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THE HAGUE

Cour internationale de Justice

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Public sitting

held on Tuesday 1 May 2012, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le mardi 1er mai 2012, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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comme assistant administratif.

The PRESIDENT: Please be seated. The sitting is now open. This morning the Court will hear Nicaragua in the second round of oral argument. Before giving the floor to the Agent, I wish to inform you that Judge Abraham, for reasons duly explained to me, is unfortunately unable to sit today on the Bench. And I now give the floor to His Excellency Dr. Carlos José Argüello Gómez, Agent for Nicaragua. You have the floor, Sir.

Mr. ARGÜELLO GOMEZ: Mr. President, Members of the Court, good morning.

1. I will begin with a few short comments on certain points addressed by Colombian counsel during the oral pleadings of last week.

I. Admissibility

2. Colombian counsel repeatedly mocked Nicaragua's submission in its Reply requesting a continental shelf delimitation. It has claimed that this is a completely unrelated claim to that made in the Nicaraguan Memorial that requested a single maritime boundary. I have already spoken on this point in my first oral presentation and will only add a few words since Professor Pellet will address the question of admissibility raised by Colombia.

3. The Nicaraguan case against Colombia began with the Parties claiming two different lines of delimitation: one, claimed by Colombia as a single maritime boundary, was the 82nd meridian and the other, claimed by Nicaragua in its Application, was the single maritime boundary based on a median line between the mainland coasts of the Parties. Colombia claimed that its delimitation line was in place and ran along the 82nd meridian, and began enforcing it in 1969 and has continued to enforce to this day in spite of the fact that it was considered by the Court in its 2007 Judgment not to be a line of delimitation.

4. For its part, Nicaragua did not claim that its proposed single maritime boundary was a pre-existing boundary or the only possible solution for the delimitation. Nicaragua never attempted to enforce this line with its navy. It was simply part of the request for the Court to determine a maritime boundary in conformity with international law. Nicaragua believes that the Court is the undisputed international expert on maritime delimitations and is confident that it will arrive on an equitable solution which is all that Nicaragua is seeking.

5. At this point I would also reiterate that the delimitation sought by Nicaragua is only in areas not claimed by third States. The claims of third States in the general area where the delimitation is to take place are those of Panama, Costa Rica and Jamaica. Nicaragua has full confidence that the Court will be able to effect an equitable maritime delimitation between Nicaragua and Colombia without affecting rights of third States.

II. Reparation

6. Mr. President, Professor Kohen last Friday[1] referred to the claims of reparation made by Nicaragua in its Reply. In the presentation he asks himself the real reasons for this Nicaraguan claim for reparation[2]. My response to his soliloquy is brief. Nicaragua in its Application had reserved its rights to claim compensation for being deprived by Colombia of access to maritime areas east of the 82nd meridian and for the exploitation by Colombia of these maritime areas in her benefit. Nicaragua is aware of the thinking of the Court on the question of reparation in delimitation cases. For this reason Nicaragua did not submit this claim in its Memorial of 28 April 2003. After the Judgment of the Court of 13 December 2007 found that the 82nd meridian was not a maritime boundary, and Colombia persisted in maintaining what it calls the status quo at the time the case was brought to the Court in December 2001; that is, it maintains that this meridian is a maritime boundary and it continues to impose it with its naval forces. Nicaragua considered that this situation went beyond any of the previous cases in which the Court had been faced with questions of delimitation. In the present case, there is a Judgment by the Court that has made clear that the 82nd meridian is not a line of delimitation. The continued insistence of Colombia of using it as a maritime boundary shows — at least — disrespect of that Judgment and is not simply a question of a pending delimitation. It is for this reason that Nicaragua considers that the present circumstances are different from those previously addressed by the Court and that a declaration is in order.

7. Professor Kohen displayed some vehemence in his assault on Nicaragua's position on the legal validity of the 1928 Treaty. It is true that Nicaragua denounced this Treaty in 1980 for the

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[1]CR 2012/13, pp. 56-65 (Kohen).

[2]*Ibid*., p. 65, para. 25, "Je m'interroge sur les véritables raisons de cette demande en réparation."

reasons well known to the Court. But Nicaragua never attempted to impose by force this unilateral decision on Colombia. There are many countries that have historical territorial grievances and I will not elucidate more on a question well known by Professor Kohen except to say that the claims of these countries, if asserted peacefully, are not considered violations of international law. Colombia, on the other hand, unilaterally decided that the 82nd meridian was a maritime boundary: it has been imposing it on Nicaragua since 1969, and more importantly subsequent to the Court's 2007 Judgment. That is a violation of international law and that is why Nicaragua considers the point should be noted by the Court.

8. Finally, Professor Kohen, asserts that Nicaragua has not accepted the Court's Judgment of 13 December 2007. I have referred to this question in my first presentation and will only add that Nicaragua considers itself bound by that Judgment that decided the jurisdictional questions that were placed before it by Colombia and has modified its submissions accordingly.

III. Questions of Security

9. Mr. President, several of the presentations by Colombian counsel during the first round of oral pleadings, including that of the Agent, pondered the security interests of Colombia in the area. Professor Crawford considered that Nicaragua's claim "is tantamount to throwing a very large rock into a peaceful, orderly, treaty-regulated pool"[3].

10. The security problems in the Caribbean are mainly derived from the production of cocaine in Colombia and its transfer to the United States via the Caribbean. The peaceful and orderly pool of Professor Crawford is a morass of crime originating largely in Colombia, with important bases in San Andrés and Providencia. Nicaragua spends an enormous amount of resources preventing the drug traffic originating in Colombia and sent throughout the Caribbean area. Nicaragua is a party to all the principal international conventions aimed at fighting

[3]CR 2012/13, p. 53, para. 59 (Crawford).

international organized crime, drug abuse, financing of terrorism and on mutual assistance in criminal matters[4].

IV. Aborted scientific expedition of Nicaragua to the area in dispute

11. Mr. President, I will not repeat my statement of last Monday 23 April on the question of the scientific expedition that Nicaragua attempted to send to the area in dispute, in particular to the area of Quitasueño in order to verify the surveys carried out by the Colombian navy in 2008 and 2009, this last one in the company of Dr. Smith. Colombia maintains that they were not informed of the objective of the scientific expedition of Nicaragua. First of all, it was publicly announced and a detailed description of the area to be visited was also part of this public announcement. Should Colombia have the right to presume that Nicaragua had the obligation to consult them before sending this ship? Certainly not. Did Colombia consult Nicaragua or even announce publicly the expedition of their Navy to conduct the two surveys above mentioned? Not at all.

12. Second, Colombia immediately reacted to the announcement of the voyage of the scientific expedition. The Colombian Ambassador to Nicaragua called the Ministry of Fisheries of Nicaragua and the Ministry of Foreign Affairs protesting the mission being sent by Nicaragua. The Colombian Ambassador, Mrs. Luz Jara Portilla, in fact spoke to the legal adviser of the Nicaraguan Foreign Ministry the same day of the announcement to make this protest personally. The Colombian reaction did not wait long to reach this Court in the form of a protest Note received on 23 February 2012 and on which I made several comments in my first presentation[5].

13. Professor Crawford states that in the situation involving the Nicaraguan scientific expedition there was not *a whiff* of coercion. Apparently he wants you to believe that the capture of Nicaraguan ships by the Colombian Navy is a question of the Nicaraguan imagination. Since the beginning of this case, the question of the persecution and capture of Nicaraguan vessels has been highlighted and a short list of examples was given in paragraph 5 of the Application. The

[4]E.g., UN Convention against Transnational Organized Crime, UN Convention against Corruption (UNCAC); UN International Convention for the Suppression of the Financing of Terrorism; Inter-American Convention against Corruption; Inter-American Mutual Legal Assistance Convention; Inter-American Convention against Terrorism; Cooperating Nation Information Exchange System (CNIES); 1961 UN Single Convention as amended by the 1972 Protocol; the 1971 UN Convention on Psychotropic Substances; and the 1988 UN Drug Convention; Agreement concerning cooperation to suppress illicit traffic by sea and air between the Governments of Nicaragua and the United States of America.

[5]CR 2012/8, pp. 19-20, paras. 25-28 (Argüello Gómez).

more recent incidents are listed in the Nicaraguan Memorial and Reply in the sections indicated in the footnotes of this speech[6].

V. Nicaraguan and Colombian maps

14. Mr. President, the originals of the maps cited by Colombia have not been deposited with the Court, to the knowledge of Nicaragua. This makes it difficult to comment on them. But certain questions are apparent even from the copies that have been made available. The maps of the Colombian territory presented by Colombian counsel in the first round of oral pleadings have been artificially adorned and painted over by Colombia; in particular the colouring of this 82nd meridian and the reefs in dispute as shown in the copy of the 1931 map in Colombia's judges' folder, tab 25.

15. The copy of the Nicaraguan map of 1967 presented by Colombia has a legend indicating that it is a preliminary edition. In any event, even if there were a map with the type of indication suggested by Colombia, it must be recalled that it was only until 1980 that Nicaragua denounced the 1928 Treaty. Up to that moment, Nicaragua only claimed sovereignty over the cays presently in dispute and not the islands of San Andrés, Providencia and Santa Catalina.

16. Mr. President, Members of the Court, this concludes my Agent's presentation proper. The order of the pleadings is as follows. I will speak on the questions of the interpretation of the second paragraph of Article 1 of the 1928 Treaty. Professor Antonio Remiro will then follow with further analysis on the questions of sovereignty over the cays. Dr. Alex Oude Elferink will address the questions of islands and cays and the submerged feature of Quitasueño. Mr. Paul Reichler will then respond to Colombia's effort to defend the inequitable nature of the delimitation that Colombia has proposed. Dr. Robin Cleverly will further respond to Colombia on the technical and scientific questions related to a continental shelf. Professor Vaughan Lowe will deliver Nicaragua's response on the delimitation of the continental shelf. In so doing, he will provide Nicaragua's answer to the question put by Judge Bennouna to both Parties at the close of the first round. Professor Alain Pellet will address the question of the admissibility of Nicaragua's

[6]MN, Vol. I, pp. 159-162, paras. 2.215-2.222; RN, Vol. I, pp. 15-19, paras. 34-43, and pp. 226-227, para. 7.20.

submissions and will give a summary of the Nicaraguan position. Finally, the Nicaraguan submissions will be delivered by the Agent.

17. Mr. President, Members of the Court, the Court's 13 December 2007 Judgment determined that the 1928 Treaty was valid and in force at the date of the conclusion of the Pact of Bogotá in 1948 and that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina had been decided by that Treaty. On the other hand, it considered that this treaty did not decide the questions of sovereignty over the other maritime features in dispute. The determination of sovereignty over the three maritime features excluded from the 1928 Treaty will depend in good measure on the interpretation given to the second paragraph of Article I of that treaty. Our Reply deals with this question in paragraphs 1.79 to 1.96.

VI. 1928 Treaty: the text

18. Mr. President, the translation of the first paragraph of Article I of the treaty is not in question. But Professor Kohen has claimed that the translations of the second paragraph into English and French by the Secretariat of the League of Nations are incorrect[7]. Different versions of the translation of this short text were offered by Professor Kohen as belated alternatives to that of the official translation of the Secretariat many years ago.

19. The nuances in the different translations are fundamentally irrelevant and miss the obvious point. The treaty does not say that these keys will not be considered part of the San Andrés Archipelago but that "The present Treaty does not apply to the reefs of Roncador, Quitasueño and Serrana" — in the League of Nations translation — or that "The Roncador, Quitasueño and Serrana Cays are not considered to be included in this Treaty" — as Professor Kohen would have them read. So, are these maritime features part of the substantial continental coast of Nicaragua? Or are they part of the relatively minor and insignificant island group of San Andrés? The paragraph itself does not give any indication. But geography, history and plain common sense would clearly indicate that these features fell under the dominant mainland coast and not under three small islands completely detached from the cays and located some 100 miles distant from them.

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[7] CR 2012/11 p. 46, para. 42 (Kohen).

20. More importantly than the nuances of translation, the meaning and intent of this paragraph needs further interpretation. First, the text itself. Does it mean that Nicaragua is recognizing that those cays are not under its sovereignty but under that of Colombia or the United States? This cannot be read into the Treaty for the following reasons.

(i) It is not recognizing sovereignty of third parties to those cays because it does not say so. In stark contrast the wording of the first paragraph makes it clear that it is a recognition of sovereignty over territory. If the intention of recognizing the sovereignty of Colombia or the United States over the cays was intended, the appropriate wording was at hand.

(ii) Nicaragua is not relinquishing its rights. The text has no hint of this.

VII. 1928 Treaty: negotiating history

21. Apart from the text itself, the negotiating history makes this clear. As explained and substantiated in Nicaragua's Memorial[8], the negotiations of the 1928 Treaty were quasi exclusively between the United States (acting for Nicaragua) and Colombia. These negotiations make it clear that,

(i) The United States did not consider these cays to be part of the San Andrés Archipelago. In a Memorandum of United States Assistant Secretary of State White of 1 August 1927[9], he summarizes a meeting held that day with the Colombian Minister in charge of negotiating the question of San Andrés and the three maritime features. He made clear to the Colombian Minister that the United States did not consider that Roncador, Serrana and Quitasueño were part of the San Andrés Archipelago.

(ii) The cays were considered of very minor importance. In a Memorandum of 2 August 1927, Mr. White explains that he told the Colombian Minister that "these cays appeared to have very little intrinsic value; that they do constitute a very real menace to shipping, lying as they do on the trade route between the Panama Canal and the Straits of

[8]MN, Vol. I, paras. 2.149-2.156.

[9]*Papers Relating to the Foreign Relations of the United States* 1927, Vol. I, US Government Printing Office, Washington, 1942, pp. 323-325.

Yucatan". The Colombian Minister agreed they were "practically worthless. Part of the year they are completely submerged."[10]

22. That Colombia itself considered these uninhabited cays of no importance is also made clear in the internal communications of the Colombian authorities. During the negotiations between Colombia and the United States, the Colombian negotiator, Mr. Olaya, sent to the Colombian Foreign Minister several communications. In note number 826-17, of 18 August 1927, he stated:

> "If we accept the cession of the cays, that are uninhabited and uninhabitable islets, of scarce or no value for us, I would have you consider the following:
>
> . . . . . .
>
> *(d)* According to your cable [that is, the Foreign Minister's cable] number 26 in case of agreeing to the cession of our rights over the cays, the government would like that if any compensation is to be received it would prefer that it was not in money, taking into account that no demand of any importance can be made since the cays are of insignificant value."[11]

23. Another communication from the Colombian negotiator to the Colombian Foreign Minister on 10 December 1927, stated:

> "As that Honorable Office has indicated in its cables to this Legation, the value of the cays of Roncador, Quitasueño and Serranilla is insignificant for us. They are far away reefs, uninhabitable and unproductive, that, covered with water during part of the year, have even been considered by England as high seas, not susceptible of appropriation."[12]

24. The reason why Colombia was not willing to surrender the cays directly to the United States was clarified by the Assistant Secretary of State Mr. White in the above quoted Memorandum. He noted down that the Colombian Minister had stated

> "that it was a question of *amour propre* for Colombia as she could not well give up the Islands or recognize American jurisdiction over them except through arbitration and that he felt sure that Colombia would accept anybody proposed by the United States as arbitrator"[13].

25. The initial proposal of the United States to Colombia was that both Nicaragua and Colombia in the 1928 Treaty relinquish any claim to these three reefs. The text proposed stated:

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[10] *Op. cit*. pp. 325-328.

[11] Moyano, C., *El Archipiélago de San Andrés y Providencia*, Ed. Temis, Bogotá, 1983, pp. 522-523.

[12] *Ibid.*, p. 524.

[13] *Op. cit.*, p. 325.

"It is understood that the present Treaty does not include the cays of Roncador, Quitasueño and Serranilla (sic), the sovereignty of which the two Parties agree to no longer claim from now on."[14]

26. In passing I would note that this proposal makes at least one thing clear. It was the understanding of the United States and Colombia that Nicaragua had claims over those cays.

27. The counter proposal of Colombia to the United States was that the Treaty should recognize the sovereignty of Nicaragua over the three cays. The Colombian proposal stated:

> "Colombia acknowledges Nicaragua's absolute domain over the Mosquitia, the Mangles Islands and the cays of Roncador, Quitasueño and Serranilla, with the express condition that in the said cays the Colombians may exercise the fishing rights for perpetuity. Nicaragua acknowledges Colombia's absolute domain over all the other islands of the Archipelago of San Andrés and Providencia."[15]

28. The object of this offer by Colombia was to facilitate the transfer of sovereignty over the cays to the United States. The Colombian note indicated that, "It is considered preferable that Nicaragua be the one to receive and cede the cays to the United States because thus we can avoid any constitutional difficulty that might arise and the cession would be less discussed in Congress and the press."

29. On the other hand, why did the United States not accept that the keys be recognized as Nicaraguan by Colombia? The problem with Nicaragua being the undisputable sovereign over the cays was that it would then have to be Nicaragua that ceded them to the United States. Since Nicaragua was under United States occupation and political, economic and military control, it would have been exceedingly embarrassing for the United States to be seen as directly taking territory from Nicaragua.

30. The different texts in the negotiations make it clear that if the intention was for Nicaragua to relinquish its claim, it would have clearly said so. It could have stated, paraphrasing for example the wording of the proposal of the United States cited in paragraph 25 above: "It is understood that the present Treaty does not include the cays of Roncador, Quitasueño and Serranilla the sovereignty of which Nicaragua agrees to no longer claim from now on." But, nowhere in the text does Nicaragua make any indication that it was relinquishing its claim to those cays. If the Treaty had that wording or any similar we would probably not be having this pleading.

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[14]MN, Vol. I, p. 129-130, para. 2.151, and MN, Vol. II, ann. 75, and Moyano, *op. cit*., p. 124.

[15]MN, Vol. I, p. 131, para. 2.155.

Why did this paragraph not leave things clear as in the first paragraph of Article I? The explanation is that this would have eliminated Nicaragua's claim and have left the Colombian claim more solid vis-à-vis the United States that wanted these cays.

31. The only conclusion from the text and negotiations of the Treaty is that the cays were simply left out of the Treaty. It did not apply to the cays.

32. In that case, how can sovereignty be determined over these maritime features? The Treaty itself is the key. In it Colombia recognized Nicaragua's sovereignty over the Mosquito or Caribbean Coast and Great and Little Corn Island, and Nicaragua recognized Colombia's sovereignty over the Archipelago of San Andrés. This recognition of Nicaragua's sovereignty over this large mainland coast with all its appurtenances included all titles based on the *uti possidetis iuris* at independence. Any title of Colombia based on *uti possidetis iuris* over that mainland coast was transferred to Nicaragua without any reservations. Whatever rights Colombia had over the Mosquito Coast based on the Royal Order of 1803 — which Nicaragua has never accepted — but, whatever the value of those rights and titles over the mainland coasts, they were transferred to Nicaragua.

33. Professor Remiro will analyse what areas were considered to be included in the island group of San Andrés at the time of independence. For the moment, a simple common sense view is that it would be preposterous to consider that at independence two small islands, San Andrés and Providencia (since Santa Catalina is simply a small appendix of Providencia), with a population of approximately 700 inhabitants at the time[16], should take precedence over the extensive Nicaraguan mainland coast on matters of sovereignty over a few uninhabitable and uninhabited cays fronting this coast. It should be recalled that located on this mainland coast was the mouth of the San Juan River, gateway to the Great Lake of Nicaragua and its commercial cities during colonial times and at the time of independence. Nicaragua's coastline was a very valuable asset sought after independence by, among others, Great Britain, the United States and, of course, Colombia.

34. To conclude, Mr. President:

[16] http://www.bdigital.unal.edu.co/1237/10/09CAPI08.pdf.

It is clear from the text of the Treaty that it does not decide questions of sovereignty over the three maritime features excluded by name from the Treaty.

It is clear that the text of the Treaty is not worded in any way that can be interpreted as a relinquishment of Nicaragua's claims.

It is also clear that the negotiating history of the Treaty confirms the above statements.

Finally, these negotiations also make clear a different question of fact. That is, that these cays were uninhabitable and uninhabited and not under the control of Colombia.

35. Mr. President, this ends my presentation. Thank you, Mr. President, Members of the Court. May I ask you now, Mr. President, to call Professor Remiro Brotóns.

The PRESIDENT: Thank you very much, Sir. Je passe la parole à M. le professeur Remiro Brotóns. Vous avez la parole, Monsieur.

M. REMIRO BROTÓNS :

SOUVERAINETÉ DU NICARAGUA SUR LES «FORMATIONS MARITIMES» EN LITIGE AVEC LA COLOMBIE

1. Monsieur le président, Mesdames et Messieurs les juges, après avoir entendu les interventions des honorables membres de la délégation colombienne sur la souveraineté des formations maritimes en litige, je dois, tout d'abord, réaffirmer les concepts, les faits et les conclusions exposés lors de ma plaidoirie du 23 avril dernier, que je tiens comme maintenue dans son intégralité[17].

2. Aujourd'hui mon intervention doit se limiter à préciser quelques points soutenus par les conseils et avocats de la Colombie au premier tour de ces audiences.

Sur les effectivités

3. Commençons, tout d'abord, par les effectivités. «Au fond», écrivait un cher collègue,

> «le règlement des conflits territoriaux par la voie juridictionnelle oscille, essentiellement, entre deux situations : l'existence d'un titre juridique (soit

[17] CR 2012/8, p. 32-49 (Remiro Brotóns).

> l'*uti possidetis juris*, soit un traité de frontières, colonial ou non) et la présence de l'occupation effective d'un territoire *nullius*»[18].

4. L'affaire qui nous occupe n'est pas un cas où les effectivités des Parties rivalisent entre elles aux fins d'établir un meilleur droit sur un territoire sans maître[19]. Le nôtre est un cas où il n'y a pas de *terra nullius* ; les effectivités peuvent, donc, servir pour confirmer un titre, mais pas pour le créer, à moins que le titre originaire ait été abandonné de manière incontestable par celui qui le détenait[20].

5. Comme l'ont écrit les juges Simma et Abraham dans leur opinion dans l'affaire *Pedra Branca* :

> «une idée se dégage avec certitude de la jurisprudence : lorsqu'il existe un souverain originaire, aucun exercice de l'autorité étatique, si continu et effectif soit-il, ne peut entraîner un transfert de souveraineté s'il n'est pas possible d'établir que le souverain originaire a, d'une manière ou d'une autre, consenti à la cession du territoire en cause ou acquiescé à son transfert au profit de l'Etat ayant exercé *de facto* son autorité. Sans un tel consentement — ou acquiescement —, le titre originaire ne peut pas céder, même en présence d'un exercice continu et effectif de l'autorité par un Etat autre que le titulaire.» (*Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 120, par. 13.)

6. Evidemment le Nicaragua n'a jamais prétendu se battre avec la Colombie sur le terrain des effectivités. Le Nicaragua est le petit poisson de cette histoire. Cela n'empêche que la Colombie, le gros poisson, n'arrive à apporter la preuve d'effectivités *décisives* pour sa cause, au vu de la nature mineure des activités qu'elle avance comme preuves et du moment où ces activités se sont produites.

7. En tout cas, même s'il en allait différemment et si ses effectivités étaient probantes, elles ne pourraient pas détruire un titre de souveraineté fondé sur un traité en vigueur ou sur l'*uti possidetis juris*, à moins que la Colombie ne démontre que le Nicaragua a renoncé ou a abandonné son titre. Puisque cela n'est pas arrivé, la confrontation juridique doit se tenir aux titres, pas aux effectivités présumées des Parties.

8. Ainsi, il n'est guère nécessaire de dire grand-chose sur les effectivités. Cependant, on fera, à titre indicatif, certaines remarques. Contrairement à ce qui a été déclaré par l'expérimenté

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[18] L. I. Sánchez Rodríguez, «L'*uti possidetis* et les effectivités dans les contentieux territoriaux et frontaliers», *Recueil des Cours*, t. 263, 1997, p. 370.

[19] *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 625.

[20] Voir *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 51, par. 122.

agent de la Colombie, il n'est pas vrai qu'elle ait exercé la souveraineté sur «each and every one of the cays in dispute» d'une manière «effective, peaceful and ininterrupted for two centuries»[21]. La «overwhelming evidence», l'écrasante évidence, dont parlent les conseils de la Colombie[22] n'est plus telle si de l'archipel on se déplace vers les cayes, si du papier on saute à la réalité, si dès les années plus récentes on remonte deux cents ans.

9. A supposer qu'il eût existé, pendant le XIX[e] siècle et une bonne partie du XX[e] siècle, cet exercice de souveraineté s'est borné au papier. La Colombie n'a pas mis un pied sur les cayes litigieuses pendant plus d'un siècle, tant et si bien que ce sont les citoyens des Etats-Unis qui les ont occupées pour l'exploitation du *guano*. Le fait que les cayes ont été enregistrées par le département du Trésor en 1871 comme «appertaining to the United States», conformément au *Guano Islands Act* de 1856, suppose qu'elles étaient inhabitées, mais aussi qu'elles ne montraient aucun signe d'occupation, même pas apparente.

10. C'est seulement en 1890 que la Colombie s'est intéressée à la question[23] ; trois ans plus tard, en 1893, elle a formulé une revendication par rapport à Roncador, sans pourtant mentionner Serrana[24]. A cet égard, la réaction du Nicaragua a précédé celle de la Colombie, car le Nicaragua a réclamé la souveraineté sur Serrana, en tant que successeur de l'Espagne, en 1868, dans une note de son ministre des affaires étrangères en date du 3 avril[25].

11. Lorsqu'en 1890 le préfet de la province de Providencia, qui venait d'être créée, a été appelé à informer sur les activités menées à Roncador, il déclara qu'il ne pouvait pas s'étendre là-dessus à cause de «the absolute lack of information»[26] [«le manque total d'informations»].

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[21] CR 2012/11, p. 11, par. 6 (Londoño).

[22] CR 2012/11, p. 51-52, par. 6 (Bundy).

[23] Note présentée par le chargé d'affaires de la Colombie le 8 décembre 1890 (contre-mémoire de la Colombie (CMC), annexe 26).

[24] Note du 18 janvier 1893 (CMC, annexe 27).

[25] Voir J. M. Skaggs, *The Great Guano Rush. Entrepreneurs and American Overseas Expansion*, St. Martin's Griffin, New York, 1994, p. 127 ; Office of the Legal Adviser, Department of State, *Sovereignty of Islands Claimed under the Guano Act and of the North-western Hawaiian Islands, Midway and Wake*, Washington D.C., 1932, p. 106-107 ; Notes from the Nicaraguan Legation in the United States to the Department of State 1862-1906 (National Archives Microfilm Publication, T-797, roll 1), Records of the Foreign Service Posts of the Department of State, Record Group 84 ; National Archives Building, Washington D.C.

[26] Note n° 326, du préfet de la province de Providencia au secrétaire du gouvernement à Cartagène, du 19 septembre 1890 (CMC, annexe 82).

12. La Colombie présente une liste de «legal provisions concerning the archipelago of San Andrés»[27]. Toutefois, ces dispositions ne regardent pas spécifiquement les cayes en dispute.

13. La Colombie attire l'attention sur l'installation de phares et d'aides à la navigation, une activité qui est en elle-même peu concluante pour établir la souveraineté[28].

14. Ceci étant, la Colombie n'a construit aucun phare à Roncador ni sur aucune autre formation maritime en litige avant que le différend ait surgi.

15. Ce sont les Etats-Unis qui ont fourni les phares et les aides à la navigation à Roncador, Quitasueño et Serrana, en 1919, une fois que les décrets du président Wilson du 5 février et du 5 juin ont déterminé que ces formations appartenaient à son pays.

16. Le Gouvernement de la Colombie l'a appris parce que le fait est venu, par hasard, aux oreilles de l'intendant de San Andrés, où, à l'époque, il n'y avait pas un seul bateau pour garder la côte ou, même, pour assurer la communication avec le continent[29]. Cela veut dire que le bateau prévu par la loi n° 52 de 1912, que le conseil de la Colombie emploie comme exemple des effectivités colombiennes[30], n'est jamais arrivé à sa destination.

17. Plus tard, dans une communication du 13 septembre 1919, le ministre de la légation colombienne à Washington a déploré l'initiative des Etats-Unis ; parmi d'autres raisons, à cause de «la situation quasi sans défense dans laquelle nous nous trouvons dans ces îles et cayes»[31].

18. Les expéditions et opérations de l'armée colombienne[32], pas davantage que les opérations de sauvetage en mer[33], ne constituent pas d'effectivités probantes ; toutefois, les premières cherchent à préparer une occupation militaire des cayes de la part de la Colombie quand les Etats-Unis les ont abandonnées.

19. En 1937 le garde-côtes *Junín* s'y déplaça. Le fonctionnaire Ortega Ricaurte signale, dans le rapport qu'il adresse au ministre des affaires étrangères, que l'exploitation des cayes est

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[27] CMC, vol. II-B, appendice 4, p. 35-62.

[28] Voir *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 52-65, par. 126-162.

[29] Voir la note n° 1287 en date du 21 septembre 1919 adressée au ministre du gouvernement par le gouverneur de San Andrés (CMC, annexe 102) et le Rapport annuel de l'*Intendente* (mai 1919-avril 1920) (CMC, annexe 103).

[30] CR 2012/11, p. 55, par. 21 (Bundy).

[31] CMC, annexe 101.

[32] CR 2012/11, p. 60, par. 37-38 (Bundy).

[33] CR 2012/11, p. 61, par. 40 (Bundy).

contrôlée par une entreprise *(Whiteside & Ritch)* formée par deux citoyens, l'un nord-américain, l'autre de la Jamaïque, qui agissaient sans autorisation des autorités colombiennes, qui n'étaient pas même au courant. La Colombie a éliminé certains passages du rapport dans la version anglaise qu'elle a produite à la Cour[34].

20. La Colombie soutient que le Nicaragua «n'a jamais protesté contre l'exercice par la Colombie de sa souveraineté et de sa juridiction sur les cayes»[35], mais elle ne précise pas quels sont les actes de souveraineté dont il s'agit, car, dans ces années-là, avant la conclusion du traité Saccio-Vázquez, il n'y a pas eu de tels actes, et ceux que la Colombie a pu réaliser plus tard sont postérieurs à la date à laquelle a surgi le différend entre les Parties. La cristallisation du différend exclut toute initiative de la Partie adverse visant à améliorer sa position.

21. Bref, les faits mentionnés par la Colombie manifestent des revendications, pas des effectivités sur les cayes en litige.

Sur les titres : du traité Molina-Gual au traité Bárcenas-Esguerra

22. Monsieur le président, Mesdames et Messieurs les juges, qu'est-ce qu'on trouve en ce qui concerne les titres? Tout d'abord, l'acceptation par les parties au traité Molina-Gual, de 1825, de l'*uti possidetis juris* comme principe tranchant leurs limites souveraines. Ce traité est encore en vigueur, dans la mesure où ses dispositions ne sont pas incompatibles avec celles d'un traité postérieur.

23. En second lieu, du point de vue chronologique, on a le traité Bárcenas-Esguerra, de 1928. La Cour a décidé dans son arrêt du 13 décembre 2007 que «le traité de 1928 était valide et en vigueur à la date de la conclusion du pacte de Bogotá en 1948» (*Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 859, par. 81), ce qui l'a conduite à *retenir l'exception d'incompétence* soulevée par la Colombie sur la base des articles VI et XXXIV du pacte du Bogotá, «en ce qu'elle a trait à la souveraineté sur les îles de San Andrés, Providencia et Santa Catalina» (*Différend territorial et maritime (Nicaragua*

[34] CMC, par. 3.98 et annexe 120.

[35] CMC, par. 4.45.

c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II), p. 875, par. 142 1). Le Nicaragua a respecté et respecte cette décision à la lettre.

24. Dans les limites établies par la Cour pour le déroulement de notre affaire, le premier élément pertinent est l'article premier du traité de 1928, qui, dans ses deux paragraphes, pose des problèmes d'interprétation qui ont été débattus par les Parties. L'ambassadeur Carlos Argüello s'en est déjà occupé. Je vais donc m'arrêter sur certains aspects concernant les cayes du point de vue de leur appartenance à l'archipel et du rôle du méridien 82º ouest à cet égard.

A propos des cayes et de l'«archipel de San Andrés»

25. La première mention dans un document de la Colombie de Roncador comme faisant partie de l'archipel de San Andrés se trouve dans la note 326, du 19 septembre 1890, que le préfet de la province de Providencia a adressée au secrétaire du gouvernement de Cartagène[36]. Il s'agit, bien évidemment, d'une note *interne* entre des fonctionnaires colombiens.

26. On dirait qu'elle a été rédigée avec l'intention de démontrer, permettez-moi l'expression, la «colombianité» de l'îlot de Roncador à des dates auxquelles l'on essayait de convaincre de ceci le département d'Etat nord-américain. On peut suggérer que la Colombie cherchait aussi à contrer le Nicaragua, qui venait d'occuper les îles Mangles, un événement auquel fait allusion d'une façon *intentionnelle* le préfet de la province dans son document[37].

27. Peu après, le ministre des affaires étrangères de la Colombie, Jorge Holguín, dans son rapport au Congrès de 1896, a mentionné les cayes en dispute comme composantes d'un des trois groupes d'îles qui formaient l'archipel de San Andrés[38].

28. La délégation colombienne a mis en exergue le silence du Nicaragua devant ces manifestations, tenant pour acquis qu'il devait les connaître et réagir[39]. Cependant, si, comme l'a dit la Cour dans l'affaire *Cameroun c. Nigéria*, «un Etat n'est pas juridiquement tenu de s'informer des mesures d'ordre législatif ou constitutionnel que prennent d'autres Etats et qui sont, ou peuvent devenir, importantes pour les relations internationales de ces derniers» (*Frontière terrestre et*

[36] CMC, par. 2.53 et annexe 82.

[37] CMC, annexe 82, texte original.

[38] CMC, par. 2.59 et annexe 89.

[39] CR 2012/11, p. 21-22, par. 15 (Crawford) ; p. 34, par. 12-14 (Kohen).

maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002, p. 430, par. 266), à plus forte raison, un Etat ne sera pas obligé de connaître tout ce qu'y se passe à l'intérieur d'autres Etats.

Sur le méridien 82º

29. Venant au méridien, l'agent de la Colombie a dit que l'interprétation que fait le Nicaragua des limites du méridien 82º comme ligne d'attribution territoriale «defies logic and crashes against the weight of evidence, contradicting the good faith that should govern treaty relations»[40].

30. Ces mots très âpres surprennent à double titre. D'abord, parce qu'ils ont été utilisés par le représentant d'un Etat qui, à l'encontre du droit, a employé le méridien 82º comme une frontière maritime pendant des décennies, s'attribuant unilatéralement une juridiction qui ne lui appartient pas ; un Etat qui, maintenant, après que la Cour a adopté son arrêt du 13 décembre 2007, cherche à *blanchir* sa conduite et à persister à la suivre, au nom du *statu quo*.

31. Est aussi frappante, en deuxième lieu, la tendance obsessionnelle des conseils de la Colombie[41] à qualifier d'«infraction flagrante» du traité de 1928 tout désaccord par rapport à leur interprétation de cet instrument, appelant la Cour à donner une «réponse ferme et catégorique» au nom du sacro-saint principe *pacta sunt servanda*.

32. Or, dans son arrêt du 13 décembre 2007, la Cour elle-même a considéré

> «qu'il ressort très clairement du libellé du premier paragraphe de l'article premier du traité de 1928 que celui-ci ne répond pas à la question de savoir quelles sont, en dehors des îles de San Andrés, Providencia et Santa Catalina, les formations maritimes qui font partie de l'archipel de San Andrés» (*Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 863, par. 97).

33. Le Nicaragua ne manque ni à la bonne foi ni au respect des règles. Ce qu'il y a, c'est un désaccord entre les Parties sur la signification du méridien 82º aux effets de déterminer les îles composant l'archipel. De l'avis de la Colombie[42], le méridien 82º ouest sépare ce qui est

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[40] CR 2012/11, p. 14, par. 22 (Londoño).

[41] Voir *ad ex. ibid.*, p. 38, par. 23 ; p. 49, par. 53 (Kohen).

[42] *Ibid.*, p. 43, par. 35 (Kohen).

colombien à l'est de ce qui est nicaraguayen à l'ouest, jusqu'à ce que l'on trouve des Etats tiers au nord et au sud.

34. D'après le Nicaragua, cette approche est erronée. Ce n'est pas le méridien 82º qui détermine l'extension de l'archipel de San Andrés. C'est l'archipel de San Andrés, une fois identifié, qui détermine les limites sud et nord du méridien 82º comme ligne d'attribution de souveraineté sur les cayes en litige (onglet 1 du dossier des juges). Il faut rappeler qu'à la même latitude des cayes Misquitos et à l'est du méridien 82º se trouve Serrana, qui a fait l'objet d'une réclamation concrète et spécifique de la part du Nicaragua depuis la moitié du XIX[e] siècle, bien que la Colombie s'obstine à le nier emphatiquement[43]. Comme le rappelle le conseil de la Colombie[44], le ministre des affaires étrangères du Nicaragua a expliqué, à l'époque, que le méridien 82° «indiquait la limite géographique entre les archipels litigieux», c'est-à-dire les Mangles d'un côté, et San Andrés de l'autre. Les Misquitos ne faisaient pas, comme la Colombie semble le suggérer, l'objet du différend. Personne n'a soutenu qu'elles étaient des composantes de l'archipel de San Andrés ou mis en doute leur appartenance au Nicaragua.

35. Pour la Colombie, soutenir, comme le fait la Nicaragua, que les cayes soit appartiennent à la côte soit appartiennent à l'archipel est un *non sequitur* — un *non sequitur*, on dit même, typique[45]. Et pourquoi l'argumentation du Nicaragua est fallacieuse ? Est-ce que dans un traité qui vise à finir avec les conflits territoriaux, comme le remarque constamment la Colombie, il peut exister une troisième voie ? Ou est-ce que finir avec les conflits territoriaux veut dire que toutes les cayes en litige doivent être attribuées à la Colombie[46] ?

36. Si la Cour attribue la souveraineté sur les cayes à la Colombie, ce ne peut pas être seulement parce qu'elles se trouvent à l'est du méridien 82º.

L'*uti possidetis juris*

37. Monsieur le président, Mesdames et Messieurs les juges, qu'est-ce qu'on peut dire maintenant sur *l'uti possidetis juris* ? Pour appliquer ce principe, la Colombie a attribué un rôle

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[43] CR 2012/11, p. 34, par. 15 ; p. 36-37, par. 20 ; p. 39, par. 26 ; p. 41, par. 30, ; p. 46, par. 44 (Kohen).

[44] *Ibid.*, p. 44, par. 39 (Kohen).

[45] *Ibid.*, p. 37, par. 21 (Kohen).

[46] *Ibid.*, p. 36-37, par. 20 (Kohen).

central au décret royal du 20-30 novembre 1803, qui aurait séparé la côte des Mosquitos et les îles adjacentes de la capitainerie générale de Guatemala (à laquelle appartenait la province du Nicaragua) pour les placer dans la vice-royauté de Santa Fé (d'où est issue la Colombie)[47].

38. Je ne fatiguerai pas les honorables membres de cette Cour avec un exposé ennuyeux des raisons pour lesquelles le Nicaragua considère que ce décret royal n'a pas été le dernier décret du roi d'Espagne à être appliqué avant l'indépendance de l'Amérique centrale en 1821. Je renvoie aux écritures[48].

39. Par ailleurs, je me demande si les remarques que je pourrais faire maintenant concernant la portée de ce décret arriveraient à temps, car la Partie adverse a invoqué à plusieurs reprises[49] l'arrêt du 8 octobre 2007, dans l'affaire du *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes*, où, *en passant*, la Cour semble accepter qu'en vertu du décret royal de 1803 la partie de la côte des Mosquitos située au sud du cap Gracias a Dios passa sous contrôle de la vice-royauté de Santa Fé[50].

40. Etant donné que ce décret royal n'avait pas donné lieu à des débats dans l'affaire en cause et ne touchait pas aux rapports entre le Nicaragua et le Honduras, l'*obiter dictum* de la Cour est quand même surprenant, mais je ne crois pas qu'il suffise à préjuger l'affaire pendante aujourd'hui devant vous.

La sentence Loubet et ses conséquences

41. Au-delà des termes dans lesquels on peut débattre du droit espagnol des Indes, il faut tenir compte de ce que le président de la République française, M. Loubet, en tant qu'arbitre du différend territorial entre le Costa Rica et la Colombie, a rejeté la prétention de la Colombie sur la côte des Mosquitos. Et s'il a attribué à ce pays les îles de l'«archipel de San Andrés», parmi lesquelles ne sont pas, d'ailleurs, mentionnées les cayes en litige au nord de Providencia, ce fut simplement parce que le Costa Rica, qui se trouve au sud de ces îles, ne les avait pas revendiquées.

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[47] CMC, par. 3.7-3.14; CR 2012/11, p. 31, par. 5 (Kohen).

[48] MN, par. 1.45-1.79.

[49] CMC, par. 3.10, 6.14-6.16; CR 2012/11, p. 21-22, par. 15 (Crawford) ; p. 31, par. 5 (Kohen).

[50] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 708, par. 161.

42. La réaction immédiate de l'ambassadeur du Nicaragua à Paris, dans son ardeur pour sauver les Mangles, occupées déjà par le Nicaragua et qui avaient été déclarées comme colombiennes par l'arbitre Loubet[51], n'était pas nécessaire. L'ambassadeur a prêté tellement d'attention aux Mangles qu'il a perdu de vue les mangroves. Mais l'on sait que les affirmations erronées d'un fonctionnaire, même d'un haut fonctionnaire, ne peuvent pas priver un Etat d'un titre qu'il croit posséder sur un territoire[52].

Sur la reconnaissance de la souveraineté colombienne par des tiers

43. Monsieur le président, Mesdames et Messieurs les juges, le caractère litigieux des cayes au nord de Providencia était bien connu par les puissances qui avaient dominé la mer des Caraïbes pendant les derniers deux cents ans.

44. La Colombie insiste sur le fait que sa souveraineté sur les cayes en dispute avait été reconnue par des tiers. Il ne fait guère de doute que la reconnaissance par des tiers, y inclus ceux ayant signé des traités de délimitation maritime avec la Colombie, ne serait pas opposable au Nicaragua.

45. Les traités que la Colombie fait valoir sont importants mais pour découvrir les limites des prétentions de leurs parties, pas pour limiter les prétentions des Etats tiers[53].

46. En outre, ni les Etats-Unis ni le Royaume-Uni, qui ont dominé le scénario des Caraïbes, n'ont procédé à une telle reconnaissance.

47. Venant au cas des Etats-Unis, auquel la Colombie a consacré presque 40 pages de son contre-mémoire[54], la correspondance diplomatique révèle la non-reconnaissance par ce pays de la prétention colombienne pendant des décennies et finalement son abandon des cayes sans, pourtant, reconnaître le meilleur titre de la Colombie sur elles.

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[51] Voir F. Silvela, *Limites entre la Colombie et le Costa Rica. Exposé présenté à S.E. M. le président de la République française en qualité d'arbitre*, Madrid, 8 décembre 1898, p. 72 ; R. Poincaré, *Arbitrage de S.E. M. le président de la République française, troisième mémoire de la Colombie*, résumé des conclusions, Paris, 1900, p. 2-3.

[52] Voir *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 81, par. 227 ; opinion dissidente commune de MM. les juges Simma et Abraham, p. 124, par. 24.

[53] Voir *Arbitration between Barbados and the Republic of Trinidad and Tobago*, sentence du 11 avril 2006, par. 344-349. Voir aussi *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 725, par. 225.

[54] CMC, p. 150-188.

48. On peut dire la même chose en ce qui concerne le Royaume-Uni. Une des directives du *Foreign Office* était justement de ne pas tomber dans le piège de la reconnaissance d'une souveraineté controversée aux Caraïbes. La correspondance diplomatique britannique concernant la Colombie[55] se limite à constater les revendications colombiennes, pas à les reconnaître.

Les cayes dans le plateau

49. Monsieur le président, Mesdames et Messieurs les juges, le Jonkheer Feith, dans un rapport rédigé en juin 1948 pour la conférence de l'International Law Association tenue à Copenhague en août 1950, observait : «Si, par suite d'un cataclysme affectant le sol marin ou par suite d'un tremblement de terre le plateau continental venait à émerger, pourrait-il alors appartenir à un pays autre que l'Etat riverain ?»[56] Roncador, Serrana, Serranilla ou Bajo Nuevo, qui sont le résultat de processus géologiques qui se perdent dans le temps, sont des exemples *avant la lettre* de ce qui peut se passer. Si le droit international n'a pas fait de cela un titre sur les cayes, on peut au moins espérer que les cayes ne portent pas atteinte aux droits de l'Etat riverain sur son plateau.

50. Avec ces réflexions un peu mélancoliques, Monsieur le président, Mesdames et Messieurs les juges, on rentre dans les enjeux plus substantiels de l'affaire soumise à votre décision. Mais ma tâche finit ici. Je vous remercie de votre bienveillante patience et je vous prie, Monsieur le président, d'appeler à la barre mon collègue Alex Oude Elferink pour continuer avec les plaidoiries dans la défense des intérêts légitimes du Nicaragua, à moins que vous considériez venu le moment de faire la pause.

Le PRESIDENT : Merci, Monsieur le professeur. Le moment n'est pas encore venu. It is for Mr. Oude Elferink to continue in the pleadings of Nicaragua. I give the floor to Mr. Oude Elferink.

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[55] CMC, par. 4.81-4.93.

[56] P. R. Feith, «Rights to the Seabed and its Subsoil. The Importance of the Continental Shelf Theory for the Exploitation of Submarine Regions», cité par G. Gidel, *Mémorandum sur le régime de la haute mer*, 3e partie, p. 77 (A/CN.4/32).

Mr. OUDE ELFERINK:

THE ISLANDS, CAYS AND BANKS IN THE RELEVANT MARITIME AREA

1. Thank you, Mr. President. Mr. President, Members of the Court, it is my task to again address the islands and cays in the relevant maritime area and the submerged bank of Quitasueño.

The islands and cays in the relevant maritime area

2. Mr. President, just a couple of words about Nicaragua's fringing islands and San Andrés and Providencia and the other islands in the middle of the delimitation area that are claimed by Colombia. We still have not heard anything from counsel for Colombia refuting Nicaragua's arguments on the case law in respect of fringing islands[57], so I need not dwell on that issue.

3. Last Monday, I also explained that the case law of this Court does not justify using the presence of overlapping contiguous zones to determine whether islands are in each other's proximity[58]. Counsel for Colombia nonetheless continues to insist on the relevance of overlapping contiguous zones to demonstrate the alleged proximity of cays[59]. In the past, Colombia has held differently as regards this matter. After a survey of the area in 1937, an official of the Colombian Ministry of Foreign Affairs reported to the Minister for Foreign Affairs on the "cays of Serrana and Roncador, whose total area does not amount to some 30 hectares and which are abandoned in the middle of the Ocean"[60].

4. Mr. Bundy did spend considerable time to refute our point that the cays claimed by Colombia constitute rocks in the sense of Article 121, paragraph 3, of the 1982 Convention[61]. One of his arguments was that "the term 'rocks' that appears in Article 121 (3) should be interpreted in accordance with its ordinary meaning — 'rocks'. These [that is, the cays,] are not rocks."[62] He did not explain what he meant by that, but I assume he was referring to the fact that the cays are not

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[57]See CR 2012/9, p. 38, para. 5 (Oude Elferink).

[58]CR 2012/8, p. 31, para. 17 (Oude Elferink).

[59]CR 2012/12, p. 18, paras 42-43 (Bundy).

[60]CMC, original texts of the Anns. translated into English, Vol. 2, Ann. 120, p. 19. Translation at judges' folders, tab 2.

[61]CR 2012/12, p. 17, paras 37-40 (Bundy).

[62]CR 2012/12, p. 17, para. 37 (Bundy).

rocks in geological terms, but consist of sand and other materials. Mr. Bundy was putting a little too much emphasis on ordinary meaning and too little on context. His view would imply that a few square centimetres of sand permanently above water would be entitled to a continental shelf and exclusive economic zone, but much larger geological rocks might not be. A publication by the United Nations Secretariat indicates that Mr. Bundy is indeed wrong. This study indicates that the term rock is not defined in the 1982 Convention and then refers to the definition of islands and low-tide elevations[63]. That is, it indicates that the term rock in Article 121 (3) refers to a naturally formed area of land, thus also including cays.

5. Mr. Bundy also referred to the presence of persons on the cays and *effectivités*. I will discuss the latter topic in connection with Quitasueño and will not look at the significance of *effectivités* for the title to the cays. That latter matter has been addressed by Professor Remiro Brotóns. As I will set out, the leases granted by Colombia in respect of Quitasueño point to the conclusion that Colombia had no knowledge whatsoever of the nature of the bank of Quitasueño. It gave out leases to exploit guano and coconut, whereas there was no piece of dry land on Quitasueño. That practice also puts into doubt that the leases in respect of the cays were anything else than paper claims. In that sense, they do not provide evidence that the cays were capable of sustaining an economic life of their own.

6. As far as human habitation is concerned, the other leg of paragraph 121 (3), Mr. Bundy submitted that two agreements of Colombia with Jamaica "provided that up to 36 fishermen could stay on Serranilla and up to 24 fishermen from Jamaica could stay on Bajo Nuevo. That many individuals do not stay on 'rocks'."[64] *Could stay*, he said. Not, did stay. And among the many photographs of the cays Colombia has shown you, there were none showing the dwellings of fishermen on Serranilla and Bajo Nuevo. And as I explained last Tuesday the mere presence of persons on a feature does not constitute proof that they are capable of sustaining human habitation[65]. So, we remain where we were last Tuesday, the evidence that Colombia has

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[63]*The Law of the Sea; Baselines: An examination of the relevant provisions of the United Nations Convention on the Law of the Sea*, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, p. 61.

[64]CR 2012/11, p. 59, para. 34 (Bundy).

[65]CR 2012/9, p. 41, para. 12 (Oude Elferink).

submitted indicates that the cays are not capable of sustaining human habitation or economic life of their own.

Quitasueño — Surveys predating Nicaragua's Application instituting the present proceedings

7. Mr. President, until last Thursday, Colombia had not said anything on a number of surveys on Quitasueño that spanned the period between the 1830s and Nicaragua's Application instituting the present proceedings. These included a survey by the United Kingdom in the 1830s, a Colombian survey in 1937 and surveys of the Colombian Navy up to and including the 1990s in connection with the preparation of nautical charts. As Nicaragua had repeatedly observed, all these surveys pointed out that there were no islands or low-tide elevations on the Bank of Quitasueño[66]. Professor Crawford attempted to disqualify the British survey of the 1830s. Allegedly, at that time there was no reason "for naval surveyors to enquire closely of such a dangerous place as Quitasueño"[67]. That is a preposterous proposition. Surveys like these are intended to chart dangers to navigation. That made it particularly relevant to survey Quitasueño. I would respectfully invite the Court to read the relevant part of the report of Captain Owen of the Royal Navy, included at Annex 12 of the Reply. The report indicates that the Bank was carefully surveyed. The resulting information was included in the 1861 edition of *The West India Pilot* of the British Admiralty[68].

8. Mr. Bundy addressed Colombia's 1937 report on a Colombian survey. He was brief. He said the lighthouse at Quitasueño was visited[69]. He refrained from commenting on my quotations from the Report to the effect that the entire bank was permanently submerged. An official of the Colombian Ministry of Foreign Affairs who prepared the report on that survey for the Minister of Foreign Affairs did comment on the survey's implications for Quitasueño, stating that

> "From the description that we have made of the four great banks of Quitasueño, Serrana, Roncador and Serranilla, it results that for the issue of sovereignty and as the only dry land, the two small islets, which are the cays of Serrana and Roncador, whose

[66]See RN, Vol. I, paras. 4.27-4.33; CR 2012/9, p. 48, para. 27 (Oude Elferink).

[67]CR 2012/12, p. 36, para. 30 (Crawford).

[68]RN, Ann. 13.

[69]CR 2012/11, p. 60, para. 37 (Bundy).

> total area does not amount to some 30 hectares abandoned in the middle of the Ocean, are the only ones that may be taken into consideration"[70].

We consider that this statement, as well as other evidence from Colombia to the effect that there were, until 2008, no islands on the bank of Quitasueño, to be of particular significance. As has been observed repeatedly by this Court, this constitutes evidence of a party against its own interest[71].

Colombia's alleged *effectivités* in relation to Quitasueño

9. Notwithstanding all the surveys indicating the absence of any islands on Quitasueño, Colombia insists that it is otherwise. For instance, Ambassador Londoño referred to a cay on Quitasueño[72]. Mr. Bundy, in discussing Colombia's alleged *effectivités* over the cays claimed by Colombia, went even further. He had no problem in telling you that Colombia had granted leases to extract guano and coconuts from Quitasueño[73]. He did not explain the details of this extraction industry. Hardly surprising, as we are talking about a submerged bank. What this tells us is that the Colombian Government was issuing leases for the extraction of non-existing resources. It did not have a clue about the true nature of Quitasueño when it issued those leases.

10. Mr. Crawford also asserted that the United States practice in relation to fisheries confirmed that Colombia had sovereignty over the islands of Quitasueño. In that connection he referred to a 1983 Exchange of Notes between the United States and Colombia[74]. Nicaragua discussed that Exchange of Notes in the Reply[75]. The Reply concluded that this practice indicated that there was no baseline, that is, no islands, on the submerged bank of Quitasueño to measure a territorial sea limit from. On the screen we have the area to which the arrangement on fisheries applied. This is at tab 3 of the judges' folder. For Roncador and Serrana the limit is at 12 nautical

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[70]CMC, original texts of the Annexes translated into English, Volume 2, Annex 120, p. 19. Translation at Judges' folder, tab 2.

[71]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 41 and 42, paras 64 and 69; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

[72]CR 2012/11, p. 11, para. 5 (Londoño).

[73]CR 2012/11, p. 56, para. 26 (Bundy).

[74]CR 2012/12, pp. 33-34, para. 22 (Crawford).

[75]RN, pp. 121-122, paras 4.38-4.39.

miles from the baselines. In the case of Quitasueño it is a rectangle[76]. The latter definition is explained by the fact that the United States had the position that Quitasueño, being permanently submerged at high tide, was not subject to the exercise of sovereignty[77]. Interestingly, at the time of the 1983 Exchange of Notes, Dr. Smith, Colombia's expert on Quitasueño was in the United States Department of State where he was "responsible for the technical and geographical aspects of negotiating U.S. bilateral boundary agreements and establishing U.S. claims to marine jurisdiction"[78].

Quitasueño — The 2008 and Smith Reports

11. Let me now turn to the 2008 and Smith Reports on Quitasueño[79]. Last Thursday Professor Crawford took us to task because Nicaragua allegedly until that week "had addressed neither the legal case, nor the factual case"[80]. I beg to differ. In the Reply, we put in a whole section specifically addressing Quitasueño's status and the 2008 Report that had been included in the Counter-Memorial[81]. The Reply concluded that there was no merit to Colombia's belated attempt to convert the submerged bank of Quitasueño into an "island"[82]. Colombia decided to persist in its claim and, in its last round of written pleadings, put in the Smith Report that raised further issues that required a response. Obviously, we had not had the chance to do so before last week. In light of Professor Crawford's misplaced indignation, it is all the more striking what he had to say about charts last Thursday. Virtually nothing, although I had gone through these charts in considerable detail[83]. And he concluded by observing "I will return to the question of charts in

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[76]Agreement between Colombia and the United States of America on certain fishing rights in implementation of the Treaty between Colombia and the United States of America of 8 September 1972, concerning the status of Quitasueño, Roncador and Serrana: Diplomatic Note Nº 711 from the Embassy of the United States of America to the Colombian Foreign Ministry, 24 October 1983; and Diplomatic Note Nº DM 01763 from the Colombian Foreign Ministry to the Embassy of the United States of America, 6 December 1983 (CMC, Vol. II-A, pp. 45-49, Ann. 8).

[77]See Note of the Embassy of the United States to the Ministry of Foreign Affairs of Colombia of 8 September 1972 (CMC, Ann. 3, p. 14).

[78]RC, Vol. II, App. 1, Ann. 1, p. 41.

[79]Study on Quitasueño and Albuquerque prepared by the Colombian Navy, September 2008 (CMC, Vol. II-A, Ann. 171); Expert Report by Dr. Robert Smith "Mapping The Islands Of Quitasueño (Colombia) — Their Baselines, Territorial Sea, And Contiguous Zone", February 2010 (hereinafter "Smith Report"), RC, Vol. II, App. 1.

[80]CR 2012/11, p. 25, para. 24 (Crawford).

[81]RN, Chap. IV, Section IV, pp. 115-123, paras 4.25-4.43.

[82]RN, p. 123, para. 4.43.

[83]CR 2012/9, pp. 53-55, paras 38-42 (Oude Elferink).

more detail next week"[84], that is, after Nicaragua's second round of pleading. In view of our Colombian friends' ability to distort the facts, let me just revisit two points as regards the charts. First, last Tuesday, I explained the difference between the symbol for breakers on nautical charts and that for drying reefs[85]. I did this because Dr. Smith had created the impression that the symbol for breakers is used to chart drying reefs[86]. If this were the case, Colombia's charts on, among others, Quitasueño and Bajo Nuevo, would always have shown the existence of extensive drying reefs. As I explained the symbol for breakers is not used to depict drying reefs and breakers do not form part of the low-water line[87]. On the screen we now have an extract from British Admiralty Chart 666[88]. It indicates the edge of a reef, that is, the low-water line, and offshore it shows the presence of breakers, which are clearly seaward of the low-water line in an area that is identified as being always submerged. And, as a matter of fact, on the figure you can also see chart depths in the area of the breakers. Last Tuesday, I also discussed Appendix 2.10 of the Rejoinder and its incorrect use of the symbol for drying reefs in an area of breakers, whereas breakers are correctly shown on the Colombian charts[89]. On the screen, you have again that picture, with next to it an extract from Colombian chart COL 046[90]. As can be seen the chart shows the symbol for breakers that identifies permanently submerged features.

12. Professor Crawford last Friday insisted that Dr. Smith is an independent expert[91]. That assertion is problematic on both counts. As regards his alleged independence, Dr. Smith was hired by Colombia to prepare his report. As the report indicates, it was elaborated in close collaboration with the Colombian Navy. A number of the appendices to the report, on which Dr. Smith relies in his report, were prepared by Colombia's Office of Hydrographic Services[92]. And what about Dr. Smith's expertise? As Professor Crawford indicated, Dr. Smith is a geographical and technical

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[84]CR 2012/12, p. 42, para. 52 (Bundy).

[85]CR 2012/9, p. 55, para. 42 (Oude Elferink).

[86]See CR 2012/9, p. 55, para. 42 (Oude Elferink).

[87]CR 2012/9, p. 55, para. 42 (Oude Elferink).

[88]Judges' folder, tab 4.

[89]CR 2012/9, pp. 43-44, para. 17 (Oude Elferink).

[90]Judges' folder, tab 5.

[91]CR 2012/12, pp. 30-31, para. 12 (Crawford).

[92]See e.g. Smith Report, Apps. 4, 6 and 8.

expert[93]. He is certainly a distinguished political geographer. Does that also make him qualified to deal with matters of hydrography, such as chart datum? Mr. President, Members of the Court, by now you will be familiar with some of the technical terms that are used in connection with the vertical datum that is relevant to determining the high- and low-water line along the coast for charting purposes. One of those terms is low-water springs. So, this is a basic notion in hydrography. Colombia itself on most of its nautical charts of the area uses mean low-water springs as the datum for its low-water line. Of the 13 Colombian charts of the area we examined, eight used mean low-water springs, four mean low-water, and one mean lower low-water. All the charts on Quitasueño used mean low-water springs. Dr. Smith was questioned about the term low-water springs in 2006, when he acted as an expert witness for Guyana in the Annex VII arbitration with Suriname. During his cross-examination by counsel for Suriname, the following transpired[94]. Question: "Have you heard of the concept of low-water springs?" Answer: "I may have heard about it, but I don't think I could define it." Question: "You don't know what it is?" Answer: "No"[95]. So that is as far as the expertise of Dr. Smith goes as far as hydrography is concerned.

13. Mr. President, there is one further point to be noted about the support Dr. Smith received from the Colombian Hydrographic Service. Professor Crawford at one point submitted that their recommendations should not be questioned by the Court[96]. We respectfully submit that the Court should not follow his advice. In our view, these recommendations are similar to affidavits. As this Court observed in *Nicaragua* v. *Honduras*, a number of criteria are relevant in assessing the value of affidavits. In this connection, this Court observed that

> "In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry

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[93]CR 2012/12, pp. 30-31, para. 12 (Crawford).

[94]Judges' folder, tab 6.

[95]In the Matter of Arbitration between the Republic of Guyana and the Republic of Suriname; transcript, Vol. 4 of Monday, 11 Dec. 2006, p. 505, lines 5-9 (available at http://www.pca-cpa.org/upload/files/1211%20Day%204.pdf).

[96]CR 2012/12, p. 41, para. 46 (Crawford).

> less weight than affidavits sworn at the time when the relevant facts occurred." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 731, para. 244.)

If these criteria are applied to the declarations of the Colombian Hydrographic Service it is clear that they should be treated with particular caution by the Court.

14. Let me now turn to the substance of the Smith report once more. My critique of the inexactness of measurements was not to the liking of Professor Crawford[97]. On screen we have again QS 4. It is at tab 7 of the judges' folder. As Professor Crawford pointed out the "surveying ruler's accuracy is to the centimetre. The apparent millimetre accuracy is a function of the method of calculation"[98]. This warrants a number of comments. First, the ruler may be accurate to the centimetre, but does that mean that the measurement is accurate up to the centimetre? The photograph does not give any confidence that this is the case. However, the alleged accuracy may be — and I quote Professor Crawford — a "function of the method of calculation". As he pointed out, this method comprised a statistical analysis[99]. Let me show you one other example of what statistics may apparently be capable of. On screen we have a photograph of QS 18 — tab 8 of the judges' folder. This is one of the base points of Colombia's proposed equidistance line Professor Crawford discussed last Friday afternoon[100]. He did not show you this photograph. The text alongside it indicates that the height of QS 18 was recorded about 30 m from the feature because of wave conditions. Fortunately, a statistical analysis allowed Dr. Smith to provide an exact height. This brings to mind the somewhat worn-out, but in this case very apposite, one-liner "there's lies, damn lies and statistics". The fundamental problem with Colombia's statistical analysis is that, in order for a statistical analysis to be reliable, the raw data on which it is based has to be reliable also. In the present case, the raw data does not pass muster.

15. Professor Crawford did not accept our criticism of the Grenoble Tide Model FES 95.2 used by Dr. Smith[101]. It sounded like he knew the ins and outs of the science. But did he? I have to disappoint you. Professor Crawford wittingly or unwittingly confused two basic concepts. I

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[97]CR 2012/12, pp. 32-33, paras 19-21 and pp. 37-38, para. 34 (Crawford).

[98]CR 2012/12, pp. 37-38, para. 34 (Crawford).

[99]*Ibid.*

[100]See CR 2012/13, p. 16, para. 26 (Crawford).

[101]CR 2012/12, pp. 41-42, paras 45-51 (Crawford).

invite you to carefully read Professor Crawford's statement. You will note that he is submitting that a tidal model equals the chart datum that is used for nautical charts. However, these are different concepts.

16. A chart datum is a reference level selected by the coastal State to apply to its charts — for example, lowest astronomical tide (LAT) or mean low-water springs. All water depths on the chart are referred to this level. So, if a water depth sounding of 5 m is shown on a chart this means that at the time of lowest astronomical tide there is 5 m of water — that is if the chart LAT as a reference datum — and so for navigation purposes there will nearly always be more water than is shown.

17. On the other hand, a tidal model or method is required to convert bathymetric measurements made at different stages of the tide to a standard level. During a survey, measurements are made of water depth throughout the day. The tidal model will provide an estimate of the tidal height at the time of each observation — this value will be subtracted from the observed reading to give the value reduced to chart datum.

18. Professor Crawford referred to two peer-reviewed papers to refute our criticism of the Grenoble Tide Model FES 95.2 applied by Dr. Smith[102]. Contrary to what he suggested, we were not criticizing the vertical datum used by Dr. Smith. What Professor Crawford lost from view is that these articles confirm our main point of criticism of the Grenoble Tide Model FES 95.2, namely that in shallow waters it is quite unreliable. As we pointed out, NASA has observed that this makes the model unsuitable for navigation or other practical applications[103].

19. Professor Crawford is also wrong as far as the applicable law on this point is concerned. He submits that international law does not entitle Nicaragua to oblige Colombia to adopt a special tidal model or vertical datum. To use a cherished expression of my good friend Alain Pellet, that is putting the cart before the horse. Colombia assumes that it is the coastal State. It is not. In the 1960s, it became evident that Colombia and Nicaragua have competing claims to the maritime zones in which the bank of Quitasueño is located. Colombia cannot impose its tidal model or vertical datum on Nicaragua. Even if Colombia were the coastal State, *quod non*,

[102]CR 2012/12, pp. 41-42, paras 49 (Crawford).

[103]See CR 2012/9, p. 51, para. 33 (Oude Elferink).

Professor Crawford is still wrong. As this Court has repeatedly observed: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law." (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 132.)[104] Another State is not obliged to accept an inappropriate tidal model or vertical datum that would qualify features that would otherwise not be islands as islands.

20. My analysis of Article 121 of the 1982 Convention neither was to the liking of Professor Crawford. He made it appear that we disagreed on a large number of aspects of the article[105], but in reality this only concerns the question whether the coral debris found on Quitasueño constitutes "a naturally formed area of land". Or, as he referred to it "the "poor white coral trash" theory"[106]. I must confess that I still have not figured out what he meant by that. But what did he have to say on the substance of the matter? My submission was that individual pieces of coral debris do not qualify as a naturally formed area of land. Such debris as a consequence neither is an island nor a low-tide elevation under the definitions of Articles 121 and 13 of the 1982 Convention[107]. Professor Crawford intimated that I was saying something completely different, namely that I was submitting that whole island States made of up coral islands, like the Maldives, do not have any maritime zones[108]. Now, there is of course a huge difference between a coral island and a piece of coral debris. On the screen you have two photographs. Over the weekend, I asked some people to tell me which of these two in their view was a coral island, and the choice unanimously was for the figure on the left[109]. Let me add that it should be clear from my presentation of last Tuesday that I fully subscribed to that view. On Tuesday, I submitted that the cays claimed by Colombia are entitled to a territorial sea. According to the IHO Hydrographic

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[104]See also *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 22, para. 49; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 191, para. 41. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 66-67, para. 87.)

[105]CR 2012/12, pp. 27-30, paras 3-11 (Crawford).

[106]CR 2012/12, p. 26, para. 2 (Crawford).

[107]CR 2012/9, pp. 56-57, paras 44-46 (Oude Elferink).

[108]CR 2012/12, p. 43, para. 53 (Crawford).

[109]Judges' folder, tab 9.

Dictionary a cay is a flat island of sand or coral and the term originally applied to the coral islets found in the Caribbean Sea[110].

21. The status of coral debris has been considered in the legal literature. Professor Crawford actually referred to one of those authors. On the screen we have a text by Derek Bowett, as he was then, that Professor Crawford quoted[111]. What he failed to mention was the text immediately preceding his quotation: "It should be added that many islands are in fact coral islands, formed over centuries, by the gradual accretion of skeletons of the coral polyp in temperate waters, creating first reefs and then, by further elevation, islands"[112]. It should be clear from the information on Quitasueño that the phase of gradual accretion of skeletons of coral polyp has hardly started. A similar distinction between coral debris and coral islands is made by Beazley, who observes:

> "On fringing reefs and broad barrier reefs there is a boulder zone behind the seaward flat where dead coral masses and fragments of reef thrown up by the sea may be found. It is here that sand, resulting from the pulverizing of loose coral, will lodge, and it is from here that any associated island may gradually rise."[113]

On Quitasueño we just have some pieces of dead coral and no associated island has risen.

22. Professor Crawford in setting out his "poor white coral trash" theory also tried to give the loose pieces of coral debris on Quitasueño an impression of permanence by suggesting that they are attached to the subsoil. He said: "as to coral debris, I ask you to look at the pictures. They reflect what Dr. Smith saw, coral rocks affixed to the substrate."[114] The *compte rendu* does not specify the source for this alleged observation by Dr. Smith. No reference to the coral being affixed to the substrate is to be found in the Smith Report, so this is at best hearsay. The photographs in the Report in no way support Professor Crawford's suggestion.

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[110]Hydrographic Dictionary, Part I, Vol. I, English, Special Publication No. 32 Fifth Edition, International Hydrographic Organization, Monaco, 1994, item 665.

[111]Judges' folder, tab 10.

[112]D. W. Bowett, "The legal regime of islands in international law", Oceana, 1979, pp. 4-5.

[113]P. D. Beazley "Reefs and the 1982 Convention on the Law of the Sea", 6, 1991, *International Journal of Estuarine and Coastal Law* pp. 281-312 at p. 285.

[114]CR 2012/12, p. 43, para. 55 (Crawford).

Conclusions

23. Mr. President, I can be brief as far as my conclusions are concerned. While reaffirming my conclusions from last Tuesday[115], let me just emphasize the two most important points. First, the cays claimed by Colombia are rocks in the sense of Article 121, paragraph 3, of the 1982 Convention. Secondly, the coral debris on Quitasueño that Colombia alleges to constitute islands and low-tide elevations do not fall under the definition of a naturally formed area of land that is included in Article 13 on low-tide elevations and Article 121 on the definition of islands of the 1982 Convention. There are no islands or low-tide elevations on the permanently submerged bank of Quitasueño.

24. Mr. President, Members of the Court, this finalizes my presentation. I once more thank you for your kind attention. I respectfully request you to allow my colleague Paul Reichler to continue on behalf of Nicaragua, but I assume that you would first like to take a coffee break. Thank you.

The PRESIDENT: Thank you, Mr. Oude Elferink. It is indeed the moment for a pause of 15 minutes. The sitting is suspended for 15 minutes.

The Court adjourned from 11.30 to 11.50 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and I invite Mr. Reichler to the podium. You have the floor, Sir.

Mr. REICHLER:

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

1. Mr. President, Members of the Court, good morning.

2. Here is a graphic that Colombia did not show you last week. In pink is what they are claiming in this case. This is not an exaggeration. It is what they are really claiming. This is at tab 11 of your judges' folders.

[115]CR 2012/9, pp. 60-61, paras 56-57 (Oude Elferink).

3. From east to west, they first claim an EEZ and continental shelf of 200 miles from their mainland coast. This then links with their territorial seas, EEZs and continental shelves that they claim are generated by their geographically detached islands of San Andrés, Providencia and Santa Catalina, as well as the minor cays Colombia associates with them.

4. Colombia leaves Nicaragua with a narrow band of sea, extending only some 55 miles from its mainland coast, even less from its fringing islands. The result: Colombia gets 87 per cent of the maritime area lying between itself and Nicaragua that is not claimed by third States. Nicaragua gets 13 per cent.

5. Last Monday, Ambassador Argüello spoke of Colombia's aspiration to be Queen of the Caribbean. I think he was too generous. They look more to me like *Pirates* of the Caribbean. Last week I even thought I saw Johnny Depp sitting at their counsel table. But it turned out to be my good-looking friend, Marcelo Kohen.

6. What you see before you is the claim of a State that has accused Nicaragua of the mortal sin of gluttony. Professor Crawford charges Nicaragua with gluttony for wanting "both"; but he has nothing to say about the fact that Colombia wants "all" — or just about "all"[116].

7. Let us focus at what they claim within 200 miles of Nicaragua's coast. It is at tab 12.

8. Colombia insists, repeatedly, emphatically, that this is an equitable delimitation. But they completely fail — indeed, they do not even try — to prove this by means of the third essential step of the maritime delimitation process. I am referring of course to the proportionality/disproportionality test.

9. Mr. President, you will recall how I challenged Colombia, in the first round, to perform a proportionality/disproportionality test and show us the results. I could not have been more direct. I threw down the gauntlet. I did everything but challenge them to a duel.

10. What was their response? Nothing whatsoever. In nine hours of pleading, they made no attempt to subject their delimitation line to a disproportionality test. To the contrary, they ran away from it like it was the plague.

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[116]CR 2012/11, p.18, para. 5 (Crawford).

11. To cover their retreat, they put up a smokescreen. Professor Crawford acknowledged that the Court has sanctioned a three-step process in maritime delimitation cases. But what are his three steps: (1) identify the base points; (2) plot the equidistance line; and (3) check for relevant circumstances[117]. My friend has invented a new dance: the Crawford three-step. The actual third step, the disproportionality test, has gone missing.

12. Mr. Bundy took a different escape route. He cut the three-part process down to two. You can guess which part he threw overboard[118].

13. Mr. President, the fundamental truth remains: the line Colombia proposes cannot pass the proportionality/disproportionality test. Let us look at the numbers.

14. Colombia now concedes that Nicaragua's mainland coast is relevant to the delimitation. This is an indisputable fact, with or without their concession, but it is nice to have. This is at tab 13. Rendered as a straight line, the coast measures 453 km. This has not been disputed by Colombia. According to Mr. Bundy, the relevant Colombian coasts are the west-facing sides of its insular features closest to Nicaragua[119]. Also rendered as straight lines, these measure 21 km. We did not hear any disagreement with this figure last week, either. The coastal ratio is, therefore, more than 21:1 in Nicaragua's favour.

15. The relevant area is where the potential entitlements of Nicaragua and Colombia overlap. This is that area. Nicaragua and Colombia agree that continental land territory, like Nicaragua's mainland coast, generates a potential EEZ entitlement out to a distance of 200 miles. Islands, too, generate 200-mile potential EEZ entitlements, although it is less clear in the case law than Professor Crawford made it appear that they generate these entitlements radially, in all directions[120]. However, for the sake of argument, we accept this proposition, *quod non*, and we

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[117]CR 2012/13, p. 11, para. 5 (Crawford).

[118]CR 2012/13, p. 21, para. 2 (Bundy).

[119]CR 2012/12, p. 14, para. 23 (Bundy); CR 2012/12, p.63, para. 92 (Bundy).

[120]CR 2012/11, p. 29, para. 36 (Crawford). In their separate opinion in the *Libya/Malta* case, Judges Jiménez de Aréchaga, Ruda and Bedjaoui observed: "Such a radial projection may, undoubtedly, exist in the case of islands in the open ocean not facing other States' coasts, but it does not correspond to the practice of States in enclosed or semi-enclosed seas, where more than two States may advance conflicting claims in respect of a given maritime area." (*Continental Shelf (Libyan Arab Jamahiriya* v. *Malta), Judgment, I.C.J. Reports 1985* (hereinafter "*Libya/Malta*"); separate opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga, p. 78, para.5.)

show here the overlapping potential EEZ entitlements generated by Nicaragua's coast and Colombia's islands of San Andrés and Providencia.

16. Colombia's proposed delimitation line divides the relevant area in this manner: 72 per cent for Colombia; 28 per cent for Nicaragua. Despite a coastal ratio of more than 21:1 in Nicaragua's favour, Colombia's line gives Colombia between two and three times more of the relevant area than Nicaragua. This is the epitome of disproportionality. Colombia has said nothing to change this.

17. For obvious reasons, Colombia is uncomfortable with this result. So, on Friday, Professor Crawford tried to jiggle the numbers. It was Colombia's position, throughout this case, that only the *west*-facing coasts of Colombia's islands should be counted. This was repeated last week by Mr. Bundy[121]. But, because he is well aware that this leads Colombia to a dead end — that is, a 21:1 coastal ratio in favour of Nicaragua — Professor Crawford suddenly changed Colombia's position. Apparently, changing arguments is actually a good thing, when it is Colombia that makes the change.

18. And so, Professor Crawford claimed that because islands generate potential entitlements in all directions, the entire circumferences of Colombia's islands, or at least what he called the main islands of San Andrés and Providencia, should be considered relevant coasts[122]. Professor Crawford said these add up to 62 km[123].

19. Since Colombia did not make this argument or provide these precise measurements in its written pleadings**,** we asked our hydrographers from the UKHO to make the measurements. Instead of using straight lines, they followed the sinuosities of the coasts, which produces a longer, but more accurate, coastline than the use of straight line vectors. The circumferences of San Andrés and Providencia, including its offshore dependency, Santa Catalina, which are the only true islands in the so-called "archipelago", total 65 km, that is, 3 km longer than Professor Crawford himself claimed.

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[121]CR 2012/12, p. 63, para. 92 (Bundy).

[122]CR 2012/11, p. 29, para. 36 (Crawford).

[123]*Ibid.*

20. Let me be clear. We do not accept Professor Crawford's circumferential approach to measuring the relevant coasts. It leads to a double counting of the coasts of islands. Colombia had it right in its written pleadings and the first time their counsel, Mr. Bundy, addressed this issue last week: only the *west*-facing coasts of Colombia's islands are relevant to the delimitation. They measure 21 km.

21. However, and again for the sake of argument, let us accept Professor Crawford's double counting of Colombia's relevant coasts, and give them 65 km as measured according to their sinuosities. To compare apples to apples, we have re-measured Nicaragua's east facing coast — its mainland coast -- according to its sinuosity. But, to be conservative, we have excluded the east-facing sides of Nicaragua's offshore islands, the Corn Islands and Miskito Cay. Nicaragua's relevant coast, by this standard — the same one Professor Crawford used to measure Colombia's coasts — is 701 km. This is at tab 14. But even by this arithmetic, which is weighted in favour of Colombia, the ratio of relevant coasts is still 11:1 in Nicaragua's favour. Even using *this* coastal ratio, Colombia's delimitation proposal is grossly inequitable, because the distribution of maritime areas is still 2.6:1 in *Colombia's* favour.

22. For comparison purposes, let us look again at Nicaragua's proposed delimitation. This is at tab 15. As you know, we have proposed enclaves of 12 miles for San Andrés and Providencia/Santa Catalina; and 3 miles for any other Colombian features. But, as I said last Tuesday, just as a provisional equidistance line can be adjusted in light of relevant circumstances to achieve an equitable solution, so too enclaves, provisionally drawn, can be adjusted.

23. Professor Crawford insists that all islands, even rocks, regardless of how insignificant, get at least a 12 mile territorial sea. Let us give him that much — for the sake of argument only, of course. The result of giving 12-mile enclaves to all of the features owned or claimed by Colombia (except Quitasueño — which is under water) is this: 201,000 sq km for Nicaragua; 18,000 sq km for Colombia. This is a ratio of 11:1 in favour of Nicaragua, almost precisely the same as the coastal ratio using Professor Crawford's inflated approach and treating as relevant coasts the entire circumferences of Colombia's islands, where the ratio of relevant coasts was also 11:1.

24. Mr. President, you will recall that Professor Crawford tried to discredit our analysis by resort to infinitology: that is, the study of the concept of infinity. On Thursday, he showed you a

graphic telling you that Nicaragua's proposal gives Nicaragua an EEZ of 186,362 sq km, and Colombia an EEZ of zero, a ratio of "infinity"[124].

25. Mr. President, Nicaragua is not troubled by this piece of advocacy. But Colombia should be. This is not how you measure maritime spaces. It is misleading. It deliberately excludes all the maritime space Nicaragua's proposal would allocate to Colombia within the various territorial sea enclaves. Yes, Colombia gets territorial seas, not EEZs; but that is inherent in the nature of an enclave; the island gets a territorial sea, not an EEZ. I note in that regard that the Channel Islands, St. Martin's Island and Abu Musa were all enclaved within 12 miles. There is nothing unprecedented or out of the ordinary here. When Colombia's territorial sea enclaves are taken into account, the ratio is not infinity. It is 11:1.

26. Infinitology, as applied in these hearings, is mere gamesmanship. But, it is a game that two can play. Let us look at how Colombia's proposal divides the Parties' overlapping entitlements in the relevant area — east of San Andrés and Providencia/Santa Catalina. Colombia 122,000 sq km; Nicaragua zero. Ratio: infinity.

27. Why is not this area, where both Parties have potential entitlements, part of the relevant area to be divided equitably between the Parties? Why should it go by default to Colombia? In our first round, we challenged Colombia on this point, too. Here again, they failed to answer us.

28. But Mr. Bundy made an interesting, and very significant concession, perhaps more than he intended. He challenged our depiction of Colombia's relevant area — shown here, and which we also showed in the first round. He said, and this is the interesting part, that for Colombia the relevant area extends westward beyond Nicaragua's coastal islands all the way to Nicaragua's mainland coast — the natural limit[125]. This is at tab 16. I invite you to think about this for a moment. The entitlement generated by Colombia's islands reaches to the west beyond — past — Nicaragua's islands to Nicaragua's coast. We fully agree with this.

29. But how can Mr. Bundy then deny that Nicaragua's islands — or more importantly, Nicaragua's mainland coast — reach to the east beyond Colombia's islands to the natural limit of their 200-mile EEZ entitlement? He asserts that Nicaragua's islands do not block the maritime

[124]CR 2012/11, p. 29, para. 37 (Crawford).

[125]CR 2012/12, p. 11, para. 9 (Bundy).

entitlement emanating from Colombia's islands toward the west[126] while, at the same time, he continues to assert the completely contradictory position that Colombia's islands block — and completely block — the maritime entitlements emanating not only from Nicaragua's islands but also from its much more significant mainland coast. These two contrary positions cannot be reconciled.

30. Colombia's solution is unsustainable. It does not divide the relevant area equitably. It comes nowhere close to doing so. Colombia has failed to demonstrate, by means of a proportionality/disproportionality test, that its claimed delimitation line constitutes the equitable solution required by international law.

31. Yet, Colombia insists that it properly applied standard delimitation methodology in the way the Court's jurisprudence dictates. And Colombia insists, further, that Nicaragua's approach would stand that jurisprudence on its head. They portray Nicaragua as some kind of barbarian at the gates, eager to burn down the temple of international law.

32. Mr. President, I cannot help but ask this question. If they are so right and we are so wrong, how is it that the result they produce is so manifestly inequitable, and the one we produce is proportionate, and meets the standards for an equitable solution?

33. Let us start to answer this question by looking a bit more carefully at the *Jan Mayen* and *Libya/Malta* cases than Professor Crawford did on Friday[127]. These are the two cases that Colombia considers the most relevant, because they involve delimitations between mainland coasts on the one hand, and islands on the other. We disagree with Colombia on the lessons to be drawn from these cases.

34. *Jan Mayen* bears some similarities to this case. This is at tab 17. The delimitation was between Greenland's extensive coast, and the shorter coast of Jan Mayen. But the case also has a very significant dissimilarity with our case. Because the parties were located 250 miles from one another, neither one could claim a potential entitlement beyond, that is, on the far side of, the other. The area of overlapping entitlements was therefore necessarily limited to the area lying in between

[126]CR 2012/12, p. 11, para. 9 (Bundy)

[127]*Ibid.*, p. 41, paras. 25-26 (Crawford).

them. Naturally, the provisional delimitation line was drawn in that area, equally dividing the overlapping entitlements.

35. The provisional line was then adjusted because the sizeable disparity in coastal lengths of 9:1 was deemed to be a relevant circumstance. As a result of its longer coast, Greenland got a larger portion of the area of overlap than Jan Mayen. In fact, Greenland ended up with 74 per cent of the area of overlapping entitlements, to 26 per cent for Jan Mayen.

36. The *Libya/Malta* case exhibits similar circumstances. This is at tab 18. The distance between the parties was 180 miles. So the entire maritime area between them was within each party's respective 200-mile entitlement, and this formed the relevant area, except for the areas claimed by a third State, Italy, which were both to the east and the west of the area that was delimited. Theoretically, Libya's 200-mile EEZ entitlement might have extended a few miles beyond Malta, but Libya could make no such claim, because Italy lies just 43 miles north of Malta, effectively excluding Libya from that area.

37. So, here again, the delimitation necessarily was entirely in between Libya and Malta. The provisional delimitation line, a median line, could only be placed in the area between the two parties, equally dividing that area. And, here again, Libya's much longer coast, eight times that of Malta's, was a relevant circumstance justifying an adjustment in favour of Libya. Colombia trivializes the adjustment, but it ended up giving Libya 74 per cent of the delimitation area defined by the parties' relevant coasts and Italy's claims, and left Malta with only 26 per cent. Malta got even that much because it is not a mere island, but an island that is a sovereign State unto itself; and because of its size — Malta is 316 sq km — more than six times larger than San Andrés and Providencia/Santa Catalina put together.

38. Now, from these cases, Professor Crawford labours to draw out two so-called principles, each of them questionable. First is that you must *always* start by placing an equidistance line halfway between the coasts of the two parties[128]. We say, this may be the case where the entire area to be delimited, where the entirety of the parties' potential entitlements overlap, lies in between the two States. But that conclusion does not follow when, as in this case, the potential

[128]CR 2012/13, pp. 11-12, paras. 10-12 (Crawford).

entitlements of one party extend *beyond*, past, the coast of the other party, such that the other party lies in the *middle* of the area of overlapping entitlements, rather than at its *extremity*.

39. It is more logical to understand *Jan Mayen* and *Libya/Malta* as requiring that the provisional delimitation line be placed in the middle of the area of overlapping potential entitlements, dividing the area of overlap equally between the parties, because that is what the Court actually did in both cases. If we were to follow the approach taken in *Jan Mayen* and *Libya/Malta* here, this is how a provisional delimitation line would look. If this looks different from the provisional lines drawn in *Jan Mayen* and *Libya/Malta* it is because here, unlike in those cases, the area of overlapping entitlements extends 100 miles beyond San Andrés and Providencia/Santa Catalina. They are in the middle of the area of overlapping entitlements, not at its extremity. This illustrates why we think starting with a provisional equidistance line is not appropriate in this case, and why it is not required by the Court's holdings in *Jan Mayen* or *Libya/Malta*, where the geographic circumstances were significantly different.

40. Here, the provisional line dividing in equal shares the area of overlapping entitlements inevitably leaves San Andrés and Providencia/Santa Catalina on the wrong side of the line, and it arbitrarily cuts off the seaward projection of Nicaragua's coast well short of its potential 200-mile EEZ entitlement. In the *Gulf of Maine* case, the Chamber emphasized that an equitable solution entailed "preventing, as far as possible, any cut-off of the seaward projection of the coast or of part of the coast of either of the States concerned" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984* (hereinafter "*Gulf of Maine*"), p. 313, para. 157).

41. The second lesson that Professor Crawford attempts to draw from these two cases is that, where there is a substantial disparity in coastal lengths, the provisional line must be adjusted in favour of the Party with the longer coast, but — he adds — the adjustment must be "modest"[129]. Well, what else would he concede, as advocate for the Party with the shorter coast? We say two things about this. First, the adjustment must be made in favour of the Party with the longer coast, so that it receives a larger share of the area of overlap than the Party with the shorter coast.

[129]CR 2012/13, p. 54, para. 63 (4) (Crawford).

Second, the size of the adjustment is dependent on what the Court deems appropriate in order to achieve an equitable solution in the particular circumstances of the case at hand.

42. So if, for the sake of argument, we were to start with a provisional delimitation line that divides the area of overlapping entitlements between Nicaragua and Colombia equally, we know we would have to adjust it in a manner favourable to Nicaragua because the coastal ratio is 21:1 in Nicaragua's favour, or even allowing, *quod non*, for Colombia's double counting of its insular coasts, it is still 11:1 in Nicaragua's favour. In either case, bigger than the disparity in either *Jan Mayen* or *Libya/Malta*.

43. Professor Crawford accuses us of arguing for "redistributive justice" and the "refashioning of geography"[130]. But Nicaragua makes no such argument. What we do say is that the goal of maritime delimitation must be an equitable solution, and that the method of delimitation that is adopted must be one that leads to an equitable result. Equidistance certainly has its place. But it is not the alpha and omega of maritime delimitation. In many cases it will lead to an equitable solution. But, as Professor Crawford tellingly admitted, in some situations "geography can produce unwarranted results"[131].

44. In this case, equidistance inevitably produces just such unwarranted results. This is at tab 19. As we have shown, it would allow Colombia's small islands to entirely cut off the maritime entitlements of Nicaragua's geographically predominant mainland coast, and allocate to Colombia 100 per cent of the area east of those islands, despite the overlapping potential entitlements of both Parties in that entire area.

45. The only practical way to apply the teachings of *Jan Mayen* and *Libya/Malta*, and ensure that Nicaragua receives the larger share of the area of overlap, to which it is entitled by the coastal ratio, is to enclave Colombia's islands within appropriately sized territorial seas.

46. The solution this achieves is manifestly an equitable one. Unlike Colombia's proposed solution, Nicaragua's satisfies the Court's proportionality/disproportionality test. This is not an exercise in redistributive justice, or a case of working backwards from a preconceived outcome. It is the end result of a proper application of the delimitation methodology developed by the Court

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[130]CR 2012/13, p. 14, para. 18; p. 48, para. 44 (Crawford).

[131]CR 2012/13, p. 14, para. 18 (Crawford).

through its jurisprudence, and followed by other international tribunals including, most recently, the International Tribunal for the Law of the Sea.

47. Moving on to the other cases Professor Crawford discussed, I regret that I must disagree with the lessons he would like you to draw from those cases as well. These are also delimitation cases involving mainland coasts and islands — the *Anglo-French* arbitration, the *St. Pierre and Miquelon* case, and the *Dubai/Sharjah* arbitration, where islands similar to — or more significant than — Colombia's islands were enclaved.

48. These are all very difficult cases for Colombia, which has to find a way to distinguish them. And it quite fittingly resorts to the great mind of Professor Crawford to come up with a way. But what he says, notwithstanding his customary eloquence, wit, and erudition, does not stand up. Here is his theory: that the tribunals enclaved the islands solely because they were close to the coast of the other State. For Professor Crawford, it was the "adjacency" of these islands to that other coast that alone accounted for their enclavement[132].

49. But this interpretation cannot be squared with either the decisions or the logic behind them. To be sure, in the cases he selected, the islands were closer to the other State's coast than Colombia's islands are to Nicaragua. But that turns out to be a distinction without a difference. It is not why the islands were enclaved.

50. They were enclaved because of their geographical detachment from their own States, and especially the blocking effects they produced on the other State's maritime entitlements. In some cases, the closeness of the island to the other State's coast contributed to the blocking effect; but what mattered was the blocking effect, not the distance from the coast. I am afraid that my distinguished friend has confused cause and effect.

51. In the *Anglo-French Arbitration*, for instance, the Court of Arbitration did not allow the UK's Channel Islands to cut off the maritime entitlements of France. This is at tab 20. As shown here, the tribunal recognized that France's entitlements extended northward beyond, past, the Channel Islands, which were not allowed to function as a brick wall cutting off France's seaward projection. True, the islands were close to France, but what the Court of Arbitration emphasized in

[132]CR 2012/13, p. 44, para. 35; p. 46, para. 39 (Crawford).

enclaving them was their "substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic" which, if those islands had not been enclaved would "effect a radical distortion of the boundary creative of inequity"[133]. In regard to geographic location, the tribunal emphasized that the Channel Islands "are not only on the wrong side of the mid-Channel median line but wholly detached geographically from the United Kingdom"[134].

52. The case of St. Pierre and Miquelon is to the same effect. This is at tab 21. The western and south-western coasts of the two French islands were not close to the opposite facing coast of Nova Scotia lying at the distance of 143 miles. Yet the arbitral tribunal nevertheless enclaved them within 24 miles on those sides, because they otherwise would have blocked the seaward extension of Newfoundland's southern coast[135]. Even more interesting, the southern coasts of the two French islands faced *away* from Canada's coast, toward an entirely open expanse of sea. The tribunal's solution, and its reasoning, are worth quoting:

> "The French islands have a coastal opening towards the south which is unobstructed by any opposite or laterally aligned Canadian coast. Having such a coastal opening, France is fully entitled to a frontal seaward projection towards the south until it reaches the outer limit of 200 nautical miles . . . On the other hand, such a seaward projection must not be allowed to encroach upon or cut off a parallel frontal projection of the adjacent segments of the Newfoundland southern coast."[136]

As a result, in order to prevent a cut-off of Canada's maritime entitlements, the maritime zones awarded to St. Pierre and Miquelon were constricted, as shown, to only 10.5 miles in breadth.

53. We see, again, that the focus is not on how close the island is to the other State's mainland, but on the effects produced on the other State's maritime entitlements, as well as the geographical detachment of the island from the mainland of its own State.

54. This is also reflected in the *Dubai/Sharjah* arbitration, another case Professor Crawford attempted to explain away[137]. In that case, Sharjah's island of Abu Musa was enclaved within a 12-mile arc. This is at tab 22. It is worth noting that Abu Musa was more than 30 miles offshore,

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[133]*Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 *RIAA* 3 (hereinafter "*Anglo-French Continental Shelf Case*"), paras. 196, 199.

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

[135]Case concerning *Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 *ILM* 1149, (hereinafter "*St.Pierre and Miquelon*"), paras. 67, 69.

[136]*St.Pierre and Miquelon*, para. 70.

[137]CR 2012/13, pp. 48-49, paras. 47-48 (Crawford).

not adjacent to Dubai's coast. It comprised 12 sq km, and had a permanent population of 800. It was also important economically: its red oxide deposits and Mubarek oil field lying just offshore contributed hugely to Sharjah's revenue[138]. If Abu Musa is the "incidental" feature that Professor Crawford said it is, then so are all of Colombia's islands. The arbitral tribunal observed that "*the equidistance principle of delimitation . . . must be subject to the overriding aim of achieving an equitable apportionment of shelf areas between adjacent and opposite States*"[139]. It then concluded that: "*to allow to the island of Abu Musa any entitlement to an area of the continental shelf of the Gulf beyond the extent of its belt of territorial sea would indeed produce a distorting effect upon neighbouring shelf areas*"[140].

55. Professor Crawford, of course, did not refer to these aspects of the arbitral award, nor did he mention the award in the *Newfoundland/Nova Scotia* arbitration, or the treatment given by the distinguished tribunal to Nova Scotia's Sable Island, even though I discussed this case in Nicaragua's first round. Sable Island, as you will recall, was given no effect because of its blocking effects on the seaward projection of Newfoundland's coast. This is at tab 23. What is important to point out here is that Sable Island, 34 km long, is 88 miles offshore, and it was the island's very "remote location", as well as its distorting effects, not its proximity to Newfoundland's coast, that caused the tribunal to disregard it[141].

56. Another case that disproves Professor Crawford's theory is *Eritrea/Yemen*. This is at tab 24. The two Yemeni islands that were disregarded in the delimitation, because of their distorting effects on the median line were located 71 and 58 miles from Eritrea's coast. They were not in close proximity to that coast. They were considered to have distorting effects because of their geographical detachment from Yemen's coast, lying, respectively, 62 and 26 miles from it.

57. With these cases in mind, let us look one more time at the blocking effects produced by Colombia's islands on Nicaragua's entitlements. This is a more complete cut-off of a mainland coast's maritime entitlements than in any of the cases we have been discussing. In the

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[138] *Dubai/Sharjah Border Arbitration,* Award, 19 Oct. 1981, reprinted in 91 *ILR* 543 (hereinafter "*Dubai/Sharjah*"), p. 668, para. 246.

[139] *Dubai/Sharjah*, p. 676, para. 263; emphasis added.

[140] *Dubai/Sharjah*, p. 677, para. 265; emphasis added.

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

Anglo-French Arbitration only a small portion of France's coast was blocked by the Channel Islands. Colombia's islands, by comparison, block the entire length of Nicaragua's mainland coast. This is the epitome of an inequitable result. An equitable solution requires that Nicaragua be relieved of this cut-off effect.

58. Professor Crawford told you he has been unable to find a case where islands 100 miles offshore have been enclaved[142]. There is another side to that coin. He has also been unable to identify a case where islands causing such severe blocking effects have been allowed to do so. Whether 10 miles, 50 miles, 100 miles or more, islands that produce these cut-off effects are either enclaved, or disregarded.

59. Remarkably, Colombia's counsel had absolutely nothing to say last week about the blocking effects of small islands, and the fact that, when they have these effects, they are either enclaved or otherwise discounted in the delimitation process. This was another challenge we made in the first round, from which they conspicuously retreated.

60. Mr. President, let us take a closer look, with your permission, at the insular features that, under Colombia's delimitation scenario, so severely block and cut off Nicaragua's maritime entitlements.

61. Mr. President, I began this speech talking about the mortal sin of gluttony. Maybe I am guilty of it. When I look at this Colombian graphic, I see breakfast. Every morning, I start out with two fried eggs. Usually, if I am staying in a good hotel, they are not blue. I always sprinkle a few grains of pepper on top.

62. Now this graphic, which Professor Crawford and Mr. Bundy displayed over and over again last week[143], makes it appear as though Colombia has a number of very large eggs. But it is an optical illusion. If we take away the blue paint, all we are left with is . . . my few grains of pepper. Professor Crawford said that Nicaragua needs an optician[144]. He was right, at least in my case. With these glasses I can barely make out any of Colombia's insular features.

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[142]CR 2012/13, p. 54, para. 63 (2) (Crawford).

[143]See, e.g., CR 2012/13, p. 35, para. 4 (Crawford).

[144]CR 2012/13, p. 19, para. 35 (Crawford).

63. What you see here is a very clever piece of creative cartography. What it is intended to do is make tiny and insignificant features appear much larger than they are. Not only does Colombia frame them within a 12-mile territorial sea — the yolk of the egg; but to enhance the illusion, they add a 12-mile contiguous zone — the egg white.

64. To really see these features for what they are, we have to go to a much smaller-scale map. Fortunately, Colombia has provided these as well. These are the ones used by Professor Crawford to defend Colombia's placement of base points on insignificant features[145].

65. Rather remarkably, Colombia places not just one but *four* base points on Quitasueño. Even my worthy opponent admits that three of them are on what he says are "low-tide elevations". That is another way of saying they are under water. The fourth base point on Quitasueño, according to Professor Crawford, is on the feature identified as QS4[146]. This is the one my colleague Mr. Oude Elferink has demonstrated so convincingly to be below water at high tide. Four base points on Quitasueño, all below water. Yet Professor Crawford stands by them. Or maybe it is more accurate to say he swims by them.

66. Let us look at another of their base points. This one, supposedly on Providencia, is actually on Low Cay. If this is above water, it is only barely so. It is no more than a sand bar 300 metres long. It makes Serpents' Island look like a brontosaurus.

67. At the southern end of this so-called "chain" of islands — the opposite end from Quitasueño — is the uninhabited and economically lifeless feature of Albuquerque Cay. Colombia has placed base points, not even on the small cay itself, but on two low-tide elevations lying to the west of anything that is permanently above water.

68. This is the so-called "chain" of islands that Colombia says should cut off Nicaragua's maritime entitlements approximately one quarter of the way toward the natural limit of its 200-mile EEZ entitlement.

69. Mr. President, I do not want to exaggerate. San Andrés and Providencia are indeed islands, although small ones. The rest of Colombia's insular features — if they belong to Colombia at all — are tiny, uninhabitable, economically lifeless rocks. They are equivalent to, if not smaller

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[145]CR 2012/13, p. 16, paras. 25-30 (Crawford).

[146]*Ibid.*, p. 16, para. 26 (Crawford).

than, Venezuela's Monjes Islands, which *Colombia* insists on disregarding entirely in any maritime delimitation with Venezuela because of what Colombia considers their small size and distorting effects on a delimitation line. This is an example of Colombia's double standard — one for itself, another for everybody else. But it cannot hope to place any base points on its own similar features, especially after the Court's treatment of Serpents' Island in the *Black Sea* case, and ITLOS' treatment of St. Martin's Island in *Bangladesh* v. *Myanmar*.

70. Mr. President, your Court's unwillingness to allow the placement of base points on tiny insular features goes back at least as far as the *Gulf of Maine* case. In that Judgment, the Chamber warned of

> "the potential disadvantages inherent in any method which takes tiny islands, uninhabited rocks or low-tide elevations, sometimes lying at a considerable distance from terra firma, as basepoint for the drawing of a line intended to effect an equal division of a given area" (*Delimitation of the Maritime Boundary in the Gulf of Main Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, pp. 329-330, para. 201).

The Chamber expressly objected to: "making a series of such minor features the very basis for the determination of the dividing line, or for transforming them into a succession of basepoints for the geometrical construction of the entire line" (*ibid.*, p. 330, para. 201). But that is exactly what Colombia asks you to do here.

71. With the exception of San Andrés and Providencia/Santa Catalina, Colombia cannot even hope to persuade the Court that any of its features is entitled to affect the delimitation line, or to get anything more than a territorial sea. They have all but admitted this. On several occasions, counsel referred to these three features as significant islands, distinguishing them from the rest. Professor Crawford said that the San Andrés Archipelago consists of "at least three main islands"[147]. We all know that in legal-speak this means "at most" three main islands. We accept that San Andrés and Providencia/Santa Catalina are the only islands that *may have* potential maritime entitlements beyond 12 miles.

72. What we object to is the very unsubtle effort to convert these three small islands, and a smattering of pepper grains, into an insular behemoth, a kind of Caribbean Australia. Last week, we were subjected to a barrage of references to the San Andrés Archipelago as "a significant

[147] CR 2012/13, p. 50, para. 49 (Crawford).

historical, political and geographical unit"[148] and "a major feature of the Western Caribbean"[149]. This, from counsel who accused Nicaragua of an "absurdly inflated maritime claim"[150].

73. But even those three islands cannot be used as the basis of any delimitation line. This is an equidistance line drawn between San Andrés and Providencia/Santa Catalina on the one hand, and the Nicaraguan coast on the other, ignoring all the minor insular features. It is at tab 25. As we demonstrated last week, it creates just as severe and inequitable a cut-off effect as the line that Colombia proposes. It still gives Colombia all of the area east of the line, and 63 per cent of the entire area of overlap between Nicaragua's coast and its 200-mile EEZ limit, almost twice as much area as Nicaragua, despite a coastal ratio, of 21:1 in Nicaragua's favour.

74. Colombia had no answer for this during its first round of oral pleading. They know this line is inequitable. That is why they hinted, repeatedly, that the line will have to be adjusted to take account of Nicaragua's vastly longer relevant coast. That is why they have spoken openly of "modest" adjustments to their provisional equidistance line[151].

75. What do they mean by "modest adjustments"? We presume they will tell you in the second round, and it is only then that you, and we, will learn what they really want. But that puts Nicaragua at a serious disadvantage. Colombia gets to tell you why their "modest adjustments" lead to an equitable solution, and Nicaragua has no chance to demonstrate that they do not. So, to protect Nicaragua's interests, we have no choice but to try to anticipate what Colombia might propose.

76. One possibility, and this would be the most "modest", is that Colombia will propose moving its provisional equidistance line to the east, but still keeping it to the west of its so-called "chain" of islands. For reasons we have already explained, this could not possibly solve the problem. Merely moving the line a few miles to the east does not begin to cure the inequity. It would, in effect, give Colombia the 82nd meridian boundary that the Court already said was not part of the 1928 Treaty. It would still allow Colombia's small islands to block Nicaragua's

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[148]CR 2012/13, p. 54, para. 63; p. 50, para. 49 (Crawford). CR 2012/12, p. 10, para. 3, p.19, para. 45 (Bundy).

[149]*Ibid.*, p. 36, para. 5 (Crawford).

[150]CR 2012/11, p. 23, para. 18 (Crawford).

[151]CR 2012/13, p.54, para. 63(4) (Crawford).

seaward extension very far short of — in fact, less than half way to — the limit of its 200-mile EEZ entitlement, and leave the overwhelming majority of the area to Colombia, despite Nicaragua's vastly longer relevant coast.

77. Another proposal Colombia might make is to follow the example of the *Anglo-French* case in regard to the treatment of the Scilly Isles. This is at tab 26. In that case, the Court of Arbitration found that the equidistance line west of the Channel was distorted by the United Kingdom's Scilly Isles, to the point that it caused a cut-off effect on a portion of France's west-facing coast. The Scilly Isles are located 102 miles from France, almost the same distance as Colombia's islands are from Nicaragua. As you can see, the effect of the Scilly Isles on France's seaward projection was not very great to begin with, and the only part of the French coast that was affected was the portion between Portsall and Point Penmarch, covering just 97 km. None of the rest of France's very extensive Atlantic coastal front was cut off. In these circumstances, the Court of Arbitration decided to give the Scilly Isles half effect. Your Court itself gave half effect to islands in the *Tunisia/Libya* case and the *Gulf of Maine*[152].

78. Nicaragua opposes a similar approach here. It would be inequitable to Nicaragua to give even half weight to San Andrés and Providencia. The effects are shown in this graphic. Together with the 3-mile-territorial-sea enclaves surrounding the area this line gives to Colombia, the relevant area where the Parties' potential entitlements overlap would be divided in this manner: Nicaragua 149,000 sq km; Colombia 65,000 sq km. This is a ratio of only 2.3:1 in favour of Nicaragua, despite the 21:1 ratio of coastal lengths in Nicaragua's favour. The result is not equitable to Nicaragua. For these reasons, Nicaragua submits that the only equitable solution is the one it has proposed: territorial-sea enclaves for all of Colombia's insular features within 200 miles of Nicaragua's coast. For the benefit of our intrepid interpreters, I am moving to paragraph 82.

79. Mr. President, it is not uncommon in this Great Hall for advocates to make literary references in their speeches: Rousseau; Montaigne; Shakespeare; Dostoyevsky; Confucius; Cervantes; Mark Twain; Saramago. But *Winnie the Pooh*? Much as I would prefer to avoid perpetuating a discussion on that level, there is a useful legal point to be made. The fictional

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[152] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982* (hereinafter "*Tunisia/Libya*"), pp. 88-89, paras. 128-129; *Gulf of Maine*, pp. 336-337, para. 222.

animal had no legal entitlements under the Law of the Sea Convention to either condensed milk *or* honey, both of which, according to Professor Crawford, he gluttonously demanded. By contrast, Nicaragua *does* have legal entitlements under the Law of the Sea Convention to *both* a 200-mile EEZ, and a continental shelf based on the natural prolongation of its continental landmass well beyond 200 miles. And, yes, Nicaragua wants *both*. What sovereign State would not? Mr. President, we think the Law of the Sea Convention is stronger legal authority than Walt Disney.

80. Another comment by Professor Crawford to which I will respond is that, in my first round speech, I "assiduously avoided" discussing diplomatic practice[153]. This is incorrect. I spoke at length about this. I refer the Court to paragraphs 59 to 70[154] of my speech on Tuesday, 24 April. The Court will recall that I quoted several times from the work of Sir Derek Bowett, in regard to the treatment of small islands in maritime agreements, and showed that the practice largely supports Nicaragua's position in this case. I think it is interesting that Professor Crawford referred to these agreements as "diplomatic" practice[155]. This reinforces one of the points I emphasized last week: these are negotiated agreements often based as much on political and economic factors as on legal ones. And even where they say they are based on legal principles, they do not often specify which principles, or how the parties chose to apply them. Diplomatic practice is a very shaky basis on which to base a maritime delimitation claim.

81. However, because Professor Crawford challenged me to respond to some of the specific examples he cited, which supposedly support Colombia's position, I will do so. My friend whipped through so many maps so quickly that it seemed like a condensed version of "Around the World in 80 Seconds". Time, and I am sure the patience of the Court, do not allow me to do more than respond to a few of his carefully picked examples.

82. Let us start with the so-called "agreement" between the Dominican Republic and the United Kingdom in regard to the Turks and Caicos Islands[156]. What Professor Crawford neglected

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[153]CR 2012/13, p. 18, para. 34 (Crawford).

[154]CR 2012/10, pp.48-51, paras. 59-70 (Reichler).

[155]CR 2012/13, p. 18, para. 34 (Crawford).

[156]CR 2012/13, p. 39, para. 22 (Crawford).

to tell you is that the treaty was never ratified, and has been publicly denounced by the Dominican Republic, precisely because it rejects equidistance as inequitable between the large Caribbean island of Hispaniola, and the tiny islets of the Turks and Caicos.

83. In the agreement between India and the Maldives, the eastern half of the boundary discussed by Professor Crawford on Friday is, as he said, a median line between the Maldives and a segment of India's mainland coast[157]. But this does not help Colombia. The Maldives is an island State. Your Court gave special deference to Malta for this reason, in *Libya/Malta*: "it might well be that the sea boundaries in this region would be different if the islands of Malta did not constitute an independent State, but formed a part of the territory of one of the surrounding countries" *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985* (hereinafter "*Libya/Malta*"), p. 42, para. 53). According to Bowett "the Court seems to imply that, as a *dependent* territory, Malta's entitlement would have been reduced"[158]. The India/Maldives agreement is cited by Bowett as reflecting a practice of giving island States — States entirely composed of a group of islands — equal treatment in a delimitation with another State's mainland coast[159]. Colombia derives no benefit from such practice.

84. The Cape Verde/Senegal agreement, and the Sao Tome/Equatorial Guinea agreement, also mentioned by Professor Crawford can be distinguished from the present case on the very same basis[160].

85. The agreement concerning Venezuela's Aves Island was also cited[161]. According to Bowett, the Netherlands appears to have accepted full effect in return for the same treatment of its

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[157]CR 2012/13, p. 39, para. 19 (Crawford).

[158]D. Bowett, "*Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations,*" in J. Charney and L.M. Alexander (eds.), *International Maritime Boundaries,* 1993, Vol. I, pp.133-134.

[159]*Ibid.*, p. 138.

[160]CR 2012/13, p. 39, paras. 20-21 (Crawford).

[161]CR 2012/13, p. 38, para. 14 (Crawford).

own Saba Island[162]. In any event, the Organization of Eastern Caribbean States, and CARICOM as well, have registered their objections to the weight given to Aves Island[163].

86. The delimitation agreement between Australia and France is equally unhelpful to Colombia[164]. This is at tab 27; it was displayed by Professor Crawford. The boundary is a median line between islands and reefs on both sides that are far removed from the main coasts of either party. According to Bowett, "the islands balance each other so as to eliminate distortion" because "the islands and reefs to the west of New Caledonia [lie] about as far offshore as the Australian reefs to the east of the mainland"[165]. This is apparent when the small islands and reefs on both sides of the delimitation line, which the parties used in constructing it, are shown on the map. For whatever reason, they were not depicted on the map displayed by Professor Crawford last week.

87. Mr. President, as I said last week, Colombia has cherry-picked a few diplomatic agreements that it considers favourable to its position. Here are some that are not, as cited in Bowett's study of the practice. In these agreements, the States concerned reduced the distorting effects of small islands by enclaving them within what Bowett calls "a 3- or 12-mile arc of territorial sea"[166]. He mentions in particular, the island of Daiyina in the Qatar/UAE agreement of 1969; the island of Pelagruz in the Italy/Yugoslavia agreement of 1968; and the islands of Pantellaria, Linosa, and Lampedusa in the Italy/Tunisia agreement of 1971, the latter of which were enclaved within 13 miles[167].

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[162]D. Bowett, "*Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations,*" in J. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, 1993, Vol. I, p. 142.

[163]*Ibid.*, p. 142, and footnote 82. Communiqué Issued at the Conclusion of the Twenty-Second Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM) (5 Jul. 2001) (http://www.caricom.org/jsp/communications/communiques/22hgc_2001_communique.jsp?menu=communications); B. Wilkinson, "*OECS raps Caracas' claim to island*," Barbados Nation News (11 Sep. 2005) (http://web.archive.org/web/20070930154742/http://www.nationnews.com/353940187592816.php); "CARICOM may ask UN to settle Las Aves dispute," *Latin American Herald Tribune* (11 Aug. 2005) (http://www.laht.com/article.asp?CategoryId=10717&ArticleId=203478); "OECS searching for Bird Island solution," *Caribbean News* (16 Mar. 2006) (http://www.caribbeannewsnow.com/caribnet/cgi-script/csArticles/articles/000008/000874.htm).

[164]CR 2012/13, p. 40, para. 23 (Crawford).

[165]D. Bowett, "*Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations,*" in J. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, 1993, Vol. I, pp. 138-139 and footnote 52 at p. 138.

[166]*Ibid.*, p. 143.

[167]*Ibid.*, p. 143.

88. Mr. President, diplomatic practice does not support Colombia's arguments in this case. That practice is best summed up by Bowett, and I will complete my discussion of this subject and my speech by reading his conclusion:

> "where the island is remote or not in alignment with the general coastal façade, a different treatment is usually adopted. This will lie either in a method different from equidistance, or in modifying the equidistance method. These variants upon equidistance have great flexibility: the islands may be given 'partial' effect (half-effect or some other fractional weighting), or they may be partially or fully enclaved, or simply allowed such an area that there will be no impinging on a neighbouring claim. Or they may be partially or fully enclaved or simply allowed such an area that they will be no impinging on a neighbouring claim."[168]

89. Mr. President, Members of the Court, this concludes my speech. Since it is my last one in these proceedings, I want to thank you again for your kind patience and courtesy in putting up with me for as long as you have had to, and to underscore what an honour and a privilege it has been for me to appear before you. And I wish you all a nice lunch. *Bon appétit.*

The PRESIDENT: Thank you very much, Mr. Reichler, for your pleading and also for your wish. I extend the same wish to the Parties' teams and to the public observing this hearing. The Court will meet this afternoon, from 3 p.m. to 5 p.m., to hear the conclusion of Nicaragua's second round of oral argument and final submissions in the case. Thank you. The Court is adjourned.

The Court rose at 12.55 p.m.

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[168] D. Bowett, *"Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitations,"* in J. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, 1993, Vol. I, p. 151.