INTERNATIONAL COURT OF JUSTICE

DISPUTE CONCERNING THE QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST
(NICARAGUA V. COLOMBIA)

REPLY

OF THE REPUBLIC OF NICARAGUA

VOLUME I

9 July 2018

TABLE OF CONTENTS

LIST OF FIGURES v

CHAPTER 1. INTRODUCTION 1

A. The Procedural Context 1

B. The Subject-Matter of the Dispute 2

C. Outline of the Reply 4

CHAPTER 2. THE COURT MAY DELIMIT THE PARTIES' CONTINENTAL SHELF ENTITLEMENTS 9

A. The Law Applicable to the Present Dispute 9

B. Nicaragua's Continental Shelf Entitlement is Opposable to Colombia 12

C. The Respective Roles of the ICJ and the CLCS 25

1. The Court Has Already Found That A Recommendation By The CLCS Is Not A Prerequisite To The Delimitation Of The Continental Shelf Beyond 200 Nautical Miles 26

2. The Court May Entertain Nicaragua's Delimitation Request 29

a. The CLCS does not delineate the outer limit of the continental shelf of States 31

b. The Court's task in the present case 35

CHAPTER 3. CONTINENTAL SHELF ENTITLEMENT 41

A. Nicaragua's Submission To The CLCS Confirms That It Is Entitled To A Continental Shelf Beyond 200 M 42

1. Summary Of Nicaragua's Submission To The CLCS 42

a) Regional Geomorphology 43

b) The Limits of the Continental Margin 46

B. "Natural Prolongation" Does Not Have The Meaning Colombia Seeks To Ascribe To It 51

1. Colombia's "Natural Prolongation" Argument Is Inconsistent With The Jurisprudence 53

2. An Analysis Of Article 76 In Accordance With The Vienna Convention On The Law Of Treaties Proves That ITLOS Was Correct 58

a. The Text of Article 76 59

b. Context 62

c. Object and Purpose 64

d. The Practice of the CLCS..65

e. The Travaux Préparatoires 70

C. Colombia's Geological and Geomorphological Arguments Are Wrong in Any Event 75

1. Regional Geology 75

2. The Upper And Lower Nicaraguan Rise Are Geologically Continuous 80

3. The Upper And Lower Nicaraguan Rise Are Geomorphologically Continuous...86

CHAPTER 4: ENTITLEMENT OF COLOMBIA'S ISLANDS AND CAYS 97

A. San Andrés and Providencia 98

B. Cays of Roncador Serrana, Serranilla and Bajo Nuevo.......................101

1. Article 121(3) Reflects Customary International Law 101

a. The Court's Jurisprudence on the customary law status of Article 121(3)...102

b. State practice has not led to a divergence between conventional and customary international law 104

2. The Term "Rocks" Does Not Apply Only to "Geological" | Rocks 115

a. Colombia's interpretation of the term 'rock' leads to a manifestly absurd and unreasonable result.........116

b. The drafting history of Article 121(3) 120

c. The jurisprudence on the meaning of the term 'rock' 125

d. State Practice 127

3. Sustaining Human Habitation and Economic Life of their Own 129

4. The Cays on the Banks of Serrana, Roncador, Serranilla and Bajo Nuevo Are Rocks that Cannot Sustain Human Habitation or Economic Life of Their Own 137

a. Serrana Has No Entitlement Beyond 12M 138

b. Roncador Has No Entitlement Beyond 12M 145

c. Serranilla Has No Entitlement Beyond 12M 148

d. Bajo Nuevo Has No Entitlement Beyond 12M 152

CHAPTER 5. A STATE'S ENTITLEMENT TO CLAIM A 200 NM EEZ WITH ITS ATTENDANT RIGHTS OVER THE SEABED DOES NOT EXTINGUISH ANOTHER STATES OVERLAPPING OCS CLAIM 159

A. The Continental Shelf, Including The Portion Beyond 200 Nm, Is An Ipso Jure Entitlement Of Each Coastal State, Which Automatically Appertains To The Coastal State……….......................161

B. An Overlap Between One State's OCS And Another State's Continental Shelf Within 200 NM Requires Delimitation In The Normal Way………………………………...........................171

C. The Juridical Nature Of The Rights Of The Coastal State Are The Same Throughout Its Entire Continental Shelf...................................174

D. Qualifying Islands And Mainlands Are Subject To The Same Customary International Law Regime Regarding Their Continental Shelves, But May Be Treated Differently In The Context Of Delimitation 176

E. The UNCLOS Travaux Préparatoires And State practice 177

1. The Universalization And Central Importance Of The 200-Nautical-Mile Limit..178

2. The Distinction Between The EEZ And The OCS 179

3. The OCS May Overlap With The Continental Shelf Of Another State Or May Direcly Abut The International Seabed Area 182

4. Continental Shelf Claims Under UNCLOS Article 76(1) Based On The 200 NM 'Distance' Criterion Have No Automatic Precedence Over Continental Shelf Claims Under Unclos Article 76(1) Based On The Outer Edge Of The Continental Margin 184

F. State Practice Evidences No Juridical Distinction Or Hierarchy Between The Entitlement To A Continental Shelf Within 200NM And The Entitlement To A Continental Shelf Beyond 200 NM 185

CHAPTER 6. THE RIGHTS OF THIRD STATES WOULD NOT BE AFFECTED BY THE DELIMITATION NICARAGUA PROPOSES 193

A. A Large Portion of the Relevant Area Is Beyond Any Potential Claims by a Third State 194

B. The Delimitation of the Boundary between Nicaragua and Colombia Is Without Prejudice to Third States 196

CHAPTER 7. CONCLUSIONS 203

SUBMISSIONS 209

CERTIFICATION 211

LIST OF ANNEXES 213

LIST OF FIGURES

Figure 3.1	Regional Geomorphology of the SW Caribbean	43
Figure 3.2	Regional Geomorphology of the SW Caribbean – perspective view	44
Figure 3.3	Nicaragua’s Eight Foot of Slope Points	47
Figure 3.4	Formula line: FOS + 60M	48
Figure 3.5	Construction of the Outer Limit of the Continental Shelf	49
Figure 3.6	The Outer Continental Shelf in the Relevant Area	50
Figure 3.7	Outer limits of the continental shelf of New Zealand reflecting the recommendations of the Commission adopted 22nd August 2008	67
Figure 3.8	Philippines’ Outer Continental Shelf in the Benham Rise Area	69
Figure 3.9	Regional Tectonics of the SW Caribbean	76
Figure 3.10	Eastwards Motion of the Caribbean Plate from 125 Ma to Present	78
Figure 3.11	Continental Reconstruction and Geological Terrane Accretion in the Caribbean (upper) and NW Colombia (below)	79
Figure 3.12	The Chortis and Siuna Blocks forming the Nicaraguan Landmass and the Western Part of the Nicaragua Rise	82
Figure 3.13	Accretion of Crustal Blocks in the Caribbean Plate	84
Figure 3.14	Modification of Figure 1 from the Parson-Croker Report showing the effect of differing colour intervals	88
Figure 3.15	Geomorphological Trend Lines showing the Extent of the Nicaraguan Rise	90
Figure 3.16	Transverse profiles illustrating morphological coherency of the Nicaraguan Rise.	92
Figure 3.17	Example of a continental margin used as illustration by the CLCS	94
Figure 3.18	Philippines’ Outer Continental Shelf: Connection between the Benham Rise and the continental slope	96
Figure 4.1	Final Delimitation	99
Figure 4.2	Aves Island, Venezuela	107
Figure 4.3	The Outer Limits of the EEZs of Malaysia and Vietnam in the South China Sea	111
Figure 4.4	200M Limits for Mainlands and Entitled Islands	157
Figure 6.1	200M Limits for Colombia, Jamaica and Panama	196
Figure 6.2	Costa Rica/Nicaragua line	200
Figure 7.1	Final Delimitation	208

CHAPTER 1. INTRODUCTION

1.1 After summarising the procedural context of this submission, (**A.**) this Introduction briefly recalls the questions at the core of this case and the manner in which they relate to the Court's Judgment dated 19 November 2012 in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* ('the 2012 Judgment'),[1] (**B.**), and gives an outline of the present Reply (**C.**).

A. The Procedural Context

1.2 Nicaragua submits this Reply in accordance with the Court's Order of 8 December 2017.[2]

1.3 Nicaragua filed its Application instituting proceedings in this case on 16 September 2013. It made two requests of the Court. First, it asked the Court to establish "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012". Nicaragua's Second Request asked the Court to declare "[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of

---

[1] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J Reports* 2012, p. 624.

[2] *I.C.J., Order*, 8 December 2017, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia).*

its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast".

1.4 On 14 August 2014, Colombia raised preliminary objections to the jurisdiction of the Court. In its Judgment dated 17 March 2016, the Court found that it had jurisdiction on the basis of Article XXXI of the Pact of Bogotá to entertain Nicaragua's First Request and that that Request was admissible, while Nicaragua's Second Request was inadmissible. The Court made an Order on 28 April 2016, fixing new time-limits for the filing of the Memorial and Counter-Memorial, and a further Order on 8 December 2017, fixing the time-limits for the filing of this Reply and of a Rejoinder.

1.5 Nicaragua's Reply draws the appropriate consequences from the Court's Judgment of 17 March 2016 and its Orders of 28 April 2016 and 8 December 2017, and does not address claims that are outside the Court's jurisdiction or have been declared inadmissible.

B. The Subject-Matter of the Dispute

1.6 The Court's Judgment dated 19 November 2012 in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* decided on the course of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of

Colombia eastwards from the Nicaraguan coast out as far as the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured.[3]

1.7 In accordance with customary international law, reflected in Article 76(1) of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS'), Nicaragua claims a continental shelf that includes, in the words of Article 76(1), "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." That continental margin includes areas of seabed that lie more than 200 nautical miles from Nicaragua's baselines.

1.8 UNCLOS Article 76 stipulates that the outer limits of the continental shelf, defined by the coastal State in accordance with the detailed criteria set out in Article 76, are "final and binding" if they are established on the basis of the recommendations of the Commission on the Limits of the Continental Shelf ('CLCS'), established under UNCLOS, concerning the location of the outer limits of the continental shelf. Those recommendations are themselves made on the basis of data concerning the characteristics of the seabed provided to the CLCS by the coastal State.

1.9 In the 2012 Judgment, the Court observed that Nicaragua had at that time not submitted to the CLCS all of the data that would ultimately be required[4] to

---

[3] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J Reports 2012*, p. 624, para. 251(4).

[4] Nicaragua had, on 7 April 2010, submitted to the CLCS the Preliminary Information that it was required to submit at that time. The rules of the CLCS permitted States to make an initial filing of

enable the CLCS to make its recommendations concerning the location of the outer limits of the continental margin. The Court went on to hold that Nicaragua had not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to a continental shelf, and that the Court was therefore not in a position to delimit the continental shelf boundary between Nicaragua and Colombia as requested by Nicaragua in that case.[5]

1.10 On 24 June 2013, in accordance with the CLCS rules, Nicaragua made its full submission to the CLCS. Having done everything required of it in this respect by UNCLOS, Nicaragua filed its Application in the present case on 16 September 2013, requesting the Court to complete the delimitation of Nicaragua's continental boundary with Colombia.

C. Outline of the Reply

1.11 There are six further chapters in this Reply. **Chapter Two** responds to the arguments in Chapter 2 of the Counter-Memorial, in which Colombia argued that the continental shelf more than 200 NM from the baselines is, for UNCLOS States Parties, subject to a special set of rules distinct both from the regime applicable to the area of the continental shelf closer to shore and from the regime of the continental shelf under customary international law, and that the applicable

---

'Preliminary Information' followed at a later date by fuller data: see UN Doc. SPLOS/183, 20 June 2008.

[5] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J Reports 2012*, p. 624, para. 129.

law so far as concerns Colombia in this case is different from the applicable law so far as concerns Nicaragua. Colombia further argued that the Parties to UNCLOS have excluded the delineation of the outer limit of the continental shelf from the jurisdiction of this Court and conferred exclusive competence in relation to that task on the CLCS established under UNCLOS.

1.12 Chapter Two of this Reply argues that this conception of the applicable law is incoherent and incorrect, and sets out Nicaragua's submission regarding the applicable law and the respective roles and competences of the Court and of the CLCS.

1.13 **Chapter Three** of this Reply responds to arguments concerning the substantive law applicable to the continental shelf that are set out in Chapters 2, 5 and 7 of the Counter-Memorial. Those arguments relate to the precise nature of the juridical concept of the continental shelf, and to the manner in which an entitlement to a continental shelf is to be proved. Nicaragua's Chapter Three sets out Nicaragua's legal submissions on the nature of the continental shelf and of the entitlement to it, and also sets out the technical details of the basis of Nicaragua's continental shelf entitlement, derived from expert reports.

1.14 **Chapter Four** of this Reply responds to Chapter 4 of the Counter-Memorial, in which Colombia addressed the question of the continental shelf and exclusive economic zone ('EEZ') entitlements of islands and rocks. Chapter Four of the Reply submits that Colombia has both mis-stated and misapplied the law

relating to the entitlements of minor maritime features such as rocks and islets. In doing so Colombia has wrongly conflated the question of the entitlement of a feature to a continental shelf with the question of the effect of a feature on the delimitation of the course of a maritime boundary.

1.15 **Chapter Five** of this Reply responds to Chapter 3 of the Counter-Memorial, in which Colombia argued that as a matter of international law a State's entitlement to a 200 NM EEZ and continental shelf based on the 'distance from the coast' criterion automatically enjoys precedence over another State's overlapping continental shelf entitlement based on its rights over the continental shelf out to the edge of its continental margin when that edge lies more than 200 NM from the coast, under customary international law, enshrined in UNCLOS Article 76(1). Chapter Five submits that Colombia's argument has no basis in international law.

1.16 **Chapter Six** of this Reply responds to Chapter 6 of the Counter-Memorial, in which Colombia argued that the rights of third States would be affected by Nicaragua's continental shelf claims in the Caribbean Sea. Nicaragua submits in Chapter Six that Colombia's argument concerning the rights of third parties is based on an erroneous assumption, not only because the Court's delimitation of the boundary between Nicaragua and Colombia will be *res inter alios acta* as to third States, and therefore without prejudice to their interests, but

also because a large portion of the relevant area is beyond any potential claims by a third State.

1.17 **Chapter Seven** of this Reply sets out Nicaragua's Conclusions and Submissions

CHAPTER 2. THE COURT MAY DELIMIT THE PARTIES' CONTINENTAL SHELF ENTITLEMENTS

2.1 In Chapter 2 of its Counter-Memorial, Colombia contends that the Court may not proceed with the delimitation of the continental shelf beyond 200 nautical miles from Nicaragua's coasts. In support of this claim, the Respondent develops two main arguments, with which Nicaragua will deal in turn:

- Nicaragua's continental shelf entitlement beyond 200 nautical miles would not be opposable to Colombia (**B.**); and

- CLCS recommendations would be a pre-requisite to the delimitation in the present case (**C.**).

Both assertions are misconceived.

2.2 Before turning to Colombia's first argument, it is necessary to come back to the law applicable to the present dispute which Colombia misrepresents (**A**.).

A. The Law Applicable to the Present Dispute

2.3 Throughout its Counter-Memorial, Colombia treats Article 76(8) of UNCLOS and other provisions of this Convention related to the CLCS as part of the applicable law between the Parties. The Respondent makes the extraordinary claim that "different laws and procedures apply to the Applicant and its

Application, on the one hand, and to the Respondent and its defence, on the other."[6] It further stresses that:

> "The Applicant is a Party to UNCLOS and purports to rely on certain treaty-based rights which that Convention affords; proof of those rights is subject to the rules and procedures prescribed in and under the authority of the CLCS and UNCLOS."[7]

By contrast, "the Respondent is not a Party to UNCLOS and is only subject, in these proceedings, to customary international law."[8]

2.4 The position Colombia adopts today contradicts the position it defended in the *Territorial and Maritime Dispute*. As the Court noted in its 2012 Judgment, "[t]he Parties agree that, since Colombia is not a party to UNCLOS, *only customary international law may apply* in respect to the maritime delimitation requested by Nicaragua."[9] As Colombia rightly notes, *pacta tertiis nec nocent nec prosunt*.[10] This principle has been codified in Article 34 of the Vienna Convention on the Law of Treaties.[11] It is the corollary of the maxim *res inter alios acta*. As the Court noted in the *Anglo-Iranian* case, it means that a treaty to which only one of the Parties to a dispute is a contracting State "cannot produce any legal

[6] CCM, para. 2.1.
[7] *Ibid.*, para. 2.2.
[8] *Ibid.*, para. 2.3.
[9] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Reports 2012*, p. 666, para. 114 – emphasis added. See the Counter-Memorial of Colombia in the *Territorial and Maritime Dispute*, 11 November 2008, para. 4 of the Introduction to Part III and para. 9.3.
[10] CCM, para. 2.12.
[11] *U.N.T.S.*, Vol. 1155, No. 18232, p. 341 ("A treaty does not create either obligations or rights for a third State without its consent").

effect as between"[12] the Parties to the dispute. It follows that provisions of UNCLOS which do not reflect customary international law cannot be invoked in the present proceedings.

2.5 In the present case, the Parties agree that Article 76(1), 83 and 121 of UNCLOS reflect customary international law and are applicable between the Parties. They also agree that the provisions concerning the CLCS are not part of customary international law.[13] Therefore, these provisions cannot have, by themselves, any impact on the decision that the Court has been requested to take.

2.6 Conversely, the Parties disagree on the customary nature of paragraphs 2 to 6 of Article 76 of UNCLOS. As shown in the next Section, these paragraphs are part of customary international law and, consequently, are applicable to the present case. This leads to the inescapable conclusion that Nicaragua's entitlement to a continental shelf "throughout the natural prolongation of its land territory to the outer edge of the continental margin" in accordance with the formula in Article 76(1) of the UNCLOS, as elaborated in Article 76, paragraphs 2 to 6, is opposable to Colombia.

2.7 In other words, both Colombia and Nicaragua are bound by the substantive rules set out in Article 76, which now reflect customary international law and are part of the public order of the oceans; in their bilateral relations, they are not bound by the "institutional" rules included in the UNCLOS, notably by

[12] I.C.J., Judgment, 22 July 1952, *Anglo-Iranian Oil Co. case, Preliminary Objections, Reports 1952*, p. 109.
[13] See CCM, para. 2.21.

those concerning the CLCS. Neither Colombia nor Nicaragua, in their relations *inter se*, can rely upon said rules or upon the possible findings of the Commission.

B. Nicaragua's Continental Shelf Entitlement is Opposable to Colombia

2.8 In support of its claim that "the OCS [outer continental shelf] is not an entitlement *per se*"[14] and hence not opposable to it, Colombia presents three arguments according to which the continental shelf entitlement beyond 200 nautical miles is dependent on

> "revenue-sharing, in essence a royalty, to be paid to the other States Parties to UNCLOS, not to non-Parties (1); the realisation of a State Party's claim to an OCS is contingent on a determination and the prior recommendations by the CLCS, an exclusively UNCLOS institution (2); and, in any case, neither Nicaragua, nor the Court, can rely on Article 76, specially paragraph 4 therein, *vis-à-vis* Colombia (3)."[15]

2.9 Nicaragua will address each of these arguments in turn below.

2.10 The **first Colombian argument** is that the "privilege of acquiring an OCS is granted in return for revenue sharing."[16]

2.11 It is true that Article 82 of UNCLOS obliges States to "make payments or contributions in kind in respect of the exploitation of the non-living resources of

[14] CCM, para. 2.9.
[15] *Ibid*.
[16] CCM, p. 36.

the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[17]

2.12 It is also true that Article 82 is a conventional provision and does not reflect customary international law. This simply means that third States may not be required to make such payments and that in turn they cannot claim redistribution from the International Seabed Authority as provided for in paragraph 4 of Article 82. Nothing less, nothing more. And, of course, as a Party to the Convention, Nicaragua, will comply with Article 82.

2.13 Significantly, Article 82 does not address the nature of States' continental shelf entitlements. As aptly explained by ITLOS, a procedural requirement like the one contained in article 82

> "does not imply that entitlement to the continental shelf depends on any procedural requirements. As stated in article 77, paragraph 3, of the Convention, '[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation'".

A coastal State's entitlement to the continental shelf exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present. It does not require the establishment of outer limits."[18]

2.14 This statement is applicable *mutatis mutandis* to Article 82 payments and contributions.[19]

---

[17] Article 82 of UNCLOS.

[18] I.T.L.O.S, Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, p. 107, paras. 408-409. See also paras. 2.52-2.54 below.

2.15 Moreover, Colombia's position is contradicted by its acceptance of the customary nature of Article 76(1),[20] which does not distinguish between an inner and an outer continental shelf.[21] The unavoidable conclusion is that the entitlement provided for in Article 76(1) is customary but not Article 82, it means that the entitlement to an extended continental shelf does not depend on revenue-sharing. As was recalled in Section A above, an entitlement under customary international law cannot be subject to a treaty-based and non-customary law condition.

2.16 Colombia's **second argument** is that "the realization of an OCS claim requires prior determination by the CLCS."[22] Nicaragua will address this argument in more detail in Section C below.[23] Suffice it to recall here that, in the words of ITLOS, "the existence of entitlement does not depend on the establishment of the outer limits of the continental shelf by the coastal State."[24]

---

[19] Colombia's description of Article 82 payments as "royalty" (CCM, para. 2.9) is inadequate. A royalty is money paid to the owner of the right. This is not the case here. The owner of the right is the coastal State. Article 82 payments resembles more to a tax on the coastal State's property.

[20] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Reports 2012*, p. 666, para. 117 ("Colombia accepts that paragraph 1 of Article 76 reflects customary international law").

[21] See *Decision of 11 April 2006*, *R.I.A.A.*, *Vol. XXVII*, pp. 208-209, para. 213; I.T.L.O.S, Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, pp. 96-97, para. 362 and Special Chamber, Judgment, 23 September 2017, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, para. 490.

[22] CCM, p. 40.

[23] See paras. 2.37-2.63 below.

[24] I.T.L.O.S., Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, p. 107, para. 409.

2.17 The **third argument** developed by Colombia is that Article 76(4) of UNCLOS cannot be invoked by Nicaragua in the present case because it is not part of customary international law.[25]

2.18 To recall, the Parties agree that "the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law."[26] They disagree, however, on the customary status of the other paragraphs of Article 76. For the purposes of the present case, the other relevant paragraphs are paragraphs 2 to 6. Colombia asserts they do not reflect customary international law.[27] Nicaragua will show that they do.

2.19 Article 76 concerns the "Definition of the continental shelf". It reads as follows:

> "1. The continental shelf of a coastal State comprises the seabed 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 seabed 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

[25] See CCM, paras. 2.17 and 2.22-2.28.
[26] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Reports 2012*, p. 666, paras. 116-117.
[27] See CCM, para. 2.5-2.17

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 seabed, 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 coordinates of latitude and longitude.

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

> 10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."

2.20 Paragraphs 1 to 6 of Article 76 are closely interrelated and they are necessary for understanding paragraph 1, as they explicate the meaning of the determination of the continental shelf in Article 76(1). As the ITLOS explained,

> "the reference to natural prolongation in article 76, paragraph 1, of the Convention, should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin. Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose."[28]

2.21 As early as 1985, Hutchinson concluded from his examination of State practice that "it is quite likely that Article 76 of the UN Convention, although not yet wholly reflecting the position at customary law, will act as a clear and authoritative guide for future State practice."[29] Similarly, in 1990, Brownlie noted that Article 76 "will probably be recognized as the new standard of customary law."[30] This is now confirmed by a largely dominant doctrine.[31]

---

[28] I.T.L.O.S, Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, p. 114, para. 437.

[29] D.N. Hutchinson, "The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law", *British Yearbook of International*, Vol. 56, 1985, p. 188.

[30] I. Brownlie, *Principles of Public International Law*, C.U.P., 4th ed., 1990, p. 223. Twenty years later, Crawford confirmed Brownlie's prediction (*Brownlie's Principles of Public International Law*, C.U.P., 8th ed., 2012, p. 274).

[31] See e.g. R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Juris Publishing, Manchester UP, 3rd ed. 1999, pp. 149-150; T. A. Clingan Jr., "The Law of the Sea in Prospective: Problems of States Not Parties to the Law of the Sea Treaty", German Yearbook of International Law, Vol. 30, 1987, p. 111 and K.A. Baumert, "The Outer Limit of the Continental Shelf under Customary International Law", *A.J.I.L.*, Vol. 111, 2017, Issue 4, p. 857. See also the Separate Opinion of Judge Mbaye in the *Libya/Malta* case (*I.C.J. Reports 1985*, p. 94) and B.M. Magnusson, "Can the

2.22 The review of State practice is indeed compelling in that it shows that, when their continental shelf extends beyond 200 M, States have apparently unanimously used Article 76 for the determination of the limits of their continental shelf. As the ILC has concluded "[f]orms of State practice include, but are not limited to: […] conduct in connection with treaties; […] legislative and administrative acts [...]."[32]

2.23 The legislative and administrative acts of several States constitute particularly relevant State practice because they were adopted *before* these States became Parties to UNCLOS:

- Brazilian Law No. 8.617 adopted in 1993 provides that "[t]he outer limits of the continental shelf will be established in accordance with article 76";[33]

- paragraph 6 of the Preamble of the Costa Rican Decree 18581-RE of 1988 reads as follows: "The regulations of the Convention that refer to the zones of national jurisdiction, including the system of drawing straight baselines, reflect contemporary international practice and have been considered to derive from prevailing International customary law";[34]

United States Establish the Outer Limits of Its Extended Continental Shelf Under International Law?", *Ocean Development and International Law*, 2017, p. 12.

[32] Report of the International Law Commission on the Work of the Sixty-Eight Session (2016), U.N. Doc. A/71/10, Conclusion 6(2), p. 91.

[33] Article 11(Sole paragraph) http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BRA_1993_8617.pdf. Brazil became a party in 1994.

[34] http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CRI_1988_Decree18581.pdf. Costa Rica ratified UNCLOS in 1992.

- the 1994 Maritime Zones Act of South Africa establishes that "[t]he continental shelf as defined in article 76 of the United Nations Convention on the Law of the Sea […] shall be the continental shelf of the Republic";[35]

- in a 1985 Declaration, the Ministry of Foreign Affairs of Chile, referring to the continental shelf of Easter Island and of Sala y Gomez Island "declare[d] and communicate[d] to the international community that its sovereignty over their respective shelves extends up to a distance of 350 nautical miles, measured from the baselines from which their respective territorial seas are measured";[36]

- the 1985 Ecuadorian Declaration on the continental shelf provides that "the international law of the sea recognizes that the coastal States have the power to delineate the limits of their continental shelves up to a distance of 100 miles from the 2,500 metre isobath";[37] and

- in its 1985 Ordinance No. 85-013, Madagascar declares that its continental shelf "shall comprise the sea-bed and its subsoil beyond the territorial sea to a distance of 200 nautical miles from the baselines from which the breadth

---

[35] Article 8(1) (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ZAF_1994_Act.pdf). South Africa ratified UNCLOS in 1997.

[36] Article 1 (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHL_1985_Declaration.pdf). Chile ratified UNCLOS in 1997.

[37]http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ECU_1985_Declaration.pdf. Ecuador ratified UNCLOS in 2012.

of the territorial sea is measured, or to the limit determined by agreement with adjacent States, or else to 100 nautical miles from the 2,500-metre isobath."[38]

2.24 The few treaties delimiting the continental shelf beyond 200 nautical miles support Nicaragua's position:

- the Agreement between the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland Concerning the Delimitation of the Continental Shelf between the Two Countries of 7 November 1988[39] was adopted before these two States became Parties to UNCLOS. As noted in Anderson's report on the Agreement in *International Maritime Boundaries*: "Point 94 was chosen according to the criterion of the foot of the slope plus 60 n.m.; Point 132 according to that of the 2500 meters isobath plus 100 n.m., thereby taking into account Article 76 of the UN Convention on the Law of the Sea";[40]

- the Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas of 18 April 1990[41] is pertinent since Venezuela is not a Party to UNCLOS. As pointed out in the Nweihed report on the Treaty: "the edge of the margin was calculated

---

[38] Article 7 (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MDG_1985_Ordinance.pdf). Madagascar ratified UNCLOS in 2001.

[39] J.L. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Brill, 1993, Report No. 9-5, pp. 1774-1779.

[40] *Ibid.*, p. 1771. See DOALOS, *Law of the Sea: Practice of States at the Time of Entry in Force of the United Nations Convention of the Law of the Sea*, Sales No. E.94.V.13, 1994, p. 141 ("The continental shelf delimitation line agreed between Ireland and the UK in 1988 was apparently fixed on the basis of the criteria in article 76, paragraphs 4 and 5 of the Convention").

[41] J.L. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Brill, 1993, Report No. 2-13(3), pp. 685-689.

on the basis of the thickness of the sedimentary rocks as equal to 1 percent of the shortest distance from the slope" and "the potential extension of the boundary to a point close to the 350-n.m. limit (LOS Convention, Art. 76, No.4 and 5) was virtually pre-empted by the parties"[42]; and

- the preamble of the 2017 Treaty between Cuba and the United States affirms "that the provisions of international law pertaining to the seaward extent of the continental shelf are reflected in Article 76 of the 1982 United Nations Convention on the Law of the Sea".[43]

2.25 In 1988, before UNCLOS even entered into force, the Consultative[44] and Contracting Parties[45] to the Antarctic Treaty concluded that the "international law" for the determination of "the geographic extent of the continental shelf" is "paragraphs 1 to 7 of Article 76 of the United Nations Convention on the Law of the Sea."[46]

2.26 Likewise, the *opinio juris* is unquestionable. The "[f]orms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions."[47]

---

[42] *Ibid.*, p. 681.

[43] See K.A. Baumert, "The Outer Limit of the Continental Shelf under Customary International Law", *A.J.I.L.*, Vol. 111, 2017, Issue 4, p. 852 (note 197).

[44] Argentina, Australia, Belgium, Brazil, Chile, China, France, German Democratic Republic, Federal Republic of Germany, India, Italy, Japan, New Zealand, Norway, Poland, South Africa, USSR, United Kingdom, United States, and Uruguay.

[45] Bulgaria, Canada, Czechoslovakia, Denmark, Ecuador, Finland, Greece, Republic of Korea, Netherlands, Papua New Guinea, Peru, Romania, and Sweden.

[46] Final Act of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources, *I.L.M.*, Vol. 27, 1988, p. 866.

[47] Report of the International Law Commission on the Work of the Sixty-Eight Session (2016), U.N. Doc. A/71/10, Conclusion 10(2), p. 99.

2.27 The following public statements and government legal positions illustrates this *opinio juris*.

2.28 During the UN Conference on the Law of the Sea, Costa Rica declared "that the legal regime which […] governed […] the continental shelf [reflected in the draft convention] formed part of customary international law and was already binding upon all States […]."[48] Similarly, the U.K. Representative stated that Article 76 makes "more precise what is inherent or implicit in existing international law" and that it "accurately reflects the evolution and development of the concept" of the continental shelf.[49]

2.29 In a 1987 Memorandum, the Department of External Affairs of Canada stated that "elements of [the provision of the Law of the Sea Convention] on delimitation of the continental shelf […] probably do reflect current international law."[50] Canada confirmed its position in the context of the *St. Pierre and Miquelon* case, in which it challenged France's application of Article 76(4). Canada argued "that although the continental margin off Newfoundland generally extends beyond 200 nautical miles, the point at which France is making its claim may, in fact, lie beyond the edge of that margin determined in accordance with Article 76 of the 1982 Convention on the Law of the Sea […] Canada adds that it does not accept the French assertion concerning the location of the outer edge of the continental margin and observes that France itself does not know the location

---

[48] 139th Plenary meeting, U.N. Doc. A/CONF.62/SR.139 (1980), *XIV Official Records*, p. 66.
[49] 189th Plenary meeting, U.N. Doc. A/CONF.62/SR.189 (1980), *XVII Official Records*, p. 79.
[50] *Canadian Yearbook of International Law*, 1987, p. 490 – brackets in the original text.

of the outer edge of the margin."[51] Canada became a Party to UNCLOS only in 2003.

2.30 In that same case, France invoked Article 76(4)(a)(ii) in support of its claim to "rights over the continental shelf beyond 200 miles, asserting that its shelf in the area extends as far as the outer edge of the continental margin."[52] France became a Party to the Convention in 1996.

2.31 In the *Peru* v. *Chile* case, Peru, a non-party to UNCLOS, referred to "the customary rule codified in Article 76 of the 1982 Convention" in its Memorial.[53]

2.32 It can also be noted that, as early as 1987, the United States, also a non-party to UNCLOS, considered that "that the delimitation provisions of Article 76 of the 1982 United Nations Convention on the Law of the Sea reflect customary international law."[54] Accordingly, the U.S.

> "has exercised and shall continue to exercise jurisdiction over its continental shelf in accordance with and to the full extent permitted by international law as reflected in Article 76, paragraphs (1), (2), and (3). At such time in the future that it is determined desirable to delimit the outer limit of the continental shelf of the United States beyond two hundred nautical miles from the baseline from which the territorial sea is measured, such delimitation shall be carried out in accordance with paragraphs (4), (5), (6), and (7)."[55]

---

[51] *Case Concerning Delimitation of Maritime Areas between Canada and the French Republic*, Award, 10 June 1992, *I.L.M.*, Vol. 31, pp. 1171-1172, para. 76.
[52] *Ibid.*, p. 1171, para. 75.
[53] 20 March 2009, p. 260, para. 7.25.
[54] Memorandum from Assistant Secretary John D. Negroponte to Deputy Legal Adviser Elizabeth Verville, 17 November 1987, State Dep't File No. P89 0140–0428, in *Cumulative Digest of United States Practice in International Law (1981–1988)*, 1995, p. 1878.
[55] "United States Policy Governing the Continental Shelf of the United States of America", *ibid.*, State Dep't File No. P89 0141-0429/0430, in *Cumulative Digest of United States Practice in International Law (1981–1988)*, 1995, p. 1879.

2.33 More recently, the United States has confirmed its position:

> "The legal rules for determining the ECS outer limits are reflected in Article 76 in the Convention. A coastal State can use one of two formulas in any combination to determine the outer edge of its continental margin. Article 76 also contains two constraint lines. If the formula lines extend past the constraint lines, a State can use any combination of those two constraint lines to maximize its ECS. The outer limit of the continental shelf is determined by the combined use of Article 76's formula lines and constraint lines."[56]

2.34 Only one State has at some point argued that Article 76(2)-(6) does not reflect customary international law. That State is Colombia. However, Colombia's objection has not been consistent. Contrary to what it now argues,[57] in its Counter-Memorial in the *Territorial and Maritime Dispute*, Colombia stated 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."[58] Moreover, Colombia never objected to its neighbour Ecuador's continental shelf limits established in 1985 and based on paragraph 5 of Article 76, [59] or to Chile's extended continental shelf claim made public that same year.[60]

---

[56] See https://www.state.gov/e/oes/ocns/opa/ecs/about/index.htm (last accessed 26 February 2018).

[57] CCM, para. 2.26.

[58] 11 November 2008, p. 306, para. 4 – emphasis added.

[59] See Declaration on the continental shelf, 19 September 1985 (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ECU_1985_Declaration.pdf).

[60] See http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHL_1985_Declaration.pdf.

2.35 The aforementioned evidence of the customary nature of Article 76(1)-(6) was provided by major maritime states – i.e: Brazil, Canada, Chile, France, Iceland, India, South Africa, the United States, and the United Kingdom – at a time these States were not yet Parties to UNCLOS.[61]

2.36 Finally, it is worth noting that no method other than those prescribed in Article 76 has been used or referred to by States in the determination of the outer limits of their continental shelf.[62]

C. The Respective Roles of the ICJ and the CLCS

2.37 The argument Colombia develops in Chapter 2, Sections C and D, of its Counter-Memorial is a mere reiteration of its fifth preliminary objection, as the Respondent itself recalls.[63] The Court has already rejected that objection in its 2016 Judgment on Colombia's Preliminary Objections and found that it may proceed with the delimitation before the CLCS has made recommendation on Nicaragua's submission (**1.**). Thus, without repeating the arguments it developed in its Written Statement[64] or during the public hearings of October 2015,[65] Nicaragua will respond to Colombia's new argument according to which the Court should decline to exercise its jurisdiction in the present case (**2.**).

---

[61] See paras. 2.23-32 above.
[62] K.A. Baumert, "The Outer Limit of the Continental Shelf under Customary International Law", *A.J.I.L.*, Vol. 111, 2017, Issue 4, pp. 853-854.
[63] See *ibid.*, para. 2.36.
[64] Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, 19 January 2015, paras. 5.1-5.36.
[65] See CR 2015/27, 6 October 2015, pp. 45-55 (Oude Elferink) and 2015/29, 9 October 2015, pp. 29-37 (Oude Elferink).

1. THE COURT HAS ALREADY FOUND THAT A RECOMMENDATION BY THE CLCS IS NOT A PREREQUISITE TO THE DELIMITATION OF THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES

2.38 According to Colombia's fifth preliminary objection, Nicaragua's request for delimitation was "inadmissible due to the fact that Nicaragua has not secured the requisite recommendation on the establishment of the outer limits of its continental shelf from the CLCS."[66]

2.39 The Court has already rejected this objection. In its 2016 Judgment, the Court explained that it had to "determine whether a recommendation made by the CLCS, pursuant to Article 76, paragraph 8, of UNCLOS, is a prerequisite in order for the Court to be able to entertain the Application filed by Nicaragua in 2013"[67]. The Court gave a negative answer to this question[68] and found Nicaragua's request to be admissible and proceeded to the merits of the case.[69]

2.40 Colombia now asserts that:

> "regarding the 2016 Preliminary Objections Judgment, it is worth emphasising that all that the Court decided was that a State can ask it to effect a delimitation of the OCS, not that such delimitation might in all circumstances be carried out without prior recommendations of the CLCS."[70]

---

[66] I.C.J., Judgment, 17 March 2016, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 134, para. 95.
[67] *Ibid.*, p. 136, para. 106.
[68] *Ibid.*, p. 137, para. 114.
[69] *Ibid.*, p. 140, para. 126(2).
[70] CCM, para. 2.50.

Whether this is true or not is irrelevant because the Court already found that, in the *present* case, the requested delimitation may be carried out.

2.41 Colombia attempts to re-argue that the reason why the Court allegedly cannot entertain Nicaragua's submission is that "[i]n the present case, which involves States with opposite coasts, it is not possible to proceed with the delimitation leaving unanswered the question of delineation of the outer limit of Nicaragua's alleged OCS."[71]

2.42 During the jurisdictional phase, the Respondent advanced the exact same argument. At paragraph 7.16 of its Preliminary Objections, Colombia argued that:

> "Nicaragua's Application requests a continental shelf delimitation between opposite coasts, which cannot be done without first identifying the extent, or limit, of each State's shelf entitlement."

2.43 This argument was expressly dealt with in the 2016 Judgment where the Court noted:

> "Colombia adds that, in the present case, Nicaragua 'requests a continental shelf delimitation between opposite coasts, which cannot be done without first identifying the extent, or limit, of each State's shelf entitlement'. The absence of a recommendation from the CLCS must therefore result in the inadmissibility of the First Request contained in the Application of 16 September 2013."[72]

2.44 After observing that the delineation process was without prejudice to the delimitation process,[73] the Court found that

---

[71] *Ibid.*, para. 2.49.
[72] I.C.J., Judgment, 17 March 2016, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 135, para. 100.
[73] *Ibid.*, p. 136, para. 110 and p. 137, paras. 112-113.

> "since the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation."[74]

The Court then concluded that it could entertain Nicaragua's request for a delimitation of the boundary between the Parties' continental shelves beyond 200 nautical miles from the coast of Nicaragua.[75]

2.45 Colombia would have the Court believe that the situation has changed since the 2016 Judgment on Preliminary Objections because, at the time of the Judgment, Nicaragua had not yet filed its Memorial[76] and, therefore, the Court did not know "Nicaragua's precise claim".[77] This is an artificial argument. The Court has been well aware of Nicaragua's delimitation claim since the proceedings in the *Territorial and Maritime Dispute*. In its 2012 Judgment, the Court depicted Nicaragua's position on Sketch-map No. 2.[78] The Court's 2016 Judgment, which expressly refers to Nicaragua's submissions,[79] takes Nicaragua's position into account. In any event, even if Nicaragua's position had

---

[74] *Ibid.*, p. 137, para. 114.

[75] I.C.J., Judgment, 17 March 2016, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 140, para. 126(2).

[76] See CCM, para. 2.37.

[77] *Ibid.*, para. 2.41.

[78] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Reports 2012*, p. 663. Nicaragua's claim in the present proceedings is *very slightly* different from its claim in that case (since it was based on preliminary information).

[79] I.C.J., Judgment, 17 March 2016, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 123, para. 49.

not been known (*quod non*), the Court would not be precluded from entertaining Nicaragua's delimitation request in the absence of CLCS recommendations.

2. THE COURT MAY ENTERTAIN NICARAGUA'S DELIMITATION REQUEST

2.46 In its Counter-Memorial, Colombia complains that the Court cannot identify the outer limits of Nicaragua's continental shelf and argues that "it would not be appropriate for the Court to assume this task, which is the exclusive prerogative of the CLCS, and that such a task would run counter to the Court's judicial function."[80] Colombia's position brings to light its misconception of the functions of both the CLCS (**a.**) and the Court (**b.**).

2.47 Before turning to the role of the CLCS, a clarification is needed. Colombia has referred to cases in which the Court refused to exercise its jurisdiction.[81] These cases are of an exceptional nature and are unrelated to the present case:

- As Colombia noted,[82] in the *Free Zones* case, the Court did not exercise its jurisdiction because the validity of the Judgment it would have rendered would have been dependent on the approval of the Parties;[83]

[80] CCM, para. 2.55.
[81] See CCM, paras. 2.69-2.70.
[82] See *ibid.*, 2.70.
[83] P.C.I.J., Judgment, 7 June 1932, *Free Zones of Upper Savoy and the District of Gex, Series A/B, No. 46*, p. 161.

- In the *Northern Cameroons* case, the Court declined to proceed to the merits of the case because it would have been "impossible for the Court to render a judgment capable of effective application";[84]

- Finally, in the more recent *Burkina Faso/Niger* case, the Court refused to entertain a claim because there was no dispute between the Parties concerning that claim.[85] The Court concluded that:

> "In the circumstances of the present case, it is not necessary for the Court to rule on such a possibility. What the Special Agreement provides for is that the Court should place on record the *'entente'* reached by the Parties at the end of their negotiations, before the proceedings were instituted. According to Burkina Faso, this should be included in the operative part of the Judgment. But for the reasons explained above, the Court considers that such a request is not compatible with its judicial function."[86]

2.48 Unlike these cases, the present case is not exceptional. There is a dispute between the Parties. It is a legal dispute. Nicaragua requests the Court to apply legal rules, i.e. those reflected in Article 83 of UNCLOS. These norms may involve a scientific aspect, but this does not transform the nature of the dispute. It remains a legal dispute. The validity of the Judgment the Court will deliver is not dependent on the approval of the Parties or of the CLCS, which has no mandate to review the Court's Judgments.

2.49 Were the Court be asked to delimit the continental shelf beyond 200 nautical miles by non-Parties to UNCLOS, it would be required to review the

---

[84] I.C.J., Judgment, 2 December 1963, *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Reports 1963*, p. 33.
[85] I.C.J., Judgment, 16 April 2013, *Frontier Dispute (Burkina Faso/Niger), Reports 2013*, pp. 69-71, paras. 46-53.
[86] *Ibid.*, p. 72, para. 58.

scientific evidence brought by the Parties in order to verify that there is no "significant uncertainty as to the existence of a continental margin in the area in question."[87] If the Court believes that scientific assistance is needed, it could appoint an expert or experts, as it has recently done in the case concerning the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)*.[88]

a. The CLCS does not delineate the outer limit of the continental shelf of States

2.50 In its Counter-Memorial, Colombia asserts that "no State can establish the limits of its outer continental shelf except on the basis of the prior recommendations of the CLCS."[89] This assertion is erroneous as regards both the relations between UNCLOS Parties and between Parties and non-Parties to UNCLOS:

- Whereas an outer limit of the continental shelf established unilaterally by a State may be challenged by another State on the basis that the unilaterally-determined limit does not in fact satisfy the criteria set out in Article 76, an outer limit established on the basis of a CLCS recommendation is final and binding and cannot be challenged by any UNCLOS State Party. That is the clear meaning and effect of Article 76(8) as between UNCLOS States Parties;

[87] I.T.L.O.S, Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, p. 115, para. 443.
[88] I.C.J., Order, 31 May 2016, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua), Reports 2016*, pp. 237-238, para. 10. See also para. 2.62 below.
[89] CCM, para. 2.33.

- Concerning the relations between UNCLOS Parties and non-Parties (or between non-Parties) it must be kept in mind that, under Article 76(1), the continental shelf of a State may extend beyond 200 nautical miles when the outer edge of the continental margin extends beyond that distance. Since States non-parties to UNCLOS may claim rights over the continental shelf beyond 200 nautical miles but have no access to the CLCS (as the Parties agree[90]), it must follow that the establishment of the rights of a non-party State to the continental shelf beyond 200 nautical miles may occur without the need for recommendations by the CLCS.

2.51 The absurdity of Colombia's argument is further demonstrated by the following thought experiment. Let us assume for the sake of argument that the Court was asked to delimit the continental shelf *beyond 200 nautical miles from Colombia's coasts*. Under Colombia's argument, it would have to wait for the recommendations of the CLCS concerning Colombia's extended continental shelf. However, since the CLCS would have no jurisdiction over Colombia's claim because it is not a party to UNCLOS, the Court would never be in a position to proceed with the requested delimitation.

2.52 Colombia's argument reveals its misconception of the role of the CLCS:

- *First*, the CLCS makes *recommendations*, not *decisions*, concerning the delineation submitted by the coastal State. These recommendations are neither

[90] See CCM, para. 2.21. See also para. 2.5 above.

final, as States may file revised or new submissions,[91] nor binding[92]; in their effect,

- *Second*, in accordance with the rules exposed in Article 76(7) and (8), and in Article 7, Annex II, it is for the coastal State – and not the CLCS – to delineate the outer limits of its continental shelf. This obligation is expressly set out in Article 76(7), which provides that "[t]he coastal State shall delineate the outer limits of its continental shelf", and confirmed in Article 76(8) which recalls that "limits of the shelf [are] established by a coastal State";

- *Third*, as explained in Nicaragua's Written Statement on Colombia's preliminary objections,[93] the primary role of the CLCS is to protect the international community from excessive claims;[94] however, it is not concerned with the relations between a State party to the Convention and a non-Party;[95] and

- *Fourth*, for these reasons, when not yet reviewed by the CLCS, the limit of the extended continental shelf claim of a State party to UNCLOS may be challenged by other States Parties.[96] However, it does not mean that this State has no entitlement over the extended shelf thus defined. As the ITLOS explained and

---

[91] See UNCLOS Annex II, Article 8.

[92] See e.g. B.M. Magnusson, *The Continental Shelf Beyond 200 Nautical Miles*, Brill/Nijhoff, 2015, pp. 40 and 48; M. Lando, "Delimiting the Continental Shelf Beyond 200 Nautical Miles at the International Court of Justice: The *Nicaragua v. Colombia* Cases", *Chinese Journal of International Law*, 2017, p. 15 or D. Müller, "L'étendue des espaces marins", in M. Forteau & J.-M. Thouvenin (eds.), *Droit international de la mer*, Paris, Pedone, 2017, p. 560.

[93] Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, 19 January 2015, para. 5.15.

[94] See also B.M. Magnusson, *The Continental Shelf Beyond 200 Nautical Miles*, Brill/Nijhoff, 2015, p. 51.

[95] See para. 2.50 above.

[96] ITLOS, Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, pp. 106-107, para. 407.

as Nicaragua has recalled above,[97] a coastal State's entitlement to the continental shelf exists *ipso facto*, by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present. It does not require the establishment of outer limits."[98] In other words, the entitlement is inherent.[99]

2.53 This is consonant with Article 77(3) of UNCLOS which provides "[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation." This Article recalls that a State possesses rights over the continental shelf *ipso facto* and *ab initio*.[100] The continental shelf is defined by the rules set up in Article 76 (which have a customary character) and hence concerns the whole shelf, including the portion extending beyond 200 nautical miles. As the Tribunal in the *Arbitration between Barbados and Trinidad and Tobago* noted, "there is in law only a single 'continental shelf'."[101] The rights of the coastal state over the continental shelf exist *ipso facto* from the coast to the outer edge of its margin, whether the margin is located within or beyond 200 nautical miles.[102]

---

[97] See para. 2.13 above.
[98] ITLOS, Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, p. 107, para. 409.
[99] I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf, Reports 1969*, p. 22, para. 19.
[100] *Ibid*.
[101] *Decision of 11 April 2006*, *R.I.A.A.*, *Vol. XXVII*, pp. 208-209, para. 213. See also I.T.L.O.S, Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, pp. 96-97, para. 362 and Special Chamber, Judgment, 23 September 2017, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, para. 490.
[102] See paras. 5.4-5.23 below.

2.54 The role of the CLCS is to ensure a clear identification between the zones within national jurisdiction and those beyond national jurisdiction (the "Area"[103]) in which States Parties to UNCLOS may carry out certain activities. However, the CLCS does not create the entitlement of a State over the portion of the continental shelf beyond 200 nautical miles. It simply legitimizes its outer limits *vis-à-vis* other States Parties to UNCLOS and ensures that it does encroach upon the Area.[104]

2.55 Nicaragua's entitlement to a continental shelf including that beyond 200 nautical miles exists simply by reason of the fact that it is a coastal State with a continental margin beyond 200 nautical miles. The entitlement is generated by Nicaragua's sovereignty over its land territory. The CLCS' role is simply to make recommendations to the States Parties in order to delineate the outer limits of their continental shelf in accordance with article 76; however it has no preliminary role – and, indeed, no role at all in the *delimitation* of the continental shelf between States with opposite or adjacent coasts.

b. The Court's task in the present case

2.56 As the Parties agree,[105] the task of the Court in the present case is to delimit the maritime boundary between two States, not to delineate the outer

[103] See Article 1(1)(1) of UNCLOS.
[104] I.C.J., Judgment, 17 March 2016, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 136, para. 109.
[105] See CCM, paras. 2.57-2.60.

limits of their continental shelf. Two important comments are in order in this respect.

2.57 *First*, other international courts and tribunals have delimited the continental shelf of the States before them beyond 200 nautical miles, without the need for recommendations of the CLCS or acting *in lieu et place* of it.[106] Similarly, in the recent *Ghana* v. *Côte d'Ivoire* Judgment, the Special Chamber of the ITLOS found that "Côte d'Ivoire may invoke its revised submission to the CLCS"[107] and identified the relevant maritime boundary by reference to the "outer limits of the continental shelf as claimed by Côte d'Ivoire in its submission to the CLCS", absent any recommendation by the Commission.[108] The ITLOS' Judgment of 2012, in the *Bangladesh/Myanmar* case, is also illuminating. Bangladesh argued on the basis of its interpretation of UNCLOS Article 76 that Myanmar's continental shelf "has no natural prolongation beyond 50 nm off that coast."[109] The Tribunal nevertheless delimited the continental shelf beyond 200 nautical miles between the two countries. The Tribunal's decision to proceed with the delimitation was reached on the basis of "information submitted during the proceedings."[110] The Tribunal concluded that it was "satisfied"[111] that Myanmar's

---

[106] See ITLOS; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Award, 7 July 2014, para. 309.

[107] I.T.L.O.S., Special Chamber, Judgment, 23 September 2017, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, para. 518.

[108] *Ibid.*, para. 3.84.

[109] I.T.L.O.S, Judgment, 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Reports 2012*, p. 114, para. 441.

[110] *Ibid.*, p. 115, para. 446.

continental margin extends beyond 200 nautical miles. In order to reach this conclusion, the Tribunal must have reviewed and processed the scientific information provided by the Parties. There was no CLCS recommendation.

2.58 *Second*, it must be noted that the decision of the Court will bind only the two Parties to the present case, Nicaragua and Colombia.[112] Therefore, any reference the Court could make to the outer limits of Nicaragua's continental shelf will not be binding upon the CLCS or other States, including States Parties to UNCLOS. Furthermore, such reference will only be ancillary to the Court's decision. The Court's mandate is to fix a maritime boundary, not the outer limit of the continental shelf of a State. This maritime boundary – and this maritime boundary only – will be *res judicata* as a result of the present case.

2.59 In the *Bangladesh/Myanmar* case, the ITLOS added an important point. It explained that

> "[n]otwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm *had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question*."[113]

2.60 The emphasized passage calls for two remarks:

- The standard is high. A "significant uncertainty" is not a mere doubt; and

[111] *Ibid*.
[112] See Article 59 of the Statute of the International Court of Justice.
[113] *Ibid*., para. 443 – emphasis added.

- It is for the Court to decide whether such "significant uncertainty" exists after reviewing the evidence on the record.[114]

2.61 In order to do so, the Court must apply the rules embodied in Article 76(4) and (5) of UNCLOS. This does not mean that the Court is bound by any guidelines of the CLCS, which, in any event, are not binding in the relations between the Parties since Colombia is not a party to UNCLOS.[115] However, the Court may certainly seek guidance from these guidelines in determining whether there is a significant uncertainty concerning the outer limits of Nicaragua's continental shelf.

2.62 In this respect, the Court should not be impressed by Colombia's repeated innuendoes about the Court's inability to deal with scientific issues[116] or the risk to which the Court would expose "its authority and credibility, as well as the integrity of its judicial function and the coherence of international jurisprudence" by dealing with them.[117] In the past, the Court has dealt satisfactorily with scientific evidence; and it enjoys the prerogative of appointing an expert or experts in order to ensure that there is no significant uncertainty in the present case.

2.63 In fact, the Court has never shied away from scientific aspects of cases. As it stated in the *Pulp Mills* case:

---

[114] See paras. 2.48-2.49 above.
[115] See paras. 2.3-2.7 above.
[116] See e.g. CCM, paras. 2.66-2.69 and 2.71-2.72.
[117] CCM, para. 2.66.

> "[D]espite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful considerations to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed."[118]

2.64 For all of these reasons, the Court is empowered and well positioned to delimit the continental shelf boundary between Nicaragua and Colombia beyond 200 M from Nicaragua's coasts. In particular:

- The Court has found in its 2016 Judgment that it has jurisdiction to delimit the continental shelf boundary between the Parties, and that Nicaragua's request is admissible;

- The applicable customary international law for determining the continental shelf entitlements of the Parties is easily identifiable, as it is reflected in Articles 76(1) to (6), 83 and 121 of UNCLOS;

- There is no competition between the Court and the CLCS. They have two clear and distinct functions; and, in any event, the CLCS and its recommendations cannot have any bearing on the present dispute since Colombia is not a party to UNCLOS; and

- Nicaragua has provided the Court will all the relevant information and evidence it needs to reach a decision in the present case.

[118] I.C.J., Judgment, 20 April 2010, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Reports 2010*, pp. 72-73, para. 168.

CHAPTER 3. CONTINENTAL SHELF ENTITLEMENT

Chapter (pages 41 to 96) not reproduced

CHAPTER 4: ENTITLEMENT OF COLOMBIA'S ISLANDS AND CAYS

4.1 Chapter 4 of Colombia's Counter-Memorial addresses the entitlement of Colombia's mainland and islands to an EEZ and continental shelf. According to the Counter-Memorial, in addition to Colombia's mainland and the islands of San Andrés and Providencia,[198] the cays that are located on the banks of Serrana, Roncador, Serranilla and Bajo Nuevo also generate 200 M potential entitlements. Nicaragua agrees that Colombia's mainland and the islands of San Andrés and Providencia are entitled to an EEZ and continental shelf. But Nicaragua does not agree that any entitlement of Colombia's islands of San Andres and Providencia to an EEZ or continental shelf could, in a delimitation, deprive Nicaragua of its entitlement to an extended continental shelf generated by its mainland (**Section A**); or that the cays located on the banks of Roncador, Serrana, Serranilla and Bajo Nuevo generate any entitlement to an EEZ or continental shelf **(Section B).**

4.2 **Section A** will demonstrate that the Islands of San Andres and Providencia are small land masses, particularly, in comparison to Nicaragua's extensive mainland and that these small islands have already been attributed extensive maritime areas in the 2012 Judgment of the Court.

4.3 **Section B** will demonstrate that the cays of Roncador, Serrana, Serranilla and Bajo Nuevo are "rocks" within the meaning of the customary law equivalent

---

[198] Any reference to Providencia also includes the nearby island of Santa Catalina, unless specifically stated otherwise.

of Article 121(3) of UNCLOS, which provides: “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”.

4.4 **Section B** is organized as follows: **Subsection 1** demonstrates that the content of the rule stated in Article 121(3) is identical to the analogous rule of customary international law. **Subsection 2** addresses the meaning of the term “rock” and shows that it does not refer to the geological composition of islands, but rather was adopted to distinguish insignificant features from other islands on the basis of their capacity to sustain human habitation and economic life. **Subsection 3** analyses the meaning of the terms “sustain”, “human habitation” and “economic life of their own”, relying on the rules of treaty interpretation provided in the Vienna Convention on the Law of Treaties; and **Subsection 4** applies the analysis set forth in the preceding sections to the cays located on the banks of Serrana, Roncador, Serranilla and Bajo Nuevo.

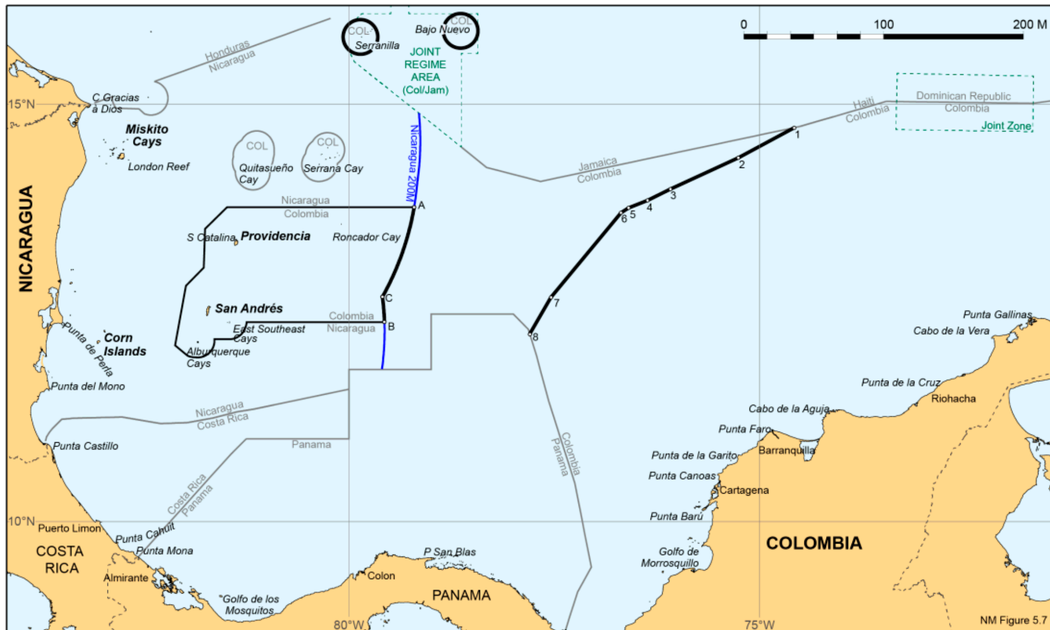
A. San Andrés and Providencia

4.5 Nicaragua set out its proposal for an equitable delimitation in Chapter 5 of its Memorial. Colombia chose not to address it in its Counter-Memorial. Colombia simply argued that its mainland and islands are each entitled to a continental shelf of 200 NM, and that these entitlements overlap and, as a matter of law, take precedence over all of Nicaragua’s claims beyond 200 NM and,

therefore, that all of Nicaragua's claims beyond 200 M must fail and there is no need for a delimitation.

4.6 Since Colombia did not address Nicaragua's proposed delimitation, this section describes it briefly in the interest of completeness. It is depicted below.

Figure 4.1 Final Delimitation



4.7 In the east, where Nicaragua's extended continental shelf overlaps with the continental shelf of Colombia adjacent to its mainland, Nicaragua has proposed that the area of overlap be delimited by means of an equidistance or median line, based on the

> "criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States ... converge and overlap."[199]

[199] *Nicaragua v. Honduras*, para. 287 (quoting Gulf of Maine, para. 195)

4.8 In the center, in the area immediately beyond Nicaragua's 200 M EEZ limit (as drawn by the Court in its 2012 Judgment), Nicaragua considers that the delimitation should not accord the islands of San Andres and Providencia a continental shelf beyond Nicaragua's 200 M limit. In the 2012 Judgment, the Court accorded Colombia's islands very substantial continental shelf rights, extending along a 82 nm-wide corridor out as far as the 200 nm limit measured from Nicaragua's baselines. That limit lies some 124 and 112 nm east of those islands, respectively. The total maritime space already accorded to these islands, together with the territorial sea enclaves around Quitasueño and Serrana Cay, measures fully 48,750 sq km in area.

4.9 It bears emphasis that Colombia's entitlements in this area emanate from what the Court itself has described as "a few small islands which are many nautical miles apart."[200]

4.10 Of these, only San Andrés and Providencia meet the requirements of Article 121(3) for entitlement to an exclusive economic zone or continental shelf. The east-facing coasts of these two islands, taken together, measure 20 km (27 km if sinuousities are included in the calculation) as compared with 454 km (531 km including sinuousities) for Nicaragua's east-facing coast; the ratio of coastal lengths is thus 22.7:1 in Nicaragua's favour (or 20:1 if sinuousities are included).

[200] *Nicaragua v. Colombia*, para.215.

4.11 In Nicaragua's view, there is no reason to extend the continental shelf of San Andres or Providencia east of Nicaragua's 200 nm limit, where it would overlap with Nicaragua's extended continental shelf. Any such extension, in the geographical circumstances of this case, would be inequitable to Nicaragua. Hence, the delimitation line separating the continental shelf of Nicaragua from the continental shelf of Colombia in this area should follow the line previously drawn by the Court, 200 M from Nicaragua's coast.

B. Cays of Roncador Serrana, Serranilla and Bajo Nuevo

4.12 Nicaragua and Colombia agree that Article 121(3) reflects customary international law.[201] But they disagree over the interpretation of that paragraph in several critical respects. This chapter of the Reply will focus on those differences and their implications for the classification of Serrana, Roncador, Serranilla and Bajo Nuevo, and show that, as rocks that cannot sustain human habitation or economic life of their own, those cays are not entitled to a 200 M EEZ or continental shelf.

1. ARTICLE 121(3) REFLECTS CUSTOMARY INTERNATIONAL LAW

4.13 Article 121(3) of the Convention poses an insurmountable challenge to Colombia. As demonstrated below, there can be no doubt that Serrana, Roncador,

[201] *See* CCM, para. 4.22.

Serranilla and Bajo Nuevo are all "rocks" that do not have an EEZ or continental shelf under the customary law equivalent of Article 121(3).

4.14 Colombia seeks to escape its fate by positing that State practice in relation to Article 121(3) has led to the existence of a rule of customary law that is different from the conventional rule.[202] Colombia's attempt to drive a wedge between the conventional and customary rule fails for two reasons. First, Colombia ignores what the Court has said about the customary law status of Article 121(3) (Section a). Second, State practice has *not* led to a rule of customary law different from the rule contained in that paragraph because there is no settled practice evincing a different rule (Section b).

a. The Court's Jurisprudence on the customary law status of Article 121(3)

4.15 The customary law status of Article 121(3) was confirmed by the Court in its 2012 Judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, where the Court stated that it

> "has recognized that the principles of maritime delimitation enshrined in Articles 74 and 83 reflect customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 91, paras. 167 *et seq.*). In the same case it treated the legal definition of an island embodied in Article 121, paragraph 1, as part of customary international law (*ibid.*, p. 91, para. 167 and p. 99, para. 195). It reached the same conclusion as regards Article 121, paragraph 2 (*ibid.*, p. 97, para. 185). The Judgment in the *Qatar* v. *Bahrain* case did not specifically address paragraph 3 of Article 121. The Court observes, however, that the entitlement to maritime rights accorded to an island by the provisions of

[202] CCM, paras 4.183-4.184.

> paragraph 2 is expressly limited by reference to the provisions of paragraph 3. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the long-established principle that 'islands, regardless of their size,... enjoy the same status, and therefore generate the same maritime rights, as other land territory" *(ibid.)* and the more extensive maritime entitlements recognized in UNCLOS and which the Court has found to have become part of customary international law. The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law."[203]

4.16 The Counter-Memorial quotes from the same paragraph of the 2012 Judgment,[204] and recognizes that the "proposition that a conventional rule can become customary law due to practice has been recognized by the Court".[205] But it then argues the opposite - that the customary law rule on entitlements of rocks is different from the rule set out in Article 121(3). According to the Counter-Memorial: "Since non-Parties to [the Convention] are only subject to customary international law, the extent of such customary law, developed from a conventional rule, should be interpreted primarily by reference to State practice, including 'that of States whose interests are specially affected.'"[206]

4.17 Colombia's argument cannot be reconciled with the 2012 Judgment, which, of course, has the force of *res judicata*. It attempts to exclude paragraph 3 of Article 121 from the body of customary international law at the same time that

---

[203] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, para. 139.
[204] CCM, para. 4.25.
[205] CCM, para. 4.26.
[206] CCM, para. 4.26.

it admits that paragraphs 1 and 2 are part of that body. But the 2012 Judgment expressly precludes the excision that Colombia attempts to perform. The pertinent language merits repetition:

4.18 "The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law."[207]In other words, the whole of Article 121 as negotiated at UNCLOS III has become part of customary international law. It is not up to individual States to pick and choose from this package. Colombia tries to do exactly that by claiming an EEZ and continental shelf for its rocks based on an alleged rule of customary international law that is inconsistent with Article 121(3).

b. State practice has not led to a divergence between conventional and customary international law

4.19 A large part of Chapter 4 of the Counter-Memorial is dedicated to an analysis of State practice in relation to Article 121(3). The yardstick for assessing the relevance of State practice for the formation of a rule of customary international law is provided by the Court's judgment in North Sea Continental Shelf, where it observed:

> "The essential point in this connection–and it seems necessary to stress it–is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the

[207] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, para. 139.

> *opinio juris*;–for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[208]

4.20 As set out below, State practice in relation to Article 121(3) does not amount to settled practice. A few States, by their conduct have exhibited divergent interpretations of what constitutes the content of the rule contained in Article 121(3) and the corresponding rule of customary international law.

4.21 The Counter-Memorial wrongly suggests that States are unanimous in claiming an EEZ and continental shelf from all but the most insignificant insular features, and that this practice has been met with approval by the international community at large.[209] A more balanced review of State practice reveals a very different picture. State practice has not led to the formation of a rule of customary law that diverges from the rule contained in Article 121(3).

4.22 Colombia either misstates or ignores key facts. For example, the Counter-Memorial observes that Venezuela's Aves Island (picture in **Figure 4.2** below) was given full effect in delimitation treaties concluded by Venezuela with the United States[210], France and the Netherlands[211]. But it fails to mention that several Caribbean States have indicated that the treatment of Aves Island in the delimitations between Venezuela and France, the Netherlands and the United

[208] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 45, para. 77.
[209] CCM, paras. 4.113-125.
[210] CCM, para. 4.69.
[211] *Idem.*

States cannot prejudice their rights. In particular, Antigua and Barbuda, Saint Kitts and Nevis, and Saint Vincent and the Grenadines stated in diplomatic notes that were distributed to the States Parties to the Convention that Aves Island should not receive any weight in the delimitation between those States and Venezuela. The Secretary-General reported on the contents of these notes in his annual report on oceans and law of the sea for the year 1997.[212]

4.23 The Government of Saint Kitts and Nevis observed in this connection that with regard to the status of Aves Island it

> "wishes to recall that as recognized in customary international law and as reflected in the 1982 United Nations Convention on the Law of the Sea, rocks which cannot sustain human habitation or an economic life of their own shall have no exclusive economic zone or continental shelf".[213]

4.24 The Government of Saint Vincent and the Grenadines made exactly the same statement concerning the content of "customary international law" in its note to the Secretary-General of the U.N. dated 8 August 1997.[214]

---

[212] See A/52/487, paras. 74-75. The diplomatic notes are reproduced in Annexes 6-8 of this Reply.

[213] Note from the Permanent Mission of St. Kitts and Nevis to the U.N. Secretary-General, 16 July 1997. UN, LOS Bull. No. 35, pp. 98-99. (NR, Annex 7). According to the Counter-Memorial, Aves Island measures 30 by 375 meters, and the Counter-Memorial observes that it is similar in size to the Colombian cay of Bajo Nuevo. CCM, para. 4.69.

[214] Note from the Permanent Mission of Saint Vincent and the Grenadines to the U.N. Secretary-General, 8 August 1997. UN, LOS Bull. No. 35, p. 100. (NR, Annex 8).

Figure 4.2 Aves Island, Venezuela

4.25 Colombia's reliance on certain boundary treaties, in which some States appear to accept disputed entitlements, such as that of Aves Island beyond 12 M, is misplaced. Boundary treaties can reflect many factors, including political and economic ones, as well as trade-offs between the parties.[215]

4.26 Thus, boundary treaties do not necessarily reflect the *opinion juris* of the parties themselves, let alone a position widely held by a significant number of States. In fact, such treaties sometimes reflect the opposite, even when the same purported "rule" is reflected in a "considerable number" of them.

[215] "Soons argues that Aves may qualify as a rock. He has concluded that the delimitation treaty between The Netherlands and Venezuela could have followed the more equitable enclave solution while admitting, however, that the full effect for Aves, 'seen in the broader framework of the entire delimitation treaty, is understandable as a negotiating deal package'". J. Charney, L. Alexander, eds., *International Maritime Boundaries*, Vol.I, p.623.

4.27 Conclusion 11(2) of the draft conclusions on the identification of customary international law adopted by the International Law Commission provides:

> The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.[216]

4.28 The ILC commentary to this provision provides:

> Paragraph 2 seeks to caution that the existence of similar provisions in a considerable number of bilateral or other treaties, thus establishing similar rights and obligations for a broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. While it may indeed be the case that such repetition attests to the existence of a corresponding rule of customary international law (or has given rise to it), it "could equally show the contrary" in the sense that States enter into treaties because of the absence of any rule or in order to derogate from it. Again, an investigation into whether there are instances of practice accepted as law (accompanied by opinio juris) that support the written rule is required.[217]

4.29 The Court itself has followed this cautious approach. In the case concerning *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*, in the Judgment on preliminary objections (2007), the Court held:

> The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts

[216] ILC draft conclusions on the identification of customary international law adopted by the Commission, Conclusion 11(2), http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp5.pdf&lang=EFSRAC, p. 102.

[217] ILC draft conclusions on the identification of customary international law adopted by the Commission, Conclusion 11(2), Comment 8, http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp5.pdf&lang=EFSRAC, p. 106.

> entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.[218]

4.30 The Counter-Memorial ignores State practice that contradicts the Colombian view. The Philippines took the position in the South China Sea case that all the islands among the Spratly Islands constituted "rocks" in the sense of Article 121(3).[219] Interestingly, Itu Abu, the largest of the Spratly Islands at 0.46 sq km, is significantly larger than the cays on the banks of Serrana, Roncador, Serranilla and Bajo Nuevo. Serrana, the largest according to Colombia, is 0.26 sq km.[220]

4.31 This was not just the view of the Philippines. Both Vietnam and Malaysia have also taken the position that all of the islands in the Spratlys are rocks that cannot sustain human habitation or economic life of their own. This is evident from their joint submission to the CLCS on the outer limits of their continental shelf beyond 200 M in the southern part of the South China Sea.[221]

4.32 As is illustrated by Figure 1 of the joint submission, which is reproduced as **Figure 4.3** of this Reply, the outer limits of the EEZ of Malaysia and Vietnam

---

[218] Judgment (24 May 2007), 2007 ICJ Rep. 582, para. 90.

[219] See *South China Sea Arbitration (Philippines* v *China), Award of 12 July 2016, PCA Case No. 2013-19*, para. 1203(A)(3).

[220] See CCM, para. 4.161.

[221] Malaysia and the Socialist Republic of Viet Nam, Joint submission to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea in respect of the southern part of the South China Sea; Executive Summary; available at www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009excutivesummary.pdf.

are defined by reference to the straight baselines along the Vietnamese coast and the Malaysian territories of Sarawak and Sabah. The Spratly Islands are ignored in determining the outer limits of the EEZ of the coastal States of the South China Sea. In other words, they have been treated as rocks under Article 121(3).

Figure 4.3 The Outer Limits of the EEZ of Malaysia and Vietnam in the South China Sea

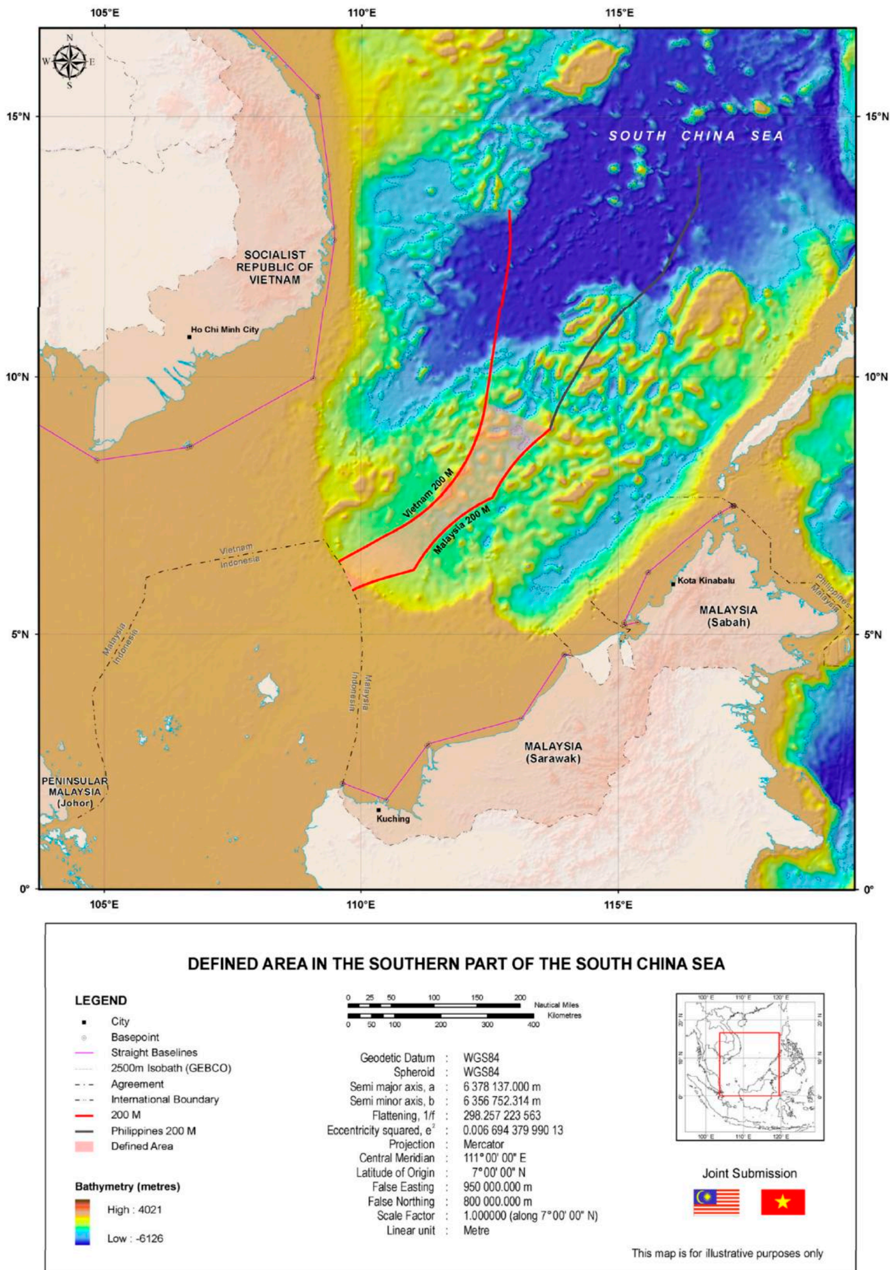


Figure 1 from the Malaysia/Vietnam Joint Submission to CLCS
http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm

4.33 Vietnam confirmed this view in a statement submitted to the tribunal in South China Sea case, in which it observed that none of the features in the Spratly Islands can "generate maritime entitlements in excess of 12 nautical miles since they are low-tide elevations or 'rocks which cannot sustain human habitation or economic life of their own' under Article 121(3) of the Convention".[222]

4.34 China, for its part, has asserted not only that the Nansha Islands (its name for the Spratly Islands) are entitled under UNCLOS to an exclusive economic zone and continental shelf, but also that for historic reasons it has rights over all the areas of the South China Sea it claims to.[223]

4.35 However, there is no evidence that China has accepted the interpretation of Article 121(3) that Colombia now propounds, or that there is a customary international law rule that diverges from the conventional one. To the contrary, China has made clear in its representations to the Commission on the Limits of the Continental Shelf that it reads Article 121(3) in much the same way as Nicaragua does: that "rocks" which cannot sustain human habitation or economic life of their own do not generate en exclusive economic zone or a continental

---

[222] See *South China Sea Arbitration (Philippines* v *China), Award of 12 July 2016, PCA Case No. 2013-19*, para. 36.

[223] See the Notes Verbales sent by the Permanent Mission of the People's Republic of China CML/17/2009 available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf ; CML/18/2009 available at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf ; and CML/8/2011 available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf

shelf. In objecting to Japan's claim to an extended continental shelf for Okinotorishima, China explained:

> Article121(3) of the Convention stipulates that, "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. Available scientific data fully reveal that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no exclusive economic zone or continental shelf Even less shall it have the right to the extended continental shelf beyond 200 nautical miles.[224]

4.36 States may differ on whether the Spratly Islands consist only of "rocks" and lesser features, or whether any of these small islands is capable of sustaining human habitation and economic life. But that difference is not enough to demonstrate the existence of a State practice that is sufficient to create an opinio juris on the meaning of Article 121(3), or a new rule of customary international law that differs from it.

4.37 Colombia discusses a number of examples from the practice of the United States, France, Australia and other countries claiming an EEZ and continental shelf for a number of small islands.[225] According to the Counter-Memorial: "This practice clearly confirms a very restrictive interpretation of this rule."[226] Nicaragua does not agree.

---

[224] Communication from the People's Republic of China to the Secretary-General of the United Nations, CML/2/2009 (6 February 2009), http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf . Communication from the Republic of Korea to the Secretary-General of the United Nations, MUN/046/09 (27 February 2009), http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf

[225] CCM, paras 4.70-4.73.

[226] CCM, para. 4.73.

4.38 In the first instance, with the exception only of the United States and Venezuela, the examples Colombia cites are from States that are parties to UNCLOS. Their practice could therefore only be of direct relevance to the interpretation of the treaty-based rule on rocks, not its customary international law equivalent. And even in that respect, they are too few and far between to be of any relevance to the interpretation of Article 121(3). Under Article 31(3)(b) of the VCLT, subsequent State practice may be taken into account in the interpretation of a treaty's terms only if it establishes the agreement of the parties regarding its interpretation. In the case of a multi-lateral treaty like UNCLOS, such practice would have to be universal, or at least nearly so, in character. The sampling of claims that Colombia mentions do not rise anywhere close to that level, particularly given the contrary examples discussed above.

4.39 Insofar as Colombia seeks comfort in the practice of the United States and Venezuela, the conduct and views of two States plainly cannot give rise to settled practice sufficient to reflect a customary rule, particularly when the claim of one of those two States (Venezuela/Aves Island) has been met with opposition by a number of other States.

4.40 Moreover, the mere fact that some States may have made maximalist claims from comparatively minor features is not surprising and certainly does not have the implications Colombia suggests. This is particularly true given that most of the examples Colombia cites relate to islands in the open ocean, where no

other State has a direct interest in opposing an exaggerated claim, or to delimitation agreements involving minor insular features on both sides in which the States concerned have a mutual interest in accepting each other's maximalist claims.[227] Colombia cannot possibly draw out of these self-interested exercises the kind of *opinio juris* necessary for the establishment of a new rule of customary international law.

4.41 All that they show is that, some States occasionally succumb to what one distinguished commentator has called the "territorial temptation";[228] that is, the desire for more. But that is no reason to read more into the State practice than what is really there, especially since, as discussed below, Article 121(3) exists precisely as a check on the territorial temptation.

2. THE TERM "ROCKS" DOES NOT APPLY ONLY TO "GEOLOGICAL" ROCKS

4.42 A core argument of the Counter-Memorial is that the term "rock" in Article 121(3) only refers to "geological" rocks, "meaning a feature made solely of solid rock".[229] According to Colombia, that interpretation accords with the ordinary meaning of the term,[230] and finds support in the drafting history of

---

[227] *See generally* CCM, paras. 4.62-92.

[228] Bernard Oxman, "The Territorial Temptation: a Siren Song at Sea", 100 AM. J. INT'L. L. 830 (2006).

[229] CCM, para. 4.32.

[230] CCM, para. 4.32.

Article 121(3) and State practice.[231] The Counter-Memorial also contends that the jurisprudence, apart from the award in South China Sea, supports its interpretation.[232]

4.43 The present section will address these contentions. First, **Subsection (a)** considers Colombia's position from the perspective of the rules of treaty interpretation. Second, **Subsection (b)** considers the drafting history of Article 121(3), which supports the conclusion that the term "rock" is intended to refer to insular features that cannot sustain human habitation or economic life of their own regardless of their geological configuration. Third, **Subsection (c)** assesses the jurisprudence including the Court's 2012 Judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, where the term 'rock' 'was deemed applicable to features that are not made up of solely of solid geological rock. Finally, **Subsection (d)** discusses State practice. As that discussion indicates, the practice does not support the view that the term only applies to geological rocks. States have repeatedly invoked Article 121(3) in relation to islands that are not rocks in a strictly geological sense.

a. Colombia's interpretation of the term 'rock' leads to a manifestly absurd and unreasonable result

4.44 The meaning of the term "rock" was directly addressed by the arbitral tribunal in the South China Sea arbitration, which relied on the Court's 2012

[231] CCM, paras. 4.37 and 4.67.
[232] CCM, paras 4.41-4.51.

Judgment in Nicaragua v. Colombia and ruled "that 'rocks' for the purposes of Article 121(3) will not necessarily be composed of rock in the lay sense of that term."[233]

4.45 Colombia is understandably unhappy with this rule. According to the Counter-Memorial, the arbitral tribunal "struggled to demonstrate that the term 'rocks' has no specific geological or geomorphological meaning and, ultimately, no meaning at all".[234]

4.46 The tribunal had no such difficultly. In fact, as stated, the tribunal placed principal reliance on the Court's own 2012 Judgment, observing that it was guided in part by the Court's finding that Quitasueño (QS 32), "a 'miniscule' protrusion of coral" was a rock[235] despite being comprised of the skeletons of dead coral, not solid geological rock.

4.47 The Court's qualification of Quitasueño (QS 32) as an Article 121(3) "rock" causes Colombia considerable embarrassment. The Counter-Memorial seeks to escape the logic of the Court's findings by submitting that: "Quitasueño was never qualified by the Court as a 'protrusion of coral'; which it is not. All that the Court stated was that: 'the photographic evidence shows that QS 32 is composed of solid material, attached to the substrate, and not of loose debris.'"[236]

---

[233] *South China Sea Arbitration (Philippines* v *China), Award of 12 July 2016, PCA Case No. 2013-19*, para. 482.
[234] CCM, para. 4.46.
[235] *South China Sea Arbitration (Philippines* v *China), Award of 12 July 2016, PCA Case No. 2013-19*, para. 480.
[236] CCM, para. 4.51.

4.48 The Counter-Memorial's discussion of the Court's treatment of Quitasueño is a fine example of selective quoting. Colombia purports to back up its assertion that the Court never qualified QS 32 as coral by quoting from paragraph 37 of the 2012 Judgment. However, the context of the quoted passage, plainly confirms that the Court considered that QS 32 consists of coral:

> "Nicaragua's contention that QS 32 cannot be regarded as an island within the definition established in customary international law, because it is composed of coral debris, is without merit. International law defines an island by reference to whether it is "naturally formed" and whether it is above water at high tide, not by reference to its geological composition. The photographic evidence shows that QS 32 is composed of solid material, attached to the substrate, and not of loose debris. The fact that the feature is composed of coral is irrelevant".[237]

4.49 The Court's finding that the term "rocks" encompasses coral formations confirms that it does not apply only to features that consist solely of solid geological rock, but also to features made up of other materials.

4.50 In any event, insofar as the issue now in dispute concerns the composition of Serrana, Roncador, Serranilla and Bajo Nuevo, the debate is purely academic. As discussed in more detail below, all four of these features are naturally comprised of sand and coral. The Court has already held that coral can be considered a form of "rock". The same must equally be true of sand, which is formed by the slow erosion of rock and coral over geological time.[238] It is, in other words, a mass of tiny, weathered rocks.

---

[237] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, para. 37.

[238] *See*, *e.g.*, https://oceanservice.noaa.gov/facts/sand.html (defining sand).

4.51 For Colombia to prevail on its argument that Serrana, Roncador, Serranilla and Bajo Nuevo are not "rocks" it would have to convince the Court that pulverized rock is not rock. Nicaragua considers the argument absurd on its face.

4.52 In fact, the historical record shows that the term "rock" has been used to describe Serrana, Roncador and Serranilla (and Quitasueño). For example, a 1932 study prepared by the U.S. Department of State analyzing the territorial claims of various States to Serrana, Roncador, Serranilla and Quitasueño states:

> "Although the islands of Old Providence and San Andres, and the Mosquito coast and Keys were occupied and their possession was disputed from time to time during the 17th century, no evidence has been found of any use of the islands of Roncador, Quito Sueno, Serrana, or Serranilla. … [T]hese Keys were then, and probably for many years to come, regarded only as *barren, uninhabited, useless rocks*".[239]

4.53 Colombia's argument is wrong in another sense as well: it would lead to manifestly absurd results that are plainly inconsistent with the object and purpose of Article 121(3). Under Colombia's approach, a small, uninhabitable sand-spit or mud-patch, devoid of economic life would be entitled to generate expanded maritime rights and jurisdiction even though an otherwise identical feature that happens to be composed of granite would not be.

4.54 Here again, Nicaragua considers such a result self-evidently absurd. As discussed more fully below, it is also inconsistent with the object and purpose of

---

[239] "The Sovereignty of the Islands of Roncador, Quita Sueno, Serrana and Serranilla", Legal Advisor's Office, U.S. Dept. of State (9 Aug. 1932) ("1932 State Dept. Study"), pp. 50-51 (emphasis added) (NR, Annex 5).

Article 121(3). The newly created regime of the EEZ reflected a compromise that was intended to balance the interests of the peoples of developing States with the interests of the traditional maritime States. The compromise that was reached gave coastal States exclusive access to the living and non-living resources within 200 M of their coasts so that these resources could be used for the benefit of their people. Article 121(3) serves as a check to prevent insignificant features from inequitably generating enormous entitlements to maritime space that would not benefit the local population.

b. The drafting history of Article 121(3)

4.55 In discussing the travaux of Article 121(3) of the Convention, the Counter-Memorial submits that they "are inconclusive on this issue" (i.e. the meaning of the term "rocks").[240] But that does not stop Colombia from jumping to the bold conclusion that the drafters of the Convention deliberately chose to use the term "rocks" to restrict the scope of the provision's application to geological rocks.[241]

4.56 Nicaragua agrees that the *travaux* are of limited value in interpreting Article 121(3). But it disagrees that one can nevertheless draw from them the conclusion Colombia suggests. To the contrary, the only genuine conclusion the *travaux* support is that the architects of the Convention were concerned about

[240] CCM, para. 4.37.
[241] CCM, para. 4.39.

preventing minor insular features from generating expanded maritime entitlements and impinging on (1) the Area as the common heritage of mankind, or (2) the rights and interests of other coastal States.

4.57 The final text of Article 121(3) differs substantially from the various proposals submitted by States like Colombia, Malta, Romania, Turkey and a group of 14 African States.[242] There is therefore limited utility in reviewing any of those proposals in detail. In the end, the agreed text was the product of the work of the Second Committee's informal consultative group on islands. That group produced the text that ultimately became Article 121 during the Third Session in Geneva in April 1975, but it left no records of its work.[243]

4.58 That does not, however, obscure the object and purpose of the provision. In particular, the negotiation records reflect the fact that what former ITLOS President Jesus—himself a participant in the negotiations—has called "an overwhelming number of countries"[244] opposed the idea of granting insignificant islands maritime zones beyond the territorial sea.

4.59 At a 1971 meeting of the UN Sea-Bed Committee, the preparatory body for UNCLOS III, Ambassador Arvid Pardo of Malta expressed the stakes for the forthcoming negotiations:

---

[242] David Anderson, "Islands and Rocks in the Modern Law of the Sea" in *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), p. 313.

[243] *See South China Sea Arbitration (Philippines* v *China), Award of 12 July 2016, PCA Case No. 2013-19*, para. 532.

[244] Jose Luis Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space" in *Negotiating for Peace* (Jochen A. Frowein, et. al., eds., 2003), p. 583.

> "If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction could be gravely impaired."[245]

4.60 Similar concerns were expressed throughout the negotiations. For example, the delegate of Tunisia, Mohamed Marsit, who later became an ITLOS judge, stated that the then-existing law, which drew no distinction among islands,

> "favoured mainly those countries which had been able to extend their power over a large number of islands, while it was detrimental to the developing countries, which had not participated in the elaboration of the 1958 Geneva Conventions and which for the most part did not possess any islands. It was also unfavourable to all land-locked and other geographically disadvantaged States, which, having expected an equitable distribution of the resources of the international zone, were justly concerned at seeing that concept rendered meaningless by the exaggerated claims of countries possessing islands…".246

4.61 There was also much concern about the potential for insignificant insular features to intrude on the maritime entitlements of other States. Former ITLOS President Jesus wrote: "The very purpose of the rock provision … was to deny to tiny islands … the capacity to generate unfairly and inequitably huge maritime spaces … which would, in most cases, impinge on other States maritime space or on the area of the international seabed…".[247]

4.62 The oft-quoted Danish view—expressed in the context of late-stage proposals by some States in 1982 to delete paragraph 3—captures the consensus

---

[245] *Russia v. Australia*, Declaration of Judge Vukas, para. 10 (citing UN Sea-Bed Committee, Doc. A/AC.138/SR.57, p. 167).

[246] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), p. 65.

[247] Jose Luis Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space" in *Negotiating for Peace* (Jochen A. Frowein, et. al., eds., 2003), p. 588.

perfectly. The Danish representative emphasized that without a provision limiting the maritime entitlements of insignificant insular features,

> "tiny and barren islands, looked upon in the past as mere obstacles to navigation, would miraculously become the golden keys to vast maritime zones. This would indeed be an unwarranted and unacceptable consequence of the new law of the sea."[248]

4.63 The connection between the enlargement of coastal States' maritime zones to 200 M and the need for a check against that enlargement when it was not warranted was articulated by Ambassador Tommy Koh of Singapore, who later assumed the Presidency of the Conference, when he observed:

> "The rationale for the proposal that coastal States should have the right to establish an economic zone was essentially based upon the interests of the people and the desire to marshal the resources of ocean space for their development. . . . However, it would be unjust, and the common heritage of mankind would be further diminished, if every island, irrespective of its characteristics, was automatically entitled to claim a uniform economic zone. Such an approach would give inequitable benefits to coastal States with small or uninhabited islands scattered over a wide expanse of the ocean. The economic zone of a barren rock would be larger than the land territory of many States and larger than the economic zones of many coastal States".[249]

4.64 The representative of Colombia notably made substantially the same point at the final stages of the Conference, during the 172nd session of the Plenary in 1982. He stated: "Rocks are entitled only to a territorial sea since they cannot

[248] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII* (Article 121) of the United Nations Convention on the Law of the Sea, Part 8 (1988), p. 107.

[249] "Summary Records of Meetings of the Second Committee, 39th Meeting," UN Doc. A/CONF.62/C.2/SR.39 at p. 285, para. 72 (14 August 1974) (Statement of the Representative of Singapore), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*.

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 benefit the inhabitants, with an economic concept".[250]

4.65 Explaining why his country opposed the deletion of what is now Article 121(3), the representative of Colombia further stated that

> "Colombia was opposed to the amendments concerning article 121 proposed in documents A/CONF.62/L.108 and Corr.1 and L.126 because that article reflected a unique and delicate balance and would help to preserve the common heritage in the oceans. A simple look at the map of the Pacific Ocean would show what could result from the deletion of article 121, paragraph 3, or from reservations in respect of that paragraph".[251]

4.66 The Court itself made much the same point in its 2012 Judgment when it observed that

> "the entitlement to maritime rights accorded to an island by the provisions of [Article 121,] paragraph 2 is expressly limited by reference to the provisions of paragraph 3. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the long established principle that 'islands, regardless of their size,... enjoy the same status, and therefore generate the same maritime rights, as other land territory' …) and the more extensive maritime entitlements recognized in UNCLOS."[252]

4.67 This "essential link" would be broken if uninhabitable spits of sand and coral debris were accorded the more extensive maritime entitlements recognized

---

[250] "189th Plenary Meeting," UN Doc. A/CONF.62/SR.189, p. 66 at p. 83, para. 251 (8 December 1982) (Statement of the Representative of Colombia), *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XVI (Summary Records, Plenary, First and Second Committees, as well as Documents of the Conference, Eleventh Session)*.

[251] Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVI, p. 116, para. 29.

[252] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, para. 139.

in UNCLOS, while "geological" rocks were not, simply because the former happen to be comprised of finer mineralogical material.

c. The jurisprudence on the meaning of the term 'rock'

4.68 The Counter-Memorial also seeks to shore up Colombia's position by reference to a number of decisions in other cases. With the exception of the Court's 2012 Judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, which Nicaragua addressed above, none of the other cases on which Colombia attempts to rely are relevant to the issues now before the Court.

4.69 In the case of the *Volga*, ITLOS dealt with the arrest of the Russian fishing vessel *Volga*.[253] It was strictly a prompt release case under UNCLOS Article 292, and the Tribunal's judgment did not address the question of whether Australia's Heard and MacDonald Islands were entitled to an EEZ. (That notwithstanding, Vice-President Vukas submitted a separate declaration opining that Heard and MacDonald Islands were rocks in the sense of Article 121(3) of the Convention.[254]) The Counter-Memorial nevertheless has no qualms asserting that the Tribunal confirmed that Article 121(3) only applies to rocks as defined by Colombia, *i.e.* made up of solely of solid geological rock.[255] Colombia's argument is untenable on its face. There is nothing in the ITLOS judgment to

---

[253] *"Volga" (Russian Federation v Australia), Prompt Release, Judgment, ITLOS Reports 2002.*
[254] *Ibid.*, Declaration of Vice-President Vukas.
[255] CCM, paras 4.40-4.41.

indicate that the Tribunal even considered the issue. The question simply was not before it.

4.70 The Counter-Memorial also tries to find support in the Court's case law for its argument that "rock" means only "geological" rocks because, Colombia says, the jurisprudence "demonstrates the Court's resolve to distinguish between 'rocks' and 'small islands'".[256] Although the Court has sometimes used the words "rocks" and "islets", it has never done so in a way that supports the position of Colombia.

4.71 First, the Counter-Memorial refers to the Court's Judgment in *North Sea Continental Shelf*, which in *dictum* refers to "the presence of islets, rocks and minor coastal projections".[257] As may be appreciated, the Court's enumeration does not list different features according to their composition, as Colombia would have it,[258] but provides a generic list of minor geographical features, rocks being one of them. Moreover, this observation was made in the context of discussing the delimitation of maritime boundaries and the potential distorting effect of minor features.[259] But that issue, of course, has no bearing on the meaning of the term "rocks" under Article 121(3) or its customary international law equivalent.

4.72 The Counter-Memorial also observes that the Court's Judgment in *Libya/Malta* expressly qualified the Maltese island of Filfla as "a small rocky

[256] CCM, para. 4.43.
[257] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 37, para. 57.
[258] CCM, para. 4.44.
[259] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 37, para. 57.

feature" and as an "uninhabited rock".[260] How this helps Colombia is not explained. The Court did not consider Filfla's status under Article 121(3). While the Court's characterization of Filfla as a small feature indicates that the Court took into account the size of Filfla in assessing its role in the delimitation of the continental shelf between Libya and Malta, there is no indication in the Judgment that Filfla's geological composition played any role in that respect. The Court merely explained that it had decided to ignore Filfla in drawing the provisional equidistance line between Libya and Malta. Again, that issue has nothing to do with the interpretation of Article 121(3).

4.73 The truth is simple and clear: prior to its 2012 Judgment in *Nicaragua v. Colombia,* the Court never previously interpreted Article 121(3) or applied that interpretation to particular, disputed features. Colombia's references to the Court's prior jurisprudence therefore do nothing to advance its case.

d. State Practice

4.74 Colombia also tries to enlist State practice in aid of its argument about the meaning of the term "rocks". According to the Counter-Memorial, "based upon State practice…the term 'rock' should be continued restrictively, in the geological sense of the term."[261]

---

[260] CCM, para. 4.45.
[261] CCM, para. 4.97.

4.75 Colombia is mistaken. The State practice is far from uniform and indicates that different States have different views on the meaning of the term "rock". The practice of eastern Caribbean island States in relation to Venezuela's Aves Island—which, like Colombia's cays, is made up of sand and coral, not solid rock—indicates that these States consider Article 121(3) and its customary law equivalent applicable to insular features regardless of their geological composition.[262]

4.76 The same conclusion follows from the practice of the Philippines, Vietnam and Malaysia in relation to the Spratly Islands,[263] which are similar in composition to the Colombian cays on the banks of Roncador, Serrana, Serranilla and Bajo Nuevo.

4.77 Colombia's myopic focus on geology is reflected in the Counter-Memorial's discussion of State practice in relation to the Japanese islands of Okinotorishima and Minamitorishima. As the Counter-Memorial sets out, China and the Republic of Korea have protested Japan's use of Okinotorishima to determine the extent of its EEZ and continental shelf, but apparently have not raised such objections in relation to Minamitorishima.[264]

4.78 Colombia submits that what distinguishes the two cases is that "[w]hile Okinotorishima is clearly a feature made of solid rock, Minamitorishima is an

---

[262] *See* paras. 4.19- 4.24.
[263] *See* paras. 4.30-4.36.
[264] CCM, para. 4.92.

island and it has never been treated as a "rock"."[265] However, this is no more than speculation. Colombia points to nothing to support its statement. Moreover, neither China's nor Korea's protest regarding Okinotorishima made any reference to the feature's geological composition. To the contrary, as China plainly stated, Okinotorishima is a "rock" because it is incapable of sustaining human habitation or economic life of its own.[266]

4.79 In any event, the State practice is sufficiently inconsistent that no firm conclusion about the interpretation of the term rock can be drawn from it. While some States may take the self-interested view that it applies only to "geological" rocks, others plainly do not share that view. The practice is, in short, not settled.

3. SUSTAINING HUMAN HABITATION AND ECONOMIC LIFE OF THEIR OWN

4.80 Article 121(3) provides that "[r]ocks" which "cannot sustain human habitation or economic life of their own" are not entitled to an EEZ or continental shelf. Features that do have these capacities, on the other hand, are, regardless of geological composition, entitled to the full suite of maritime zones under the Convention and customary law.

---

[265] CCM, para. 4.92.

[266] Communication from the People's Republic of China to the Secretary-General of the United Nations, CML/2/2009 (6 February 2009), http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf Communication from the Republic of Korea to the Secretary-General of the United Nations, MUN/046/09 (27 February 2009), http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf

4.81 The *travaux* of Article 121(3) shed little light on the meaning of the terms "sustain", "human habitation" and "economic life of their own".[267] One thing is clear, however. As discussed above, the Convention's expanded maritime zones were created for the benefit of the inhabitants of coastal States, and Article 121(3) was intended as a counter-weight to prevent unreasonable encroachments on the Area or the interests of other States. In the words of Colombia's own representative to UNCLOS III:

> "Article 121 defines what is 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 benefit the inhabitants, with an economic concept. Any other interpretation would distort the concept".[268]

4.82 Nicaragua considers that reading the terms "sustain", "human habitation" and "economic life of their own" in accordance with their ordinary meaning results in an unambiguous understanding of Article 121(3) that is entirely consistent with the provision's object and purpose.

4.83 "Sustain" has a clear meaning. The Oxford English Dictionary defines it as:

---

[267] Nicaragua and Colombia agree that "cannot" refers to the capacity (or lack thereof) to sustain human habitation and economic life. *See* CCM, para. 4.99.

[268] Statement of the Colombian representative at the resumed eleventh session of the Third United Nations Conference on the Law of the Sea (reproduced in *The Law of the Sea; Regime of Islands* (United Nations, 1988) p. 111) (emphasis added).

> "To keep in existence, maintain; *spec*. to cause to continue in a certain state for an extended period or without interruption; to keep or maintain at the proper level, standard, or rate; to preserve the status of.
> To maintain (a person, etc.) in life and health; to provide with food, drink, and other substances necessary for remaining alive; to feed, to keep."[269]

4.84 It follows that to avoid being found a rock within the meaning of Article 121(3), a feature must be capable of providing the fresh water, the food, the shelter and the living space that are necessary to keep human beings alive for an extended period of time.

4.85 The feature must, moreover, be able to do so on its naturally occurring conditions. Paragraph 1 of Article 121 provides that an island is a "naturally formed" area of land that is above water at high-tide. Article 121(3) "rocks" are a sub-category of islands. The "naturally formed" criterion thus applies equally to rocks, and dictates that a feature's capacity to "sustain" human habitation and economic life must be determined by reference to its natural conditions.

4.86 It therefore cannot be the case (as Colombia suggests[270]) that importing all the supplies that make life possible can transform a rock into a full-fledged island. Nor can this be accomplished by building a desalination plant to provide a source of fresh water (as Colombia also suggests[271]). Such an approach would fly in the place of the plain meaning of "sustain" and "naturally formed", as explained above.

---

[269] Oxford English Dictionary (online version) (last accessed 20 June 2018).
[270] CCM, para. 4.109.
[271] CCM, para. 4.109.

4.87 Moreover, that understanding would create perverse incentives for States to undertake such actions to extend their maritime zones to the detriment of other coastal States and/or the common heritage of mankind. Under such an interpretation, every high-tide feature, no matter how small, no matter how remote, and no matter how incapable of sustaining human habitation or economic life in its natural conditions, could be converted into an island generating a 200 M entitlement if the State that claims it is willing to supply the resources necessary to sustain a human settlement.

4.88 This same understanding of what it means to "sustain" human habitation follows equally from the other authentic texts of the Convention. In French, the verb used is "se prêter à", which means "to lend itself to"[272] and, in Spanish, the word is "mantener", which means: "Provide someone with the necessary food. Finance someone's economic necessities. Maintain something in its being, to give it vigor and permanence".[273]

4.89 The phrase "human habitation" has an equally clear meaning. Again, according to the Oxford English Dictionary, "habitation" means: "The action of dwelling in or inhabiting as a place of residence; occupancy by inhabitants."[274] In

---

[272] Larousse French-English Dictionary (1981), p. 558.

[273]Dictionary of the Royal Spanish Academy (http://dle.rae.es) (last accessed 20 June 2018).In Chinese, the word used is "维持" (*wéichi*), which means to "maintain" or keep. In the Russian text, the words "cannot sustain" are expressed as "не пригодный", which means "unfit" for a particular purpose. In the Arabic text they are expressed as "تـ هـ يئ ا سـ تمرار" ("*tuhayyi' istimraar*"), where "*tuhayyi'*" means "to make ready, get ready, put in readiness (something); to prepare (something); to fix up, fit up, set up (something)", and "*istimraar*" means "duration, permanence, continuity, continuance, continuation, continued existence, survival; persistence".

[274] Oxford English Dictionary (online version) (last accessed 20 June 2018).

French, the word is "habitation," which has the same meaning as its English equivalent.[275] .

4.90 It is not enough that a feature be able to keep a single soul alive or provide episodic shelter for a group of people. To "sustain human habitation" can only mean to maintain a stable group of human beings by providing the food, water and other necessities they need to make the island their residence.[276]

4.91 Moreover, the terms "sustain" and "habitation" include an obvious time element, all the more when used together. As the dictionary definition reflects, to "sustain" something is an action that occurs across "an extended period" of time. So too for "habitation." To inhabit a place is to reside there, not to stop there episodically. To "sustain human habitation" can therefore only mean to support a human settlement for a significant and continuous period of time, such that the human population can validly be considered to make their residence on the feature.

4.92 Human beings are, of course, endlessly resourceful. The Russian cosmonaut Valeriy Poliyakov lived on the space station Mir for over 437 days, taking his food and water with him. Nicaragua doubts that even Colombia would argue that Mir was capable of sustaining human habitation.

---

[275] Larousse French-English Dictionary (1981), p. 376 ("habitation, inhabiting, dwelling, occupancy"). And in Chinese, the word used is "居住" (*jūzhù*), which means to dwell or "to live".

[276] *See* J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983).

4.93 For these reasons, Nicaragua shares the views of Van Dyke and Brooks, who wrote that in determining whether a feature can sustain human habitation,

> "[t]he key factor must be whether the island can in fact support a stable population. Islands should not generate ocean space if they are claimed by some distant absentee landlord who now desires the island primarily because of the ocean resources around the island. Islands should generate ocean space if stable communities of people live on the island and use the surrounding ocean areas".[277]

4.94 In their words, "it does not serve the central purposes of the Treaty to grant ocean space to barren atolls that have only slight links to some distant nation".

4.95 Colombia attempts to escape these conclusions by arguing that "neither the word 'permanent' nor the word 'stable' are used in Article 121(3)."[278] But that misses the point. Interpreted in accordance with their ordinary meaning in light of the object and purpose of the provision, the words that Article 121(3) does use—"sustain human habitation"—plainly contemplate the continuous residence of a group of people across a period of time. Any contrary interpretation would deprive those words of their plain meaning.

4.96 In this respect it is significant that the provision does not use the terms "person" or "survival" as would be expected if the test were merely whether a feature could keep individual people alive intermittently or for some temporary period.

---

[277] J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983).
[278] CCM, para. 4.104.

4.97 Article 121(3) also requires that feature be able to sustain "economic life of its own" if it is to have an entitlement to an exclusive economic zone and a continental shelf. Nicaragua has already addressed what it means to "sustain" habitation and therefore need not pause any longer on the word "sustain" other than to underscore that the grammatical structure of Article 121(3) makes it clear that the verb applies equally to the economic life requirement and the human habitation requirement.

4.98 The meaning of "of their own" could scarcely be clearer, all the more when the other authentic texts are also examined. On its plain and obvious meaning, "of their own" means that the feature itself has the ability to support an independent economic life without infusion from the outside. In his monograph on "The Legal Regime of Islands in International Law", Sir Derek Bowett put the point this way: "The phrase 'of their own' means that a State cannot avoid a rock being denied both an EEZ and a shelf by injecting artificial life, based on resources from its other land territory".[279]

4.99 In Nicaragua's view, "economic life" cannot be equated to "economic value". If Article 121(3) were intended to capture the latter meaning, it would have used those words or others to the same effect. But it does not. On its plain meaning, economic "life" suggests the presence of local economic activity that is the expression of human life. According to the Oxford English Dictionary, "life"

---

[279] D. W. Bowett, *The Legal Regime of Islands in International Law* (1979), p. 34.

in this sense means: "Vitality or activity embodied in material (esp. human or animal) forms".[280]

4.100 For a feature to sustain an "economic life", it must therefore support the development and maintenance of local human economic activity across time. This presupposes more than the existence of a resource or the presence of an installation of an economic nature, however important. As former ITLOS President Jesus has observed, it requires that a feature have the capacity "to develop its own sources of production, distribution and exchange in a way that … it would constitute the material basis that would justify the existence and development of a stable human habitation or community …".[281]

4.101 This, moreover, must be true of the feature as naturally formed. Conditions to support economic life cannot be artificially created or injected from the mainland. This does not mean, and Nicaragua does not argue, that links with the mainland must be entirely disregarded. One hundred percent self-sufficiency is not required. Especially in the modern world, there is no such place. But the economic life must be real and not contrived, local and not imported.

4.102 The Counter-Memorial submits that the requirement of "economic life of its own" is "extremely low".[282] But Colombia rather conspicuously offers no further explanation. For the reasons just explained, this cursory treatment of the

---

[280] Oxford English Dictionary (online version) (last accessed 20 June 2018).

[281] Jose Luis Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space" in *Negotiating for Peace* (Jochen A. Frowein, et. al., eds., 2003), p. 590.

[282] CCM, para. 4.184.

phrase does not accord with an interpretation that is consistent with the rules of treaty interpretation.

4.103 The understanding of what it means to sustain human habitation and an economic life is clear, but nevertheless only general, guidance on how to distinguish between a rock and a true island. There are, and can be, no bright line rules. Size matters but is not by itself determinative. Fresh water resources matter but are not by themselves determinative. Soil composition and capacity to sustain agriculture matter but are not by themselves determinative.

4.104 In the end, it is a question of appreciation in light of the natural characteristics of a given feature. That question of appreciation in this case is entrusted to the Court. Under any view, however, the Colombian cays that are located on the banks of Serrana, Roncador, Serranilla and Bajo Nuevo do not meet the requirements of being able to sustain human habitation or economic life of their own.

4. THE CAYS ON THE BANKS OF SERRANA, RONCADOR, SERRANILLA AND BAJO NUEVO ARE ROCKS THAT CANNOT SUSTAIN HUMAN HABITATION OR ECONOMIC LIFE OF THEIR OWN

4.105 The Counter-Memorial contends that all of Colombia's cays that are located on the banks of Serrana, Roncador, Serranilla and Bajo Nuevo escape the application of the customary law equivalent of Article 121(3). The Counter-

Memorial first provides a general overview in this respect and then separately assesses the individual cays.[283] For convenience, Nicaragua will assesses the status of the individual cays that are located on the banks of Serrana, Roncador, Serranilla and Bajo Nuevo in that order. In so doing, it will respond as appropriate to Colombia's general arguments concerning the status of each of these features.

4.106 One prior point is necessary, however. Colombia argues that the cays on the banks of Roncador, Serrana, Serranilla and Bajo Nuevo "are naturally-formed islands", not "geological" rocks.[284] Nicaragua has already shown that the composition of an island is not determinative of its status as a rock. Nicaragua will therefore not respond separately on this point in addressing the status of each of the features below. The fact that they consist of sand and broken coral does not preclude them from being "rocks" under Article 121(3) or customary international law.

a. Serrana Has No Entitlement Beyond 12M

4.107 Serrana Cay (also sometimes called Southwest Cay[285]) poses the simplest issue because its entitlements have already been determined by the Court. In its

---

[283] *See* CCM, paras. 4.126-182.

[284] CCM, para. 4.126.

[285] There are actually several other, much smaller cays on the bank of Serrana: Triangle Cay, Little Cay, Anchor Cay, East Cay, North Cay, Northwest Cay, Sand Cay and Sunny Cay. Colombia makes no argument that these other cays are entitled to an EEZ and continental shelf. Nicaragua will therefore not separately address them in this Reply.

2012 Judgment, the Court enclaved Serrana within a 12 M territorial sea. In so doing, the Court observed:

> "Its small size, remoteness and other characteristics mean that, in any event, the achievement of an equitable result requires that the boundary line follow the outer limit of the territorial sea around the island. The boundary will therefore follow a 12 nautical mile envelope of arcs measured from Serrana Cay and other cays in its vicinity".[286]

4.108 The maritime boundary between Serrana and Nicaragua established by the Court definitively determines the extent of its entitlements.[287] To argue now, as Colombia does, that Serrana generates entitlement to a 200 M EEZ and continental shelf effectively ignores the Court's prior determination. It would require a finding that Serrana's entitlements could somehow leap-frog over Nicaragua's EEZ and reassert themselves to the east of Nicaragua's 200 M limit. There can therefore be no question of Serrana having overlapping entitlements with Nicaragua that remains to be delimited.

4.109 In any event, even ignoring the Court's 2012 Judgment, it is clear that Serrana is plainly a "rock" that cannot sustain human habitation or economic life of its own.

4.110 Serrana Cay is diminutive, measuring only some 0.26 sq km in area.[288] Although it has some vegetation on it, it is comprised entirely of sand, rendering agriculture impossible. The 1902 version of "The Navigation of the Gulf of

---

[286] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, para. 238.
[287] *Ibid*., para. 251(5).
[288] CCM, para. 4.161.

Mexico and the Caribbean Sea" published by the Hydrographic Office of the United States Navy ("US Sailing Directions"), describes Serrana Cay as

> "composed entirely of sand covered with grass and stunted brushwood and has upon it summit a single cocoanut tree which can be seen sometime before the cay. At the southwest end large masses of broken coral have been thrown up upon the beach to a height of 3 or 4 feet".[289]

4.111 Given the insignificance of the feature, it is not surprising that there is no record of any habitation there. The 1932 U.S. State Department Study quoted above indicates that "[i]n 1920, the superintendent of the lighthouse [erected by the United States] reported that the island was uninhabited, but that there was one fisherman's hut at the north end of the Cay".[290] The presence of the hut appears connected with the fact that Serrana, like other "islands have been frequented by fishermen". This is confirmed by the US Sailing Directions which state that "[i]n the turtle season [Serrana] bank is visited by small fishing vessels from Jamaica and the neighboring islands, and at this period their masts and temporary huts on the cays may be seen before the reefs".[291]

4.112 The record concerning the sovereignty dispute between Colombia and the United States only underscores the lack of significance Colombia itself attached to Serrana. In or around 1919, the United States erected a lighthouse on Serrana (as well as Roncador and Quitasueño). Thereafter, "[i]n September, 1919, Colombia protested: asserting that these keys, Roncador, Quita Sueno, and

[289] "The Navigation of the Gulf of Mexico and the Caribbean Sea" ("U.S. Sailing Directions"), Hydrographic Office of the United States Navy (1902), p. 280. (NR, Annex 2)
[290] 1932 U.S. State Depart. Study, p. 59.(NR, Annex 5)
[291] U.S. Sailing Directions (1902), p.282.(NR, Annex 2)

Serranilla (although the light was on Serrana) belong to Colombia …”.[292] In other words, even as it was contesting sovereignty over the feature with the United States, Colombia itself did not know the difference between Serrana and Serranilla.

4.113 The Counter-Memorial makes a number of arguments that, despite its evident insignificance, Serrana Cay is not a “rock” within the meaning of the customary international law equivalent of Article 121(3). First, the Counter-Memorial points out that there is vegetation on Serrana, consisting of “grass, coconut palms and stunted brushwood”.[293] While that assertion is consistent with the historical descriptions recounted above, it does nothing to demonstrate that Serrana can sustain human habitation or economic life of its own. The mere fact that some plants grow on a feature does not mean that it can produce the quality or quantity of food products necessary to feed a human community across time. Colombia has not made—because it cannot make—any showing that Serrana is capable of producing edible plants in sufficient quantity to sustain human habitation.

4.114 Second, the Counter-Memorial observes that Serrana Cay is “constantly visited” by fishermen from San Andrés and Providencia and that there are Navy and Coastguard personnel on the cay.[294] Colombia thus negates its own argument. Visitation is not habitation. With respect to how “constantly” the feature was

---

[292] 1932 U.S. State Dept. Study, p. 83 (underlining in original).(NR, Annex 5)
[293] CCM, para. 4.161.
[294] CCM, para. 4.161-4.162.

visited, Nicaragua observes that the historical record only appears to support the assertion that it was visited by fishermen from Colombia and elsewhere during turtle season (i.e., between the months of March and August). Such temporary sojourns hardly constitute "constant visitation," let alone the establishment or existence of a continuously settled human community (which Colombia does not even allege).

4.115 In this respect, one of the documents Colombia submits in support of the assertion that there was a "constant periodic presence"[295] —a revealingly awkward phrase—on its islands, the 1941 report on the Results of the Fifth George Vanderbilt Expedition,[296] undermines its case about Serrana. Although the report noted the presence of fishermen on Serranilla during turtle season, it said nothing about the presence of any fishermen on Serrana at that time.[297]

4.116 In any event, as stated, visitation is not habitation, which connotes something more. And here the historical record is clear: Serrana has never been inhabited. Writing generally about the history of Serrana, Serranilla, Roncador and Quitasueño, the 1932 U.S. State Department study states that

> "there is practically no mention of anything taking place on Serrana, Serranilla, Roncador and Quito Sueno before the middle of the nineteenth century, although it is plain that there [sic] existence was known by the beginning of the seventeenth century. Apparently the islands themselves had no history before modern times. This inference

---

[295] CCM, para. 4.62.

[296] J. Bond and R. Meyer de Schauensee, "The Birds", *The Academy of Natural Sciences of Philadelphia*, Monographs, Number 6, Results of the Fifth George Vanderbilt Expedition (1941), Wickersham Printing Company, 1947, p. 10 (CCM, Annex 47).

[297] *Ibid*.

> is reasonable in view of their tiny size and comparative uselessness …".[298]

4.117 Colombia itself acknowledges the importance of this point when it states that "the way of assessing [the] ability to sustain human habitation could be by looking at past and present habitation …".[299] This is only logical. If a feature were historically uninhabited and sustained no economic life, that would constitute powerful evidence of its lack of capacity to do so.

4.118 The absence of any historical habitation is particularly telling in assessing the capacity of Serrana to sustain human habitation. It is not located in some remote part of the globe, but in an area that has been inhabited for well over 10,000 years. The presence of pre-Colombian human habitation and a colonial presence on many other nearby Caribbean islands indicates that those other islands historically had the capacity to sustain human habitation. There has to be a reason that Serrana, in contrast, has never been inhabited. Undoubtedly, it is because it is uninhabitable.

4.119 The presence of Navy and Coast Guard personnel also does not meet the standard of human habitation as understood in the context of Article 121(3) and its customary international law equivalent. That presence is temporary in character, and directed and supported by Colombia for reasons that have nothing to do with the purposes of the expanded maritime zone UNCLOS created. As former ITLOS Judge David Anderson (among others) has written: "The

---

[298] 1932 U.S. State Dept. Study, p. 40 (NR, Annex 5).
[299] CCM, para. 4.105.

introduction on to a small feature, such as a rock or a sand spit, of an official or military presence, serviced from the outside, does not establish that the feature is capable of sustaining human habitation or has an economic life of its own."[300]

4.120 Third, the Counter-Memorial submits that there are buildings, other infrastructure and an internet kiosk on the island.[301] The information that is provided with the Counter-Memorial indicates that these facilities, which are plainly of recent origin, are used by the personnel of the Navy and the Coast Guard, and sometimes fishermen.[302] Again, this evidence does not even begin to prove that Serrana Cay can sustain human habitation or economic life of its own. Facilities like those Colombia points to could be installed on virtually any feature anywhere in the world. But Article 121(3) requires the capacity to sustain "human habitation" and "economic life of its own", not the capacity to be built upon.

4.121 There is therefore no escaping the conclusion that, even setting aside the Court's 2012 Judgment, Serrana does not generate entitlement to an EEZ or continental shelf.

---

[300] David Anderson, "Islands and Rocks in the Modern Law of the Sea" in *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), p. 313. *See also* Robert Kolb, "The Interpretation of Article 121, Paragraph 3 of the United Nations Convention on the law of the Sea: Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", FRENCH YEARBOOK OF INTERNATIONAL LAW, Vol. 40 (1994), p. 906; United Nations, Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8 (1988), p. 7.
[301] CCM, para. 4.162.
[302] CCM, para. 4.162.

b. Roncador Has No Entitlement Beyond 12M

4.122 The Court's 2012 Judgment did not separately address the delimitation of Roncador. What it did say about Roncador, however, suggests that it too is entitled to no more than a territorial sea. In particular, the Court drew the parallel of latitude comprising the northern limit of Colombia's corridor, and thus limited the extent of Colombia's maritime zones, by reference to the 12 M territorial sea limit of Roncador.[303] Especially given the diminutive size of Roncador (0.07 sq km), its entitlements vis-à-vis Nicaragua should therefore be limited to 12 M.

4.123 Roncador is also a "rock" within the meaning of Article 121(3).[304] The 1932 U.S. State Department study cited above[305] describes Roncador as follows:

> "It is about twelve feet above water and 600 by 630 yards in size, and is composed of sand and coral without trees or bushes, but with some guano on it. Brackish water may be obtained by digging wells, but there is no good drinking water on the island.
>
> […]
>
> That it has been used by fishermen in the Nineteenth and Twentieth Centuries is quite certain. A fisherman's hut may usually be seen on the Key, though it is probably only occupied by the men at intervals from March to August, during the turtle breeding season."[306]

4.124 Colombia's own official documents prove that this miniscule feature is a "rock". In 1893, the Legation of Colombia to Washington, DC sent a note to the

[303] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, para. 237.

[304] There are three cays on the bank of Roncador: Roncador Cay, Middle Cay and South Cay. The Counter-Memorial makes no argument that Middle Cay or South Cay can sustain human habitation or economic life of their own. Like Colombia, Nicaragua will therefore also focus its analysis on Roncador Cay.

[305] 1932 U.S. State Dept. Study, (NR, Annex 5).

[306] 1932 U.S. State Dept. Study, pp. 58, 61, (NR, Annex 5)

U.S. Secretary of State protesting the United States' sovereignty claim over Roncador (and Quitasueño), and stating the basis of Colombia's competing claim. In that note, Colombia said of both Roncador and Quitasueño:

> "The aforesaid banks are not, neither can they be, permanently inhabited; they are barren islands without any kind of vegetation; they are destitute of the elements necessary for life of man, and the passing but periodical sojourn which the inhabitants of the more fertile contiguous islands make thereon, as well as the pursuit of turtle fisheries, of which, as I have stated, those keys are the breeding grounds, constitute the sole useful purpose of which they are susceptible".[307]

4.125 Adding further colour to this description, the note tells the tale of 12 Jamaican laborers, hired to mine guano, who were abandoned on the feature. After waiting in vain for someone to return for them, and "being destitute of all means of subsistence on that arid and desert island", seven left on a small boat and were picked up by a passing ship four days later.[308] The remaining five all died. Fishermen subsequently found two of the corpses, the position of which is reported to have "clearly showed that death had come upon them in the midst of the most absolute destitution".[309]

4.126 Notwithstanding the characterisation of Roncador by its own Legation to Washington (in the midst of a sovereignty dispute, no less), the Counter-Memorial makes a number of arguments that Roncador can sustain human habitation and an economic life of its own. First, the Counter-Memorial points

---

[307] Letter, Legation of Colombia to the United States (18 Jan. 1893), p. 12.(NR, Annex 9).
[308] Letter, Legation of Colombia to the United States (18 Jan. 1893), p. 3. (NR, Annex 9).
[309] Letter, Legation of Colombia to the United States (18 Jan. 1893), p. 4. (NR, Annex 9).

out that there is now vegetation, and various species of fish and birds on Roncador Cay.[310] This, however, does nothing to show that Roncador Cay can sustain human habitation or an economic life of its own. Indeed, Colombia's own prior description of the feature provides compelling evidence that it cannot.

4.127 Second, the Counter-Memorial observes that Roncador Cay is "constantly visited" by fishermen from San Andrés and Providencia, and that there are Navy and Coastguard personnel on the cay.[311] These arguments are no more persuasive in respect of Roncador than they are in respect of Serrana.

4.128 Historically, visits by fishermen were limited to the turtle season. The 1941 report on the Results of the Fifth George Vanderbilt Expedition indicates that Roncador was deserted at the time the expedition visited the islands. The only other evidence of the "constant visiting" that Colombia offers relates only to the period after 2010 and records rare visits with large intervals in between.[312] And, for the reasons already stated, the presence of Navy and Coast Guard personnel does not meet the standard of human habitation as understood in the context of Article 121(3) and its customary law equivalent.[313]

4.129 Third, the Counter-Memorial submits that there are buildings, other infrastructure and an internet kiosk on the island.[314] The information that is

---

[310] CCM, para. 4.152.
[311] CCM, para. 4.153.
[312] *See* CCM, para. 4.129 & Annexes 10-15.
[313] *South China Sea Arbitration (Philippines* v *China), Award of 12 July 2016, PCA Case No. 2013-19*, para. 520.
[314] CCM, para. 4.154.

provided by the Counter-Memorial indicates that these facilities, which are of recent origin, and presumably installed by the Government of Colombia with building materials transported to the island, are used by the personnel of the Navy and the Coast Guard and fisherman. As in the case of Serrana, the mere fact that a feature can be built upon is not by itself indicative of its ability to sustain human habitation or economic life, particularly when considered in light of Colombia's own previous description of the feature.

4.130 Fourth, the Counter-Memorial asserts that before the Second World War Germany requested that a consul be accredited to San Andrés, Providencia and Roncador.[315] According to the Counter-Memorial: "[C]learly, a foreign State would not request a consul to be accredited over another State's rock".[316] This is pure speculation; the documents to which the Counter-Memorial refers do not provide any explanation for Germany's actions.[317] Nicaragua will not try to guess why Germany did what it did. Whatever the case, the characteristics of Roncador are a matter of objective fact and speak for themselves. It is plainly a "rock" within the meaning of Article 121(3).

c. Serranilla Has No Entitlement Beyond 12M

4.131 The Court's 2012 Judgment did not address the delimitation between Nicaragua's mainland coast and the cays on the banks of Serranilla. Nicaragua

[315] CCM, para. 4.157.
[316] CCM, para. 4.157.
[317] CCM, p. 260, fns. 434 and 435.

does note, however, that in the 1993 delimitation agreement between Colombia and Jamaica, Colombia agreed that the entitlements of Serranilla should be limited to a 12 M territorial sea.[318] Although that agreement is *res inter alios acta* as to Nicaragua, it constitutes persuasive evidence of Colombia's own assessment of the weight to be accorded the feature. Nicaragua respectfully submits that the Court should follow Colombia's lead and find that as a matter of delimitation vis-à-vis Nicaragua, Serranilla generates no more than a territorial sea.

4.132 Serranilla's entitlements should also be limited to 12 M for the additional reason that it is an Article 121(3) "rock".[319] It therefore does not even potentially generate entitlements beyond 12 M.

4.133 At just 0.12 sq km in area,[320] Serranilla is only marginally less tiny than Roncador. And the evidence is clear that it is equally incapable of sustaining human habitation or an economic life of its own. The 1902 U.S. Sailing Directions describe Serranilla Cay (also known as Beacon Cay) in the following terms:

> "[I]ts shape is that of a quarter moon, convex to the south, and from point to point it is about ½ mile in length. The sand and coral, of which it is composed, is covered with samphire grass and stands 8 feet above the sea …. The fishermen say that indifferent brackish water, strongly

[318] Treaty on Maritime Delimitation between the Republic of Colombia and Jamaica of 12 November 1993 (1776 UNTS 27).

[319] There are several cays on the bank of Serranilla: Serranilla Cay, East Cay, Middle Cay, West Cay and Sand Cay. The Counter-Memorial makes no argument that any feature other than Serranilla Cay can sustain human habitation or economic life of their own. Like Colombia, Nicaragua will therefore also focus its analysis on Serranilla Cay.

[320] CCM, para. 4.168.

> impregnated with lime, may be obtained on Beacon cay by digging wells."[321]

4.134 The Colombian Navigator, published in 1839 by English hydrographer John Purdy, describes Serranilla in very similar terms, stating that there "is a small creeping shrub just covering the sand. Seals frequent this kay, with their young, in March and April …".[322]

4.135 Serranilla is so small and so unimportant that Colombia historically paid it scant attention. As recorded in the aforementioned 1932 U.S. State Department study:

> "Colombia is the only government other than the United States that appears to have had any claim to sovereignty over Serranilla, and that claim has never been presented through diplomatic channels to the United States. Its existence is only inferred from certain records of the State Department which indicate that Colombia regards Serranilla as a part of the Providence Archipelago, and as under Colombian jurisdiction.
>
> Serranilla was never mentioned in the exposition of Colombia's claim in 1893. … [I]t was not until 1919, after the erection of lights on the other three banks, that Serranilla was mentioned in the diplomaitc [sic] negotiations between the two governments. Even then, as has been seen, it was by mistake, Serrana and not Serranilla being what each side had in mind. Serranilla was dropped from the correspondence when this mistake was discovered, though no mention was made of the error. Furthermore, Serranilla was not included in the treaties of 1928 between Colombia and Nicaragua, and Colombia and the United States, and has not figured in any of the subsequent negotiations."[323]

---

[321] U.S. Sailing Directions (1902), p. 277. (NR, Annex 2).

[322] The Colombian Navigator; or, Sailing Directory for the American Coasts and the West Indies (1839), John Purdy, Vol. III, p. 248. (NR, Annex 3).

[323] 1932 U.S. State Dept. Study, pp.113-14.(NR, Annex 5).

4.136 Notwithstanding the physical and historical unimportance of Serranilla Cay, Colombia argues that it generates entitlement to a 200 M EEZ and continental shelf. The arguments that Serranilla can sustain human habitation or an economic life of its own that the Counter-Memorial makes are largely the same as those it made in respect of Serrana and Roncador; namely, that it has vegetation, that it is "permanently inhabited on a rotating basis by fishermen",[324] and that there are buildings and a detachment of the Colombian Navy on it.[325] These arguments fail as to Serranilla for all the same reasons they did as to Serrana and Roncador.

4.137 Moreover, Nicaragua notes that the only document introduced in connection with Colombia's argument that Serranilla is visited by fishermen is the 1941 report on the Results of the Fifth George Vanderbilt Expedition.[326] The report observes that "fishermen with their families were living [in Serranilla] for the purpose of catching turtles as well as gathering tern eggs and guano".[327] However, the report neither specifies where these fishermen came from, nor indicates their number or the duration of their stay. It is quite possible that the fishermen came from Jamaica. A discussion of the Joint Regime Area created by the 1993 Agreement between Colombia and Jamaica states:

---

[324] CCM, para. 4.168.
[325] CCM, paras. 4.169-70.
[326] J. Bond and R. Meyer de Schauensee, "The Birds", *The Academy of Natural Sciences of Philadelphia*, Monographs, Number 6, Results of the Fifth George Vanderbilt Expedition (1941), Wickersham Printing Company, 1947, p. 10 (CCM, Annex 47).
[327] *Ibid*., p. 10.

> "Friction over these fishing grounds had been frequent between Jamaican fishermen and Colombian naval guards. It must be borne in mind that Colombia's fishermen are based either on the distant mainland or quite locally on the inhabited islands of San Andrés and Providencia, but they have not been motivated to engage in activities traditionally carried out by Jamaican boats on these banks."[328]

4.138 In any event, regardless of the provenance of the fishermen temporarily present at Serranilla, the fact that fishermen from other islands travel long distances to fish around a feature is not enough to entitle it to expanded maritime zones. If it were, then logic would dictate that Quitasueño should be entitled to an EEZ and continental shelf because they too have long been a destination for regional fishermen.[329] But, of course, the Court has already ruled that they are not. The same conclusion should apply to Serranilla.

d. Bajo Nuevo Has No Entitlement Beyond 12M

4.139 As in the case of Serranilla, the Court did not address the delimitation between Nicaragua's mainland coast and the cays on the banks of Bajo Nuevo in its 2012 Judgment. But as also in the case of Serranilla, Bajo Nuevo was enclaved within a 12 M territorial sea in the 1993 delimitation agreement between Colombia and Jamaica.[330] As such, it shows that Colombia itself does not consider the feature significant enough to generate an EEZ or continental shelf. Nicaragua respectfully submits that the Court should adopt the same approach

[328] J.I. Charney and L.M. Alexander (eds.) *International Maritime Boundaries; Volume III*, p. 2187.
[329] *See* 1932 U.S. Dept. Study, p. 75.(NR, Annex 5).
[330] Treaty on Maritime Delimitation between the Republic of Colombia and Jamaica of 12 November 1993 (1776 UNTS 27).

and find that as a matter of delimitation vis-à-vis Nicaragua, Bajo Nuevo is entitled only to a territorial sea.

4.140 Bajo Nuevo entitlements should be limited to 12 M also because it is an Article 121(3) "rock". [331] It therefore does not even potentially generate entitlements beyond 12 M.

4.141 Bajo Nuevo Cay is just *one-tenth* the size of Roncador Cay: 0.007 sq km.[332] Nicaragua considers it self-evident that Bajo Nuevo can no more sustain human habitation or an economic life of its own than Roncador. Colombia's own photographs make this clear. Counter-Memorial Figure 4.59 is reproduced below.

[331] There are several cays on the bank of Bajo Nuevo: Bajo Nuevo Cay (also known as Low Cay), West Cay, Sand Cay and Middle Cay. The Counter-Memorial makes no argument that any feature other than Bajo Nuevo Cay can sustain human habitation or economic life of their own. Like Colombia, Nicaragua will therefore also focus its analysis on Bajo Nuevo Cay.

[332] CCM, para. 4.177.

THE LIGHTHOUSE ON BAJO NUEVO

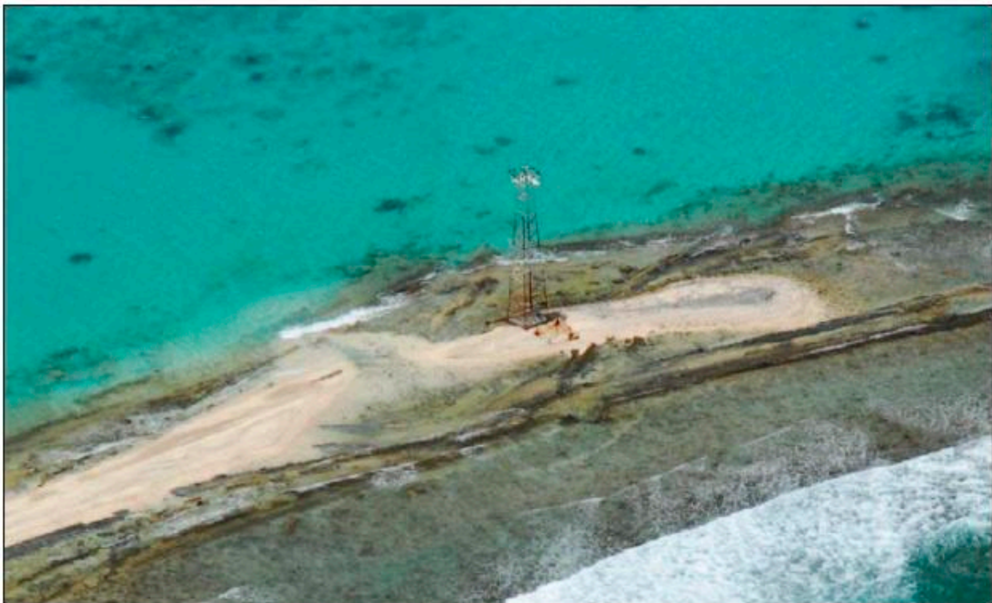


Figure 4.59

4.142 The 1890 U.S. Sailing Directions confirm what the photographs show. They describe Bajo Nuevo as

> "a barren cay composed of sand, broken coral, and drift wood, thrown up by the waves to the height of 5 feet above the sea. It is 300 yards long, and about 50 yards broad, and lies in lat. 15° 52' 28" N., long. 78° 39' 4" W. At the south end there is a small pond, which is resorted to by seals; and in the months of March and April the bank is visited by fishing vessels, from St. Andrews [San Andrés] and Old Providence [Providencia], for the purpose of taking them."[333]

4.143 In the face of the obvious, the Counter-Memorial makes several hopeless arguments that Bajo Nuevo Cay is in fact capable of sustaining human habitation or an economic life of its own. The Counter-Memorial does not—because it cannot—argue that there is vegetation on Bajo Nuevo Cay. But it does argue that it is "frequently visited" by Colombian fishermen.[334] It produces no documents to support this assertion, however. The Book of Information and the Sailing Directions contained in Annexes 10 to 15 of the Counter Memorial, and which cover the period from 2010 to the present, do not register even a single visit to Bajo Nuevo. Moreover, as stated, the historical record suggests that it was, at most, visited by fishermen from San Andrés and Providencia only during March and April for purposes of hunting seal. Again, visitation is not habitation.

4.144 Colombia also refers to the activities of Jamaican fishermen.[335] But as Colombia itself describes those activities, they are extremely limited and only

[333] The Navigation of the Gulf of Mexico and Caribbean Sea (U.S. Sailing Directions), Hydrographic Office of the United States Navy (1890), p. 116. (NR, Annex 4).
[334] CCM, para. 4.177.
[335] CCM, para. 4.181.

underscore the incapacity of Bajo Nuevo to sustain human life or economic activity. It states, for instance, that under the 1984 Agreement between Colombia and Jamaica, a maximum of just 12 Jamaican fishermen were "permitted temporary stationing in Bajo Nuevo".[336] Moreover, as explained above, there is no basis for according a feature extended maritime entitlements on the basis of transient activities undertaken by fishermen who reside on an island over 125 M away.

4.145 Finally, Colombia gets no mileage from its citation to the provisions of the 1984 Agreement with Jamaica that state that Bajo Nuevo (and Serranilla) "allow the habitation and can sustain of their own the life of Jamaican fishermen …".[337] The intent behind that provision is obvious. But States cannot change objective reality simply by describing a feature in a way that best suits their interests.

4.146 The conclusion remains: Bajo Nuevo, like Serrana, Roncador and Serranilla, is a "rock" within the meaning of the customary international law analogue to Article 121(3). None of them can sustain human habitation or an economic life of their own, and they therefore do not generate even a potential entitlement to an EEZ or continental shelf.

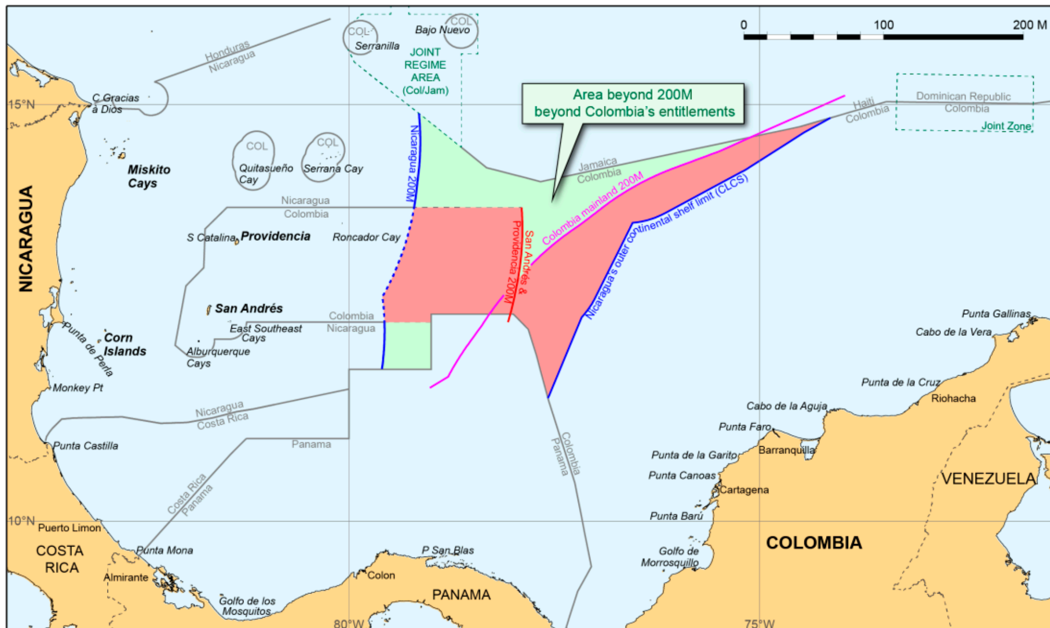
---

[336] CCM, para. 4.181.

[337] CCM, para. 4.181.

4.147 **Figure 4.4** illustrates the maritime zones of Colombia and Nicaragua taking into account the absence of these entitlements of the cays that are located on the banks of Roncador, Serrana, Serranilla and Bajo Nuevo.

Figure 4.4 200M Limits for Mainlands and Entitled Islands



CHAPTER 5. A STATE'S ENTITLEMENT TO CLAIM A 200 NM EEZ WITH ITS ATTENDANT RIGHTS OVER THE SEABED DOES NOT EXTINGUISH ANOTHER STATES OVERLAPPING OCS CLAIM

5.1. This chapter of Nicaragua's Reply responds to the arguments set out in Chapter 3 of Colombia's Counter-Memorial concerning the juridical nature of the continental shelf, including the OCS, and the EEZ. The essence of Colombia's arguments is that a continental shelf defined under UNCLOS Article 76 in terms of its distance from shore is juridically different from, or in some way hierarchically superior to, a continental shelf defined under UNCLOS Article 76 in terms of the outer edge of the continental margin. This chapter shows that those arguments are incorrect. There is no juridical difference between a coastal State's rights in different parts of its continental shelf; and there is no hierarchy between continental shelf entitlements based on the different criteria that together define the continental shelf under UNCLOS Article 76.

5.2. Those arguments lie at the heart of Colombia's case, and because of their pivotal importance it is worthwhile quoting Colombia's summary of the arguments *verbatim*.

> "3.5 In this Chapter, Colombia will show that, in accordance with both UNCLOS, which binds Nicaragua, and customary international law, which applies to both Parties, any coastal State's entitlement to a 200-

nautical-mile EEZ with its attendant continental shelf, encompassing the waters superjacent to the seabed, as well as the seabed and its subsoil, prevails over another State's claim to extend its putative OCS into the same area. There are three principal reasons for this: (1) while the 200-nautical-mile EEZ with its attendant continental shelf is an *ipso jure* entitlement of coastal States, which pertains to them on the basis of the distance criterion, any OCS claim must be proven by the coastal State with reference to geological and geomorphological criteria; (2) OCS claims were never intended to encroach upon another State's *ipso jure* entitlement to an EEZ with its attendant continental shelf, but only upon the International Area, which is the Common Heritage of Mankind; and (3) the economic rights assigned in the 200-nautical-mile EEZ with its attendant continental shelf are sovereign rights fully and exclusively exercised by the coastal State, whereas the OCS is a grant to a wide-shelf State in exchange for revenue-sharing with the other States Parties. Colombia will also demonstrate that the customary international law regime applies equally to EEZ with its attendant continental shelf generated by islands and mainland.

3.6 This Chapter will prove that this is compelled by customary international law as well as by UNCLOS, the latter through an exhaustive canvassing of the legislative history of UNCLOS III, in which the concepts of the EEZ and the OCS were forged; by a survey of preponderant subsequent State practice; and by the near unanimity of doctrine. Colombia will establish that not only would no other interpretation of customary and conventional international law finds support in the legislative history and State practice, but also no other would be reasonable, equitable or just. […]

3.7 For clarity, the UNCLOS travaux will be treated in five sections. The first will demonstrate the primacy which was assigned to the EEZ, with its attendant 200-nautical-mile continental shelf, as "the keystone" of the new regime. The second section will show that the negotiating Parties were clearly distinguishing between the OCS and the EEZ: the EEZ with its attendant continental shelf pertained to a coastal State as of right, while the OCS was contingent on the proof of prescribed geological and geomorphological facts. The third section will confirm that the OCS of one State, rather than encroach upon the EEZ with its attendant continental shelf of another, was intended only to infringe upon the international Area. Moreover, if a claim was proved through an internal scientific process, the permission to encroach was only to be granted in return for revenue-sharing with the other States Parties. The

> fourth section will prove that the OCS of one State was not to infringe upon the 200-nautical-mile zone of another State. The fifth section will show that this UNCLOS regime was to extend equally to the EEZ with its attendant continental shelf of mainland and islands."[338]

5.3. The 'principal reasons' given by Colombia have no basis in international law. They are bare assertions of propositions that contradict established and fundamental principles of international law and misrepresent the work of UNCLOS III. The following paragraphs address, first, each of the 'three principal reasons' in turn, and then the question of the application of the principles of international law to the continental shelves of islands. This Chapter closes with a review of Colombia's treatment of the UNCLOS *travaux préparatoires* and of State practice.

A. The Continental Shelf, Including The Portion Beyond 200 NM, Is An Ipso Jure Entitlement Of Each Coastal State, Which Automatically Appertains To The Coastal State.

5.4. Colombia's first proposition, in paragraph 3.5, is that "while the 200-nautical-mile EEZ with its attendant continental shelf is an *ipso jure* entitlement of coastal States, which pertains to them on the basis of the distance criterion, any OCS claim must be proven by the coastal State with reference to geological and

[338] Footnotes omitted.

geomorphological criteria."[339] The plain implication, according to Colombia's argument, is that an OCS claim is not an *ipso jure* entitlement.

5.5. The authority that it cites for this proposition is "2016 Judgment, Separate Opinion of Judge Greenwood, para. 18." That paragraph reads as follows:

> "18. Nor does the 2012 Judgment give any indication of what it was that Nicaragua had to prove. Since Colombia was not a party to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), the Court necessarily held that the applicable law was customary international law (*I.C.J. Reports 2012 (II)*, p. 666, para. 118). It concluded that the definition of the continental shelf contained in paragraph 1 of Article 76 of UNCLOS forms part of customary international law. That provision states:
>
> "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."
>
> The Court thus accepted that customary international law, like UNCLOS, recognizes two distinct grounds for entitlement to a continental shelf, one based upon distance and the other upon the possession of a continental margin which constitutes a natural prolongation of the coastal State's land territory. To assert a claim to an area based upon the first ground, a State need only establish that the area claimed lies within 200 nautical miles of its baselines. Claims based upon the second ground are, however, rather more complicated. A State asserting such a claim in respect of a particular area must demonstrate that it possesses a continental margin which constitutes a natural prolongation of its land territory and that the area in question falls within the outer limits of that continental margin. That is what Nicaragua was seeking to prove in 2012."

[339] Cf CCM para. 3.12.

5.6. As is apparent, Judge Greenwood did not assert the proposition for which he is cited as authority. He said, to borrow Colombia's words, that ""while the 200-nautical-mile … continental shelf is an ... entitlement of coastal States, which pertains to them on the basis of the distance criterion, any OCS claim must be proven by the coastal State with reference to geological and geomorphological criteria." In the sense that a State must demonstrate the existence of its continental margin — just as a State must demonstrate that a particular point falls within 200 NM of its baselines — Nicaragua does not dispute that proposition. But Judge Greenwood did not say that ""the 200-nautical-mile EEZ with its attendant continental shelf is an *ipso jure* entitlement of coastal States, which pertains to them on the basis of the distance criterion." That is a quite different proposition; and it is incorrect. Nor did he suggest in any way that the OCS is not an *ipso jure* of a coastal State.

5.7. UNCLOS does not say that the EEZ is an *ipso jure* entitlement of coastal States. UNCLOS makes no provision in relation to the EEZ that is equivalent to the provision in UNCLOS Article 77(3), which stipulates in relation to the continental shelf that "[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

5.8. UNCLOS Article 77(3) reflects what the Court called "the most fundamental of all the rules of law relating to the continental shelf", namely that

"the rights of the coastal State in respect of the area of continental shelf … exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land."[340] It is important to be clear on the meaning of that proposition. It means, as the Court went on to explain, that

> "there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted."

5.9. In other words, every coastal State has, by operation of law, and as a necessary and automatic consequence of it having a coastline, a continental shelf. A State may enact legislation or a declaration or a proclamation asserting its rights over the continental shelf; but those rights themselves are inherent, and their existence does not depend upon the making of any such legislation or declaration or proclamation. Like the territorial sea, the continental shelf is an automatic appurtenance of the coastal State, attaching to the coastal State by operation of law. The Court also said that the continental shelf rights of the coastal State exist *ab initio.* [341] That follows naturally: because the law automatically ascribes a continental shelf to every coastal State, there is no rational basis for saying that it ascribes those right only after the State has performed this or that act, or after a certain date or after a certain period of time.

5.10. Colombia makes the mistake of conflating *ipso facto* appurtenance, in the sense just described, with the question of what might be called the 'automatic

---

[340] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 3, at para. 19.
[341] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 3, para. 19.

entitlement” of a coastal State to *establish* an EEZ. It is true that every coastal State is entitled to claim and establish an EEZ. It is not true that international law automatically ascribes an EEZ to every coastal State whether or not a coastal State has as a matter of fact claimed one.

5.11. Some States choose not to claim an EEZ. The UN Division for Ocean Affairs and the Law of the Sea (‘DOALOS’) maintains a list of legislation and proclamations of EEZ rights.[342] DOALOS lists Albania, Algeria, Bahrain, Benin, Bosnia and Herzegovina, Ecuador, El Salvador, Gambia, Greece, Iraq, Jordan, Kuwait, Malta, Monaco, Montenegro, Papua New Guinea, Peru, Saudi Arabia, Somalia, and Sudan as making no EEZ claim, and lists other States that claim only limited competences, not amounting to a full EEZ claim, beyond their territorial seas.[343] In the same sense, in 2013 a European Commission press release referred to a statement by the European Commissioner for Maritime Affairs and Fisheries that “There are huge untapped opportunities in the Mediterranean Sea, which could come to fruition by establishing Exclusive Economic Zones (EEZs). The proclamation and establishment of maritime zones remains the sovereign right of each coastal State.”[344]

---

[342] < http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htmm >

[343] <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf >

[344] Press Release, ‘Improving governance of the maritime space: an opportunity for Blue Growth in the Mediterranean sea’, Brussels, 11 July 2013, < http://europa.eu/rapid/press-release_IP-13-681_en.htm >. (last accessed 20 june 2018)

5.12. The ‘proclamation and establishment’ of an EEZ is a right: it is not a duty; and it is not a legally-irrelevant act which is redundant because international law imposes an EEZ on every coastal State in any event. It is an opportunity, and States choose whether and when to avail themselves of it. If a coastal State chooses not to claim an EEZ, the area beyond its territorial sea, overlying its continental shelf, remains high seas.

5.13. Of course, if an EEZ is in fact proclaimed, it entails rights over both the water column and the seabed.[345] That is what the EEZ is, as a legal regime. The EEZ seabed rights are historically derived from, and their exercise is legally defined by reference to,[346] the legal regime of the continental shelf. The proclamation of an EEZ is in that sense necessarily an assertion of rights that exist also under the regime of the continental shelf. That is why, as the Court held in 1985 in the *Libya / Malta* case:

> “Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.”[347]

5.14. That is one reason that Colombia’s first proposition in paragraph 3.5 of its Counter-Memorial is incorrect. The 200-nautical-mile EEZ is not an *ipso jure*

---

[345] UNCLOS Article 56.
[346] UNCLOS Article 56(3).
[347] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985,* p. 13, para. 34.

appurtenance of coastal States in the sense that the continental shelf undoubtedly is an automatic appurtenance of costal States, *ipso facto* and *ab initio*.

5.15. There is a further point. If Colombia's statement that "while the 200-nautical-mile EEZ with its attendant continental shelf is an *ipso jure* entitlement of coastal States … any OCS claim must be proven by the coastal State with reference to geological and geomorphological criteria" is meant to imply that the OCS does not attach to coastal States *ipso facto* and *ab initio*, that too would be incorrect.

5.16. UNCLOS Articles 76(1) and 77(3) ascribe a continental shelf to each coastal State. When Article 77(3) states that "[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation," the "continental shelf" that is referred to must be that defined in Article 76(1), which speaks of the continental shelf of a coastal State extending "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 breath of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." There is no reason to suppose anything different.

5.17. It is accordingly clear that the "inherent rights" of the coastal State extend throughout its entire continental shelf. They extend both to that portion of the

continental shelf that lies within 200 NM of the baselines, and to that portion that lies more than 200 NM from the baselines.

5.18. As was explained above, in Chapter 2,[348] the involvement of the Commission on the Limits of the Continental Shelf ('CLCS') in the process of settling the outer limit of the continental shelf does not alter this position.

5.19. UNCLOS Article 76(8) provides that:

> "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

5.20. Nothing in that provision suggests that the submission of the "information" is an act constitutive of the coastal State rights over the OCS. Nothing suggests that the rights of the coastal State over the continental shelf do not exist, or are in some sense inchoate, pending the submission of the information to the CLCS and / or the receipt of its recommendation. The International Tribunal for the Law of the Sea, in the *Bangladesh / Myanmar* case, explained the position:[349]

> "406. Regarding the question whether it can and should decide on the entitlements of the Parties, the Tribunal first points out the need to make

[348] See paras. 2.37-2.45 above.
[349] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No. 16, Judgment of 14 March 2012, para. 409.

> a distinction between the notion of entitlement to the continental shelf beyond 200 nm and that of the outer limits of the continental shelf.
> 407. It is clear from article 76, paragraph 8, of the Convention that the limits of the continental shelf beyond 200 nm can be established only by the coastal State. Although this is a unilateral act, the opposability with regard to other States of the limits thus established depends upon satisfaction of the requirements specified in article 76, in particular compliance by the coastal State with the obligation to submit to the Commission information on the limits of the continental shelf beyond 200 nm and issuance by the Commission of relevant recommendations in this regard. It is only after the limits are established by the coastal State on the basis of the recommendations of the Commission that these limits become "final and binding".
>
> 408. The foregoing does not imply that entitlement to the continental shelf depends on any procedural requirements. As stated in article 77, paragraph 3, of the Convention, "[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation".
>
> 409. A coastal State's entitlement to the continental shelf exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present. It does not require the establishment of outer limits. Article 77, paragraph 3, of the Convention confirms that the existence of entitlement does not depend on the establishment of the outer limits of the continental shelf by the coastal State.
>
> 410. Therefore, the fact that the outer limits of the continental shelf beyond 200 nm have not been established does not imply that the Tribunal must refrain from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned."

5.21. The point is reinforced by UNCLOS Article 76(10), which provides that "[t]he provisions of this article are without prejudice to the delimitation of the continental shelf between States with opposite or adjacent coasts." The *Virginia Commentary* notes that

> "78.18(m). Paragraph 10 is a savings provision for all questions regarding the delimitation of overlapping claims between States to continental shelf. It provides that the determination of the outer limits of

> the continental shelf is 'without prejudice' to the delimitation of the continental shelf between States with opposite or adjacent coasts. This provision emphasizes that article 76 prescribes the method of determining the outer limits of the continental shelf; it does not address in any way the question of delimitation of the continental shelf between opposite or adjacent States, which is addressed exclusively in Article 87. This distinction is reinforced by Annex II, article 9, which provides that the actions of the Commission on the Limits of the Continental Shelf in making the recommendations on the basis of data and other material submitted by the coastal State does not in any way affect 'matters relating to delimitation of boundaries between States with opposite or adjacent coasts. The distinction is further reinforced by article 134, paragraph 4, which provides that nothing in Part XI 'affects the establishment of the outer limits of the continental shelf … or the validity of agreements relating to delimitation between States with opposite or adjacent coasts'.

5.22. As the ITLOS points out, the technical experts of whom the CLCS is made up do not decide questions of legal entitlement: they decide technical questions, such as the validity of inferences drawn from oceanographic data on the precise location of the 2,500 metre isobath,[350] or of the points at 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.[351] The CLCS's review and recommendations serve the same function as a technical review of the drawing of baselines that might occur if, for example, the calculation by a coastal State of the coordinates of the outer limit of the territorial sea were challenged by another State, or the status as an island or a low-tide elevation of a maritime feature used as a basepoint were contested. The *entitlement* to a territorial sea is not in

[350] Article 76(5).
[351] Article 76(4)(a)(i).

question: the validity of the precise location of the claimed outer limit is questioned.

5.23. Colombia, of course, is not bound by UNCLOS. It has no duty, and no right, to submit information on its continental shelf to the CLCS. Colombia's entitlement to its continental shelf, including any areas of OCS to which it may lay claim, is nonetheless as legally complete as it can ever be. Colombia's entitlement in this matter is governed by customary international law, as are its relations with Nicaragua. Nicaragua's continental shelf rights are similarly complete. The Court can delimit the maritime boundary between Nicaragua and Colombia on the basis of the evidence placed before it, just as it would delimit the maritime boundary of any other pair of State whose relationship is governed by customary international law.

B. An Overlap Between One State's OCS And Another State's Continental Shelf Within 200 NM Requires Delimitation In The Normal Way.

5.24. Colombia's second proposition is that "OCS claims were never intended to encroach upon another State's *ipso jure* entitlement to an EEZ with its attendant continental shelf, but only upon the International Area, which is the Common Heritage of Mankind." That proposition can be dealt with swiftly.

5.25. The fallacy of the reference to an "*ipso jure* entitlement to an EEZ " has been addressed above. Further, the tendentious language[352] can be put aside. It is not a question of 'encroachment': it is a question of finding the boundary between two maritime zones, each of which sits within its proper limits as determined in accordance with international law.

5.26. It is undoubtedly correct that the importance of the outer limit of the continental shelf, whether defined according to the 200 NM distance criterion or defined according to the geomorphological criteria of Article 76, is that, where it abuts the International Sea-Bed Area ('the Area') which is the common heritage of mankind, it constitutes the boundary with the Area. But the fact that every part of the boundary of the Area abuts a continental shelf does not mean that every part of a continental shelf boundary must abut the Area. It is a basic logical fallacy to suggest otherwise, as the existence of continental shelf boundaries between opposite and adjacent States clearly demonstrates.

5.27. Colombia points rightly to evidence at UNCLOS III that States were concerned that national continental shelves, and particularly outer continental shelves, should not 'encroach' upon the Area. That concern with the *International* Sea-Bed Area does not entail the proposition that no State's OCS could 'encroach' upon the OCS of another State, or upon the 200 NM continental shelf of another State. The continental shelf has a straightforward definition in

[352] And similar examples, such as the reference to the OCS as "a tolerated infringement on the Common Heritage of Mankind": CCM para 3.3.

UNCLOS Article 76, which is understood to represent the definition in customary international law. A continental shelf drawn in accordance with that definition either does or does not overlap with a continental shelf drawn by another State. That is a simple question of fact. If they do overlap, delimitation is called for.

5.28. Plainly, it is usually the case that a State's continental shelf claims will overlap with those of neighbouring States. That is obviously the case with the very many claims to a continental shelf based on distance from the coast. But Colombia points to no authority that establishes — or even attempts to argue — that there can be no overlap between the OCS entitlements created by the mainlands[353] of opposite or adjacent States, or between one continental shelf based on the entitlement through to the outer edge of the continental margin and another continental shelf based on the 200 NM 'distance from the coast'criterion, both of which are equally provided for UNCLOS Article 76(1).

5.29. Similarly, there is no basis for the proposition that the continental shelf within 200 NM of the coast has a juridical character different from the continental shelf beyond 200 NM from the coast, and that where two continental shelf claims overlap the continental shelf within 200 NM will somehow extinguish any entitlement to a continental shelf based on geomorphological criteria. Nor is there any basis for the suggestion that UNCLOS reflects or establishes a hierarchy between continental shelf entitlements based on which of the Article 76(1)

[353] The question whether a continental shelf measured from an island should be given full effect in a delimitation is a distinct question, addressed in Chapter 4 above.

criteria defines each of the entitlements in question. The location of the boundary is to be determined in each specific case on the basis of international law in order to achieve an equitable solution in the circumstances of that case.

C. The Juridical Nature Of The Rights Of The Coastal State Are The Same Throughout Its Entire Continental Shelf.

5.30. Colombia's third argument is that the economic rights assigned in the 200 NM EEZ with its attendant continental shelf are sovereign rights fully and exclusively exercised by the coastal State, whereas the OCS is a grant to a wide-shelf State in exchange for revenue-sharing with the other States Parties.

5.31. The proposition that the rights of the coastal State over the seabed and subsoil within 200 NM and out to the edge of the continental margin, whether derived from the legal regime of the EEZ[354] or that of the continental shelf,[355] are sovereign rights, is not controversial. Nor is the proposition that those rights "are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State."[356] But the assertion that "the OCS is a grant to a wide-shelf State in exchange for revenue-sharing with the other States Parties"[357] is misconceived.

[354] UNCLOS Article 56(1)(a), 56(3).
[355] UNCLOS Article 77, and Part VI passim.
[356] UNCLOS Article 77(2), 56(3).
[357] CCM, para. 2.13, and cf., paras 22.10–2.16

5.32. As has been shown above, rights over the continental shelf are not 'granted' to States. They are inherent rights. They are rights which attach to every coastal State automatically and which are enjoyed by every coastal State by operation of law. Those rights exist throughout "the continental shelf".[358] UNCLOS does not distinguish in this respect between the juridical nature of that part of the continental shelf that lies within 200 NM of the baseline and that part of it that lies more than 200 NM from the baseline; and there is no basis, whether in UNCLOS or otherwise, for such a distinction. As was stated in the Award in the *Bay of Bengal Maritime Boundary Arbitration:*

> ": "The Tribunal emphasizes that article 76 of the Convention embodies the concept of a single continental shelf. This is confirmed by article 77, paragraphs 1 and 2 of the Convention, according to which a coastal State exercises exclusive sovereign rights over the continental shelf in its entirety. No distinction is made in these provisions between the continental shelf within 200 nm and the shelf beyond that limit. Article 83 of the Convention, concerning the delimitation of the continental shelf between States with opposite or adjacent coasts, likewise makes no such distinction. This view is in line with the observation of the tribunal in *Barbados/Trinidad and Tobago* that "there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf" (*Award of 11 April 2006*, RIAA, Vol. XXVII, p. 147, at pp. 208-209, paragraph 213)."[359]

[358] UNCLOS Article 77.

[359] *Bay of Bengal Maritime Boundary Arbitration, (Bangladesh / India), Award of 7 July 2014,* para. 77; < https://www.pcacases.com/web/sendAttach/383 >.

5.33. It is of course the case that some UNCLOS States Parties[360] are liable to pay a levy or tax in respect of production from their OCS, in the same way that some UNCLOS States Parties are liable to have to share the living resources of their EEZ with other States in certain circumstances.[361] These liabilities do not, however, affect the juridical nature of the rights exercised by the coastal State.

D. Qualifying Islands And Mainlands Are Subject To The Same Customary International Law Regime Regarding Their Continental Shelves, But May Be Treated Differently In The Context Of Delimitation

5.34. Colombia asserts that "the customary international law regime applies equally to EEZ with its attendant continental shelf generated by islands and mainland".[362] That proposition is itself not controversial; but it is important to be aware of the limits upon it.

5.35. Colombia does not say that all islands have the same entitlement as a mainland coast to an EEZ. That is correct: the entitlement is qualified. UNCLOS Article 121(2) says plainly that "[e]xcept as provided for in paragraph 3… the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory"; and Article 121(3) says that "[r]ocks which cannot sustain human

[360] The duty does not apply to a developing State that is a net importer of a mineral resource produced from its continental shelf: UNCLOS Article 82(3). Nor does it apply to non-Party States, such as Colombia.
[361] UNCLOS Articles 62, 69, 70.
[362] CCM, para. 3.5.

habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

5.36. Similarly, Colombia says that the "customary international law regime applies equally" to the EEZ of islands and of mainlands. It does not say that under the customary international law regime mainlands and islands necessarily have the same effect upon the course of the maritime boundary between opposite and adjacent States. That too is correct; and the implications of that point for the present case have been considered in Chapter 4, above.

E. The UNCLOS Travaux Préparatoires And State practice.

5.37. Colombia devotes much space to its attempt to glean support from the UNCLOS *travaux préparatoires* for the propositions set out above. Many of the points arising from that part of the Counter-Memorial have been addressed in earlier chapters in this Reply; but it is convenient to summarize Nicaragua's main responses here.

1. THE UNIVERSALIZATION AND CENTRAL IMPORTANCE OF THE 200-NAUTICAL-MILE LIMIT

5.38. Colombia first asserts "the primacy which was assigned to the EEZ, with its attendant 200-nautical-mile continental shelf, as "the keystone" of the new regime."[363]

5.39. It is undoubtedly reasonable to point to the central importance of the EEZ as a concept promoted to reconcile the aspirations of, on the one hand, those States seeking the widest possible extent of national sovereignty over adjacent waters, epitomised by the 200 NM territorial sea claims extant during the Third UN Conference on the Law of the Sea ('UNCLOS III') which drafted UNCLOS, with, on the other hand, the aspirations of those States seeking to maximize the extent of waters that remain subject to the *laissez faire* regime of the high seas.

5.40. It is quite another matter to assert that, for example, "the OCS was considered supplemental to the entitlement *ipso jure* to the EEZ rather than its juridical equal."[364] No evidence is cited by Colombia to support that assertion. No evidence is cited to indicate that the delegates to the Law of the Sea Conference even considered the question of "juridical equality" between the EEZ and the OCS. There is no basis whatever for the suggestion that any form of juridical hierarchy was established between the EEZ and the OCS.

---

[363] CCM para 3.7.
[364] CCM para. 3.15.

2. THE DISTINCTION BETWEEN THE EEZ AND THE OCS

5.41. Colombia's second proposition is (i) that the States negotiating at UNCLOS III distinguished between the EEZ and the OCS, and (ii) that the EEZ appertains to the coastal State as of right whereas the OCS is contingent on the proof of geomorphological facts. The first part of the proposition is correct: the second is not.

5.42. The distinction between the EEZ and the OCS is obvious. They are subject to separate and different legal regimes. But, as was explained above,[365] it is the continental shelf – whether within or beyond 200 NM from the baseline – that is an 'inherent right', so that the continental shelf appertains automatically to a coastal State without needing to be claimed. The EEZ, in contrast, must be claimed by a coastal State. If it does not claim an EEZ, the area beyond the territorial sea of a coastal State, overlying its continental shelf, remains high seas.

5.43. It might be said that a coastal State has the 'right to proclaim' an EEZ. But it does not actually have an EEZ automatically, by operation of law. A coastal State does, on the other hand, have a continental shelf automatically, by operation of law – *ipso facto* and *ab initio.*

5.44. Plainly, the area that is automatically ascribed by law to the coastal State as its continental shelf must be defined. It is defined by UNCLOS Article 76. That definition uses a range of different physical criteria to define the limits of the

[365] See paras. 5.4 to 5.13, above.

continental shelf. It uses distance (the 200 NM limit in Article 76(1) and 76(4(a), and the 350 NM limits in Article 76(5) and 76(6)), and depth (the 2,500 metre isobath in Article 76(5)), and the thickness of sedimentary rocks at a given point and its proportion to the distance to the foot of the continental slope (Article 76(4(a)(i)), and gradient (the criterion for locating the foot of the slope under Article 76(4)(b)).

5.45. States have a certain freedom to choose between those criteria. But in every case, the limit of the continental shelf is "contingent upon" conformity with the relevant physical criteria set out in UNCLOS Article 76. That is as true of the 200 NM distance criterion in Article 76(1), which must be calculated from baselines drawn in accordance with international law, as it is of, for example, the 'change-of-gradient' criterion in Article 76(4)(ii). And it is no more pertinent to observe that "geological and geomorphological features were deemed irrelevant within 200 nautical miles from the baselines"[366] than it is to observe that the 200 NM distance criterion is irrelevant when applying the change-of-gradient test.

5.46. The Court has made clear that where there is an overlap between overlapping entitlements caused by the overlap of a 200 NM claim of one State with a 200 NM claim of another State, geological and geomorphological considerations are not relevant to delimitation.[367] That must be so: geological and geomorphological considerations have no relevance to the basis of the

[366] CCM para. 3.18.
[367] 2012 Judgment, para 214.

entitlement, which is calculated on the basis of distance from baselines. But at paragraph 3.21 of the Counter-Memorial, Colombia makes a different point: not that geology and geomorphology is irrelevant in areas within 200 NM of *both* claimant States, but that it is irrelevant within 200 NM of Colombia, even if Nicaragua's claim is *not* based on distance at all. That is a fallacy.

5.47. At a given point on the seabed, Colombia may have a claim under the definition of the continental shelf in Article 76(1) based on the fact that the point is within 200 NM of its coast. Nicaragua may have a claim to the same point, also made under the definition of the continental shelf in Article 76(1), but based on the fact that it is within "the outer edge of the continental margin". Obviously, Nicaragua has to put forward evidence to demonstrate that a point is within Nicaragua's continental margin, as defined in Article 76, and in particular Article 76(4)-(6). Nicaragua has put forward the evidence to support its claim to an OCS, and Colombia's evidence has not pointed to any significant uncertainty concerning it, so that Nicaragua's case meets the evidential standard set in the *Myanmar / Bangladesh* case.[368] Equally obviously, Colombia will not need to put forward precisely the same kind of evidence in respect of its own distance-based claim, though it will have to put forward evidence relating to its baselines and its distance calculations, and to the maritime entitlements of each of its various offshore features.

---

[368] *Bay of Bengal (Bangladesh / Myanmar), Judgment of 14 March 2012*, para. 443; < https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16-J-14_mar_12.pdf >

5.48. To say that geology and geomorphology, which are the essential basis for the calculation of the outer edge of the continental margin under Article 76, are 'irrelevant' in these circumstances would be to bar Nicaragua *in limine* from even articulating the basis of its claim, while permitting Colombia to make its claim on a different basis under the Article 76 definition. The Court has never adopted such an extreme position; and Nicaragua submits that there is no principled basis for such a position. A State must be able to make and defend its claim to its inherent rights over the continental shelf, in accordance with the provisions of UNCLOS. If, in a given case, it is determined that, having considered the overlapping claims, the continental shelf boundary is not to be drawn inside one State's 200 NM on the basis of another State's claim to its continental margin, that determination must be on the basis that it is necessary to reach that decision in order to arrive at an equitable result, not on the basis that the claim is a juridical nonsense because there can be no claim to a continental margin that extends within 200 NM of another State.

3. THE OCS MAY OVERLAP WITH THE CONTINENTAL SHELF OF ANOTHER STATE OR MAY DIRECLY ABUT THE INTERNATIONAL SEABED AREA.

5.49. Colombia says that it will show that "the OCS of one State, rather than encroach upon the EEZ with its attendant continental shelf of another, was

intended only to infringe upon the international Area. Moreover, if a claim was proved through an internal scientific process, the permission to encroach was only to be granted in return for revenue-sharing with the other States Parties."[369]

5.50. That point has been addressed already.[370] The fact that the focus of UNCLOS III was on the risks of the intrusion of national claims to a continental shelf extending into areas that properly belong to the International Sea-Bed Area does not mean that a continental shelf can only extend beyond the 200 NM limit if it extends into the International Sea-Bed Area. Nothing indicates that an OCS cannot extend into an area that would otherwise be claimed by a neighbouring coastal State as its own OCS, or be claimed by a neighbouring coastal State as its own continental shelf on the basis of the 200 NM distance criterion. Indeed, just such an overlap occurred, and was adjudicated, in the *Bay of Bengal* cases.[371] Colombia's argument to the contrary is based entirely upon unsupported assertions and suppositions and has no basis in international law.[372]

---

[369] CCM para. 3.5.
[370] See paras. 5.254-529 above.
[371] *Bay of Bengal (Bangladesh / Myanmar), Judgment of 14 March 2012*, para. 443; < https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16-J-14_mar_12.pdf >; *Bay of Bengal Maritime Boundary Arbitration, (Bangladesh / India), Award of 7 July 2014,* < https://www.pcacases.com/web/sendAttach/383 >.
[372] And Colombia itself refers to contrary examples, such as the overlap between Australia's OCS and Indonesia's 200 NM zone:see CCM para 3.59, "Australia did not submit this potential OCS claim to the CLCS because it lies within the 200-nautical-mile zone of Indonesia and did not diminish the International Area."

4. CONTINENTAL SHELF CLAIMS UNDER UNCLOS ARTICLE 76(1) BASED ON THE 200 NM 'DISTANCE' CRITERION HAVE NO AUTOMATIC PRECEDENCE OVER CONTINENTAL SHELF CLAIMS UNDER UNCLOS ARTICLE 76(1) BASED ON THE OUTER EDGE OF THE CONTINENTAL MARGIN.

5.51. Colombia states that "the 200-nautical-mile EEZ with its attendant continental shelf was to prevail over any OCS claim purporting to encroach upon it, whether the coastal States entitlement extended from mainland or islands".[373]

5.52. In so far as that section of the Counter-Memorial is concerned to make out an argument on the relative weights to be given to islands and to mainlands in the context of the delimitation of overlapping continental shelf claims, based on distance and on the natural prolongation of land territory throughout the continental margin, it is addressed in Chapter 4 of this Reply.

5.53. In so far as that section of the Counter-Memorial is seeking to advance the suggestion that a continental shelf claim based on distance must always extinguish or prevail over or trump a continental shelf claim based on natural prolongation, it has been addressed above in this chapter. There is no basis in the UNCLOS *travaux préparatoires* for the creation of two different classes of

---

[373] CCM para 3.32.

coastal State entitlement to a continental shelf, depending on which of the criteria available under UNCLOS Article 76 they choose to apply.

F. State Practice Evidences No Juridical Distinction Or Hierarchy Between The Entitlement To A Continental Shelf Within 200NM And The Entitlement To A Continental Shelf Beyond 200 NM

5.54. Colombia argues that State practice confirms that the entitlement of one State to an EEZ prevails over the OCS claim of another State.[374] It arranges its analysis in three parts: "First, State practice within 200 nautical miles from baselines. Second, State practice with respect to delimitations in which OCS claims are involved. Third, the rare deviations from the preponderant practice, which have created so-called Gray Areas (areas where the OCS of one State encroaches upon the 200-nautical-mile zone of another State)."[375]

5.55. The first part, State practice on overlapping areas within 200 NM of the baselines, is not relevant to the question of overlaps with continental shelf claims beyond 200 NM. Nicaragua's claims in this case are, by definition, not based on the distance criterion and must be addressed in the terms in which they are framed – as claims based on Nicaragua's inherent sovereign rights over the continental shelf to the outer edge of the continental margin, in accordance with UNCLOS Article 76(1).

---

[374] CCM para. 3.39 et seq.
[375] CCM para. 3.40.

5.56. As to Colombia's reference to the Micronesia / Palau agreement and the provision that gave EEZ rights precedence over OCS rights,[376] Nicaragua does not question the right of States to adopt such an approach in an agreed delimitation. It notes, however, that the statement made by Ambassador David Colson, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs for the U.S., and Dr Smith (former US State Department Geographer), quoted by Colombia, that "care has been taken" to ensure that result,[377] does not suggest any confidence at all in the existence of a rule of international law that automatically imposes that result.

5.57. The second part of the analysis of State practice, on OCS delimitations, similarly does not advance Colombia's case. Nicaragua fully accepts that there are instances where a State has claimed or agreed to a continental shelf boundary that extends more than 200 NM from its baseline, but stops at or short of the 200 NM zone of another State. Nicaragua accepts the right of States to make such claims and agreements, and accepts that in the circumstances of some such possible claims this approach might in fact yield an equitable result, as required by UNCLOS Article 83. This practice does not, however, engage with Nicaragua's central point, which is that the delimitation of overlapping continental shelf claims, whether based on distance or geological or gradient criteria under Article 76, are to be settled on a case-by-case basis in order to

[376] CCM paras 3.45, 3.46.
[377] CCM para. 3.46.

achieve an equitable solution in accordance with UNCLOS Article 83. The point is that stopping at or short of the 200 NM limit of another State does not *necessarily* secure an equitable solution in every case, so that it can be applied mechanically without regard to the specific circumstances in each case.

5.58. The third part of Colombia's analysis is concerned with gray areas in State practice.[378] As Colombia observes, gray areas, in which one State's continental shelf lies under or projects into another State's EEZ, are not common. The existence of examples such as Australia/Indonesia,[379] and those decided upon in the Bangladesh/Myanmar and Bangladesh/India cases,[380] however, demonstrates conclusively that they are legally possible.

5.59. Colombia tries to explain that the reasons for which those gray areas were created are not applicable in the present case.[381] Again, that misses the point. Nicaragua does not argue that gray zones must be created in every case. Its argument is that each case of overlapping claims should be approached on its own facts, in accordance with the Court's established jurisprudence, in order to find an equitable solution, as international law requires.

5.60. The analysis of State practice is followed by what Colombia calls "an extensive analysis of State practice with respect to submissions of OCS claims to the CLCS" which "reveals that in 73 out of the overall 77 submissions, States did

[378] CCM para 3.52 et seq.
[379] CCM paras 3.58 – 3.60.
[380] CCM para. 361 – 3.64.
[381] CCM para. 3.65, 3.67 – 3.69.

not claim an OCS that would have encroached upon another State's 200-nautical-mile entitlement."[382] Colombia continues:

> "Of these 73 submissions, with the exception of submissions that terminated at points set by previous awards or by pre-existing treaties, 39 reached the 200-nautical-mile limit of other States Of these 39 submissions, 35 involved States that could have potentially claimed an OCS that would have encroached upon the 200-nautical-mile entitlement of another State, but they stopped at the other State's 200-nautical-mile zone."

5.61. The material statistic *from the CLCS submissions* is that "35 … States that could have potentially claimed an OCS that would have encroached upon the 200-nautical-mile entitlement of another State, … stopped at the other State's 200-nautical-mile zone" and that "[o]nly four States claims failed to respect another State's 200-nautical-mile entitlement: China, the Republic of Korea, Somalia and, of course, Nicaragua".[383] (In fact there appear to be three other examples. Russia, in its submission in 2001 concerning the Barents Sea, included areas within its OCS that were within 200 M of Norway. The submission of Bangladesh obviously would not have been possible at all if it had been confined by the 200 M zones of India and Myanmar. And Australia's submission and the CLCS recommendation concerning Heard and McDonald Islands indicate that the OCS extends into the 200 M zone of the Australian Antarctic Territory.)

---

[382] CCM para. 3.70.
[383] CCM para 3.77.

5.62. That is not surprising. A submission to the CLCS which involves a dispute arising from overlapping maritime claims will not be considered without the prior consent of all States concerned. The CLCS Rules of Procedure stipulate:

> "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute."[384]

5.63. Again, Nicaragua reiterates its position. It does not argue that all States that could claim an OCS overlapping a 200 NM zone of another State must do so. It argues simply that each case of overlapping claims must be approached on its own facts, in accordance with the Court's established jurisprudence, in order to find an equitable solution, as international law requires.

5.64. The Counter-Memorial closes with a review of "the OCS in Doctrine."[385] It fails to advance Colombia's case. Colombia asserts

> "This Section will demonstrate that the type of OCS claim which Nicaragua is making is not supported by most international legal scholars Indeed, legal scholarship confirms that an OCS may not encroach upon another State's EEZ: (1) It is not the proof of natural prolongation, upon which a claim to an OCS claim must rely that is the basis for title within 200 nautical miles from any State's baselines: the latter is a right *ipso jure,* and (2) most scholarship favours the use of a single maritime delimitation line, comprising both the EEZ and the continental shelf, and the avoidance, especially on a large scale, of Gray Areas."[386]

[384] CLCS Rules of Procedure, Rule 46 and Annex I para. 5.
[385] CCM para. 3.79 et seq.
[386] CCM para. 3.81.

5.65. The confusion in the quoted paragraph is evident. Point (1) is irrelevant to the present case. In the case of overlapping 200 NM claims, geomorphology is indeed irrelevant. In the case of overlapping claims involving opposite States that are more than 400 NM apart, natural prolongation will necessarily be relied upon by at least one of the States as the basis of its claim. Indeed, the scholars quoted by Colombia appear to recognise this.[387]

5.66. As to point (2), a single maritime boundary may well be usually favoured by scholars. That does not imply that a single maritime boundary must always be established. Indeed, the existence of a single exception would be sufficient to prove that international law does not require that there must be a single maritime boundary but accommodates other solutions– and as was noted above, Colombia itself refers to four such cases.[388]

5.67. The Counter-Memorial closes with an extended *quod erat demonstrandum*.[389] As has been shown, the material from the UNCLOS *travaux préparatoires* and from State practice and the selection of anglophone scholars quoted by Colombia do not support its case, and Colombia's case is in any event misdirected. It misses Nicaragua's argument, which is simply that the

[387] See CCM paras 3.85 (Cottier), 3.86 (Anderson), 3.87 (Legault and Hankey), 3.88 (Colson. The quotation from Colson at CCM para. 3.91 refers to entitlements to a continental shelf, not to delimitation of overlapping claims). At paras 3.89 – 3.90 Jensen is presented as if he is denying that the natural prolongation / continental margin of a State [his 'State X'] continental margin can extend into the 200 NM zone of another State [his State Y]; but Jensen says only that where State Y's natural prolongation does not extend even as far as State Y's 200 NM limit, the CLCS "will recommend that the continental shelf of state Y should cover the seabed only out to 200-miles." (emphasis added).

[388] See fn. 383 above.

[389] CCM paras 3.102 – 3.107.

delimitation of overlapping continental shelf claims, whether based on distance or geological or gradient criteria under Article 76, are to be settled on a case-by-case basis in order to achieve an equitable solution in accordance with UNCLOS Article 83.

CHAPTER 6. THE RIGHTS OF THIRD STATES WOULD NOT BE AFFECTED BY THE DELIMITATION NICARAGUA PROPOSES

6.1 In Chapter 6 of the Counter-Memorial, Colombia argues that the Court cannot effect the delimitation Nicaragua requests because it would impermissibly encroach on areas in which third States have potential interests.

6.2 This chapter responds to that argument and shows why Colombia is mistaken. The argument is wrong in the first instance because it is based on an incorrect premise. There is, in fact, a very substantial portion of the area in dispute in this case where no third State has even a *potential* entitlement. In that area, only the interests of Nicaragua and Colombia are implicated.

6.3 Colombia is also mistaken because the Court's delimitation of the boundary between Nicaragua and Colombia will be *res inter alios acta* as to third States, and therefore without prejudice to their interests. That allowed the Court, in its most recent maritime delimitation decision (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*), to draw the boundary between Nicaragua and Costa Rica into areas where it was understood that a third State (Panama) had a potential interest. There is no reason the Court cannot do the same in this case in those areas where Panama and Jamaica might have potential interests.

A. A Large Portion of the Relevant Area Is Beyond Any Potential Claims by a Third State

6.4 The Counter-Memorial argues that the Court "cannot draw a single point of any new purported maritime boundary between Colombia and Nicaragua without trespassing into maritime areas where third States could have existing and contingent legal interests against Nicaragua …".[390] In particular, Colombia argues: "Any delimitation between the Parties to the proceedings … would inevitably trespass into areas where Jamaica and Panama could have legal interests *vis-à-vis* Nicaragua …".[391] The result, Colombia says, is that "the possibility of judicial action in the present case" is "preclud[ed]".[392]

6.5 Colombia's argument stumbles at the threshold. It is factually incorrect. It is contradicted by Colombia's own map, at Figure 6.1 of the Counter-Memorial. In reality, there are substantial areas at issue in the delimitation now before the Court that do not "trespass into areas where Jamaica and Panama could have legal interests". This is true whether Jamaica's and Panama's areas of potential interest are defined by reference to their respective treaties with Colombia or by reference to the larger areas encompassed by their notional 200 M limits. Indeed, Colombia's own maps prove the point.

6.6 Reproduced below is an annotated copy of Figure 6.1 from Colombia's Counter-Memorial. As the Court can see, there is a large, continuous area (in

[390] CCM, para. 6.7.
[391] CCM, para. 6.20.
[392] CCM, para. 6.25.

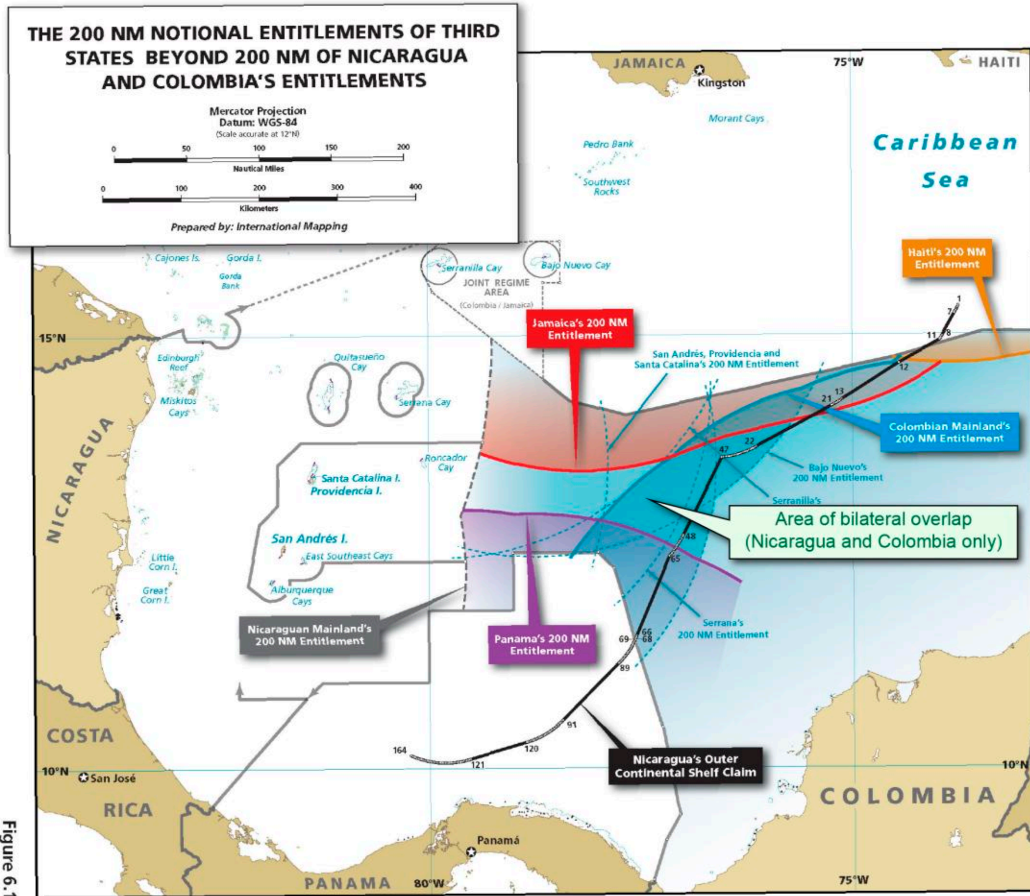
blue) running all the way from Nicaragua's 200 M limit to the boundary it claims in this case, which does not "trespass" in any way on any space within the 200 M limits drawn from either Jamaica or Panama.

6.7 In this respect, Nicaragua observes that the 200 M limits drawn from Jamaica and Panama represent their maximum area of potential interest even if their treaties with Colombia are disregarded. As Colombia itself rightly observes: "Costa Rica, Panama and Jamaica, with reason, have not claimed an OCS in the Caribbean Sea. … Their entitlements *vis-à-vis* Nicaragua, like those of Colombia, are based on 200-nautical-mile projections".[393] There can therefore be no question of Jamaica or Panama having even potential interests beyond 200 M.

6.8 Accordingly, in this middle portion of the delimitation area, the ostensible problem of "trespassing" into areas where third States could have interests simply does not arise. Colombia's argument fails on this basis alone.

[393] CCM, para. 6.19.

Figure 6.1 The 200 M Limits for Colombia, Jamaica and Panama



B. The Delimitation of the Boundary between Nicaragua and Colombia Is Without Prejudice to Third States

6.9 Colombia's argument that the Court may not act on the delimitation requested by Nicaragua also fails because any judgment the Court might render would be without prejudice to the rights and interests of third States.

6.10 The Court needs no reminding that Article 59 of the Statute provides: "The decision of the Court has no binding force except between the parties and in

respect of that particular case." The Court recently had occasion to reaffirm the rule in the context of the maritime delimitation between Nicaragua and Costa Rica. The Court stated in its February 2018 Judgement:

> 1. "An issue is raised by the fact that, in the area of the Caribbean Sea in which the Court is requested to delimit the maritime boundary between the Parties, third States may also have claims. As was stated in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the Court's Judgment may only address the maritime boundary between the Parties, 'without prejudice to any claim of a third State or any claim which either Party may have against a third State' (*Judgment, I.C.J. Reports 2012 (II)*, p. 707, para. 228). The Judgment can refer to those claims, but cannot determine whether they are well founded. Conversely, a judgment rendered by the Court between one of the Parties and a third State or between two third States cannot per se affect the maritime boundary between the Parties"[394].

6.11 Colombia argues that the protections afforded by Article 59, and the fact that any delimitation would be without prejudice to any claim of a third State, are not enough. According to the Counter-Memorial: "[T]he jurisprudence shows that the Court, at the very least, ends the maritime delimitation before it reaches areas that are located closer to the coast of a third State than to the coast of one of the parties to the proceedings".[395]

6.12 Here again, Colombia is mistaken. In its recent Judgment on delimitation in *Costa Rica v. Nicaragua*, the boundary the Court drew in the Caribbean crossed into areas that are closer to Panama than to Costa Rica and in which Panama has a potential interest. This can be observed in Figure {+} below, a copy

[394] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), I.C.J., Judgment, 2 February 2018*, para. 123.
[395] CCM, para. 6.11.

of Sketch-map No. 11 from the Court's February 2018 Judgment (which has been annotated to include a notional equidistance line between Costa Rica and Panama). As the Court can see, beginning between points T and V of the boundary determined by the Court, the boundary line is closer to Panama than to Costa Rica. Indeed, as shown, the Court's boundary even crosses the line representing the seaward extension of the existing treaty line between Costa Rica and Panama.

6.13 In drawing the provisional equidistance line in that case, which also crosses both the Costa Rica-Panama equidistance line and the seaward extension of the treaty line between those States, the Court stated that "the construction of this line is without prejudice to any claims that a third State may have on part of the area crossed by the line".[396] The same, of course, applies equally to the final delimitation line, which was adjusted so as to give Nicaragua's Corn Islands half effect.

6.14 There is no reason the Court could not do the same in this case and draw an appropriate delimitation line with the express proviso that it is without prejudice to the claims or interests of any third States.

6.15 Colombia argues that the Court cannot possibly draw a delimitation line that might impinge on the 200 M limits drawn from Jamaica or Panama for the additional reason that "the EEZ with its attendant continental shelf rights" of

[396] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), I.C.J., Judgment, 2 February 2018*, para. 144.

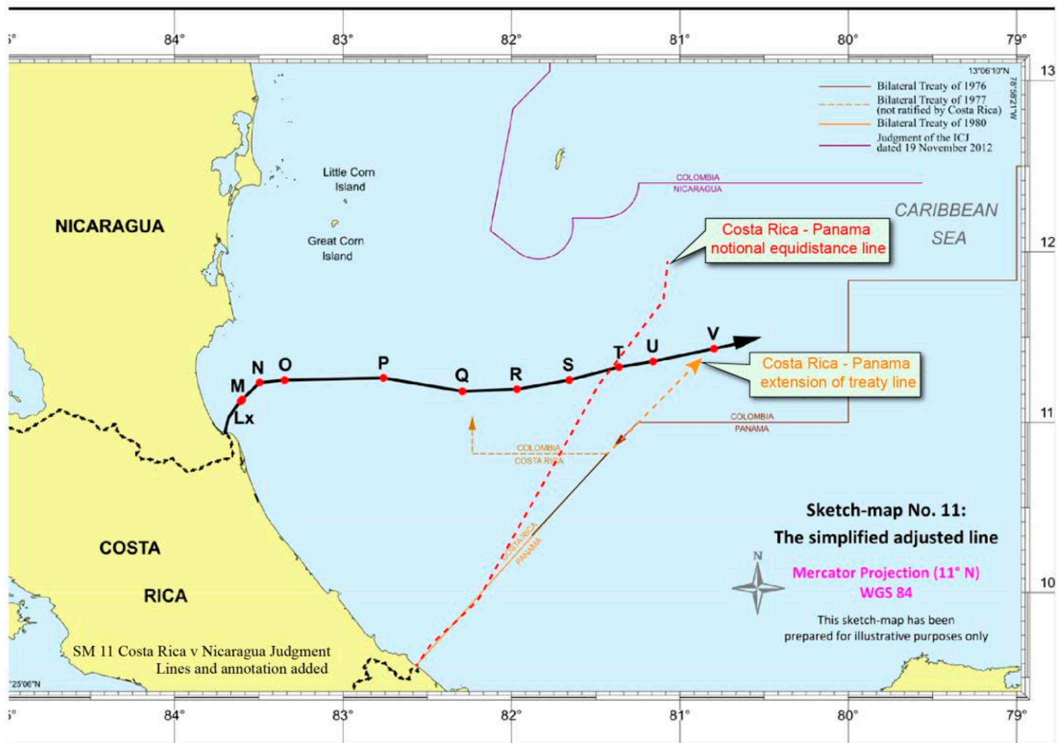
those States "would prevail over Nicaragua's OCS claims".[397] This is both legally incorrect and entirely beside the point.

6.16 It is incorrect as a matter of law for the reasons explained in Chapter 5 of this Reply. That is, there is no reason that one State's EEZ entitlement necessarily takes precedence over another State's entitlement to a continental shelf beyond 200 M when the two overlap.[398]

[397] CCM, para. 6.2

[398] See paras. 5.54-5.67 above.

Figure 6.2 Costa Rica/Nicaragua line



6.17 It is irrelevant for the reasons explained above. Even if the Court were to draw a boundary that passed into areas within the potential entitlements of a third State, that boundary could have no effect on the interests of that State. The only thing the Court would be finding is that in the affected area, as between the Parties, either Nicaragua or Colombia has superior rights *vis-à-vis* the other. Such a finding would have no implications for the legal status of the area in question as between Nicaragua and either Jamaica or Panama, as the case may be.

6.18 Finally, Nicaragua observes that if the Court were to decline to act in this case, the result would be the indefinite prolongation of this dispute, potentially forever. The only authoritative body that can act to resolve the prevailing uncertainty is the Court. Doing so would serve the interests of peace and stability by providing clarity, and paving the way for the full and final settlement of the outstanding delimitation issues in this area of the Caribbean.

6.19 In particular, if *quod non* the Court were to determine that Colombia has superior rights *vis-à-vis* Nicaragua, the status of the area would be as provided for in the existing treaties among the States concerned. Alternatively, if Nicaragua were adjudged to have superior rights *vis-à-vis* Colombia, the legal status of the area as between Nicaragua and Jamaica and Panama would fall for subsequent determination, either by negotiation or, if necessary, by third-party dispute resolution.

6.20 Nicaragua anticipates that it would quickly be able to reach boundary agreements with both Jamaica and Panama. That would certainly be its objective.

6.21 For all the foregoing reasons, the rights of third States would not be affected by the delimitation Nicaragua proposes, and there is no reason for the Court to refrain from drawing the boundary between Nicaragua and Colombia beyond 200 M from Nicaragua's coast.

CHAPTER 7. CONCLUSIONS

7.1 In 2001, Nicaragua brought to the Court its maritime boundary dispute with Colombia. On 19 November 2012, the Court determined the boundary of the exclusive economic zone and continental shelf within 200 nautical miles of Nicaragua's Caribbean coastal baselines. On 16 September 2013, Nicaragua requested the Court to delimit the portion of the continental shelf which extends beyond 200 nautical miles from its baselines. The Judgment the Court will render in the present proceedings will fix the last segment of their common maritime boundary and, hence, definitively close this long-lasting dispute between the two States.

7.2 The first step towards the final settlement of this dispute was made on 17 March 2016, when the Court found that it has jurisdiction to entertain Nicaragua's request.[399] Unfortunately, instead of setting out its position on the location of its common continental shelf boundary with Nicaragua, Colombia, in its Counter-Memorial, seeks once again to prevent the Court from establishing it. Colombia has put forward five main arguments. Nicaragua has shown in the present Reply that all five of them are legally and factually unfounded:

[399] I.C.J., Judgment, 17 March 2016, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 100.

- *First*, Colombia claims that Nicaragua has no continental shelf entitlement beyond 200 nautical miles because the natural prolongation of its land territory does not extend beyond 200 nautical miles.[400] In **Chapter 3 of the Reply**, Nicaragua has shown that Colombia's argument is based on a misconceived interpretation of the notion of "natural prolongation". Contrary to what Colombia argues, "natural prolongation" is not a criterion independent of the concept of "continental margin". In any event, Colombia's claim is grounded on erroneous facts, as there are no geomorphological or geological discontinuities in Nicaragua's continental shelf;

- *Second*, according to Colombia, even if Nicaragua had such an entitlement, it would not be opposable to Colombia because the OCS is allegedly a "non-customary internal UNCLOS regime".[401] In **Chapter 2**, Nicaragua has established its entitlement to a continental shelf beyond 200 nautical miles on the basis of customary international law, as reflected in Article 76(1) to (6) of UNCLOS;

- *Third*, according to Colombia, even if Nicaragua's entitlement was opposable to Colombia, the Court would be barred from acting until the CLCS has issued its recommendations on Nicaragua's submission.[402] Still in **Chapter 2**, Nicaragua has shown that there is only one continental shelf and that its entitlement to a continental shelf, whether within or beyond 200 NM exists *ipso*

[400] See CCM, Chapter 7.
[401] See *ibid.*, Chapter 2(B).
[402] See *ibid.*, Chapter 1(C)(2) and Chapter 2(C) and (D).

facto and *ab initio* and is not created by the CLCS, and that the Commission can have no role in the determination of the maritime boundary;

- *Fourth*, Colombia asserts that the entitlement of a State to a 200 NM continental shelf prevails over the entitlement of another State to the portion of its continental shelf located beyond 200 nautical miles.[403] In **Chapter 5**, Nicaragua has shown that Colombia's assertion is unsupported by customary international law, as reflected in the relevant provisions of UNCLOS, the *travaux préparatoires* of this Convention, state practice or the case law; and

- *Fifth*, Colombia argues that the Court is not in a position to decide on Nicaragua rights on the continental shelf beyond 200 NM because it would prejudice the rights of third States.[404] In **Chapter 6**, Nicaragua has recalled that the Court's decision in the present case will not bind third States, as Article 59 of the Court's Statute makes clear, and has shown that insofar as part of Nicaragua's continental shelf beyond 200 nautical miles might overlaps with third States' entitlements, the overlapping area would have to be delimited by the States concerned, either by negotiations or by any other pacific mean they would choose. Accordingly, the potential interests of third States do not preclude the Court from determining the maritime boundary between Nicaragua and Colombia beyond 200 NM from Nicaragua's coastal baselines.

---

[403] See *ibid.*, Chapter 3.
[404] See *ibid.*, Chapter 6.

7.3 It is striking that Colombia's Counter-Memorial fails to address the outer limits of Nicaragua's continental shelf, as established in Nicaragua's Memorial that contains the submission and material filed before the CLCS,all of which has been validated by the Expert Report of Dr. Alain Murphy and Dr. Richard Haworth. Although Colombia has included in its Counter-Memorial a Report by Dr Lindsay Parson and Mr Peter Crocker, it does not challenge Nicaragua's demonstration concerning the outer limits of its continental margin, its foot of slope points, or any other aspect of its submission to the CLCS based on Article 76(4)(a)(ii) of UNCLOS. Nor does Colombia challenge the delimitation methodology set out in Nicaragua's Memorial or its application in the present case. Colombia's opposition to Nicaragua's claim is based solely on its erroneous contention that the "natural prolongation" of Nicaragua's coast does not extend beyond 200 NM, notwithstanding Nicaragua's full satisfaction of the criteria of Article 76(4)(a)(ii), which Colombia does not challenge.

7.4 In the Memorial, Nicaragua has demonstrated the following points:

(1) the relevant customary rules for the determination the Parties' entitlements in the present case are enshrined in Article 76 and 121 of UNCLOS;

(2) Nicaragua's continental shelf entitlement beyond 200 nautical miles overlaps with that of Colombia's mainland and the islands of San Andrés and Providencia only;

(3) the relevant customary rule for the delimitation of the continental shelf boundary is reflected in Article 83 of UNCLOS, as interpreted and applied by international courts and tribunals;

(4) the standard three-stage method is applicable to the delimitation of the continental shelf beyond 200 nautical miles;

(5) the relevant area is formed by the area between the mainland coasts of the Parties and limited by maritime boundaries between Colombia and third States, and between Nicaragua and third States;

(6) the appropriate provisional delimitation line is the line that equally divides the area of overlap between Nicaragua's continental shelf beyond 200 nautical miles and Colombia's continental shelf within 200 nautical miles of its mainland;

(7) there are no relevant circumstances justifying the adjustment of the provisional delimitation lines; and that

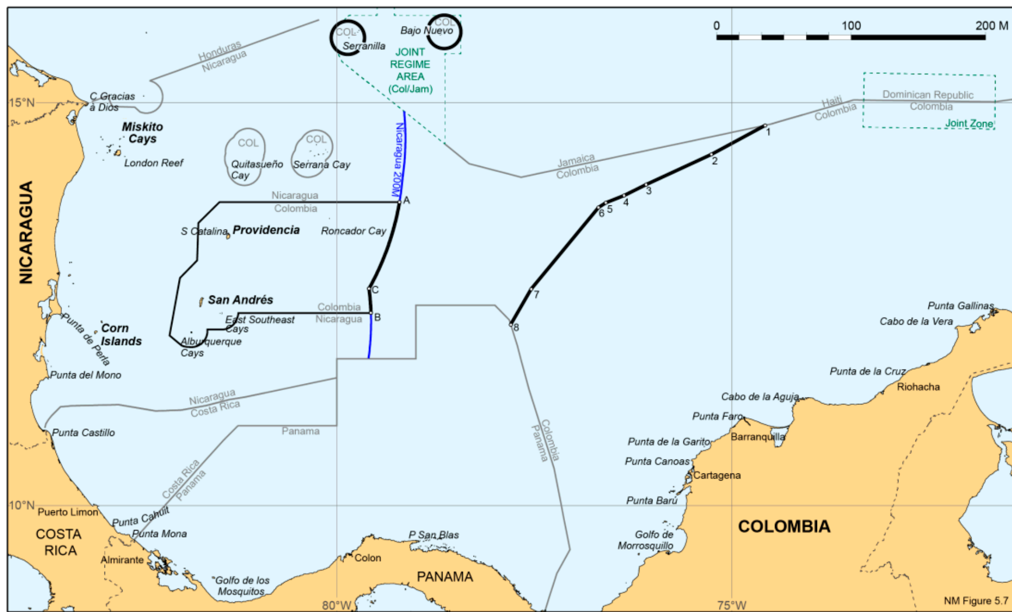
(8) these lines easily passes the disproportionality test and, therefore, achieves an equitable solution.

7.5 Colombia claims that the small cays that are located on the banks of Roncador, Serrana, Serranilla and Bajo Nuevo are also entitled to a 200-nautical-mile continental shelf. In **Chapter 4**, Nicaragua has shown that all these cays are rocks within the meaning of Article 121(3) of UNCLOS, which reflects customary international law. None of these tiny features can sustain human

habitation or economic life of its own. For these reasons, they are not entitled to a 200-nautical-miles continental shelf (or an exclusive economic zone).

7.6 The maritime boundary proposed by Nicaragua, on the basis of all of these considerations, is depicted in **Figure 7.1** below.

Figure 7.1 Final Delimitation



SUBMISSIONS

For the reasons given in the Memorial and the present Reply, the Republic of Nicaragua requests the Court to adjudge and declare that:

1. The maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundary determined by the Court in its Judgment of 19 November 2012, follows geodetic lines connecting the points with the following co-ordinates:

Point	Latitude	Longitude
1	14° 43’ 20.6” N	74° 34’ 49.1” W
2	14° 21’ 53.4” N	75° 15’ 39.3” W
3	13° 59’ 29.8” N	76° 5’ 15.6” W
4	13° 51’ 26.0” N	76° 21’ 57.1” W
5	13° 46’ 6.1” N	76° 35’ 44.9” W
6	13° 42’ 31.1” N	76° 41’-20.33” W
7	12° 41’ 56.9” N	77° 32’ 27.4” W
8	12° 15’ 38.3” N	77° 47’ 56.3” W

2. The islands of San Andrés and Providencia are entitled to a continental shelf up to a line consisting of 200 nm arcs from the baselines from which the territorial sea of Nicaragua is measured connecting the points with the following co-ordinates:

Point	Latitude	Longitude
A	13° 46’ 35.7” N	79° 12’ 23.1” W
C	12° 42’ 24.1” N	79° 34’ 4.7” W
B	12° 24’ 9.4” N	79° 34’ 4.7” W

3. Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical miles, and Serrana is enclaved as per the Court's November 2012 Judgment.

All coordinates are referred to WGS84.

The Hague, 9 July 2018

Carlos J. Argüello-Gómez

Agent of the Republic of Nicaragua

CERTIFICATION

I have the honour to certify that this Reply and the documents annexed are true copies and conform to the original documents.

The Hague, 9 July 2018

Carlos J. Argüello-Gómez

Agent of the Republic of Nicaragua

LIST OF ANNEXES

Annex No.	Document	Page
1	Expert Report (June 2018), Dr. Alain Murphy and Dr. Richard Haworth.	215
2	The Navigation of the Gulf of Mexico and the Caribbean Sea ("U.S. Sailing Directions"), Hydrographic Office of the United States Navy (1902).	273
3	The Colombian Navigator; or, Sailing Directory for the American Coasts and the West Indies (1839), John Purdy, Vol. III.	289
4	The Navigation of the Gulf of Mexico and Caribbean Sea ("U.S. Sailing Directions"), Hydrographic Office of the United States Navy (1890).	299
5	The Sovereignty of the Islands of Roncador, Quitasueño, Serrana and Serranilla", Legal Advisor's Office, U.S. Dept. of State (9 Aug. 1932) ("1932 State Dept. Study").	313
	Diplomatic correspondence	
6	Letter from the Government of Antigua and Barbuda with regards to maritime treaties and a protest with regard to the status granted to Isla Aves, 19 June 1997.	467
7	Note from the Permanent Mission of St. Kitts and Nevis to the U.N. Secretary-General, 16 July 1997.	471
8	Note from the Permanent Mission of Saint Vincent and the Grenadines to the U.N. Secretary-General, 8 August 1997.	475
9	Letter, Legation of Colombia to the United States (18 Jan. 1893).	479
	Other materials	
10	Figures	495