessment of that geography in the light of the applicable law will it be possible to determine what constitutes an appropriate provisional delimitation line. This question is addressed below.

V. The Provisional Delimitation Line Appropriate to the Area to be Delimited

6.70. According to the Court's Judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* the provisional delimitation line has to meet two criteria:

1. It has to be appropriate for the area in which the delimitation takes place; and
2. It has to be geometrically objective.

Thus, it is first of all necessary to inquire into the characteristics of the delimitation area. This inquiry will naturally center around the limited area of the Colombian scenario with which this chapter is dealing.

6.71. The relevant area for the delimitation sought by Colombia within Nicaragua's 200-nautical-mile exclusive economic zone entitlement lies between Nicaragua's mainland coast and the outer limit of Nicaragua's 200-nautical-mile zone. There is no opposite coast of another coastal State which blocks the frontal seaward projection of

Nicaragua's coast. Within this area there are a number of small maritime features. Any provisional delimitation line would have to be appropriate for this delimitation area.

6.72. Nicaragua believes that an equidistance line would not be an appropriate starting point for such a delimitation in the light of the characteristics of the delimitation area. An equidistance line as a starting point could have merit where the main area to be delimited is located between two opposite and similar coasts (see paragraph 6.55 above). In the present case, and under the scenario put forward by Colombia, the exercise is indefensible, since there is no Colombian coast opposite Nicaragua's, and even if San Andrés and Providencia could be said to collectively constitute a "coast" – which Nicaragua disputes – the area located between them and the Nicaraguan mainland represents no more than 50 % of the area to be delimited, and the two "coasts" are entirely dissimilar. In sum, it makes no sense to place a provisional delimitation line midway, or equidistant, between San Andrés and Providencia on the one hand, and Nicaragua's mainland coast or her coastal islands on the other.

6.73. In light of the conclusion that the equidistance line proffered by Colombia does not provide an appropriate starting point for any delimitation between Nicaragua and Colombia, it is necessary to consider if there is another method which can be used as a starting point of a delimitation. Nicaragua recognizes that this method will need to meet the two criteria of the Court. The line not only has to be appropriate for the area in which the delimitation takes places, but it also has to be geometrically objective.

6.74. The jurisprudence of the Court and international tribunals indicates the way forward in the search for a provisional delimitation line. As was demonstrated above in Section IV, that jurisprudence consistently indicates that in cases in which the equidistance line is considered to provide an appropriate starting point, a first step is to identify the appropriate basepoints for establishing the equidistance line. In that exercise, the Court and tribunals have routinely excluded islands, islets and rocks as basepoints. A number of examples illustrate this point. Indeed, it is the norm[252]. In the *Anglo-French arbitration*, the Court of Arbitration discounted the Channel Islands in establishing the median line between the opposite coasts of the United Kingdom and France, and in the case concerning *Maritime delimitation in the Black Sea (Romania v. Ukraine),* the Court disregarded Sulina Dyke and Serpents' Island in constructing the provisional equidistance line, stating,

> "To count Serpents' Island [located 20 miles of Ukraine's Black Sea coast] as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes"[253].

6.75. Similarly, in the case concerning *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (*Qatar v. Bahrain*), the Court decided to disregard the "very small island" of Qit'at Jaradah in drawing the median line, stating:

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[252] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 36-37, para. 57.
[253] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), I.C.J., Judgment of 3 February 2009*, p. 45, para. 149.

> "if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature"[254].

6.76. Citing *Libya/Malta* for the proposition that "the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain 'islets, rocks and minor coastal projections'"[255], the Court similarly decided to give no effect to the island of Fasht al Jarim, "a remote projection of Bahrain's coastline in the Gulf area, which, if given full effect, would 'distort the boundary and have disproportionate effects"[256].

6.77. In the *Libya/Malta Case* itself, the Court disregarded the presence of the islet of Filfla, five kilometers south of the main island of Malta, for purposes of drawing the provisional equidistance line on the continental shelf separating Libya and Malta[257].

6.78. Another case worthy of the Court's attention is *Nicaragua v. Honduras.* In that case, the maritime boundary adopted by the Court consisted primarily of a bisector line drawn between the straight line coastal fronts of the two States' mainland coasts. In determining the angle of the bisector line, no account was taken of the offshore islands

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[254] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, pp. 104 and 109, para. 219.
[255] *Continental Shelf (Lybian Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* pp. 49-50, para. 67.
[256] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, pp. 114 -115, para. 247.
[257] *Continental Shelf (Lybian Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 48, para. 64.

and islets in question; the angle was determined solely by reference to the mainland coastal fronts of Nicaragua and Honduras.

6.79. The approach of disregarding minor insular features and specific basepoints can also be applied in the present case. Nicaragua considers that it is appropriate to disregard all basepoints on islands and cays claimed by Colombia in establishing the provisional delimitation line (as well as all corresponding basepoints that Colombia similarly located on Nicaragua's insular features). This conclusion is reached on the basis of the physical characteristics of these features and in the context of the delimitation area as compared to similar features which have been given no effect in establishing a provisional delimitation line in other cases, such as the Channel Islands in the *Anglo-French arbitration* and Abu Musa in the *Dubai/Sharjah* arbitration[258]. The *Tunisia/Libya* case is also instructive in this respect. In that case, the Court effected a delimitation by first selecting a line which was unrelated to the equidistance line. That line completely ignored the Tunisian island of Jerba[259]. With an area of about 515 square kilometers (approximately 20 times larger than San Andrés), Jerba is a much more significant island that either San Andrés or Providencia. Jerba is also closely linked to the mainland coast of Tunisia and not an isolated feature.

6.80. Colombia's delimitation claim places no basepoints on either of the two opposite mainland coasts. Even if basepoints were placed on

[258] The geography of the islands and cays under consideration in the present case is described in Chapter IV of the *Reply*. For a discussion of the treatment of the Channel Islands in the *Anglo French* arbitration and Abu Musa in the *Dubai/Sharjah* arbitration see pp. 149-156, paras. 6.14- 6.24 above.

[259] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 85, para. 120.

Nicaragua's coast, there would be no equivalent Colombian basepoints from which to establish a provisional equidistance line, since Colombia's insular possessions adjacent to Nicaragua must be disregarded for purposes of constructing the provisional equidistance line.

6.81. In the light of the conclusion that there are no appropriate Colombian basepoints from which to establish a provisional line, the question arises how to establish such a line. In this case, the answer is also readily available in the jurisprudence. In a case in which a feature is not taken into account as a basepoint in establishing the provisional equidistance line, the jurisprudence has dealt with it in one of two ways, depending on whether the feature is located in the maritime zone of the party which has sovereignty over it or in the maritime zone of the other party. In the latter case, the jurisprudence has commonly accorded a maximum 12-nautical-mile zone to such features and enclaved them within the maritime zones of the other party. This was for instance the case for the Channel Islands in the *Anglo-French arbitration*. Chapter V dealt with this case with respect to the situation involving the delimitation of the continental shelf. In the present scenario, whether dealing with a continental shelf delimitation as requested by Nicaragua or an economic exclusive zone delimitation within Nicaragua's 200-nautical-mile limits as sought by Colombia, the same logic applies.

6.82. This results in a set of provisional delimitation lines which coincide with the 12-nautical-mile limit drawn from the baselines of San Andrés and Providencia/Santa Catalina, and at the 3-nautical-mile limit drawn from the cays claimed by Colombia. In accordance with

the applicable rules of international law as contained in Article 5 of the 1982 Law of the Sea Convention, the normal baseline is the low-water line along the coast as marked on large scale charts officially recognized by the coastal State. As was demonstrated in Chapter IV, this implies that there is no provisional delimitation line in the area of the bank of Quitasueño, which is totally submerged at high-tide.

6.83. Nicaragua believes that the set of provisional delimitation lines it proposes meets the requirements the Court indicated for such a line in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. Nicaragua's provisional delimitation lines are appropriate for the geography of the area in which the delimitation is to take place. The provisional lines are also geometrically objective. They allow the Court to take due account of the seaward projection of the mainland coast of Nicaragua and, in accordance with the relevant international jurisprudence, do not give undue weight to minor features. Figure 6-9 shows the resulting delimitation.

VI. The Relevant Circumstances do not Require an Adjustment of the Provisional Delimitation Lines Posited by Nicaragua

6.84. It remains to be considered whether there are relevant circumstances requiring an adjustment of this set of provisional lines. Nicaragua considers that there are no circumstances indicating that there is a need to adjust the provisional delimitation lines to achieve an equitable delimitation.

6.85. The provisional delimitation lines result in maritime limits around the islands of San Andrés and Providencia/Santa Catalina at a distance of 12 nautical miles from the baselines established in accordance with international law. In the *Memorial*, Nicaragua explained that the very limited size and other characteristics of the insular features other than San Andrés and Providencia imply that they should be enclaved at most in a territorial sea of three nautical miles[260]. In light of the relevant jurisprudence and State practice this would constitute an equitable solution in view of the characteristics of these cays[261]. Figure 6-10 shows the result of applying a 12-nautical-mile enclave to the main islands of San Andrés and Providencia/Santa Catalina, and a 3-nautical-mile enclave to the minor cays.

6.86. The general recognition of a 12-nautical-mile territorial sea was inspired by the need to protect the vital security interests of coastal States. It is not tenable to argue that the security interests of Colombia in these small, barren, uninhabited cays, with no economic life of their own and far from her coasts (but near the Nicaraguan coast) require a 12-nautical-mile territorial sea. At the same time, Nicaragua recognizes that in two recent cases - the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* and the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* - the Court accorded small islets a 12-nautical-mile territorial sea in a delimitation

[260] NM, Vol. I, pp. 254-260, paras. 3.127-3.136.

[261] See also the discussion at above Chap. V, and p. 208, para. 6.130 below, which indicates that according all of the features a 12-nautical-mile area results in attributing Colombia more than sufficient maritime areas in comparison to the coastal length ratios of Nicaragua and Colombia.

of the exclusive economic zone and the continental shelf[262]. However, all of those features were close to the mainland coast of the sovereign that possessed them, and the maritime attribution was the result of a composite reasoning that aspired to an equitable result. If the same result were woodenly applied to the cays under consideration in the present case, they would be attributed a maritime zone which is totally disproportionate to their actual significance. In that respect, Nicaragua recalls the example she provided in paragraph 3.129 of the *Memorial*. Giving 12-nautical-mile zone to an isolated cay –in reality nothing more than a rock barely protruding form the sea– would give it the same area of territorial sea as a straight mainland coast of more than 37 nautical miles.

6.87. Nicaragua considers that the disproportionate result of attributing a 12-nautical-mile territorial sea to the cays is a relevant circumstance to be taken into account in assessing the equitableness of the provisional delimitation line. According a 12-nautical-mile territorial sea to all the disputed cays in this case would give them a total maritime area of 9,200 square kilometers, whereas they lack any significance.

6.88. The only features which arguably could receive more than a 12-nautical-mile territorial sea are the islands of San Andrés and Providencia. This would be the case if they were located in mid-ocean far from other States and not off a large mainland coast of another State. To better assess the weight that San Andrés and Providencia should be accorded, the following paragraphs offer a comparative analysis of these islands to others which have been given limited

[262] See *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *I.C.J., Judgment of 3 February 2009*, p. 57, para. 188.

effect in the delimitation of the continental shelf and exclusive economic zone between neighboring States.

6.89. Before embarking on that comparative analysis it is, however, appropriate to make an assessment of the space there actually might be for adjusting the provisional delimitation lines. In this regard, it is interesting to note the solution the Court of Arbitration found for a seaward projection of Saint Pierre and Miquelon in the *Delimitation of Maritime Areas between Canada and France*. The Award, in effecting a delimitation, enclaved the islands to the west and to the east, but accorded them maritime zones southward to the 200-nautical-mile limit through a corridor of the same breadth as the southward coastal projection of the islands.

6.90. Figure 6-11 shows the potential result of adapting the approach of the Court of Arbitration in the *Delimitation of Maritime Areas between Canada and France* to San Andrés and Providencia. Under this approach, San Andrés and Providencia would be enclaved to the west, north and south, but would enjoy maritime zones projecting eastward beyond the 200-nautical-mile exclusive economic zone of Nicaragua. This solution attributes approximately an additional 4,000 square kilometers of maritime area to Colombia, if compared to the enclave solution advocated by Nicaragua and discussed further below.

6.91. The jurisprudence in a significant number of cases has had to assess the impact of islands on the delimitation of maritime boundaries between States. The first instance in this respect was the *Anglo-French* arbitration. As is observed in paragraphs 5.18 to 5.25 above, the Court of Arbitration in that case found that it was appropriate to

draw a median line between the mainland coasts of France and the United Kingdom. The Channel Islands were ignored in the establishment of that median line and were only accorded a 12-nautical-mile enclave in a second step of the delimitation.

6.92. The *Counter-Memorial* denies that the Channel Islands is analoguos with the present case[263]. The *Counter-Memorial* gives three arguments to reject the analogy between the two cases. First, Colombia submits that the Channel Islands are very close to the French mainland and that this was one of the main reasons to treat them as a special circumstance, and that San Andrés and Providencia are a considerable distance from the Nicaraguan mainland. Second, the *Counter-Memorial* submits that the Channel Islands are surrounded on three sides by French territory, whereas San Andrés and Providencia are facing the Nicaraguan mainland coast. Third, the *Counter-Memorial* submits the delimitation concerned two mainland coasts and that the Channel Islands were "on the wrong side" of the mid-Channel median line[264].

6.93. The *Counter-Memorial* is parsimonious in referring to the reasoning of the Court of Arbitration for enclaving the Channel Islands. A look at that reasoning goes a long way to undermining the *Counter-Memorial*'s argument. The Court of Arbitration summarized its findings on the delimitation in the English Channel as follows in paragraph 199 of its 1977 decision:

[263] CCM, Vol. I, pp. 330-331, paras. 7.42-7.43.
[264] *Ibid*, pp. 331-333, paras. 7.44-7.48.

> "The Court considers that the primary element in the present problem is the fact that the Channel Islands region forms part of the English Channel, throughout the whole length of which the Parties face each other as opposite States having almost equal coastlines. The problem of the Channel Islands apart, the continental shelf boundary in the Channel indicated by both customary law and Article 6, as the Court has previously stated, is a median line running from end to end of the Channel. The existence of the Channel Islands close to the French coast, if permitted to divert the course of that mid-Channel median line, effects a radical distortion of the boundary creative of inequity. The case is quite different from that of small islands on the right side of or close to the median line, and it is also quite different from the case where numerous islands stretch out one after another long distances from the mainland. The precedents of semi-enclaves, arising out of such cases, which are invoked by the United Kingdom, do not, therefore, seem to the Court to be in point. The Channel Islands are not only "on the wrong side" of the mid-Channel median line but wholly detached geographically from the United Kingdom"[265].

6.94. As paragraph 199 indicates, the Court of Arbitration did not decide to enclave the Channel Islands for the mere reason that they were close to the French mainland, but upon the Court of Arbitration's assessment of the totality of the delimitation area that they were "on the wrong side of the mid-Channel median line" and "wholly detached geographically from the United Kingdom". The case is clearly analogous to the present one, which is proved merely by substituting "mid-Caribbean" for "mid-Channel", and "Colombia" for the "United

[265] *Case concerning the Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 20 June 1977. RIAA*, Vol. XVIII, UN, p. 94, para. 199.

Kingdom". This indicates that the fact that the Channel Islands are close to the French mainland coast is not in itself relevant for an assessment of their treatment.

6.95. The Court of Arbitration's assessment that the Channel Islands were "wholly detached geographically from the United Kingdom" does not help Colombia. This is a conclusion with obvious implications for the islands of San Andrés and Providencia. The distance between the Channel Islands and the mainland coast of the United Kingdom is approximately 90 kilometers, whereas the distance between the islands of San Andrés and Providencia and the mainland coast of Colombia is approximately 750 kilometers. The conclusion that the Channel Islands are geographically detached from the mainland coast of the United Kingdom thus applies *a fortiori* to the islands of San Andrés and Providencia.

6.96. What the *Counter-Memorial* is implicitly suggesting is that San Andrés and Providencia should get a better treatment although they are in a worse situation than islands which are buttressed by a mainland coast behind them.

6.97. It should also be noted that the Court of Arbitration discussed the relationship between the Channel Islands and the mainland coast of the United Kingdom in the context of an argument that the continental shelf of the Channel Islands should be linked to the continental shelf of the British mainland. The Court of Arbitration rejected this proposal on the basis that the Channel Islands were detached from the mainland of the United Kingdom. Again this is a conclusion which also applies to San Andrés and Providencia. There is no basis in law

or fact to justify that there should be uninterrupted maritime zones between the islands of San Andrés and Providencia and the Colombian mainland.

6.98. Colombia seems to suggest that the impact of the Channel Islands on the delimitation between France and the United Kingdom would have been much bigger than the impact of San Andrés and Providencia in the present case. The opposite is actually true. An equidistance line between France and the United Kingdom giving full weight to the Channel Islands would have only affected a small part of the mid-Channel median line, which divided the area of overlapping claims equally, and would have given the United Kingdom a limited area of continental shelf over and above the continental shelf it was awarded (see Figure 5-3). By contrast, the line of delimitation proposed by Colombia is not only heavily affected by the treatment she wishes to give to San Andrés and Providencia, but entirely dependent on those islands. Indeed, there would be no "median line" at all without taking them into account. The result of Colombia's doing so is to give them three times as much maritime space as Nicaragua, notwithstanding Nicaragua's 450 kilometer-long mainland coast (see Figure 6-8).

6.99. To sum up the discussion of the case involving the Channel Islands, the *Counter-Memorial*'s argument largely ignores the reasoning of the Court of Arbitration. A comparison of the geographical context of that case with the present one indicates that a 12-nautical-mile enclave for San Andrés and Providencia is wholly consistent with the reasoning of the Court of Arbitration.

6.100. The *Counter-Memorial* dismisses the relevance of the *Dubai/Sharjah* arbitration because the geographic situation in which that delimitation was effected supposedly was entirely dissimilar from the situation in the present case[266]. Colombia bases this conclusion on a number of grounds. First, according to the *Counter-Memorial*, the delimitation was primarily one between States with adjacent coasts sharing a land boundary. This is a gross oversimplification of the reasoning of the Court of Arbitration. The analysis contained in the Award indicates that the Court of Arbitration was mindful of the existing jurisprudence and the requirement to assess the weight of particular features in the context of the overall geographical framework of a delimitation[267]. In its analysis the Court of Arbitration explicitly agreed with the reasoning of the Court of Arbitration in the *Anglo-French arbitration*:

> "The Court of Arbitration in the *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, 1977, found that there was:
> … a single rule, a combined equidistance-special circumstances rule … (Award, para. 68.)
> and that the equidistance principle of delimitation (on which, in a modified form, the Government of Sharjah has placed reliance in its claim for "half-effect" to the accorded to the island of Abu Musa) must be subject to the overriding aim of achieving an equitable apportionment of shelf areas between adjacent or opposite States. (Award, para. 97.) As has been noted earlier, the principles of delimitation expounded in Article 6 of the 1958 Convention on the Continental Shelf were seen

[266] CCM, Vol. I, pp. 334-335, para. 7.52.
[267] *Dubai-Sharjah Border Arbitration of 19 October 1981, ILR* Vol. 91, Grotius Publication Limited, 1993, pp. 669-677.

> by the Court of Arbitration as applicable within the overall context of reaching an equitable solution to the delimitation of any shelf area"[268].

6.101. The *Counter-Memorial* also argues that the semi-enclave around the island of Abu Musa "only caused a minor deflection to the adjacent coasts equidistance line"[269]. That depiction of the outcome of the case suggests that Abu Musa in any case would have had a limited impact on the equidistance line. The reality is quite different. As can be appreciated from Figure 6-12, an equidistance line giving full weight to Abu Musa veers in a completely different direction than the first part of the equidistance line between the mainland coasts before the latter line reaches the 12-nautical-mile enclave around Abu Musa.

6.102. The *Counter-Memorial* further indicates that in the *Dubai/Sharjah* arbitration there was "a single small island situated in the middle of a confined maritime area which would inequitably distort the course of an equidistance line"[270]. The *Counter-Memorial* contrasts this with Colombia's possessing "a lengthy archipelago comprising many islands and cays, the nearest island of which is over 100 miles from Nicaragua, and Nicaragua also possesses offshore islands which figure in the delimitation. As such, the situation is very different from that presented in the *Dubai-Sharjah* arbitration"[271]. This comparison by the *Counter-Memorial* of the *Dubai/Sharjah* arbitration to the present case generates a number of comments.

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[268] *Dubai-Sharjah Border Arbitration of 19 October 1981, ILR* Vol. 91, Grotius Publication Limited, 1993, p. 676.
[269] CCM, Vol. I, p. 335, para. 7.53.
[270] *Ibid*, p. 335, para. 7.54.
[271] *Ibid*, pp. 335-336, para. 7.54.

6.103. First, in discussing Abu Musa in paragraph 7.54, the *Counter-Memorial* refers to it as a *small* island. The island of Abu Musa is inhabited and measures about 12 square kilometers. The island of San Andrés measures about 25 square kilometers and the island of Providencia measures about 17 square kilometers. Not much of a difference.

6.104. Secondly, the *Counter-Memorial* refers to Abu Musa as a *single* island and sets it apart from Colombia's "lengthy archipelago"[272]. Again, an interesting comparison. The distance of Abu Musa to the nearest point on the coast of the mainland of Sharjah is about 60 kilometers and the distance to the nearest island is less than 40 kilometers. These are considerable distances, but certainly much less than the distance of 83 kilometers between the islands of San Andrés and Providencia or the distance of 305.6 kilometers between San Andrés and Serranilla, and the distance of over 700 kilometers to the Colombian mainland. These figures confirm the conclusion of Nicaragua that on the basis of the jurisprudence San Andrés and Providencia have to be treated as separate single islands for the purposes of maritime delimitation. Finally, the *Counter-Memorial* observes that Abu Musa is "situated in the middle of a confined maritime area which would inequitably distort the course of an equidistance line"[273]. This description again fits the case of the islands of San Andrés and Providencia. The only difference is the fact that the total delimitation area is less confined in the present case. Like Abu Musa, the single island of San Andrés and the single island of Providencia are located approximately in the middle of the delimitation area. Like Abu Musa, they inequitably

[272] CCM, Vol. I, p. 335-336, para. 7.54.
[273] *Ibid*, p. 335, para. 7.54.

distort the delimitation line.[274] In the case of Abu Musa that effect was avoided by according the island of Abu Musa a 12-nautical-mile enclave. That same solution should be applied to the islands of San Andrés and Providencia.

6.105. Prior cases have not only enclaved islands, which were found to constitute special or relevant circumstances, but have also given them limited effect in other ways. Two examples - the treatment of the Kerkennah Islands in the *Tunisia/Libya* case, and that of Malta in the *Libya/Malta* case - suffice to show that much more significant islands than San Andrés and Providencia have been accorded limited effect. The Kerkennah Islands and Malta had longer coasts behind them. The presence of a longer coast explicitly was taken into consideration and limited the extent to which the islands were discounted. In the case of San Andrés and Providencia, there is no mainland coast backing the islands.

6.106. In the *Tunisia/Libya* case, the Court in establishing the second segment of the continental shelf boundary had to consider the weight to be accorded to the Kerkennah Islands. The starting point for establishing this segment of the boundary was provided by the general direction of the mainland coast of Tunisia[275]. In that respect, the Judgment provides a further example of a provisional starting line for the delimitation which disregarded the presence of islands. It should

[274] The award in the *Dubai/Sharjah* arbitration among others observes that giving full weight to certain islands would "produce a distortion of an equidistance line or an exaggerated result which would be inequitable" *Dubai-Sharjah Border Arbitration of 19 October 1981*, *ILR* Vol. 91, Grotius Publication Limited, 1993, p. 676.

[275] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 88, para. 127.

also be noted that the Kerkennah Islands are much larger (180 km^2) than either the island of San Andrés (25 km^2) or the island of Providencia (17 km^2).

6.107. Having established a provisional starting line, the Court noted that:

> "the bearing of this line is approximately 42º to the meridian. To the east of this line, however, lie the Kerkennah Islands, surrounded by islets and low-tide elevations, and constituting by their size and position a circumstance relevant for the delimitation, and to which the Court must therefore attribute some effect. The area of the islands is some 180 square kilometres; they lie some 11 miles east of the town of Sfax, separated from the mainland by an area in which the water reaches a depth of more than four metres only in certain channels and trenches. Shoals and low-tide elevations also extend on the seaward side of the islands themselves, which are surrounded by a belt of them varying from 9 to 27 kilometres in width. In these geographical circumstances, the Court has to take into account not only the islands, but also the low-tide elevations which, while they do not, as do islands, have any continental shelf of their own, do enjoy some recognition in international law for certain purposes, as is shown by the 1958 Geneva Conventions as well as the draft convention on the Law of the Sea. It is not easy to define what would be the inclination of a line drawn from the most westerly point of the Gulf of Gabes to seaward of the Kerkennah Islands so as to take account of the low-tide elevations to seaward of them; but a line drawn from that point along the seaward coast of the actual islands would clearly run at a bearing of approximately 62º to the meridian. However, the Court considers that to cause the delimitation line to veer even as far as to 62º to run parallel to the island

> coastline, would, in the circumstances of the case, amount to giving excessive weight to the Kerkennahs.
>
> 129. The Court would recall however that a number of examples are to be found in State practice of delimitations in which only partial effect has been given to islands situated close to the coast; the method adopted has varied in response to the varying geographical and other circumstances of the particular case. One possible technique for this purpose, in the context of a geometrical method of delimitation, is that of the "half-effect" or "half-angle"[276].

6.108. The reasoning of the Court leading to a decision on the weight to be accorded to the Kerkennah Islands indicates that their size and close relationship to the mainland coast necessitated adjusting the provisional line to arrive at the final delimitation line. The reasons for giving some effect to the Kerkennah Islands are not present here, since San Andrés and Providencia are almost 6 and more than 7 times smaller than the Kerkennah Islands, respectively, and they are both completely detached from the Colombian mainland.

6.109. In the *Libya/Malta* case, the Court as a first step in the delimitation process traced an equidistance line between Libya and Malta, disregarding as basepoints the straight baselines of Malta and the small islet of Filfla.[277] The Court then turned to the question whether that equidistance line should be adjusted in the light of the relevant circumstances of the case. The Court observed there was a large

[276] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 88-89, paras. 128-129.
[277] *Continental Shelf (Lybian Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 48, para. 64.

difference in the lengths of the relevant coasts – the relevant coast of Malta measured 24 miles (44 kilometers) and that of Libya 192 miles (356 kilometers)[278]. The Court then used a median line between Libya and Sicily (Italy) giving no effect to Malta to establish the maximum extent of the shift of the Court's provisional delimitation line. The distance between these two lines was 24′ of latitude. Next the Court arrived at a boundary line by shifting its provisional line not by the full 24′ of latitude to the north, but, in according some weight to Malta, it shifted the line by 18′ of latitude[279]. That is, it accorded Malta one quarter of this area.

6.110. A comparison of the situation of that of Malta to San Andrés and Providencia is interesting. San Andrés and Providencia are much smaller than Malta. Malta measures some 246 square kilometers making it almost 9.5 times bigger than San Andrés and almost 14.5 times bigger than Providencia. The relevant coast of Malta identified by the Court is almost three times longer than the coast of San Andrés facing the mainland of Nicaragua and five and a half times that of Providencia. On the other hand, the relevant coast of Libya identified by the Court is almost 100 kilometers shorter than the relevant coast of Nicaragua. The Court in the *Libya/Malta* case put a limit on the extent of a provisional median line by referring to the longer coast of Sicily behind the coast of Malta. In the case of San Andrés and Providencia, there is no such longer coast. Furthermore, the southeastern tip of Malta lies approximately 340 kilometers from the nearest point on the coast of Libya. The distance between the mainland coast of Nicaragua and San and Andrés and Providencia is

[278] *Continental Shelf (Lybian Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 50, para. 68.
[279] *Ibid,* pp. 51-53, paras. 71-73.

much less. Furthermore, as a consequence of the distance between Malta and Libya and the presence of Italy to the north of Malta, the Court did not have to consider whether a boundary might be located to the north of Malta. The situation in the present case is different. Nicaragua's 200-nautical-mile zone extends well to the east of the islands of San Andrés and Providencia and there is no mainland coast behind the islands blocking the projection of Nicaragua.

B. STATE PRACTICE CONCERNING MINOR ISLANDS INVOKED BY COLOMBIA

6.111. The *Counter-Memorial* invokes a number of examples from State practice in the form of bilateral delimitation agreements to support Colombia's proposed delimitation methodology. In that respect, the *Counter-Memorial* refers both to Colombia's own practice with her neighboring States and the practice of third States[280]. As indicated below in paragraphs 7.27 to 7.29, the jurisprudence does not show any support for using Colombia's own self-serving practice as a precedent. With one exception, the present section will therefore only address the bilateral practice of third States invoked by the *Counter-Memorial*. That exception concerns the role of the islands of Los Monjes in the delimitation between Colombia and Venezuela.

1. Colombia/Venezuela

6.112. The *Memorial* observed that Colombia has taken the position that no weight should be given to small islets in connection with the delimitation of the maritime boundary with Venezuela in the Gulf of Venezuela and outside the Gulf in the Caribbean Sea[281]. The *Counter-*

[280] CCM, Vol. I, pp. 352-364, paras. 8.33-8.56.
[281] NM, Vol. I, p. 259, para. 3.135.

Memorial replies to this by noting that no definitive boundary has been agreed upon between Colombia and Venezuela, and that the Los Monjes islands "are located about 19 miles off the Colombian coast, i.e. less than twice the breadth of the territorial sea"[282].

6.113. Both of Colombia's arguments are unconvincing. First, the fact that there is no boundary agreement between Venezuela and Colombia does not negate the fact that it is Colombia's position that Los Monjes should get no weight in a delimitation – a position, one supposes, which is based on a careful assessment of the jurisprudence of the Court and arbitral tribunals.

6.114. Secondly, the distance of Los Monjes to the Colombian coast is not the decisive factor since their distance to the Gulf and the coast of Venezuela would balance this out. Specific circumstances always have to be assessed in context. A comparison of Los Monjes and Colombia's "San Andrés Archipelago" shows that the latter have a much more pronounced impact on the putative boundary than Los Monjes. Among other considerations, the Los Monjes islands lie outside a predominantly Venezuelan gulf, while, the islands of San Andrés lie inside a predominantly Nicaraguan part of the Caribbean Sea. Thus, if Colombia finds that the Los Monjes islands should be disregarded completely in her delimitation with Venezuela, the same applies *a fortiori* for her "archipelago" in the delimitation with Nicaragua.

[282] CCM, Vol. I, p. 336, para. 7.56.

2. Italy and Tunisia

6.115. The *Counter-Memorial* in paragraph 7.51 rejects the relevance of the delimitation between Italy and Tunisia, to which the *Memorial* had made reference[283]. The *Counter-Memorial* submits that the geographic context of that delimitation is different from the present case because the Italian islands in question either straddled the equidistance line between the mainland coasts or lay "on the wrong side" of it[284]. This is again the same fallacious reasoning Colombia applies elsewhere in the *Counter-Memorial*. The fact that there are two mainland coasts instead of only one mainland coast is not decisive of the treatment small islands should get in a maritime delimitation.

6.116. The treatment of small islands has to be assessed in the overall context of a delimitation. That context is remarkably similar in the delimitation involving Tunisia and Italy and the delimitation between Nicaragua and Colombia. The delimitation area between Italy and Tunisia involving the enclaved islands lies between the mainland coast of Tunisia and the major Italian island of Sicily. In the middle of that delimitation area a number of small Italian islands are located. In the case of any delimitation within Nicaragua's 200-nautical-mile exclusive economic zone entitlement, the delimitation area would lie between the mainland coast of Nicaragua and the outer limit of Nicaragua's 200-nautical-mile zone. The islands of San Andrés and Providencia are located in the middle of that area. To put the two cases in proper perspective, it is also useful to compare the geography of the islands. The largest of the Italian islands involved in the delimitation with Tunisia, Pantelleria, has a coast facing Tunisia of

[283] NM, Vol. I, p. 245, para. 3.109.
[284] CCM, Vol. I, p. 334, para. 7.51.

about 30 kilometers, or about two times the length of the coast of San Andrés facing the mainland coast of Nicaragua, and about three times the coast of Providencia. With a size of about 83 square kilometers, Pantelleria is more than three times bigger that San Andrés and almost five times bigger than Providencia. The second largest Italian island, Lampedusa, has a facing coast of 24 kilometers, or about one and a half times the coast of San Andrés and about three times the coast of Providencia, and has an area of 20 square kilometers (somewhat smaller than San Andrés but bigger than Providencia). To make this comparison complete, the coast of Tunisia between Cape Bon and the land boundary with Libya facing the islands measures approximately 430 kilometers or slightly less than the 450 kilometers of Nicaragua's coast facing the delimitation area. In light of the above, Nicaragua remains of the view that the delimitation between Tunisia and Italy points to the appropriateness of an enclave solution for the islands of San Andrés and Providencia.

3. Other States

6.117. Other State practice discussed in paragraphs 9.47 to 9.55 of the *Counter-Memorial* are not helpful to the Colombian case, as the comparisons are based on the erroneous assumption that the mainland coast of Nicaragua does not constitute part of the coast relevant for the delimitation with Colombia[285].

6.118. The maritime delimitation agreement between India and the Maldives discussed in paragraph 9.47 of the *Counter-Memorial* is considered in two sections by Colombia. A first part of the delimitation line is situated between small islands on both sides and thus has no relation

[285] See CCM, Vol. I, p. 401, para. 9.55.

to the situation involving a mainland coast and small islands. The second part of the delimitation does concern the mainland coast of India. However, that coast faces a tightly knit group of islands, most of which are only kilometers apart. The Maldives as an archipelago do not bear any resemblance to the minor islands and cays of Colombia adjacent to Nicaragua which are far apart and which do not in any event constitute a single archipelago (See Figure 6-13).

6.119. The example cited by the *Counter-Memorial* at paragraph 9.48 again bears no resemblance to a delimitation between Nicaragua and Colombia. The delimitation between Australia and New Caledonia (France) is mostly effected between a number of small islands (See Figure 6-14). The mainland coasts of both parties are a considerable distance behind these islands. Although the geography of this case is thus different from that involving the delimitation between Nicaragua and Colombia, it does show that the mainland coasts of both States have been treated broadly equally.

6.120. Another example given by Colombia is concerned with India and Thailand[286] (See Figure 6-15). The geography of that delimitation again bears little resemblance with the present case. The delimitation line is located between the Nicobar Islands of India and certain islands of Thailand. Behind these Thai islands is the mainland coast of Thailand.

6.121. The *Counter-Memorial* ends its review of State practice with three delimitations involving the Venezuelan island of Aves with the United

[286] CCM, Vol. I, p. 400, para. 9.49.

States, the Netherlands and France, respectively[287]. These agreements reflect the larger problem with drawing legal conclusions from State practice in delimitation: the delimitation agreements are normally not reasoned out. There are economic, political, military and many other reasons that lead to an interstate boundary agreement that are not spelled out in the agreements.

6.122. Colombia assumes that the treatment given to Aves in some delimitations supports her case. Unfortunately, the analysis provided by the *Counter-Memorial* is far from complete and further information, which is readily available, indicates that the case of Aves does not provide any support in law for the delimitation the *Counter-Memorial* is proposing between Nicaragua and Colombia.

6.123. First of all, the *Counter-Memorial* refers to the 1978 delimitation treaty between the United States and Venezuela. Two well-informed commentators have observed in respect of this treaty:

> "Another issue related to the treatment to be given to Aves Island, a small island in the eastern Caribbean sometimes used as a garrison by Venezuelan military authorities and more notable as sea turtle breeding grounds. The limits of the fisheries jurisdiction provisionally established by the United States gave full effect to Aves despite its small size, and the United States determined to maintain that position when the Netherlands and Venezuela reached their boundary settlement, which did not treat Aves as a special circumstance. That settlement, of course, did not and could not prejudice U.S. rights and interests with respect to this delimitation. However, as a political

[287] CCM, Vol. I, pp. 400-401, paras. 9.50-9.53.

> matter, there was little to gain and potentially much to lose in asserting a broader U.S. boundary interest, particularly in light of the marginal resource interest in this area."[288]

6.124. Secondly, the *Counter-Memorial* refers to the 1978 treaty between the Netherlands and Venezuela. The *Counter-Memorial* first of all mistakenly asserts that large areas of exclusive economic zone and continental shelf were accorded to Aves in the delimitation with Aruba, Bonaire, Curacao and Saint Eustachius. As a matter of fact, the delimitation with Aves only involves the small island of Saba. Still, according Aves full weight against Saba would have been too generous an approach in the legal determination of a maritime boundary. An assessment of the relevance of this delimitation in any case is virtually impossible because it not only concerned the islands of Aves and Saba, but also the Venezuelan mainland coast and adjacent islands, and the Netherlands islands of Aruba, Curacao and Bonaire. It is not known how these various aspects of the 1978 treaty between the Netherlands and Venezuela, which also provides for a specific navigational regime, tie in with each other. But there is no question that all these elements entered into the negotiation.

6.125. Finally, the *Counter-Memorial* refers to the 1983 Treaty between France and Venezuela[289]. It is not known what inspired the conclusion of that Treaty. What is certain is that there can be no doubt that giving full weight to the small cay of Aves vis-à-vis the large islands of

[288] M.B. Feldman and D. Colson "The Maritime Boundaries of the United States" 75 (1981) *American Journal of International Law* pp. 729-763 at p.747 (footnote omitted).
[289] CCM, Vol. I, p. 401, para. 9.53.

Guadeloupe and Dominica would not have been the outcome of a delimitation effected by a third party.

6.126. The *Counter-Memorial* also ignores that several Caribbean States have indicated that the use of Aves in the delimitation between Venezuela and France, the Netherlands and the United States cannot prejudice their rights. Antigua and Barbuda, Saint Kitts and Nevis and Saint Vincent and the Grenadines have indicated that they consider that Aves should not receive any weight in the delimitation between these States and Venezuela in diplomatic notes that were distributed to the States Parties to the 1982 Law of the Sea Convention. The Secretary-General reported on the contents of these notes in his annual report on oceans and law of the sea of the year 1997[290]. The view expressed by Antigua and Barbuda, Saint Kitts and Nevis and Saint Vincent and the Grenadines implies that Aves would be enclaved within a 12-nautical-mile territorial sea within the maritime zones of the other coastal States of the Eastern Caribbean.

C. THE ALIGNMENT OF SAN ANDRÉS AND PROVIDENCIA EXACERBATES THE INEQUITABLE NATURE OF COLOMBIA'S EQUIDISTANCE LINE

6.127. The geographical relationship between the islands of San Andrés and Providencia exacerbates the impact these minor features have on any form of median line. San Andrés and Providencia are some 83 kilometers apart. As was discussed in Chapter V, this substantial distance makes it appropriate for these small islands to be treated separately and for each to be enclaved. Colombia's approach, by contrast, is to use them as separate basepoints in the construction of a median line; this gives them the same effect as if they were two points

[290] See A/52/487, paras. 74-75 reproduced in NR, Vol. II, Annexes 1-4.

along an uninterrupted mainland coast. This results from the north-south alignment of the islands which runs parallel to and facing the mainland coast of Nicaragua. In other words, in Colombia's methodology, the small islands of San Andrés and Providencia, which have a coast facing Nicaragua of about 13 and 8 kilometers, respectively, are given the same impact on the line of delimitation as a section of the continuous mainland coast measuring more than 100 kilometers. This again illustrates that equidistance, as employed by Colombia, is not an appropriate method for this delimitation. It leads to treating two minor isolated islands in a similar fashion as a hypothetical mainland coast which is more than 12 times the length of Providencia and almost 7 times the length of San Andrés. And even that hypothetical mainland coast would be much shorter than the 450 kilometers of Nicaragua's actual Caribbean Coast.

6.128. The alignment of the islands of San Andrés and Providencia in relation to each other is similar to the relation of Serpents' Island to the Ukrainian mainland coast in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In its Judgment the Court observed that:

> "To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes"[291].

[291] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment of 3 February 2009*, p. 45, para 149.

6.129. In the case of San Andrés and Providencia there is not even a mainland coast onto which the islands could be grafted. If equidistance were to be used in this instance as a method of delimitation, San Andrés and Providencia would, like Baron Münchhausen, who pulled himself out of a swamp by his own hair, escape being treated on their individual merits because they are allowed to pull each other out of their status as insignificant islands.

6.130. As shown, the relevant coast of Nicaragua "her mainland coast facing the Caribbean Sea" measures 450 kilometers, as compared to the facing coasts of San Andrés and Providencia, which measure 13 and 8 kilometers, respectively. The ratio between the Nicaragua's relevant coast and that of San Andrés is 35:1. The ratio between Nicaragua's relevant coast and that of Providencia is more than 55:1. When the two Colombian coasts are combined, the ratio is still more than 21:1 in Nicaragua's favour. In view of these huge disparities in coastal lengths, there obviously can be no equitable base for adjusting the provisional delimitation line proposed by Nicaragua seaward beyond the 12-nautical-mile limits of San Andrés and Providencia.

VII. Other Relevant Circumstances

6.131. The equitableness of the provisional delimitation lines proposed by Nicaragua is confirmed by other considerations as well. In particular, the proposed delimitation would accord both Parties equitable access to natural resources in the area. In addition, it would protect both Parties' legitimate security concerns.

A. EQUITABLE ACCESS TO NATURAL RESOURCES

6.132. As set forth in the *Memorial*, the jurisprudence of the Court recognizes that in certain situations equitable access to natural resources will be taken into account as a relevant circumstance. Colombia not only agrees, but argues that the putative equity of her proposed median line is confirmed by this criterion. Colombia argues first that there is no "particular stock of fish" near San Andrés and Providencia that needs to be "taken into account to ensure that the parties have equal access to such resource",[292] and second that

> "since mid-nineteenth century the population of San Andrés and Providencia have relied for their subsistence on the fisheries, turtle hunting, guano exploitation and other food resources in Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo"[293].

Colombia is wrong about the first point and the second does not support her proposed median line.

6.133. With respect to Colombia's argument that there are no valuable fish stocks in the area, the truth is to the contrary. Since 1965, Nicaragua has claimed a fishing zone both west and east of San Andrés and Providencia, extending 200 nautical miles from her mainland coast. Her fishermen from that coast and from the Corn Islands, have regularly sought to fish in these waters, but have been physically blocked by Colombia from doing so east of the 82nd meridian, at great cost to their livelihoods. Colombia's proposed median line, like her

[292] CCM, Vol. I, p. 409, para. 9.75.
[293] *Ibid*, p. 410, para. 9.78.

preferred 82nd meridian, not only would *not* accord the Parties' equitable access to these fisheries, it would deprive Nicaragua of any access to these areas whatsoever.

6.134. Colombia's assertion that the equity of her median line is confirmed by the alleged fact that the populations of San Andrés and Providencia have long relied on the waters around the other incidental maritime features in the region is flawed in at least two respects. *First*, Colombia offers no evidence whatsoever to support this claim. No references of any kind are given. In fact the evidence provided by Colombia points to the contrary conclusion that these cays were, if ever, very infrequently visited during the XIX century.[294] *Second*, even if it were true, the median line boundary Colombia advances would not be necessary to protect these alleged interests. Colombia's median line lies substantially to the west of all of the features Colombia mentions: Roncador (by 125 nautical miles), Serrana (by 95 nautical miles), Serranilla (by 125 nautical miles) and Bajo Nuevo (by 150 nautical miles). Assuming Colombia is correct that the resources she seeks to protect are "in" the features mentioned, such vast expanses of maritime space are not necessary to safeguard her interests.

6.135. In fact, the 3-nautical-mile enclaves Nicaragua proposes would fully protect these interests (assuming, of course, they could be proven with actual evidence). Colombia would not only have sovereignty over the features in question (and thus the resources "in" them) but she would also have sole access to the resources within a substantial maritime

[294] See CCM, Vol. II-A, pp. 136-149, Annex 27. Note of Colombian Chargé d'Affaires in Washington protesting the activities of the United States over these cays 20 years after the fact.

space around each. Granting Roncador Cay a 3-nautical-mile enclave, for instance, would result in an award to Colombia of over 388 square kilometers of maritime space in its immediate vicinity.

6.136. With respect to the natural resources located in the area in dispute it is necessary to recall the special constraints Nicaragua confronts in furnishing the Court with information on this question.

6.137. The first steps taken by Nicaragua in the exploration of the area presently in dispute which is located east of the 82nd meridian consisted in the grant of oil exploration concessions in the 1960s. These concessions were contested by Colombia[295] and since that period she has with her military forces effectively stopped Nicaragua from pursuing any further activities east of that meridian, including the exploration of the area.

6.138. Since Nicaragua's claim is for a delimitation of the continental shelf, the relevant resources of the area to be taken into account in a delimitation would be generally those of the sea-bed and subsoil of the submarine areas in dispute. Due to Colombia's position and her use of force to impose the 82nd meridian as a boundary, Nicaragua has been unable to explore the area and thus of being able to provide the Court with a full study of the natural resources located on the continental shelf.

6.139. The constraints imposed by Colombia have in fact impeded all activities including the exploration and exploitation not only of the resources of the shelf itself but also those of the superjacent waters.

[295] NM, Vol. I, pp. 153-154, para. 2.204

Any fishing activities by Nicaraguan vessels have been forcibly stopped by Colombia and, thus, Nicaragua is also not in a position to give a complete account of these other resources.

B. Security Considerations

6.140. Colombia also argues that the median line she proffers is equitable because "the preponderance of security interests in the area is Colombian"[296]. As support for this remarkable assertion, Colombia claims that she has "been the sole Party to police the waters around the Archipelago, to interdict illegal fishing as well as contraband in the area and to carry out surveying operations"[297].

6.141. In the first instance, Nicaragua observes that, once again, Colombia has introduced no evidence to support her assertions. No references of any kind are offered. Colombia's contentions can be rejected for this reason alone. Moreover, Nicaragua notes that "surveying operations" have nothing to do security interests in any meaningful sense and thus are irrelevant to the question at hand.

6.142. Even more fundamentally, Colombia seems to have forgotten that the waters beyond the territorial sea in the exclusive economic zone are not a zone of sovereignty. She has no right to exercise general "police" powers or to interdict contraband unrelated to the specific economic rights she might enjoy in the area. In addition it can be noted that the regime of the exclusive economic zone leaves freedom of navigation and other rights of communication between the islands

[296] CCM, Vol. I, pp. 411-412, para. 9.81.
[297] *Ibid*, p. 411, para. 9.80.

and the Colombian mainland unaffected. Enclaving the islands thus in no way affects the security interests of Colombia in that respect.

6.143. With respect to her assertion that she has been the "sole Party" to interdict illegal fishing in the area, two observations are in order. *First*, as set forth in Nicaragua's Application, much of the "illegal" fishing Colombia has interdicted has been Nicaraguan, thereby seriously imperiling the livelihood of Nicaragua's coastal population[298]. *Second*, if it is indeed true that Colombia has been the only Party to interdict illegal fishing in the area, it is only because she has resorted to the use of force to impermissibly exclude all Nicaraguan vessels from much of the 200-nautical-mile fishing zone and exclusive economic zone that Nicaragua has long claimed. Colombia's efforts to extract benefit from her own aggressive conduct in this fashion cannot be sustained.

6.144. The question of security considerations is in any case more pertinent from the point of view of the security interests of Nicaragua since these islands and cays are located on her continental shelf and near her mainland coast, whilst they are situated more than 300 nautical miles from the mainland coast of Colombia. The implications of this closeness of San Andrés and Providencia to the Nicaraguan mainland was pointed out by the Sub-Committee of the IMO when considering a proposal by Colombia for imposing navigation restrictions in the area of San Andrés and Providencia. The Sub-Committee indicated

[298] Application, pp. 5-6, para. 5. *See also* NM, Vol. II, pp. 151-179, Annexes 44-58.

that it was not appropriate to consider any of these proposals without consulting with Nicaragua.[299]

6.145. For all these reasons, Colombia's argument that security considerations confirm the equity of her median line must be rejected.

6.146. In fact, the enclaving solution proposed by Nicaragua protects Colombia's security interests and appropriately ensures that Nicaragua "contrôle les territoires maritimes situés en face de ses côtes et dans leur voisinage"[300]. Enclaving San Andrés and Providencia within a 12-nautical-mile territorial sea would still allow Colombia to, in her words, exercise adequate "protection of the 70,000 inhabitants living in the Archipelago"; and, assuming they are awarded to Colombia, granting her other, uninhabited insular possessions a 3-nautical-mile enclave would still enable her to prevent them from being used for the illicit trafficking of drugs as claimed in the *Counter-Memorial*. By the same token, recognizing the full scope of Nicaragua's exclusive economic zone entitlement would better enable her to adequately perform the far larger task of protecting her 5.1 million people living on the Central American mainland than artificially truncating her exclusive economic zone, as proposed by Colombia, just 50 nautical miles from her coast.

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[299] See NR, Vol. II, Annex 15. Report of NAV 51 (Doc. NAV/51/19) and see p. 135, para. 5.25 above.

[300] *Case concerning the Delimitation of the Maritime Boundary between Guinea and Guinea Bissau, Decision of 14 February 1985, RIAA,* UN, Vol. XIX, p. 194, para. 124. (English Translation: "control the maritime territories situated opposite its coasts and in their vicinity) *ILM*, Vol. XXV, N. 2, March 1986.

VIII. Concluding Remarks

6.147. For all the reasons discussed in the preceding sections, Colombia's delimitation methodology and claims are indefensible, and should be rejected by the Court. Colombia cannot arbitrarily constrain the area of delimitation to the narrow strip between San Andrés /Providencia in the east, and Nicaragua's coastal islands in the west. Rather, the area of any exclusive economic zone to be delimited would have to extend to the limits of Nicaragua's exclusive economic zone entitlement under the 1982 Law of the Sea Convention, which would extend in a seaward direction for 200 nautical miles from the baselines from which the breadth of her territorial sea is measured. None of Colombia's insular possessions within this area is of sufficient geographic stature to merit base points or full weight in the construction of a provisional equidistance line, rendering the placement and drawing of such a line inappropriate.

6.148. The so-called median line Colombia offers as an alternative in Chapter 9 of her *Counter-Memorial* is no alternative at all. It is inconsistent with the prevailing geographic circumstances and the jurisprudence established by this Court and arbitral tribunals. *First*, as is indicated by the jurisprudence, under Colombia's scenario, which ignores both the Colombian and Nicaraguan mainland coasts, the equidistance line does not provide an appropriate provisional delimitation line. *Secondly*, Colombia's equidistance line is drawn inappropriately using minor coastal features as basepoints. The features in question do not merit being considered in the construction of the provisional delimitation line, much less being used as the very basis of the delimitation itself. *Thirdly*, Colombia's median line or any other

variation of the equidistance line produces results that are grossly inequitable to Nicaragua, the relevant coast of which is more than 21 times longer than the relevant coast of Colombia's islands.

6.149. Finally, even within the limited scenario dealt with in this chapter which would involve only an exclusive economic zone delimitation between the mainland coast of Nicaragua and the islands claimed by Colombia, the conclusion is that these islands should be enclaved and not be used as a wall to enclose the extensive coast of Nicaragua. Thus, the result would be the same whether the situation dealt with is the delimitation of the continental shelves of both Parties (Chapters III and V, above) or whether it is limited to a delimitation of the exclusive economic zone in the area arbitrarily selected by Colombia.

CHAPTER VII

COLOMBIA'S INVOCATION OF THE 82ND MERIDIAN AND HER TREATIES WITH THIRD STATES

I. The 82° W Meridian Generally

7.1. The Protocol of Exchange of Ratifications of the 1928 Treaty on 5 May 1930 stated that:

> "The undersigned, in virtue of the full powers which have been granted to them and on the instructions of their respective Governments, hereby declare that the San Andrés and Providencia Archipelago mentioned in the first article of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich"[301].

7.2. In her *Counter-Memorial,* Colombia does not expressly reiterate her previous claim according to which there is "no doubt as to the meaning of the 82° W meridian within the 1930 Protocol of Exchange of Ratifications: a border, a dividing line of the waters in dispute, a delimitation, a demarcation of the dividing line (*límite, línea divisoria de las aguas en disputa, delimitación, demarcación de la linea divisoria*)– in other words: a maritime boundary"[302]. However, while declaring herself "mindful" of the Court's position[303], Colombia promptly disregards it[304]:

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[301] NM, Vol. II, pp. 55-59, Annex 19.
[302] CPO, p. 92, para. 2.41.
[303] CCM, Vol. I, p. 364, para. 8.58.
[304] After the 2007 Judgment of the Court Colombia continues to impose the 82nd meridian. See above Intro. pp. 15-19, paras. 34-43.

- on the one hand, she affirms that:

> "… the legal significance of the 82° W meridian, as far as the territorial element of the dispute is concerned, lies in the fact that it plays a role with regard to the scope and composition of the rest of the San Andrés Archipelago: specifically it fixes the limit of the Archipelago"[305].

- and, on the other hand, she:

> "considers that the 82°W meridian constitutes an important factor to be taken into account in assessing where an equitable delimitation lies"[306]. This twisted formula is repeated several times in the *Counter-Memorial*[307].

7.3. It is necessary to reiterate that the 82nd meridian does not constitute a border or dividing line or limit of the waters between Colombia and Nicaragua. In the first place, the limit imposed by the Protocol is not a border but only a line fixing a maximum limit westward of the Archipelago as the Court clearly stated in paragraphs 115 and 120 of the *Judgment of 13 December 2007*:

> "The Court considers that, contrary to Colombia's claims, the terms of the Protocol, in their plain and ordinary meaning, cannot be interpreted as effecting a delimitation of the maritime boundary between Colombia and Nicaragua. That language is more consistent

[305] CCM, Vol. I, p. 7, para. 1.12.
[306] *Ibid*, p. 365, para. 8.58.
[307] Cf. CCM, Vol. I, p. 370, para. 8.76: "The 82° W meridian limit is therefore an element of essential importance for establishing a maritime delimitation between the San Andrés Archipelago and Nicaragua…"; see also, Vol. I, p. 377, para. 8.93; p. 379, para. 8.94 (5); pp. 423-424, para. 10.16.

> with the contention that the provision in the Protocol was intended to fix the western limit of the San Andrés Archipelago at the 82nd meridian."
>
> "… after examining the arguments presented by the Parties and the material submitted to it, the Court concludes that the 1928 Treaty and 1930 Protocol did not effect a general delimitation of the maritime boundary between Colombia and Nicaragua. … Since the dispute concerning maritime delimitation has not been settled by the 1928 Treaty and 1930 Protocol within the meaning of Article VI of the Pact of Bogotá, the Court has jurisdiction under Article XXXI of the Pact."[308]

7.4. Secondly, a border must impose a limit on both parties and it is clear from the text of the Protocol that the limit is not imposed on Nicaragua but only on the "Archipelago". The limit imposed on the Archipelago simply means that there are no parts of this "Archipelago" located west of the 82nd meridian; but it does not set any limit to Nicaraguan territories east of that meridian.

II. The 82° W Meridian and the Maritime Delimitation

7.5. Probably conscious of the incompatibility of her position with that of the Court in its *2007 Judgment*[309], Colombia tries hard to by-pass the latter by reintroducing a major role for the 82nd meridian without formally describing it as the border. Contrary to her insistent position during the Preliminary Objections phase, she now accepts that "the Court held that the 1928 Treaty and the 1930 Protocol did not in

[308] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, pp. 34-36, paras. 115-120.
[309] See above, pp. 218-219, para. 7.3.

themselves effect a general delimitation of the maritime boundary. But", she immediately adds, "as will be seen, this does not entail that the 82° W meridian has no role to play in the delimitation"[310]. And indeed she confers to the meridian a very preeminent role in the delimitation[311].

7.6. In a rather sibylline formula, Colombia asserts that:

> "[i]n case the 82° W meridian is considered as a limit between the archipelagos, it inevitably constitutes a 'limit' that must be taken into account in a delimitation of the maritime spaces that those archipelagos generate."[312]

But this neglects the fact that, as shown above[313], the limit in question is only a limit to the islands belonging to the "San Andrés Archipelago" and not to those which belong to Nicaragua. It is therefore not the 82nd meridian which must be "taken into account", but the individual islands that potentially generate those "maritime spaces".

7.7. In reality, Colombia goes much further than just "taking [the 82° W meridian] into account" in the way she uses it to define the "San Andrés Archipelago". Under the guise of "taking it into account" (and in a rather disorderly manner), she:

- uses it as a limit between the respective maritime areas appertaining to each Party;

[310] CCM, Vol. I, p. 8, para. 1.14.
[311] See above, pp. 217-218, para. 7.2 and fn. 307.
[312] CCM, Vol. I, pp. 369-370, para. 8.73.
[313] See above p. 219, para. 7.4.

- considers that it constitutes a "special circumstance" which should be taken into consideration for drawing the maritime border; and

- considers that it "has an important role to play in determining where an equitable delimitation lies ..."[314].

7.8. In other words, Colombia attempts the *tour de force* of using the 82nd meridian at each possible stage of the process of establishing the maritime border between the Parties, when its only real purpose was circumscribing the extent of the Archipelago.

A. THE MERIDIAN AS LINE OF DELIMITATION

7.9. Colombia alleges that "the 1928/1930 Treaty…expressly recognized Colombian sovereignty over the Archipelago, which includes all maritime features and areas to the east of the meridian 82º W"[315]; and she then states further that the 82º W meridian "divided" the maritime areas between the Parties[316]. This statement is doubly incorrect. In the first place, the 1930 Protocol does not recognize Colombian sovereignty over all maritime "features" east of the 82nd meridian. The protocol only and very clearly sets a limit westward to all the "features" of the Archipelago and does not even hint at a limit for Nicaraguan rights east of that meridian. Secondly, the word "areas" implies that, in spite of the Court's dismissal of her claim in this respect, Colombia persists in her fundamental mistake in considering that the meridian is a "division line", which allocates maritime areas, while in reality it only concerns the islands themselves.

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[314] CCM, Vol. I, p. 377, para. 8.93.
[315] *Ibid*, p. 9, para. 1.17 (emphasis added by Nicaragua).
[316] *Ibid*, p. 373, (v); see also e.g.: p. 278, para. 5.71 (3).

7.10. In the same vein, it must be noted that, contrary to Colombia's assertion, there is absolutely no difficulty in seeing "how Nicaragua's recognition of Colombia's 'full and entire' sovereignty over an Archipelago that lies east of the 82° W meridian is compatible with Nicaragua's current attempt to argue that it possesses sovereign rights (continental shelf and exclusive economic zone) that not only extend east of the 82° W meridian, but also swallow up and surround all of Colombia's islands comprising the Archipelago"[317]. Once one accepts (as must be the case) that the meridian simply establishes the western maximum extension of the Archipelago, it follows not only that there are Nicaraguan maritime areas east of the 82nd meridian but also territories, islands and cays that are not part of the Archipelago. With respect to delimitation it also follows and can –and must– be admitted that all around the island of this Archipelago the usual rules of delimitation apply. The respective rights of the Parties must be established accordingly and the 82nd meridian has no more role to play in that regard.

B. THE MERIDIAN AS PART OF THE *EFFECTIVITÉS*

7.11. While hardly consistent with her continued claim that the meridian has realized a sharing of the respective maritime areas of the Parties, Colombia in a brief but most obscure passage of her *Counter-Memorial*, lists "The Conduct of the Parties and the 82º W Meridian" among the "relevant circumstances" to be taken into consideration for the establishment of the delimitation line[318]. The general explanation to this would be that, "[e]ven if the 82º W meridian is not a line of maritime delimitation per se, the circumstances in which it was

[317] CCM, Vol. I, p. 366, para. 8.62.
[318] *Ibid*, pp. 404-405, paras. 9.60-9.64.

agreed, and the Parties' mutual respect of it in practice over a considerable period of time, represent key factors to be considered in relation to a equidistance based boundary arrived at independently on the basis of contemporary international law."[319]

7.12. Moreover, invoking *Tunisia-Libya*[320], Colombia points to "a total lack of any Nicaraguan presence or claim east of the 82º W meridian for some 40 years after the 1928/1930 Treaty was concluded",[321] which would contrast with her own conduct in the same zone during the same period[322]. These robust assertions call for three remarks.

7.13. First, it is important to distinguish the facts in the *Tunisia-Libya* case from those of the present case. The line adopted by Tunisia and Libya "was drawn by each of the two States separately, Tunisia being the first to do so, for purposes of delimiting the eastward and westward boundaries of petroleum concessions."[323] By contrast, in the present case, the 82º meridian was not adopted as a line related to activities in the continental shelf in the 1928/1930s, but as a limit to the archipelago that was the object of the 1928 Treaty. Therefore, it cannot be considered as a relevant circumstance in delimiting a maritime boundary; unlike the situation in *Tunisa/Libya* there is no evidence of the Parties' mutual and "de facto respect for a line drawn from the land frontier"[324]. Clearly these differences between the two

[319] CCM, Vol. I, p. 404, para. 9.60.
[320] See CCM, Vol. I, p. 374, para. 8.87.
[321] CCM, Vol, I, p. 375, para. 8.88.
[322] *Ibid*, pp. 371-373, paras. 8.78-8.84.
[323] *Continental Shelf (Tunisia/Libya Arab Jamahiriya*), *Judgment, I.C.J. Reports 1982*, p. 84, para 118.
[324] *Ibid.* p. 84, para. 119.

cases preclude Colombia from relying on a case which, by no means, can be considered a precedent.

7.14. Second, as the Court recalled in its *Judgment of 8 October 2007* in the case concerning *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*:

> "Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. A de facto line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary."[325]

7.15. Third, in the present circumstances, it is obvious that no such line has ever been recognized in practice or even contemplated. And it is clearly not true that "Nicaragua for nearly 40 years, and Colombia until the present time, fully respected the 82º W meridian in practice as the limit of the exercise of their respective jurisdictions."[326]:

- it was not until 1969 that Colombia began to claim sovereignty over the waters situated east of the 82nd meridian[327]. Her first

[325] *Territorial and Maritime Dispute (Nicaragua v. Honduras), Judgment of 8 October 2007,* p. 69, para. 253; see also: *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009,* p. 59, para. 198.
[326] CCM, Vol. I, p. 371, para. 8.77.
[327] See NM, Vol. I, p. 153, para. 2.203.

claim in this respect was made on 4 June of that year[328] and it immediately met a firm opposition by Nicaragua[329];

- all subsequent attempts by Colombia to establish her claimed rights through *faits accomplis*, were, similarly firmly opposed by Nicaragua[330];
- Colombia's most authoritative voices repeatedly recognized that the respective maritime areas between the Parties were not delimited.[331]

7.16. Although Colombia attempts to portray a consistent exercise of sovereignty in the areas east of the 82nd meridian since the 1930s, there is no evidence that Colombia ever claimed or exercised exclusive sovereignty east of that meridian before 1969 as indicated above. What exists since that date is evidence that the Colombian military forces have imposed unlawful restrictions on Nicaragua's exercise of her own sovereignty east of the 82nd meridian.

7.17. *Effectivités* or State practice can have a role to play in territorial delimitation. Thus, the Chamber, in *Burkina Faso/Mali*, considered that *effectivités* must be taken into consideration when they do "not co-exist with any legal title"[332]. However, these rules have not been generally accepted in cases of maritime delimitation; in practice, *effectivités* have not had a significant influence on maritime delimitation. The Chamber, in *Burkina Faso/Mali* emphasized that "the process by which a court determines the line of a land boundary

[328] NM, Vol. II, pp. 101-105, Annex 28; see NM, Vol. I, p. 154, para. 2.204.
[329] See the Nicaraguan Note verbale of 22 September 1969 (NM, Vol. II, p. 154, Annex 29); see NM, Vol. I, pp. 154-155, para. 2.204 and pp. 157-158, para. 2.212.
[330] See NM, Vol. I, pp. 157-163, paras. 2.212-2.223.
[331] See *ibid*, pp. 155-157, paras. 2.206-2.210.
[332] *Frontier Dispute Judgment, I.C.J. Reports 1986,* p. 587, para. 65.

between two States can be clearly distinguished from the process by which it identifies the principles and rules applicable to the delimitation of the continental shelf"[333].

7.18. Exercise of sovereign activities in maritime areas cannot be taken into account for delimitation purposes. In fact, both the Geneva Convention on the Continental Shelf and the 1982 Law of the Sea Convention provide that "[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional"[334]. The Court has endorsed the content of those conventions and affirmed in several cases that "[t]he delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law"[335].

7.19. In this context, Nicaragua's supposed lack of exercise of sovereignty east of the 82nd meridian must not be held against her. The Colombian claim that the 82nd meridian was a line of delimitation was not only a verbal claim but an imposition by force. The first incident highlights this situation; it concerned State practice in relation to oil.

7.20. In 1966, Nicaragua granted several exploration concessions in her continental shelf that covered areas east of the 82nd meridian. This occasioned the first protest by Colombia by note dated 4 June 1969,

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[333] *Frontier Dispute Judgment, I.C.J. Reports 1986,* p. 578, para. 47.
[334] Article 2 (3) of the Geneva Convention on the Continental Shelf (*UNTS*, Vol. 499, p. 315); and Art. 77 (3) of the UNCLOS (*UNTS*, Vol. 1834, p. 36).
[335] *Fisheries case, Judgment of 18th December 1951: I.C.J. Reports 1951,* p. 132; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, I.C.J. Reports 1974*, p. 22, para. 49; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, I.C.J. Reports 1974*, p. 191, para. 41. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 66-67, para. 87.

and her first assertion that this meridian was a maritime boundary to which Nicaragua firmly replied contradicting this assertion[336]. Since then Colombia has imposed that limit by use of force or the threat of force as can be seen in the multiple incidents of captures and harassment of Nicaraguan vessels navigating or attempting to navigate east of the 82nd meridian[337].

C. The Role of the Meridian in Assessing the Equitable Character of the Line

7.21. For good measure, Colombia stresses, in several parts of her *Counter-Memorial*, that the 82nd meridian would be of particular importance in assessing the equitable character of the delimitation line[338]. It is indeed extremely difficult to follow this reasoning from a legal perspective since Colombia confuses

> - the distinct, and now well defined stages of the procedure to be followed for the delimitation of maritime areas, as so clearly described by the Court in its *Judgment of 3 February 2009* in the case concerning *Maritime Delimitation in the Black Sea*[339]; and
> - general considerations of equity and good faith, and even more obscure considerations equating the meridian with the equidistance line.

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[336] See generally NM, Vol. I, pp. 153-154, para. 2.204 and Vol. II, pp. 101-110, Annexes 28 and 29.
[337] See NM, Vol. I, pp. 159-162, paras. 2.215-2.222 and above Intro. pp. 15-19, paras. 34-43.
[338] See above, fn. 306 and 307.
[339] See e.g. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment of 3 February 2009,* pp. 37 and 39, paras. 115-122.

7.22. Thus, in paragraph 8.91 of her *Counter-Memorial*, Colombia asserts that:

> "It was Nicaragua who, in 1930, demanded and obtained the establishment of a limit along the 82° W meridian. It would be contrary to a delimitation carried out in accordance with equitable principles for Nicaragua now to be permitted to acquire rights that it had never claimed to the east, or on 'the wrong side', of the 82° W meridian limit that Nicaragua itself demanded."[340]

7.23. Here the argument seems to relate to the behaviour of Nicaragua. It has nothing to do with the law of maritime delimitation and simply implies that Nicaragua would be estopped (in the very general meaning of the word) from claiming areas beyond the delimitation line since she, herself, would have requested such a delimitation. This begs the question. As shown above, it cannot be seriously sustained that the 82nd meridian constitutes such a line, much less that Nicaragua ever sought this line as a line of delimitation.

7.24. Even more disconcerting is the assertion made by Colombia in Chapter 9 of her *Counter-Memorial*:

> "While the two lines [the equidistance line and the 82° W meridian] do not coincide – a fact that is not surprising – they do lie in the same general area between the San Andrés Archipelago and the Nicaraguan islands. Both

[340] CCM, Vol. I, p. 376, para. 8.91.

> lines follow the same general north-south orientation."[341]

And

> "The result reflects a certain balance in the situation that is broadly consistent with the past conduct of the Parties relating to their maritime presence and activities in the area of concern. While the 82º W meridian may not represent a delimited boundary in and of itself, an equidistance based delimitation does not depart disproportionately from the line and thus gives it due effect as a relevant circumstance to be taken into account in arriving at an equitable result."[342]

7.25. Thus, it would appear that the meridian – which, as clearly established by the Court, does not constitute "a general delimitation of the maritime boundary between Colombia and Nicaragua"[343] and only concerns the extension of the "San Andrés Archipelago" – would confirm the equitable character of the provisional equidistance boundary drawn between all the islands in the region.

7.26. This is pure fantasy. As explained above, the 82nd meridian has absolutely no role to play in the delimitation of the respective maritime areas over which the Parties have sovereignty or sovereign rights, and does not reflect any voluntary practice by Nicaragua. Quite the contrary, Colombia has imposed this limit by force and with a straight face now offers it as a parameter for judging the equity of the result of a delimitation.

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[341] CCM, Vol. I, p. 404 , para. 9.61.
[342] *Ibid*, p. 405, para. 9.64.
[343] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007,* p. 36, para. 120.

III. The 82nd Meridian and Colombia's Delimitation Treaties with Third States

7.27. The *Counter-Memorial* submits that it "is striking that there is a considerable body of State practice in the form of bilateral delimitation agreements along the limits of the area to be delimited in the present case involving all of the other riparian States in the immediate region"[344]. What is really striking is the feigned surprise of Colombia about this considerable body of State practice since Colombia herself was involved in the conclusion of these bilateral treaties, which form part of her policy to hem in Nicaragua's maritime zones by the 82º W meridian.

7.28. Also striking is how Colombia completely ignores the jurisprudence of the Court and arbitral tribunals, which have consistently held that such practice is not relevant for the delimitation of maritime boundaries with another State that is not a party to these bilateral treaties. The latest case in which a similar argument on the relevance of regional practice was made will not have escaped the attention of Colombia. It was made by Honduras in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*. In this regard, in its *Judgment of 8 October 2007* the Court did not attach any significance to that argument of Honduras. The only point the Court considered in relation to this bilateral practice of third States was whether the

[344] CCM, Vol. I, p. 363, para. 8.56.

interest of third States would be affected by the delimitation line the Court adopted.[345] The Court concluded that:

> "The Court has thus considered certain interests of third States which result from some bilateral treaties between countries in the region and which may be of possible relevance to the limits to the maritime boundary drawn between Nicaragua and Honduras. The Court adds that its consideration of these interests is without prejudice to any other legitimate third party interests which may also exist in the area. 319. The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-State rights."[346]

7.29. The reference to the 82nd meridian in these paragraphs is concerned with the same line which Colombia has tried to impose unilaterally on Nicaragua as a maritime boundary. Colombia and Honduras had used this meridian in their 1986 delimitation treaty. The Judgment of the Court not only rejected that this bilateral treaty had any relevance for the delimitation between Nicaragua and Honduras, but the Court also found that this bilateral boundary extended eastward beyond the meridian of 82˚ W.

[345] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment of 8 October 2007*, pp. 87-90, paras. 312-319.
[346] *Ibid*, p. 90, para. 319.

IV. Conclusions

7.30. If any pertinence for these proceedings is to be drawn from the position of the Parties with respect to the 82nd meridian, it would be the following:

i. Nicaragua has never accepted this meridian as a border line or a limit to her rights over maritime areas or features lying to the east of it.

ii. Colombia has attempted to impose this meridian as a border or limit to Nicaragua's sovereignty by use of force or threat of force since 1969.

iii. In its *Judgment of 13 December 2007* the Court considered that this meridian did not constitute a line of delimitation.

iv. Nevertheless, since the Court's *Judgment* Colombia has continued physically enforcing the 82nd meridian as her maritime border with Nicaragua.

v. The conclusion from the above facts should be that it would discredit the sacrosanct principle of good faith to attribute to Colombia one centimetre of maritime area west of the 82nd meridian which has constituted her extreme claim and which she has upheld by force since 1969. Although the principle of estoppel is not directly applicable to this situation since Nicaragua has never recognized or accepted the 82nd meridian as a line of delimitation, the more important and overriding principle of good faith is applicable. In this respect, it is undeniable that Colombia has drawn benefit from interpreting the 82nd meridian as a line of delimitation by exploiting the resources in the area and prohibiting and stopping Nicaragua

from doing so and, hence, should be prevented from obtaining advantage from this illicit conduct.

vi. Finally, the mainstay of any maritime delimitation is that the result should be equitable. An equitable result can only be the outcome of an exercise of good faith. If any limit were decided that granted to Colombia areas beyond her most extreme claims, which have been imposed on Nicaragua by force for half a century, the result would certainly be disconcerting for all Nicaraguans who expect an equitable solution.

DECLARATION

1. Nicaragua's Application contained a reservation of her rights expressed as follows:

> "Whilst the principal purpose of this Application is to obtain declarations concerning title and the determination of maritime boundaries, the Government of Nicaragua reserves the right to claim compensation for elements of unjust enrichment consequent upon Colombian possession of the Islands of San Andrés and Providencia as well as the keys and maritime spaces up to the 82 meridian, in the absence of lawful title. The Government of Nicaragua also reserves the right to claim compensation for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua."[347]

2. In her *Memorial* of 28 April 2003, Nicaragua described the methods used by Colombia to block her from the use of the maritime areas east of the 82nd meridian. A list of incidents was given and documented of the many occasions in which Colombian naval patrols had harassed or captured Nicaraguan vessels that ventured east of the 82nd meridian and some vessels that navigated near but not across this meridian.[348] This list of incidents was brought up to date when Nicaragua filed her *Written Statement* to the Preliminary Objections on 26 January 2004. In this *Written Statement* Nicaragua pointed out that since the filing of

[347] Nicaraguan Application, p. 8, para. 9
[348] NM, Vol. I, pp. 159-162, paras. 2.215-2.222.

the case the threats by Colombia made at the highest level had increased.[349]

3. Section IV of the Introduction to this *Reply* explains that in spite of the *Judgment of 13 December 2007* in which the Court considered that the 82nd meridian is not a line of delimitation of the Parties' respective maritime spaces, Colombia continues to enforce it as a maritime boundary against Nicaraguan vessels.

4. The Colombian authorities have publicly confirmed that they are enforcing this meridian as a boundary, and that they will continue to do so. The clearest expression of this is contained in the letter sent by Colombia to the Secretary General of the United Nations on 29 February 2008 in which is stated that Colombia will "continue to take routine measures designed to ensure that any fishing vessel that engages in activities to the east of that line (the 82nd meridian) has been licensed to do so by the competent Colombian authorities."[350]

5. At the present stage of the proceedings it is neither necessary nor appropriate moment in which to enter into a detailed account of the damage caused to Nicaragua by these Colombian "routine measures" that are in fact a blockade against Nicaragua's access to the natural resources located east of the 82nd meridian. What is undisputed is that Colombia since the late 1960s has prevented Nicaragua from granting concessions of exploration of petroleum in areas east of the 82nd meridian and has captured and harassed all Nicaraguan vessels that

[349] NWS, pp. 6-9, paras. 12-17.
[350] NR, Vol. II, Annex 6.

attempted to go about their lawful business to the east of this meridian.

6. The maritime areas that are being illicitly used by Colombia for her unjust enrichment and to the detriment of Nicaragua extend over 100,000 square kilometers of maritime spaces.

7. These Colombian activities, especially with their continuing character after the *Judgment of the Court of 13 December 2007*, are in manifest violation of Nicaragua's rights to access and use her natural resources located east of the 82nd meridian and an unjust enrichment of Colombia by her unilateral and unlawful possession of the areas located east of that meridian.

8. After due consideration of the implications of these violations having flagrantly continued after the Judgment of the Court, Nicaragua has decided that it is necessary for the maintenance and respect of the rule of law to request a declaration from the Court that:

- Colombia is not acting in accordance with her obligations under international law by preventing and otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82nd meridian;
- Colombia immediately cease all these activities which constitute violations of Nicaragua's rights;
- Colombia is under an obligation to make reparation for the damage and injuries caused to Nicaragua by the breaches of the obligations referred to above; and,

- The amount of this reparation shall be determined in a subsequent phase of these proceedings.

SUBMISSIONS

Having regard to the legal considerations and evidence set forth in this *Reply*:

I. *May it please the Court to adjudge and declare that*:

(1) The Republic of Nicaragua has sovereignty over all maritime features off her Caribbean coast not proven to be part of the "San Andrés Archipelago" and in particular the following cays: the Cayos de Albuquerque; the Cayos del Este Sudeste; the Cay of Roncador; North Cay, Southwest Cay and any other cays on the bank of Serrana; East Cay, Beacon Cay and any other cays on the bank of Serranilla; and Low Cay and any other cays on the bank of Bajo Nuevo.

(2) If the Court were to find that there are features on the bank of Quitasueño that qualify as islands under international law, the Court is requested to find that sovereignty over such features rests with Nicaragua.

(3) The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary with the following coordinates:

1. 13º 33′ 18″N	76º 30′ 53″W
2. 13º 31′ 12″N	76º 33′ 47″W;
3. 13º 08′ 33″N	77º 00′ 33″W;
4. 12º 49′ 52″N	77º 13′ 14″W;
5. 12º 30′ 36″N	77º 19′ 49″W;

6. 12º 11′ 00″N 77º 25′ 14″W;
7. 11º 43′ 38″N 77º 30′ 33″W;
8. 11º 38′ 40″N 77º 32′ 19″W;
9. 11º 34′ 05″N 77º 35′ 55″W

(All coordinates are referred to WGS84).

(4) The islands of San Andrés and Providencia (Santa Catalina) be enclaved and accorded a maritime entitlement of twelve nautical miles, this being the appropriate equitable solution justified by the geographical and legal framework.

(5) The equitable solution for any cay, that might be found to be Colombian, is to delimit a maritime boundary by drawing a 3-nautical-mile enclave around them.

II. Further, the Court is requested to *adjudge and declare that*:

- Colombia is not acting in accordance with her obligations under international law by stopping and otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82nd meridian;

- Colombia immediately cease all these activities which constitute violations of Nicaragua's rights;

- Colombia is under an obligation to make reparation for the damage and injuries caused to Nicaragua by the breaches of the obligations referred to above; and,

- The amount of this reparation shall be determined in a subsequent phase of these proceedings.

The Hague, 18 September 2009.

Carlos J. ARGÜELLO GÓMEZ
Agent of the Republic of Nicaragua

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