INTERNATIONAL COURT OF JUSTICE

_____

QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST

(NICARAGUA *v.* COLOMBIA)

REJOINDER OF THE REPUBLIC OF COLOMBIA

11 February 2019

TABLE OF CONTENTS

Chapter 1

INTRODUCTION

1 .1 This Rejoinder is filed pursuant to the Court's Order of 8 December 2017, fixing 11 February 2019 as the time-limit for its submission . In accordance with Article 49, paragraph 3, of the Rules of Court, in responding to the arguments advanced by Nicaragua in its Reply, this Rejoinder will focus on the issues that continue to divide the Parties .

1 .2 In these proceedings, Nicaragua is seeking a delimitation between its alleged outer continental shelf ("OCS") and the seabed and subsoil of Colombia's *ipso jure* 200-nautical-mile exclusive economic zone ("EEZ") . As Colombia will show, Nicaragua has ignored the law relating to the EEZ, which is fundamental to this case . Its proposition that an OCS claim of one State can encroach upon the 200-nautical-mile EEZ entitlements of another coastal State is wholly untenable. The legislative history of the United Nations Convention on the Law of the Sea ("UNCLOS" or "the Convention"), State practice, doctrine, and the Court's case law all show precisely the opposite: namely, that geology and geomorphology are irrelevant for both title and delimitation within 200 nautical miles of a State's coast, and that a claim to an OCS may not encroach upon another State's 200-nautical-mile entitlement to its EEZ with its attendant continental shelf .

1.3 Since the maritime areas concerned lie within the 200-nautical-mile EEZ with its attendant continental shelf entitlements of Colombia, it follows that Nicaragua has no continental shelf entitlement beyond 200 nautical miles from its coast. Contrary to Nicaragua's contentions, therefore, there is nothing further to delimit between the Parties. This is quite apart from the fact that Nicaragua has failed to prove on scientific grounds that its natural prolongation extends more than 200 nautical miles from its landmass, as well as the fact that it, being a Party to UNCLOS, is seeking to by-pass the procedures of the Commission on the Limits of the Continental Shelf ("CLCS" or "the Commission") and secure from the Court a delineation of the outer limits of its alleged OCS, without obtaining the prior recommendations from the said Commission.

A. Nicaragua's Misrepresentation of the Subject-Matter of the Case

1.4 In its Reply, Nicaragua has misrepresented what this case is about and distorted Colombia's position. Nicaragua asserts that the Parties agree that "the task of the Court in the present case is to delimit the maritime boundary between two States".[1] Colombia does not agree that this is the subject-matter of the present case. Nicaragua also alleges that, in its 2016 decision on Colombia's Preliminary Objections, "the Court already found that, in the *present* case, the requested

[1] *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 (hereinafter, "NR"), para. 2.56.

delimitation may be carried out".[2] Colombia believes this is a misrepresentation of what the Court decided on the Preliminary Objections. Elsewhere in the Reply, Nicaragua repeats the assertion, claiming that "[t]he Court's mandate is to fix a maritime boundary, not the outer limit of the continental shelf of a State."[3] Colombia is convinced that this is not true.

1.5 All the statements of Nicaragua are demonstrably false. Colombia has made it crystal clear that it does not agree with Nicaragua's characterization of the case. Nicaragua's assertions pervert both what the case is about and how Nicaragua itself has presented its claim for a continental shelf boundary – a claim that seeks to have the Court assume the task of the CLCS in establishing the existence of an OCS and delineating the limits thereof. Nicaragua also distorts the scope of the Court's decision on the Preliminary Objections.

1.6 With respect to the subject-matter of the case, Nicaragua chooses to ignore the fact that the Court has entitled the case "*Question* of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast".[4] This formulation indicates that *in limine litis*, there is a "question" – as Colombia will explain, a very serious one – whether there should be any delimitation of areas

---

[2] NR, para. 2.40 (emphasis in the original).

[3] NR, para. 2.38.

[4] Emphasis added. This was the title given to the case from the beginning. This is the first time in the practice of the Court that a case involving delimitation of maritime areas is not entitled simply "Delimitation of…", as opposed to "*Question* of the delimitation…".

situated beyond 200 nautical miles from the Nicaraguan coast, particularly where they lie within the 200-nautical-mile entitlements of Colombia (and even those of third States), and where Nicaragua's scientific case for an OCS has not been proved. The Court has not yet decided that it will proceed to carry out any such delimitation; indeed, there are compelling reasons why it should not do so.

1.7 Similarly, in its 2016 Judgment on Colombia's Preliminary Objections, while the Court rejected Colombia's jurisdictional objection that Nicaragua's claim was barred by *res judicata* by eight votes to eight (with the President's casting vote), and found that Nicaragua's claim was admissible (the latter decision again by an 8-to-8 vote),[5] it does not follow that the requested delimitation "may be carried out"[6] or that the Court's "mandate" is to fix a maritime boundary.[7] To the contrary, as Colombia has shown in its Counter-Memorial and will continue to show in this Rejoinder, there are compelling reasons why the Court, in exercise of its jurisdiction, should decline to carry out any delineation or delimitation of alleged OCS areas claimed to lie beyond 200 nautical miles from the Nicaraguan coast.

---

[5] *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, Judgment, I.C.J. Reports 2016*, pp. 139-140, para. 126.

[6] NR, para. 2.40.

[7] NR, para. 2.58.

1 .8 Equally misleading is Nicaragua's assertion that it is only requesting the Court to fix a continental shelf boundary, not the establishment of the outer limits of its OCS claim .Nicaragua made this disclaimer because it knows full well that, as a Party to UNCLOS, under Article 76 (8) of the Convention it can only establish the limits of its OCS in a final and binding manner on the basis of the recommendations of the CLCS .Moreover, under Article 76 (9), Nicaragua would be required to 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 .Nicaragua has done no such thing .

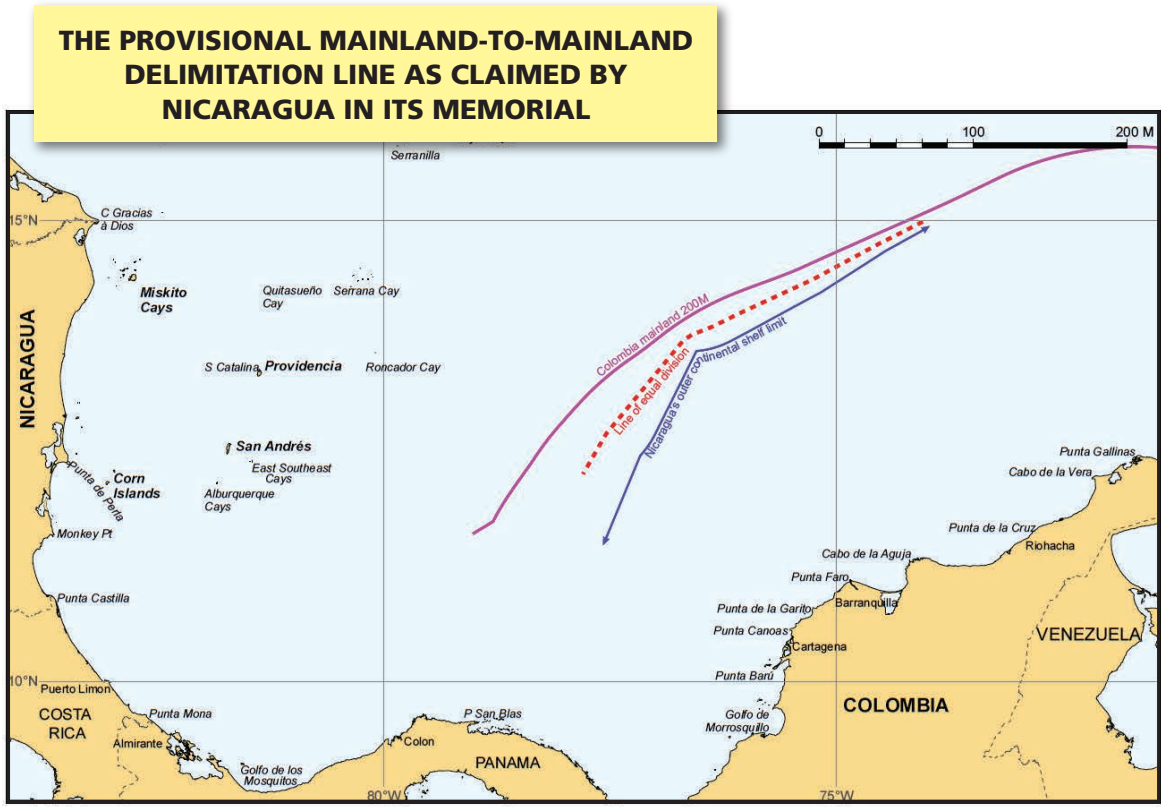
1 .9 Notwithstanding these deficiencies, Nicaragua's Memorial made it abundantly clear that its whole delimitation claim depends on the Court carrying out the CLCS' task,[8] that is, by validating first the existence of its alleged OCS and establishing the outer limits of said claimed OCS without any recommendations from the CLCS, and then delimiting the area of overlap between any such outer limits and the 200-nautical-mile entitlements measured from Colombia's mainland coast (but not from its islands, which Nicaragua conveniently ignores even though they also generate a 200-nautical-mile entitlement to an EEZ with its attendant continental shelf).[9]

---

[8] Indeed, virtually acknowledging that the Court may not have the specialised knowledge of the CLCS, Nicaragua goes so far as to propose that the Court appoint experts to perform that function .See NR, para .2 49 .

[9] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan*

1.10 This can be seen from Figure CR 1.1 below, which reproduces Figure 5.1 from Nicaragua's Memorial.



Source: Nicaragua's Memorial, Figure 5.1. **Figure CR 1.1**

Coast (Nicaragua v. *Colombia)*, Memorial of the Republic of Nicaragua (hereinafter, "NM"), para. 5.12.

1.11 The blue line in this Figure represents what Nicaragua claims as the outer limits of its continental shelf; the pink line is the 200-nautical-mile limit drawn from Colombia's mainland. As is evident, Nicaragua's boundary claim is a "line of equal division" between these two lines. It is obvious that, contrary to Nicaragua's disclaimer, it *is* asking the Court to determine first the existence of its claimed OCS and then to delineate its outer limits, all this as part and parcel of its wholly artificial and self-serving claim.

1.12 All of this is as unprecedented as it is untenable. As the Court stated:

> "The Court begins by noting that the jurisprudence which has been referred to by Nicaragua in support of its claim for continental shelf delimitation involves no case in which a court or a tribunal was requested to determine the outer limits of a continental shelf beyond 200 nautical miles."[10]

1.13 Moreover, Nicaragua's delimitation claim, dependent on the Court's determination of the outer limits of Nicaragua's asserted OCS, is contrary to its obligations as a Party to UNCLOS, which require prior recommendations from the Commission and the deposit of charts and relevant information with the Secretary-General of the United Nations. Moreover, it flies in the face of the Court's statement in its 2012 Judgment

[10] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 668, para. 125 (hereinafter "2012 Judgment" or "*Territorial and Maritime Dispute* case").

that "the fact that Colombia is not a party [to UNCLOS] does not relieve Nicaragua of its obligations under Article 76 of that Convention".[11]

B. The Fundamental Flaws Undermining Nicaragua's Case

(1) 200-NAUTICAL-MILE EEZ ENTITLEMENTS PREVAIL OVER OCS CLAIMS

1.14 Despite Nicaragua's claim that it seeks an equitable delimitation, its assertion that there exists an alleged OCS entitlement that (i) has been scientifically proven, (ii) encroaches upon Colombia's 200-nautical-mile entitlements including from its mainland and islands, (iii) by-passes the CLCS' procedures that are obligatory for Nicaragua as a Party to UNCLOS, and (iv) trespasses on the 200-nautical-mile entitlements of third States, all fail on factual, legal and procedural grounds.

1.15 In Chapter 2, Colombia will start by addressing the applicable law in this case. The Parties agree that, because Colombia is not a Party to UNCLOS, the applicable law is customary international law. But Nicaragua's cavalier treatment of customary international law misrepresents the notion of natural prolongation and relies on elements of Article 76 of UNCLOS that, even according to Nicaragua, do not constitute customary international law and are thus not binding in this

[11] 2012 Judgment, p. 669, para. 126.

case . Colombia will point out these and other contradictions in Nicaragua's theory of the case in the course of this pleading.

1 .16 Chapter 3 will then show that one of the basic fallacies underlying Nicaragua's case is the assumption that an alleged entitlement to an OCS of one State constitutes a lawful title within the 200-nautical-mile entitlements of other States . This proposition is unsustainable . It does not find any support in the text of UNCLOS. Moreover, there is no evidence that the negotiating States to UNCLOS considered that, by agreeing to the novel OCS regime in the Convention, they were potentially placing in jeopardy their hard-won entitlements to a 200-nautical-mile EEZ, which include its attendant continental shelf. EEZ entitlements do not depend on the geological or geomorphological characteristics of the underlying seabed and subsoil . Indeed, the Court's decision in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case left no doubt that natural prolongation, i.e., the geology and geomorphology which constitute the foundation of any OCS claim, is irrelevant to the question of both entitlement and delimitation in areas situated within 200 nautical miles of a State's baselines .[12]

1 .17 Colombia has shown that State practice subsequent to the conclusion of UNCLOS reinforces the point . Delimitation practice demonstrates that the overwhelming majority of States that could have claimed more extensive OCS areas on scientific

[12] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985* (hereinafter "*Libya/Malta*"), pp .35-36, paras .39-40 .

grounds stopped their claims when they reached the 200-nautical- mile limits of other States .[13] This practice indicates that States do not accept the possibility that a coastal State can claim an OCS that encroaches upon the 200-nautical-mile entitlements of other States. Similarly, in respect of submissions to the CLCS, predominant State practice demonstrates that States halted their OCS claims at the 200-nautical-mile entitlements of other States .Nicaragua's attempt to diminish the significance of this practice by arguing that it was only intended to avoid a negotiation or conflict with such States, is far-fetched .

1 .18 As for the CLCS, it has never issued recommendations for an OCS claim that encroaches upon the 200-nautical-mile zones of opposite States. In the very rare instances where a State has made such a submission – and there have only been four such instances, all of which occurred after the Court's 2012 Judgment – it was invariably met with objections from opposite States .It is clear that States do not countenance the notion that OCS claims can encroach upon their 200-nautical-mile entitlements .

1 .19 Notwithstanding this, Nicaragua's truly exorbitant claim extends as far as 490 nautical miles from its coast into areas that lie less than 200 nautical miles from Colombia's mainland and that in addition would amputate huge areas falling within the

[13] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v . *Colombia),* Counter-Memorial of the Republic of Colombia (hereinafter, "CCM"), paras. 3.47-3.78 and Annex 50. See also Chapter 3 *infra* .

200 nautical miles of Colombia's islands. Such a result, purporting to create, not a grey area, but a vast and unprecedented grey zone, finds no support either under UNCLOS or customary international law, or indeed, in the practice of States. Nicaragua's attempt to introduce a new type of maritime zone into international law, which it aptly names the "grey zone", consisting of large-scale differentiation between water column and seabed rights, would wreak havoc on the public order of the oceans and should thus be rejected by the Court.

1.20 The Court has already observed that the islands of San Andrés, Providencia and Santa Catalina are entitled, in addition to a territorial sea, to an EEZ and continental shelf to the east of Nicaragua's 200-nautical-mile range.[14] Unable to contest this finding, Nicaragua artificially disregards their entitlement in blunt contrast to the Court's ruling in the 2012 Judgment that they should not be cut-off from their entitlements to the east. Nicaragua then argues that other islands such as Roncador, Serrana, Serranilla and Bajo Nuevo are mere "rocks" within the meaning of Article 121 (3) of UNCLOS and thus have no EEZ or continental shelf entitlement.

1.21 Chapter 4 will demonstrate that this contention has no merit. The description of these islands and the evidence that Colombia has provided, leave no doubt that they are not "rocks", within the ordinary meaning of Article 121 (3) and as

[14] 2012 Judgment, pp. 686-688, para. 168.

that provision has been interpreted in State practice. They are full-fledged islands which can sustain human habitation or an economic life of their own, as they have for centuries, and they generate 200-nautical-mile entitlements as recognised by international law, under any applicable criteria . Moreover, their EEZ and continental shelf entitlements have been recognised by neighbouring States in the delimitation agreements they entered into with Colombia .

1 .22 Yet, as noted above, Nicaragua's OCS claim would encroach upon vast parts of the maritime areas that fall within the 200-nautical-mile entitlements of the islands of San Andrés, Providencia and Santa Catalina, as well as of Roncador, Serrana, Serranilla and Bajo Nuevo. This is contrary to international law as reflected in State practice .

1 .23 Colombia will also demonstrate that regardless of the entitlements of its other islands, the entitlements of San Andrés, Providencia and Santa Catalina, recognised by the Court, preclude any OCS claim by Nicaragua. Besides the principle that Nicaragua's alleged OCS may not serve as a title within 200-nautical-miles from San Andrés, Providencia and Santa Catalina, Nicaragua, as it agrees, may not "leapfrog" over or "tunnel" under these islands' entitlement, to claim an OCS beyond them . The entitlements of these islands, and those of third States such as Panama and Jamaica, as will be elaborated in Chapter 5, prevent a continuous Nicaraguan maritime entitlement to any part of what Nicaragua alleges as the

"relevant area", a legal concept which is inapplicable in these proceedings since, as was demonstrated in Colombia's Counter-Memorial, there are no overlapping entitlements to be delimited .

(2) NICARAGUA'S OCS CLAIM PREJUDICES THE RIGHTS OF THIRD STATES

1 .24 Indeed, as Chapter 5 will show, a further reason why Nicaragua's claim is unsustainable is that it prejudices the potential legal interests of third States in the region .Nicaragua's OCS claim not only extends within the 200-nautical-mile entitlements of Colombia's mainland and islands, it also extends far into the 200-nautical-mile potential legal interests generated by Jamaica and Panama *vis-à-vis* Nicaragua; indeed, even of Haiti and the Dominican Republic. This has given rise to objections from both Jamaica and Panama which, together with Costa Rica and Colombia, have expressly not consented to the CLCS' consideration of Nicaragua's OCS submission . In fact, other than Nicaragua, no State in the Caribbean Sea considers that there is an OCS therein given that there are no areas farther than 200 nautical miles from the nearest land territory of a coastal State .

1 .25 The fact that all of the eight foot of slope points ("FOS") used by Nicaragua to establish the outer edge of its alleged continental margin are situated in maritime areas falling within 200 nautical miles of other States in the area (Colombia, Haiti, Jamaica and Panama), illustrates the wholly artificial and

contrived nature of the claim and its prejudice to the interests of third States. Moreover, the bathymetric profile that Nicaragua relies on to demonstrate its natural prolongation transits through the EEZs of Honduras and Jamaica without having any connection to Nicaragua's coast; its only function is to manoeuvre itself into Colombia's EEZ. Nicaragua's proposition that the natural prolongation of its landmass extends into Jamaica's EEZ before, quite conveniently, executing a 90° manoeuvre and steaming south into Colombia's EEZ, is as extraordinary as it is mistaken; it can hardly represent any genuine natural prolongation of Nicaragua's landmass .

1 .26 In this respect, an analogy can be drawn to the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* case, where Cameroon attempted to use parts of the coastline belonging to third States to define the relevant coasts . The Court rejected such an approach. It ruled that "the maritime boundary between Cameroon and Nigeria can only be determined by reference to points on the coastlines of these two States and not of third States".[15] Similarly, it is impermissible for Nicaragua to attempt to prove its natural prolongation beyond 200 nautical miles from its landmass by means of bathymetric profiles and FOS points that are situated in areas appertaining to third States. This is yet another reason why Nicaragua's contention that the delimitation

[15] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v . *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p .442, para .291 .

it proposes would not affect the rights of third States is plainly wrong.[16]

(3) NICARAGUA FAILED TO MEET ITS BURDEN OF PROOF AND DID NOT DEMONSTRATE THAT IT HAS AN OCS

1.27 In view of the basic legal defects in Nicaragua's OCS claim, the Court does not need to reach the question whether Nicaragua has met its burden of proving its OCS claim on scientific grounds. Nonetheless, Chapter 6 will show that Nicaragua's technical case is fraught with scientific distortions and shortcomings which completely undermine the notion that there is a natural prolongation that extends more than 200 nautical miles from its landmass. It will show that Nicaragua's submission to the CLCS fails to fulfil the requisite burden of proof and would not be acceptable as it stands.

1.28 As explained in Chapter 6 and the appended expert report prepared by three renowned experts in the field (including two who are former members of the CLCS, one of whom was its the Chair, and another who was Vice-Chair),[17] the "Nicaraguan Rise" as a whole is not a continuous feature that constitutes the natural prolongation of Nicaragua's land territory. This is because the Upper Nicaraguan Rise, which Nicaragua, in its case against Honduras, equated with the "Nicaraguan Rise" is fundamentally different both geologically and geomorphologically from the much more irregular and

[16] NR, para. 6.21.
[17] See Appendix 1: Colombia's Second Scientific Report.

disjointed Lower Nicaraguan Rise from which Nicaragua now purports to measure the limits of its alleged OCS . The two features are separated by a pronounced and deep geological and geomorphological discontinuity – the Pedro Bank Escarpment-Providencia Trough Lineament – which breaks any natural prolongation of Nicaragua's territory and which is a much more prominent and sharply defined feature than the Hess Escarpment on which Nicaragua places much emphasis .

1 .29 In the light of the scientific evidence demonstrating that Nicaragua's natural prolongation is interrupted before it reaches the 200-nautical-mile limit, Chapter 6 shows that Nicaragua has failed to prove an OCS with the required scientific certainty. In sharp contrast to past cases involving adjacent States and where the existence of an OCS was undisputed, here there is not only a high degree of uncertainty regarding Nicaragua's scientific case; that case has not been proven to the required degree of evidentiary certainty.

1 .30 Nicaragua asserts that it has "done everything required of it" in accordance with the CLCS' rules .This is not the case . The mere filing by Nicaragua of a submission with the Commission is insufficient to establish an OCS entitlement, let alone its outer limits . The CLCS virtually never issues recommendations on submissions as they are submitted .Rather, the process is an iterative one where a submitting State is often required to submit further data to a seven-member subcommission, which tests submissions against rigorous and

highly specialised scientific standards . Moreover, even where a subcommission recommends outer limits, these can be overruled by the full Commission, as has happened on occasion . Nicaragua's *de facto* amendment of its OCS claim in the Reply, evidenced by the submission of new bathymetric profiles that do not overcome the original flaws of the Submission, illustrates why this case should not be dealt with by the Court and why Nicaragua's CLCS submission is far from proving its claimed OCS .

1 .31 Not only does Nicaragua ask the Court to usurp the CLCS' responsibilities by determining and endorsing the outer limits of its purported continental shelf, it also suggests that if the Court has any doubts, it can appoint an expert. But the appointment of an expert is no substitute for the CLCS, which comprises 21 members who are required to be experts in the fields of geology, geophysics or hydrography and are elected by the States Parties to the Convention. Within the Commission, a two-thirds majority must approve any recommendations.

1 .32 Nicaragua has now had several chances to prove its OCS. It confidently asserted that it had done so in the *Territorial and Maritime Dispute* case, but the Court did not uphold that submission .It tried again in its Memorial in the present case, but Colombia showed in its Counter-Memorial that the claim was wholly untenable. The same holds true now that Nicaragua has filed its Reply. Nicaragua inappropriately suggests the appointment of an expert or experts to carry out a function that

is specifically entrusted to the CLCS and for which Nicaragua bears the burden of proof and additionally, it has not proved, either in fact or in law, that it has an OCS entitlement that overlaps with Colombia's entitlements .

(4) The Unsettling Implications of Nicaragua's Case

1 .33 As the Counter-Memorial made clear and will be elaborated in Chapter 7 of this Rejoinder, Nicaragua's excessive and unfounded claim has dire implications for the Caribbean Sea and the public order of the oceans: at the international level, Nicaragua's alternative regime, by attempting to rely on an unproven natural prolongation as a source of title within 200 nautical miles from another State's coasts, runs against the package-deal at the core of the OCS regime, according to which narrow margin States were assured of a 200-nautical-mile EEZ with its attendant continental shelf in return for wide margin States being permitted to extend their OCS into the International Seabed Area (hereinafter the "Area") upon proof of geology and geomorphology and in return for revenue-sharing . Scrapping this regime now threatens the foundation of dozens of delimitations and many submissions to the CLCS, all rejecting natural prolongation as a source of title within 200 nautical miles .

1 .34 In the same vein, Nicaragua's exorbitant thesis regarding insular features would lead to the possible deprivation of the entitlements of plenty of full-fledged islands throughout the

world's oceans, running against decades of unprotested State practice on this matter. Deeming as merely "rocks" features that evidently are islands and that meet the criteria of those for which the international community has recognised 200-nautical-mile entitlements, would undoubtedly cause disruption in other parts of the world and could lead to, *inter alia*, the renegotiations of maritime boundaries already established, the reduction of Marine Protected Areas and a change of the regime of islands as has been construed in the contemporary Law of the Sea .

1 .35 At the regional level, Nicaragua's excessive claim threatens to undermine the stability of the Caribbean Sea. By inserting itself into a maritime space where it does not belong, and which lies closer to Colombia, Jamaica and Panama, Nicaragua will transform this stable environment into a testing ground for its so called "grey zones".

1 .36 In conclusion, Nicaragua's exorbitant claims in these proceedings, if accepted by the Court, would have disrupting implications, not only in the Caribbean Sea, but in other closed and semi-enclosed seas such as the Baltic Sea, the Black Sea, the Mediterranean Sea, the North Sea and the Arctic Ocean, as well as in all the oceans around the world wherein the 200-nautical-mile entitlements of full-fledged islands and the EEZ of coastal States have been fully respected.

Chapter 2

APPLICABLE LAW

2.1 Contrary to what Nicaragua suggests,[18] it is in fact common ground between the Parties that the law applicable to the dispute between them is customary international law.[19] Colombia is a Party to the 1958 Geneva Convention on the Continental Shelf, and Nicaragua is a Party to the 1982 UNCLOS; but neither of these conventions is in force between the Parties.

2.2 At the same time, as a Party to UNCLOS, Nicaragua is bound by its provisions concerning the establishment of any claim to an OCS, as well as by its provisions concerning the delineation of the outer limits of any such purported OCS. As the Court explained in its 2012 Judgment, "the fact that Colombia is not a party [to UNCLOS] does not relieve Nicaragua of its obligations under Article 76 of that Convention."[20] To that extent, it is not the case, as is now claimed by Nicaragua, "that provisions of UNCLOS which do not reflect customary international law cannot be invoked in the present proceedings."[21] Though not applicable as between the

[18] NR, paras. 1.11-1.12.

[19] The same was true for the prior dispute between the Parties, also originated in a Nicaraguan request for a maritime delimitation: "[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". See 2012 Judgment, p. 666, para. 114.

[20] 2012 Judgment, p. 669, para. 126.

[21] NR, para. 2.4.

Parties, Nicaragua's obligations under UNCLOS may well be relevant to the Court's assessment of the present case, as they were in the 2012 Judgment.

2 .3 The law applicable to the dispute between the Parties is the customary international law on the EEZ, and the customary international law on the continental shelf . The customary international law on these two regimes will be addressed in turn . But first it is necessary to recall briefly the proper methodology for the identification of customary international law, since Nicaragua's approach is far removed from the "structured and careful process and legal analysis and evaluation [that is] required to ensure that a rule of customary international law is properly identified" .[22]

A. The Identification of Customary International Law

2 .4 Article 38, paragraph 1(*b*) of the Statute of the Court lists among the sources of international law to be applied by the

[22] International Law Commission (hereinafter "ILC"), "Conclusions on Identification of Customary International Law and Commentaries Thereto" (hereinafter "2018 Conclusions on Identification of Customary International Law"), *Annual Report of the International Law Commission on the Work of its Seventieth Session,* A/73/10, General Commentary, Paragraph (2), p. 122, available at: http://undocs.org/en/A/73/10 (last visited: 21 Jan. 2019). The Commentaries also refer to "the systematic and rigorous analysis required". See ILC, 2018 Conclusions on Identification of Customary International Law, Commentary to Conclusion 3, Paragraph (1), p. 127. On 20 December 2018, by Resolution A/RES/73/203 (which was adopted without a vote) the United Nations General Assembly took note of the conclusions, the text of which was annexed to the resolution, with the commentaries thereto; brought them to the attention of States and all who may be called upon to identify rules of customary international law; and encouraged their widest distribution .

Court "international custom, as evidence of a general practice accepted as law". In its case law, the Court has consistently applied the two-element approach, looking for both a general practice and acceptance of that practice as law (*opinio juris*) .

2 .5 Thus, in *Jurisdictional Immunities of the State (Germany* v .*Italy: Greece intervening)* case, the Court held that:

> "It follows that the Court must determine, in accordance with Article 38 (1) (*b*) of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law . In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p . 44, para . 77) . Moreover, as the Court has also observed,
>
> > '[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them' (*Continental Shelf (Libyan Arab Jamahiriya/Malta),*

> *Judgment, I.C.J. Reports 1985*, pp .29-30, para. 27)."[23]

2 .6 This approach has recently been endorsed by the ILC in its 2018 Conclusions on *Identification of customary international law* .[24]

2 .7 The significance of treaty provisions for the development and identification of rules of customary international law has been the subject of important case law of the Court, including in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases .[25] This has recently been described in Conclusion 11 (Treaties) of the 2018 Conclusions on *Identification of Customary International Law* by the ILC. Paragraph 1 of Conclusion 11 reads:

> "A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
>
> (a) codified a rule of customary international law existing at the time when the treaty was concluded;
>
> (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

---

[23] *Jurisdictional Immunities of the State (Germany* v . *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, pp .122-123, para .55 .

[24] "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)" .See ILC, 2018 Conclusions on Identification of Customary International Law, Conclusion 2 (Two constituent elements), p .119 .

[25] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969* .

> (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law."[26]

2 .8 The commentary to this conclusion emphasises the need for caution: "The words 'may reflect' caution that, in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content."[27]

2 .9 The conclusion further makes it clear that a rule set forth in a treaty may only reflect a rule of customary international law "if it is established that" one of three circumstances is present . As the ILC stated:

> "The words 'if it is established that' make it clear that establishing whether a conventional rule does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty: in each case the existence of the rule must be confirmed by practice (together with acceptance as law) .It is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become a rule of customary international law."[28]

---

[26] ILC, 2018 Conclusions on Identification of Customary International Law, Conclusion 11 (Treaties), p .121 .

[27] ILC, 2018 Conclusions on Identification of Customary International Law, Commentary to Conclusion 11, paragraph (2), p. 143 .

[28] ILC, 2018 Conclusions on Identification of Customary International Law, Commentary to Conclusion 11, Paragraph (4), p. 144.

B. The Customary International Law on the EEZ

2 .10 In its pleadings, Nicaragua has largely ignored the law on the EEZ, which is fundamental to the present dispute. Indeed, its Application, Memorial and Reply ask the Court to delimit the continental shelf, with no recognition that what Nicaragua is actually seeking is a delimitation between its claimed OCS and the seabed and subsoil of Colombia's EEZ .[29]

2 .11 The institution of the EEZ evolved rapidly in customary international law in the 1970s and 1980s, at the time of the preparations for and proceedings of the Third United Nations Conference on the Law of the Sea ("UNCLOS III"). Many coastal States adopted 200-nautical-mile EEZs already in the 1970s in accordance with the "specific legal regime" that was developed early in the Conference (the Informal Consolidated Negotiating Text [ICNT] of 1977); and many more did so well before UNCLOS was adopted and opened for signature in 1982, indeed, at a time when the adoption and entry into force of the Convention were far from certain . The coastal States adopted EEZs without protest from other States. There was clear evidence of a general practice along the lines of the specific legal regime of the EEZ and of acceptance of that regime as law.

[29] Nicaragua requests the Court to adjudge and declare "[t]he maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them (…)". See *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v . *Colombia),* Application Instituting Proceedings, filed in the Registry of the Court on 16 September 2013 (hereinafter "Application"), para. 12(a); NM, p. 145; NR, p . 209 .

Already in 1985, the Court held that the institution of the EEZ was part of customary international law .[30]

2 .12 The essence of the specific legal regime of the EEZ (now reflected in Part V of UNCLOS) is that, within the EEZ, the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed *and of the seabed and its subsoil*" (Article 56, emphasis added) .

2 .13 For present purposes, the key provisions of Part V read as follows:

> "Article 55
> Specific legal regime of the exclusive economic zone
>
> The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention .
>
> Article 56
> Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

[30] "It is in the Court's view incontestable that (…) the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown *by the practice of States* to have become a part of customary law." (Emphasis added). See *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p . 33, para . 34 .

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention .

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention .

3 . The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Article 57
Breadth of the exclusive economic zone

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured ."

2 .14 It follows that the rights set out in Article 56 ("sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources (…) of the seabed and its subsoil") are not just continental shelf rights. To the contrary, they are also EEZ rights, spelt out in Article 56 which is in Part V of the Convention. The Court made this clear in *Libya/Malta*, when it referred to "the rights which the exclusive economic zone entails over the sea-bed of the zone" .[31] Nicaragua nowhere acknowledges this fact .

2 .15 An important distinction should be noted between the specific legal regime of the EEZ and the institution of the continental shelf . Based on what the Court has called "entitlement by reason of distance",[32] the EEZ, including its attendant continental shelf, extends as of right up to 200 nautical miles from the baselines, whereas under UNCLOS the continental shelf may extend beyond that distance, into parts of the oceans that would have otherwise formed part of the common heritage of mankind, but only if natural prolongation is proven with scientific certainty and other conditions are met. Such OCS may be established only after the coastal State has gone through the rigorous scientific procedures of the CLCS, proved the existence of an OCS with scientific certainty, and established the outer limit on the basis of the CLCS's recommendations . In addition, when a State is recognised to

---

[31] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p .33, para .34 .

[32] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p .33, para .34 .

have OCS rights, it is required to pay a royalty to other State Parties as part of the OCS revenue-sharing regime in Article 82 of UNCLOS .

2 .16 The relationship between the EEZ and the continental shelf was well described by the Court in *Libya/Malta* in 1985:

> "It is in the Court's view incontestable that, apart from those provisions, the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law. (…) 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."[33]

2 .17 The relationship between the EEZ and the OCS, which is addressed in Colombia's Counter-Memorial[34] and in Chapter 3 below, is a key to the matters before the Court in this case .

C. The Customary International Law on the Continental Shelf, including on the OCS

2 .18 The institution of the continental shelf evolved over the two decades or so prior to the *North Sea Continental Shelf* cases in 1969. But the customary rules on the outer limit of the

---

[33] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p .33, para .34 .

[34] CCM, Chapter 3 .

continental shelf were far from clear at that time . In the *North Sea Continental Shelf* cases the Court had recalled that Article 1 of the 1958 Convention on the Continental Shelf was one of the provisions regarded as "reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf" .[35] In its 1982 Judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, however, the Court referred to the definition in Article 1 as "clearly open-ended" .[36]

2 .19 By the time of UNCLOS III (1973-1982) it had become necessary to define the outer limit of the continental shelf so as to establish the extent of the Area, which is defined in UNCLOS as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" .[37]

2 .20 Acceptance of the institution of the EEZ as part of customary international law in the 1970s included the coastal State's entitlement to continental shelf rights out to 200 nautical miles . As the Court said in *Libya/Malta*, "[a]lthough 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."[38]

---

[35] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp .38-39, para .63 .

[36] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment*, *I.C.J. Reports 1982*, pp .45-46, para .42 .

[37] UNCLOS, Article 1 1(1) .

[38] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p .33, para .34 .

2 .21 After hard-fought negotiations, a compromise was reached at UNCLOS III between the wide-margin States (sometimes referred to as the "margineers") and others, including the group of land-locked and geographically disadvantaged States, on a package-deal for the definition of the continental shelf under the future convention. As explained in the Counter-Memorial, this package-deal recognised an opportunity for wide-margin coastal States to exploit the resources of the continental shelf beyond the EEZ, in the area which would have otherwise formed part of the common heritage of mankind, subject to the fulfilment of certain conditions and obligations.[39] This package-deal comprised, in addition to the definition in Article 76, paragraph 1, four main elements:

(i) A complex set of provisions of a scientific-technical nature for the continental shelf beyond 200 nautical miles from the baselines, to ensure that the shelf could not encroach indefinitely and arbitrarily upon the Area (Article 76, paragraphs 2 to 6);

(ii) A procedure involving the CLCS, established by UNCLOS, to ensure that the coastal State may not unilaterally delineate the outer limits of its continental shelf beyond 200 nautical miles (Article 76, paragraphs 7 to 8 and Annex II);

[39] See CCM, Chapters 2 and 3 .

(iii) A requirement to deposit charts and relevant information permanently describing the outer limits of its continental shelf with the Secretary-General of the United Nations, to inform all States Parties to the Convention (Article 76, paragraph 9); and

(iv) An obligation upon the coastal State to make royalty payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles. The payments are to be made through the International Seabed Authority (the "Authority") for distribution to the States Parties to UNCLOS (Article 82) .

2 .22 It is beyond doubt, and agreed between the Parties, that elements (ii), (iii) and (iv) of the package-deal do not reflect customary international law. As explained in Colombia's Counter-Memorial[40] and below, it follows that the OCS regime as a whole and element (i), which is an integral part thereof, is likewise not part of customary international law .[41]

2 .23 In its pleadings, Nicaragua seeks to make much of what it claims is Colombia's mistaken view that the OCS is subject to a quite different regime from the shelf within 200 nautical miles .[42]

---

[40] CCM, paras . 2 10-2 16 (citing *inter alia* the Statement by the President of UNCLOS III at the final Plenary Meeting).

[41] CCM, paras .2 17-2 21 .

[42] NR, para . 2.15 .

Nicaragua is confusing the issue of the source of title over the continental shelf, dealt with in Chapter 3 below, and the regime applicable to the continental shelf, once established. Colombia considers, and Nicaragua accepts, that there are separate and specific rules (set forth in UNCLOS) concerning the shelf beyond 200 nautical miles, which are different from those applicable to the shelf within 200 nautical miles. These relate *inter alia* to the different sources of legal title to the seabed and subsoil within and beyond 200 nautical miles from the coasts; the procedures for the establishment of entitlement to an OCS and the delineation of its outer limits; the obligation to make royalty payments or contributions in kind through the Authority; and the rules governing marine scientific research. It is thus evident that international law prescribes a separate legal regime to govern the OCS.

2.24 The Parties to the present case disagree on whether, and if so to what extent, Article 76 of UNCLOS reflects customary international law. They set out their respective positions in response to a question from a member of the Court in the course of the *Territorial and Maritime Dispute* case; in its Memorial in the present proceedings, Nicaragua reproduced its response to Judge Bennouna in full.[43] It has repeated and expanded upon its arguments in the Reply.[44] Colombia set out its position fully in response to Judge Bennouna and in its Counter-Memorial.[45]

---

[43] NM, para. 2.10.
[44] NR, paras. 2.62-2.36.
[45] CCM, paras. 2.9-2.28.

2 .25 In the 2012 Judgment, the Court opined that:

> "The Court considers that the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law . At this stage, in view of the fact that the Court's task is limited to the examination of whether it is in a position to carry out a continental shelf delimitation as requested by Nicaragua, it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law."[46]

2 .26 Article 76 is much more than a definition . Together with Annex II to UNCLOS, Article 76 comprises five different sets of provisions:

– Paragraph 1 sets out the definition of the continental shelf and the "natural prolongation" requirement for any OCS claim;

– Paragraphs 2 to 6 set out precise scientific-technical formulae fixing limits beyond which an OCS may not extend. There is disagreement between the Parties as to whether these paragraphs reflect customary international law;

– Paragraphs 7 and 8, together with Annex II, set out a procedure whereby the coastal State, subject to the involvement and recommendation of the CLCS, may

[46] 2012 Judgment, p .666, para .118 .See also, p .666, para .114 .

establish an OCS claim; it is common ground between the Parties that these paragraphs do not reflect customary international law;

– Paragraph 9 requires the coastal State to deposit charts and relevant information permanently describing the outer limits of its continental shelf; and

– Paragraph 10 states that the provisions of the article are without prejudice to the question of the delimitation of the continental shelf between States with opposite or adjacent coast .

2 .27 As noted above, in the 2012 Judgment, the Court was of the opinion that the definition of the continental shelf set out in paragraph 1 of Article 76 formed part of customary international law .But the Court took no position on the remaining provisions of the Article. Colombia respectfully submits that the OCS regime cannot plausibly be recognised to form part of customary international law and is thus not opposable to Colombia .

2 .28 Article 76, paragraphs 2 to 6, which set out precise scientific-technical formulae fixing limits beyond which an OCS may not be claimed, do not reflect customary international law. They cannot be viewed in isolation since they form an integral and indissoluble part of a compromise or package-deal negotiated at UNCLOS III which recognised the opportunity of

wide-margin States to exploit the resources of the seabed and subsoil beyond 200 nautical miles from their coasts.

2.29 As explained above, that package-deal includes the detailed paragraphs 2 to 6 of Article 76, the procedures involving the CLCS, and the obligations of royalty payments and contributions prescribed in Article 82. The OCS regime cannot be regarded as forming part of customary international law in isolation from these other elements of the package-deal.[47] As Ambassador Koh, President of the Conference, indicated in the final plenary session:

> "Even in the case of article 76, on the continental shelf, the article contains new law in that it has expanded the concept of the continental shelf to include the continental slope and the continental

[47] In its Reply, Nicaragua relies on a brief statement by ITLOS in its case *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Reports 2012*, p. 107, paras. 408-409. See NR, paras. 2.Ɓ-2.14. ITLOS, having noted that the outer limits of the continental shelf beyond 200 nautical miles only become "final and binding" when established on the basis of recommendations of the CLCS, went on to say that this did not imply that entitlement to the continental shelf depended on any procedural requirements. The passage continues by saying that entitlement does not require the establishment of limits and refers in this regard to Article 77(3) of UNCLOS. The circumstances of *Bangladesh/Myanmar* were entirely different from the present case. Said case was between two States Parties to UNCLOS, and UNCLOS was the applicable law. There was agreement between the Parties on the facts determinative of the question of their respective entitlements beyond 200 nautical miles. ITLOS was dealing with a delimitation between adjacent States, and for that purpose did not need to know the outer limits of the shelf. Most importantly, the circumstances were such that both Parties were in fact bound by all the elements of the package deal under UNCLOS: neither Party could exercise its continental shelf resource rights beyond 200 nautical miles except on the basis of recommendations by the CLCS or without making payments or other contributions as required by Article 82. ITLOS was not called upon to consider the position under customary international law.

> rise . *This concession to the broad-margin States was in return for their agreement to revenue-sharing on the continental shelf beyond 200 miles. It is therefore my view that a State which is not a party to this Convention cannot invoke the benefits of article 76.*"[48]

As will now be shown, these other elements are not capable of becoming rules of customary international law, and there is no practice or acceptance as law (*opinio juris*) to suggest otherwise .

2 .30 Article 82 was an essential part of the package-deal leading to agreement on the recognition of the OCS regime and inclusion of the rules on the outer limit . Article 82 imposes an obligation on States Parties, having established an OCS, to make precisely calculated royalty payments or contributions in kind in respect of the exploitation of "the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." It does not form part of customary international law .

2 .31 Of the three circumstances set out in the Court's case law, and Conclusion 11 (a) of the 2018 Conclusions on *Identification of Customary International Law* by the ILC, Nicaragua cannot show that the detailed rules concerning the "outer edge of the continental margin" codified rules existing at

---

[48] UNCLOS III, *Official Records,* Vol. XVII, 193rd Plenary Meeting, para . 48, UN Doc . A/CONF 62/SR 193 (UNCLOS III, Official Records), available at: http://legal.un.org/docs/?path= ./diplomaticconferences/1973_los/docs/english/vol_17/a_conf62_sr193.pdf&lang=E (last visited: 21 Jan. 2019). (Emphasis added) .

the time that UNCLOS was concluded. The negotiating history shows the opposite . Article 76 was a package-deal, and few if any of the negotiating States considered that it reflected existing law. Indeed, the solution eventually agreed upon was just one of many considered during the negotiations at UNCLOS III . Others included that agreed in 1958 (200 m isobath and exploitability); the USSR proposal in 1973 (maximum extent up to the 500 m isobath); a Chinese proposal also in 1973 (a coastal State may reasonably define the outer limit); a Japanese proposal in 1976 (the boundary between continental and oceanic crustal structures); and a USSR proposal in 1978 (outer edge of the margin but no further than 100 nautical miles from the outer limit of the 200-nautical-mile economic zone) .[49]

2 .32 The possibilities for recognising the OCS regime as customary international law are then the crystallization of a rule that was emerging in 1982, or the generation of a new rule . The OCS cannot have crystallised in 1982; it can be seen from the examples above that there was no common understanding of the definition of the outer limit of the continental shelf and how it was to be identified at that time . And Nicaragua has not begun to show the general practice that is accepted as law that would

[49] For an account of the negotiating history of Article 76, see United Nations Division for Ocean Affairs and the Law of the Sea (hereinafter "DOALOS"), *The Law of the Sea: Definition of the Continental Self – An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, United Nations Publications Sales No. E.93. V.16, (available at the Peace Palace Library); M. H. Nordquist, S. N. Nandan and S .Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, University of Virginia / Martinus Nijhoff (Virginia Commentary), Vol. II, 1993, pp. 841-873 (available at the Peace Palace Library).

be required to show that a new rule of customary international law had been generated after 1982 .

2 .33 Paragraph 2 of Article 76 has to be read together with paragraphs 4 to 6, to which it makes a direct cross-reference, and with paragraph 7, to which paragraph 4 makes direct reference .The Parties disagree on whether these provisions, and hence the OCS regime, reflect customary international law .[50]

2 .34 The relevant provisions of Article 76 read:

> "2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6 .
>
> 4 . (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
>
> (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope .
>
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base .

[50] CCM, paras .2 5-2 17; NR, paras .2 18-2 36 .

> 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."

The rule in paragraph 2 incorporates paragraphs 4, 5 and 6 (and by further incorporation by reference, paragraph 7). Paragraph 2 could therefore only reflect a rule of customary international law if each of those four later provisions also reflected customary international law . This is not and cannot be the case, as is now explained.

2 .35 Paragraph 4 of Article 76 places an obligation on the coastal State, "[*f*]*or the purposes of this Convention*", to establish the outer edge of its continental margin (where that lies beyond 200 nautical miles from the baselines) by one or other

(or both) of two lines (known respectively as the Hedberg formula and the Gardiner formula) . Inclusion of the words "for the purposes of this Convention" is a clear indication that the negotiators did not consider these provisions to reflect customary international law, nor intend them to become such.

2 .36 This is not the place to elaborate on the two technical formulae set forth in paragraph 4 .[51] It is in any event clear that the rules set forth in paragraph 4, and in paragraphs 5, 6 and 7 with which paragraph 4 has to be read, are not "of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law" .[52] They are highly technical and scientific, containing strict and complex measurements such that they could not enter into the corpus of customary international law. By way of example, they include such precise requirements as "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"; "fixed points not more than 60 nautical miles from the foot of the continental slope"; "fixed points (…) either shall not exceed 350 nautical miles from the baselines (…) or shall not exceed 100 nautical miles from the 2,500 metre isobath"; "on submarine ridges [excluding submarine elevations that are natural components of the continental margin], the outer limit of the continental shelf shall not exceed 350 nautical miles from

[51] In its Reply, Nicaragua itself refers to them as "detailed criteria": See NR, para .1 8 .

[52] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp .41-42, para .72 .

the baselines (…)"; and "straight lines not exceeding 60 nautical miles in length" .

2 .37 In its Reply, Nicaragua invokes writings and practice to support its view that these paragraphs of Article 76 reflect customary international law. In doing so it reveals the weakness of its position. Nicaragua argues that a "largely dominant doctrine" confirms that the whole of Article 76 has become customary international law .[53] Even if this were so (*quod non*), scholarly opinions are no substitute for State practice and *opinio juris* – they do not create customary international law. In any case, there are academic opinions that take the opposite view and do not consider that the whole of Article 76 has become customary international law. For instance, Malcolm Evans, in 2018, refers to the "complex compromise found in LOSC article 76(1)" and, after describing the remainder of Article 76, concludes that "[t]his complicated formula is difficult to apply and its customary law status unclear" .[54] In the same vein, Yoshifumi Tanaka states that "with the emergence of the concept of the EEZ, the continental shelf within 200 nautical miles is currently established as customary law" .[55] He makes no such claim for the continental shelf beyond 200 nautical miles. The fact that the OCS could not plausibly be recognised to form part of customary international law has been supported by Ambassador Koh, as quoted above, and by Professor William T.

[53] NR, para . 2.21 .

[54] M. Evans (ed.), *International Law*, Oxford University Press, 2018, p. 656 (available at the Peace Palace Library).

[55] Y. Tanaka, *The International Law of the Sea*, Cambridge University Press, 2015, p. 139 (available at the Peace Palace Library).

Burke who criticised the position of the United States favouring the OCS as customary:[56]

> "This particular situation seems to be an especially unappealing one for insisting on the status of the convention principles as customary law. The appearance, or perhaps it is better stated as the odor, of picking and choosing is unusually strong in this vicinity. The agreement on the broad margin provisions rested not only on the trade-off of revenue sharing beyond 200 miles, but also on the acceptance of an elaborate, especially created third-party decision procedure designed to discourage easy claims and to assure that such claims as might be made were founded on a solid basis of scientific data regarding the critical characteristics of the area that justified the claim .
>
> To take the position now that the Article 76 provisions on the foot of the slope and the depth of the sediment are a matter of customary law appears to dispense with the aforementioned safeguards as if they are insignificant. It is impossible to argue plausibly that the requirement for sharing revenue from operations beyond 200 miles is established customary international law – no one in the world would believe that. And it is perfectly obvious that Article 76(8) and the contents of Annex II on the Commission on the Limits of the Continental Shelf are not found in general practice of states . But if these are not also customary law, and the other paragraphs of Article 76 are customary law, then there can be no assurance founded in international procedures that coastal states' claims beyond 200 miles have any substance to them other than air."[57]

---

[56] CCM, Annex 43: W. Burke, "Customary Law as Reflected in the LOS Convention: A Slippery Formula", in J. P. Craven, J. Schneider, C. Stimson (eds), *The International Implications of Extended Maritime Jurisdiction in the Pacific*, Law of the Sea Institute, 1989, pp .402-409 .

[57] W. Burke, footnote 56 *supra*, p .405 .

2 .38 The scholars Nicaragua referenced to support this proposition also recognise that it is a controversial matter .Bjarni Már Magnússon, for instance, emphasised the package-deal elements of OCS and the difficulty with its recognition as customary:

> "One issue must be addressed. As mentioned earlier, the definition and limits of the continental shelf were negotiated together with the requirement to share the revenues of the continental shelf, and it is unlikely that article 76 would have been concluded in its present form if article 82 were not part of the deal . Although it is difficult to view article 82 as part of customary international law (e g ., because there is so far no state practice concerning it), it could upset other states if the United States established the outer limits of its extended continental shelf without showing an intent to respect the package deal."[58]

2 .39 Nicaragua's analysis and scholarly references seem to follow the analysis conducted in a recent article by Kevin A. Baumert, an attorney-advisor to the US Department of State .[59] Baumert, however, recognised that his proposition that the OCS has become part of customary international law was controversial and referenced many scholars that objected to this

---

[58] B .M .Magnússon, "Can the United States Establish the Outer Limits of Its Extended Continental Shelf Under International Law?", *Ocean Development and International Law: the Journal of Marine Affairs*, Vol. 48, 2017, p. 11 (available at the Peace Palace Library).

[59] NR, para. 2.21. See K. Baumert, "The Outer Limits of the Continental Shelf under Customary International Law", *American Journal of International Law*, Vol. 111, 2017, p. 857 (available at the Peace Palace Library).

view.[60] Amongst these is Judge Vladimir Golitsyn, the former President of ITLOS.[61] Judge Golitsyn explained that "Article 76 can hardly be viewed as a reflection of customary international law", pointing out that a contrary proposition would place the "United States (…) in an advantageous position compared to other Arctic States, as it will not subject its assertion of the outer limit of the U S . continental shelf to the scrutiny of the Commission".[62]

2 .40 Nicaragua's review of what it terms "State practice"[63] is likewise much distorted . It lists States that adopted legislative and administrative acts conforming to Article 76 shortly before they became Parties to UNCLOS .It fails to produce evidence of *opinio juris*. There may be many reasons why States decided to refer to Article 76 . In particular, Nicaragua overlooks the fact that States would have been acting in anticipation of becoming States Parties to UNCLOS. Indeed, with only one exception, namely the United States, Nicaragua has not referred to the practice of States that are not Parties to UNCLOS . This one example has, as indicated above, been criticised by scholars.

2 .41 Paragraph 8 of Article 76, which has to be read with Annex II, requires the coastal State, in order to establish the limits of its OCS as final and binding, to engage in a procedure

---

60 K .Baumert, footnote 59 *supra*, pp .836-837, 849-850 .

61 V. Golitsyn, "Continental Shelf Claims in the Arctic Ocean: A Commentary", in *The International Journal of Marine and Coastal Law*, Vol. 24, 2009, p. 405 (available at the Peace Palace Library).

62 V. Golitsyn, footnote 61 *supra* .

63 NR, paras .2 .22-2 36 .

with the CLCS (and to do so within a fixed period of becoming a State Party) and establish any OCS based on the Commission's recommendations . The procedure involves the submission of particulars of the limits to the CLCS along with supporting scientific and technical data,[64] its consideration of the data, and its recommendations . In the case of disagreement by the coastal State with the recommendations of the CLCS, the coastal State shall, within a reasonable time, make a revised or new submission to the CLCS .[65] The fact that paragraph 8 includes a time-limit for a State Party to undergo the procedure necessary to establish its outer limit, based on the date of becoming party to UNCLOS, is a further indication that the procedure cannot be regarded as customary international law.

2 .42 Paragraph 9 obliges States Parties to deposit charts and relevant information, including geodetic data, permanently describing the outer limits of the continental shelf .[66] It is common ground between the Parties that these procedural requirements are not and cannot form part of customary

---

64 Article 76 (8) of UNCLOS reads: "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." See also UNCLOS Annex II, Article 3 (1) (a).

65 UNCLOS Annex II, Article 8.

66 Article 76 (9) reads: "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."

international law.[67] It is well established that procedural and institutional requirements in a treaty are not "of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law". Since these procedural requirements are an essential part of the overall UNCLOS package-deal recognising the OCS, it means that no part of the package, neither an OCS entitlement nor the "outer limit" rule, could have become or should be recognised by the Court to form part of customary international law.

2 .43 It also follows that the procedural requirements for the establishment of the outer limit of the OCS including the deposit with the Secretary-General of the United Nations of charts and information on the location of that outer limit are exercises that are opposable only *vis-à-vis* States Parties to UNCLOS .

2 .44 By requesting the Court to delineate the outer limit of its purported OCS in lieu of the CLCS, Nicaragua attempts to by-pass all the safeguards put in place under UNCLOS to verify with a high degree of scientific certainty that an OCS is factually warranted and lawfully claimed. This is wholly apart from the legal questions whether such claim is opposable to a non-Party (*quod non*) and, critically to Nicaragua's case, whether this natural prolongation may even serve as a lawful source of legal

[67] "[The Parties] agree that the provisions concerning the CLCS are not part of customary international law." See NR, para. 2.5.

title to the seabed and subsoil within another State's EEZ, i.e., within "sea-bed areas less than 200 miles from the coast".[68]

2 .45 In conclusion, the national legislation, papers and books cited by Nicaragua are insufficient to establish rules of customary international law in the sense of the OCS regime and the detailed provisions of Article 76 . Moreover, the provisions in question are not of a nature that may make them the basis of a general rule of law. And in so far as they involve interaction with institutions established under UNCLOS (the CLCS and the Authority), or require royalty payments or contributions in kind, they are self-evidently not capable of becoming binding on non-State Parties as rules of customary international law. Nicaragua itself appears to accept at least this last point . Thus, Colombia submits that the OCS regime entirely, and specifically the UNCLOS provisions on its recognition and extent, do not form part of customary international law and hence are unopposable to Colombia .[69]

---

[68] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p .36, para .40 .

[69] In making these submissions, Colombia does not deem it necessary to claim persistent objector status; if, however, the Court were to consider that the rules in question have become customary international law, the Court would also need to consider whether Colombia was indeed a persistent objector to any such rules.

Chapter 3

NICARAGUA'S ALLEGED NATURAL PROLONGATION IS NOT A SOURCE OF LEGAL TITLE WITHIN 200 NAUTICAL MILES FROM COLOMBIA'S MAINLAND AND INSULAR TERRITORIES

A. Introduction

3 .1 In Chapter 3 of its Counter-Memorial, Colombia reviewed and analysed State practice, legislative history and doctrine to demonstrate that, under customary international law as well as under UNCLOS, one State's alleged geological and geomorphological OCS claim may not encroach upon another State's entitlement to its 200-nautical-mile EEZ with its attendant continental shelf.[70] As the Counter-Memorial showed, the EEZ was recognised to be the "keystone" of the current regime of the Law of the Sea .The OCS, on the other hand, was recognised under UNCLOS as a supplemental grant to wide-margin coastal States, subject to a verification process by a scientific commission, the CLCS, and in return for revenue-sharing. In this "package-deal", a State's OCS could extend into areas that would otherwise have been the Area, but not into another State's EEZ with its attendant continental shelf. Accordingly, in both delimitation practice and CLCS submissions, States generally have refrained from claiming that

[70] CCM, Chapter 3 .

their geological and geomorphological OCS may encroach upon another State's EEZ. Indeed, as the Court confirmed in *Libya/Malta,*[71] natural prolongation, the foundation of an OCS claim, is not a source of title within maritime areas that lie 200 nautical miles from another State's baselines, i e , within that State's EEZ:

> "This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial."[72]

The Court then confirmed that the law which used to accord title based on natural prolongation "(…) now belongs to the past, in so far as seabed areas less than 200 miles from the coast are concerned."[73]

3 .2 In Chapter 5 of its Reply, Nicaragua boasts of "swiftly" repudiating this established legal principle, but this is based on nothing more than unsubstantiated assertions and unsuccessful

---

[71] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* pp .35-36, paras .39-40.

[72] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p .35, para .39 .

[73] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p .36, para .40 .

attempts to raise doubts about established customary and treaty-based international law .

3 .3 Nicaragua argues that a single continental shelf under international law may serve as a source of title throughout its natural prolongation to the edge of the continental margin, regardless of whether such areas lie within another State's EEZ. But Nicaragua is mistaken .Under international law, continental shelf entitlement is distinct within and beyond 200 nautical miles from the coast. As explained in the Counter-Memorial, and in Chapter 2 above, while the continental shelf entitlement within 200 nautical miles from the coast is included within the customary and conventional EEZ regime, any continental shelf entitlement beyond 200 nautical miles is founded, perforce, upon geological and geomorphological features, i .e.,the natural prolongation of the landmass . There are thus two distinct sources of title for the continental shelf; one within 200 nautical miles and one beyond.

3 .4 Nicaragua's apparent argument is that in spite of State practice, legislative history, jurisprudence and doctrine, geology and geomorphology may constitute a source of title within 200 nautical miles from another State's baselines .

3 .5 Nicaragua argues that a few excessive claims and *quid pro quo* deviations from the general practice demonstrate that there is no established State practice. That is plainly false, as the Counter-Memorial and this Chapter demonstrate .Nicaragua has

failed to show that under customary international law, based on State practice and *opinio juris*, claims to title based on geological and geomorphological factors, i .e., OCS claims, are valid within 200 nautical miles from another State's coast . Nicaragua attempts this by proposing an interpretation that is, at once, cynical and incoherent. Cynical because it distorts the clear purport of legislative history, practice, doctrine and jurisprudence . Incoherent because it produces a result that is wholly inconsistent with the developments in the Law of the Sea .

3 .6 Nicaragua's real, though belatedly revealed argument is that, in spite of legislative history, State practice, doctrine and the Court's jurisprudence, the Court should ignore customary international law and instead conduct an "equitable solution" exercise, dividing Colombia's EEZ.[74] But that puts the cart before the horse. An equitable delimitation of Colombia's EEZ and its attendant continental shelf presupposes that Nicaragua has some title to the area which it wishes to divide, and that said title is equal to Colombia's. Yet its OCS claim, purporting to be based on geology and geomorphology (and ignoring, for the moment, that it has not been proved), cannot be the basis of an entitlement within another State's 200-nautical-mile EEZ, with its attendant continental shelf .

3 .7 This is the sleight of hand in Nicaragua's argument: to speak piously of equity and equitable delimitation as a means of

[74] NR, para . 5.6 .

hiding the fact that it simply lacks legal title to the area it covets. This is not to say that there is no principle of equitability at work here. The accepted principle that OCS claims may not encroach upon the 200-nautical-mile entitlements of other States, i e , that geological and geomorphological factors are not a source of title within 200 nautical miles from a State's baselines is what States accept and agree is needed to ensure an equitable distribution of access to resources .

3 .8 Nicaragua further claims that Colombia had not produced evidence or references to support the principle that natural prolongation, i.e., geology and geomorphology, upon which an OCS claim is founded, is not a source of title within 200 nautical miles from another State's baselines.[75] All of Nicaragua's arguments in Chapter 5 of its Reply have already been fully rebutted in Chapter 3 of the Counter-Memorial and Colombia respectfully refers the Court to its thorough review of the legislative history, State practice and doctrine there.

3 .9 In Section B to this Chapter, Colombia will demonstrate that, under both customary and conventional international law and in contrast to Nicaragua's unsupported assertions, natural prolongation, upon which an OCS claim is founded, does not serve as a source of title within the EEZ of another State, i.e., within 200 nautical miles from another State's baselines . Colombia will show this, based upon legal doctrine, State practice, the legislative history of UNCLOS and the Court's

[75] NR, paras .5 24, 5 40, 5 48 .

jurisprudence .In Section C, Colombia will demonstrate that this principle is supported by sound policy considerations for maintaining stability between States and equitable access to resources .

B. Geology and Geomorphology are not a Source of Title Within 200 Nautical Miles from Any State's Baselines

3 .10 Nicaragua contends that Colombia failed to provide references to support the argument that an OCS claim may not encroach upon another State's EEZ, with its attendant continental shelf. Nicaragua attempts to sidestep the necessary link between the questions of delimitation and of legal title . According to Nicaragua, an equitable delimitation should be performed regardless of whether its claimed source of legal title, natural prolongation, is even a source of title in the area it claims .

3 .11 Nicaragua argues that natural prolongation, i.e., geology and geomorphology, provides for an "inherent" legal title to the entire breadth of that natural prolongation . Legal sophistries often try to create the illusion of authority by presenting themselves as "natural" or "inherent". But title to maritime resources, either as part of the customary EEZ regime or the conventional OCS regime, is the product of law-making by the international community; they are not natural rights. Just as the law of nature does not provide a State with a territorial sea or set the scope of that space, legal title to maritime zones within 200

nautical miles from the baselines has been effected irrespective of criteria based on geology or geomorphology; simply put, natural prolongation is not a source of title within 200 nautical miles .

(1) The Principle that Natural Prolongation is not a Source of Title within 200 Nautical Miles from Any State is Recognised in Doctrine

3 .12 A review of Nicaragua's 30-page attempt in Chapter 5 of its Reply to show that natural prolongation is a source of title within 200 nautical miles from *any* State's baselines reveals that Nicaragua can marshal neither authority, practice nor doctrine to support its claim that natural prolongation, the basis of its alleged OCS claim, may be a source of title in another State's EEZ.

3 .13 Indeed, the flaw in Nicaragua's attempt to overturn the existing legal regime is made manifest in its own attempt to distinguish its OCS claim from any other claim to sustain legal title based on geology and geomorphology within 200 nautical miles from another State . In its Reply, Nicaragua attempts to justify its position by stating that

> "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."[76]

As Colombia demonstrated in its Counter-Memorial, and will reaffirm in Chapter 5 below, there are no areas in the Caribbean Sea that lie more than 200 nautical miles from the coasts of other States .Regardless of this fact, Nicaragua's reasoning here is a *petitio principii*. When the question is the legal cogency of a claim, Nicaragua's only answer is that the claim has been made out of necessity and for want of a better one.

3 .14 The legislative history of UNCLOS, the jurisprudence of the Court, State practice and doctrine all support the principle that the EEZ entitlement of one State may not be encroached upon by the alleged geology and geomorphology-based claim of another State . Natural prolongation, the foundation of an OCS claim, is only a source of title in areas that would otherwise be part of the common heritage of mankind, which lie beyond 200 nautical miles from *any* State .

3 .15 Nicaragua accepts, as the quote above shows, that within 400 nautical miles of opposing coasts, distance supersedes geology and geomorphology. For example, if the coasts are 400 nautical miles apart, while the natural prolongation of one State may extend 350 nautical miles, and the opposing State's natural prolongation extends only 25 nautical miles, since natural prolongation is not a source of title within the EEZ, the

[76] NR, para .5 65 .

delimitation would be effected, without regard to natural prolongation, by dividing their respective EEZ entitlements with an equidistance line (absent relevant circumstances):

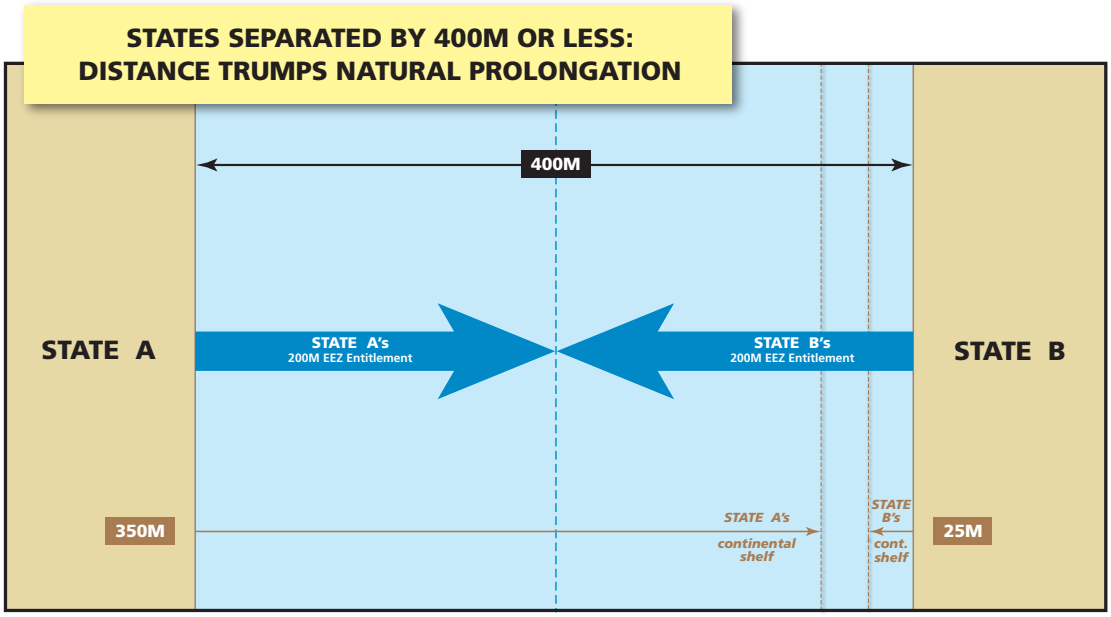


Figure CR 3.1

3 .16 According to Nicaragua, however, were the distance 401 nautical miles, "natural prolongation will necessarily be relied upon by at least one of the States as the basis of its claim",[77] within and beyond the other State's 200-nautical-mile range .

3 .17 Nicaragua's effort at "universalization" of its own exorbitant claim by means of the adverb "necessarily" should be rejected. It is a "necessary" claim only if a claimant has the temerity to bring a claim devoid of a respectable legal basis. The fact that it might be relied on by another such State does not

[77] NR, para .5 65 .

validate it .As Colombia established in the Counter-Memorial,[78] and will further elaborate below, State practice in both delimitation treaties and CLCS submissions clearly proves the opposite. Natural prolongation "necessarily" is *not* relied upon by States as a source of title within 200 nautical miles from another State. Nicaragua is in a tiny minority of States in making such an unlawful, unrecognised and excessive claim to title .

3 .18 Nicaragua muddles the distinction between the sources of title relating to the continental shelf within and beyond 200 nautical miles from coasts. Nicaragua claims that by increasing the distance by 1 nautical mile, natural prolongation springs back as a source of title within the entire area between the States and thus necessarily within "sea-bed areas less than 200 miles from the coast". To use Nicaragua's words, it is correct that when the coasts of the States are 401 nautical miles apart, "natural prolongation [may] be relied upon by at least one of the States as the basis of its claim",[79] provided that a natural prolongation beyond 200 nautical miles exists and both States are Parties to UNCLOS .Nicaragua is, however, mistaken about the "where". What Nicaragua misses is that natural prolongation could be relied upon in the 1 nautical mile of high seas, between the opposing EEZs of the two States. If the distance were 450 nautical miles, then natural prolongation would be relied upon in the 50 nautical miles between the EEZs, and so forth. To accept

78 CCM, Chapter 3 .
79 NR, para .5 65 .

Nicaragua's proposition would mean reverting to the old regime and creating potentially vast "grey" areas solely because the distance is 401 rather than 400 nautical miles .

3 .19 The extraordinary result of Nicaragua's position may be illustrated by a simple example: if the coasts are 401 nautical miles apart, and State A Party to UNCLOS has a 350-nautical-mile shelf and State B has a 25-nautical-mile shelf, instead of each State being recognised with title to 200 nautical miles of EEZ, and State A being recognised with 1 nautical mile of OCS, Nicaragua would have the Court separate between water column and seabed and draw, in respect of seabed rights only, an equidistance line between the 200-nautical-mile EEZ of State B and the 350-nautical-mile natural prolongation of State A . According to Nicaragua, since natural prolongation would spring back to an equal source of title within another State's 200-nautical-mile zone, in this example, State A will have an EEZ of 200 nautical miles, while State B will have an EEZ of only 125.5 nautical miles . In the middle will lie a huge "grey" area totalling 74 .5nautical miles, in which State A will possess seabed rights as part of the OCS regime and State B water column rights . State A will also have OCS rights to the 1 nautical mile in between . The unreasonableness of Nicaragua's proposed global order may be depicted:

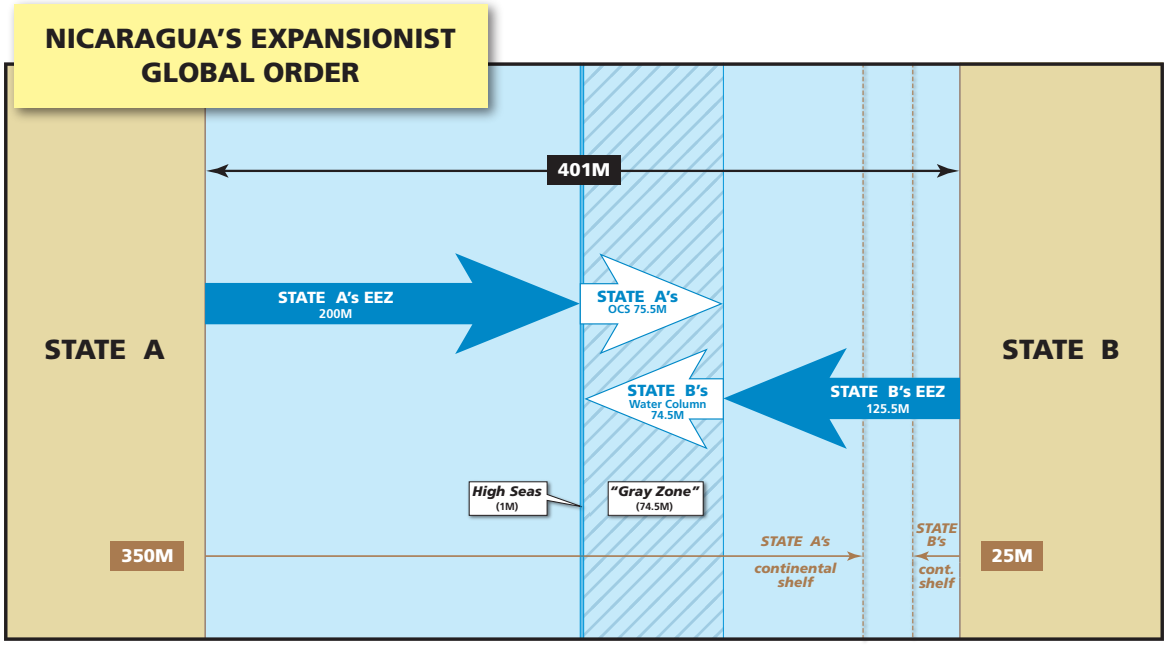


Figure CR 3.2

3 .20 The legal regime established as a result of UNCLOS III divided access to maritime resources so that each State is recognised to possess the exclusive title to such resources, based on the EEZ regime with its attendant continental shelf, up to 200 nautical miles from the baselines or until confronted by and delimited with another State's 200-nautical-mile EEZ. This division of access to resources was supplemented, under UNCLOS, by affording wide-shelf States the opportunity to utilise resources beyond 200 nautical miles, as part of the OCS regime, subject to revenue-sharing and the recommendations of a scientific commission.[80] Colombia has established this in the Counter-Memorial and will further elaborate on it below . For

[80] CCM, Chapter 2 .

the purposes of this section, however, it is sufficient to show that under this regime, natural prolongation, the basis of an OCS claim, is only a source of legal title *vers le large* and beyond 200 nautical miles from *any* State . An OCS claim cannot encroach upon the coastal State's EEZ entitlement to exclusively utilise the resources of the seabed and the subsoil up to 200 nautical miles .

3 .21 The legal principle that natural prolongation is not a source of title within 200 nautical miles from a State's coast, has been widely recognised and supported by legal scholarship. In the Counter-Memorial, Colombia has provided a thorough review of legal scholarship in support of this principle .[81] A few examples will suffice. Writing in 1989 in respect of the Court's decision in *Libya/Malta*, Professor Malcom D. Evans concluded that:

> "Natural prolongation would only provide the legal basis of title to a continental shelf where a geological shelf extended beyond 200 miles from *any* state, i .e. it would not conflict with a 200-mile zone drawn from the coast of another state".[82]

Similarly, Professor Thomas Cottier concluded that:

> "the EEZ includes full jurisdiction over shelf rights. While the shelf can exist independently, the EEZ necessarily includes the continental shelf. As

[81] CCM, Chapter 3, Section E.

[82] M. D. Evans, *Relevant Circumstances and Maritime Delimitation*, Oxford University Press, 1989, p. 51 (available at the Peace Palace Library).

> the Court phrased it: 'there can be a continental shelf where there is no exclusive economic zone, [but] there cannot be an exclusive economic zone without a corresponding continental shelf' . It is important to note that up to the 200 nm limit, the existence of the EEZ is no longer dependent upon the existence of a shelf in the physical sense. *Thus, to the extent of 200 nm, the doctrine of natural prolongation as a legal title to the shelf no longer applies under the definition of Article 76 of the 1982 Convention. Shelf rights therefore directly rely upon the EEZ.*"[83]

This conclusion was also supported by Judge Anderson[84] and Øystein Jensen.[85] Leonard Legault and Blair Hankey further explained that natural prolongation, "a legal concept expressive of the basis of title and of the outer limit of that title", is only relevant as a source of title, in areas which are beyond 200 nautical miles from *any* State:

---

[83] T .Cottier, *Equitable Principles of Maritime Boundary Delimitation*, Cambridge University Press, 2015, p. 123 (available at the Peace Palace Library). (Emphasis added)

[84] "Those recent developments about entitlement to shelf rights were crystallised in the *Libya/Malta* case, which concerned delimitation . The acceptance into the law of the distance criterion had a direct effect upon the law relating to the delimitation of the continental shelf. In the way in which there is no longer a role for geological or geophysical factors in establishing the entitlement of the coastal state, so also is there no role for those factors in delimiting the continental shelf within 200 nm of two or more coastal states… Where the case concerns boundaries which do not exceed 200 nm from the relevant coasts, the presence of submarine features such as channels, ridges, banks, troughs, caps or spurs should not affect a delimitation reached in accordance with the rules of international law: other principles and factors would be determinative", D. H. Anderson, "Some Recent Developments in the Law Relating to the Continental Shelf", *Journal of Energy and Natural Resources Law*, Vol. 6, 1988, pp. 96-97 (available at the Peace Palace Library).

[85] Ø. Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy,* Brill, 2014, pp .139-140 (available at the Peace Palace Library).

> "Where the physical continental shelf extends to a distance of less than 200 miles, natural prolongation is defined solely in terms of geographical adjacency measured from the coast, that is, by the distance criterion; *thus, title in respect of the continental shelf up to 200 miles from the coast is determined on precisely the same basis as title in respect of the economic zone* (although that zone does not require the doctrinal underpinning of 'natural prolongation' that is inherent in the concept of the continental shelf) . Where the physical continental shelf extends beyond 200 miles from the coast, natural prolongation is defined by a combination of geological-geomorphological and geographical or distance criteria."[86]

David A. Colson opined that "[f]ollowing the advent of the 200-nautical-mile zone, *Libya-Malta* held that such facts [geological and geomorphological factors] are not relevant because they *are unrelated to title in this zone* (…)".[87] That geological and geomorphological factors serve in delimitation of competing OCS claims is irrelevant in the EEZ. For instance, were two opposing States situated 500 nautical miles apart, natural prolongation would not be a source of title within 200 nautical miles from each State, but, *ceteris paribus*, could serve as a source of title *only* in the 100 nautical miles that lay between. If

---

[86] L. H. Legault and B. Hankey, "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case", *American Journal of International Law*, Vol. 79, 1985, pp. 982-983 (available at the Peace Palace Library). (Emphasis added)

[87] D. A. Colson, "The Delimitation of the Outer Continental Shelf between Neighboring States", *American Journal of International Law*, Vol. 97, 2003, pp . 102-103 (available at the Peace Palace Library). (Emphasis added)

State A has a 400-nautical-mile shelf and State B has a 50-nautical-mile shelf, were State A an UNCLOS Party, the natural prolongation of State A could, if scientifically proven, only serve it as a source of title within the 100 nautical miles between their respective 200-nautical-mile entitlements, and not within the 200-nautical-mile entitlement of State B. Such scenarios were discussed in legal scholarship, all reaching the same conclusion.[88]

3.22 Nicaragua has failed to produce a shred of evidence, from either legal scholarship or jurisprudence to support its claim that natural prolongation, the foundation of an OCS claim, may serve as a source of title within the 200-nautical-mile EEZ of another State.

3.23 Nicaragua claims that the established legal principle which prescribes that its natural prolongation does not serve as a source of title within 200 nautical miles from Colombia is an "extreme position" as it "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",[89] or the customary international law regime of the EEZ, which is the source of title within 200 nautical miles of Colombia. With respect, it is Nicaragua's claim that is extreme. It is hardly "extreme" to conclude that a State geographically located hundreds of miles away may not claim an entitlement to

[88] CCM, paras. 3.89-3.91; Ø. Jensen, footnote 85 *supra*, p. 142; D.A. Colson, footnote 87 *supra*, p. 103.
[89] NR, para. 5.48.

an area within another State's 200-nautical-mile entitlements . In the same sense, it would be unthinkable for a State to claim an EEZ with its attendant continental shelf within 12 nautical miles from another State, as the EEZ regime is not a source of title within another State's territorial sea. Similarly, natural prolongation, upon which an OCS claim must be founded, does not serve as a source of title within 200 nautical miles from another State's baselines. There is nothing "extreme" in saying that there may be different sources of title within different areas of the oceans .

3 .24 Colombia does not request the Court to create any new rules or to alter existing rules, but only to give effect to an existing principle of customary international law: natural prolongation does not serve as a source of title within the 200-nautical-mile EEZ of *any* State . This principle has been given effect and followed by the great majority of States and is manifest in the negotiating history of UNCLOS. As Colombia established in the Counter-Memorial and will recall below, States have respected this principle in both delimitation practice and CLCS submissions .

(2) State Practice Follows the Principle that Natural Prolongation is not a Source of Title within the 200-Nautical-Mile EEZ and its Attendant Continental Shelf of any State

3 .25 As Colombia showed in the Counter-Memorial, a review of State practice demonstrates that when the coasts of two or

more States are opposite, the vast majority of States have abided by the principle that natural prolongation is not a source of title within 200 nautical miles from another State's coast, irrespective of the distance between the coasts .

3 .26 In this section of the Rejoinder, Colombia will respond to Nicaragua's attempts to sow doubts about the body of practice which Colombia assembled . It will first respond to Nicaragua's claims in respect of delimitations and then in respect of CLCS practice .

(a) Delimitation Practice Follows the Principle that Natural Prolongation is not a Source of Title within 200 Nautical Miles from Any State's Baselines

3 .27 Nicaragua's main argument in this respect is not that there is a general practice which supports its purported claim of title based upon natural prolongation within another State's EEZ. Rather it makes several more oblique claims: (1) Nicaragua purports to label all practice within 400 nautical miles as irrelevant;[90] (2) because there are a few negotiated exceptions, Nicaragua argues that Colombia did not prove existing State practice;[91] and (3) Nicaragua argues that the practice shown by Colombia only demonstrated what the States considered to be the equitable delimitation in those cases .[92] Each of these arguments proves, on examination, to be unfounded.

---

90 NR, para .5 55 .
91 NR, para .5 66 .
92 NR, paras .5 57 and 5 63 .

3.28 Nicaragua's first argument, that practice within 400 nautical miles is irrelevant, rests upon the same flawed logic as its argument that once the distance between the coasts becomes 401 nautical miles, the regime governing the entire area reverts to the pre-EEZ regime, and natural prolongation springs back as a source of title within the *entire* area. Nicaragua must label such practice irrelevant precisely because it shows that States accept that the EEZ entitlement with its attendant continental shelf prevails over another State's natural prolongation within 200 nautical miles from *any* State's baselines.[93] Contrary to Nicaragua's assertion, practice demonstrates that States followed the principle that natural prolongation does not serve as a source of title within 200 nautical miles from any State's baselines.

3.29 In the Counter-Memorial, Colombia provided an extensive review of State practice both within and beyond 200 nautical miles from States. Colombia respectfully refers the Court to Section C of Chapter 3 of the Counter-Memorial. Confronted with that wealth of evidence, Nicaragua argues that because of a few *quid pro quo* deviations, Colombia has failed to demonstrate State practice. There are two responses to this. First, Nicaragua attempts here to reverse the burden of proof. It has failed to establish that under customary international law its alleged geological and geomorphological-based OCS claim, even if legally proven (*quod non*), can be a source of title within

[93] CCM, Chapter 3, Section C.

another State's 200-nautical-mile entitlements. Second, as explained above,[94] under international law, it is sufficient to establish general practice; there is no requirement of unanimity.

3.30 Nicaragua's main argument is that delimitation practice indicates only what the States considered equitable in those circumstances.[95] According to Nicaragua, the fact that the vast majority of delimitation examples did not recognise natural prolongation as a source of title within 200 nautical miles from another State's baselines, simply reflects the equitable nature of the delimitation achieved in those instances, while in other instances (which are not identified), natural prolongation may serve as a source of title within another State's EEZ. That is incorrect and represents a misconception of the notion of State practice.

3.31 State practice shows that in their delimitation agreements, States have accepted the principle that natural prolongation is not a source of title within 200 nautical miles from another State's baselines. As Colombia demonstrated in its Counter-Memorial, this predominant practice is evident both when the area was confined to 200 nautical miles from each State and also in delimitations involving claims beyond 200 nautical miles from each State.[96] The practice shows that States

---

94 See Chapter 2.

95 NR, paras. 5.57, 5.63.

96 CCM, Chapter 3, Section C. A comprehensive record and analysis of delimitation practice may be found in J. Charney and L. Alexander, *International Maritime Boundaries*, Vol. I – Vol. VII, 1993-2016, (hereinafter, "*International Maritime Boundaries*").

do not consider their natural prolongation to constitute a source of title within the 200-nautical-mile entitlements of another State .

3 .32 Nicaragua submits that practice within 200 nautical miles from both States, which is based solely on the distance criterion as a basis for title, is irrelevant for an EEZ versus natural prolongation claim. Nicaragua, however, ignores why State practice within 200 nautical miles did not consider geology and geomorphology as relevant. If natural prolongation was, as Nicaragua claims, a valid source of legal title within 200 nautical miles from another State's baselines, then States would have claimed such title, whether the distance between the coasts was more or less than 400 nautical miles . But State practice shows that even when natural prolongation could have been raised as a possible basis for a claim of title within 200 nautical miles from another State, States did not take geological and geomorphological factors into account,[97] precisely because it

[97] *International Maritime Boundaries*, Vol. I, *Colombia-Dominican Republic*, Rep . 2-2, 477; *Ibid.,* Vol. I, *Colombia-Honduras*, Rep . 2-4, 503; *Ibid.,* Vol. I, *Cuba-Haiti*, Rep .2-7, 551; *Ibid.,* Vol. I, *Cuba-Mexico*, Rep .2-8, 565; *Id.,* Vol. I, *France (Martinique)-Saint Lucia*, Rep . 2-10, 591; *Ibid.,* Vol. I, *France (Guadeloupe and Martinique)-Venezuela*, Rep .2-11, 603; *Id.,* Vol. I, *Trinidad and Tobago-Venezuela*, Rep . 2-13(2), 655; *Ibid.,* Vol. I, *Trinidad and Tobago-Venezuela*, Rep . 2-13(3), 675; *Ibid.,* Vol. I, *United States (Puerto Rico and the Virgin Islands)-Venezuela*, Rep .2-14, 691; *Ibid.,* Vol. I, *Dominica-France (Guadeloupe and Martinique)*, Rep . 2-15, 705; *Ibid.,* Vol. I, *Argentina-Uruguay*, Rep .3-2, 757; *Id.,* Vol. I, *Australia-France (New Caledonia)*, Rep . 5-1, 905 (equidistance was used for the area within and beyond the 200-nautical-mile EEZ); *Id.,* Vol. I, Australia-Solomon Islands, Rep . 5-4, 977; *Id.,* Vol. II, *Australia (Heard/McDonald Islands)-France (Kerguelen Islands)*, Rep . 6-1, 1185 (equidistance was used within and beyond the EEZ); *Id.,* Vol. II, *India-Maldives*, Rep .6-8, 1389; *Id.,* Vol. II, *India-Thailand*, Rep . 6-11, 1433; *Id.,* Vol. II, *Italy-Tunisia*, Rep . 8-6, 1611; *Id.,* Vol. III, *Colombia-Jamaica*, Rep .2-18, 2179; *Id.,* Vol. III, *Cuba-*

was understood that natural prolongation was not a source of title within 200 nautical miles from another State's baselines. For example, this is evident in the delimitation between Denmark and Norway, in which the Parties did not accord the significant geological and geomorphological features any part in the delimitation of their respective titles, which were based, solely, on their 200-nautical-mile overlapping entitlements.[98]

3.33 In similar circumstances in the delimitation between the United Kingdom and Denmark,[99] Jonathan Charney and Robert Smith comment that:

> "From a geomorphological point of view, the Faroe Islands are divided from Scotland by the Faroe-Shetland Channel, but this feature does not represent a major break in the continental shelf.

Jamaica, 2205; *Id.,* Vol. III, *Dominican Republic-United Kingdom (Turks and Caicos Islands)*, Rep. 2-22, 2235; *Id.,* Vol. III, *Cape Verde-Senegal*, Rep. 4-8, 2279; *Id.,* Vol. III, *Papua New Guinea-Solomon Islands*, Rep. 5-16(2), 2323; *Id.,* Vol. III, *Denmark-Netherlands*, Rep. 9-18, 2497; *Id.,* Vol. III, *Finland-Sweden (Bogskär Area)*, Rep. 10-13, 2540; *Id.,* Vol. IV, *United States-Mexico*, Rep. 1-5(2), 2621 (equidistance was used to delimit the area both within and beyond the 200-nautical-mile zone) (in the initial report 1-5, Vol 1, it was stated that there were no relevant geological or geomorphological features that could have offset the equidistance line, this report only deals with the OCS) *Id.,* Vol. IV, *Oman-Pakistan*, Rep. 6-17, 2809; *Id.,* Vol. IV, *Bulgaria-Turkey*, Rep. 8-13, 2871; *Id.,* Vol. IV, *Belgium-Netherlands*, Rep. 9-21, 2921; *Id.,* Vol. IV, *Denmark (Greenland)-Iceland*, Rep. 9-22, 2942; *Id.,* Vol. V, *Cameron-Nigeria*, Rep. 4-1 (add. 2), 3605; *Id.,* Vol. VI, *Mauritius-Seychelles*, Rep. 6-22, 4391; *Id.,* Vol. VI, *Denmark/Greenland-Norway (Svalbard)*, Rep. 9-25, 4513; *Id.,* Vol. VII, *Bahamas-Cuba*, Rep. 2-23, 4721 (because the area was comprised by overlapping EEZs and territorial sea, OCS claims had no effect of the delimitation); *Id.,* Vol. VII, *Kenya-Tanzania*, Rep. 4-5(2), 4781; *Id.,* Vol. VII, *Cook Islands-New Zealand (Tokelau)*, Rep. 5-43, 4973.

[98] *International Maritime Boundaries,* Vol. VI, *Denmark/Greenland-Norway (Svalbard)*, Rep. 9-25, 4513, 4524.

[99] *International Maritime Boundaries*, Vol. IV, Denmark (Faroe Islands)-United Kingdom, Rep. 9-23, 2956.

> Moreover, as the Channel lies within the 200 n m . limits of the two sides, geomorphology would not have had a role to play in the delimitation".[100]

3 .34 The Court should take account of State practice within 200 nautical miles from both States . Such practice relates precisely to the example of 400 nautical miles between the coasts, with State A having a 350-nautical-mile physical shelf and State B having 25-nautical-miles of shelf . Were the Court now to revise the law and accept Nicaragua's proposition that one State may claim title based on natural prolongation, i.e., an alleged OCS, within another State's 200-nautical-mile entitlements, then in the above example, the natural prolongation of State A may serve as title within State B's 200-nautical-mile entitlements . This would diverge from State practice, which, in such scenarios, shows precisely the opposite.

3 .35 This principle is also evidenced by cases where the distance between the coasts exceeded 400 nautical miles.[101] State practice shows that States do not consider their geological and geomorphological OCS claim as a source of title within another State's 200-nautical-miles entitlements .[102] In the Denmark

---

100 *International Maritime Boundaries*, Vol. IV, Denmark (Faroe Islands)-United Kingdom, Rep .9-23, 2956 .

101 CCM, Chapter 3, Section C .

102 Until today the treaties which delimited the OCS are: *International Maritime Boundaries*, Vol. VII, *Denmark (Greenland)-Iceland*, Rep . 9-22 (2), 5259; *Id.,* Vol. V, *Australia-New Zealand*, Rep .5-26, 3759; *Id.,* Vol .I, *Australia-France (New Caledonia)*, Rep .5-1, 905 (the parties delimited the entire area including beyond the 200-nautical-mile distance using the equidistance method); *Id.,* Vol. I, *Trinidad and Tobago-Venezuela*, Rep .2-13(3), 675; *Id.,* Vol. I, *Australia-Solomon Islands*, Rep . 5-4, 977 (the delimitation used equidistance and began beyond the 200 nautical miles of

(Greenland) and Iceland delimitation, Iceland's claim terminated at Greenland's 200-nautical-mile entitlement and not at the edge of its natural prolongation.[103] The delimitation between Australia and New Zealand is especially instructive, as Colombia explained in the Counter-Memorial:[104] In that delimitation, natural prolongation was not used as a source of title within each State's 200-nautical-mile entitlement. On the contrary, each State was recognised as having as a minimum 200-nautical-mile entitlements from both mainland and islands, regardless of any geological or geomorphological considerations.[105] Only where the distance was greater than 200 nautical miles from *both* coasts, did natural prolongation play a role in the delimitation.[106] This is fully in conformity with the rules concerning title to the continental shelf embodied in Article 76 (1) of UNCLOS, and is evident from the official map published by the Parties:[107]

---

each State); *Id.,* Vol. II, *Australia (Heard/McDonald Islands)-France (Kerguelen Islands)*, Rep. 6-1, 1185 (equidistance was used when the line extended beyond their respective 200-nautical-mile zones); *Id.,* Vol. VI, *Denmark/The Faroes-Iceland-Norway*, Rep. 9-26, 4532; *Id.,* Vol. VI, *Barbados-France (Guadeloupe and Martinique),* Rep. 2-30, 4223; *Id.,* Vol. I, *Argentina-Uruguay*, Rep. 3-2, 757 (1973).

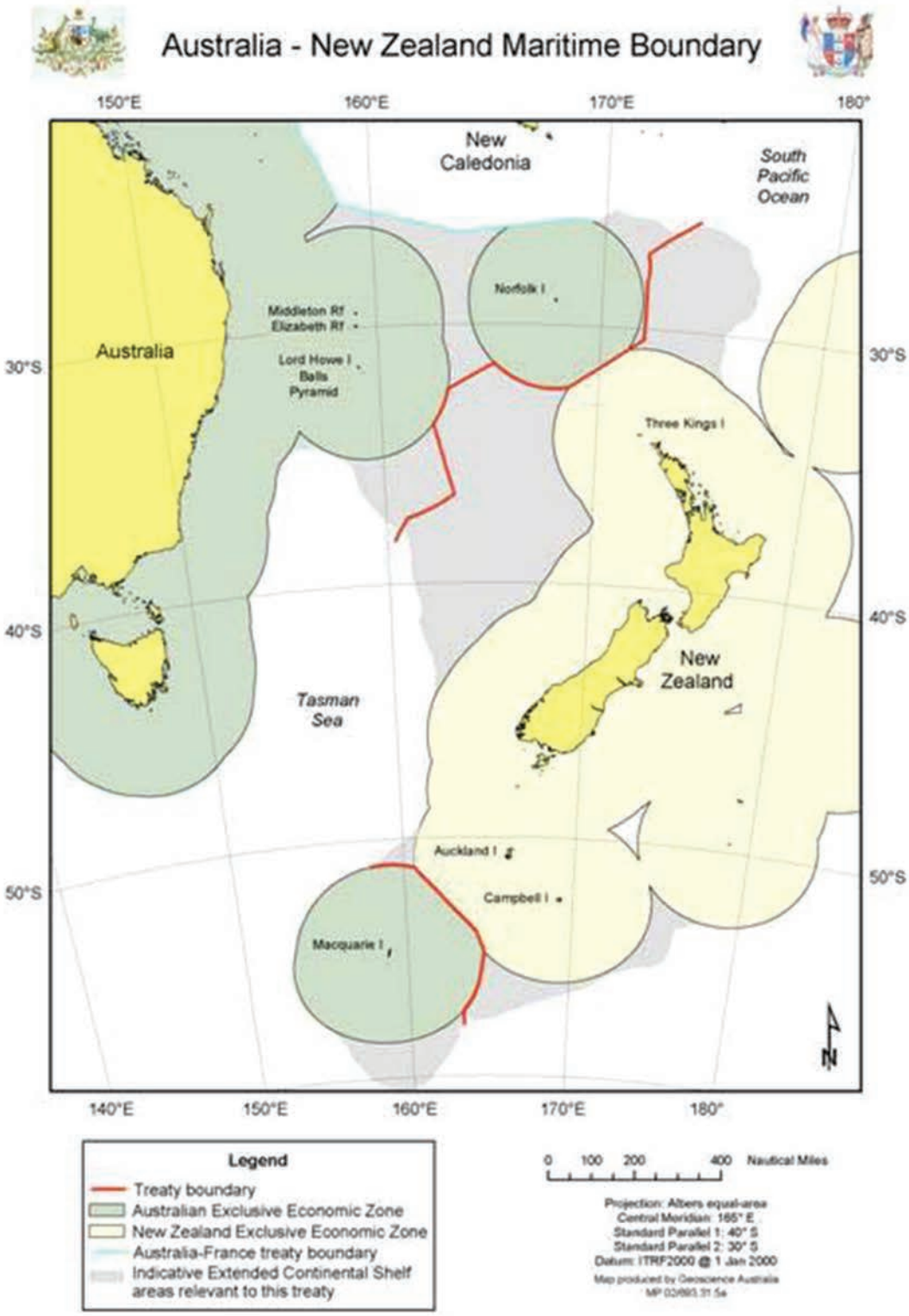
[103] See map in *International Maritime Boundaries*, Vol. VII, *Denmark (Greenland)-Iceland*, Rep. 9-22 (2), 5259, 5268.

[104] CCM, paras. 3.49 - 3.51.

[105] *International Maritime Boundaries*, Vol. V, *Australia-New Zealand*, Rep. 5-26, 3759. See also V. Prescott and G. Triggs, "Islands and Rocks and their Role in Maritime Delimitation", *International Maritime Boundaries*, Vol. V, 3245; C. Yacouba and D. McRae, "The Legal Regime of Maritime Boundary Agreements", *International Maritime Boundaries*, Vol. V, 3281, 3289.

[106] *International Maritime Boundaries*, p. 3764.

[107] Land Information New Zealand, "Exclusive Economic Zone & continental shelf boundaries between New Zealand & Australia", available at: http://www.linz.govt.nz/sea/nautical-information/maritime-boundaries/exclusive-economic-zone-continental-shelf-boundaries-between-new-zealand-australia (last visited 21 Jan. 2019). See also *International Maritime Boundaries,* p. 3767.



Source: http://www.linz.govt.nz/sea/nautical-information/maritime-boundaries/exclusive-economic-zone-continental-shelf-boundaries-between-new-zealand-australia

Figure CR 3.3

3 .36 Thus, in general State practice, States have refrained from according natural prolongation any consideration in respect of title in so far as seabed areas less than 200 nautical miles from the coast are concerned . This principle was followed regardless of the distance between the coasts involved .It seems that States, with the exception of only four, including Nicaragua, have not claimed maritime areas which lie beyond 200 nautical miles from their coastline and within 200 nautical miles of another State's coastline .

3 .37 Contrary to Nicaragua's misrepresentation, general State practice clearly demonstrates that distance and natural prolongation based on geology and geomorphology are not equal sources of title. Within 200 nautical miles from the coast, the Law of the Sea prescribes that distance, i.e., the EEZ with its attendant continental shelf, is the *sole* source of legal title, while natural prolongation cannot serve as a competing source of title . Natural prolongation may only serve as a possible source of legal title in areas beyond 200 nautical miles from *any* State . Nicaragua has failed to produce any State practice to support its proposition that natural prolongation may serve as a source of title within 200 nautical miles from another State .

(b) Submissions to the CLCS are Consistent with the Principle that Natural Prolongation is not a Source of Title within 200 Nautical Miles from Any State

3 .38 Nicaragua contends that the significant body of State practice confining geological and geomorphological OCS claims

to areas situated beyond 200 nautical miles from any State does not reflect recognition that natural prolongation cannot be a source of title within 200 nautical miles from *any* State, but, rather, is only a series of case-specific choices of the States concerned. Aside from the fact that that is precisely the essence of State practice, Nicaragua attempts to explain such choices on the ground that otherwise the CLCS would not have reviewed the applications had there been a conflict.[108] In essence, Nicaragua's explanation for why States refrained from claiming title was to avert a conflict of entitlements and prolonged CLCS disposal of their applications. Nicaragua wants the Court to believe, without a shred of evidence, that 31 States,[109] relinquished their "inherent right" to potentially vast OCS resources, in favour of another State to avoid a dispute with another State.

3.39 In the face of a total number of at least 230 delimitation treaties and judgments in force worldwide,[110] out of which nine treaties delimited conflicting OCS claims,[111] it strains credulity to suggest that 31 States,[112] while believing that they had a legitimate source of title to the seabed and subsoil within

---

108 NR, para. 5.62.

109 CCM, Annex 50.

110 As of 2016, see *International Maritime Boundaries* Vol. VII, Regional Maps (Region 1, North America, six delimitations; Region 2, Caribbean Sea 33 delimitations; Region 3, South America, 10 delimitations; Region 4, Africa, 19 delimitations; Region 5, Central Pacific and East Asia, 44 delimitations; Region 6, Indian ocean, 30 delimitations; Region 7, Persian Gulf, 14 delimitations; Region 8, Mediterranean Sea, 22 delimitations; Region 9, Northern Europe, 27 delimitations; Region 10, Baltic Sea, 21 delimitations; Region 11, Caspian Sea, four delimitations).

111 See footnote 102 *supra*.

112 CCM, Annex 50.

another State's EEZ, simply relinquished such title in return for nothing . According to Nicaragua, while these States negotiated numerous delimitation treaties with other States,[113] they relinquished title instead of negotiating another treaty. The States that Nicaragua claims to have willingly relinquished their purported "inherent" OCS rights in another State's EEZ supposedly in order to avoid a "conflict" with other States, include the United Kingdom, France, Spain, Canada, Japan and Australia .[114]

3 .40 As Colombia showed in its Counter-Memorial, 31 States could have claimed an OCS within another State's EEZ but refrained from doing so. Only China, the Republic of Korea, Somalia and, of course, Nicaragua, submitted OCS claims which encroached upon another State's EEZ. These claims have not been recognised and were objected to by the directly affected States, i e , Japan, Yemen, Costa Rica, Panama, Jamaica and Colombia .[115]

---

[113] *International Maritime Boundaries*, Vol. VII, Country-by-Country Index, 5289. *E.g.* The Russian Federation negotiated 25 maritime delimitation treaties; France 36; the United Kingdom 27; Norway 24; and Australia 14 .

[114] Other States include Iceland, Norway, New Zealand, Denmark, Pakistan, Yemen, Cook Islands, Fiji, Ghana, Micronesia, Papua New Guinea, Solomon Islands, Palau, Côte d'Ivoire, Sri Lanka, Portugal, Tonga, Trinidad and Tobago, Mozambique, Maldives, Tanzania, Gabon, Kiribati, Bahamas and Liberia .See CCM, Annex 50.

[115] Permanent Mission of Japan, Communication dated 28 December 2012 to the CLCS, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_28_12_2012 pdf (last visited 21 Jan. 2019); Permanent Mission of the Republic of Yemen, Communication to the CLCS dated 10 December 2014, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/som74_14/2014_12_10_YEM_NV_UN_001_14.pdf (last visited 21 Jan. 2019).

3 .41 The three additional examples presented by Nicaragua in the Reply are irrelevant. The submission of Bangladesh followed two judicially-made maritime delimitations . The Russian submission in respect of the area delimited with Norway follows a *quid pro quo* delimitation in which Norway transferred to Russia the water column rights in the small grey area created due to their delimitation . As with Australia and Indonesia,[116] when the entire area to be delimited lies within 200 nautical miles of their respective coasts, States may, absent a *jus cogens*, create a *lex specialis*, deviating from established rules and practices in *quid pro quo* agreements; they can transfer title as part of such agreements .In all such cases, conflicting titles in the entire delimited area were resolved with certain exchanges between the States .

3 .42 Nicaragua's third purported example of encroachment of the EEZ of one State by *another* State's OCS claim is found, to quote Nicaragua, in "Australia's submission and the CLCS recommendation concerning Heard and McDonald Islands [which] indicate that the OCS extends into the 200 M zone of the Australian Antarctic Territory ."[117] The irrelevance of this example to this case is evident: it involved a single State.

3 .43 The review of CLCS submissions shows that they are consistent with the legislative history of UNCLOS, doctrine and

116 CCM, paras .3 58-3 59 .
117 NR, para .5 61 .

practice . As with delimitation treaties, the review of CLCS submissions demonstrates that except for a few excessive claims, States, presented with this choice, did not consider their natural prolongation to be a source of title within another State's 200- nautical-mile EEZ. As Colombia explained in the Counter-Memorial, and will review below, this principle is confirmed by the legislative history of UNCLOS.

(3) The Legislative History of UNCLOS Shows that the OCS Was Only Intended to Encroach upon the Area and not upon the EEZ of another State

3 .44 Nicaragua simply asserts that Colombia's review of the legislative history presents no evidence that the negotiating States considered that the OCS should not encroach upon another State's EEZ but only upon the Area.[118] Colombia respectfully refers the Court to Chapter 3 of its Counter-Memorial which provides an extensive analysis of the negotiating history. It shows that the negotiating States never considered this additional grant to wide-shelf States in return for revenue-sharing as a potential source of title within another State's 200-nautical-mile EEZ, with its attendant continental shelf .[119] The OCS was intended only to extend to seabed and subsoil that would have otherwise been part of the common heritage of mankind .[120]

---

118 NR, para .5 40 .

119 CCM, Chapter 3, Section B .

120 See CCM, Chapter 3, Section B; see also UNCLOS III, Vol. II, Summary Records of Meetings of the First, Second and Third Committees, Second Committee, Second Session, 20th Meeting, available at:

3 .45 As explained in the Counter-Memorial, the OCS was considered supplemental to the EEZ; States, including the United States and the USSR, deemed the OCS to lie beyond the EEZ.[121] The continental shelf within 200 nautical miles was considered by many to have been absorbed by the EEZ regime

---

http://legal.un.org/diplomaticconferences/1973_los/ (last visited 21 Jan. 2018) ("Second Committee Meetings"), Ghana, para. 65. (Emphasis added). See also, UNCLOS III, Official Records, Vol. I – Vol. XVII, Summary records of meetings of the Plenary, available at: http://legal.un.org/diplomaticconferences/1973_los/ (last visited 21 Jan. 2019) ("UNCLOS Plenary Meetings"), 127th Plenary Meeting, Yugoslavia, para .5 ("Turning to the proposed articles 76 and 82, he pointed out that his delegation, as well as those of the group of Arab States and many other States, had favoured a 200-mile limit for the continental shelf. Their willingness to negotiate another limit had not been reciprocated by the broad-margin States. Proposals to increase the rate of payments or contributions with respect to the exploitation of the shelf had not been examined. Only if the international community benefited substantially from the exploitation of the continental shelf beyond the 200-mile limit could the extension of the shelf régime be justified. Payments and contributions should be made to the Authority, and in that context the proposed common heritage fund could play a useful role serving the interests of all States."); *Id.,* 116th Plenary Meeting, Canada, para. 39 ("The Canadian delegation had been the first to propose a revenue-sharing system which it regarded as an essential element in any over-all compromise on the definition of the outer edge of the continental margin").

[121] See UNCLOS Documents, Informal Suggestion by the USSR, Part VI, Article 76, C 2 Informal Meeting/14, 27 April 1978, Vol. V, p. 20. See also *Ibid.*, United States: draft articles for a chapter on the economic zone and the continental shelf, UN Doc A/CONF 62/C 2/L 47, Article 22 (2), Vol. V, pp. 165, 167; *Ibid.*, Proposal by Austria, Article 63 bis, Informal Single Negotiating Text, Part II ("ISNT"), April 28, 1976, Vol. IV, p. 323; *Ibid.*, Proposal by the Netherlands, Article 82, Informal Composite Negotiating Text ("ICNT"), 17 April 1979, Vol. IV, p. 516; *Ibid.*, Proposal by the Federal Republic of Germany, Article 76 and Annex II, ICNT, Revision 2, 5 August 1980, Vol. IV, p. 527; UNCLOS III, Official Documents, Second Committee Meetings, 17th Meeting, UN Doc A/CONF 62/C 2/SR 17, para .3 (Finland); *Ibid.*, para. 32 (Spain); *Ibid.*, 116th Plenary Meeting, UN Doc A/CONF 62/SR 116, para .51 (USSR); *Ibid.,* para .63 (United States) (differentiating between the regime of scientific research within the EEZ and in the OCS beyond it); *Ibid.*, 164th Plenary Meeting, UN Doc A/CONF 62/SR 164, para. 158 (Algeria); *Ibid.*, 128th Plenary Meeting, UN Doc A/CONF 62/SR 128, para. 167 (Kenya).

and superfluous;[122] some proposed to abolish the concept of the continental shelf altogether .[123] Geological and geomorphological features were thus considered by most States to be irrelevant within 200 nautical miles from the baselines .[124]

3 .46 The legislative history demonstrates that the compromise between broad margin and narrow margin States was a *quid pro quo*: any sovereign rights to exploit the resources of the OCS, which would have otherwise been part of the Area, were recognised in return for revenue-sharing and subject to

---

122 CCM, paras .3 .17-3 18; see e g .UNCLOS III, Official Documents, Second Committee Meetings, 17th Meeting, UN Doc A/CONF 62/C 2/SR 17, para .3 (Finland); *Ibid*., 28th Plenary Meeting, UN Doc A/CONF 62/SR 28, para . 52 (Congo); *Ibid*., UN Doc A/CONF 62/SR 35, 35th Plenary Meeting, para. 21 (Switzerland); *Ibid*., 37th Plenary meeting, UN Doc A/CONF 62/SR 37, para .56 (Malta); *Ibid*., 40th Plenary Meeting, UN Doc A/CONF 62/SR 40, para .28 (Guinea-Bissau) .

123 CCM, para .3 22 .

124 CCM, para .3 19; see Virginia Commentary, Vol. II, pp. 841, 874; UNCLOS Documents, Informal Suggestion by the USSR, Part VI, Article 76, C 2 Informal Meeting/14, 27 April 1978, Vol. V, p. 21; *Ibid.*, Canada, Article 62 (RSNT II), Vol IV, p. 467; *Ibid.*, Spain, Articles 62 and 71 (RSNT II), Vol IV, p. 467; *Ibid.*, Algeria, *et al*, Articles 62 and 71, Revised Single Negotiating Text ("RSNT"), Revision II, Vol. IV, p. 468; *Ibid.*, Netherlands: draft article on delimitation between States with opposite or adjacent coasts, UN Doc A/CONF 62/C 2/L 14, Vol. V, pp. 133-4; *Ibid.*, Romania: draft articles on delimitation of marine and ocean space between adjacent and opposing neighbouring States and various aspects involved, UN Doc A/CONF 62/C 2/L 18, Vol. V, pp. 138-9; *Ibid.*, Greece: draft articles on the continental shelf, UN Doc A/CONF 62/C 2/L 25, Vol. V, p. 145; *Ibid.*, Japan: revised draft article on the continental shelf, UN Doc A/CONF 62/C 2/L 31/Rev 1, Vol. V, p. 154; *Ibid.*, Greece: draft article on the exclusive economic zone beyond the territorial sea, UN Doc A/CONF 62/C 2/L 32, Vol. V, p. 154; *Ibid.*, Ireland: draft article on delimitation of area of continental shelf between neighbouring States, UN Doc A/CONF 62/C 2/L 43, Vol. V, p. 163; *Ibid.*, France: draft articles on the delimitation of the continental shelf or the exclusive economic zone, UN Doc A/CONF 62/C 2/L 74, Vol. V, p. 181; UNCLOS III, *Official Records*, Second Committee Meetings, 20th Meeting, UN Doc A/CONF 62/C 2/SR 20, paras . 60-61 (Federal Republic of Germany).

validation and review by an independent commission composed of scientists .[125]

3 .47 This understanding of the different sources of titles makes perfect sense. After securing title to maritime zones which lay 200 nautical miles from the coast, no reasonable negotiator would have relinquished such title, in favour of wide-margin States, for a fraction of the contingent revenue-sharing obligation. As Pakistan stated during the negotiations:

> "It would (…) be prepared to give sympathetic consideration to other proposals based on geomorphological considerations [for the OCS] *so long as they did not cause prejudice to the rights and jurisdiction of the continental coast states which the concept of the economic zone or* patrimonial sea sought to establish".[126]

3 .48 In summary, as was explained in the Counter-Memorial, the negotiating history of UNCLOS, shows that the OCS entitlement was a concession to wide-margin States in return for revenue sharing . Claiming continental shelf rights, based on geology and geomorphology, was only recognised by the Conference in areas which lay beyond 200 nautical miles from *any* State and which would otherwise have been part of the Area .

---

125 CCM, para .3 25 .

126 Second Committee Meetings, 18th Meeting, Pakistan, para . 74 . (Emphasis added)

(4) THE PRINCIPLE THAT NATURAL PROLONGATION IS NOT A SOURCE OF TITLE WITHIN 200 NAUTICAL MILES FROM ANOTHER STATE'S BASELINES WAS CONFIRMED BY THE COURT IN *LIBYA/MALTA*

3 .49 Nicaragua is correct that *Libya/Malta* concerned an area which lay within 200 nautical miles from the respective coasts. Nicaragua, however, fails to understand the *ratio legis* of the Court's decision, or the basic principle it confirmed .

3 .50 While Nicaragua makes multiple references to the Court's statements in the 2012 Judgment, it treads carefully around and fails to quote the 1985 decision in *Libya/Malta*, to which the Court approvingly refers in the same statements. Nicaragua's omission is telling, for in *Libya*/*Malta*, the Court states, as a principle of law, that within 200 nautical miles from a State's baselines, geology and geomorphology, the essence of an OCS claim, are no longer a source of legal title:

> "The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims . *This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of*

> *any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial.* It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that *no geophysical feature can lie more than 200 miles from each coast*, the feature referred to as the 'rift zone' cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary."[127]

The Court then quotes from the *North Sea Continental Shelf* and *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* cases, and explains that the regime in which natural prolongation, i.e., geology and geomorphology, was a source of title within 200 nautical miles from a State's baselines, is now a relic of the past:

> "However to rely on this jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, *it finds warrant for doing so in a régime of the title itself which used to allot those factors a place which now belongs to the past, in so far as sea-bed areas less than 200 miles from the coast are concerned*."[128]

As the Court explained, under the current regime of titles, for geological and geomorphological features to be relevant in

---

[127] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 35, para. 39. (Emphasis added)

[128] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 36, para. 40. (Emphasis added)

respect of legal title, they must "lie more than 200 miles *from each coast*".[129]

3 .51 Nicaragua fails to present State practice or doctrine which supports its claim that natural prolongation, the foundation of an OCS claim, serves as a source of title within 200 nautical miles from a State's baselines . Its failure is understandable .Such a proposition would go against the Court's dictum quoted above .

3 .52 While *Libya/Malta* concerned areas that were within 400 nautical miles from coasts, whether within 200 nautical miles from a State, or beyond that distance as an OCS claim, a State's natural prolongation is not a source of title within 200 nautical miles from another State's baselines .

C. From Grey Areas to Grey "Zones": The Absence of Title Based on Natural Prolongation within 200 Nautical Miles from Any State's Baselines Fosters the Orderly Management of Ocean Resources

3 .53 In its Reply, Nicaragua did not address the question of grey areas, a matter relevant to its case which Colombia had treated in depth. Nicaragua only claims that grey areas are "legally possible"[130] and states that:

---

[129] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 35, para. 39. (Emphasis added)

[130] NR, para .5 58 .

> "Nicaragua does not argue that gray zones [*sic*] 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."[131]

3 .54 The proposition that natural prolongation may serve as a source of title within another State's EEZ entails the creation of a potentially coextensive grey area. But rather than a device reluctantly resorted to in confined situations, Nicaragua aspires to create a new type of maritime zone in international law, which it aptly calls a "gray *zone*." The use of the neologism "gray zone" rather than a "grey area" is telling. Grey areas, as Colombia explained in the Counter-Memorial, are small abnormalities created due to extreme geographical constraints;[132] what Nicaragua proposes is for the Court to recognise as legitimate, arrangements which require the creation of large-scale "grey zones", in which water column rights are arbitrarily separated from seabed rights, potentially over all of a State's EEZ. This is unprecedented and should be rejected.

3 .55 Under the current regime of access to maritime resources in the area within 200 nautical miles from the coasts in question, natural prolongation cannot serve as a source of title.[133] Therefore, within a State's 200-nautical-mile areas, the

---

131 NR, para .5 59 .

132 CCM, Chapter 3, Section C .

133 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp .35-36, paras .39-40 .

delimitation of maritime entitlements is normally effected through a single delimitation line dividing both the water column and the seabed.[134] As explained by legal scholarship[135] and by a Chamber of the Court,[136] this is a sound policy for the orderly management of maritime resources.

3.56 Grey areas, which are exceptions to the single delimitation line, are created between adjacent States where the criterion of equidistance was abandoned. As Colombia explained in the Counter-Memorial "[i]n State practice, Grey Areas manifest a general pattern: (1) they are a response to geography and not geomorphology; (2) they are created on a small segment of the delimited area; and (3) they are usually responses to the undesirable consequences of the delimitation line that emerges from the application of the law that would normally apply."[137] States tend to avoid the creation of grey areas due to the associated management difficulties,[138] and

---

134 CCM, Chapter 3, Sections C and E.

135 CCM, Chapter 3, Section E. See also T. Cottier, footnote 83 *supra*, pp. 124-129; D. H. Anderson, footnote 84 *supra*, p. 32; see L. H. Legault and B. Hankey, footnote 86 *supra*, pp. 983-988.

136 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 327, para. 194; see also, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 93, para. 173; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 440, para. 286; *Award in the Arbitration Regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, Award of 17 September 2007, Vol.* XXX *R.I.A.A 1*, para. 334.

137 CCM, para. 3.52.

138 CCM, Chapter 3, Section C. See, e.g., *International Maritime Boundaries* Vol. VII, *Norway-Russian Federation*, Rep. 9-5 (3), 5181-5182; *Ibid.,* Vol. VII, *Ireland-United Kingdom*, Rep. 9-5 (3), 5152, 5153; *Ibid.,* Vol. II, *India-Maldives*, Rep. 6-8, 1389, 1391.

scholars have cautioned about their creation .As Judge Anderson explained:

> "There are obvious practical reasons for using the same line for regulating fisheries, pollution control and oil and gas operations. The existence of different boundaries for different purposes results in a situation of overlapping functional jurisdictions, which can all too easily lead to practical problems calling for consistent monitoring, *e.g.*, through the creation of a bilateral oversight commission . Such problems are best avoided by agreeing upon a single, all-purpose boundary. Some older agreements relating solely to the continental shelf remain in force, but the new ones having this limited scope relate to areas beyond the 200 n.m. limit".[139]

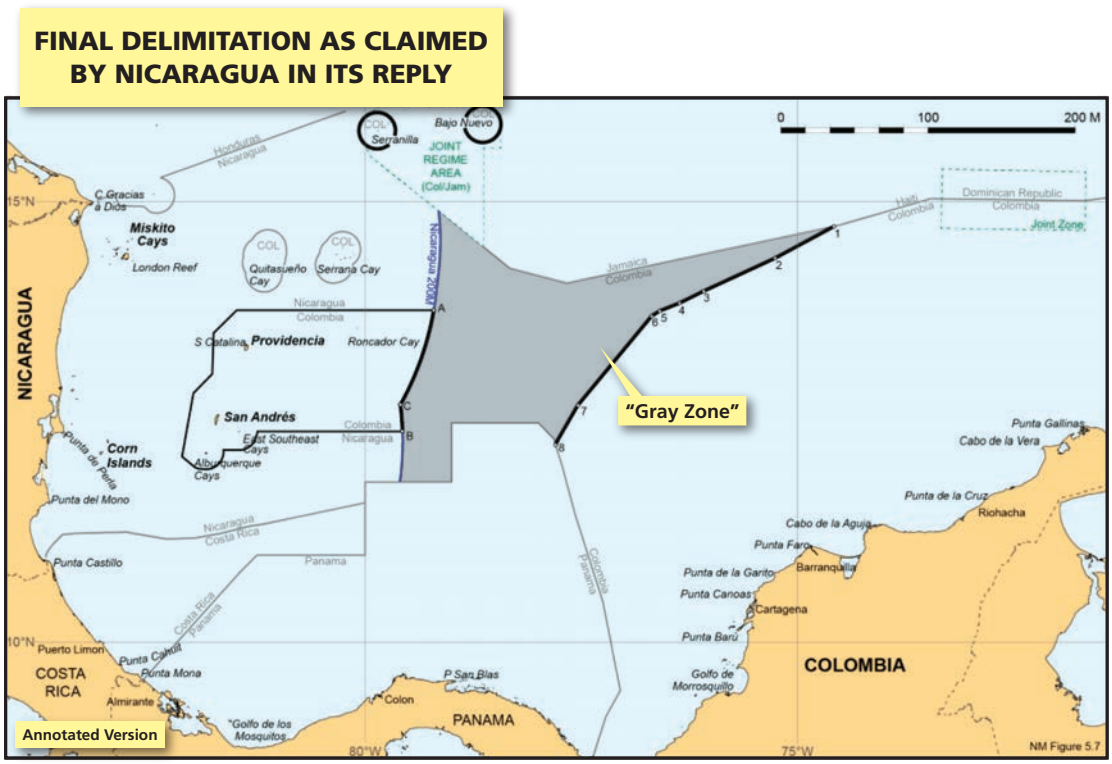
3 .57 Soon after the adoption of UNCLOS, in 1985, Leonard Legault and Blair Hankey stressed that the "creation of a substantial grey area should be avoided to the greatest extent possible".[140] But Nicaragua's proposed alteration of the title would create exactly that: a grey "zone".

---

[139] See also D. H. Anderson, footnote 84 *supra*, p . 32; see also L .H. Legault and B. Hankey, footnote 86 *supra*, p .985 ("It does not require a great deal of imagination to envisage the kinds of problems that would arise if one state were to have jurisdiction over rich hydrocarbon resources in the continental shelf, while another state had jurisdiction over valuable fishery resources in the superjacent waters .The domestic litigation in the late 1970s and early 1980s over oil and gas lease sales on the United States continental shelf, in areas such as Georges Bank, illustrates the conflict of interests between oil and gas exploitation, on the one hand, and fisheries and environmental concerns, on the other. Such unavoidable conflicts are likely to be greatly exacerbated if both divergent political interests and separate sovereign powers are allowed to compete in the same geographical space.").

[140] L .H. Legault and B. Hankey, footnote 86 *supra*, p .988 .

3 .58 Nicaragua's purported alternative regime would result in the creation of large-scale grey areas, in effect "grey zones", in which the seabed and water column rights would be severed, with only the latter going to the EEZ State. Wholly apart from the absolute lack of legal support and its inherent lack of equity, such a proposition has dire implications for the orderly management of ocean resources .If Nicaragua's claim were to be accepted, the "grey zone" would comprise the entire area claimed by Nicaragua in the present proceedings. Moreover, it would be almost 35 times larger than the grey area created in the Bay of Bengal and would be the largest and most unmanageable grey area ever created.



Source: Nicaragua's Reply, Figure 7.1. **Figure CR 3.4**

As the Court can see, the grey zone which Nicaragua purports to create encompasses most of the Southwestern Caribbean Sea and is larger than the land territory of Lebanon, the Netherlands and Jamaica combined.

3 .59 The creation of the small grey areas in the Bay of Bengal was criticised by scholars, and echoed the warning that Legault and Hankey had sounded, that the "creation of a substantial grey area should be avoided to the greatest extent possible".[141] The problems anticipated by scholars, which provoked their warnings, pale in the face of the problems to be associated with these grey zones which Nicaragua asks the Court to create.

3 .60 As evident from Colombia's review of State practice, at least 34 delimitation treaties and 36 CLCS submissions, from 31 States, were based on the principle that natural prolongation is not a source of title within the 200-nautical-mile entitlements, measured from any State's baselines. If the Court were to reverse the law and conclude that natural prolongation may in fact be the source of title within the 200-nautical-mile entitlements measured from a State's baselines, as Nicaragua proposes, it will put in question the foundation of these delimitations and submissions . An alteration of the regime of titles would thus precipitate new claims, disputes, submissions and hugely complex delimitations.

---

[141] L. H. Legault and B. Hankey, footnote 86 *supra*, p .988 .

To claim now, as Nicaragua does, that simply because the coasts are 401 or more nautical miles apart, the old regime is to be resurrected and retrofitted all the way back to the baselines from which the other State's EEZ is measured, and natural prolongation is to be restored *pro hac vice* as a source of title there, is extraordinary. If accepted, it would undermine the foundation of the established public order . It will create a huge grey zone in which the continental shelf otherwise appurtenant to the EEZ is carved out and assigned to Nicaragua . To use the example above, this is the difference between the existing global order and Nicaragua's proposed alteration:

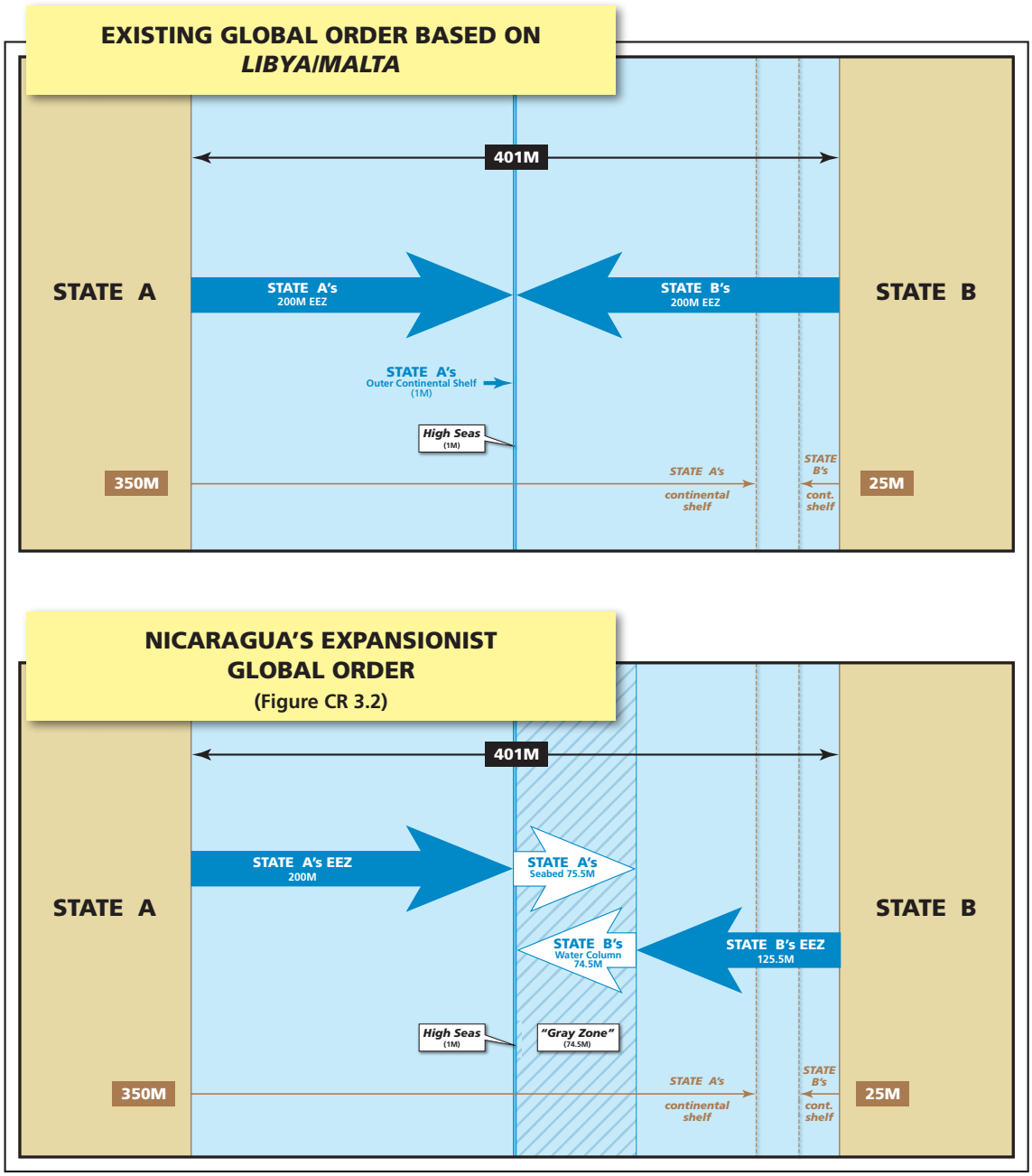

EXISTING GLOBAL ORDER BASED ON
LIBYA/MALTA
401M
STATE A
STATE A's
200M EEZ
STATE B's
200M EEZ
STATE B
STATE A's
Outer Continental Shelf
(1M)
High Seas
(1M)
350M
STATE A's
continental
shelf
STATE
B's
cont.
shelf
25M
NICARAGUA'S EXPANSIONIST
GLOBAL ORDER
(Figure CR 3.2)
401M
STATE A's EEZ
200M
STATE A's
Seabed 75.5M
STATE A
STATE B
STATE B's
Water Column
74.5M
STATE B's EEZ
125.5M
High Seas
(1M)
"Gray Zone"
(74.5M)
350M
STATE A's
continental
shelf
STATE
B's
cont.
shelf
25M

Figure CR 3.5

3 .61 These examples illustrate two things. First, the reasons why the principle that natural prolongation, upon which an OCS claim is based, is not a source of title within 200 nautical miles from another State's baselines. Second, the reasons why the regime evidenced by the legislative history and State practice is such a sound foundation for the public order in the oceans . It also shows that if the OCS had been intended to encroach upon other States' 200-nautical-mile EEZ with its attendant continental shelf, narrow margin States would have objected during the negotiations .

3 .62 Nicaragua is frustrated that its alleged and yet unconfirmed natural prolongation is not a source of title within 200 nautical miles from Colombia's baselines and asks the Court to alter the sources of title, because the current regime is "extreme". There is nothing extreme in the established legal order. There is nothing extreme in the proposition that each State is entitled to utilise the resources which lie within 200 nautical miles from its coasts regardless of geology and geomorphology. There is nothing extreme in the State practice which respects the right of all States to a 200-nautical-mile EEZ and continental shelf, confining OCS claims to the Area. What is extreme is Nicaragua's radical claim to resurrect natural prolongation as a source of title in "sea-bed areas less than 200 miles from the coast" and to have the Court sanction vast grey zones in international law.

D. Conclusions

3 .63 In this Chapter, Colombia has shown that the OCS regime may not encroach upon another State's 200-nautical-mile entitlement to an EEZ, with its attendant continental shelf.

3 .64 Within 200 nautical miles, all maritime entitlements are based solely upon distance. Beyond 200 nautical miles from any coast, in areas that would have otherwise been part of the Area, a State Party to UNCLOS may claim entitlement to submarine areas based on geology and geomorphology, i.e., an OCS claim, in return for revenue-sharing and subject to strict scientific and technical validation by a body established by the Convention, and constituted by experts, based on equitable geographical representation .

3 .65 Natural prolongation, i.e., geology and geomorphology, does not serve as a source of title in another State's EEZ and continental shelf, i .e., within 200 nautical miles of that other State . This is evident from the legislative history of UNCLOS and has been recognised by the Court in *Libya/Malta.* State practice clearly demonstrates that geology and geomorphology are not a source of title within the 200-nautical-mile entitlements of another State and hence an OCS claim may not encroach upon another States' entitlements . This understanding is reflected in both delimitation practice and CLCS submissions .

3 .66 Nicaragua's purported alteration of this legal position, in which natural prolongation springs back as a source of legal title throughout the entire area, finds no support in legislative history, practice, doctrine or jurisprudence . If accepted, it would destabilise the Law of the Sea, creating large scale "grey zones" in which the water column and the seabed rights would be severed .

3 .67 Colombia submits that the Court should reject Nicaragua's effort to change the settled law and reaffirm the principle that geology and geomorphology are not a source of title within the *ipso jure* EEZ and inner continental shelf, i .e., within 200 nautical miles measured from the coast . The Court should confirm that an alleged OCS claim may never encroach upon another State's 200-nautical-mile entitlements . Accordingly, since Nicaragua's entire claim of title within Colombia's EEZ and continental shelf is founded upon purported geological and geomorphological assertions, the Court should reject Nicaragua's claim in its entirety.

Chapter 4

THE 200-NAUTICAL-MILE ENTITLEMENTS OF COLOMBIA'S ISLANDS

A. Introduction

4 .1 Colombia takes note of the fact that Nicaragua acknowledges in its Reply that the islands of San Andrés, Providencia and Santa Catalina generate entitlements to an EEZ and its attendant continental shelf .[142]

4 .2 However, as is apparent from Figure 4.4 of the Reply,[143] Nicaragua contends that these islands' entitlements are limited beyond Nicaragua's 200 nautical miles by horizontal lines prolonging to the east the lines drawn by the Court in its 2012 Judgment. This position is presented by Nicaragua in its Reply prior to its final delimitation claim, in which it asks the Court to fully enclose the islands. This would have the practical effect of completely cutting off San Andrés, Providencia and Santa Catalina from their entitlements to the northeast and southeast .

4 .3 This is contrary to what the Court ruled in 2012 .On that occasion it found that these islands generate an entitlement which "is capable of extending up to 200 nautical miles in each direction".[144] The Court also recognised that "to the east the

142 NR, para . 4.1.
143 NR, p .157 .
144 2012 Judgment, pp. 686-688, para .168 .

maritime entitlement of the three islands extends to an area which lies beyond a line 200 nautical miles from the Nicaraguan baselines and thus falls outside the relevant area as defined by the Court"[145] and ruled that the islands "should not be cut off from their entitlement to an exclusive economic zone and continental shelf to their east, *including in that area which is within 200 nautical miles of their coasts but beyond 200 nautical miles from the Nicaraguan baselines*."[146]

4 .4 As a consequence, the entitlements of San Andrés, Providencia and Santa Catalina go beyond 200 nautical miles from the Nicaraguan baselines and cannot be cut-off . Their coasts continue to radiate an EEZ and continental shelf entitlement in *all* directions, as recognised by the Court.[147] These islands' entitlements extend to their full 200 nautical miles, as shown in the following Figure .[148]

145 2012 Judgment, pp. 686-688, para .168 .
146 2012 Judgment, p. 716, para. 244. (Emphasis added)
147 2012 Judgment, p. 716, para. 244.
148 See also CCM, Figure 4 3, p .172 .

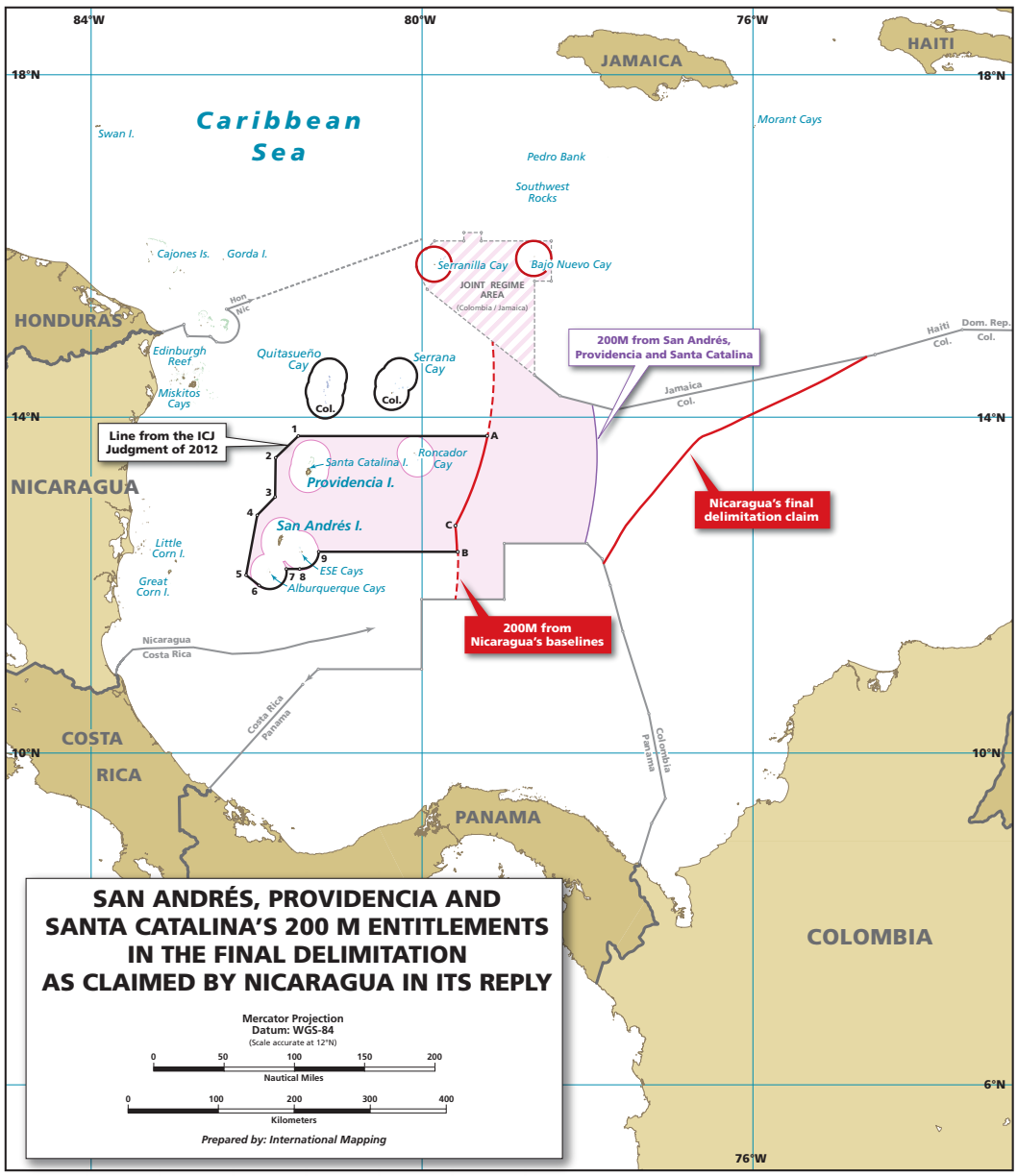

84°W
80°W
76°W
18°N
14°N
10°N
6°N
HAITI
JAMAICA
Caribbean Sea
Swan I.
Morant Cays
Pedro Bank
Southwest Rocks
Cajones Is.
Gorda I.
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
HONDURAS
Hon.
Nic.
Edinburgh Reef
Miskitos Cays
Quitasueño Cay
Serrana Cay
Col.
200M from San Andrés, Providencia and Santa Catalina
Haiti
Col.
Dom. Rep.
Col.
Jamaica
Col.
Line from the ICJ Judgment of 2012
1
2
3
4
5
6
7
8
9
A
B
C
Santa Catalina I.
Roncador Cay
Providencia I.
San Andrés I.
NICARAGUA
Little Corn I.
Great Corn I.
ESE Cays
Alburquerque Cays
Nicaragua's final delimitation claim
200M from Nicaragua's baselines
Nicaragua
Costa Rica
Costa Rica
Panama
COSTA RICA
PANAMA
Colombia
Panama
COLOMBIA
SAN ANDRÉS, PROVIDENCIA AND SANTA CATALINA'S 200 M ENTITLEMENTS IN THE FINAL DELIMITATION AS CLAIMED BY NICARAGUA IN ITS REPLY
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping

Figure CR 4.1

4 .5 Even if Nicaragua could demonstrate to the Court that its natural prolongation extends uninterrupted east of the 200-nautical-mile limit from its mainland coast – which it has not, and cannot do (see Chapter 6 below) – such natural prolongation, an OCS claim, may not serve as a source of title within San Andrés, Providencia and Santa Catalina's EEZ and its attendant continental shelf.[149] With no competing source of title, the islands are entitled to their full 200 nautical miles east of Nicaragua's 200-nautical-mile line .

4 .6 The same holds true further east of San Andrés, Providencia and Santa Catalina's 200-nautical-mile limit, where any potential Nicaraguan claim to an OCS cannot encroach upon other Colombian islands' EEZs and their attendant continental shelves . But even absent these other islands' entitlements, Nicaragua's claim would fail because its OCS cannot "leapfrog" over or "tunnel" under the San Andrés, Providencia and Santa Catalina's EEZ and attendant continental shelf,[150] which limits any potential Nicaraguan projection eastward of its 200-nautical-mile limit. Nicaragua has accepted that "leapfrogging" or "tunnelling" under entitlements is impermissible under international law .[151]

4 .7 It follows that absent entitlements of Nicaragua east of its 200-nautical-mile limit, there is no overlap with Colombia's entitlements and therefore no delimitation needs to be carried

149 CCM, Chapter 3 and Chapter 3 to this Rejoinder .
150 CCM, Chapter 5 .
151 NR, para .4 108 .

out in this area .Moreover, since Nicaragua's 200-nautical-mile limit marks the eastern limit of its maritime entitlements, which cannot continue eastwards because of the entitlements of San Andrés, Providencia and Santa Catalina, there is no need for the Court to consider the extent of any entitlement of Colombia's other islands .

4 .8 Nicaragua tries to escape these inevitable conclusions by contending that the islands of San Andrés, Providencia and Santa Catalina "have already been attributed extensive maritime areas in the 2012 Judgment"[152] (B) .Nicaragua also contends that "Roncador, Serrana, Serranilla and Bajo Nuevo are 'rocks' within the meaning of the customary law"[153] (C) .Colombia will respond to these baseless contentions in turn .

B. The Entitlement of San Andrés, Providencia and Santa Catalina to an EEZ and Attendant Continental Shelf

4 .9 In the Section of its Reply devoted to the maritime entitlements of San Andrés, Providencia and Santa Catalina, Nicaragua purports to sum up Colombia's Counter-Memorial in a few misleading lines,[154] then presents irrelevant arguments regarding Nicaragua's claim for a delimitation in Colombia's EEZ adjacent to its mainland coast,[155] and finally asserts that it "considers" that "the delimitation should not 'accord' the islands

152 NR, para . 4.2.
153 NR, para . 4.3.
154 NR, para . 4.5.
155 NR, para .4 7 .

of San Andres and Providencia a continental shelf beyond Nicaragua's 200 M limit ."[156] These contentions are baseless .

4 .10 As explained above, the Court has already recognised the full entitlements of these islands to the east . As a consequence, there is no delimitation to entertain east of Nicaragua's 200-nautical-mile limit .

4 .11 Moreover, Nicaragua's only arguments in support of its claim are that, quoting the Court out of context, Colombia's islands are "small islands which are many nautical miles apart",[157] and that the ratio between the east-facing coasts of Colombia and Nicaragua in the area east of Nicaragua's 200 nautical miles is in favour of Nicaragua .[158] But even if Nicaragua could prove a potential OCS entitlement, there would be no basis in international law to limit the entitlements of Colombia's islands to an EEZ and its attendant continental shelf .

4 .12 *First*, Nicaragua's 200-nautical-mile limit is of no consequence at all to the entitlements of Colombia's islands . There is no basis for Nicaragua to claim that *its* limit is to be applied to the entitlements of Colombia's islands and become also a limit to their entitlements to the east .[159]

---

156 NR, para . 4.8.

157 NR, para. 4.9. Yet, it is worth noting that by 2015 the Archipelago Department of San Andrés, Providencia and Santa Catalina had approximately 76.442 inhabitants.

158 NR, para . 4.10 .

159 Nicaragua further asserts that the Court has "drawn" a "line" 200 nautical miles from Nicaragua's coast (NR, para . 4 11) as if the Court had intended to fix a limit to Colombia's entitlements east of this line. This is

4.13 *Second*, Nicaragua ignores the words of the Court in its 2012 Judgment, recalled by Colombia in its Counter-Memorial[160] and above. The Court stated that:

> "(…) San Andrés, Providencia and Santa Catalina should not be cut off from their entitlement to an exclusive economic zone and continental shelf to their east, including in that area which is within 200 nautical miles of their coasts but beyond 200 nautical miles from the Nicaraguan baselines."[161]

4.14 As held by the Court in 2012, San Andrés, Providencia and Santa Catalina should not be "cut off" from their entitlements east of Nicaragua's 200-nautical-mile limit. That Nicaragua now "considers" that this should be the case is not an argument the Court should entertain. In asserting that the islands should not be accorded title east of Nicaragua's 200-nautical-mile range and thus limiting their entitlement, Nicaragua asks the Court to contradict its prior decision.

4.15 In sum, San Andrés, Providencia and Santa Catalina project their entitlements as far as 200 nautical miles from their baselines, in *all* directions; their entitlement in this area was not, and cannot, be confined by invoking a delimitation performed in *another* area. Thus, Colombia's EEZ and continental shelf

---

erroneous: the Court did not "draw" a line, but simply represented the 200-nautical-mile limit from Nicaragua's coast as the eastern limit of the relevant area, which it found that could be determined "only on an approximate basis". See 2012 Judgment, p. 683, para. 159 and sketch-map No. 7, p. 687.

[160] CCM, para. 4.14.

[161] 2012 Judgment, p. 716, para. 244.

extends east of Nicaragua's 200-nautical-mile and reach the 200-nautical-mile limit from San Andrés, Providencia and Santa Catalina. Even if Nicaragua could prove a natural prolongation which extends uninterrupted beyond 200 nautical miles from its baselines (*quod non*), it could not claim any right in this area because the islands' 200-nautical-mile entitlements prevail over any OCS claim. Moreover, the Court has already decided that the entitlements of Colombia's islands to the east should not be cut-off. Therefore, Nicaragua cannot claim any right to areas beyond 200 nautical miles from its baselines and within the EEZ and attendant continental shelf of San Andrés, Providencia and Santa Catalina, and may neither "leapfrog" over nor "tunnel" under their EEZ to claim an OCS beyond .

C. The Full Entitlements of the Northern Islands of the San Andrés Archipelago

4 .16 Turning to the islands of Roncador, Serrana, Serranilla, and Bajo Nuevo, the legal question discussed by the Parties so far is whether under customary international law they generate an entitlement to an EEZ with its attendant continental shelf. The discussion has focused on the rule of customary international law reflected in Article 121 (3) of UNCLOS .

4 .17 Colombia submits that the Court does not have to address it because, as explained above, Nicaragua's natural prolongation cannot, even if proven (*quod non*), serve as a source of title beyond Nicaragua's 200 nautical-mile limit, into

the EEZ and attendant continental shelf of San Andrés, Providencia and Santa Catalina, nor "leapfrog" over or "tunnel" under it. However, since in its Reply Nicaragua continues to insist on this question, Colombia will further address it in the present section .

4 .18 In its Counter-Memorial, Colombia recalled that in the 2012 Judgment, the Court for the first time considered that Article 121 (3) of UNCLOS reflected a customary international law rule .[162] Colombia also acknowledged that it was common ground that where sufficient State practice and *opinio juris* exist, a treaty provision can reflect customary international law.[163] Colombia further explained that the interpretation of this customary law rule is to be demonstrated primarily by reference to State practice .[164] Assessing the said practice in detail, Colombia demonstrated that under customary international law:

(i) the ordinary meaning of the term "rock" is different from the term "island" and is interpreted as referring to features composed of solid rock; and

(ii) the criterion that a rock can sustain human habitation or economic life of its own has not been applied by States with the extremely high threshold Nicaragua suggests .

---

162 CCM, para .4 25 .

163 CCM, para .4 26 .See also Chapter 2 to this Rejoinder and the ILC 2018 Conclusions on Identification of Customary International Law.

164 CCM, para . 4.26 .

Colombia fully maintains these conclusions, and will add further illustration of their accuracy below, with additional State practice.[165] Colombia has proven in the Counter-Memorial and will reiterate below, that Roncador, Serrana, Serranilla, and Bajo Nuevo are entitled to an EEZ with its attendant continental shelf.

4.19 On this question, Nicaragua distorts Colombia's position by suggesting that Colombia denies that the Court has held that Article 121 (3) reflects customary international law.[166] Colombia's Counter-Memorial clearly states the contrary.[167] Nicaragua confuses *interpretation* of this customary international law rule, which is what Colombia discussed, with *disputing* the existence of this rule, which Colombia did not do. In this regard, the title of Chapter IV, Section B (1) (*b*) of Nicaragua's Reply ("*State practice has not led to a divergence between conventional and customary international law*") is misconceived, because the point in discussion between the Parties is not whether there is a divergence between the rules of conventional and customary international law, but is about the correct interpretation of the customary international law rule reflected in Article 121 (3) of UNCLOS.[168]

---

[165] See sub-section (d) *infra* and Appendix 2: Additional Examples of State Practice on the Entitlements of Islands. In this Appendix, Colombia presents 11 additional examples of State practice of islands from the United Kingdom, France, Argentina, Brazil, South Africa and the United States, which have been recognised full maritime entitlements.

[166] NR, paras. 4.17-4.18.

[167] CCM, para. 4.25 ("In its 2012 Judgment, the Court affirmed the customary law status of Article 121 (3).")

[168] According to the Court, "[r]ules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application.", *Military and Paramilitary*

4.20 Colombia's response will not follow the confusing outline of Nicaragua's Reply, but concentrates on the rule of customary international law and its application to the facts. Colombia will first discuss Nicaragua's arguments regarding the legal definition of "rocks which cannot sustain human habitation or economic life of their own" (1), and then will rebut Nicaragua's erroneous characterization of Colombia's islands (2).

(1) THE NOTION OF "ROCKS WHICH CANNOT SUSTAIN HUMAN HABITATION OR ECONOMIC LIFE OF THEIR OWN"

4.21 As for the interpretation of the notion of "rocks which cannot sustain human habitation or economic life of their own", the Parties disagree on all aspects, namely on the meaning of the term "rocks" (*a*), on the meaning of "which cannot sustain human habitation or economic life of their own" (*b*), on the case law (*c*), and on State practice (*d*). Colombia will address these issues in turn.

(a) The term "rocks"

4.22 In its Counter-Memorial, Colombia demonstrated that under customary international law "rock" refers to "a feature made solely of solid rock", based, first, on the customary rules of treaty interpretation, taking into account the ordinary meaning

---

Activities in and against Nicaragua (Nicaragua v. *United States of America). Merits, Judgment, I.C.J. Reports 1986*, p. 95, para. 178.

of the term "rocks" ("rochers" in French, "rocas" in Spanish), as well as the context which demonstrate that "rocks" is not synonymous with "island" but means a peculiar kind of island characterised by the very word "rocks".

4.23 Colombia also showed that the *travaux préparatoires* of UNCLOS clearly point to the fact that the negotiating States did not agree on a broad extension of the exception contained in Article 121 (3) and *knowingly* decided to use the term "rocks", which has an ordinary geological meaning, precisely to limit the exception to the general rule.[169]

4.24 Since none of the islands discussed by Colombia in its Counter-Memorial meet the criteria of "rocks" under UNCLOS, Colombia concluded that, even relying solely on UNCLOS as correctly interpreted, none of the islands relevant to these proceedings are rocks within the meaning of Article 121 (3).

4.25 In its Reply, Nicaragua denies any significance to the term "rocks". It asserts that Roncador, Serrana, Serranilla and Bajo Nuevo are sand and coral features, made of "a mass of tiny, weathered rocks",[170] and that "[f]or Colombia to prevail on its argument that Serrana, Roncador, Serranilla and Bajo Nuevo are not 'rocks' it would have to convince the Court that

---

[169] CCM, paras. 4.39-4.40 and generally paras. 4.19-4.109. See also S. Talmon, "Article 121. Regime of islands", in A. Proelss, *United Nations Convention on the Law of the Sea. A Commentary*, Munich, C.H. Beck / Hart / Nomos, 2017, pp. 862 and 868-872 (available at the Peace Palace Library).

[170] NR, para. 4.30.

pulverised rock is not rock. Nicaragua considers Colombia's argument absurd on its face".[171]

4.26 What is "absurd on its face" is to suggest, as Nicaragua does, that the ordinary meaning of the term "rocks" in Article 121 (3) includes grains of sand in the beach. Likewise, as recalled by Colombia in its Counter-Memorial, "rocks" in Article 121 (3) reads, in the French authentic text of UNCLOS "[l]es rochers". As in English, the ordinary meaning of "les rochers" (rocks) cannot be assimilated to "du sable et des débris de corail" (sand and coral debris).[172]

4.27 Nicaragua argues that the Court took this position in its 2012 Judgment.[173] But Nicaragua has not been able to contradict Colombia's demonstration in its Counter-Memorial that what the Court concluded in 2012 regarding Quitasueño (including QS 32) is that it qualifies as a "rock". The Court noted that it is "composed of solid material, attached to the substrate, and not of loose debris".[174] Colombia further explained that this "solid material, attached to the substrate, and not loose debris", is undoubtedly a category of rocks, in the geological sense.[175]

---

171 NR, para. 4.51.

172 The *Dictionnaire de l'Académie française* defines "rocher" as: "Bloc de pierre brute, généralement abrupt et isolé, de taille variable". In Spanish, the *Diccionario de la Real Academia Española* defines "roca" as "Piedra, o vena de ella, muy dura y sólida" or "Material sólido de origen natural formado por una asociación de minerales o por uno solo, que constituye una parte importante de la corteza terrestre". In Russian, "скала" designates a bloc of hard rock as well.

173 NR, para. 4.50.

174 2012 Judgment, p. 645, para. 37.

175 CCM, para. 4.51.

Thus, if the words of the Court confirm anything, it is the exact opposite of what Nicaragua asserts .[176]

4 .28 Nicaragua refers to the controversial arbitral award[177] in the *South China Sea* case which deprived the term "rock" from any particular meaning . Nicaragua tries to justify the Arbitral Tribunal's finding by stating that it "placed principal reliance on the Court's own 2012 Judgment".[178] Thus, according to Nicaragua, the Arbitral Tribunal applied the Court's own view . But the Tribunal erred in its interpretation of the 2012 Judgment,

---

176 CCM, para . 4.51 .

177 See, e.g., M. H. Nordquist and W. G. Phalen, "Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award" in M. H. Nordquist, J. N. Moore and R. Long (eds.), *International Marine Economy: Law and Policy*, Leiden, Martinus Nijhoff, 2017 (available at the Peace Palace Library); A. G. Oude Elferink, "The South China Sea Arbitration's Interpretation of Article 121 (3) of the LOSC: A Disquieting First, The JCLOS Blog, available at: http://site.uit.no/jclos/files/2016/09/The-South-China-Sea-Arbitrations-Interpretation-of-Article-1213-of-the-LOSC-A-Disquieting-First pdf (last visited: 21 Jan. 2019); J. Mossop, "The South China Sea Arbitration and New Zealand's Maritime Claims", *New Zealand Journal of Public and International Law*, Vol. 15, No. 2, 2017 (available at the Peace Palace Library); J. A. Roach, "Rocks versus islands: implications for protection of the marine environment" in S. Jayakumar, Tommy Koh *et al* (eds .) *The South China Sea Arbitration: The Legal Dimension*, Edward Elgar Publishing, 2018 (available at the Peace Palace Library); P. Gewirtz, *Limits of Law in the South China Sea*, Brookings Institution, 2016, available at: https://www.brookings.edu/wp-content/uploads/2016/07/Limits-of-Law-in-the-South-China-Sea-2 pdf (last visited: 21 Jan. 2019); S . Talmon, footnote 169 *supra*; J. Wang, "Legitimacy, Jurisdiction and Merits in the South China Sea Arbitration: Chinese Perspectives and International Law", *Journal of Chinese Political Science*, Vol. 22, No. 2, 2017 (available at the Peace Palace Library); C. Whomersley, "The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique", *Chinese Journal of International Law*, Vol. 16, No. 3, 2017 (available at the Peace Palace Library); Chinese Society of International Law, "The South China Sea Arbitration Awards: A Critical Study", *Chinese Journal of International Law*, Vol. 17, No. 2, 2018 (available at the Peace Palace Library).

178 NR, para . 4.46 .

since the latter supports the opposite view to that taken by the Arbitral Tribunal .The *South China Sea* award, therefore, cannot be regarded as a useful precedent .

4 .29 Nicaragua contends that interpreting the term "rocks" as referring to features made solely of solid rock would be inconsistent with the object and purpose of Article 121 (3) of UNCLOS. But to the contrary, giving the term "rocks" its ordinary meaning meets the object and purpose of Article 121 (3), which was to avoid States claiming full entitlements for small rocky features, save when they can sustain human habitation or economic life of their own . Colombia's interpretation meets this object and purpose, since it does effectively limit the extent of claimed entitlements as shown by the examples of Quitasueño, Rocas Alijos,[179] Rockall,[180] or Kolbeinsey.[181]

4 .30 Nicaragua's interpretation would use the second element, namely the requirement on the capacity to "sustain human habitation or economic life of their own", to define the term "rocks". Such an exercise, however, equates the term "island" with the term "rock", undermining the clear intention of the drafters to use the distinct term "rocks". Interpreting a treaty provision by depriving of any meaning a key element, intentionally distinguished by the drafters, cannot be consistent

179 CCM, para . 4.62 .
180 CCM, para .4 65 .
181 See para .4 63 *infra* .

with a "good faith" interpretation, as prescribed by Article 31 of the Vienna Convention on the Law of Treaties .

4 .31 The term "rocks" must indeed have a meaning distinct from "islands"; defining it by only using the second element would have the same meaning as if the provision read "*Islands* which cannot sustain human habitation or economic life of their own (…)" .The negotiating States, however, clearly intended the term "rocks" to have a meaning distinct from the term "island".

4 .32 In any event, the correct interpretation of the term "rocks", is only half of the criteria that must be met for islands to be deprived of their entitlements to an EEZ and attendant continental shelf . The other half, to which Colombia will turn below, is that rocks "cannot sustain human habitation or economic life of their own".

(b) The meaning of "which cannot sustain human habitation or economic life of their own"

4 .33 Nicaragua gives a misleading title to the discussion of this topic: "*Sustaining human habitation and economic life of their own*" .[182] Article 121 (3) uses the conjunction "or" not "and"; Nicaragua reiterates this mistake throughout the Reply.[183]

4 .34 Nicaragua further contends that the term "which cannot sustain human habitation or economic life of their own" "results

[182] NR, p .129, Sub-section (3) .
[183] See, e g , NR, paras .4 4, 4 36, 4 85 and 4 103 .

in an unambiguous understanding".[184] Such position stands in sharp contrast with virtually all the scholarship on the issue.[185] To recall just one example, Churchill and Lowe, the latter having acted as Counsel for Nicaragua, insist on the subjectivity of the rule, its vagueness and its poor drafting .[186]

4 .35 Colombia's view on the law is fully set out in its Counter-Memorial. It is that since the term "which cannot sustain human habitation or economic life of their own" is unclear, and since the only applicable rule in the present case emanates from customary international law, reference must be made to State practice .[187] Colombia has already presented the relevant State practice,[188] and sets out further practice below .[189] Nicaragua's Reply is silent on this point. Thus, Colombia maintains its position and will not rebut in detail the purported "unambiguous understanding" provided by Nicaragua,[190] which is devoid of any support.[191]

---

184 NR, para . 4.82 .

185 CCM, para . 4.30 .

186 CCM, para .4 30 .See also CCM, paras .4 101-4 106 .

187 CCM, para . 4.113 .

188 CCM, paras . 4.113-4 125 .

189 See sub-section (d) *infra* and Appendix 2 to this Rejoinder.

190 NR, paras . 4.83-4 104 .

191 Colombia notes for example that in seeking support for its interpretation of the terms "rocks… [which can] sustain human habitation" as meaning that the "rock" must provide, in and by itself, the capacity for human beings to live almost in an autarkical way, Nicaragua acknowledges that in the French version of the Convention the corresponding word for "sustain" is "se prêter à", and concludes that this confirms its interpretation. But, to the contrary, saying that an area "se prête à l'habitation humaine" means that this area is *suitable* for human habitation, or that it is *possible* to have human habitation there, certainly not that the area can provide all services, like food, water, building material, etc., necessary for human life and development .

4.36 Nicaragua asserts that "the feature's capacity to 'sustain' human habitation and economic life must be determined by reference to its natural conditions",[192] so that it would not be acceptable 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".[193]

4.37 This is a distorted interpretation. In the case of Roncador, Serrana and Serranilla fresh water is available even without a desalinization plant.[194] Moreover, Nicaragua's argument is solely based on its own peculiar interpretation of Article 121 according to which since an island is a "naturally formed" area of land, and since "'rocks' are a sub-category of islands", then "[t]he '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 its natural conditions."[195] This is a *non sequitur*: the fact that a "rock" is a "natural" feature is relevant to characterise it as an island under Article 121, but it is not relevant for interpreting the notion of "which cannot sustain human habitation (…)". It is not disputed that all Colombian islands are naturally formed.

---

192 NR, para. 4.85.
193 NR, para. 4.86.
194 CCM, paras. 4.154, 4.162 and Figure 4.54.
195 NR, para. 4.85.

4 .38 Nicaragua's confusion derives notably from its error in reading Article 121 (3) as saying "which cannot sustain human habitation *and* economic life of their own". The paragraph actually reads "which cannot sustain human habitation *or* economic life of their own". Thus, the conditions are alternative, not cumulative .

4 .39 The words "of their own", which Nicaragua erroneously associates with "which cannot sustain human habitation", only qualify the economic life that rocks may or may not be capable of sustaining . The distinction between the two concepts separated by "or" is even clearer in the French version, which reads: "Les rochers qui ne se prêtent pas à l'habitation humaine *ou à* une vie économique propre" . The term "propre", which corresponds to "of their own", refers to "vie économique", not to "l'habitation humaine", since (as in English) it would be meaningless to speak about "l'habitation humaine propre" .

4 .40 Thus, Nicaragua's interpretation of the notion of "sustain human habitation", which would mean that the feature should be able to provide, in and of itself, all the services needed for human beings to live there, is meritless .

(c) Case law

4.41 The Court's case law supports Colombia's view, as explained in the Counter-Memorial.[196] Nicaragua's position in this regard is not convincing.

4.42 Nicaragua denies any significance to the fact that the Court qualified the Maltese island of Filfla as an "uninhabited rock"[197] and argues that "the Court did not consider Filfla's status under Article 121 (3)".[198] But Nicaragua cannot deny that (i) Filfla is an undisputable "rock", made of solid rock, (ii) the Court expressly said that it was a "rock", and (iii) apart from Quitasueño, Filfla is the *only* maritime feature that the Court has qualified as a "rock".

4.43 By contrast, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, the Court qualified Qit'at Jaradah as a "very small island",[199] not as a "rock" or as an "uninhabited rock". The Court's spontaneous description of maritime features, consistent with the ordinary meaning of terms, confirms Colombia's view on the interpretation of the term "rocks".

---

196 CCM, paras. 4.43-4.45.

197 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 20, para. 15.

198 NR, para. 4.72.

199 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 197.

4 .44 Nicaragua also fails to convince when it seeks to argue that the Court did not mean what it said in the *North Sea Continental Shelf* cases, when it referred to "islets, rocks and minor coastal projections" ("des îlots, des rochers, ou des légers saillants de la côte").[200] The Court thus distinguished between "islets" and "rocks". When the Court mentions "rocks" ("rochers"), it means what it says, namely solid rocks, to be distinguished from "islets", that are tiny islands not consisting solely of rock.

4 .45 Nicaragua misunderstands the judgment in the *Volga (Russian Federation* v .*Australia)* case before ITLOS,[201] which was explained in detail in Colombia's Counter-Memorial .[202] In this case, contrary to what Nicaragua asserts, the Tribunal accepted that Heard Island and the McDonald Islands, which manifestly cannot sustain human habitation or economic life of their own, but are not rocky features, were entitled to an EEZ. This confirms that, according to ITLOS, Article 121 (3) applies to an island only if the two cumulative conditions are met: one positive (that the island is a rocky feature) and the other negative (that it cannot sustain human habitation or economic life of its own) .If one of these two conditions is not met, the feature is a full-fledged island .

4 .46 Finally, the *South China Sea Arbitration* award (which Oude Elferink, who has acted as Counsel for Nicaragua,

200 NR, para . 4.71 .
201 NR, para . 4.69 .
202 CCM, paras . 4.41-4 42 .

considers "disquieting")[203] must be mentioned since Nicaragua's arguments repeat almost *verbatim* the "significantly flawed"[204] reasoning of that tribunal .

4 .47 For example, Nicaragua proposes a textual analysis of Article 121 (3) from which it concludes 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. (…) The feature must, moreover, be able to do so on its naturally occurring conditions" .[205]

and that

> "[f]or 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 (…) 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 ."[206]

4 .48 These are the very same positions as those adopted in the *South China Sea* Award. Colombia recalls that they have been

---

203 A. G. Oude Elferink, footnote 177 *supra* .

204 C. Whomersley, footnote 177 *supra*, p .403, para .47 .

205 NR, paras .4 84-4 .85 .

206 NR, paras . 4.100-4 101 .

cogently criticised for being devoid of legal support .[207] As noted by Nordquist and Phalen, the assertion that the feature's capacities must be assessed on its natural form, without external input "does not appear in [Article] 121(3)".[208] They also commented that the Tribunal has "overreach[ed] its legal mandate and denie[d] well-founded facts before it by injecting doctrines not rooted in the Convention or State Practice ."[209]

4 .49 Colombia agrees with the many commentaries stating that the Arbitral Tribunal's views expressed in the *South China Sea* Arbitral award do not represent customary international law, are devoid of legal basis, purport to "overturn decades of practice on the basis of an interpretation of article 121 (3) which is highly controversial",[210] and lead to "widespread repudiation

---

[207] According to Nordquist and Phalen "[t[he Tribunal was not empowered under the Convention to rewrite the Convention text. It overstepped its role when it took upon itself to use the legitimate procedural latitude entrusted to it to embark on a wide-ranging historical review of factors with only a marginal relationship to the intended meaning of the Convention text and little relation to the Conference negotiations . The Tribunal, for example, read into the text dependence upon the 'objective capacity of a feature, in its natural condition, to sustain either a stable community of people or economic activity that is not dependent on outside resources or purely extractive in nature'. Such discretionary input by the Tribunal has no credible support in the text or context of the Convention. In applying self-injected criteria, the Tribunal inaccurately concluded that none of the features considered in the Spratly / Nansha Group were 'islands'. Such a conclusion was procedurally convenient to allow the Tribunal to proceed with jurisdiction in the case since under this holding there was asserted to be no overlapping sea boundaries between the two parties to the arbitration". M. H. Nordquist and W. G. Phalen, footnote 177 *supra* . See also A . G . Oude Elferink, footnote 177 *supra*; J. Mossop, footnote 177 *supra*; J. A. Roach, footnote 177 *supra*; P. Gewirtz, footnote 177 *supra*; S .Talmon, footnote 169 *supra*; J. Wang, footnote 177 *supra*; C. Whomersley, footnote 177 *supra*; Chinese Society of International Law, footnote 177 *supra* .

[208] M. H. Nordquist and W. G. Phalen, footnote 177 *supra*, p .30 .

[209] M. H. Nordquist and W. G. Phalen, footnote 177 *supra*, p .32 .

[210] J. Mossop, footnote 177 *supra*, p .290 .

of decades of unprotested State Practice relevant to the regime of islands throughout the world's oceans".[211] Oude Elferink, who has acted as Counsel for Nicaragua in these proceedings, agrees that "there is an abyss between the tribunal's approach and the practice of many States" and asserts that "if the findings of the tribunal (…) were to be applied across the board, many islands that have not been considered to fall under the scope article 121 (3) would likely have to be (re)categorized as article 121 (3) rocks".[212]

(d) State practice

4 .50 Colombia gave many examples of State practice concerning islands' entitlements in its Counter-Memorial .It will provide further examples below (ii), after having demonstrated that what Nicaragua says about State practice is untenable (i).

(i) Nicaragua's case regarding State practice is untenable

4 .51 Nicaragua's case finds no support in State practice . To try to escape this conclusion, it argues that "the State practice is far from being uniform and indicates that different States have different views on the meaning of the term 'rocks'".[213] But Nicaragua does not demonstrate its assertion. It refers only to a

---

211 M. H. Nordquist and W. G. Phalen, footnote 177 *supra*, pp .77-78 .

212 A. G. Oude Elferink, footnote 177 *supra* . Among the islands identified by Oude Elferink which would be deprived of their entitlements are, *inter alia*, Jan Mayen and Bouvet (Norway), Henrietta and Jeanetta (Russia), Heard and McDonald (Australia), Clipperton, Tromelin and Kerguelen (France) and Jabal al-Tayr (Yemen).

213 NR, para .4 75 .See also NR, para .4 79 .

few States dissenting from the general practice illustrated in Colombia's Counter-Memorial, in highly controversial situations. These States, at most, can qualify as persistent objectors .

4 .52 Moreover, if Nicaragua were right about the absence of uniformity of State practice, there simply could be no customary rule regarding the meaning of the terms "rocks which cannot (…)". Indeed, no customary rule can ever emerge when States have "different views" and when their practice is "far from being uniform", as argued by Nicaragua.

4 .53 If Nicaragua were right, it would either mean that the Court erred in considering that Article 121 (3) reflected a customary international law rule, or that the notion of "rocks" in this rule is legally undetermined and subject to the sovereign interpretation of each State with respect to its own maritime features. In the latter case, there would be "no strict rule on the point in dispute".[214] But the reality is different. As Colombia has shown, the common view of States supports an interpretation of "rocks" as meaning "rocks"/"rochers", and a flexible approach to the requirement of being capable of sustaining "human habitation or economic life of their own".

4 .54 Nicaragua also purports to disqualify the practice of non-member States of UNCLOS, on which Colombia's Counter-

[214] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p .211 .

Memorial relies, arguing in particular, that the practice of the United States, based on its *opinio juris*, which comes in full support of Colombia's position, is isolated and is thus not a practice capable of reflecting a customary rule.[215]

4.55 But the true question is whether, when the Court acknowledged the customary nature of this rule, it did so in complete opposition to the long lasting and consistent practice and *opinio juris* of the United States and other States. The answer cannot but be negative: the rule recognised as customary by the Court in 2012 must necessarily be consistent with State practice, including the practice of the States that are not Parties to UNCLOS, because these States are undoubtedly States "whose interests are specially affected",[216] and thus their practice contributes to the creation of the customary international law rule.

4.56 The customary definition of rocks as acknowledged in 2012 is therefore necessarily consistent with State practice, including that of the United States, which is consistent with the general State practice. And this practice, as demonstrated in the Counter-Memorial, and will be further illustrated below, wholly supports Colombia's position as to the customary international law definition of "rocks which cannot sustain human habitation or economic life of their own".

---

[215] NR, para. 4.39.

[216] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 74.

4.57 Nicaragua also fails when it seeks to disavow the abundant practice of States Parties to UNCLOS to which Colombia refers in its Counter-Memorial.

4.58 *First*, Nicaragua cannot seriously contend that the treaties concluded with Venezuela by France, the United States, and the Netherlands,[217] "do not necessarily reflect the *opinio juris* of the parties".[218] In so far as Colombia is aware, the practice of these States has been systematic, and not only applied in relation with Venezuela (see in particular the practice of France and of the United States as shown in the Counter-Memorial and further developed below).

4.59 *Second*, Nicaragua invokes two highly contested situations, one regarding Aves Island,[219] and the other concerning the Spratly Islands.[220] But the positions expressed by the Parties to these disputes have little if any value in terms of State practice and *opinio juris*, since they are mere antagonistic claims asserted in the context of ongoing maritime disputes.

4.60 Nicaragua is right that some of the practice mentioned by Colombia "relates to islands in the open ocean".[221] But Nicaragua is wrong to assert that in these cases "no other State

---

217 On the fact that these treaties recognise full entitlements to Aves Island, see, e.g., I*nternational Maritime Boundaries*, Vol. I, pp. 603, 606, 607-608 and 691-692 (available at Peace Palace Library).

218 NR, para. 4.26.

219 NR, paras. 4.22-4.24.

220 NR, paras. 4.30-4.36.

221 NR, para. 4.40.

has a direct interest in opposing an exaggerated claim".[222] To the contrary, in all instances where States claim that small features generate full entitlements, all other States are directly concerned because the creation of these zones would limit their freedom to fish and carry out other sorts of economic activities therein, and it reduces the extent of the Area.

4 .61 Thus, the absence of any reaction when this kind of islands are granted full entitlements is the most telling State practice as regards the interpretation of the rule embodied in Article 121 (3) .[223] Nicaragua itself considers that "the architects of the Convention were concerned about preventing minor insular features from generating expanded maritime entitlements and impinging on (…) the Area as the common heritage of mankind",[224] and thus is inconsistent when it claims that no conclusion can be derived from the fact that the "architects of the Convention" stay silent when most of them interpret and apply the Article 121 (3) rule in the exact same manner as Colombia .

---

222 NR, para .4 40 .

223 The importance of silence in precisely such circumstances is recognised by the ILC in Conclusion 6 (1) of its 2018 Conclusions on Identification of Customary International Law: "Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction." See also Conclusion 10 (3): "Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction."

224 NR, para . 4.56 .

(ii) Additional elements on State practice

4 .62 In addition to the State practice detailed in Colombia's Counter-Memorial, many other cases confirm Colombia's view .[225] In fact, Colombia did not find any case in which a State has refrained from claiming an EEZ and continental shelf from a non-rocky island.

4 .63 In so far as rocky features are concerned, the case of Kolbeinsey (Denmark) illustrates that only features made of rock which are uninhabitable and of no economic value are deprived of an EEZ and continental shelf. As has been explained:

> "Kolbeinsey (…) is a barren, rocky feature about 70 meters long and from 30 to 60 meters wide with a maximum elevation of 7 meters and lies just to the north of the Arctic Circle (…) . It is isolated (…) well to seaward of the system of straight baselines around Iceland, and about 38 n .m. from the nearest inhabited place namely Grimsey (…) It has no history of human habitation, although landing can be achieved on the South East side. It is uninhabited and may well be considered to be uninhabitable (…) . Thus, Greenland/Denmark, a signatory although not a party to the UN Convention on the Law of the Sea, considered that Kolbeinsey was a rock which does not qualify as a basepoint for measuring an economic zone or continental shelf".[226]

---

225 See also Appendix 2 to this Rejoinder.

226 *International Maritime Boundaries*, Vol. IV, Denmark (Greenland) – Iceland, Rep .No .9-22, pp .2941, 2946-2947 .

4 .64 By contrast, States generally do not question that non-rocky islands are entitled to an EEZ and continental shelf.

4 .65 Rose Island (0,2 sq . km) is a non-rocky feature belonging to the United States .It is uninhabited and lacks fresh water .[227] The island's surrounding waters are a Marine Protected Area. Rose Island is entitled to an EEZ and its attendant continental shelf . It has indeed been selected as an agreed basepoint for the delimitation of the overlapping entitlements to an EEZ and continental shelf between the United States (not a Party to UNCLOS) and the Cook Islands (a Party to UNCLOS), as well as between the United States and Niue (a Party to UNCLOS) .[228]

ROSE ATOLL
A PROTECTED MARINE AREA OF THE U.S.

Source: https://blog.marine-conservation.org/2018/05/pacific-ocean-gem-scientists-on-rose-atoll.html

Figure CR 4.2

227 A .Wegmann and S .Holzwarth, *Rose Atoll National Wildlife Refuge Research Compendium*, 2006, p .7, available at: https://www.researchgate.net/publication/247151791_Rose_Atoll_National_Wildlife_Refuge_Research_Compendium (last visited: 21 Jan. 2019).

228 United States Department of State, *Limits in the Seas*, No .100 and No .119, available at: https://www.state.gov/e/oes/ocns/opa/c16065.htm (last visited: 21 Jan. 2019).

4 .66 Gaferut (0,07 sq .km) is an island under the sovereignty of the Federated States of Micronesia .It is obviously not a rocky feature, as the following picture shows . The island is uninhabited and has no fresh water. It was exploited around 1935 by Japan for phosphates,[229] and exploited for hunting and fishing purposes by inhabitants of near-by atolls.[230] Gaferut has been recognised as an island with an EEZ and continental shelf, as appears in the 2014 maritime delimitation treaty between the United States and Micronesia .[231] Indeed, point 9 of the delimitation is 120 nautical miles from Gaferut (Micronesia) and Guam (United States) .[232] The United States is not a Party to UNCLOS, while the Federated States of Micronesia is .

[229] W. A. Niering, "Observations on Puluwat and Gaferut, Caroline Islands", *Atoll Research Bulletin*, No. 76, p. 5, available at: https://repository.si.edu/bitstream/handle/10088/5013/00076.pdf?sequence=1&isAllowed=y (last visited: 21 Jan. 2019).

[230] M .-H. Sachet, "Historical and climatic information on Gaferut Island", *Atoll Research Bulletin*, No. 76, p. 11, available at: https://repository.si.edu/bitstream/handle/10088/5013/00076.pdf?sequence=1&isAllowed=y (last visited: 21 Jan. 2019).

[231] Treaty between the Government of the United States of America and the Government of the Federated States of Micronesia on the Delimitation of a Maritime Boundary, available at: https://www.state.gov/documents/organization/244470.pdf (last visited: 21 Jan. 2019).

[232] See also *International Maritime Boundaries*, Vol. V, p. 4965 ("Four of Micronesia's islands – Ulithi, Fais, Faraulep, and Gaferut – were relevant to the determination of the boundary.")

GAFERUT ISLAND
PART OF THE FEDERATED STATES OF MICRONESIA

Source: https://okeanos-foundation.org/wp-content/uploads/SATAWAL-SHOOT_DRONE-1_DJI_0009_1.jpg **Figure CR 4.3**

4 .67 Oroluk (0,13 sq . km), another island of the Federated States of Micronesia, is the sole emerged land of the Oroluk atoll. It is not a rocky island, as shown on the following picture . The island is not permanently inhabited but is exploited for its resources .[233] Micronesia regards it as an island entitled to an EEZ and continental shelf.[234]

---

[233] Latitute, "Oroluk Island", available at: https://latitude.to/articles-by-country/fm/micronesia/235946/oroluk-island (last visited: 21 Jan. 2019).

[234] See Section 4 of the "Act to amend title 18 of the Code of the Federated States of Micronesia by amending sections 101, 102, 103, 104, 105 and 107 and by adding a new section 108 to establish an Exclusive Economic Zone in the oceans surrounding the Federated States of Micronesia, to expand the size of the Territorial Sea, to make the chapter consistent with the current political status of the Federated States of Micronesia, and for other purposes" of 16 December 1988, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FSM_1988_Act pdf (last visited: 21 Jan. 2019). See also the map annexed to the "Treaty between the Federated States of Micronesia and the Republic of the Marshall Islands concerning maritime boundaries and cooperation on

OROLUK ISLAND
PART OF THE FEDERATED STATES OF MICRONESIA

Source: https://mybrothertraveler.com/oceania/micronesia/MMP_03/67FSM%20%20Pohnpei%20State%20-%20Oroluk%20Island_2003DSCN5728.JPG

Figure CR 4.4

4 .68 Huon Island is a sandy island pertaining to New Caledonia (France) of about 0,5 sq . km . It is uninhabited and lacks fresh water. It is a UNESCO World Heritage Site since 2008. It is accepted as generating entitlement to an EEZ and a continental shelf in the Agreement between France and the Solomon Islands .[235]

---

related matters" of 5 July 2006, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FSM-RMI pdf (last visited: 21 Jan. 2019).

[235] "Agreement between the Solomon Islands and France on maritime delimitation (with chart)", United Nations Treaty Series, Vol. 1591 (1991), No . 27851, p. 204, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201591/v1591.pdf (last visited: 21 Jan. 2019) .See also *International Maritime Boundaries*, Vol. I, p .1171 .

HUON ISLAND
PART OF NEW CALEDONIA (FRANCE)

Source: https://www.livingoceansfoundation.org/stunning-and-extraordinary-geography-of-new-caledonia/olympus-digital-camera-49/

Figure CR 4.5

4 .69 The Isles Maria (1,3 sq . km) are islands within French Polynesia. They are not made of rock and are uninhabited. They are considered islands entitled to an EEZ and continental shelf, as agreed between French Polynesia and the Cook Islands in an agreement on maritime delimitation of 3 August 1990 :[236]

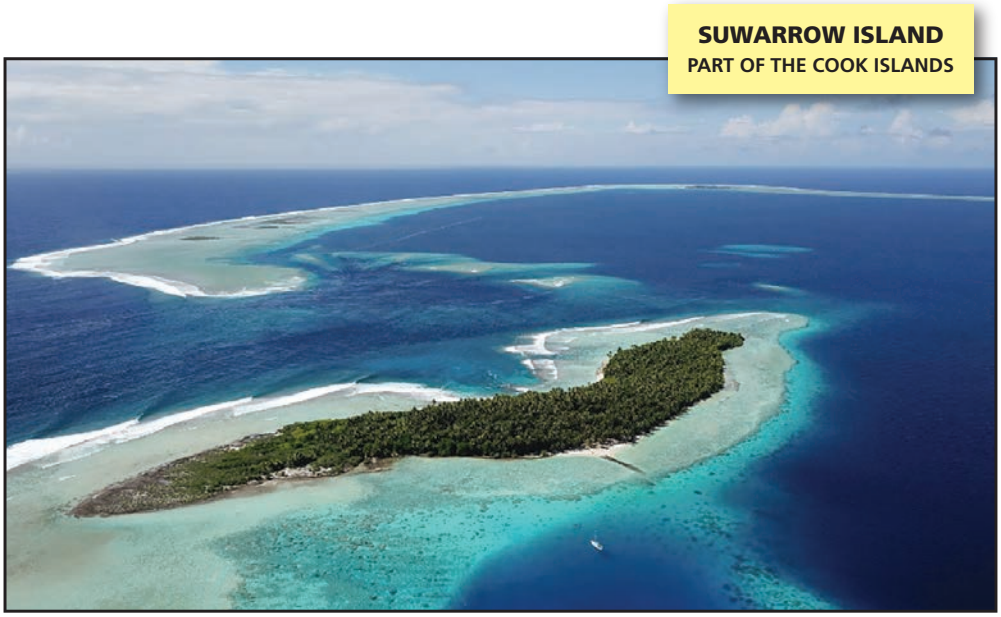
236 "Agreement on Maritime Delimitation between the Government of the Cook Islands and the Government of the French Republic of 3 August 1990", available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/COK-FRA1990MD PDF (last visited: 21 Jan. 2019) . See also *International Maritime Boundaries*, Vol. V, pp. 1176-1177 .

ÎLES MARIA
PART OF FRENCH POLYNESIA

Source: https://www.livingoceansfoundation.org/the-untamed-cool-tropical-islands-of-french-polynesia/ **Figure CR 4.6**

4 .70 Suwarrow Island belongs to the Cook Islands . The biggest feature is 0,27 sq . km. It is not a rocky feature and is uninhabited . It has been recognised as entitled to an EEZ in the maritime delimitation treaty between the United States and the Cook Islands, concluded on 11 June 1980 .[237]

[237] United States Department of State, *Limits in the Seas,* No . 100, available at: https://www.state.gov/documents/organization/58566.pdf (last visited: 21 Jan. 2019) .



Source: http://oriondevoyage.blogspot.com/2018/05/suvarov-suwarrow-30-avril-au-5-mai-2018.html **Figure CR 4.7**

4 .71 Bikar islands is a group of islands totalling 0,5 sq .km, belonging to the Marshall Islands. It is not a rocky feature. It is uninhabited and lacks fresh water .[238] The island has traditionally been visited by local population to hunt and gather resources such as seabirds and turtles .[239] Marshall Islands claims full entitlements from this island .[240]

---

238 J. E. Tobin, "Land Tenure in the Marshall Islands", *Atoll Research Bulletin*, No. 11, p. 12, available at: https://repository.si.edu/bitstream/handle/10088/5075/00011.pdf?sequence=1&isAllowed=y (last visited: 21 Jan. 2019).

239 J. E. Tobin, "Land Tenure in the Marshall Islands", *Atoll Research Bulletin*, No. 11, p. 12, available at: https://repository.si.edu/bitstream/handle/10088/5075/00011.pdf?sequence=1&isAllowed=y (last visited: 21 Jan. 2019).

240 Republic of the Marshall Islands, "Declaration of baselines and maritime zones and outer limits made under Section 118 of the *Maritime Zones Declaration Act 2016*", pp. 182-183 and 451, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/mhl_mzn120_2016_2.pdf (last visited: 21 Jan. 2019).

4 .72 Cayos Arena, is a less than 0,15 sq . km non-rocky feature belonging to Mexico. It is uninhabited and has no fresh water. Yet, it has been recognised as entitled to an EEZ and its attendant continental shelf in the delimitation between Mexico and the United States .[241]

4 .73 Rocas Atoll, is an uninhabited non-rocky Brazilian island of about 0,3 sq . km . It lacks fresh water but has a lighthouse and constitutes the Atol das Rocas Biological Reserve, which is a World Heritage Site since 2001 .[242] Brazil claims that this is a full-fledged island .[243]

4 .74 Thus, the State practice of the following States confirms Colombia's position regarding the customary international law rule regarding the maritime entitlement of islands:

- Argentina (CR, Appendix 2, Examples No. 5 and 6);
- Australia (CCM, paras . 4.744 .76);
- Brazil (CCM, paras. 4.120-4 .122;CR, para .4 .73);
- Cook Islands (CCM, paras .4 .78-4 .79;CR, paras 4 .65,4 .69-4 .70);

---

241 *International Maritime Boundaries*, Vol. I, p. 433. See also J. A. Vargas, *Mexico and the Law of the Sea: Contributions and Compromises*, Nijhoff, 2011, p .200, footnote 24 and pp .205, 224 (available at Peace Palace Library).

242 UNESCO, "Brazilian Atlantic Islands: Fernando de Noronha and Atol das Rocas Reserves", available at: https://whc.unesco.org/en/list/1000 (last visited: 21 Jan. 2019).

243 See the map in Brazil's submission to the CLCS in 2004, titled "Chart of the Outer Limit of the Continental shelf", which shows the limit of the EEZ, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_outer_limit pdf (last visited: 21 Jan. 2019).

- Denmark (CR, para . 4 .63);
- Fiji (CCM, para . 4 .86)
- France (CCM, paras .4 .69, 4 .74,4 .80-4 .84,4 .86;CR, paras . 4 .68-4.69 and Appendix 2, Examples No. 1, 4, 7 and 9);
- Japan (CCM, paras. 4.87-4 .92)
- Kiribati (CCM, paras . 4.70, 4 .78-4 .79, 4 .85);
- Marshall Islands (CCM, para . 4 .77, CR, paras . 4 .67, 4 .71)
- Mexico (CCM, paras . 4 .61-4 .63;CR, para .4 .72)
- Micronesia (CCM, para .4 .77;CR, paras .4 .66-4 .67);
- Niue (CR, para . 4 .65);
- The Netherlands (CCM, para . 4 .69)
- New Zealand (CCM, paras. 4.75-4 .76)
- Norway (CR, Appendix 2, Examples No. 3 and 11);
- Russia (CR, Appendix 2, Example No. 8);
- Solomon Islands (CR, para . 4 .68);
- South Africa (CR, Appendix 2, Example No. 4);
- United Kingdom (CCM, paras . 4 .65, 4 .67-4 .68; CR, Appendix 2, Examples No. 2, 5 and 6);
- United States (CCM, paras . 4 .69-4 .72, 4 .85, 4 .122; CR, paras . 4 .66-4.70, 4.72 and Appendix 2, Example No. 10);
- Venezuela (CCM, para. 4.69).

4 .75 To conclude, Colombia submits that Nicaragua's interpretation of the customary international law rule reflected in Article 121 (3) lacks any legal basis. Colombia maintains in full its own position, and will now turn to the status of the islands of Roncador, Serrana, Serranilla and Bajo Nuevo .

(2) RONCADOR, SERRANA, SERRANILLA AND BAJO NUEVO

(a) General overview

4 .76 In its Counter-Memorial . Colombia demonstrated that Roncador, Serrana, Serranilla and Bajo Nuevo are not rocks which cannot sustain human habitation or economic life of their own, under the applicable customary rule reflected in Article 121 (3) of UNCLOS .[244]

4 .77 In doing so, Colombia has provided substantial historical and factual information which has not been refuted by Nicaragua. Noticeably, it has failed to address the evidence submitted in the form of nine affidavits from Raizal fishermen,[245] which show the long-standing interdependence between these islands and San Andrés, Providencia and Santa Catalina .Moreover, the affidavits show that these islands fulfil the criteria for sustaining human habitation or economic life of their own (availability of fresh water, fertile soil, natural resources, modern facilities, etc .).Nicaragua did not contest the contents of any of these affidavits, therefore accepting this evidence .

4 .78 Colombia has also recalled that these islands, together with San Andrés, Providencia and Santa Catalina, and their surrounding waters, form an intrinsic geographical, economic

244 CCM, Chapter 4 .
245 CCM, Annexes 34 to 42.

and political entity, and have been historically regarded as such.[246]

4.79 On this particular point, it may also be recalled that the Court concluded in its 2012 Judgment that "for many decades Colombia continuously and consistently acted *à titre de souverain* in respect of the maritime features".[247] The Court reached this conclusion after having observed, for example:

- That an administrative report dated 1920 "specifically referred to Roncador, Quitasueño and Serrana as Colombian and forming an integral part of the Archipelago";[248]
- That in 1914 and 1924 the Governor of Cayman Islands issued a Governmental Notice regulating fishing and guano and phosphate extraction activities in the Archipelago which was explicitly described as encompassing all Colombian maritime features;[249]
- That the Colombian Navy frequently visited Serrana, Quitasueño and Roncador throughout the 20th century[250] and enforced Colombian fishing regulations in these islands;[251]

---

246 CCM, paras. 4.126-4.148.

247 2012 Judgment, p. 657, para. 84. In the same decision the Court had already found that "Colombia has indeed acted *à titre de souverain* in respect of both the maritime area surrounding the disputed features and the maritime features themselves (…)", see 2012 Judgment, p. 655, para. 81.

248 2012 Judgment, p. 656, para. 82.

249 2012 Judgment, p. 656, para. 82.

250 2012 Judgment, p. 657, para. 82.

251 2012 Judgment, p. 656, para. 82.

- That it was officially admitted in 1913 and 1937 that the jurisdiction of the German consular officials extended over the Archipelago expressly described as including Roncador;[252]
- That correspondence emanating from the United Kingdom and the colonial administrations in what, at the relevant time, were territories dependent upon the United Kingdom, indicates that the it regarded Alburquerque, Bajo Nuevo, Roncador, Serrana and Serranilla as appertaining to Colombia on the basis of Colombian sovereignty over San Andrés .[253]

4 .80 The Archipelago, as a whole, has been the habitat of the Raizales for centuries, who were sustained by the fisheries around the islands as a unit,[254] each of the islands being inextricably linked and permitting their overall economic sustainability.[255] The inhabitants of the islands are indeed closely dependent upon the resources of the Archipelago as a whole, and Colombia has amply demonstrated the interrelationship between the resources of the islands and their interconnecting waters .[256]

4 .81 Colombia maintains that the fact that the Archipelago forms a unity must be taken into account when assessing the capacity of its components to sustain human habitation or

252 2012 Judgment, p. 657, para. 82.
253 2012 Judgment, p. 660, para. 95.
254 CCM, para .4 127 .
255 CCM, para . 4. 128 .
256 CCM, paras . 4. 131-4 148 .

economic life . Colombia takes note that Nicaragua did not engage with Colombia's arguments in this regard in its Reply,[257] and will therefore not discuss this point further .

4 .82 Turning to the entitlements of the various Colombian islands, Colombia fully maintains its position as stated in its Counter-Memorial .

4 .83 Since Nicaragua's own assessment is based on an erroneous understanding of the meaning of the term "rocks which cannot sustain human habitation or economic life of their own", and in order to avoid repetition, Colombia will not discuss again the status of Serrana, Serranilla, and Bajo Nuevo under customary international law as islands entitled to an EEZ and its attendant continental shelf .

4 .84 Colombia respectfully refers the Court to its thorough review of the islands in Chapter 4 of its Counter-Memorial, which unequivocally shows that these islands are not rocks and are, in any case, able to sustain human habitation or economic life of their own .

4 .85 In any event, it is unnecessary to enter into a discussion concerning the extent of the entitlements of these islands because they largely overlap with other Colombia's 200-nautical-mile entitlements . For the purposes of the present pleading and in view of its location and distance from the

[257] NR, para .4 105 .

Nicaraguan coast, Colombia will limit itself to provide some additional comments on Roncador .

(b) Roncador

4 .86 A full and accurate description of Roncador is available at paragraphs 4 .150to 4 159 of Colombia's Counter-Memorial .

4 .87 Nicaragua's own description, in the Reply, is without merit since it relies on an inaccurate report dating from 1932, which erroneously asserts that there are no trees or bushes on Roncador .[258] Nicaragua also seeks to rely on a note sent in 1893 by the Legation of Colombia in Washington to the United States Secretary of State .[259] According to Nicaragua, these two documents prove that Roncador is a "rock which cannot sustain human habitation".

4 .88 But Nicaragua fails to point out that Roncador is described in this note as an "island", not as a "rock". Nicaragua cannot select what it likes and ignore what it dislikes .Nicaragua also fails to mention that, according to the note, Roncador "forms an integral part" of the "Providence Archipelago",[260] and has been, from time immemorial, visited by inhabitants of San Andrés and Providencia for what "constitute[s] one of their most important and lucrative industries", namely turtle fisheries.[261]

---

258 NR, para .4 123 .
259 NR, para .4 124 .
260 NR, Annex 9, p. 487.
261 NR, Annex 9, p. 491.

Nicaragua conveniently omits that in the same note reference is made to the fact that the inhabitants of San Andrés and Providencia had periodically visited the Roncador Cays

> "(…) which are the breeding grounds of those useful animals; remaining on those keys until their purpose is accomplished; constructing wells for the collection of potable water, and executing in general all necessary works for the fulfillment of their objects or for improving the conditions of their temporary sojourn".[262]

This plainly shows the strong economic and cultural link between Roncador and the inhabitants of the Archipelago, as well as this island's intrinsic capabilities .

4 .89 In any event, the question whether Roncador does or does not qualify as a "rock which cannot sustain human habitation or economic life of [its] own" can only be answered on the basis of facts, not according to what such or such person argued one century ago in order to support a sovereignty claim. Somewhat inconsistently, Nicaragua seems to agree on this point since it concludes that "the characteristics of Roncador are a matter of objective fact".[263] However, the objective facts are precisely what Nicaragua ignores.

4 .90 Nicaragua does not even seek to argue that Roncador, a non-rocky feature, is a "rock", asserting that the only relevant

---

[262] NR, Annex 9, pp. 491-492 .
[263] NR, para .4 130 .

test for applying the rule reflected in Article 121 (3) of UNCLOS is the capacity to sustain human habitation and economic life of its own.[264] But if Nicaragua were right that an island is entitled to an EEZ and continental shelf only if it can provide food, water and services necessary for human life without external support, a large number of islands throughout the world which are entitled to an EEZ and continental shelf would be deprived of their entitlements.

4.91 In the same vein, it is obvious that Roncador is not a "rock", but a fully fledged island. It is not composed of solid rock. It is similar to other small features which were recognised to generate an EEZ by other States. The fact that Roncador is not a "rock" is evident from a comparison with features that have been considered by States to constitute "rocks".[265]

4.92 But even if Roncador were to be considered a "rock", the facts explained in Colombia's Counter-Memorial show that it is able to sustain human habitation or economic life of its own. Nicaragua fails to take account of the existence of vegetation, fresh water, fish and birds on the island in assessing its nature.[266] Nicaragua also wrongly argues that the undisputed existence of inhabitants on Roncador is not relevant for assessing whether the island can sustain human habitation, because these inhabitants are members of the Navy and Coast Guard.[267] This

264 See, e.g., NR, paras. 4.85-4.86.
265 See CCM, paras. 4.150-4.159.
266 NR, paras. 4.126-4.130.
267 NR, para. 4.128.

contention relies on the assumption that Naval and Coast Guard personnel are not "human" or that their habitation is not a "human habitation" within the meaning of the rule reflected in Article 121 (3) of UNCLOS .

4 .93 Article 121 (3), in any event, contains no exclusion or restriction to "civilian" human habitation, but rather "human habitation" with no qualification, which necessarily includes "any" human habitation. Moreover, Nicaragua's assertion ignores that the criteria of the capacity "to sustain human habitation" refers, precisely, to a capacity or to a potentiality, not necessarily to a contemporaneous fact. Thus, even if the current inhabitants were to be ignored for assessing the human habitation criterion because they are members of the Navy and Coast Guard (*quod non*), the fact that persons do inhabit the island, in an environment encompassing buildings, infrastructure, electric energy, fresh water and even an internet kiosk, proves that the island is capable of sustaining human habitation .

4 .94 As for the economic life, substantiated by the rich biodiversity of the surrounding waters and the link between the main islands of the Archipelago and Roncador, Nicaragua only tries to cast some doubts on the fact that there are permanent visits by fishermen. The evidence presented by Colombia in its Counter-Memorial proves Colombia's assertion, which is not

that there is a colony of fishermen living on Roncador, but there are fishermen in the island constantly throughout the year .[268]

4 .95 As explained by Colombia, Roncador (in the same way as the other islands) is not permanently inhabited because Colombia prohibits such permanent settlement as a matter of conservation policy, in order to protect the environment of the islands for future generations .[269] This by no means signifies that Roncador (or the other islands) cannot sustain human habitation or economic life of its own; to the contrary, it is because it can sustain human habitation that Colombia continues to prohibit permanent settlement on Roncador by civilians .

4 .96 To conclude, Roncador is not a "rock", and is anyway capable of sustaining human habitation or economic life of its own. It therefore does not fall under the customary rule reflected in Article 121 (3) of UNCLOS .It is an island with entitlements radiating in all directions up to 200 nautical miles from the baselines .The same conclusion holds true concerning the other islands .

4 .97 When one compares Colombia's islands with the features to which State practice gives full entitlements, it is obvious that they do not fall under the customary exception reflected in Article 121 (3) of UNCLOS . No State, whether

268 CCM, paras . 4.129-4 133 .
269 CCM, paras . 4.133-4 148 .

Party or non-Party to UNCLOS, would refrain from considering these features as islands within paragraph 2 of Article 121 .

4 .98 Nicaragua's inability to prove the contrary is illustrated by its random description of Colombia's features as "diminutive",[270] "insignifican[t]",[271] "lack of significance",[272] "minuscule",[273] "tiny",[274] "too small and unimportant",[275] "unimportant" .[276] The Court will not be misled by a plethora of adjectives, which serve only to highlight Nicaragua's insecurity in its legal position, and suggest that the rule reflected in Article 121 (3) relies on a criterion of "small size", which it plainly does not .

4 .99 As rightly said by Nicaragua, "States cannot change the objective reality by describing features in a way that best suits their interests".[277] One only needs look at the facts presented by Colombia to see that none of Colombia's islands are "rocks which cannot sustain human habitation or economic life of their own" as defined by customary international law. They are islands entitled to an EEZ with its attendant continental shelf.

---

270 NR, para .4 110 .
271 NR, paras .4 111 and 4 113 .
272 NR, para .4 112 .
273 NR, para .4 124 .
274 NR, para .4 133 .
275 NR, para .4 135 .
276 NR, para .4 136 .
277 NR, para .4 145 .

D. Conclusions

4 .100 As Colombia has shown in this Chapter, all of its islands relevant to the present proceedings are entitled to a 200-nautical-mile EEZ radiating in every direction.

4 .101 San Andrés, Providencia and Santa Catalina have been recognised by the Court to generate an EEZ entitlement to the east of Nicaragua's 200-nautical-mile range .This entitlement is not confined by the Court's ruling in 2012 and extends in every direction in the area beyond what was considered in the 2012 Judgment. This entitlement prevails over any Nicaraguan OCS claim based on geology and geomorphology as the said elements do not serve as a source of title to maritime zones within 200 nautical miles from another State's mainland or islands .

4 .102 The entitlements of San Andrés, Providencia and Santa Catalina thus preclude Nicaragua from claiming any OCS, even if it had an uninterrupted natural prolongation (*quod non*), in any part of the Southwestern Caribbean Sea beyond the EEZ of these islands . This is so, because, as Nicaragua recognised, "leapfrogging" over or "tunnelling" under the entitlements of other States is precluded under international law .

4 .103 Colombia established in the Counter-Memorial, and has reiterated above, that for the purposes of the rule reflected in Article 121 (3), "rocks" refers to features made of solid rock. Furthermore, Colombia has shown that the second element, i .e.,

the ability to "sustain human habitation or economic life of their own", applies only to "rocks" and not all "islands", as the contrary proposition would undermine the intention of the negotiating States to distinguish between "rocks" and other "islands". This second element has been shown to be interpreted broadly, and not narrowly as Nicaragua would have it.

4 .104 The evidence provided by Colombia in the Counter-Memorial and this Rejoinder thus shows that all of Colombia's other islands, i .e., Roncador, Serrana, Serranilla and Bajo Nuevo, constitute islands and not "rocks" and are thus entitled to an EEZ with its attendant continental shelf. Even were the Court to conclude that "rocks" and "islands" is the same term, Colombia has shown that Roncador, Serrana, Serranilla and Bajo Nuevo fulfil the requirement of the ability to "sustain human habitation or economic life of their own". The Court should thus conclude that Roncador, Serrana, Serranilla and Bajo Nuevo are entitled to an EEZ with its attendant continental shelf .

4 .105 Since Nicaragua's OCS claim cannot serve as a source of legal title within maritime zones included within the EEZ of these islands, and within the EEZ of San Andrés, Providencia and Santa Catalina, Colombia respectfully requests the Court to reject Nicaragua's claim in its entirety.

Chapter 5

THE NICARAGUAN OCS CLAIM DIRECTLY AFFECTS THE POTENTIAL LEGAL INTERESTS OF NEIGHBOURING THIRD STATES

A. Introduction

5.1 The Court has frequently been confronted with the presence of neighbouring third States in maritime delimitation disputes. Nicaragua, in its Reply, glossed over the significant body of jurisprudence that has accumulated over the last four decades dealing with this situation.[278] Nicaragua's decision to ignore the case law is unsurprising, since an appropriate assessment of that case law would have led it to the conclusion that the Court has always protected the potential legal interests of third States, regardless of whether the latter filed an application for permission to intervene, and whether that request had been accepted or not.[279]

5.2 What is novel in these proceedings is the unprecedented magnitude of the neighbouring States' potential legal interests *vis-à-vis* Nicaragua that are at stake. Contrary to the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* case, for example,

---

[278] NR, Chapter 6. In fact, Nicaragua has relied on one single precedent. See para. 5.41 *infra*.

[279] CCM, paras. 6.86-11.

the present case cannot be partially resolved simply by saying that, beyond certain geographical coordinates, the boundary will proceed along a specified azimuth until it reaches the maritime areas of the interested third State .[280]

5 .3 Costa Rica and Panama, together with Colombia, jointly conveyed to the Secretary-General of the United Nations their strong objection concerning Nicaragua's submission to the CLCS, which detrimentally affects and violates their legitimate legal interests in the area .[281] Almost simultaneously, Jamaica submitted its own communication reserving its rights .[282]

5 .4 Tellingly, Nicaragua argues in its Reply that the Court may proceed to delimit a boundary between Colombia's and Nicaragua's sovereign rights, since this will only determine whom between "Nicaragua or Colombia has superior rights *vis-à-vis* the other" without objectively determining whether the alleged relevant area does, in fact, appertain to those two States .[283] In other words, because other neighbouring States, in addition to Colombia, also possess, *vis-à-vis* Nicaragua, entitlements in the purported area to be delimited, Nicaragua is requesting the Court to conduct a "relative" (and thus

---

280 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v . *Nigeria; Equatorial Guinea intervening),* Preliminary Objections of Nigeria, paras .8 1-8 17; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v . *Nigeria; Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp .416-421, paras .226-238 and p .448, para .307 .

281 CCM, Annexes 27 and 28.

282 CCM, Annex 26.

283 NR, para . 6.17 .

hypothetical) delimitation between the Parties to the present proceedings .

5 .5 Nicaragua's belated appeal to relative boundaries is the consequence of its failure to demonstrate, most recently in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v . *Nicaragua)* case,[284] that Nicaragua can somehow benefit from the treaties established between Colombia and other neighbouring States, such as Costa Rica and Panama .

5 .6 Nicaragua has repeatedly asserted that it should replace Colombia in the boundary relations as defined in the agreements concluded with Costa Rica and Panama as well as with Jamaica.[285] But as has already been demonstrated in Colombia's Counter-Memorial, Nicaragua cannot use agreements to which it is not a Party to confine the legal interests of third States *vis-à-vis* itself .[286] The consequences are fatal to Nicaragua's claim, for

---

284 See Section B *infra* .

285 "Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica" of 17 March 1977, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/COL-CRI1977MC PDF (last visited: 21 Jan. 2019); "Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Panama and the Republic of Colombia" of 20 November 1976, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/PAN-COL1976DM PDF (last visited: 21 Jan. 2019); "Maritime Delimitation Treaty between Jamaica and the Republic of Colombia" of 12 November 1993, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/JAM-COL1993MD PDF (last visited: 21 Jan. 2019).

286 CCM, paras . 6.12-6 18 .

its case *vis-à-vis* Colombia is contingent on the assumption that its alleged OCS entitlement can project unobstructed by the potential legal interests of neighbouring States. Accordingly, as far as Nicaragua is concerned, the coasts of Panama and Jamaica project their full 200-nautical-mile entitlements *vis-à-vis* Nicaragua . Such entitlements have not been delimited *vis-à-vis* Nicaragua and are not subject to the Court's jurisdiction in this case .

5 .7 Colombia will show that Nicaragua's exorbitant OCS claim does not conform to the crowded geography of the Southwestern Caribbean Sea. The broader context indicates that the allegedly disputed seabed and subsoil is of concern to Colombia, and respectively, to Panama and Jamaica, certainly not to Nicaragua. This is by no mean surprising or inequitable. It is the logical consequence of the fact that Nicaragua claims maritime areas that are not only much closer to the San Andrés Archipelago and the Colombian mainland, but also much closer to the coastlines of Panama and Jamaica, than they are to its own coastline. The inexorable conclusion, which can be drawn by merely glancing at a map of the Southwestern Caribbean Sea, is that the entitlements of Colombia, combined with the 200-nautical-mile entitlements of those two other States, leave no room for Nicaragua beyond 200 nautical miles from the Nicaraguan coastline .

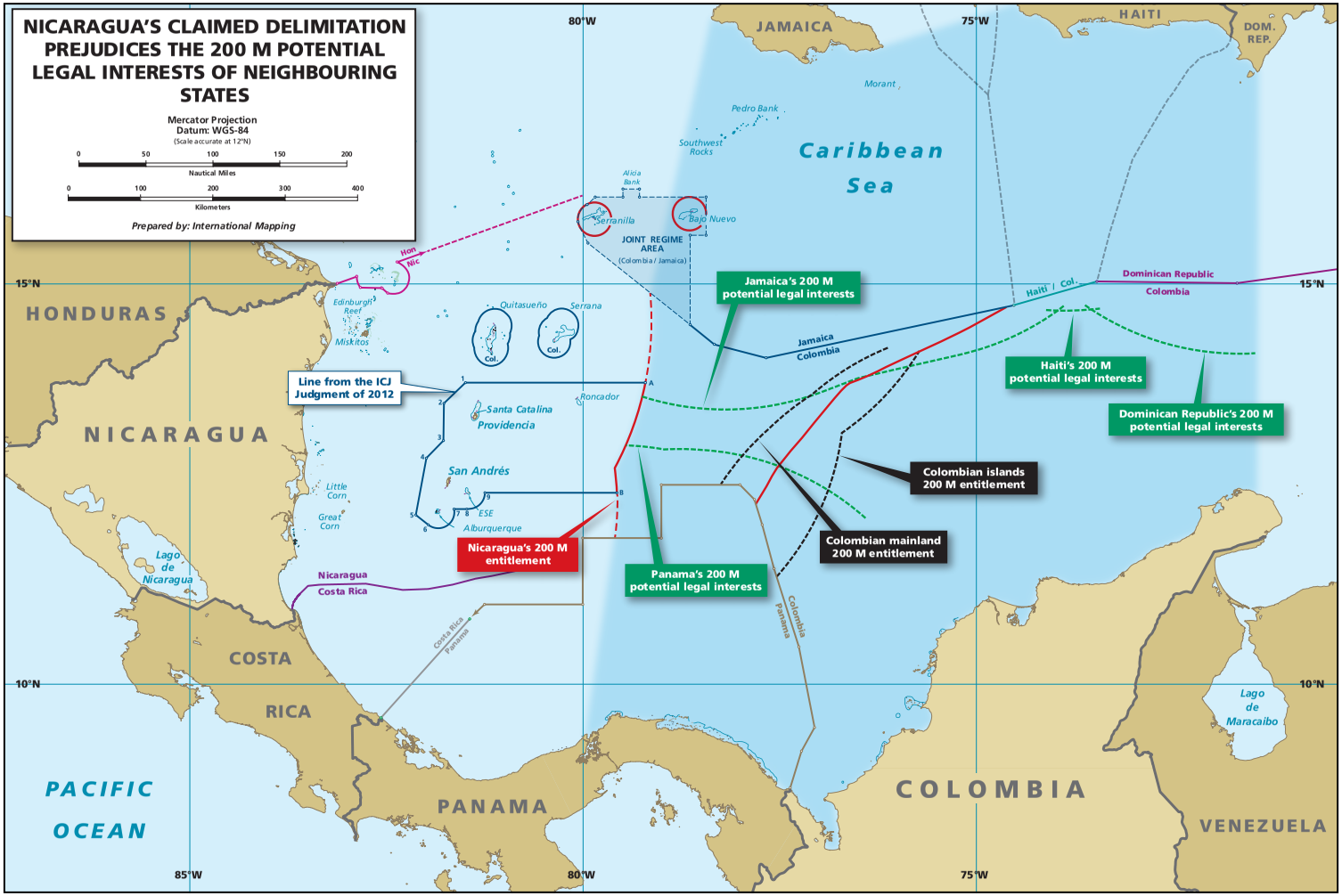

NICARAGUA'S CLAIMED DELIMITATION PREJUDICES THE 200 M POTENTIAL LEGAL INTERESTS OF NEIGHBOURING STATES
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
80°W
75°W
85°W
15°N
10°N
JAMAICA
HAITI
DOM. REP.
Morant
Pedro Bank
Southwest Rocks
Caribbean Sea
Alicia Bank
Serranilla
Bajo Nuevo
JOINT REGIME AREA
(Colombia / Jamaica)
Hon
Nic
HONDURAS
Edinburgh Reef
Miskitos
Quitasueño
Serrana
Col.
Col.
Jamaica's 200 M potential legal interests
Haiti / Col.
Dominican Republic
Colombia
15°N
Jamaica
Colombia
Haiti's 200 M potential legal interests
Dominican Republic's 200 M potential legal interests
Line from the ICJ Judgment of 2012
Roncador
Santa Catalina
Providencia
NICARAGUA
San Andrés
Little Corn
Great Corn
ESE
Alburquerque
Colombian islands 200 M entitlement
Colombian mainland 200 M entitlement
Nicaragua's 200 M entitlement
Panama's 200 M potential legal interests
Lago de Nicaragua
Nicaragua
Costa Rica
Colombia
Panama
Costa Rica
Panama
COSTA RICA
Lago de Maracaibo
PACIFIC OCEAN
PANAMA
COLOMBIA
VENEZUELA

Figure CR 5.1

5 .8 To clarify, this Chapter is not premised on the position taken in Chapter 3, according to which there can be no Nicaraguan OCS within Colombia's 200-nautical-mile entitlements, as a matter of law . That argument is, of course, equally applicable to the maritime areas located within 200 nautical miles from Jamaica and Panama. And, indeed, it is true, as shown in Figure CR 5 .1above, that there are no areas in the Southwestern Caribbean Sea lying beyond 200 nautical miles from the nearest coast . This Chapter makes the point that the neighbouring third States have potential legal interests that cannot be disregarded, irrespective of whether they prevail over Nicaragua's OCS claim .

5 .9 Likewise, this Chapter is not premised on the scientific and technical developments addressed in the following Chapter . Quite apart from the fact that Nicaragua has failed to prove that the natural prolongation of its landmass continues uninterrupted beyond 200 nautical miles, its delimitation claim must in any event be dismissed because it inevitably entails trespassing into areas where neighbouring third States have potential legal interests *vis-à-vis* Nicaragua .

5 .10 As a preliminary point, what Nicaragua in effect is attempting to achieve in the current proceedings is to disrupt the boundaries agreed between Colombia and other neighbouring States with potential legal interests in the area, such as Jamaica and Panama. This is a futile exercise given the geographic circumstances of the present case . In previous cases, the Court

could draw a line with an arrow, while at the same time avoiding the respective areas of interest of third States . In this case, as Colombia will demonstrate below, it is impossible to repeat this exercise because Nicaragua has stretched its maritime claims too far from its coastline and too close to the coastlines of the truly interested States, Colombia, Jamaica and Panama .

5 .11 Colombia will start with an examination of Nicaragua's now defunct *subrogation theory*, according to which Nicaragua would inherit all that was previously negotiated between Colombia and third States .In addition, Colombia will show that, because Nicaragua cannot rely on boundary agreements to which it is not a Party as if they were barricades shielding it from the entitlements of neighbouring States, encroachment is not only probable, but is the inevitable consequence of Nicaragua's exorbitant OCS claim (B) .

5 .12 Colombia will then address Nicaragua's new thesis, the *relative (hypothetical) delimitation theory*, that is to say the idea that the Court, far from determining the limits of Colombia's and Nicaragua's sovereign rights, should only determine which has a better title, regardless of the fact that under no plausible scenario can Colombia and Nicaragua have a boundary in this part of the Southwestern Caribbean Sea . Colombia will also address Nicaragua's assertion according to which the settling of theoretical boundaries and speculative disputes is in conformity

with the sound administration of justice and the proper exercise of the judicial function (C) .[287]

B. The Defunct Subrogation Theory: Nicaragua's Failure to Confine the Potential Legal Interests of Neighbouring Third States

5 .13 In its Counter-Memorial, Colombia (referring to its delimitation treaties with Costa Rica, Panama and Jamaica) demonstrated why Nicaragua cannot

> "on the one hand, rely on the relative effect of treaties for the purpose of arguing that those States' recognition of Colombia's sovereign rights is not opposable to itself and, on the other hand, rely on those same agreements for the purpose of confining their legal interests *vis-à-vis* itself".[288]

5 .14 Nicaragua made no effort to rebut Colombia's argument in its Reply. The reason is simple. Nicaragua's *subrogation theory*, which had already been dismissed by the Court in the *Territorial and Maritime Dispute* case,[289] was definitively rejected in the 2018 Judgment in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v .

---

287 NR, para . 6.18 .

288 CCM, para .6 14 .See also in general CCM, paras . 6.12-6 18 .

289 *Territorial and Maritime Dispute (Nicaragua* v . *Colombia), Application of Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 444, para. 72: "(…) States may conclude maritime delimitation treaties on a bilateral basis . Such bilateral treaties, under the principle *res inter alios acta, neither confer any rights upon a third State,* nor impose any duties on it. Whatever concessions one State party has made to the other *shall remain bilateral and bilateral only*, and will not affect the entitlements of the third State.". (Emphasis added)

Nicaragua) case (1) . If Nicaragua, nevertheless, insists that the neighbouring States have "objectively renounced" certain maritime areas, it is because its OCS claim is predicated on the absence of overlapping entitlements of third States susceptible of cutting off its own alleged projections (2) . However, because the Nicaraguan *subrogation theory* is baseless, it is apparent that Nicaragua's OCS claim inevitably encroaches into maritime areas where neighbouring third States, in addition to Colombia, also possess potential legal interests (3) .

(1) THE DEFINITIVE REJECTION OF THE NICARAGUAN SUBROGATION THEORY IN THE *COSTA RICA* V. *NICARAGUA* CASE

5 .15 In the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v . *Nicaragua)* case, Nicaragua's *subrogation theory* was a critical part of its delimitation claim *vis-à-vis* Costa Rica, which, in the relevant sector, perfectly abutted the delimitation line agreed between Colombia and Costa Rica in 1977 . As it argued in the proceedings relating to Costa Rica's request for permission to intervene in the *Territorial and Maritime Dispute* case,[290] Nicaragua once again stressed that that agreement objectively limited the potential entitlements, claims, or legal interests of Costa Rica, regardless

[290] *Territorial and Maritime Dispute (Nicaragua* v . *Colombia),* Public Sitting, 13 October 2010, CR 2010/13, paras . 27-45 (Reichler) and Public Sitting, 15 October 2010, CR 2010/16, paras .31-36 (Reichler) .

of the fact that the instrument constituted an *inter partes* agreement between Colombia and Costa Rica.[291]

5.16 Nicaragua's *subrogation theory* was also implicit in the way it tried to determine the relevant area in that case. On the one hand, Nicaragua submitted that "the relevant area in the Caribbean Sea [was] limited in the east by the boundary line defined in the 1977 Treaty between Costa Rica and Colombia", because what "Costa Rica ha[d] previously recognized as Colombian [could not] be part of the relevant area".[292] On the other hand, Nicaragua suggested, in the alternative, that if the relevant area were to project north-east of the agreement, on the Colombian side of the delimitation, it should not stop along the notional extension of the boundary between Costa Rica and Panama, as argued by Costa Rica. It should, rather, reach the 1976 Treaty between Panama and Colombia because, in any event, Panama had no entitlements susceptible of projecting beyond that line, on the Colombian side of this other delimitation.[293]

---

[291] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua),* Counter-Memorial of Nicaragua, paras. 3.32-3.33. For example, Nicaragua stated that "the 1977 Treaty fixed and limited Costa Rica's interests in the maritime spaces of the Caribbean Sea. Costa Rica cannot now claim areas over which it renounced any claim in what it accepted as an equitable delimitation, then with Colombia, in 1977" (para. 3.32).

[292] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua),* Counter-Memorial of Nicaragua, para. 3.78.

[293] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua),* Counter-Memorial of Nicaragua, para. 3.72.

5 .17 The Figure below portrays Nicaragua's overt reliance on treaties to which it was not a Party in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v . *Nicaragua)* case .

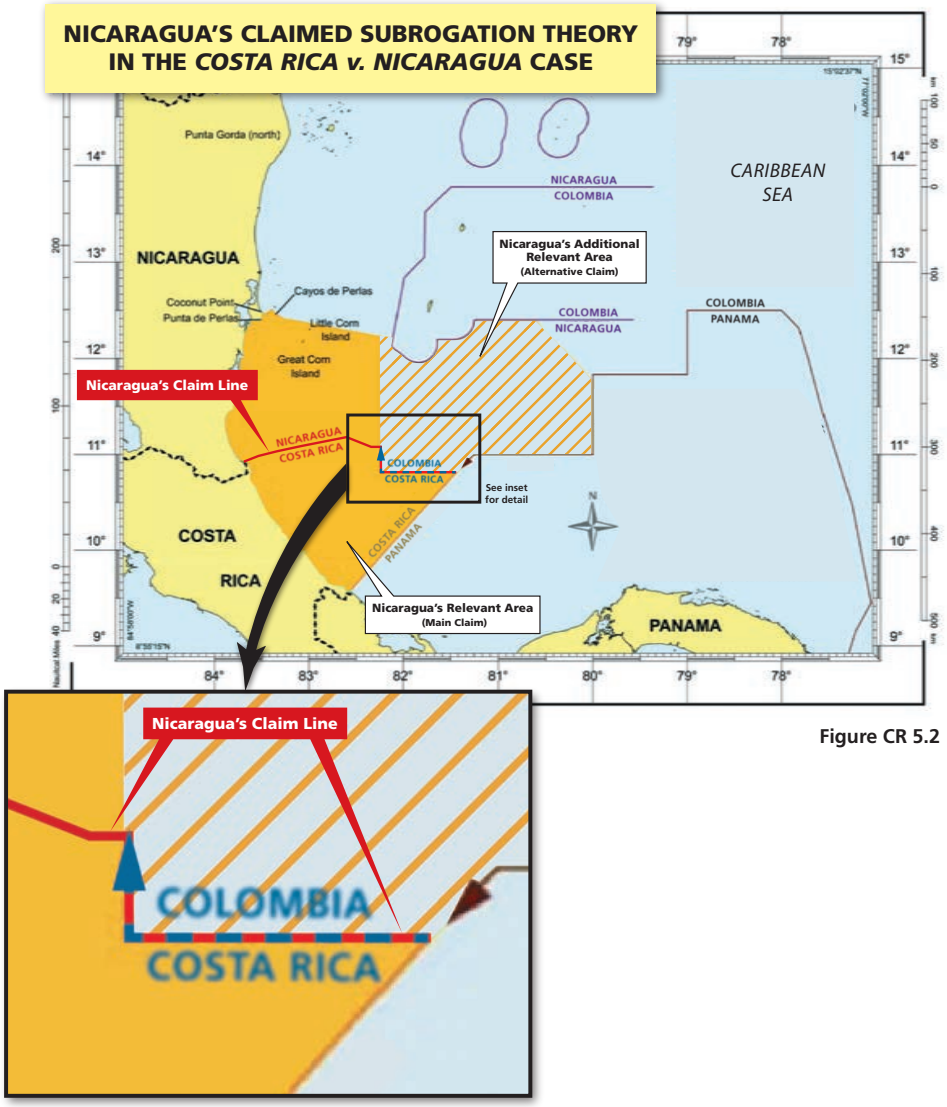


Figure CR 5.2

Source: Costa Rica *v.* Nicaragua 2018 Judgment, Sketch-map 7 (annotated).

5.18 The Court's 2018 Judgment accepted neither Nicaragua's delimitation claim nor its twofold manner of defining the relevant area as depicted above. The course of the line drawn by the Court suffices to demonstrate that the Nicaraguan *subrogation theory* was rejected.

5.19 After an extensive examination of Nicaragua's *subrogation theory*,[294] the Court concluded that:

> "(…) the 1976 Treaty between Panama and Colombia involves third States and cannot be considered relevant for the delimitation between the Parties. With regard to the 1977 Treaty between Costa Rica and Colombia, there is no evidence that a renunciation by Costa Rica of its maritime entitlements, if it had ever taken place, was also intended to be effective with regard to a State other than Colombia."[295]

In other words, contrary to Nicaragua's arguments, the Court found that, *vis-à-vis* Nicaragua, the potential legal interests of Costa Rica and Panama were not confined by the delimitation lines previously agreed with Colombia.

5.20 The above analysis was confirmed at the disproportionality test stage of the 2018 Judgment since the

---

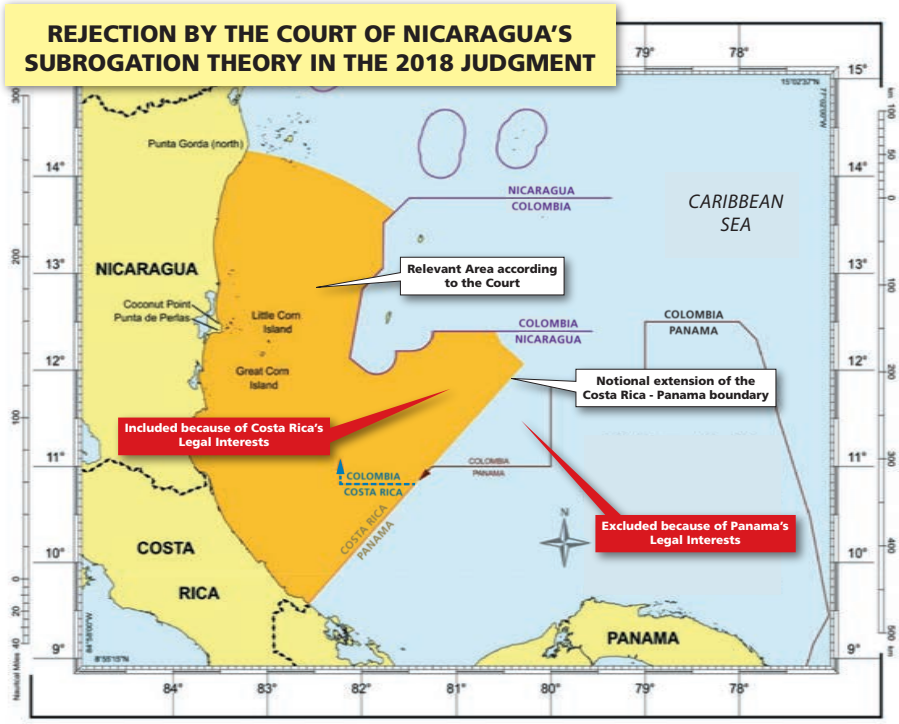
[294] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua); Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment of 2 February 2018*, paras. 123-134.

[295] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua); Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment of 2 February 2018*, para. 134.

Court decided that it was appropriate "to base this calculation on the 'notional extension of the Costa Rica-Panama boundary' as suggested by Costa Rica."[296] Thus, the Court excluded from the relevant area maritime spaces located well within 200 nautical miles of both Nicaragua and Costa Rica, because those maritime spaces could potentially appertain to Panama . This constitutes, among other things, an additional confirmation that Nicaragua's *subrogation theory* is groundless .

5 .21 The Figure CR 5 .3 depicts the relevant area determined by the Court in the 2018 Judgment . The inclusion of certain maritime spaces attests to the fact that, *vis-à-vis* Nicaragua, Costa Rica's potential legal interests were not confined by the 1977 Treaty. Likewise, the exclusion of other maritime spaces demonstrates that, *vis-à-vis* Nicaragua, the 1976 Treaty did not restrict Panama's potential legal interests .

[296] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua); Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v . *Nicaragua), Judgment of 2 February 2018*, para .164 .



Source: Costa Rica *v.* Nicaragua 2018 Judgment, Sketch-map 12 (annotated).

Figure CR 5.3

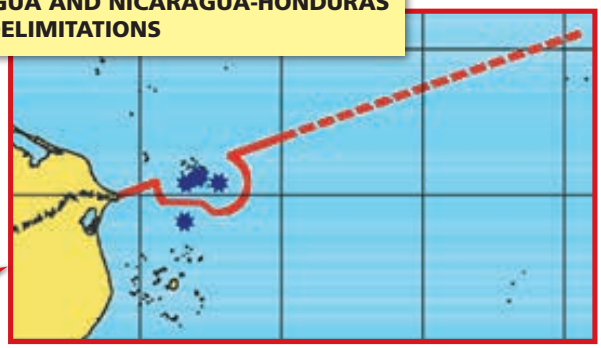
(2) The Nicaraguan Subrogation Theory as the Missing Cornerstone upon which its OCS Claim Rests

5 .22 Despite the explicit and repeated rejection of the *subrogation theory*, Nicaragua persists, in the present proceedings, to try somehow to benefit from the agreements established between Colombia and, respectively, Panama and Jamaica. In this effort, Nicaragua relies in its Reply on propositions and depictions previously rejected by the Court.

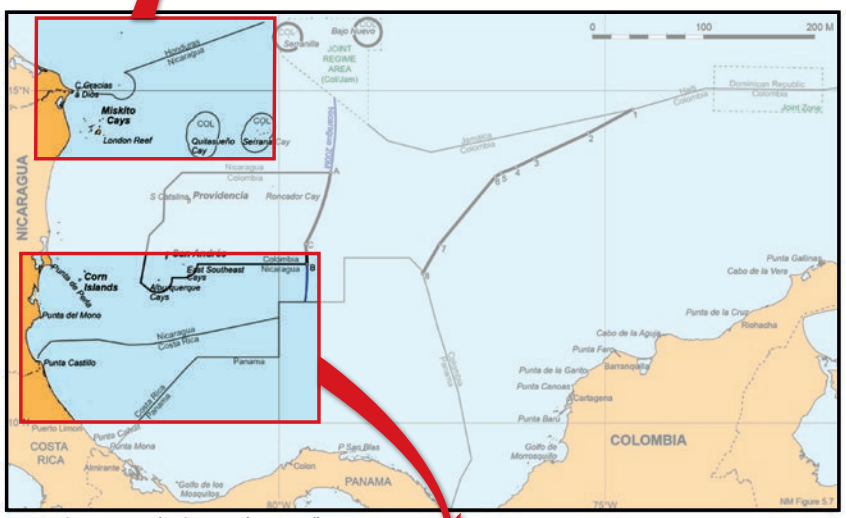
5 .23 Thus, Figure 7.1 of Nicaragua's Reply, which depicts the Applicant's "Final Delimitation" claim, prolongs the Court's 2018 delimitation drawn between Costa Rica and Nicaragua so

as to intersect the 1976 Treaty established between Colombia and Panama .[297]

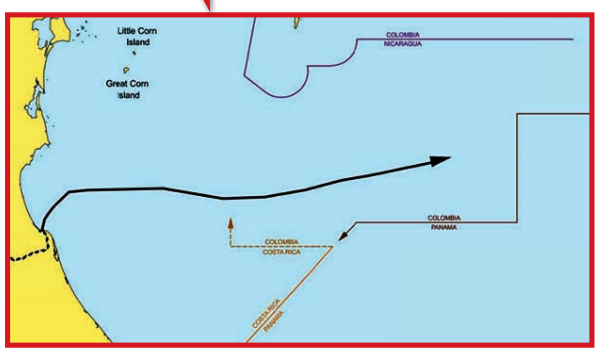
THE NICARAGUAN FALSE DEPICTION OF THE COSTA RICA-NICARAGUA AND NICARAGUA-HONDURAS DELIMITATIONS



Source: Nicaragua v. Honduras 2007 Judgment, excerpt from Sketch-Map 7.



Source: Nicaraguan Reply, Figure 7.1 (annotated).



Source: Costa Rica *v.* Nicaragua 2018 Judgment, excerpt from Sketch-Map 13.

Figure CR 5.4

297 NR, p .208 .

Nicaragua wrongly assumes that the boundary that the Court only drew up to point V, before resorting to the directional arrow technique,[298] necessarily intersects the 1976 agreement. This is nothing but a repetition of Nicaragua's already rejected argument according to which Panama has no legal interests beyond the agreement concluded with Colombia. In reality, had the Court considered the *subrogation theory* to be well-founded, it could have easily extended the boundary as depicted in the Nicaraguan Reply. But the Court did not do so precisely because, contrary to what Nicaragua suggests, such a boundary would encroach on the potential legal interests of Panama well before it reached the 1976 delimitation line .

5 .24 Moreover, Figure 7.1 of Nicaragua's Reply also wrongly suggests that the dashed section of the 2007 Court's delimitation between Nicaragua and Honduras is, in fact, a full line. This is clearly prejudicial to Jamaica's potential legal interests *vis-à-vis* Nicaragua . Indeed, as Colombia will demonstrate below, Jamaica's potential legal interests *vis-à-vis* Nicaragua reach maritime areas located well within the terminal point implicitly put forward in Nicaragua's depiction .

5 .25 Why does Nicaragua insist on its *subrogation theory*, notwithstanding the fact that the latter has repeatedly been

---

298 *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua); Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v .*Nicaragua), Judgment of 2 February 2018*, para .158 and sketch-map No .11 .

rejected?[299] Could it be that subrogation is the cornerstone upon which Nicaragua's entire edifice, its exorbitant OCS claim *vis-à-vis* Colombia, is built?

5 .26 By giving the impression that the neighbouring third States' entitlements and legal interests are objectively confined by the agreements they concluded with Colombia, Nicaragua insinuates that the Court can delimit all the maritime areas located on the Colombian sides of the aforementioned treaties without encroaching on spaces of interest to other States . Nicaragua's final delimitation claim, which intersects both with the delimitation lines contained in the 1976 and 1993 Treaties concluded between Colombia and, respectively, Panama and Jamaica, implies that the Court can set these two implicit tripoints without affecting the legal interests of the two neighbouring States .

5 .27 Under Nicaragua's *subrogation theory*, *inter partes* agreements become the objective limits of Nicaragua's maritime area, or, in other words, the perimeter that it inherited, by some form of legal alchemy, from decades of negotiations conducted by the representatives of other States. If that were the case, by delimiting the purported seabed boundary claimed by Nicaragua, the Court would in effect also be determining the

[299] In addition to Figure 7.1, see also NR, para. 6.5: "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." (Emphasis added)

boundaries between Nicaragua and, respectively, Panama and Jamaica.

5 .28 To quote from Nicaragua's official position, as it was made public in two notes sent to the Secretary-General of the United Nations:

> "Nicaragua's Submission does not in any way encroach upon any rights over submarine areas to which Jamaica is entitled under international law. (…) Nicaragua does not claim any areas of continental shelf which appertain to Jamaica in accordance with the Maritime Delimitation Treaty between Jamaica and the Republic of Colombia, dated 12 November 1993 ."[300]

> "Nicaragua's Submission does not in any way encroach upon any rights over maritime areas to which Panama is entitled under international law . (…) Nicaragua does not claim any areas of continental shelf which appertain to Panama in accordance with the Maritime Delimitation Treaty between Panama and the Republic of Colombia in force as of 30 November 1977."[301]

The problem with Nicaragua's official position, as Colombia will now demonstrate, is that its claim is in fact the epitome of encroachment since Jamaica's and Panama's potential legal interests *vis-à-vis* Nicaragua, do project well beyond the aforementioned treaties .

---

[300] Communication MINIC-NU-049-13 of the Permanent Mission of Nicaragua to the United Nations, 20 December 2013 (CCM, Annex 32).

[301] Communication MINIC-NU-050-13 of the Permanent Mission of Nicaragua to the United Nations, 20 December 2013 (CCM, Annex 33).

(3) THE NICARAGUAN OCS CLAIM INEVITABLY ENCROACHES INTO AREAS WHERE NEIGHBOURING THIRD STATES POSSESS POTENTIAL LEGAL INTERESTS

5 .29 If one disregards the treaties to which Nicaragua is not a Party, in accordance with the Court's jurisprudence, it becomes evident that the seabed and subsoil entitlements of Jamaica and Panama effectively overlap with the Nicaraguan OCS claim. This has significant repercussions in the present case. While the Court has in the past been able to draw partial maritime delimitations, in lieu of complete ones, here the degree of overlap is such that it entails, as stated in the Counter-Memorial, "that even the shortest of all maritime delimitations would inevitably trespass into areas where, aside from Colombia's sovereign rights, third States possess entitlements" *vis-à-vis* Nicaragua :[302]

[302] CCM, para . 6.5.

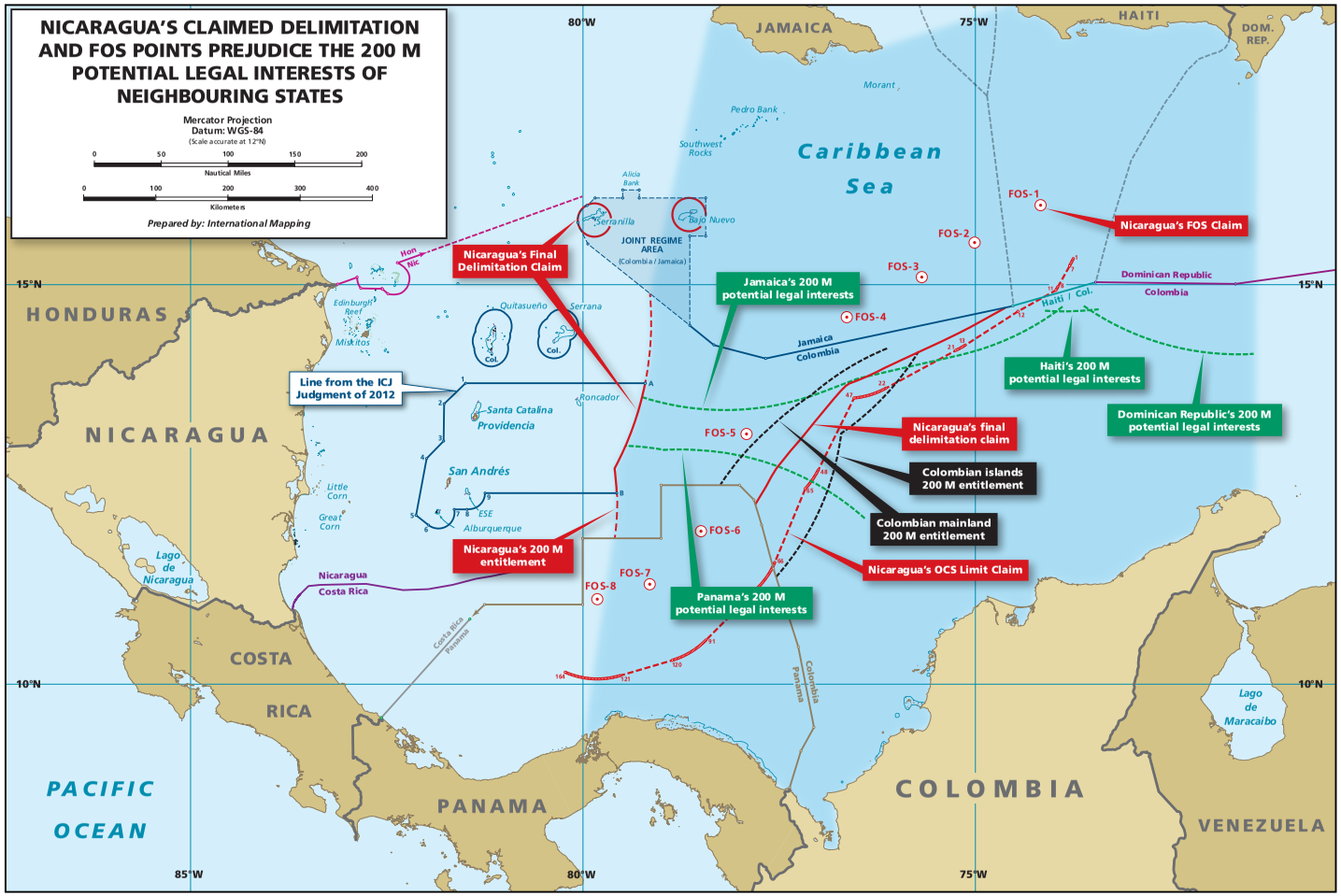

NICARAGUA'S CLAIMED DELIMITATION AND FOS POINTS PREJUDICE THE 200 M POTENTIAL LEGAL INTERESTS OF NEIGHBOURING STATES
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
Nautical Miles
Kilometers
Prepared by: International Mapping
JAMAICA
HAITI
DOM. REP.
Caribbean Sea
Morant
Pedro Bank
Southwest Rocks
Alicia Bank
Serranilla
Bajo Nuevo
JOINT REGIME AREA
(Colombia / Jamaica)
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
VENEZUELA
PACIFIC OCEAN
Edinburgh Reef
Miskitos
Quitasueño
Serrana
Roncador
Santa Catalina
Providencia
San Andrés
Little Corn
Great Corn
ESE Alburquerque
Lago de Nicaragua
Lago de Maracaibo
Nicaragua
Costa Rica
Costa Rica / Panama
Colombia / Panama
Jamaica
Colombia
Haiti / Col.
Dominican Republic
Colombia
Nicaragua's Final Delimitation Claim
Line from the ICJ Judgment of 2012
Nicaragua's 200 M entitlement
Jamaica's 200 M potential legal interests
Panama's 200 M potential legal interests
Nicaragua's FOS Claim
Haiti's 200 M potential legal interests
Dominican Republic's 200 M potential legal interests
Nicaragua's final delimitation claim
Colombian islands 200 M entitlement
Colombian mainland 200 M entitlement
Nicaragua's OCS Limit Claim
FOS-1
FOS-2
FOS-3
FOS-4
FOS-5
FOS-6
FOS-7
FOS-8
80°W
75°W
85°W
15°N
10°N

Figure CR 5.5

5 .30 The Figure above demonstrates that, beyond 200 nautical miles from the Nicaraguan coastline, the potential legal interests of Jamaica and Panama significantly overlap with the Nicaraguan OCS claim .The Court is not confronted here with a minor problem concerning the terminal sections of a delimitation line drawn between the Parties before it, which could be resolved by resorting to the directional arrow technique .

5 .31 The eight foot of slope points identified by Nicaragua are located in EEZ and continental shelf areas not appertaining to it .[303] Moreover, the greatest part of both Nicaragua's purported OCS limit and its delimitation claim likewise encroach upon areas where neighbouring States have potential legal interests *vis-à-vis* Nicaragua .

5 .32 But what is even more remarkable in the present case is the fact that the potential legal interests of Panama and Jamaica *vis-à-vis* Nicaragua conflict with Nicaragua's claim . Considering that the three interested States have opposite coastlines, hypothetically it would be possible to draw median lines between Nicaragua and, respectively, Jamaica and Panama, which would be located within the 200 nautical miles from the Nicaraguan coast, thus barring Nicaragua's projections eastwards .

303 See Chapter 6 *infra* .

5 .33 Nicaragua's delimitation claim with regard to Serranilla and Bajo Nuevo is premised on Nicaragua's belief that it can catapult itself into the Joint Regime Area established between Colombia and Jamaica. Not only does Nicaragua blatantly disregard the 2012 Judgment,[304] its delimitation claim is prejudicial to Jamaica's legal interests insofar as, at its core, lies the premise that the boundary between Nicaragua and Jamaica should be located northeast of the Joint Regime Area or, at the very least, within that area . In fact, the potential legal interests of Jamaica project southwest of that area, within 200 nautical miles from the Nicaraguan coast .

5 .34 While Nicaragua self-servingly has a myopic view of the delimitation dispute (as if Colombia and Nicaragua were the only two States in the region), the broader geographical context indicates that Nicaragua cannot claim areas located beyond 200 nautical miles from its coastline . Nicaragua's belief that it should be allowed to reach maritime areas located so far away from its coastline despite the crowded geography of the region, is based on a complete refashioning of geography.

5 .35 Nicaragua argues that there is a maritime space where the 200-nautical-mile limits of Jamaica and Panama do not overlap with those of Colombia and Nicaragua .[305] But the fact

---

304 In said Judgment, the Court stressed that the Joint Regime Area, as well as the waters within a 12-nautical-mile radius of the islands of Serranilla and Bajo Nuevo could not be part of the relevant area in view of the "potential Jamaican entitlements". See 2012 Judgment, pp. 685-686, para 163 .

305 NR, paras .6 2, 6 5 and 6 8 .

that what it calls the "middle portion of the delimitation area"[306] is located outside of Panama's and Jamaica's 200-nautical-mile potential entitlements *vis-à-vis* Nicaragua, is of no help to the Applicant . Aside from the proposition that the only way in which Nicaragua could have, *vis-à-vis* Colombia, a "better claim" to that area, would be if the San Andrés Archipelago were obliterated from the Southwestern Caribbean Sea, the fact remains that, in order to reach that area, Nicaragua would have to "leapfrog" over or "tunnel" under the maritime spaces of Panama, Jamaica and Colombia .

5 .36 Yet, when it comes to Serrana, Nicaragua asserts that its entitlements cannot "somehow leapfrog over Nicaragua's EEZ and reassert themselves to the east of Nicaragua's 200 M limit ."[307] But Nicaragua cannot have it both ways. If Serrana's entitlements cannot leapfrog over those of Nicaragua, then Nicaragua's alleged OCS claim cannot leapfrog over the maritime areas of the San Andrés Archipelago and the potential legal interests of Jamaica and Panama. Simply put, Nicaragua's delimitation claim *vis-à-vis* Colombia is unsustainable because it cannot be merged with the remainder of Nicaragua's maritime area, which must necessarily be interrupted much further to the west .

5 .37 Interestingly, Nicaragua felt compelled to stress that Panama and Jamaica have not in fact claimed an OCS and that

306 NR, para . 6.8.
307 NR, para .4 108 .

"[t]here can therefore be no question of Jamaica or Panama having even potential interests beyond 200 M".[308] Colombia considers significant the fact that, if one were to follow Nicaragua's theory, the same OCS could have been claimed by other neighbouring States which, in fact, have refrained from doing so .

5 .38 This brings Colombia to Nicaragua's new convenient theory, the *relative (hypothetical) delimitation theory*, which much like its defunct *subrogation theory* is premised on a complete reversal of the Court's *jurisprudence constante* .

C. The Latest Relative (Hypothetical) Delimitation Theory: Nicaragua's Failure to Justify Encroachment into Maritime Areas where Neighbouring Third States Have Potential Legal Interests

5 .39 Having established that Nicaragua's *subrogation theory* is meretricious and that, consequently, Panama's and Jamaica's entitlements do overlap significantly with those of Nicaragua, Colombia will address Nicaragua's assertion according to which encroachment, in any event, is of no concern since "[t]he 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'"[309] (1) . Colombia will then demonstrate why the Nicaraguan *relative delimitation*

308 NR, para . 6.7.
309 NR, para . 6.10 .

theory is not conducive to the sound administration of justice and the proper exercise of the judicial function (2).

(1) Nicaragua's Reliance on Article 59 of the Statute Conflicts with the Court's Constant Refusal to Draw Relative (Hypothetical) Delimitations

5 .40 The Court and Colombia are well aware of Article 59 of the Statute .It is Nicaragua, however, that needs to be reminded of the Court's consistent jurisprudence on maritime delimitation disputes, which it has failed to mention in its Reply.

5 .41 Nicaragua has only relied, in its Reply, on a single precedent, the 2018 Judgment in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v . *Nicaragua)* case .[310] This is all the more astonishing considering that that precedent, aside from definitively dismissing Nicaragua's *subrogation theory*, also demonstrates beyond any doubt that, when delimiting the maritime areas appertaining to the Parties to the proceedings, the Court avoids encroaching on areas susceptible of appertaining to neighbouring third States .If the contrary were to be true, as the Nicaraguan Reply suggests, the Court would not have resorted in its Judgment to the directional arrow technique beyond point V. If the protection afforded by Article 59 of the Statute were truly sufficient, as Nicaragua asserts, the Court would have delimited the boundary up to the 200-nautical-mile limits of Nicaragua or Costa Rica,

[310] NR, paras .6 3, 6 10, 6 12 and 6 13 .

whichever came first. But the Court did not do so, contrary to what Nicaragua's false depiction in Figure 7.1 suggests.

5.42 By resorting to the directional arrow technique, the Court followed its consistent jurisprudence, which dates back to the 1982 Judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. In that case, the Court resorted to the directional arrow technique so as not to affect Malta's potential legal interests. As the Court stated, when drawing an arrow well outside Malta's equidistance claims *vis-à-vis* Libya and Tunisia, "the extension of this [delimitation] line northeastwards is a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with third States".[311]

5.43 Later, in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* case, the Court said the following:

> "In the present case, Article 59 may not sufficiently protect Equatorial Guinea or Sao Tome and Principe from the effects – even if only indirect – of a judgment affecting their legal rights. (…) In view of the foregoing, the Court concludes that it cannot rule on Cameroon's claims in so far as they might affect rights of Equatorial Guinea and Sao Tome and Principe. Nonetheless, the mere presence of those two States, whose rights might be affected by the decision of the Court, does not in itself preclude the Court from having jurisdiction over a maritime

[311] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 94, para. 133 C. (3).

> delimitation between the Parties to the case before it, namely Cameroon and Nigeria, although it must remain mindful, as always in situations of this kind, of the limitations on its jurisdiction that such presence imposes."[312]

As already stated in the Introduction to the present chapter, in that case the Court was able to proceed to a partial delimitation . But once again it had to rely on an arrow, drawn well outside Equatorial Guinea's equidistance claim *vis-à-vis* Cameroon, so as not to encroach and, consequently, directly affect the legal interests of the neighbouring State. As stated by the Court, the boundary could not "be extended very far" since "it c[ould] take no decision that might affect rights of Equatorial Guinea, which is not a party to the proceedings".[313]

5 .44 In the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v . *Honduras)* case, the 2007 Judgment did not specify the endpoint of the delimitation because "[t]he Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined".[314]

---

[312] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v . *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p .421, para .238 .

[313] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v . *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p .488, para .307 .

[314] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v . *Honduras), Judgment, I.C.J. Reports 2007,* p .756, para .312 .

5.45 There is no point in addressing the additional jurisprudence that proves Colombia's point and compellingly disproves Nicaragua's unsubstantiated argument. Colombia can limit itself to stressing that all the other relevant precedents, in addition to those mentioned above, confirm the fact that the Court, "as a matter of principle",[315] does not draw boundaries that encroach into maritime areas of interest to third States. Colombia will simply refer to Judge Donoghue's comprehensive account of the Court's practice, as set out in her dissenting opinion in the proceedings relating to Honduras' request to intervene in the *Territorial and Maritime Dispute* case.[316]

5.46 Nicaragua has made a great deal of the fact that, in the 2018 Judgment in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case, the Court drew a boundary which, to a limited extent, "crossed into areas that are closer to Panama than to Costa Rica".[317] In its Counter-Memorial, Colombia noted that the jurisprudence tends to suggest that the Court will usually draw the directional arrow before the delimitation can reach maritime areas that are located closer to the coastline of a third State.[318] Colombia stands by its proposition, which is supported by the bulk of the Court's jurisprudence.

---

315 *Territorial and Maritime Dispute, Application of Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 372, para. 86.

316 *Territorial and Maritime Dispute, Application of Honduras for Permission to Intervene*, *I.C.J. Reports 2011*, Dissenting Opinion of Judge Donoghue, pp. 477-481, paras. 18-24.

317 NR, para. 6.12.

318 CCM, para. 6.8.

5 .47 In any event, Colombia must stress that, what is more significant in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case, is the fact that the Court, on the one hand, excluded from the relevant area maritime spaces susceptible of appertaining to Panama and, on the other hand, resorted to the directional arrow technique . Even if some minor degree of encroachment could be inferred from the 2018 Judgment, Nicaragua cannot compare such a limited form of trespassing to the situation at hand .

5 .48 Nicaragua's *relative (hypothetical) delimitation theory* is based on the assumption that the requested delimitation "could have no effect on the [legal] interests" of the third States because the Court's boundary would only determine which State had the better claim as between the two Parties .[319] If, for the sake of argument, the Court were to follow Nicaragua's train of thought to its proper conclusion, the consequences would be different from those mentioned in Nicaragua's Reply. Nicaragua suggests that if the Court "were to draw a boundary that passed into areas within the potential entitlements of a third State", "[s]uch 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".[320]

---

319 NR, para . 6.17 .

320 NR, para. 6.17. (Emphasis added)

5 .49 But what about the legal status of the areas between Colombia and, respectively, Jamaica and Panama, which have been delimited by treaties that are in force between these three States? If one adopts the Nicaraguan approach, which runs contrary to the entire jurisprudence of the Court, it follows that judicially established delimitations, like politically agreed ones, are not merely relative lines, they are purely hypothetical lines which can be deprived of purpose by subsequent delimitations.

5 .50 But as Judge Jennings stated, when confronted with similar arguments raised by Libya and Malta:

> "(…) if Article 59 were to be given the very broad interpretation that the Court now seems to have espoused, so that every decision is to be analogous to a bilateral agreement, and *res inter alios acta* for third States, does this not mean that the Court in effect disables itself from making useful and realistic pronouncements on questions of sovereignty and sovereign rights (and the latter is what we are in fact dealing with in this case)? 'Sovereign rights' that are opposable only to only one other party comes very near to a contradiction in terms."[321]

5 .51 The jurisprudence demonstrates that the Court has never delimited relative (hypothetical) boundaries . The following excerpt from the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case deserves to be cited at some length:

---

[321] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984,* Dissenting Opinion of Judge Jennings, p. 158, para. 30.

> "The Court notes that by the Special Agreement it is asked to define the legal principles and rules applicable to the delimitation of the area of continental shelf 'which appertains' to each of the Parties. The decision of the Court will, by virtue of Article 59 of the Statute, have binding force between the Parties, but not against third States .If therefore the decision is to be stated in absolute terms, in the sense of permitting the delimitation of the areas of shelf which 'appertain' to the Parties, as distinct from the areas to which one of the Parties has shown a better title than the other, but which might nevertheless prove to 'appertain' to a third State if the Court had jurisdiction to enquire into the entitlement of that third State, the decision must be limited to a geographical area in which no such claims exist. It is true that the Parties have in effect invited the Court, notwithstanding the terms of their Special Agreement, not to limit its judgment to the area in which theirs are the sole competing claims; but the Court does not regard itself as free to do so, in view of the interest of Italy in the proceedings."[322]

Much like Malta and Libya, Nicaragua, when instituting the proceedings, requested the Court to determine "the precise course of the *maritime boundary between Nicaragua and Colombia* in the areas of the continental shelf *which appertain to each of them*".[323] Much like Malta and Libya, it is irrelevant that Nicaragua now asks the Court merely to determine which State has a better title, i.e., "superior rights" .[324] The Court did not extend its boundary in the areas in which Italy had a

---

322 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p .25, para .21 .

323 Application of Nicaragua, para. 12. (Emphasis added)

324 NR, para . 6.17 .

potential legal interest . The Court did not draw then a relative, and thus hypothetical, boundary and it has not done so since .

5 .52 Nicaragua's exorbitant delimitation claim, like that of Cameroon in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)* case, is not a boundary line dividing equivalent overlapping entitlements .It is an exclusion line entirely divorced from geography. Nicaragua is trying to exclude Colombia from the seabed and subsoil of a maritime area that cannot, in the presence of neighbouring States' potential legal interests, in any event be Nicaraguan. Like the claim in that case, Nicaragua's final delimitation either significantly trespasses into maritime areas in which neighbouring third States would have analogous if not "better claims" than Nicaragua can possibly have, or requires "leapfrogging" over or "tunnelling" under their maritime areas .

(2) The Nicaraguan Appeal to the Settling of Relative Boundaries and Speculative Disputes is Inconsistent with the Sound Administration of Justice and the Proper Exercise of the Judicial Function

5 .53 Nicaragua says in its Reply that "if the Court were to decline to act in this case, the result would be the indefinite prolongation of this dispute, potentially forever" and that, consequently, the Court should "resolve the prevailing uncertainty" in the "interests of peace and stability".[325] These sweeping assertions are wholly unpersuasive. The settling of

[325] NR, para . 6.18 .

relative and hypothetical boundaries is by no means conducive to the sound administration of justice and the proper exercise of the judicial function. It also undermines peace and stability, contrary to Nicaragua's assertion.

5 .54 Were the Court to draw a boundary beyond 200 nautical miles from the Nicaraguan coastline, it would be suggesting that a boundary exists between Nicaragua and Colombia in an area that cannot plausibly appertain to Nicaragua. In a perfect world, that boundary, if it truly were relative (hypothetical) as suggested by Nicaragua, could later be deprived of meaning due to the drawing of two boundaries between Nicaragua and, respectively, Jamaica and Panama within 200 nautical miles from the Nicaraguan coastline . In other words, the present proceedings would, *a posteriori*, have proven to be futile because at the end of the day, the boundary relation would have been found to be non-existent .

5 .55 However, a judicially determined boundary, even when a State self-servingly suggests that it only determines who has a better claim, creates *in practice* an objective situation, which would be virtually impossible for third States to question. If the Court were to delimit the seabed and subsoil beyond 200 nautical miles from the Nicaraguan coast, Nicaragua will doubtless cease to claim that that line is relative . On the contrary, Nicaragua will offer the Court's delimitation as conclusive evidence of the fact that, at the very least, Nicaragua's sovereign rights must be present on the Nicaraguan

side, or sides, of the delimitation . This would mean that the boundaries which would fall to be established between itself and countries like Jamaica and Panama would have to turn due east so as to preserve a Nicaraguan corridor of seabed and subsoil located beyond 200 nautical miles from the Nicaraguan coast. Such a scenario would be the very definition of refashioning the geography of the region .

5 .56 What is more, this scenario entails the creation of, not one, but three grey zones in the middle of the Southwestern Caribbean Sea . The Colombian water column would in effect straddle three relative boundaries between Nicaragua and, respectively, Colombia, Jamaica and Panama. Colombia deems it totally unproductive to engage in policy considerations of what is frankly an absurd, and therefore unacceptable, scenario.

5 .57 Moreover, a judicially determined boundary, far from constituting a relative (hypothetical) line that will eventually disappear, must entail the presence of the Parties' sovereign rights on their respective sides . In other words, while the delimitation does not determine the full spatial extent of the two Parties' maritime areas, it presupposes that the maritime boundary is part of the perimeters which will define the maritime areas appertaining to the two Parties. Yet it is far-fetched to assume, as Nicaragua does, that its delimitation claim *vis-à-vis* Colombia can somehow be merged with the undefined maritime boundaries between Nicaragua and, respectively Jamaica and Panama.

D. Conclusions

5 .58 Colombia respectfully urges the Court to weigh carefully what Nicaragua's OCS claim would entail for the Respondent and third States in the region . The Court is confronted with an exorbitant claim that significantly trespasses into the 200-nautical-mile entitlements of Colombia and of the other interested neighbouring States. To put it bluntly, this unprecedented situation attests to the fact that Nicaragua's OCS claim is forcing its presence into an area in which it should have no boundary relations at all, either with Colombia, or with other neighbouring States .

5 .59 Were the Court to entertain Nicaragua's claim, it would effectively be affecting the potential legal interests of Jamaica and Panama within 200 nautical miles from Nicaragua's coastline . Moreover, by recognising a Nicaraguan presence beyond the 200-nautical-mile limit, the Court would inevitably be prejudging sovereign rights to the soil and subsoil in favour of Nicaragua and to the detriment of third States . This is an extremely advantageous proposition for Nicaragua, given that the maritime areas at stake are closer to the coastlines of the neighbouring third States than they are to those of Nicaragua .

5 .60 Nicaragua's exorbitant claim in the current proceedings would lead to disruptions in the existent boundary relations, as well as to the creation of multiple grey zones in an area where

Nicaragua has the least convincing claim of all the neighbouring States . This would constitute an unwarranted, and therefore unacceptable, refashioning of geography.

5 .61 If the Court were to entertain Nicaragua's expansionist claim in an area where it does not belong, it would create, to use Nicaragua's words, an "indefinite prolongation of this dispute, potentially forever", and add to the toxic brew disputes with other States; all in a region stabilised through equitable delimitations between the EEZ and continental shelf entitlements of the surrounding States. Contrary to Nicaragua's distorted views of "uncertainty", "peace" and "stability", if the Court were to reject Nicaragua's claim for an OCS in this part of the Southwestern Caribbean Sea, which is far removed from Nicaragua's coast and lies within 200 nautical miles of other States, it would promote certainty, peace and stability in the area . The Court would thus preserve the coherent and clear relations and delimitations of jurisdictions between the only relevant States .

5 .62 By attempting to insert itself, through its purported natural prolongation, into this part of the Southwestern Caribbean Sea covered by the 200-nautical-mile entitlements of other States, Nicaragua aspires to destabilise this region .

5 .63 Finally, Colombia wants to reiterate, as it has throughout these proceedings, that it fully respects the bilateral delimitation treaties it has concluded with its neighbouring States and abides

by the obligations arising from said instruments . Colombia's maritime delimitation treaties are *res inter alios acta* for Nicaragua and cannot be invoked by said State in order to confine the potential legal interests of the Parties to those agreements .

Chapter 6

NICARAGUA FAILED TO MEET ITS BURDEN OF PROOF AND DID NOT COMPLY WITH THE ADEQUATE STANDARD OF PROOF IN RELATION TO ITS OCS CLAIM

Chapter (pages 185 to 262) not reproduced

Chapter 7

SUMMARY AND CONCLUSIONS

7 .1 Colombia has proven that under customary international law, natural prolongation may not serve as a source of title within, and hence encroach upon, another State's 200-nautical-mile EEZ with its attendant continental shelf. Or, in other words, natural prolongation may not serve a wide-margin coastal State as a source of legal title to maritime areas which lie within 200 nautical miles from another State's baselines . Apart from Nicaragua, the many States that have made submissions to the CLCS, have respected this principle, save in three exceptional cases, in all of which submissions were filed after the 2012 Judgment and objections were raised by the States whose 200-nautical-mile entitlements were encroached upon .

7 .2 Nicaragua has failed to provide a shred of evidence from either doctrine, practice or jurisprudence to challenge this conclusion .Instead, Nicaragua has offered a contrived argument that contends that if coasts are 401 nautical miles or more apart rather than 400, the regime of title throughout the entire area, up to the baselines, reverts to the regime of the past, and natural prolongation springs back as a source of title within the entire area, including within another State's 200-nautical-mile entitlements . Colombia has shown that this argument has no basis in international law and runs counter to the whole negotiating history at UNCLOS III .

7 .3 As for the applicable law, given that Colombia is not a Party to UNCLOS, the case falls to be addressed under customary international law. In Chapter 2, Colombia established that the entirety of the OCS regime is not customary international law .The OCS regime was part of the package-deal between narrow and wide-margin States; it opened the way for a wide-margin State to exploit resources of what would have otherwise been part of the Area, if it could prove to the CLCS (an internal UNCLOS technical commission) on the basis of scientific data, that the area it sought was its continental shelf . And it was then subject to a revenue-sharing scheme .As these last two elements are an essential part of the package-deal, and may not plausibly reflect customary international law, the rest of the package-deal – including the opportunity to benefit from OCS resources – may not plausibly reflect customary international law, nor be opposable to non-Parties .As Colombia is only subject to customary international law, this alone warrants rejecting in its entirety Nicaragua's claim, based as it is on a conventional OCS regime .

7 .4 Colombia enjoys an entitlement to a continental shelf, as part of its EEZ to a distance of 200 nautical miles from its baselines . Both Colombia's mainland and its islands generate such 200-nautical-mile entitlements. The Court has already acknowledged in its 2012 Judgment that the islands of San Andrés, Providencia and Santa Catalina are entitled to an EEZ with its attendant continental shelf to the east of Nicaragua's

200-nautical-mile line and should not be cut-off from this entitlement.[442]

7.5 In asserting that the Colombian islands should not be accorded title east of Nicaragua's 200-nautical-mile range and confining their entitlements by the lines drawn by the Court in the 2012 Judgment, Nicaragua asks the Court to contradict its prior decision. Moreover, Nicaragua pretends to confine these islands' entitlements on the basis of variables such as coastal ratio, distance and size, which are not applicable in these proceedings; they would only be relevant for the final stage of a delimitation case. The Court would, however, only reach this stage if it were established that Nicaragua possessed an equal source of title that would necessitate a delimitation *vis-à-vis* Colombia. As explained in Chapter 3 above, Nicaragua's OCS claim is not a source of title within 200 nautical miles from Colombia's coasts; this unqualified principle extends to both mainland and islands. This is irrespective of the ratio, distance or size of the islands.

7.6 The 200-nautical-mile entitlements generated by these islands extend some 100 nautical miles *beyond* Nicaragua's own 200-nautical-mile EEZ and continental shelf; in other words, in areas upon which Nicaragua's purported OCS claim encroaches. Because Nicaragua may not lay claim to title based on natural prolongation within 200 nautical miles from these islands, these

[442] 2012 Judgment, pp. 716-717, para. 244.

entitlements exclude any possibility of delimitation, which is the appropriate answer to the "question" that is at issue in this case .

7 .7 Colombia has also shown that Roncador and the other relevant islands of the Archipelago have 200-nautical-mile entitlements in every direction. Contrary to Nicaragua's contentions, these islands are not "rocks" within the meaning of Article 121 (3) of UNCLOS . As Colombia has shown, under customary and conventional international law, the word "rocks" has a distinct meaning, which refers first and foremost to features made of solid rock . As the naked eye can see, the islands in question are far removed from any features recognised as "rocks" in State practice.

7 .8 Moreover, the islands' economic and human importance is attested by the fact that they have been frequented for many decades by the fishermen of the Archipelago, and form part of the Raizales' culture and natural habitat. Even though they have not been permanently inhabited because of a decision by the Colombian Government for purely environmental reasons, they are permanently visited and are an essential part of the Raizales' economy.

7 .9 They have also been the subject of significant *effectivités* of an economic nature – a factor that led the Court to rule in its 2012 Judgment that Colombia had sovereignty over them – and they are host to military contingents that permanently carry out essential security activities. Unlike Colombia, which has shown

that there is considerable State practice that treats islands having the characteristics of Colombia's islands as fully entitled to an EEZ and continental shelf, Nicaragua is unable to adduce any State practice showing the contrary. The 200-nautical-mile entitlements generated by these islands extend over 150 nautical miles beyond Nicaragua's 200-nautical-mile EEZ, yet Nicaragua would have its OCS claim encroach on these entitlements as well as those of San Andrés, Providencia and Santa Catalina.

7.10 Colombia has also demonstrated that Nicaragua's OCS claim extends well into maritime areas where third States such as Panama and Jamaica have potential legal interests *vis-à-vis* Nicaragua, within 200 nautical miles from their coasts. In such circumstances, it is not surprising that those two States, along with Colombia and Costa Rica, have, as is their right, objected Nicaragua's claim. As Chapter 5 has demonstrated, in this confined space of the Southwestern Caribbean Sea, it would be impossible for the Court to draw directional arrows to avoid the entitlements of other States. Were Nicaragua's claim to be even partially upheld, it would not simply prejudice Colombia, but the interests of third States as well.

7.11 In Colombia's submission, the above-mentioned considerations are ample grounds for rejecting Nicaragua's claim in this case. Thus, once the Court finds that OCS claims may not encroach upon the 200-nautical-mile entitlements of coastal States, or that Nicaragua's claim inappropriately prejudices the rights and interests of third States, it does not

need to review the scientific and technical arguments Nicaragua has advanced in support of its claim .

7 .12 Nonetheless, Colombia has also demonstrated (i) that Nicaragua's scientific and technical arguments have failed to prove that it has an OCS and (ii) that its Submission to the CLCS, upon which its claim purports to base itself, is seriously flawed and would not be accepted as it stands as the basis for any recommendations by the Commission. As Chapter 6 explained, Nicaragua's OCS claim must be evaluated by the same scientific standards and rigorous scientific process as the CLCS would; this process was detailed in Annex 49 of the Counter-Memorial under the title "Description of the Procedure and Scientific Rigour employed by the CLCS" based on the CLCS Guidelines .

7 .13 Contrary to Nicaragua's contention, the evidence in the record shows that the natural prolongation from Nicaragua's land territory simply does not extend up to and beyond the 200-nautical-mile limit. The scientific evidence, which is explained in detail in the expert reports Colombia has furnished and in Chapter 6, shows that the Upper Nicaraguan Rise and the Lower Nicaraguan Rise are fundamentally different, having regard to both their geological and geomorphological characteristics . These two features are separated by a marked discontinuity – the Pedro Bank Escarpment-Providencia Trough Lineament – that interrupts Nicaragua's natural prolongation, and that is a far more pronounced feature than the Hess Escarpment.

7.14 Nicaragua has tried to camouflage this reality by resorting to a bathymetric profile based on the argument that the natural prolongation of its landmass extends into Jamaica's EEZ before, conveniently, executing a 90° manoeuvre and steaming south into Colombia's EEZ. That profile does not represent any genuine natural prolongation of Nicaragua's territory towards Colombia. Similarly, Nicaragua has used foot of slope points, which are situated in maritime areas appertaining to third States and most of which are generated by bathymetric profiles that have no relation with Nicaragua's coast from which natural prolongation must be shown to exist.

7.15 It follows that, even if the Court were to reach the question of whether Nicaragua has established any OCS on geological and geomorphological grounds, not only is Nicaragua asking the Court to carry out a task reserved for the CLCS, but also its case has simply not been proven with anything resembling the requisite scientific certainty that the composition of the CLCS and its rigorous procedures require and ensure. In such circumstances, the claim should be rejected, and the result remains that there is nothing to delimit beyond 200 nautical miles from Nicaragua's baselines.

7.16 In its Reply, Nicaragua asserts, out of the blue, as it were, that the Parties agree that "the task of the Court in the present case is to delimit the maritime boundary between two

States".[443] As Colombia has pointed out, this is wrong: Colombia does not agree that both Parties coincide on the object and main issues in this case and certainly not that the Court's task in this case is to delimit. To the contrary. The case is about the "*Question* of the Delimitation of the Continental Shelf" between the Parties, not about the "Delimitation of the Continental Shelf".[444] This indicates that *in limine litis*, the question before the Court is whether, in the particular circumstances of the case, it should proceed to any delimitation at all of the continental shelf beyond 200 nautical miles from the Nicaraguan coast. Colombia has explained the compelling legal and factual reasons why there is nothing to delimit beyond 200 nautical miles from Nicaragua's coast, and that the Court should not proceed to any further delimitation in this case .

* * *

7 .17 Besides being deprived of any legal or factual basis, Nicaragua's excessive claim has grave implications for the Caribbean Sea and the entire international community. Most of these implications have been touched upon in the Counter-Memorial and the Rejoinder, however, given their gravity, Colombia will recall them briefly because it considers it imperative that the Court weigh such implications when considering Nicaragua's claim .

---

443 NR, para . 2.56 .

444 Emphasis added.

7 .18 The coastal geography of the Southwestern Caribbean Sea is such that there are no maritime areas that lie more than 200 nautical miles from the nearest land territory. This fact has been recognised by all Caribbean States except Nicaragua, as is evident from the fact that no other State has considered that it was entitled to claim OCS rights in the Caribbean, and none have made submissions to that effect to the CLCS . In short, every other Caribbean State respects the 200-nautical-mile entitlements of the other States and has refrained from attempting to encroach upon them based on natural prolongation. Every other State, that is, with the notable exception of Nicaragua.

7 .19 Nicaragua's claim to an OCS was belated and opportunistic. As previously noted, Nicaragua made no such claim in its case against Honduras, despite the fact that the Nicaraguan Rise extends northeast from the coasts of Nicaragua and Honduras towards Jamaica. Even when Nicaragua filed its Application and Memorial in the *Territorial and Maritime Dispute* case against Colombia, it made no OCS claim . Its original claim was for a single maritime boundary which, by definition, could only extend as far as the 200-nautical-mile limit of the EEZ with its attendant continental shelf. Nicaragua only conjured up its OCS claim in the Reply, and it was not upheld by the Court in its 2012 Judgment.

7 .20 When Nicaragua filed its Submission with the CLCS on 24 June 2013, Panama, Jamaica, Costa Rica and Colombia

objected, as was their right. Indeed, they did so more than once.[445] The Notes they sent to the Secretary-General of the United Nations made it clear that they did not view Nicaragua's OCS pretensions as having any justification and that they did not consent to the consideration of Nicaragua's Submission by the CLCS .As several of those States pointed out, Nicaragua had intentionally attempted to mislead the CLCS when it stated in the Executive Summary to its Submission that there were no unresolved maritime disputes relating to it . The current case which was initiated when Nicaragua itself brought before the Court one of such "non-existent disputes", is ample evidence of Nicaragua's misconduct . Panama's communication of 3 February 2014 summed up the position in the following terms:

> "We strongly object to the claim for the extension of the continental shelf submitted by the Republic of Nicaragua: we do not consent to the Commission's consideration or assessment of Nicaragua's submission and we request the Commission to dismiss it in its entirety".[446]

7 .21 Paragraph 5(a) of Annex I to the Commission's Rules of Procedure stipulates that, in cases where a land or maritime boundary dispute exists, "the Commission shall not consider and

---

[445] Costa Rica objected to Nicaragua's submission in two Notes dated 15 July 2013 and 7 February 2014 (CPO, Annexes 19 and 24); Jamaica filed a similar Note on 12 September 2013 (CPO, Annex 20); Panama filed two Notes dated 30 September 2013 and 3 February 2014 (CPO, Annexes 23 and 25); Colombia filed two Notes dated 24 September 2013 and 11 February 2014 (CPO, Annexes 22 and 27); and Colombia, Costa Rica and Panama filed two joint Notes on 23 September 2013 and 5 February 2014 (CPO, Annexes 21 and 26).

[446] CPO, Annex 25.

qualify a submission made by any of the States concerned in the dispute" without the prior consent of the other States Parties to a dispute . In the present case what Nicaragua is trying to do is to invoke its own wrongdoings, as it also did at the Preliminary Objections stage when it argued that a *practical impasse*[447] was created by Colombia. Contrary to Nicaragua's assertions, Colombia's objection to Nicaragua's Submission to the CLCS does not create an impasse; it is simply the consequence of, and reflects, the general practice of States that do not countenance the extension of alleged OCS claims of another State into their 200-nautical-mile entitlements . Nicaragua filed an overreaching OCS Submission, knowing very well that all concerned Caribbean States would be forced to object to consideration of its claim, as they did . The fact that Nicaragua's Submission cannot be considered by the CLCS is Nicaragua's own fault . While it tries to blame Colombia, it conveniently forgets the basic principle of law which states *nemo auditur propriam turpitudinem allegans.*

7 .22 Critically, Nicaragua's attempt to undermine this legal principle by introducing its "grey zones" would destabilise not only the Caribbean Sea, but have worldwide implications . Reversing the Court's dictum in *Libya/Malta* and accepting natural prolongation as a source of legal title within 200 nautical miles of other States, would run counter to well-established

447 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v . *Colombia),* Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, paras .5 29-5 31 .

State practice, destabilise existing treaties and CLCS submissions which followed this principle. Accepting Nicaragua's title theory would introduce "grey areas", or as Nicaragua would have it "grey zones" at a scale which would undermine the public order of the oceans and preclude any prospect of orderly ocean management. The validation of the separation between water column rights and seabed rights over vast areas would open a Pandora's box of disputes worldwide and exacerbate the problems in the already complicated environments of semi-enclosed seas.

7.23 By requesting the Court to establish these outer limits as part of its OCS claim, Nicaragua seeks to replace a specialised technical body, with ample geographical representation and a range of expertise especially assembled to examine OCS claims, and entrusted with that responsibility. By bypassing the CLCS, Nicaragua hopes to create a "fast-track" procedure with a lower scientific standard than that required by the CLCS, without going through the rigorous and lengthy process of dialogue with the CLCS and without having to convince a two-thirds qualified majority within the Commission of the scientific validity of its evidence. Nicaragua is trying to avoid the possible results that the normal procedure before the CLCS would have, i.e. *inter alia,* the request of more technical information to support its claim, the possibility of a non-approval by the Commission of the draft recommendations presented by a subcommission, or the possibility that the CLCS does not award any recommendations at all. It further hopes to bypass the opposition

of Colombia and other Caribbean States while encroaching on their maritime entitlements .

7 .24 Nicaragua is also trying to circumvent the applicable rules by seeking to obtain *erga omnes* effects from an *inter partes* judicial decision, something wholly unprecedented in international law . UNCLOS Articles 76(8) and (9), which are binding for Nicaragua, establish that for an OCS to be opposable to all States Parties, the coastal State shall deposit with the Secretary-General of the United Nations the charts and relevant information permanently describing the outer limits of its continental shelf, as recommended by the CLCS. The reasoning behind this requisite is that the composition of the CLCS, which is a strictly scientific and technical validation body, based on equitable geographical representation, guarantees that its recommendations have certain representation and validation by the international community, which in turn allows its deposit with the Secretary-General of the United Nations and justifies its *erga omnes* effects among States Parties to UNCLOS . Moreover, the matter is so sensitive that the procedure established in the Convention allows for the participation of any State that has an interest in the delineation claimed by a State Party .

7 .25 Nicaragua cannot pretend to bypass the requisite of the formal deposit with the Secretary-General of the United Nations, as required after receiving recommendations by the CLCS .Such a consequence would be unsustainable, as any decision of the

Court, as provided for in Article 59 of its Statute, would only have binding force between the Parties and in respect of that particular case .Therefore, the absurdity of Nicaragua's claim is evident since it pretends to obtain an OCS with *erga omnes* effects, from an *inter partes* process. This is contrary to Nicaragua's obligations under UNCLOS and to the judicial function of the Court .

7 .26 There are good reasons why the Court and other tribunals have been reluctant to conduct delineations of the outer limit of OCS claims .These tasks have been assigned to the CLCS due to their demanding burden of proof requiring scientific certainty. Nicaragua's request would have the Court assume the role of the CLCS without its standards and procedures and approve, without the required scientific certainty, that Nicaragua's natural prolongation extends beyond 200 nautical miles and then delineate its outer limit. Wholly apart from this abuse of process, the integrity of CLCS practice can only be muddled if the Court acquiesces to Nicaragua's gambit . The muddling is underway, as Nicaragua has already amended its OCS claim in the Reply, which increases the risk of contradictory determinations between the Court and the CLCS . As the sole jurisdiction over OCS delineation and verification has been assigned to the CLCS under UNCLOS, even relying upon an expert, the Court risks rendering a judgment that would be inconsistent with any eventual findings of the CLCS . And this cannot be ruled out, as it would be nearly impossible for an expert or even several of them to approximate the work of a

broad professional scientific committee of experts with extensive resources at its disposal. The Court should respect the division of work enshrined in UNCLOS, and refrain from entertaining Nicaragua's request to make itself henceforth available to verify and delineate any purported OCS claim.

7 .27 As the Court noted in its 2012 Judgment, the Preamble to UNCLOS stresses that "the problems of ocean space are closely interrelated and need to be considered as a whole".[448] Yet, if such a radical claim to an OCS as that advanced by Nicaragua were to be upheld – one that usurps Colombia's *ipso jure* entitlement to a 200-nautical-mile EEZ with its attendant continental shelf from its islands and mainland – it would set a dangerous precedent with far-reaching consequences . States would no longer consider that they were under any constraints to limit future OCS claims to areas lying within 200 nautical miles of a neighbouring State . In addition, early-submitting States which have shown restraint with their OCS, by stopping at a neighbour's 200-nautical-mile limit, and who have already received recommendations from the CLCS, may feel sufficiently short-changed that they consider submitting additional, supplementary OCS claims to the CLCS, encroaching into hitherto unthreatened 200-nautical-mile entitlements .

7 .28 Nor would States Parties to UNCLOS feel bound to await the recommendations of the CLCS if they could bypass the Commission by resorting to third-party settlement. This

[448] 2012 Judgment, pp. 668-669, para .126 .

would severely affect the stability of legal relations that currently exists, and the specific responsibilities accorded to the CLCS under UNCLOS. Ultimately, it would be the integrity of the Common Heritage of Mankind principle that would be compromised .

7 .29 In the light of the foregoing, the implications of Nicaragua's case are profoundly unsettling. Nicaragua's unprecedented OCS claim, and its proposal to alter the regime of legal titles, risk disrupting the orderly delimitation of the maritime spaces that, until now, has largely been accomplished amongst the States bordering the Southwestern Caribbean Sea . Regionally, Nicaragua's attempt to claim an OCS is at odds with the position adopted by all the other Caribbean States, recognising and respecting the fact that there are no areas of OCS within the Caribbean Sea; as there are no areas which lie beyond 200 nautical miles from States .

7 .30 Globally, Nicaragua's claim, if endorsed by the Court, would be contrary to how the vast majority of States view the relationship between the 200-nautical-mile entitlements which exists *ipso jure* without having to be proved, and OCS claims . Nicaragua's alternative regime of titles would destabilise current treaties and CLCS submissions promoting conflict where legal stability has reigned.

7 .31 Critically, Nicaragua's regime would require the establishment of vast "grey zones" undermining the orderly

management of ocean resources. Institutionally, Nicaragua's approach calls upon the Court not only to ignore inter-institutional comity but to arrogate functions that have been entrusted to a specialised body which has been designed and staffed to perform a complex scientific function.

7 .32 Moreover, Nicaragua's exorbitant thesis regarding insular features would lead to the deprivation of the entitlements of plenty of full-fledged islands throughout the world's oceans . Deeming as merely "rocks" features that evidently are islands and that meet the criteria of those for which the international community has recognised 200-nautical-mile entitlements, would undoubtedly cause disruption in other parts of the world.

7 .33 The implications of Nicaragua's claim on the global order of the oceans are profound .The Court should stand guard and protect the rights of all coastal States to enjoy the resources within 200 nautical miles of their coasts as envisioned by UNCLOS regardless of any geological or geomorphological considerations . UNCLOS III never intended this conventional grant to wide-shelf States to encroach upon the hard-earned 200-nautical-mile EEZ and continental shelves of all States; the Court should not allow this balance to be disturbed .

SUBMISSIONS

With respect to the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast,* for the reasons set out in its Counter-Memorial and Rejoinder, and reserving the right to amend or supplement these Submissions, Colombia respectfully requests the Court to adjudge and declare that:

Nicaragua's request for a delimitation of the continental shelf beyond 200 nautical miles from its coast is rejected with prejudice .

CARLOS GUSTAVO ARRIETA PADILLA
Agent of Colombia

APPENDIX 1

Colombia's Second Scientific Report

The contrasting geomorphology and geology between the Upper Nicaraguan Rise and the Lower Nicaraguan Rise confirms a fundamental natural discontinuity between these areas;

A review of the Report of Nicaragua's scientific experts and comment on Nicaragua's Reply;

An assessment of Nicaragua's submission of the 24 June 2013 with respect to Article 76 of UNCLOS except paragraph 1.

Dr Lindsay Parson, Mr Peter Croker and Dr Walter Roest

COLOMBIA'S SECOND SCIENTIFIC REPORT

The contrasting geomorphology and geology between the Upper Nicaraguan Rise and the Lower Nicaraguan Rise confirms a fundamental natural discontinuity between these areas;

A review of the Report of Nicaragua's scientific experts and comment on Nicaragua's Reply;

An assessment of Nicaragua's submission of the 24 June 2013 with respect to Article 76 of UNCLOS except paragraph 1.

Dr Lindsay Parson, Mr Peter Croker and Dr Walter Roest

Appendix (pages 283 to 398) not reproduced

APPENDIX 2

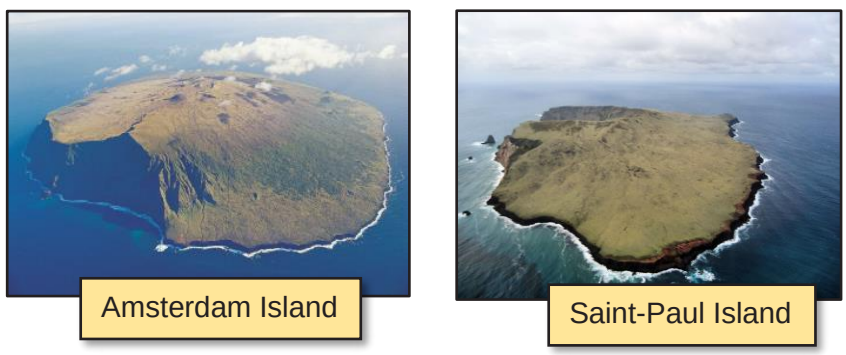
Additional Examples of State Practice on the Entitlements of Islands

APPENDIX 2

Additional Examples of State Practice on the Entitlements of Islands

Example No. 1: Amsterdam & Saint-Paul Islands (France)

Amsterdam and Saint-Paul Islands are located in the Indian Ocean and are part of the French Southern and Antarctic Lands [1].



France claims maritime entitlements to these islands up to their full extent of 200 nautical miles [2]. The claim has not been disputed by other States.

[1] Photographic material of Amsterdam Island by H. Pérau / IPEV (CC BY-SA 4 0); Photographic material of Saint-Paul Island by Francis Letourmy, CC BY-SA 4 0 .

[2] French Republic, Decree No .2017-367, enacted on 20 March 2017, available at: www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/2017-367_fr pdf (last visited: 21 Jan. 2019)

The United Nations Environment Programme (UNEP) classifies Amsterdam Island with an isolation index of 98.[3] It is 1 412 km from any other inhabited island, 3 534 km from Australia and 3 587 km from Madagascar.

The only human presence there is a scientific station located on Amsterdam Island, where about ten people permanently reside.[4] The station depends on a regular supply of food, equipment, materials, tools and fuel, which is only possible by sea. The supply ship "Marion Dufresne II" operates 4 rotations per year to the French Southern and Antarctic Lands. Since there is no harbour on Amsterdam Island, it cannot be directly reached by the supply ship and the last meters are operated by helicopter and smaller vessels, further reducing the amount of supplies which can be delivered.[5]

[3] UNEP, "Island Directory - Islands of French Southern Territories (France)", available at: islands.unep.ch/INO.htm#1121 (last visited: 21 Jan. 2019). The isolation index is of a purely geographic nature and only takes into consideration the nearest island, the nearest group and the nearest continent. In comparison, Easter Island (Chile), the most isolated island in the world, has an isolation index of 149.

[4] Institut de l'Information Scientifique et Technique, "Recherches Arctiques - Ile Amsterdam", available at: recherchespolaires.inist.fr/?Ile-Amsterdam (last visited: 21 Jan. 2019).

[5] Terres Australes et Antarctiques Françaises, "Présentation du Marion Dufresne", available at: www.taaf.fr/Presentation-du-Marion-Dufresne (last visited: 21 Jan. 2019).

Example No. 2: Gough Island (United Kingdom)

Gough Island is a British island in the South Atlantic Ocean .

According to UNEP, Gough Island has an isolation index of 125 [6]. It is about 400 km southeast of the other islands in the Tristan da Cunha group, 2600 km from Cape Town and over 3200 km from the nearest point of South America [7].

The island is inhabited by 6 to 8 people who work in a weather station leased by the United Kingdom to South Africa [8]. It has no airport and is only accessible by sea, although it has no port either . Supplies are provided to the weather station staff by the yearly rotation of the South African icebreaking polar supply and research ship "S .A . Agulhas II" [9].

[6] UNEP, "Island Directory - Islands of Tristan da Cunha Islands" available at: islands.unep.ch/INV.htm (last visited: 21 Jan. 2019) .

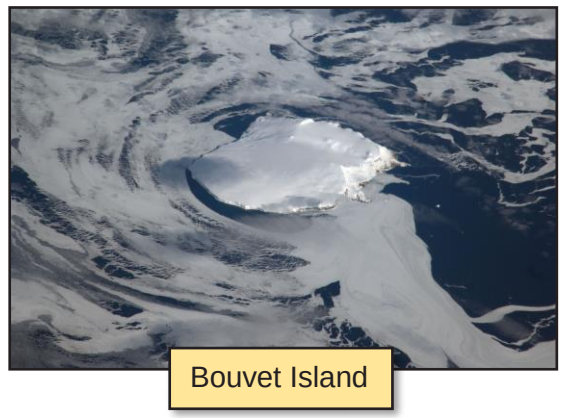
[7] South African National Antarctic Programme, "Gough Base", available at: http://www.sanap.ac.za/stations/gough-base/ (last visited: 21 Jan. 2019)

[8] Id .

[9] See the voyage schedule of the "S.A. Agulhas II" on the South African National Antartic Programme website, available at: www.sanap.ac.za (last visited: 21 Jan. 2019) .

Example No. 3: Bouvet Island (Norway)

Bouvet Island (Bouvetøya) is a Norwegian island located in the South Atlantic Ocean .



In addition to the 200-nautical-mile EEZ and continental shelf, Norway claims an outer continental shelf for Bouvet Island and has therefore presented a submission before the CLCS .[10] While the United States, [11] Russia, [12] India, [13] Netherlands, [14] and

[10] See "Continental Shelf Submission of Norway in respect of Bouvetøya and Dronning Maud Land - Executive Summary", available at: http://www.un.org/depts/los/clcs_new/submissions_files/nor30_09/nor2009_executivesummary.pdf (last visited: 21 Jan. 2019)

[11] United States Mission to the United Nations, Diplomatic Note of 4 June 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/nor30_09/usa_re_nor_2009 pdf (last visited: 21 Jan. 2019)

[12] Permanent Mission of the Russian Federation to the United Nations, Letter dated 15 June 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/nor30_09/rus_15jun09_e pdf (last visited: 21 Jan. 2019)

[13] Permanent Mission of India to the United Nations, Note No . NY/PM/443/1/2009 of 31 August 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/nor30_09/ind_re_nor_2009 pdf (last visited: 21 Jan. 2019)

[14] Permanent Mission of the Kingdom of the Netherlands to the United Nations, Note No. NYV/2009/2458 of 30 September 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/nor30_09/nld_re_nor_2009 pdf (last visited: 21 Jan. 2019)

Japan[15] have addressed Norway's submission before the CLCS, they only have done so as it relates to the Antarctic Treaty and not to the entitlements generated by Bouvet Island .

For its severe isolation and extreme weather conditions, the island has never hosted human habitation nor an economic life of its own . According to UNEP, it has an isolation index of 125, being 1 700 km from Antarctica and 2 500 km from South Africa .[16] The CIA World Factbook notes that it "is recognized as the most remote island on Earth."[17]

The island is almost entirely covered by ice and has steep cliffs on all sides, which make it extremely difficult to go ashore there . The average temperature is around -1°C and the soil is barren . The island is uninhabited and is only visited by expeditions of the Norwegian Polar Institute .[18] The research station erected in 2014 by Norway can hold six people for periods of two to four months .[19]

---

15 Permanent Mission of the Japan to the United Nations, Note SC/09/389 of 19 November 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/nor30_09/jpn_19nov2009 pdf (last visited: 21 Jan. 2019)

16 UNEP, "Island Directory - Islands of Norway", available at: islands unep ch/ICA htm#1878 (last visited: 21 Jan. 2019) .

17 CIA World Factbook, "Antarctica – Bouvet Island", available at: https://www.cia.gov/library/publications/resources/the-world-factbook/geos/bv html (last visited: 21 Jan. 2019) .

18 Norwegian Polar Institute, "Bouvetøya (Bouvet Island)", available at: http://www.npolar.no/en/bouvetoya/ (last visited: 21 Jan. 2019) .

19 CIA World Factbook, "Antarctica – Bouvet Island", available at: https://www.cia.gov/library/publications/resources/the-world-factbook/geos/bv html (last visited: 21 Jan. 2019) .

Example No. 4: Prince Edward Islands (South Africa)

Prince Edward and Marion Islands are two South African islands located in the Indian Ocean .

South Africa claims 200-nautical-mile maritime entitlements to these islands, alongside with an outer continental shelf . To this end, it filed before the CLCS a joint submission with France .[20] The claim has not been disputed .

According to UNEP, Prince Edward Island has an isolation index of 79, and Marion Island of 77,[21] being located 1900 km southeast of Cape Town .[22]

[20] See "Joint Submission by France and South Africa to the Commission on the Limits of the Continental Shelf in the area of the Crozet Archipelago and the Prince Edward Islands", available at: www.un.org/depts/los/clcs_new/submissions_files/frazaf34_09/frazaf2009exec_sum_resume pdf (last visited: 21 Jan. 2019)

[21] UNEP, "Island Directory - Islands of South Africa", available at: http://islands.unep.ch/IRL.htm#1099 (last visited: 21 Jan. 2019) .

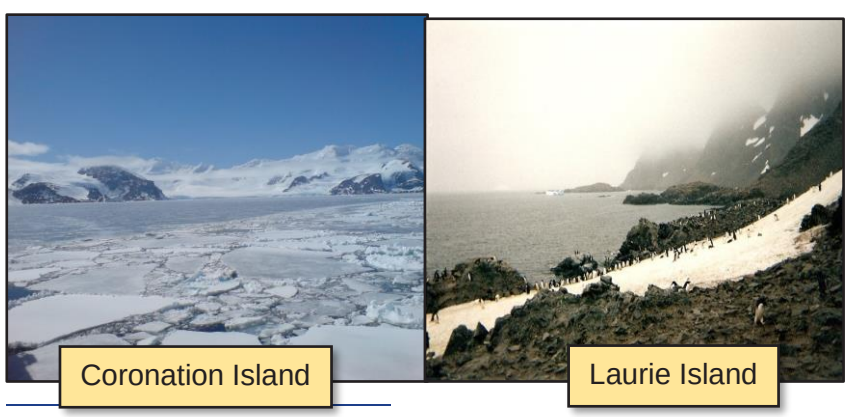
[22] Encyclopaedia Britannica, "Prince Edward Island", available at: https://www.britannica.com/place/Prince-Edward-Island-South-Africa (last visited: 21 Jan. 2019) .

The islands' soil is barren and they are inhabited by a team of 10 to 12 researchers of the South African National Antarctic Programme .[23] As noted in an article:

> "Conditions on Marion are harsh – constant winds, low temperatures and large amounts of snow and rain make it a rather inhospitable place to live .The vegetation is restricted to grasses, mosses and lichens, and much of the island's lowland is marshy due to the high precipitation."[24]

Example No. 5: South Orkney Islands (Argentina / United Kingdom)

The South Orkney Islands are a group of islands located in the Antarctic Ocean . Its sovereignty is disputed between Argentina and the United Kingdom . The two main islands are Coronation Island and Laurie Island .[25]



[23] Antarctic Legacy of South Africa, "Marion Station", available at: http://blogs.sun.ac.za/antarcticlegacy/about-2/marion-station/ (last visited: 21 Jan. 2019)

[24] Ibid .

[25] Photographic material of Coronation Island by Ben Tulis (CC BY-SA 4 0); Photographic material of Saint-Paul Island by Francis Letourmy, CC BY-SA 4 0

In addition to a 200-nautical-mile EEZ and continental shelf, Argentina has claimed that these islands are entitled to an outer continental shelf and to this end it has filed a submission before the CLCS .[26] While the United States, [27] Russia, [28] India, [29] Netherlands,[30] Japan,[31] the United Kingdom[32] and Chile[33] have addressed Argentina's submission before the CLCS, they only have done so as it relates to the Antarctic Treaty and not to the entitlements generated by the South Orkney Islands .

---

[26] See "Outer Limit of the Continental Shelf – Argentine Submission", available at http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf (last visited: 21 Jan. 2019)

[27] United States Mission to the United Nations, Diplomatic Note of 19 August 2009, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/usa_re_arg_2009 pdf (last visited: 21 Jan. 2019)

[28] Permanent Mission of the Russian Federation to the United Nations, Note No. 2282/N of 24 August 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/rus_re_arg_2009e pdf (last visited: 21 Jan. 2019)

[29] Permanent Mission of India to the United Nations, Note No . NY/PM/443/1/2009 of 31 August 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/ind_re_arg_2009 pdf (last visited: 21 Jan. 2019)

[30] Permanent Mission of the Kingdom of the Netherlands to the United Nations, Note No. NYV/2009/2459 of 30 September 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/nld_re_arg_2009 pdf (last visited: 21 Jan. 2019)

[31] Permanent Mission of the Japan to the United Nations, Note SC/09/390 of 19 November 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/jpn_re_arg_2009 pdf (last visited: 21 Jan. 2019)

[32] United Kingdom Permanent Mission to the United Nations, Note No . 84/09 of 6 August 2009, available at: http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/clcs_45_2009_los_gbr pdf (last visited: 21 Jan. 2019)

[33] Permanent Mission of Chile to the United Nations, Note No .93/2016 of 25 May 2016, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/chl_re_arg_2016_e pdf (last visited: 21 Jan. 2019)

The South Orkney Islands are about 600 km from the Antarctic Peninsula and 1,440 km from Tierra del Fuego .They are covered with ice and are completely barren.[34]

There are two scientific stations in the South Orkney Islands, an Argentinean one – Orcadas Station[35] – and a British one – Signy Station .[36]

Example No. 6: South Georgia Island (Argentina / United Kingdom)

South Georgia Island is an island in the South Atlantic Ocean, whose sovereignty is disputed between Argentina and the United Kingdom .

[34] National Geospatial Intelligence Agency, "South Orkney Islands: Antarctica", available at: https://geographic.org/geographic_names/antname.php?uni=14284&fid=antgeo_122 (last visited: 21 Jan. 2019)

[35] S. Petrowitz, "A special visit to Orcadas Station", available at: oceanwide-expeditions.com/blog/a-special-visit-to-orcadas-station (last visited: 21 Jan. 2019) .

[36] British Antarctic Survey, "Signy Research Station", available at: www bas .æ uk/polar-operations/sites-and-facilities/facility/signy/ (last visited: 21 Jan. 2019) .

Both Argentina and the United Kingdom have claimed before the CLCS an outer continental shelf from South Georgia Island[37] and have mutually objected the submissions due to the sovereignty dispute .

South Georgia is 1370 km from the Falkland Islands and 4815 km from South Africa .The UNEP classifies it with an isolation index of 113 .[38]

The soil in South Georgia Island is mainly covered with ice and is barren .[39] There is a scientific station which houses 10 scientists from the British Antarctic Survey .[40] Supplies and food are delivered every 6 weeks from the Falklands Islands by the British patrol vessel "Pharos SG", since the island is only accessible by sea .[41]

---

37 See "Submission to the Commission on the Limits of the Continental Shelf in respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands", available at: www un org/depts/los/clcs_new/submissions_files/gbr45_09/gbr2009fgs_executive%20summary.pdf (last visited: 21 Jan. 2019); and "Outer Limit of the Continental Shelf – Argentine Submission", available at http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf (last visited: 21 Jan. 2019)

38 UNEP, "Island Directory - Islands of South Georgia", available at: http://islands.unep.ch/INQ.htm#924 (last visited: 21 Jan. 2019) .

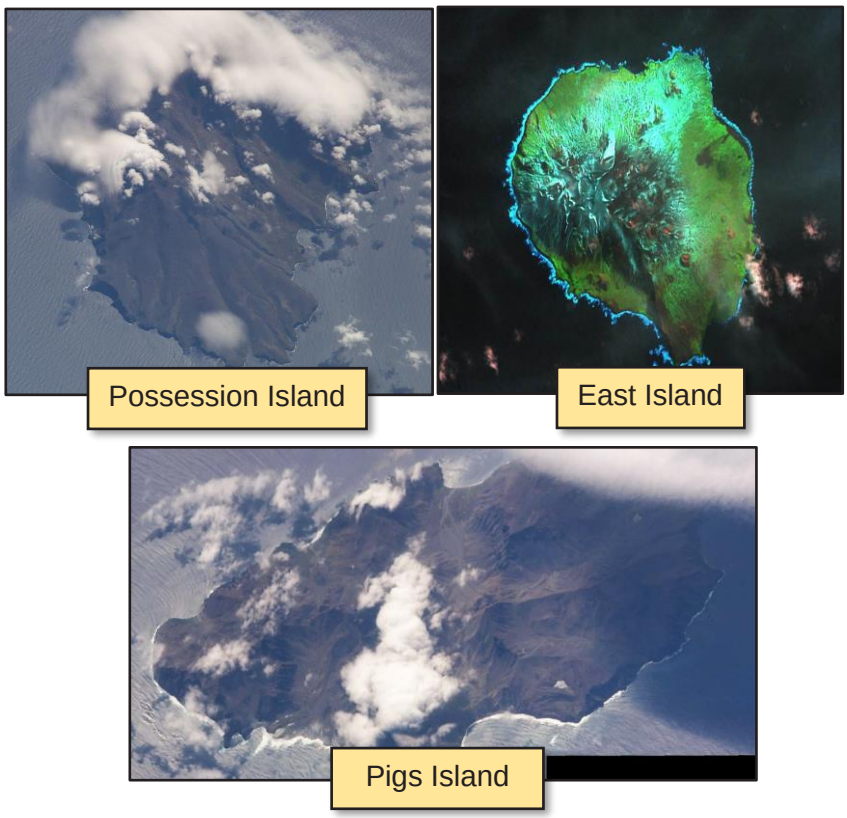
39 CIA World Factbook "South Georgia and South Sandwich Islands", available at: https://www.cia.gov/library/publications/the-world-factbook/geos/sx.html (last visited: 21 Jan. 2019) .

40 Government of South Georgia and the South Sandwich, "South Georgia & the South Sandwich Islands", available at: http://www.gov.gs/information/about-sgssi/ (last visited: 21 Jan. 2019) .

41 British Antarctic Survey, "Life on the sub Antarctic island of South Georgia", available at: https://www.bas.ac.uk/blogpost/life-on-the-sub-antarctic-island-of-south-georgia/ (last visited: 21 Jan. 2019) .

Example No. 7: Crozet Archipelago (France)

The Crozet Archipelago is located in the Indian Ocean and is part of the French Southern and Antarctic Lands .Its three main islands are Possession Island, East Island and Pigs Island .



In addition to 200-nautical-mile entitlements around the Crozet Archipelago,[42] France also claims an outer continental shelf to these islands and to this end it has filed a joint submission with

42 French Republic, Decree No .2017-366 of 20 March 2017, available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034251793&dateTexte=20180608 (last visited: 21 Jan. 2019)

South Africa before the CLCS .[43] This claim has not been disputed by other States .

The Crozet Archipelago is located 3076 km south of Madagascar and 2400 km north of the coast of Antarctica .The average annual temperature is about 5°C and the wind regime is "quite violent", blowing with gusts of over 100 km/h on average 120 days per year .[44]

UNEP classifies Pigs Island with an isolation index of 90 and Possession and East Islands of 83 .[45] As noted by a scientific journal:

> "Hier comme aujourd'hui, ce sont les conditions d'isolement et les efforts déployés pour les surmonter qui font de ces îles un milieu extrême."[46]

The only human presence in the Archipelago is the Alfred Faure scientific station on Possession Island where, depending on the

---

[43] See "Joint Submission by France and South Africa to the Commission on the Limits of the Continental Shelf in the area of the Crozet Archipelago and the Prince Edward Islands", available at: www.un.org/depts/los/clcs_new/submissions_files/frazaf34_09/frazaf2009exec_sum_resume pdf (last visited: 21 Jan. 2019)

[44] Terres Australes et Antarctiques Françaises, "L'archipel de Crozet", available at: http://www.taaf.fr/L-archipel-de-Crozet (last visited: 21 Jan. 2019) .

[45] UNEP, "Island Directory - Islands of French Southern Territories (France)", available at: islands.unep.ch/INO.htm#1121 (last visited: 21 Jan. 2019) .

[46] Jean-François Le Mouël, Patrick Arnaud, Paul Courbon *et al*, "La vallée des Phoquiers aux îles Crozet. Un fondoir à graisse, témoin des premières occupations humaines", *Archéopages : Archéologie et Societé*, No . 38, July 2013, available at: https://journals .openedition org/archeopages/501 (last visited: 21 Jan. 2019)

season, 15 to 60 scientists work .It is visited 4 times a year by the supply ship "Marion Dufresne II", which delivers supplies and rotating crews of scientists .[47] The Archipelago is only accessible by sea, although since there is no harbour on Possession Island, it cannot be directly reached by the supply vessel and the last meters must be operated by helicopter and smaller vessels .[48]

Example No. 8: Wrangel Island (Russia)

Wrangel Island is a Russian island located in the Arctic Ocean .[49]

In addition to full maritime entitlements, Russia claims an outer continental shelf from Wrangel Island and has relied on it in its submission before the CLCS .[50]

[47] French Polar Team, "Alfred Faure Station / Crozet Islands - TAAF", available at: http://french-polar-team.fr/FT5W_Alfred_Faure_Station_Crozet_Islands.php (last visited: 21 Jan. 2019)

[48] Terres Australes et Antarctiques Françaises, "Présentation du Marion Dufresne", available at: www taaf fr/Presentation-du-Marion-Dufresne (last visited: 21 Jan. 2019) .

[49] Photographic material on Wrangel Island by Виталий Дворяченко (CC BY-SA 4 0)

[50] See "Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the Russian Federation", available at:

While Canada,[51] Denmark, [52] Japan, [53] Norway, [54] and the United States[55] have reacted to the Russian submission before the CLCS on different grounds (lack of data, sovereignty, delimitation or methodology), Wrangel Island's entitlement to a continental shelf has not been disputed .

The soil is barren and frozen.[56] The mean temperature is rarely above 0°C .[57] The only human presence on the island is a station where 7 Russian rangers live (although only 3 or 4 stay through

http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm (last visited: 21 Jan. 2019) .

[51] Permanent Mission of Canada to the United Nations, Note No .0145 of 18 January 2002, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__CANtext.pdf (last visited: 21 Jan. 2019) .

[52] Permanent Mission of Denmark to the United Nations, Note No . 119.N.8 of 4 February, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__DNKtext.pdf (last visited: 21 Jan. 2019) .

[53] Permanent Mission of Japan to the United Nations, Note No. SC/02/084 of 25 February 2002, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__JPNtext.pdf (last visited: 21 Jan. 2019) .

[54] Permanent Mission of Norway to the United Nations, Note of 20 March 2002, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__NORtext.pdf (last visited: 21 Jan. 2019) .

[55] United States Mission to the United Nations, Note of 28 February 2002, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf (last visited: 21 Jan. 2019) .

[56] The Columbia Encyclopedia, "Wrangel Island", available at: https://www.encyclopedia.com/places/commonwealth-independent-states-and-baltic-nations/cis-and-baltic-physical-geography/wrangel (last visited: 21 Jan. 2019)

[57] National Oceanic and Atmospheric Administration, "Vrangelja Island", available at: ftp://ftp.atdd.noaa.gov/pub/GCOS/WMO-Normals/TABLES/REG_II/RA/21982.TXT (last visited: 21 Jan. 2019) .

the winter), who are supplied with food and fuel once a year in the spring .[58]

Example No. 9: Kerguelen Islands (France)

The Kerguelen Islands are in the Indian Ocean and are part of the French Southern and Antarctic Lands . They are also known as Desolation Islands .[59] The main island is Grande Terre .

France claims 200-nautical-mile maritime entitlements to the Kerguelen Islands, which have been recognized by Australia in a 1982 maritime delimitation treaty.[60]

[58] Otts World, "Wrangel Island", available at: https://www.ottsworld.com/wrangel-island/ (last visited: 21 Jan. 2019)

[59] James Cook noted that it is "Une île assez petite que, à cause de sa stérilité, j'appellerais avec justesse l'île de la Désolation, si je ne voulais pas enlever à M. de Kerguelen l'honneur de lui donner son nom". See E. Giret, "La « base » de Kerguelen: les travaux et les jours", *Ethnologie française*, Vol. 36, 2006, available at : https://www.cairn.info/revue-ethnologie-francaise-2006-3-page-443 htm (last visited: 21 Jan. 2019)

[60] Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic, 4 January 1982.

In addition, France claims an outer continental shelf from the Kerguelen Islands and has filed a submission before the CLCS to this end .[61] While Japan[62] and the Netherlands[63] have reacted to this submission, they have only done so as it relates to the Antarctic Treaty and not to the Kerguelen Islands' entitlements .

UNEP classifies Kerguelen Islands with an isolation index of 82 .[64] They are located 2000 km from the coast of Antarctica, 3400 km from La Réunion and 4800 km from Australia.[65]

The only human presence on the islands is the Port-aux-Français scientific base .[66] The station depends on a regular supply of food, equipment, materials, tools and fuel, which is only possible by sea .The supply ship "Marion Dufresne II" operates four rotations per year to the French Southern and Antarctic Lands .Since there

61 "Executive Summary of the French Submission to the CLCS in respect of the areas of the French Antilles and the Kerguelen Islands", available at: http://www.un.org/Depts/los/clcs_new/submissions_files/fra09/fra_executive summary_2009.pdf (last visited: 21 Jan. 2019)

62 Permanent Mission of Japan to the United Nations, Note No. SC/09/391 of 19 November 2009, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/fra09/jpn_re_nv_fra 19112009 pdf (last visited: 21 Jan. 2019)

63 Permanent Mission of the Kingdom of the Netherlands to the United Nations, Note No. NYV/2009/2184 of 28 August 2009, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/nld_re_nv_gr b2009 pdf (last visited: 21 Jan. 2019)

64 UNEP, "Island Directory - Islands of French Southern Territories (France)", available at: islands.unep.ch/INO.htm#1121 (last visited: 21 Jan. 2019) .

65 Terres Australes et Antarctiques Françaises, "L'archipel de Kerguelen", available at: http://www.taaf.fr/L-archipel-de-Kerguelen (last visited: 21 Jan. 2019) .

66 Ibid .

is no harbour, the station cannot be directly reached by the supply ship and the last meters have to be operated by helicopter and by smaller vessels, further reducing the amount of supplies which can be delivered .[67]

Example No. 10: Saint Matthew Island (USA)

Saint Matthew Island is located in the Bering Sea and belongs to the United States .

The United States claims a 200-nautical-mile EEZ from Saint Matthew Island, entitlement which was recognized by the Soviet Union in a 1990 maritime delimitation treaty .[68]

[67] Terres Australes et Antarctiques Françaises, "Présentation du Marion Dufresne", available at: www taaf fr/Presentation-du-Marion-Dufresne (last visited: 21 Jan. 2019) .

[68] Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, with Annex, signed on 1 June 1990.

The island is located 320 km from the nearest inhabited Alaskan settlement, its vegetation is predominantly low growing tundra and has been described as a "fog-bound, wind-swept island" .[69] The only human presence in the island is a group of 8 scientists stationed therein .[70]

Example No. 11: Bear Island (Norway)

Bear Island (Bjørnøya) is a Norwegian island in the Barents Sea .

Norway claims a 200-nautical-mile EEZ from the island and relied on its entitlements in the OCS submission it filed before the

[69] D. Griffin, "A history of human land use on St. Matthew Island, Alaska", *Alaska Journal of Anthropology*, Vol. 2, 2004, p. 84, available at: http://www.alaskaanthropology.org/wp-content/uploads/2017/08/Vol_2_1-2-Article-6-Griffin pdf (last visited: 21 Jan. 2019)

[70] N. Rozell, "Even by Alaska standards, St. Matthew Island is a lonely place", *Daily News-Miner*, 2 September 2012, available at: http://www.newsminer.com/features/sundays/alaska_science_forum/even-by-alaska-standards-st-matthew-island-is-a-lonely/article_c0cf60e2-ca0f-5ce0-ac6b-03efaa9d394b html (last visited: 21 Jan. 2019) .

CLCS .[71] While Denmark,[72] Iceland,[73] Russia[74] and Spain[75] have reacted to Norway's submission, they did so on grounds different to the entitlements generated by Bear Island .

For its harsh Arctic climate, with strong winds and frequent fog, the island's soil is barren and lacks vegetation.[76] The island is very inaccessible due to its "almost unapproachable coastline".[77] The only human presence in the island is a group of 11 scientists who work in a Norwegian radio and weather station for periods of 6 months .[78]

---

[71] "Continental Shelf Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea – Executive Summary", available at: www un org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf (last visited: 21 Jan. 2019) .

[72] Permanent Mission of Denmark to the United Nations, Note No . 119.N.8 of 24 January 2007, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/dnk07_00218 pdf (last visited: 21 Jan. 2019) .

[73] Permanent Mission of Iceland to the United Nations, Note No . FNY07010008/97.B.512 of 29 January 2007, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/isl07_00223.pdf (last visited: 21 Jan. 2019) .

[74] Permanent Mission of the Russian Federation to the United Nations, Note No . 82/n of 21 Jan. 2007, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/rus_07_00325 pdf (last visited: 21 Jan. 2019) .

[75] Permanent Mission of Spain to the United Nations, Note No . 184 JR/ot of 3 March 2007, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/esp_0700348 pdf (last visited: 21 Jan. 2019) .

[76] Spitsbergen – Svalbard, "Bjørnøya", available at: https://www.spitsbergen-svalbard com/spitsbergen-information/islands-svalbard-co/bjornoya.html (last visited: 21 Jan. 2019) .

[77] Norwegian Polar Institute, "Bjørnøya", available at: http://www npolar no/en/the-arctic/svalbard/bjornoya/ (last visited: 21 Jan. 2019) .

[78] Spitsbergen – Svalbard, "Bjørnøya Meteo (Bear Island weather station)", available at: https://www.spitsbergen-svalbard com/photos-panoramas-videos-and-webcams/spitsbergen-panoramas/bjoernoeya-meteo html (last visited: 21 Jan. 2019) .