INTERNATIONAL COURT OF JUSTICE

TERRITORIAL AND MARITIME DISPUTE

(NICARAGUA v. COLOMBIA)

REJOINDER OF THE REPUBLIC OF COLOMBIA

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REJOINDER OF THE REPUBLIC OF COLOMBIA

Chapter 1

INTRODUCTION

A. Overview

1.1. This Rejoinder is filed in accordance with the Court's Order of 18 December 2008. It responds to Nicaragua's *Reply* of 18 September 2009 and focuses on issues that continue to divide the Parties.

1.2. The *Reply* makes very little attempt to deal with Colombia's case on sovereignty over those components of the Archipelago left open by the Court in its decision of 13 December 2007 (hereafter referred to collectively as "the cays"). Chapter I of Nicaragua's *Reply* spends only 33 pages on "The Issue of Sovereignty" (as compared with 174 pages in Chapters II-VII on maritime delimitation).

1.3. In consequence, many of the arguments, and many items of evidence, presented by Colombia in the *Counter-Memorial*

are simply not responded to in the *Reply*. For example in the *Counter-Memorial*, Colombia set out in detail the array of *effectivités* it has exercised over the Archipelago, including all the cays, in the years since independence; and showed that Nicaragua had by contrast done nothing whatever by way of the exercise of State authority over any of the islands, individually or collectively.[1] Indeed, for long periods of time, throughout the 19th century up until 1913,[2] and then in the years from 1928 to 1980, Nicaragua simply accepted Colombian sovereignty.[3] None of this does Nicaragua's *Reply* contest or deny.[4]

1.4. The Court can therefore proceed on the basis that, as between the parties to this case,[5] only Colombia has ever administered *à titre de souverain* any of the islands and related features which are at stake, in the 200 years since its independence; that this administration has been peaceful and (for most of the time) uncontested, and that it has been widely

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[1] Colombia's Counter-Memorial (hereafter CCM) CM, Chapters 2-3, esp. pp. 88-146. The description of Colombia's *effectivités* occupies more space than the entire treatment of the sovereignty dispute in Nicaragua's *Reply* (hereafter NR).

[2] Nicaragua's first general claim to the Archipelago was made in 1913: see CCM, para. 6.6.

[3] Nicaragua claimed Quitasueño, Roncador and Serrana in 1972; its claim to the whole Archipelago, based on the "invalidity" of the 1928/1930 Treaty, only came in 1980: see CCM, paras. 6.7-6.8. For the variability of Nicaragua's claim, see CCM, paras. 6.5-6.11.

[4] For other examples of issues to which Nicaragua failed to respond, see below, paras. 2.19, 2.22, 2.58.

[5] There have been claims to individual features by third States, always resolved in Colombia's favour by treaty. See as to the United States (Quitasueño, Roncador, Serrana), CCM, paras. 4.51-4.59; as to Honduras (Serranilla), CCM, paras. 4.163-4.166.

recognized by third States, including (for most of the time) Nicaragua.

1.5. Territorial disputes normally involve some combination of (1) original title; (2) *effectivités*; (3) recognition; (4) sometimes a treaty is determinative (if it is a treaty allocating territory or fixing a boundary, it will be presumed to resolve the territorial or boundary problem completely and definitively[6]); and (5) a background factor, the maxim *quieta non movere* – respect for long, uncontested and peaceful possession. It is a feature of the present case that all five elements or factors favour Colombia, while Nicaragua gains no support from any of them. Instead, Nicaragua posits an untenable interpretation of the 1928/1930 Treaty, disregarding its real scope as an instrument recognizing Colombia's sovereignty over the San Andrés Archipelago, including all the islands to the east of the 82°W meridian, and settling definitively the territorial dispute between the two States.

B. Nicaragua's Drastic Changes of Position

1.6. A second feature of the *Reply* is equally obvious: Nicaragua has completely recast its case both on sovereignty and on delimitation. The case began as a claim (predicated on the invalidity of the 1928/1930 Treaty) to the islands comprising

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[6] See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994,* p. 6, 23-24, para. 47, citing *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No .12,* p. 20; *Sovereignty over Certain Frontier Land (Belgium/Netherlands), Judgment, I.C.J. Reports 1959,* p. 209, 221-222.

the San Andrés Archipelago (though Nicaragua omitted some individual islands, which had to be added later, as an after-thought[7]). There was also a claim to a single maritime boundary drawn as an approximate median line between mainland coasts.

1.7. In the *Reply* the cases made on these two fronts have completely changed. This is not the normal modulation of argument which occurs in the course of pleading; it is a complete transformation on both fronts. It may be illustrated by comparing the positions taken by Nicaragua in its Application with those taken in the *Reply*. For example:

- The Application claimed title on the basis of *uti possidetis*,[8] the Treaty of 1928/1930 being invalid.[9]
- The Application treated all the cays as part of the San Andrés Archipelago except Roncador, Quitasueño, Serrana and Serranilla.[10]
- The Application accepted the fundamental premise of maritime delimitation, that land sovereignty is a "condition precedent" to maritime delimitation.[11]
- The Application sought a single maritime boundary, including delimitation of the EEZ.[12]

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7 See CCM, paras. 6.9-6.10.
8 Nicaraguan Application, para. 2.
9 Nicaraguan Application, para. 4.
10 Nicaraguan Application, paras. 2, 8.
11 Nicaraguan Application, para. 3.
12 Nicaraguan Application, paras. 3, 4, 5, 8.

1.8. In each of these respects, Nicaragua's *Reply* takes a totally different, contradictory position.

- The *Reply* disavows reliance on *uti possidetis* (though without formally abandoning it).[13] Instead, the question is one of the *interpretation* of the Treaty of 1928/1930. That Treaty is read – implausibly – as reserving to Nicaragua not merely all islands west of the 82°W meridian, which is what it was intended to do, but all cays to the *east* of that meridian which are not proved to be part of the Archipelago.[14] It is also read – also implausibly – as making a *renvoi* to the *uti possidetis* of 1810/1821, rather than as finally settling the dispute between the parties over the Archipelago which broke out in 1913.[15]

- The *Reply* presumes that "[o]n the basis of the 1928 Treaty", only the three islands of San Andrés, Providencia and Santa Catalina are part of the Archipelago; all other features are not unless otherwise shown. Moreover, if not part of the Archipelago, the cays belong to Nicaragua by virtue of its sovereignty over the Mosquito Coast and "offshore maritime features".[16] This is a remarkable interpretation of a Treaty which (a) recognizes as Colombian "all the other islands, islets and cays that form part of the said

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[13] NR, p. 8 (para. 21).
[14] NR, p. 4 (para. 13).
[15] NR, para. 1.15. Cf. NR, para. 1.64 (the time of independence is said to be "the moment of determination of title").
[16] NR, p. 4 (para. 13), p. 5 (para. 14).

Archipelago"; (b) establishes the 82°W meridian as the western limit of the Archipelago, by which was meant, in the words of Nicaraguan Foreign Minister at the time, "the geographical boundary between the archipelagos in dispute",[17] and (c) does not name as Nicaraguan any offshore features other than the Corn Islands.

- The *Reply* affirms Nicaraguan sovereignty over the cays on the basis that they are on an asserted Nicaraguan continental shelf. For Nicaragua now the shelf dominates the land.[18]

- The *Reply* denies that the Court should draw a single maritime boundary, arguing instead for a continental shelf delimitation based on alleged geomorphological considerations in an area well within 200 nm of Colombia's mainland coasts and the coasts of its islands, and well beyond 200 nm from Nicaragua.[19]

1.9. These extraordinary twists and turns raise a question as to the admissibility of Nicaragua's new claims, especially to outer continental shelf: this is dealt with in Chapter 4 of this Rejoinder. For present purposes, however, Colombia merely observes that the credibility of Nicaragua's positions in the *Reply* is surely affected by the confident manner in which it had earlier affirmed quite different propositions.

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17 See CCM, para. 5.45, citing CCM Annex 199.
18 NR, p. 6 (para. 16), para. 4.1.
19 NR, Chapter III.

C. Nicaragua's Refusal to Accept the Court's Judgment on Preliminary Objections

1.10. Not the least remarkable feature of the *Reply* is Nicaragua's effective refusal to accept the Court's decision of 13 December 2007 on the Preliminary Objections.

1.11. The point is made in the following passage of the *Reply*:

> "9. Nicaragua also understands that the jurisdiction of the Court is only available on the basis that the 1928 Treaty is valid. Nicaragua accepts the decision of the Court and the conditions under which jurisdiction has been recognized and will accordingly adapt and adjust her petitions and submissions within the limits set in the *13 December 2007 Judgment*.
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> 10. Nicaragua's acceptance of the conditions under which jurisdiction has been recognized does not imply that she has changed or renounced her historical claim that the 1928 Treaty was imposed on Nicaragua and lacks any legal or moral authority. To the full extent that it is legally permissible in the present circumstances, Nicaragua will continue to reserve her position on all these issues."[20]

1.12. What moral authority Nicaragua could possibly have over a substantial Colombian population, inhabiting an archipelago which has been peacefully administered as part of Colombia for two centuries, it is impossible to understand. But the Court is the judge of *legal* authority, not Nicaragua, and the assertion that the 1928 Treaty lacks "any legal… authority" is extraordinary, not to mention disrespectful to the Court. The

[20] NR, p.3 (paras. 9-10).

Court found that it lacked jurisdiction over Nicaragua's claim (as concerns San Andrés, Providencia and Santa Catalina) *because* the Treaty settled the question of sovereignty over the San Andrés Archipelago as a whole, and over the three named islands, and was valid. This finding is *res judicata*, binding on both parties.[21] As the Court said:

> "81. *In light of all the foregoing*, the Court finds that the 1928 Treaty was valid and in force on the date of the conclusion of the Pact of Bogotá in 1948, the date by reference to which the Court must decide on the applicability of the provisions of Article VI of the Pact of Bogotá setting out an exception to the Court's jurisdiction under Article XXXI thereof.
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> …
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> 88. The Court considers that it is clear on the face of the text of Article I that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina has been settled by the 1928 Treaty within the meaning of Article VI of the Pact of Bogotá. In the Court's view there is no need to go further into the interpretation of the Treaty to reach that conclusion and there is nothing relating to this issue that could be ascertained only on the merits."[22]

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[21] Cf. *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I. C.J. Reports 1996,* p. 803, 814-815 (paras. 28-32); *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 161, 178 (para. 31).

[22] Emphasis added. The dissentients disagreed with the Court deciding the issue at the stage of Preliminary Objections; none of them, however, expressed doubt as to the outcome. See *Judgment of 13 December 2007*, Vice President Al-Khasawneh, para. 2; Judge Ranjeva, para 11; Judge Abraham, para. 32. Cf. Judge Simma, p. 4.

1.13. As the Court held, the dispute concerning sovereignty over the Archipelago, including the three named islands, was settled as between Colombia and Nicaragua when the 1928/1930 Treaty came into force. There is no legal basis whatever for Nicaragua to "continue to reserve her position on all these issues."[23]

1.14. Indeed, it is inconsistent with good faith in the settlement of disputes before the Court for a State party – more especially a Claimant State – to reserve its alleged legal rights, contrary to a decision of the Court binding on it, while calling on the Court to grant it further relief. Yet that is precisely what Nicaragua does here. It says:

> "the 13 December 2007 Judgment determined that the Court had no jurisdiction to consider the dispute over the sovereignty over these features. Hence, Nicaragua is proceeding in this case within the limits of the *jurisdiction granted by the Court* [*sic*]; that is, for the purposes of this case those islands will be considered under the sovereignty of Colombia."[24]

But the Court cannot delimit maritime areas on a hypothesis. Nor can a Claimant State assert that it only accepts a decision, on the basis of which it calls on the Court to act in its judicial capacity, "for the purposes of this case". When this case is over, what will happen then?

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[23] NR, para. 10.

[24] NR, para 2.12 (emphasis added). See also NR, para. 4.1 ("the claims to sovereignty *presently* made in this *Reply*" (emphasis added); these words imply that other claims to sovereignty may be made on other occasions).

1.15. The point is highly material to the future of the Archipelago. Figure NR-6-10 shows Nicaragua's maximalist maritime claim, which enclaves the islands and cays at 12 nm for the larger ones and 3 nm for the rest. It will be seen that the unity of the Archipelago is destroyed. And since Nicaragua's acceptance of Colombian sovereignty is only a deemed and temporary acceptance ("for the purposes of this case those islands will be considered under the sovereignty of Colombia"[25]), how long will that situation last? After all, Nicaragua now professes to believe – though the Court has repeatedly denied it – that continental shelf rights determine sovereignty over islands, and trump EEZ rights into the bargain!

D. Nicaragua's Repleaded Case on Sovereignty and Delimitation

1.16. As set out in the *Reply*, Nicaragua's latest case is as follows:

(1) SOVEREIGNTY OVER THE CAYS

1.17. Subject to various "reservations", notably the reservation of its original claim to the Archipelago,[26] Nicaragua "adapt[s]" that claim, transforming it into a claim to islands allegedly *not* part of the Archipelago. Moreover, according to Nicaragua, the onus of proof in this matter is on Colombia, despite Nicaragua's status as Applicant.

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[25] NR, para 2.12.

[26] NR, para. 1.1

> "13. On the basis of the 1928 Treaty, the position of Nicaragua is that the recognition of sovereignty over the Mosquito Coast includes all the appurtenant rights of that Coast to its off-shore maritime features. These maritime features include all those not proven to be part of the 'San Andrés Archipelago' which is recognized in that Treaty to appertain to Colombia."[27]

1.18. But Nicaragua is a claimant to sovereignty over islands long administered as part of Colombia (and never administered by Nicaragua). As such, the onus of proof is squarely on it to establish title. *Actori incumbit probatio*; if Nicaragua claims any individual feature, it has to make out its claim, something it has wholly failed to do.[28] It is a desperate argument to assert that, unless Colombia can prove that the various islands were part of the Archipelago in 1810, they were considered part of the Mosquito Coast and thus Nicaraguan. It is also a *non sequitur*. If the Islands were not definitively attributed to any State by the *uti possidetis* principle, and if sovereignty was not finally determined by the 1928/1930 Treaty – *quod non*, because of the Treaty's text itself and the limit of the 82°W meridian –, then

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[27] NR, p.4 (para. 13) (see also paras 1.39-1.44). The passage from CCM, para. 1.9 cited by Nicaragua in support, does not say the same thing at all. Following the Judgment of 13 December 2007, it is *sufficient* for Colombian sovereignty that a feature was part of the Archipelago in 1930. But it is not *necessary*: if (for the sake of argument) some feature was held not to be part of the Archipelago, that does not mean that it is Nicaraguan.

[28] Cf. *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010*, paras. 162-164.

sovereignty would be determined by the balance of *effectivités*.[29] In the present case, that balance is all one way.

1.19. Apart from considerations relating to the onus of proof, Nicaragua's adapted case is as follows:

(1) "[A]ll questions relating to the territorial dispute can be resolved by reference to" the 1928/1930 Treaty;[30] questions of *uti possidetis* are "not relevant"[31]; "the issue is not whether Nicaragua or Colombia had the better title over the territories in dispute at independence, since it must be accepted… that each had a perfect title as from the 1928 Treaty."[32]

(2) But by reference to the 1928/1930 Treaty, Nicaragua in effect reintroduces the *uti possidetis* argument by the back door:

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

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[29] See *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras),* Judgment of 8 October 2007, paras. 161-164. Nicaragua protests (NR, p. 8, fn 13) that the Court's *obiter dictum* in *Nicaragua/Honduras* "does not have the effect of *res iudicata*". Being between different parties obviously it could not have that effect. It was nonetheless a considered statement, and it is equally relevant here.

[30] NR, para. 1.3.

[31] NR, para. 1.3.

[32] NR, para. 1.64.

time of the independence of Colombia in 1810."[33]

Of course this is not at all what the Treaty says. The intention was to definitively settle the dispute arising from the Nicaraguan claim of 1913, not to leave sovereignty over the various islands, islets and cays indeterminate by reference to a criterion of the *uti possidetis* of 1810 or 1821. The Treaty is clear on this, as are the *travaux*.[34] The Treaty – Nicaragua itself accepts this – divided the five named features, all part of Colombia according to the *uti possidetis*, two going to Nicaragua (the Corn Islands), three to Colombia. The 82°W meridian was defined as the western limit of the Archipelago and therefore, "*all* the other islands, islets and cays" to the east of that limit, belonging to and administered by Colombia as part of the Archipelago, were allocated to Colombia.

(3) In fact Nicaragua was perfectly aware of the extent of the Archipelago. That was stated with precision in a Report by Foreign Minister Holguín to the Colombian Congress in 1896 (after the dispute with Nicaragua concerning the

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[33] NR, para. 1.15.

[34] See CCM, paras. 5.38-5.58. For example, the Nicaraguan Minister of Foreign Affairs is recorded as describing the 82°W meridian to the Senate, the day before its approval of the Treaty, as "the geographic limit between the archipelagos in dispute without which it could not be settled the matter completely": Nicaragua's Memorial (hereafter NM), Annex 80, p. 259. The passage is annexed to NM but is cited in neither NM nor NR. (Colombia's translation, at Annex 199 and cited in CCM para. 5.54 reads as follows: "the geographical boundary between the archipelagos in dispute, without which the question would not be completely defined.")

Corn Islands had broken out), to which Nicaragua does not respond.[35] It was equally summed up by the Colombian Ambassador to Nicaragua, Esguerra, in a letter of 27 November 1927, referring to his negotiations with Nicaragua on the Treaty, to which, equally, Nicaragua does not respond.[36] Colombia's peaceful exercise of sovereignty and jurisdiction over all of the Archipelago's components was explicit and publicly displayed.[37]

(4) The distinction between the Archipelago and "the Nicaraguan Mosquitia" – as well as the intent to "put[] an end to the question pending between both Republics regarding" the two – was repeatedly expressed in Colombian and Nicaraguan official documents of the time, among which are the following:

(a) in the Official Opinion of the Nicaraguan Government on the End of the Dispute with

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[35] CCM, paras. 2.59-2.60, and CCM Annex 89: "Colombia has upheld, upholds and will continue to uphold, until the end of time, that the islands of the Archipelago of San Andrés, formed by three groups of islands that spread from the coasts of Central America, facing Nicaragua, to the cay of Serranilla between latitude 15°52 north and longitude 80°20 west of the Greenwich meridian, the first of these groups being formed by the islands of Providencia and Santa Catalina and the cays of Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo; the islands of San Andrés and the cays of Alburquerque, Courtown Bank and others of less importance, forming the second; and the islands of San Luis de Mangle, such as Mangle Grande, Mangle Chico and the cays of Las Perlas forming the third, as well as the Mosquito Coast, are its property and belong to it by inheritance, under the *uti possidetis* of 1810."

[36] CCM, paras. 2.67-2.68 and CCM Annex 112.

[37] See, for instance, Colombian Official Journals in CCM, Annexes 73, 75, 79-81, 86, 90, 93, 96-97, 99, 100 and 110 (Guano Contracts and related provisions). See also, e.g., CCM, Annexes 72, 76, 85, 87, 89, 91-92, 94-95, and 104-109.

Colombia, 22 September 1928;[38]

(b) in the Nicaraguan Congressional Decree approving the 1928/1930 Treaty, 6 March 1930;[39]

(c) by the Nicaraguan Chamber of Deputies in its resolution of 3 April 1930;[40]

(d) in the full powers from the Nicaraguan President to the Nicaraguan Foreign Minister, 9 April 1930;[41]

(e) In the 1930 Report to Congress by the Nicaraguan Foreign Minister concerning the 1928/1930 Treaty.[42]

(5) In any event, for the reasons stated in the *Counter-Memorial* and developed further in Chapter 2, the *uti possidetis* of 1810 supported the jurisdiction of the Vice-Royalty of Santa Fe (New Granada), not that of Guatemala – i.e. of Colombia, not Nicaragua.[43] The *uti possidetis* of course related to the Archipelago as a whole, not to individual cays. The *uti possidetis* argument cannot be made to fit with Nicaragua's "adapted" case on sovereignty, which does concern individual cays.

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38 CCM, Annex 196.
39 Colombia's Preliminary Objections (hereafter CPO), Annex 10.
40 CCM, para. 5.55, and CPO, Annex 10.
41 CCM, Annex 200.
42 CCM, Annex 201.
43 CCM, paras. 3.7-3.15.

(6) As to the three other named cays of the Archipelago in Article I of the 1928 Treaty (i.e., Roncador, Quitasueño and Serrana), Nicaragua makes the following points:

(a) The cays "do not form part of the San Andrés Archipelago";[44]

(b) Article I did not involve a relinquishment of claim by Nicaragua;[45]

(c) if Colombia cannot prove the features were part of the Archipelago, then they "appertained to [the] coast", in effect, an argument from contiguity.[46]

(7) None of these arguments will do, for reasons explained in the *Counter-Memorial* and further in Chapter 2:

(a) the three features were expressed to be part of the Archipelago as shown by numerous documents cited in the Colombian *Counter-Memorial*, e.g., by the prefect of the National Territory of San Andrés in 1871,[47] by the British Colonial Office in 1874,[48] by the Governor of Jamaica in 1875,[49] by the Prefecture of the Province of Providencia in 1890,[50] by Foreign Minister Marco Fidel

44 NR, para. 1.88.
45 NR, paras. 1.90-1.91.
46 NR, para. 1.96.
47 CCM, para. 2.49.
48 CCM, para. 2.50.
49 CCM, para. 2.52.
50 CCM, para. 2.53.

Suarez in 1894,[51] by Foreign Minister Holguín in 1896,[52] by the guano extraction contracts approved by the National Congress,[53] and by the Colombian Ambassador to Nicaragua, Esguerra, in 1927,[54] among others. Colombia furnished similar evidence with regard to the cays' appurtenance to the Archipelago with regard to the 20th century prior to 1928[55] and from the conclusion of the 1928 Treaty to date.[56] Moreover, the cays as part of the Archipelago were consistently depicted as such on Colombian maps and charts;[57]

(b) Article I is not a relinquishment of a declared claim because in 1928 there was no separate Nicaraguan claim to the three features; rather it is powerful evidence that Nicaragua entertained no such claim; if it had done so, Article I would have been worded differently;[58]

(c) arguments from mere contiguity or proximity to the coast of features beyond the coastal

51 CCM, paras. 2.55 and 2.56.
52 CCM, para. 2.59.
53 CCM, para. 2.57.
54 CCM, para. 2.68.
55 CCM, paras. 2.62 to 2.70.
56 CCM, paras. 2.67 and ff.
57 See CCM, paras. 2.79-2.97, 3.117-3.125.
58 See CCM, paras. 4.36-4.47.

territorial sea, in the absence of *effectivités*, have no validity.[59] In any event the three features are not contiguous or proximate to the Nicaraguan coast.

1.20. With regard to Quitasueño, Nicaragua has both contradicted itself and is wrong on the facts. First, Nicaragua's pleadings in the present proceedings refer to Quitasueño as a "bank" while in the 1928 Treaty it had referred to it as a "cay", in the same way as for Roncador and Serrana; secondly, it now denies that it is being capable of appropriation, while in the 1928 Treaty it recognized that sovereignty was in fact in dispute between Colombia and a third State. Likewise, the official notification by Colombia to the Nicaraguan Government and Congress of the 1928 Colombia-United States Agreement referred to the features as "cays", expressly mentioned that they were part of the San Andrés Archipelago and was never objected to by Nicaragua.

1.21. As to *in situ* evidence on the characteristics of Quitasueño, only Colombia has provided any. It submitted the report on a survey conducted by its Navy in 2008 with its *Counter-Memorial*. Given the position taken in the *Reply*, Colombia has had it further verified by an expert report, finding 34 islands and 20 low-tide elevations on Quitasueño.[60]

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[59] See CCM, para. 6.15, citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment of 8 October 2007*, p.25, para. 75.

[60] See below, Chapter 3, and for the Smith Report see Appendix 1.

1.22. In fact Colombia has exercised its sovereignty and jurisdiction over Quitasueño in the same public, peaceful and uninterrupted manner as over the other islands and cays of the Archipelago.

1.23. For these reasons, Nicaragua fails to mount a credible case on sovereignty, in substitution for its claim to the whole Archipelago, made in the *Memorial* and rejected by the Court *in limine*. Moreover there is a striking contrast between the suggestion that the onus of proving sovereignty belongs to the Respondent State and the numerous arguments and documents produced by Colombia in its *Counter-Memorial* to which Nicaragua has failed to respond. Further examples will be given, as relevant, in later Chapters of this Rejoinder, with reference to the *Counter-Memorial* which remains, especially as to territorial sovereignty, the definitive statement of Colombia's case.

1.24. In short, Nicaragua has failed to make out a coherent alternative case for sovereignty over any of the cays – its primary case having failed at the Preliminary Objections stage. In essentials the case is reduced to one about maritime delimitation between the Colombian islands and Nicaragua's relevant coasts.

(2) MARITIME DELIMITATION

1.25. Turning to that maritime delimitation case, Nicaragua's *Reply* presents a new and fundamentally different claim than

was the subject of its Application and *Memorial* and even as presented in its Observations at the Preliminary Objections stage of the case. In those pleadings, Nicaragua requested the Court to delimit a single maritime boundary between the Parties based on a mainland to mainland median line. Geology and geomorphology were deemed by Nicaragua to be irrelevant. In contrast, Nicaragua's *Reply* has completely abandoned that position – a position that Colombia's *Counter-Memorial* showed to be utterly untenable given that Nicaragua's claimed median line fell much more than 200 nautical miles from Nicaragua's coast in an area where Nicaragua has no legal entitlements. Without any explanation for its change of position, the Nicaraguan *Reply* now states that Nicaragua has "decided that her request to the Court should be for a continental shelf delimitation"[61] – as if the scope of a case once submitted to the Court could be unilaterally redefined by the Claimant

1.26. It is not simply that Nicaragua no longer seeks the delimitation of a single maritime boundary from the Court that distances Nicaragua's *Reply* from its earlier submissions; Nicaragua also asks the Court to accept the proposition that it possesses extended continental shelf rights stretching well beyond 200 miles from its coasts. This claim is advanced despite the fact that Nicaragua has made no submission as required by Article 76 of the 1982 Convention to the United Nations Commission regarding such alleged rights and the Commission has neither considered the matter nor issued any

[61] NR, p.12, para. 26.

recommendations relating thereto. Notwithstanding these deficiencies, the Nicaraguan *Reply* now presents as the centrepiece of its positive case a request to the Court to delimit its extended continental shelf into areas well within 200 nm of Colombia's mainland coast.

1.27. But quite apart from formal considerations, including the inadmissibility of a new outer continental shelf claim at this late stage of the proceedings, Nicaragua's new and exaggerated claim suffers from insurmountable defects. Procedurally, extended continental shelf claims fall to be submitted to and considered by the Annex II Commission based on a full submission. Nicaragua has not made such a submission. Factually, the meagre information furnished by Nicaragua does not begin to support any entitlement to outer continental shelf rights. Legally, there are no areas of outer continental shelf in this part of the Caribbean Sea because the areas concerned all lie within 200 nautical miles of the territory of other littoral States bordering the region, including within 200 miles of Colombia's insular and mainland territory.

1.28. If Nicaragua's original claim was artificial and exaggerated, its new claim is even more so. The claim still falls in areas where Nicaragua has no legal entitlement and is based on a purported equal division alleged overlapping of physical continental shelves that is at odds with the well established principles and rules of international law governing maritime delimitation.

1.29. In contrast, Colombia's approach to delimitation has been presented squarely within the established legal principles of maritime delimitation as those principles have been articulated by the Court and arbitral tribunals. Colombia has shown that the area within which the maritime projections of the Parties' coasts meet and begin to overlap is situated in the area lying between the islands comprising the San Andrés Archipelago and Nicaragua's coast taking into account the actual and prospective rights of third States in the region. Colombia has then applied the equidistance-relevant circumstances rule to the delimitation of that area using clearly identified basepoints on the coasts of each Party to construct the provisional equidistance line.

1.30. At the second stage of the process, Colombia has then taken into account the relevant circumstances characterizing the case to assess whether those circumstances confirm the equitableness of the provisional line or call for any adjustment. In the light of the past conduct of the Parties and the relevance of the 82°W meridian as the western limit of the San Andrés Archipelago, Colombia demonstrates that an equidistance based delimitation produces an equitable result.

1.31. Nicaragua's claim does none of these things. Nicaragua rejects the equidistance-relevant circumstances rule in favour of an outer continental shelf claim which is procedurally inadmissible, legally flawed and factually unsupported. Nicaragua's attempt to enclave islands which lie between 106

(Alburquerque) and 266 (Bajo Nuevo) nautical miles from its coast is unprecedented and unsustainable. Nicaragua ignores the fact that Colombia has consistently exercised jurisdiction throughout all the waters of the Archipelago. Nicaragua also pays no attention to the presence of third States in the region or the positions such States have taken regarding the legal entitlements that Colombia's islands are entitled to.

1.32. In short, the issues of maritime delimitation in this case are not merely about resources: they raise vital issues both of fidelity to the law and the future of people. As to the law, they are about applying the well-established principles and rules relating to maritime delimitation. As to the future, they are about maintaining the traditional living space of a substantial, long-established, Colombian community, as well as preserving security in an essential area of the south-western Caribbean.

E. Structure of this Rejoinder

1.33. This Rejoinder consists of three Parts.

1.34. Part I deals with the remaining sovereignty issues. In Chapter 2, Colombia demonstrates the overwhelming character of its title and that it has exercised its sovereignty and jurisdiction over the San Andrés Archipelago for two centuries in contrast to the artificiality of Nicaragua's territorial claim; that that sovereignty was recognized by Nicaragua in the 1928/1930 Treaty. Chapter 3 then discusses Nicaragua's

assertion that Quitasueño is nothing but a submerged bank: this claim is shown to be simply wrong as a matter of fact. International law applies straightforward factual criteria in distinguishing islands from low-tide elevations, and both from submerged banks, and the facts in this case are further verified.

1.35. Part II deals with maritime delimitation. Chapter 4 addresses Nicaragua's new and even more extreme continental shelf boundary claim, discusses its (in)admissibility and outlines the severe difficulties that claim faces. Chapter 5 identifies the area for the delimitation as lying between Nicaragua's easternmost islands and cays, on the one hand, and the islands and cays making up the San Andrés Archipelago, on the other. On that basis, Chapter 6 deals with the first stage in a delimitation, the drawing of a provisional equidistance line and the factors relevant to its possible adjustment. Chapter 7 shows the groundless nature of Nicaragua's "enclave" theory. Finally, Chapter 8 deals with the relevant circumstances characterizing the case and shows that they confirm the equitable nature of Colombia's provisional equidistance line.

1.36. Part III (Chapter 9) deals briefly with another feature of the *Reply*, Nicaragua's unwarranted claim to be entitled to damages for Colombia's policing of its fisheries legislation to the east of the 82°W meridian.[62]

[62] NR, pp. 235-238 ("Declaration").

1.37. There follows the required summary of argument and Colombia's submissions. An expert report by Dr Robert W. Smith, a note on Colombia's official nautical charts, documentary annexes and maps are attached in a separate volume.

PART ONE

COLOMBIA'S SOVEREIGNTY OVER THE CAYS

Chapter 2

THE ARTIFICIAL CHARACTER OF NICARAGUA'S TERRITORIAL CLAIM

A. Introduction

2.1. In its *Reply*, Nicaragua demonstrates an extraordinary "flexibility" of argumentation with regard to its claim. In view of the clear and internationally well-recognized Colombian sovereignty, on the one hand, and on the other hand the judgment of the Court of 13 December 2007 which rejected Nicaragua's argument concerning the invalidity of the 1928/1930 Treaty, Nicaragua has not hesitated to change the positions it originally took in its Application and *Memorial*. This holds true also with regard to the positions Nicaragua adopted on similar matters in the case it brought against Honduras.[63] All this only serves to demonstrate the evident artificiality of Nicaragua's territorial claim.

2.2. In principle, Nicaragua now accepts the Colombian position that there is no need to reopen the discussion on *uti possidetis juris* since the 1928/1930 Treaty settled the question:

> "In this section [which addresses what Nicaragua's *Reply* interprets to be the "Islands of San Andrés"] the issue is not whether Nicaragua or Colombia had the better title over the territories in dispute at independence, since it must be accepted in the framework of this

[63] See below, para. 2.49.

> proceeding that each had a perfect title as from the 1928 Treaty."[64]

2.3. Unable to advance the slightest piece of evidence of even a shadow of title or of *effectivités* over the cays, Nicaragua's *Reply* concentrates on attempting to demonstrate that the cays it claims do not form part of the San Andrés Archipelago, and that this has effects in terms of the 1928/1930 Treaty. The Applicant asserts now an underlying presumption that if it cannot be proven that the cays are part of the Archipelago, they are automatically under Nicaraguan sovereignty by virtue of the Treaty. To support this supposed presumption, Nicaragua now advances the curious theory that its title to the cays *derives* from the 1928/1930 Treaty, despite its having made the invalidity of this Treaty the basis for its claim in 1980 and again of its Application and *Memorial* before this Court.

2.4. Its alleged "title" purportedly derives from the recognition by Colombia of Nicaraguan sovereignty over the Mosquito Coast and from the alleged "appurtenance" of the cays to that Coast. The arguments Nicaragua invokes to support this claim are of a quasi-geographical character: the "proximity" of the cays to the Nicaraguan coast,[65] and Nicaragua's curious and misguided "continental shelf" theory, according to which the cays belong to it because of their location on "its"

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[64] NR, para. 1.64. See also, NR p. 4 para. 12. See CCM, paras. 6.19-6.32.

[65] See NR, para. 1.51.

continental shelf.[66]

2.5. Nicaragua has been decidedly selective in dealing with Colombia's arguments on sovereignty, and this Rejoinder will only respond in detail to the points actually made. It is necessary, however, to emphasise the significance of Nicaragua's silence on key points, and as to these, Colombia's unanswered case will be briefly summarised by way of reprise.

B. Nicaragua Ignores the Basis of Colombian Sovereignty over the Cays

2.6. The arguments and evidence in support of Colombian sovereignty over the cays were set out in Colombia's *Counter-Memorial*. For its part, the Court has already recognized Colombian sovereignty over San Andrés, Providencia and Santa Catalina. It has also confirmed the validity of the 1928/1930 Treaty according to which "all the other islands, islets and cays that form part of the said Archipelago of San Andrés" belong to Colombia. Nicaragua's *Reply* did not rebut the Colombian case. Indeed, it did not even address most key issues. This section briefly recalls the overwhelming grounds supporting Colombian sovereignty over the cays, and lists some of the issues Nicaragua chose to leave unanswered in its *Reply*.

(1) THE OVERWHELMING CASE FOR COLOMBIAN SOVEREIGNTY OVER THE CAYS

2.7. Since its independence, Colombia has been the only

[66] See NR, para. 2.21.

State which has exercised sovereignty over all the cays as part of the same administrative unit, the San Andrés Archipelago.

2.8. The root of Colombian sovereignty over the San Andrés Archipelago is the Royal Order of 1803, placing it under the jurisdiction of the Viceroyalty of Santa Fe (New Granada), which exercised that jurisdiction until the time of independence. Both titles and *effectivités* correspond to the former colonial administrative entity from which Colombia emerged: the Viceroyalty of Santa Fe (New Granada). Before the entry into force of the 1928/1930 Treaty, Colombian *effectivités* corresponded to the application of the *uti possidetis juris* principle. Since the entry into force of the 1928/1930 Treaty, the validity of which has already been recognized by the Court, Colombia continued to exercise its sovereignty over all of the Archipelago's cays.[67] But even without referring to title, the continuous and peaceful exercise of Colombia's sovereignty over all cays and the absolute lack of Nicaraguan *effectivités* over them would be enough to confer sovereignty on Colombia.

2.9. In view of Nicaragua's silence with regard to most of the factual and legal elements, there is no need to repeat what has been said in the *Counter-Memorial*. It suffices to note that all the cays have always been treated as part of the San Andrés Archipelago.[68]

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

[68] See CCM, paras. 2.32-2.98.

2.10. In this regard, the Loubet Award of 11 September 1900, in which Colombia's sovereignty over all the islands, cays, islets and banks of the San Andrés Archipelago was confirmed, should be recalled:

> "Quant aux îles les plus éloignées du continent et comprises entre la côte de Mosquitos et l'Isthme de Panama, nommément: Mangle-Chico, Mangle-Grande, Cayos-de-Albuquerque, San Andrès, Santa-Catalina, Providencia, Escudo-de-Veragua, *ainsi que toutes autres îles, îlots et bancs relevant de l'ancienne Province de Cartagena, sous la dénomination de canton de San-Andrès*, il est entendu que le territoire de ces îles, sans en excepter aucune, appartient aux États-Unis de Colombie."[69]

2.11. It will be recalled that in 1900 Nicaragua lodged a protest with the French President, claiming sovereignty over the Islas Mangles (Corn Islands) and the islands, banks, cays, and islets located between the 11th and 15th parallels latitude North, and to the west of the 84°30' Paris meridian.[70] This meridian is equivalent to 82°09'45" Greenwich meridian,[71] a meridian very close to the 82°W meridian that thirty years later, Nicaragua

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[69] *Award Relating to the Boundary Dispute between Colombia and Costa Rica*, 11 September 1900, 28 UNRIAA p. 345. Emphasis added. Translation by Colombia: "As to the Islands farthest from the Continent and comprised between the Mosquito Coast and the Isthmus of Panama, particularly Mangle Chico [Little Corn], Mangle Grande [Great Corn], the Cays of Alburquerque, San Andrés, Santa Catalina, Providencia, Escudo de Veragua, *as well as any other Islands, Islets and banks that formerly depended upon the former Province of Cartagena, under the name Canton of San Andrés,* it is understood that the territory of these islands, without any exception, belongs to the United States of Colombia."

[70] Nicaraguan Note of 22 September 1900. See CCM, para. 4.114; Vol. II, Annex 32.

[71] CCM, Annex 218.

would demand to have included as the western limit of the San Andrés Archipelago. See **Figure R-2.1**. The determination made in the Loubet Award with regard to the islands, islets and banks of the Archipelago was confirmed by the White Award in 1914, without any objection from Nicaragua.[72] The key point is this: the claim made by Nicaragua in response to the Loubet Award clearly *excluded* all of the islands, islets and banks which are before the Court.

2.12. Equally, Nicaragua was unable to make any comment on the description of the Archipelago made by the Colombian Foreign Minister Jorge Holguín in his publicly available Report to the Colombian Congress, at the time of the forcible occupation of the Islas Mangles (Corn Islands) by Nicaragua.[73] Nicaragua's *Reply* did not respond to this public and comprehensive description of the Archipelago made by a Colombian official having the capacity to engage Colombia at the international level; a description that the Nicaraguan authorities could not have ignored at the time they claimed the Islas Mangles (Corn Islands).[74]

2.13. Colombia's *Counter-Memorial* also explained in detail the negotiation process that ended in the conclusion and ratification of the 1928/1930 Treaty, whereby Nicaragua

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[72] CCM, paras. 4.134-4.139.

[73] CCM, Annex 89, 1896 Report to Congress by the Colombian Foreign Minister. The description provided by Minister Holguín was reproduced in CCM, para. 2.59 and above, at note 35. See also CCM paras. 2.60, 2.81, 2.82, and 6.20.

[74] CCM, para. 6.20.

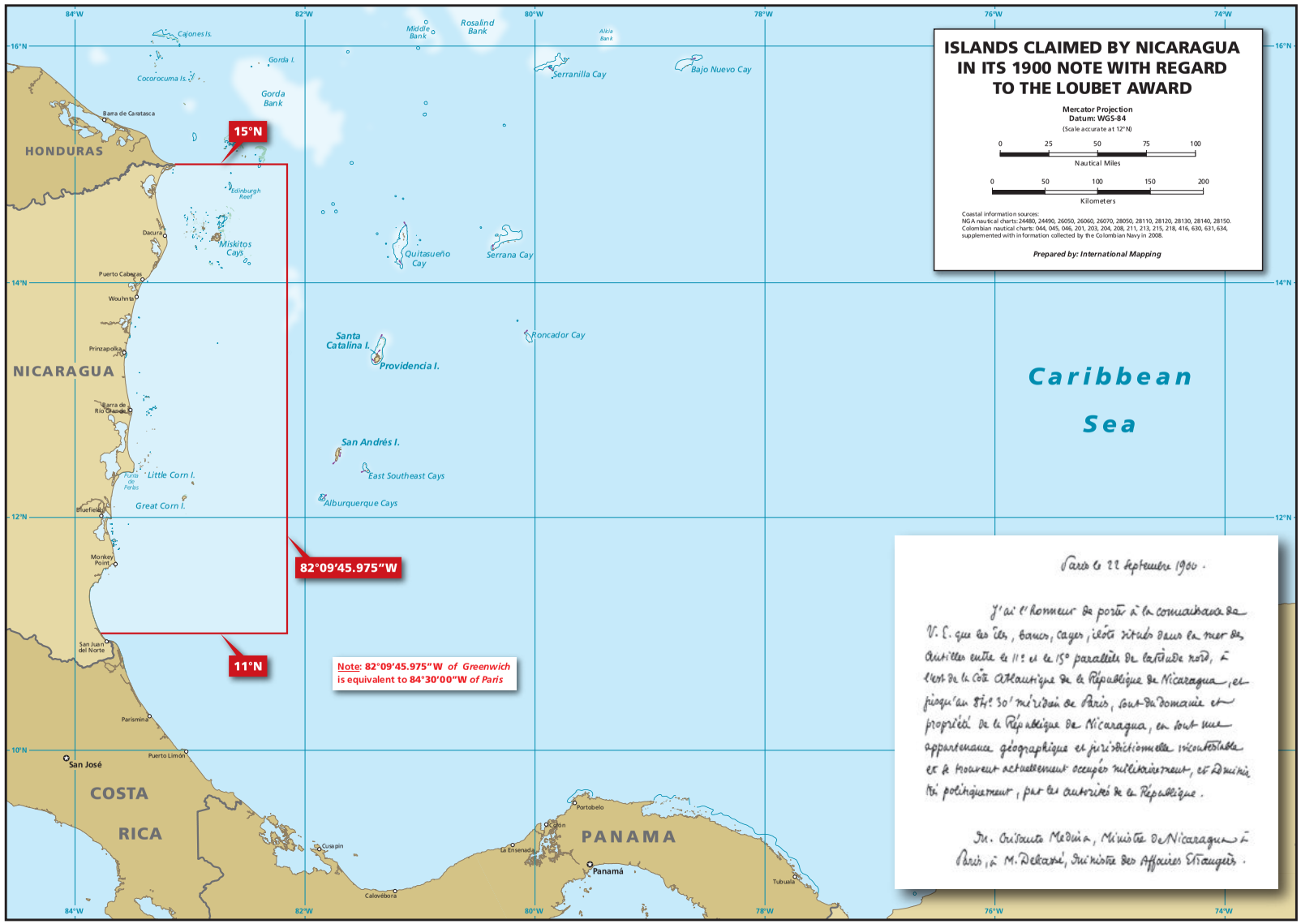

Figure R-2.1, See full size Map Vol. II - page 92

recognized Colombia's full and entire sovereignty over "all the other islands, islets and cays that form part of the said Archipelago".[75] For its part, Colombia recognized Nicaragua's sovereignty over the Mosquito Coast, comprising the area located between Cape Gracias a Dios and the San Juan River, and over the Mangle Grande and Mangle Chico islands (Great Corn Island and Little Corn Island), despite the fact that both the Coast as well as those islands had been ascribed to the Viceroyalty of Santa Fe (New Granada) in 1803. The cays now claimed by Nicaragua not only had been under Colombia's jurisdiction for over a century at that time, without any objection from Nicaragua; they had never been claimed individually by that country.

2.14. The 1928/1930 Treaty stated that the cays of Roncador, Quitasueño and Serrana (hereafter the "three features") were in dispute between Colombia and the United States of America, and were on that ground excluded from the Treaty by Article I, paragraph 2.[76] This exclusion had nothing to do with any claim by Nicaragua – indeed, in its context Article I, paragraph 2 is decisive proof that there was no such claim.[77]

2.15. In 1854, after United States citizens were discovered conducting unauthorized guano extraction activities in the Archipelago's cays, the Governor of the Province of Cartagena – from which the Archipelago was a dependency – issued a

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75 CCM, paras. 5.3-5.14, and Annex 1.
76 See CCM, Chapter 4, Section B.
77 CCM, Annex 1, Article I; and see CCM, Chapter 5.

decree banning those activities. From 1871 onwards, the Colombian Congress authorized lease to Colombian and foreign individuals for guano extraction and fishing around the cays of Roncador, Quitasueño and Serrana. These events gave rise to a protracted dispute between Colombia and the United States concerning sovereignty over the three features.[78] By the Olaya-Kellogg Agreement of April 1928, Colombia and the United States, the two parties in the dispute, provided that the United States would be allowed to install and maintain aids to navigation, while Colombian vessels and nationals could continue to carry on fishing activities in their maritime areas.[79]

2.16. The Olaya-Kellogg Agreement was notified to the Nicaraguan Government which communicated it to the Congress during the process of approval of the 1928/1930 Treaty. There was no reaction at all from either the Nicaraguan Government or the Congress to this clear assertion of Colombian sovereignty over the three features.

2.17. Following the conclusion of the 1928 Treaty, in order to prevent the possibility that the islands, islets and cays located west of the 82°W meridian could be considered as part of the San Andrés Archipelago, Nicaragua demanded – and Colombia accepted – that both the Nicaraguan Congressional decree approving the 1928 Treaty, as well as the 1930 Protocol of Exchange of Ratifications, were to include the 82°W meridian

[78] CCM, paras. 3.44-3.45, 3.47-3.71, 4.5-4.4 and Annexes 25, 72, 73, 75, 76, 77, 79, 80, 81, 82, 86, 90, 96, 97, 99, 100.
[79] CCM, paras. 4.32-4.42.

as the limit of the Archipelago.[80]

2.18. In the Judgment of 13 December 2007, the Court indicated that the inclusion of the 82°W meridian in the 1930 Protocol "…is more consistent with the contention that the provision in the Protocol was intended to fix the western limit of the San Andrés Archipelago".[81] Indeed the only plausible implication of this provision of the Protocol is that the islands, islets and cays located east of the 82°W meridian did not belong to Nicaragua and that Nicaragua did not claim them, and that those located to the west of that line did not belong to Colombia and that Colombia did not claim them. Indeed, the common sense question to ask is the following: how can cays located east of that line be considered Nicaraguan?

2.19. In short, for over a century and a half Nicaragua did not make any claim to the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque and East-Southeast Cays. If Nicaragua had harboured any such claims, it would have acted accordingly and asserted that claim following its independence. Yet it did nothing. Its silence is the more marked on those occasions when protest or at least some reaction was specifically called for. Such occasions include, for example, the following:

- During the dispute between Colombia and the United

[80] CCM, paras. 5.44-5.46.

[81] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment of 13 December 2007,* p. 34, para. 115.

States of America over the cays of Roncador, Quitasueño and Serrana, which began with the guano extraction activities by United States citizens and which was formalized in 1891.[82]

- During the diplomatic exchanges between Colombia and Great Britain between 1874 and 1927 over fishing activities carried out in the vicinity of Quitasueño and other Colombian cays by British subjects from the Cayman Islands. Nicaragua's silence is in complete contrast with its attitude during its negotiations with Great Britain between 1864 and 1916, in which it protested against fishing activities carried out by British subjects from the Cayman Islands in the vicinity of islands and cays considered to be Nicaraguan because they were "adjacent to the Mosquito Coast". Nicaragua's claim was circumscribed to the Miskito and Morrison cays, located twenty-four and forty-one miles respectively from the Mosquito Coast. Nicaragua did not make any claims about the cays located east of the 82°W meridian.[83]

- During negotiations for the Treaty between Nicaragua and Great Britain of 19 April 1905 (Treaty Altamirano-Harrison),[84] by which the former gained control of the Mosquito Coast;

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82 CCM, paras. 4.5-4.9.
83 CCM, paras. 4.103-4.108.
84 NM, para.1.101.

- During the fifteen years of negotiations between Nicaragua and Colombia following Nicaragua's first claim to the San Andrés Archipelago in 1913, leading to the 1928/1930 Treaty, notwithstanding the continuous exercise of State authority by Colombia over all the cays.
- Upon conclusion of the Olaya-Kellogg Agreement between Colombia and the United States of America in April 1928, which was officially communicated by Colombia to Nicaragua soon after the signature of the Esguerra-Bárcenas Treaty of 1928.
- Between 1928 and 1972 when the Olaya-Kellogg Agreement between Colombia and the United States of America concerning the cays of Roncador, Quitasueño and Serrana was enforced.

2.20. On each of these occasions Nicaragua remained silent. These were clear situations in which "*qui tacet consentire videtur si loqui debuisset ac potuisset*".[85] It was only in 1972 that Nicaragua first claimed some of the features comprising the Archipelago; only in 1980 did it purport to disavow the 1928/1930 Treaty and claim the whole Archipelago.

2.21. In sum, given …

- Colombian sovereignty over all the cays based on the *uti possidetis* of 1810 (both colonial title and *effectivités*);

[85] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 23.

- postcolonial *effectivités* before the conclusion of the 1928/1930 Treaty;
- the terms of the 1928/1930 Treaty, notably the effect given to the line of the 82°W meridian;
- continued and exclusive *effectivités* thereafter over all features to the east of that meridian;
- recognition of Colombian sovereignty by other relevant States;
- acquiescence by Nicaragua itself, in the period prior to 1972 (the three features) and 1980 (the whole Archipelago),

Nicaragua's late claim over the cays is groundless and opportunistic.

(2) NICARAGUA'S COMPLETE FAILURE TO RESPOND TO KEY ISSUES RAISED IN COLOMBIA'S COUNTER-MEMORIAL

2.22. Nicaragua's *Reply* fails to address most of the arguments and evidence set out in Colombia's *Counter-Memorial* concerning sovereignty over the cays. Some examples have already been given. Others include:

- The 1896 Report to Congress by the Colombian Foreign Minister Jorge Holguín, in which Minister Holguín clearly defined the San Andrés Archipelago in a detailed description as including all the cays now claimed by

Nicaragua.[86] Despite its public character, Nicaragua did not react to this report at the time it was issued,[87] and Nicaragua provides no explanation for its silence in its *Reply*.

- The constant and coherent official presentation of all cays as being Colombian since the 19th century;[88]

- Activities carried out by Colombian authorities *à titre de souverain* since the 19th century with regard to the cays. In particular, Nicaragua's *Reply* does not rebut the following examples of exercises of sovereignty by Colombia over the cays: (1) legislative and administrative control, including the regulation of fishing,[89] the regulation of other economic exploitation, including guano contracts,[90] the regulation of immigration,[91] port captaincies,[92] search and rescue operations,[93] foreign consuls,[94] and environmental matters;[95] (2) law enforcement;[96] (3) naval patrol and operations;[97] (4) seismic/oil related research;[98] (5)

86 CCM, Annex 89. See also CCM paras. 2.60, 2.81, 2.82, and 6.20.
87 CCM, para. 6.20.
88 CCM, paras. 2.33-2.85.
89 CCM, paras. 3.29-3.42.
90 CCM, paras. 3.43-3.71.
91 CCM, paras. 3.72-3.73.
92 CCM, paras. 3.74-3.75.
93 CCM, paras. 3.76-3.86.
94 CCM, paras. 3.87-3.88.
95 CCM, paras. 3.89-3.91.
96 CCM, paras. 3.92-3.94.
97 CCM, paras. 3.95-3.108.
98 CCM, paras. 3.109-3.116.

mapping surveys;[99] (6) scientific research;[100] and (7) public works;[101]

- The recognition of Colombian sovereignty over all of the cays, since the 19th and 20th centuries until the present time by neighbouring States such as Panama,[102] Costa Rica,[103] Honduras[104] and Jamaica,[105] with all of which maritime delimitation agreements have been concluded;
- The recognition of Colombian sovereignty by other States, including the United States,[106] Great Britain,[107] Sweden and Norway;[108] as well as that of the international community as a whole, which has not objected the effective and long-standing exercise of actual authority and jurisdiction over the cays and the appurtenant maritime areas by Colombian authorities.
- Official Nicaraguan cartography before 1980, which cannot be reconciled with its present claim since it did not include any of the cays it now purports to claim,[109] unlike Colombia's cartography;[110]

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99 CCM, paras. 3.117-3.125.
100 CCM, paras. 3.126-3.131.
101 CCM, paras. 3.132-3.151.
102 CCM, paras. 4.134-4.147.
103 CCM, paras. 4.149-4.162.
104 CCM, paras. 4.163-4.167.
105 CCM, paras. 4.168-4.188.
106 CCM, paras. 4.48-4.77.
107 CCM, paras. 4.78-4.102.
108 CCM, paras. 4.14-4.21.
109 CCM, paras. 2.96-2.97.
110 CCM, paras. 2.79-2.95.

- The fact that *not one* of the more than 5000 maps in the main map collections of the world that Colombia has examined depicts the cays and maritime features east of the 82°W meridian as belonging to or claimed by Nicaragua;[111]

  and

- The elementary proposition that it is not the continental shelf that determines territorial sovereignty over the cays.[112]

The only proper inference to be drawn from this long list of silences in the Nicaraguan *Reply* is that it has no good answers, and that its sovereignty claims are without foundation.

C. Nicaragua's Continued Reliance on a Groundless *Uti Possidetis* Claim

2.23. Perhaps the main argument advanced in Nicaragua's *Reply* is that since the 1928/1930 Treaty only concerned San Andrés, Providencia, Santa Catalina and the Islas Mangles (Corn Islands), all of the remaining territory, even if it had belonged to Colombia in the past (the Mosquito Coast and the "appurtenant" islands offshore) would have passed to Nicaragua by virtue of the 1928/1930 Treaty.[113] This claim is in clear contradiction with the wording of the Treaty itself, with previous and subsequent practice – including the *Loubet* Award –, with statements made by both Nicaraguan and Colombian officials, and with the existing factual situation both before and

111 CCM, paras. 2.86 and 2.88.
112 CCM, paras. 6.33-6.37.

after the conclusion of the 1928/1930 Treaty.[114]

(1) NICARAGUA'S CONTRADICTORY ARGUMENTS CONCERNING *UTI POSSIDETIS*

2.24. On *uti possidetis* Nicaragua's *Reply* is contradictory. On the one hand it asserts that, in light of the Judgment of 13 December 2007, the Treaty of 1928/1930 settled all issues and that *uti possidetis juris* is not relevant.[115] On the other hand, it insists that "any determination as to sovereignty […] has to be effectuated on the basis of the colonial titles to which the Parties succeeded at independence".[116]

2.25. With respect to the colonial title, Colombia has shown that the colonial title along with the *effectivités* rested with Colombia; with respect to the 1928/1930 Treaty, it specifically addressed the territorial dispute and put an end to it. Nicaragua first rejected the Treaty on the basis of its purported invalidity or termination. Those arguments having been rejected, it now attempts to render the content of this same Treaty meaningless through an incredible interpretation.

2.26. In the first place, Nicaragua insists upon pure proximity as the basis for its claim. This argument has already been rejected by the Court in relation to features considerably closer

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113 NR, para. 1.20.
114 CCM, paras. 5.60-5.61.
115 NR, paras. 1.3-1.4.
116 NR, para. 1.34.

inshore.[117]

2.27. Persevering in its contradictions, Nicaragua claims that the matter of the Royal Order of 1803 is "irrelevant" and "no longer at issue" in the case, yet at the same time persists in invoking a wrong interpretation of the Royal Order of 1803.[118] It is noteworthy that Nicaragua chose to criticise by way of a footnote the Court's analysis of the Royal Order of 1803 in *Nicaragua v. Honduras*:

> "With all due respect, Nicaragua considers particularly unfortunate the introduction of the *obiter dictum* of the Court related to the Royal Order of 20/30 November 1803 in a Judgment concerning another issue where the Royal Order was not relevant for deciding that case and at a moment when the Court was precisely deliberating on the question of the Preliminary Objections raised by Colombia in this case. In any event, whatever the appearances of prejudgment this reference might have on the present case, the position of Nicaragua is that this *obiter dictum* does not have the effect of *res iudicata*." [119]

2.28. Whether the Court's statement is *res judicata* or not is beside the point. The Court's analysis in its Judgment of 8 October 2007 was both accurate and relevant for that case, as well as this one. But Nicaragua repeats now the very arguments the Court rejected in *Nicaragua v. Honduras* concerning

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[117] *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment of 8 October 2007*, para. 161. See also CCM, para. 6.15.

[118] NR, paras. 1.47-1.49, 1.65.

[119] NR, p. 8, footnote 13.

proximity and the attribution of islands to one or other of the Spanish administrative units during colonial times.

2.29. In its Judgment of 8 October 2007, the Court had to analyse which of the provinces of Honduras and Nicaragua, both part of the Captaincy-General of Guatemala, administered the insular territories in dispute. To this end, it had to determine the historical period during which this exercise would have been relevant. It is against this background that the Court determined that

> "the evidence presented in this case would seem to suggest that the Captaincy-General of Guatemala probably exercised jurisdiction over the areas north and south of Cape Gracias a Dios until 1803 when the Vice-Royalty of Santa Fé gained control over the part of the Mosquito Coast running south from Cape Gracias a Dios by virtue of the Royal Decree of that year (see also *I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, Vol. I, pp. 19-22)."[120]

2.30. Nicaragua then raises what it calls a "common sense question", which it dismisses immediately: "[d]ue to the limits of the jurisdiction in this case, that question will go unanswered".[121] The so-called "common sense question" is why, if Colombia's colonial title were legally justified, would Colombia be willing to enter into a Treaty which gave it less

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[120] *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment of 8 October 2007*, para. 161.

[121] NR, para. 24.

than the 1803 Royal Order?[122] The answer is very simple: to put an amicable end to a territorial dispute by giving up a title to territory (the Mosquito Coast) over which it could not regularly exercise its sovereignty, as neither could Spain before it. More generally, agreements on territorial matters or boundaries between States almost never reflect the entire aspirations of the parties; they are invariably compromises. That is the common-sense answer.

(2) THE SUPPOSED "UNITY" OF THE CAYS AND THE MOSQUITO COAST

2.31. In its *Reply*,[123] Nicaragua claims that:

> "On the basis of the 1928 Treaty, the position of Nicaragua is that the recognition of sovereignty over the Mosquito Coast includes all the appurtenant rights of that Coast to its off-shore maritime features. These maritime features include all those not proven to be part of the 'San Andrés Archipelago' which is recognized in that Treaty to appertain to Colombia."[124]

2.32. This interpretation is contrary to the text and the spirit of the Treaty. A review of the *travaux préparatoires* suffices to confirm that at the time of the Treaty's conclusion and approval, Nicaragua was well aware of the fact that the Mosquito Coast

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[122] NR, para. 24.

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

[124] NR, para. 13.

was a separate entity, wholly independent from the San Andrés Archipelago.[125]

2.33. If, during colonial times, the Mosquito Coast and the Islands of San Andrés had been considered a single geographic unit, the Spanish King would not have needed to distinguish between them or even mention the Islands of San Andrés, these islands being a simple "appurtenance" to the Coast.[126] Governor O'Neylle would have been appointed not only Governor of the islands of San Andrés – which he was – but also of the Mosquito Coast, which he was not. Finally, Nicaragua cannot explain why Spain – which had a governor in San Andrés – would choose not to place the cays under his authority, but rather, would prefer to attach the cays to a distant coast over which it did not have any actual control, indeed, no effective authority at all.

2.34. The history of the Mosquito Coast also contradicts the current Nicaraguan sovereignty claim on the basis of "unity" or "appurtenance". Neither the British Government, nor the Miskito King, who were in effective control of the Mosquito Coast during much of the 19th century, ever claimed that Quitasueño, Roncador, Serrana, Serranilla, Bajo Nuevo, Alburquerque and East-Southeast Cays were part of their territory. No doubt, if the United Kingdom had considered them to be appurtenances to the Mosquito Coast, it would have

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125 See, e.g., CCM, Annexes 42, 45 and 46.

126 NR, para. 1.20.

claimed them. On the contrary, while controlling the Mosquito Coast, the British Government recognized Colombian sovereignty over the cays now claimed by Nicaragua, negotiating with the Colombian Government matters related to fishing in the vicinity of the cays.[127] As has also been demonstrated, the Loubet Award of 1900 distinguished between the Mosquito Coast on the one hand – attributing the relevant part of the Mosquito Coast to Costa Rica – and the islands in the Caribbean on the other hand, in relation to which the Loubet Award recognized Colombian sovereignty.[128]

2.35. Moreover, the fixing of the 82°W meridian as the limit of the Archipelago in the 1928/1930 Treaty also shows that Nicaragua never considered that the cays and islands it now claims could constitute a geographical unit with the Mosquito Coast.[129]

2.36. Following the conclusion of the 1928 Treaty, in the Official Opinion of the Nicaraguan Government on the End of the Dispute with Colombia, on 22 September 1928, the distinction between the Archipelago and "the Nicaraguan Mosquitia"[130] is asserted in the clearest way. Nicaragua did not produce this important document in its *Memorial* and remained silent on it in its *Reply*.

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127 See above, para. 2.19.
128 See above, para. 2.10.
129 Cf. NR, para. 13.
130 CCM, Annex 196.

2.37. But this distinction – subsequently confirmed by both Parties in the preamble of the 1930 Protocol – is made consistently in Nicaraguan documents of that period:

- In the Nicaraguan Congressional Decree of 6 March 1930 approving the 1928/1930 Treaty it is said that: "the Treaty puts an end to the question pending between both Republics regarding the Archipelago of San Andrés and the Nicaraguan Mosquitia."[131]

- The Nicaraguan Chamber of Deputies in its resolution of 3 April 1930 uses the following: "put[] an end to the question pending between both Republics regarding" the two;[132] this is another document which Nicaragua does not quote in its *Reply*.[133]

- The full powers from the Nicaraguan President to the Nicaraguan Foreign Minister, 9 April 1930 has: "to put an end to the question pending between both Republics concerning the Archipelago of San Andrés and Providencia and the Nicaraguan Mosquitia."[134]

- The 1930 Report to Congress by the Nicaraguan Foreign Minister concerning the 1928/1930 Treaty has: "to put an end to the question pending between both republics

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131 CPO, Annex 10.

132 CCM, para. 5.55, and CPO, Annex 10.

133 The ratification is referred to in NR, paras. 1.9, 1.25, 7.1. NM, para. 2.101 refers to the approval as occurring on 6 March 1930, but this confuses the decision of the Senate (which did occur on 6 March 1930: NM, Annex 19) and that of the Chamber of Deputies, which as stated occurred on 3 April 1930: CPO, Annex 10.

134 CCM, Annex 200.

concerning the Archipelago of San Andrés and Providencia and the Nicaraguan Mosquitia".[135]

(3) NICARAGUA'S ADJACENCY ARGUMENT

2.38. In pursuit of a false adjacency, the *Reply* invokes a purported nominal administrative division of the Spanish American dominions established by the 1812 Constitution. According to Nicaragua:

> "The Constitution of Spain of 1812, which is the last law of the Spanish Empire that provided for territorial division in America, stipulated that the area corresponding to the Captaincy General of Guatemala included 'all the adjacent islands on the Pacific and the Atlantic' (*todas las islas adyacentes sobre el Pacífico y el Atlántico*)."[136]

2.39. First, the purpose of the relevant article of the 1812 Constitution (Article 10) was not to provide for a "territorial division in America". Rather, Article 10 contained a list of all the territories in the world considered by Spain as under its sovereignty, despite the fact that the American colonies were at war with Spain in pursuit of their independence. Second, irrespective of the content of this text –which is not exactly that attributed to it by Nicaragua – the argument is groundless since any Spanish decision subsequent to 1810, the year of the *uti possidetis juris* for South America and Mexico, would not be opposable to Colombia. In 1812, Spanish authority was no

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135 CCM, para. 5.29, and Annex 201.

136 NR, para. 1.41.

longer recognized by the independent authorities in the New World.

2.40. Nicaragua's *Reply* goes on to quote the Treaty between Spain and Nicaragua of 25 July 1850, in which the former recognized the independence of the latter.[137] It asserts that when that treaty mentions the "territories situated between the Atlantic Ocean and the Pacific, with its adjacent islands…", Spain implicitly recognized Nicaragua's sovereignty over the islands "off the Caribbean coast".[138] But moreover, it is absurd to assert that Spain would have been in a position in 1850 to recognize any Nicaraguan rights over islands and cays that were under Colombia's sovereignty. All the more so, considering that Colombia and Spain would only establish diplomatic relations in 1881, thirty years later.

2.41. In this Treaty, like other treaties of recognition with former Spanish colonies concluded around this time, Spain was not taking a position as to territorial disputes among its former colonies. In no way can the reference to "adjacent islands" be read as recognition by Spain of Nicaraguan sovereignty over the islands and cays in question. The fact is that in 1850 Nicaragua was neither in possession of, nor claimed sovereignty over, any of the islands and cays forming part of the San Andrés Archipelago. The situation of Colombia was exactly the opposite, as it exercised its sovereignty over these islands and

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137 NR, para. 1.43.
138 NR, para. 1.43.

cays, and claimed them as its own since its independence.

2.42. Notably, Nicaragua now advances an argument that it strongly rejected in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*. In response to Honduras' allegation that the Treaty of Peace concluded between Honduras and Spain had recognized Honduran sovereignty over certain disputed cays, Nicaragua's interpretation of the peace treaties concluded between Spain and both countries deserves full citation:

> "It is also worth mentioning that the treaty of recognition of the independence of Honduras signed with Her Majesty, the Queen of Spain, in Madrid on March 15, 1866, which extends (article 1) to 'the adjacent islands that lie along its coasts,' is very similar to language used previously in the treaty acknowledging the independence of Nicaragua (Madrid, 25 July 1850). *Neither of these instruments makes unambiguous reference to islands*."[139]

The Court agreed with that Nicaraguan statement:

> "The names of the adjacent islands pertaining to Nicaragua were not specified in the [1850] Treaty."[140]

It is the same argument advanced by Honduras, objected to by Nicaragua and rejected by the Court, that Nicaragua now makes against Colombia.

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[139] Emphasis added. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Nicaragua's Reply, 13 January 2003, para. 4.43.

[140] *Nicaragua v. Honduras*, *Judgment of 8 October 2007,* p. 15, para. 34.

2.43. Further, in its case against Honduras, Nicaragua's *Reply* entirely disregarded the argument it advances in the present case concerning the adjacency of the islands to the continent. Nicaragua qualified the Honduras argument as "simply, wishful thinking".[141]

2.44. Nicaragua's recent thesis of "adjacency" is also contradicted by its conduct. In the official Nicaraguan cartography Colombia submitted with its *Counter-Memorial*, only the cays and islets in the immediate vicinity of the coast were presented as Nicaraguan. That depiction of "appurtenance" did not extend to features located east of the Islas Mangles (Corn Islands). Moreover, on Nicaragua's official map of 1967, arrows pointing east, placed near the right hand margin of the map, expressly read "Islas San Andrés (Colombia)" "Islas La Providencia (Colombia)."[142] If Nicaragua had harboured any claim over the cays it could have been simply indicated in a similar manner.

2.45. In March 1890, when Nicaragua forcibly took over the Islas Mangles (Corn Islands), its claim was limited to these islands alone. A decree issued by the Nicaraguan Government stated that "the jurisdiction that the municipal government of the Mosquita Reserve has been exercising in the islands of the Atlantic Coast, across from the territory of the Reserve" was

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[141] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Nicaragua's Reply, 13 January 2003, para. 4.19, *in fine*.

[142] CCM, Vol. III, Figure 2.34.

"contrary to the full sovereignty and domain of the Republic in said islands" (the Corn Islands) and that "consequently, from the time of the publication of this decree only authorities of the Republic may exercise jurisdiction in said islands".[143] No mention is made of any other Nicaraguan claim or of Nicaraguan jurisdiction over other islands and cays "of the Atlantic Coast". Nicaragua's claim only concerned islands and cays close to the continent.

2.46. In *Nicaragua v. Honduras*, the Court rejected the sovereignty claim based on adjacency both with regard to Honduras' and Nicaragua's coasts, the disputed cays lying between 27 and 41 miles from the mainland:

> "Notwithstanding the historical and continuing importance of the *uti possidetis juris* principle, so closely associated with Latin American decolonization, it cannot in this case be said that the application of this principle to these small islands, located considerably offshore and not obviously adjacent to the mainland coast of Nicaragua or Honduras, would settle the issue of sovereignty over them."[144]

2.47. This is *a fortiori* the case with regard to the cays which are part of the San Andrés Archipelago, located as they are at distances between 100 and 270 miles from the Nicaraguan coast and having been since the early 19th century under Colombian sovereignty and jurisdiction.

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[143] NM, p. 50, para. 1.100.

[144] *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment of 8 October 2007*, para. 163.

2.48. Nicaragua's *Reply* now attempts to argue that the Court adopted such a position simply because what was at issue there were minor features in proximity to two different colonial units.[145] According to Nicaragua, the cays here by contrast "were known and had been surveyed by the Spanish authorities during the colonial period":[146] "It would seem illogical that the Spanish colonial Empire would have treated these small features independently of the mainland coasts to which they were naturally attached".[147]

2.49. But the fact is that the cays, known and surveyed by the Spanish authorities as they were, were "located considerably offshore and not obviously adjacent to the mainland coast". What is essential, and what Nicaragua persists in not addressing, is that the cays here were at all relevant times administered by authorities established on the main island of San Andrés, and were considered to form part of the same territorial unit: the San Andrés Archipelago.[148] No action was taken by Spain to attach the cays to the Mosquito Coast, which in any event it was unable to control.

2.50. To sum up, the inevitable conclusion is that the cays are not adjacent to the Mosquito Coast. But even if they were this could not produce the effect of attributing sovereignty to Nicaragua.

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145 NR, para. 1.37.
146 NR, para. 1.38.
147 NR, para. 1.39.
148 NR, paras. 12-24.

2.51. Nicaragua's thesis of "appurtenance" or "proximity" of the cays to a coast has been addressed on a number of occasions. A cay or an island can be attached to a principal territory, on the basis of proximity, when there is a certain distance between the two which may range from under three hundred metres,[149] to six nautical miles.[150] For islands situated within the territorial sea, there may be a rebuttable presumption that those islands belong to the coastal State. However, where islands are situated further away there is no such presumption.[151] Furthermore, in the instant case, Colombia and Nicaragua fixed a limit – an allocation line – to define, in a precise manner, what islands and cays appertained to each of the two countries.

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[149] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *I.C.J. Reports 1992*, p. 570, para. 356.

[150] *Eritrea/Yemen, Award of the Arbitral Tribunal in the First Stage - Territorial Sovereignty and Scope of the Dispute, Award of 9 October 1998*, p. 131, para. 467 (the Mohabbakah islands), p. 133, para. 476 (the Haycock islands).

[151] See *Island of Palmas (Miangas) Award* (1928) 2 RIAA 829, 854-855: "it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms *terra firma* (nearest continent or island of considerable size)…The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso iure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty…". See also: *Eritrea/Yemen, Award of the Arbitral Tribunal in the First Stage - Territorial Sovereignty and Scope of the Dispute*, Award of 9 October 1998, para. 474.

D. Nicaragua's Attempt to Distort the Scope of the 1928/1930 Treaty

2.52. Nicaragua attempts to distort the scope of the 1928/1930 Treaty in order to support its claim of sovereignty. Three basic points should be made.

(1) The object and purpose of the 1928/1930 Treaty

2.53. After 15 years of negotiations, Colombia and Nicaragua concluded the Esguerra-Bárcenas Treaty of 1928 and the Protocol of Exchange of Ratifications of 1930 in order to resolve a complex dispute that had broken out at different times between the parties: as to the Mosquito Coast in the mid-19th century; as to the Corn Islands, in 1890; as to the San Andrés Archipelago in 1913, when Nicaragua first claimed it as a whole.

2.54. The object and the purpose of the Treaty was clearly defined in the Preamble. As the Court recalled in its Judgment of 13 December 2007:

> "[i]n the Preamble of the Treaty, Colombia and Nicaragua express their desire to put 'an end to the territorial dispute pending between them'."[152]

The same idea was reiterated in the preamble of the 1930 Protocol of Exchange of Ratifications, the Parties similarly specified that the Treaty was concluded "to put an end to the

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[152] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 23, para. 65.

question pending between both Republics concerning the San Andrés and Providencia Archipelago and the Nicaraguan Mosquitia."[153]

2.55. Contemporary documents tell the same story. For instance, when the Colombian Government submitted the 1928 Treaty to Congress for its approval, the Minister of Foreign Affairs noted that "the settlement in question comes to dispel any motive of divergence between the two countries";[154] he also pointed out that the Treaty confirmed Colombia's sovereignty over the Archipelago and thus prevented any future claim by Nicaragua and any future controversy.[155] In addition to the examples of similar avowals by the Nicaraguan Government and Congress recalled in paragraphs 2.36 and 2.37 above, Nicaragua's understanding of the definitive character and scope of the settlement is also evidenced in the Congressional records of the Treaty's approval process:

- The records of the Nicaraguan Senate's session where the Report of the Study Commission recommending the Treaty's approval was read reflect that the Treaty

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153 CCM, Annex 1.

154 *Anales del Senado, Sesiones Ordinarias de 1928* [Annals of the Senate, Ordinary Sessions of 1928], Nº 114, Bogotá, 20 September 1928, p. 713.

155 "This arrangement forever consolidates the Republic's situation in the Archipelago of San Andrés and Providencia, erasing any pretension to the contrary, and perpetually recognizing the sovereignty and right of full domain for our country over that important section of the Republic." *Anales del Senado, Sesiones Ordinarias de 1928* [Annals of the Senate, Ordinary Sessions of 1928], N° 114, Bogotá, 20 September 1928, p. 713.

brought "to an end, the question pending between both States".[156]

- Further discussions in the Nicaraguan Senate on the inclusion of the clause concerning the 82°W meridian in the Protocol of Exchange of Ratifications, refer to that limit as being "indispensable for the question to be at once terminated forever";[157] "a need for the future of both nations, as it came to establish the geographical boundary between the archipelagos in dispute, without which the question would not be completely defined";[158] and state that its "purpose was to establish a boundary between the archipelagos which had been the reason for the dispute"[159]

Also noteworthy are the terms in which the Nicaraguan Foreign Minister wrote to the Colombian Minister in Managua, on his departure at the end of his tour of duty, on 7 May 1930:

> "My Government is deeply satisfied, Mr. Minister, with the peaceful and equitable solution of our old territorial dispute with Colombia – largely due to Your Excellency's discreet and able actions..."[160]

2.56. The current Nicaraguan thesis is in plain contradiction with this object and purpose. It implies that the 1928/1930 Treaty did not put an end to the territorial dispute existing

156 CCM, Annex 198.
157 CCM, Annex 199.
158 CCM, Annex 199.
159 CCM, Annex 199.
160 CCM, Annex 50.

between the parties with regard to Alburquerque, East-Southeast Cays, Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo. In other words, it is supposed that the parties – because of a silent, purported claim kept secret by Nicaragua – decided to keep alive a dispute over most of the features composing the Archipelago. The maintenance of the Nicaraguan claim over these features flies in the face the very object and purpose of the Treaty.

(2) THE "SAN ANDRÉS ARCHIPELAGO" IN ARTICLE I COVERS ALL THE CAYS

2.57. All the islands, islets and cays that Nicaragua now claims before the Court are part of the San Andrés Archipelago over which Colombia has exercised effective, peaceful and uninterrupted sovereignty for two centuries. This is shown by the historical evidence submitted by Colombia with its *Counter-Memorial*, on which Nicaragua's *Reply* is silent. This evidence includes, among others, reports by high Colombian officials, contracts for guano exploitation in the 19th century, official reports and correspondence from governmental agencies and officials of third countries.

2.58. Among the evidence submitted by Colombia and ignored by Nicaragua in its *Reply* are exchanges such as the following:

- correspondence between the Governor of Jamaica and the British Colonial Office in 1874, where Alburquerque,

Roncador, Serrana and Serranilla, among others, are listed as part of the Archipelago;[161]

- the records of the Colonial Office concerning the report of Captain Erskine of the *HMS Eclipse* that mentions the cays of Alburquerque, Roncador, Serrana and Serranilla as part of the Colombian Archipelago;[162]
- the correspondence between the Department of State of the United States and Edward Alexander, a New York lawyer, concerning guano deposits on the cays of Roncador, Quitasueño, Serranilla and South West Cay, in the Archipelago of San Andrés;[163]
- the Reports to Congress by the Colombian Foreign Ministers, Marco Fidel Suárez (1892 and 1894),[164] on guano exploitation in Roncador and Quitasueño, and Jorge Holguín (1896), including as part of the Archipelago the following: San Andrés, Alburquerque, Courtown Bank, Providencia, Santa Catalina, Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo;[165]
- the 1890 Note from the Prefect of the Province of Providencia to the Secretary of Government at Cartagena, enclosing affidavits from fishermen and sailors attesting to the fact that the Cays of Roncador,

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161 CCM, Annex 173.

162 Report submitted by Captain Erskine to the Commodore, 26 December 1874, enclosure to CCM Annex 173.

163 CCM, Annex 189.

164 CCM, Annexes 85 and 87.

165 CCM, Annex 89.

Quitasueño and Serrana are part of the San Andrés Archipelago;[166]

- the communication addressed in 1927 by the Colombian Minister in Managua, Manuel Esguerra to the Colombian Minister in Washington, providing an account of the negotiations that led to the conclusion of the 1928/1930 Treaty, and including the cays of Alburquerque, Courtown, Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo as part of the San Andrés Archipelago;[167]
- the Colombian notification to the Government of Nicaragua and, through the Government, to the Congress, concerning the Olaya-Kellogg Agreement concluded with the United States, at the time the approval of the 1928 Treaty was being considered by the Congress, asserting that the cays were part of the Archipelago.[168]

2.59. It is unnecessary to enumerate once again the vast cartographic evidence, or the publications (sampled in the *Counter-Memorial*, Appendix 2) on Colombian geography, economy and history. This consistently reflected the established notion that the San Andrés Archipelago was a group consisting of the islands of San Andrés, Providencia and Santa Catalina as well as numerous cays, including Roncador, Quitasueño,

166 Enclosure to CCM Annex 82.
167 CCM, Annex 112.
168 CCM, Annex 49.

Serrana, Serranilla, Bajo Nuevo, Alburquerque and East-Southeast.

2.60. Nicaragua's *Reply* insists that the different cays are detached and at quite a distance from one another, making it impossible to consider them as forming part of the Archipelago.[169] This not only fails to rebut the analysis made by Colombia's *Counter-Memorial* on this point, it does not address the arguments in the *Counter-Memorial* at all. Colombia respectfully refers the Court to the relevant paragraphs of its *Counter-Memorial*.[170]

2.61. Nicaragua distinguishes three groups of cays, arguing that they are physically separate from one other and do not form a uniform whole.[171] But it is quite normal that archipelagos comprise different groups of islands.[172] With respect to the "first group" of islands identified by Nicaragua (Alburquerque and East-Southeast Cays), Nicaragua accepts "a certain proximity and possible connection with the group of 'islands of San Andrés'".[173] Nicaragua now contends for the first time, and unashamedly for the purpose of claiming them, that this first

169 NR, paras. 1.74-1.75, 4.24.

170 CCM, paras. 6.13-6.16.

171 NR, para. 1.73.

172 For example, Chagos is an archipelago in the Indian Ocean comprising sixty-five different islands which make up the island groups of the Salomon Islands, Perros Banhos, Nelsons Island, Three Brothers, Danger Island, the Egmont Islands and Diego Garcia; the Andaman archipelago in the Bay of Bengal comprises two groups of islands: the Andaman Island group and Nicobar Island group; and the Philippines is an archipelago comprising three major island groups of Luzon, Visayas and Mindanao and minor sub-groups.

173 NR, para. 1.74.

group of cays comprised in the past the Islas Mangles (Corn Islands)![174] It suffices to note that (1) in the 1928/1930 Treaty, Colombia recognized the sovereignty of Nicaragua over these islands specifically by name and not as part of a larger group; and (2) at no time from colonial times to the present day did Spain or its successors ever treat Alburquerque and East-Southeast Cays as a group with Mangle Grande and Mangle Chico islands.

2.62. Nicaragua refers then to what it calls the "second group" of cays: "Roncador and Serrana".[175] Again, there is no attempt in Nicaragua's *Reply* to furnish any concrete evidence of a purported Nicaraguan title. Nicaragua is obliged to recognize that Colombia protested the inclusion of the cays of Roncador, Quitasueño and Serrana in a list drawn up by the United States Department of the Treasury, whereas Nicaragua did not. It justifies this lack of protest on the ground that the Mosquito Coast was "still in dispute and *de facto* controlled by Great Britain".[176] But foreign control does not prevent a State from lodging a protest. It was in Washington DC where Colombian and Nicaraguan diplomats took cognizance of that list, and could protest it if they chose. The absence of Nicaraguan protest simply shows that it did not consider itself as claiming Quitasueño, Serrana and Roncador at that time.

2.63. The "third group" of cays identified by Nicaragua

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174 NR, para. 1.75.
175 NR, para. 1.76.
176 *Ibid.*

comprises Bajo Nuevo and Serranilla. Again, no attempt is made to advance any actual basis of sovereignty over these cays, located as they are at distances of over 200 nautical miles off the Nicaraguan coast, closer as they are both to Jamaica and to other Colombian territory. In fact, Nicaragua had never claimed these cays before bringing its case to the Court – in the case of Bajo Nuevo, before filing its *Memorial*. It neither objected the Colombia-Jamaica Fishing Agreements in the 1980s nor the Maritime Delimitation Treaty of 1993.[177]

2.64. A new argument advanced in the *Reply* is that the maritime features in dispute – with the exception of Quitasueño, Roncador and Serrana – are not expressly mentioned by name in the 1928/1930 Treaty. According to Nicaragua "[i]f they were thought to be part of the 'San Andrés Archipelago' they would naturally have been mentioned".[178] This contention is noteworthy for two reasons: (1) it implies – contrary to what Nicaragua contends elsewhere – that Quitasueño, Roncador and Serrana form part of the Archipelago; and (2) it ignores the reason why these three cays were explicitly mentioned in the second paragraph of Article I, namely, to exclude them from the scope of the 1928/1930 Treaty since they were the object of a dispute between Colombia and a third State. There was simply no need to mention by name each of the other components of the Archipelago, particularly when the 1928/1930 Treaty

177 CCM, paras.4.182-4.188.
178 NR, para. 16.

established the western limit of the Archipelago at the 82°W meridian.

(3) NICARAGUA'S ERRONEOUS INTERPRETATION OF ARTICLE I, PARA. 2 OF THE TREATY

2.65. In the 1928/1930 Treaty, the second paragraph of Article I deals with the special situation of three of the Archipelago's cays, Roncador, Quitasueño and Serrana: they "are not considered to be included in this Treaty" on the basis that sovereignty over them is in dispute between Colombia and the United States".

2.66. Nicaragua's *Reply*, again, makes no attempt to furnish any concrete evidence of a Nicaraguan title to Roncador, Quitasueño and Serrana.[179] In Nicaragua's view, the second paragraph of Article I means that these three cays do not form part of the Archipelago of San Andrés.[180] But on the contrary, the provision is only explicable on the basis that they *are* part of the Archipelago: only on that basis was it necessary to put them beyond the reach of the "recognition of sovereignty" provision of Article I to which they would otherwise have been subject.

2.67. Article I also necessarily implies that Nicaragua itself did not have any claim to sovereignty over the three cays. Nicaragua accepted that sovereignty over them "is in dispute between Colombia and the United States" – no mention of any

179 NR, para. 1.76.
180 NR, paras. 1.88-1.97.

dispute involving any Nicaraguan claim or right. If Nicaragua had had any claim to the three cays, it would surely at least have mentioned it. There was no such mention – because there was no such claim.

2.68. The text of the Colombian notification to the Nicaraguan Government, and through it to the Nicaraguan Congress, of the Olaya-Kellogg Agreement with the United States, prior to the latter's approval of the 1928 Treaty, states:

> "…*the Cays of Roncador, Quitasueño and Serrana* having been excluded from the Treaty of 24 March due to their being in dispute between Colombia and the United States, the Government of the latter, recognizing Colombia as owner and sovereign of the *Archipelago, of which those cays are part*, concluded with the Government of Colombia, last April, an agreement…"[181] (Emphasis added)

Thus at the crucial time Nicaragua was expressly reminded that Roncador, Quitasueño and Serrana formed part of the San Andrés Archipelago. The Nicaraguan Congress and Government not only did not object: the Colombian notification was published in its Official Journal.[182] Nicaragua never protested the Olaya-Kellogg Agreement.

2.69. The fact that for over forty years Nicaragua did not voice any reservations with regard to Colombia's exercise of

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[181] CCM, Vol. II, Annex 49.

[182] Transcribed in the Record of session XXIV of the Chamber of the Senate of the Nicaraguan Congress, 21 January 1930. *La Gaceta,* Diario Oficial, Año XXXIV, Managua, D.N., Nº 35, 11 February 1930, p. 273: CCM, Annex 49.

sovereignty and jurisdiction, not only over the cays of Alburquerque, East-Southeast, Serranilla and Bajo Nuevo, but also over Quitasueño, Serrana and Roncador – the latter expressly mentioned in the 1928 Treaty – underscores the artificiality of Nicaragua's claim advanced in these proceedings.

(4) THE LIMITED SCOPE OF THE "MOSQUITO COAST" IN ARTICLE I OF THE TREATY

2.70. Nicaragua's *Reply* contends that every feature that does not form part of the San Andrés Archipelago is Nicaraguan, because these features are "appurtenances" to the Mosquito Coast.[183] This is a pure *petitio principii*. If Nicaragua claims sovereignty over these features, it must submit concrete evidence in support of this claim. Not a single piece of evidence has been furnished. Neither Article I of the 1928/1930 Treaty nor the alleged "proximity" of the features to the Mosquito Coast provides any legal basis for such a claim.

2.71. Leaving aside for a moment the fact that all the cays *do form part* of the San Andrés Archipelago, the following paragraphs will demonstrate that the two propositions on which this Nicaraguan argument is premised have no basis.

(a) Nicaragua's contention that everything not belonging to the San Andrés Archipelago is appurtenant to the Mosquito Coast

2.72. Article I of the 1928/1930 Treaty only recognizes Nicaraguan sovereignty over "the Mosquito Coast between

[183] NR, para. 1.20.

Cape Gracias a Dios and the San Juan River, and over the Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island)". Colombia's recognition of Nicaraguan sovereignty, with regard to islands, was *specifically* "over the Mangle Grande and Mangle Chico islands, in the Atlantic Ocean (Great Corn Island and Little Corn Island)". It said nothing about islands, islets and cays that were "appurtenances" to the Mosquito Coast or to the Islas Mangles (Corn Islands). This is in clear contrast with the wording employed in the same Article I of the 1928 Treaty when Nicaragua recognizes Colombian sovereignty "over the islands of San Andrés, Providencia and Santa Catalina and *all the other islands, islets and cays that form part of the said Archipelago*". What Nicaragua proposes is that the terms of Article I stated in a restrictive way be interpreted broadly, while at the same time, other terms contained in the same Article which are worded broadly should be interpreted narrowly.

2.73. The only explanation given in Nicaragua's *Reply* to justify such an extraordinary interpretation of this treaty provision is that "all features that are not proven to be part of the 'San Andrés Archipelago' of necessity are appurtenances of the Mosquito Coast".[184] It may well be a matter "of necessity" for Nicaragua to invoke such a last-ditch argument, but this does not constitute a legal argument, nor is it evidence to be taken into account for the purpose of these proceedings. It is for Nicaragua to prove what this purported "necessity" would be

[184] NR, para. 1.20.

and what would be its scope.

2.74. Colombia showed in its *Counter-Memorial* that the proximity/appurtenance argument has neither factual nor legal basis. As a matter of fact, none of the islands of the Archipelago can be considered as being in any way appurtenant to the Mosquito Coast, situated as they are between 100 and 270 nautical miles away. As a matter of law, there is no such presumption, certainly as to islands lying beyond the mainland territorial sea.[185]

2.75. A Chamber of the Court has had occasion to refer to a notion similar to that of "appurtenance" when dealing with the determination of sovereignty over islands, namely the notion of "dependence". The Chamber applied this notion to a small island, considered to be a "dependence" of a larger island (Meanguera with regard to Meanguerita):

> "The small size of Meanguerita, its contiguity to the larger island, and the fact that it is uninhabited, allow its characterization as a 'dependency' of Meanguera, in the sense that the Minquiers group was claimed to be a 'dependency of the Channel Islands' (*I.C.J. Reports 1953*, p. 71)."[186]

2.76. The *Minquiers* case serves to further undermine Nicaragua's "appurtenance" theory. This group of minor

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185 See CCM, paras. 6.13-6.15.

186 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *I.C.J. Reports 1992*, p. 570, para. 356.

features, even closer to the French island of Chausey than to British territory, was considered a dependency of the Channel Islands group, even though it was located not in the immediate vicinity of the major islands of this group, on the basis of British activities exercised *à titre de souverain*.[187] Indeed, the Court's Judgment in the *Minquiers and Ecrehos* case shows that *effectivités* would prevail over the simple argument of contiguity or adjacency. Clearly, the notion of "appurtenance" does not assist Nicaragua.

(b) Nicaragua's claim based on the cays' location on "its" continental shelf

2.77. Nicaragua maintains its claim concerning the cays on the ground that they are located on "its" continental shelf.[188] Given the absence of any articulated argument in favour of this position, its defects can be dealt with briskly.

2.78. The first defect is temporal. The continental shelf as a juridical construction did not exist prior to 1945. It therefore cannot sustain any alleged interpretation of the Spanish administrative divisions during colonial times; nor is it relevant to the appreciation of the factual situation at the time of the conclusion of the 1928/1930 Treaty. Moreover, given that there were no *terra nullius* territories in America at the time of the independence of the former Spanish colonies between 1810 and

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[187] *The Minquiers and Ecrehos case (France/United Kingdom),I.C.J. Reports 1953*, p. 71.

[188] NR, paras. 4.19, 6.9.

1821 – as Nicaragua has repeatedly acknowledged[189] – it cannot be held that the alleged title over the cays and banks would be based on a legal notion that would only take shape in international law 150 years later.

2.79. Not only is the assertion that the islands and cays are located on the "Nicaraguan continental shelf" anachronistic, it is also legally untenable. The principle that "the land dominates the sea" determines the relationship between land territory and maritime spaces in international law. This principle was recalled by the Court in *Nicaragua* v. *Honduras* as follows:

> "On a number of occasions, the Court has emphasized that 'the land dominates the sea' (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 51, para. 96; Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p. 36, para. 86; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 97, para. 185)*."[190]

To say that land territory, including islands, belongs to a State which claims adjacent maritime zones is to ignore basic principle and to turn the law upside down.

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189 NM, paras. 2.146, 2.178.

190 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment of 8 October 2007,* p. 34, para. 113.

(c) The view that the 82°W meridian "maintained" Nicaragua's alleged sovereignty over cays to the east is groundless

2.80. The recognition of Nicaraguan sovereignty in the 1928 Treaty did not extend to other islands and cays besides the Islas Mangles (Corn Islands). In order to prevent the possibility that other islands, islets and banks located west of the San Andrés Archipelago might be claimed by Colombia, Nicaragua demanded – and Colombia accepted – that both the Nicaraguan Congressional decree approving the Treaty, as well as the Protocol of Exchange of Ratifications, specify the 82°W meridian as the western limit to the Archipelago.

2.81. It is not credible to assert that the intention of the parties was thereby to fix an effective limit only for Colombia to the west but not for Nicaragua to the east.[191] Equally untenable is the proposition that Nicaragua was free, at any time, to decide to claim islands, islets and cays located to the east of that meridian – features it had never claimed and over which Colombia had uninterruptedly exercised its sovereignty and jurisdiction. Neither the Colombian nor the Nicaraguan governments ever considered that that was a possibility.

2.82. The debates in Nicaragua's Congress show that the 82°W meridian was considered as a limit, and that the Nicaraguan Government believed that such a limit was indispensable to bring a definitive end to the dispute between

[191] NR, para. 1.26.

the two States.[192]

2.83. If indeed Nicaragua considered that it had sovereignty over islands, islets and cays located to the east of the 82°W meridian (*quod non*), such claims would surely have been included (or at least preserved) in the 1928 Treaty. It is similarly incomprehensible that no such mention of a claim of sovereignty over the cays by Nicaragua was included in the Protocol of Exchange of Ratifications in 1930, nor was such a claim the subject of a treaty reservation, or any official declaration issued by the Nicaraguan Government or the Nicaraguan Congress.

2.84. This strange theory is even in contradiction with the argument that the 82° W meridian is an "allocation line", which Nicaragua has also held before the Court,[193] and as high Nicaraguan officials have also long stated,[194] according to which, it had the effect of determining which islands, cays and islets belonged to Colombia and to Nicaragua, respectively. In fact, it is perfectly normal for delimitation treaties to provide limits like the 82°W meridian contained in the 1928/1930 Treaty in order to determine issues of sovereignty. As has been noted:

> "It is not uncommon for treaties dealing with cession or allocations of sovereignty over islands or other territory to define the areas ceded or

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[192] CCM, Annexes 198 and 199; CPO, Annex 9, pp. 65-66.

[193] NM, paras. 2.225-2.231, 2.237, 2.244; NWS, p. 3, paras. 5, 7, and paras. 1.58, 1.60, 1.86; CR 2007/17, p. 17, para. 43; p. 19, para. 49; p. 58, para. 11.

[194] See e.g., NM, Annexes 31, 34, 35.

> allocated between those states on the basis of lines drawn at sea. The essential purpose of those lines is to provide a convenient reference for determining which islands and territories are ceded as allocated to particular party."[195]

Obviously, if the 82°W meridian had indeed been an "allocation line" as Nicaragua has asserted, its contention to the effect that there were Nicaraguan islands and cays not only to the west, but also to the east of that line, would totally nullify that argument.

2.85. The explanation of the scope of the 82° meridian was clearly stated by the Nicaraguan Minister when he informed the Senate about the Protocol negotiated with his Colombian colleague. He referred to the line – indicating the Nicaraguan position – as "*the* boundary in this dispute with Colombia". Its purpose was "to establish a boundary between the archipelagos which had been the reason for the dispute".[196]

E. Nicaragua's Conduct Compared with that of Colombia

2.86. In support of its claim that all the maritime features not proven to be part of the San Andrés Archipelago would appertain to it by virtue of the recognition of sovereignty over the Mosquito Coast in the 1928 Treaty, Nicaragua quotes Colombia's *Counter-Memorial* as follows:

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[195] B.H. Oxman, "Political, Strategic, and Historical Considerations", in: J. Charney and L. Alexander, eds., *International Maritime Boundaries*, Vol. I, ASIL/Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 32. Also quoted in NM, para. 2.231.

[196] See CCM, para. 5.54 and Annex 199.

> "[T]he Court acknowledged that the whole Archipelago belongs to Colombia. All that Colombia needs to show at the merits stage is that those cays do belong to the Archipelago."[197]

2.87. Despite the fact that the burden of proof is incumbent on the Applicant, Colombia has amply proven the composition of the San Andrés Archipelago.[198] In any case, the Nicaraguan quotation is characteristically incomplete. The next sentence reads:

> "Additionally, Colombia will prove that these cays have been administered by Colombia to the exclusion of third States, in particular Nicaragua. Either of these facts would be enough to sustain Colombia's sovereignty: in fact both are true, as will be seen."[199]

2.88. In its *Counter-Memorial*, Colombia provided an extensive account of hundreds of *effectivités* carried out *à titre de souverain* before and after the conclusion of the 1928/1930 Treaty, in a peaceful and uninterrupted manner over each and every one of the cays that Nicaragua now claims.[200] Nicaragua cannot show a single similar act in nearly 200 years of republican existence. This is readily explained on the basis that Nicaragua never considered, either before or after 1928, that it had any rights over any of the cays.

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197 NR, para. 13.
198 CCM, Chapter 2.
199 CCM, para. 1.9.
200 CCM, Chapter 3.

2.89. For instance, Colombian legislation has regulated the territorial organization and administration of the San Andrés Archipelago as Colombia's own political and territorial structure evolved; the Colombian Government has consistently regulated fishing activities in the maritime areas appertaining to the San Andrés Archipelago; Colombia has enforced its criminal and civil legislation over the entire Archipelago; the Colombian authorities have carried out surveillance and control activities over the entire Archipelago; Colombia has conducted seismic studies, surveys and extensive mapping and charting of the Archipelago; the Colombian Navy has carried out search and rescue operations and the Port Captaincy of San Andrés has conducted investigations on the naval incidents occurred on the cays and their appurtenant areas; Colombia has sought to increase scientific knowledge of the San Andrés Archipelago with a view to preserving and making sound use of its natural wealth and improving the environment; the Autonomous Corporation for the Sustainable Development of the Archipelago (Coralina) was created in 1993 with a jurisdiction comprising the entire territory of the Archipelago Department and its appurtenant maritime areas; public works have been built and maintained by the Colombian Government on the Archipelago's cays (including, among others, lighthouses, quarters and facilities for Navy detachments, solar panels, water collection wells, facilities for the use of the Navy infantry corps and fishermen who visit the cays, and the installation of weather and radio stations or antennae).[201] The Navy infantry

[201] CCM, Chapter 3.

detachments deployed in most of the cays conduct missions relating to fishing control, the preservation of the environment, and the fight against drug trafficking and other illegal activities.

F. Conclusion

2.90. This Chapter has demonstrated the triviality of the Nicaraguan territorial claim. After failing in its attempt to reopen the discussion about Colombian sovereignty over the San Andrés Archipelago as such, Nicaragua continues to pursue its territorial claim by asserting that the cays do *not* form part of the Archipelago. This is in clear contradiction with Nicaragua's previous conduct and with all of the evidence at the disposal of the Court.

2.91. In particular:

(1) There is overwhelming proof of Colombian sovereignty over all the cays, based on *uti possidetis juris* and *effectivités* before the entry into force of the 1928/1930 Treaty, and on this conventional title and *effectivités* after its entry into force. In contrast, Nicaragua is not able to show any shadow either of title or *effectivités*.

(2) The 1928/1930 Treaty settled the entire territorial dispute between Colombia and Nicaragua once and for all. This includes all the cays that Nicaragua now claims.

(3) Nicaragua's insistence upon the same arguments the Court rejected in its 13 December 2007 Judgment, or

which were rendered unnecessary by it, such as Nicaragua's flawed interpretation and application of the *uti possidetis juris* rule, are groundless;

(4) Nicaragua's theory of the "appurtenance" of the cays to the Mosquito Coast is untenable, both during and after colonial times;

(5) The cays have been considered to constitute part of the Archipelago and have been administered peacefully and uninterruptedly by Colombia since independence;

(6) Nicaragua had never claimed the Archipelago's cays individually (it only claimed the Archipelago as a whole, for the first time, in 1913) either before or after the 1928/1930 Treaty. It would be 40 years later that it would first attempt to claim Roncador, Quitasueño and Serrana; 71 years later that it would first attempt to claim Serranilla; and some years later still that it would first attempt to claim Alburquerque, East-Southeast and finally Bajo Nuevo (in the *Memorial*).

(7) By reason of the 1928/1930 Treaty, where it expressly acknowledged that sovereignty over the cays of Roncador, Quitasueño and Serrana was in dispute between Colombia and the United States of America, Nicaragua precluded itself from making any claim over them;

(8) During the Treaty's approval process in the Nicaraguan Congress, the Nicaraguan Government and Congress

were fully aware of the composition of the Archipelago, including the cays of Roncador, Quitasueño and Serrana.

(9) The 82°W meridian line precludes Nicaragua from making any claim of sovereignty to any feature to the east of this line.

(10) In any event, the continuous and peaceful exercise of State authority confers title on Colombia, confirmed by the general recognition by third States and by Nicaragua's conduct itself.

Chapter 3

QUITASUEÑO

A. Introduction

3.1. The geographical location and history of Quitasueño as a maritime feature was very fully set out in the Counter-*Memorial*.[202] As was shown there, Quitasueño has been treated throughout as the first and one of the most valuable of the Archipelago's features from a resource point of view. Moreover the resource – the Quitasueño fishery – has been regulated and managed by Colombia since the mid-19th century with the express recognition or at least acquiescence of other States. Quitasueño was identified in many early maps and charts—more often than other elements of the Archipelago and appears in the geographical descriptions and voyage chronicles of the Caribbean area, even dating back to the colonial times before the independence of both Colombia and Nicaragua. It has not been treated as simply part of the high seas, but the fishery was, and is, regulated by Colombia *erga omnes*. As such, it was a recognized part of the Archipelago, recognized also by Nicaragua in the 1928/1930 Treaty. (Quitasueño of course is located wholly to the east of the 82°W meridian, recognized in 1930 as the western limit of the Archipelago.) This history

[202] See CCM, paras. 2.25-2.29, 4.5-4.108.

Nicaragua can hardly deny; but it seeks to negate it by treating Quitasueño as a wholly submerged bank.

B. The Issues as Presented in the Pleadings

3.2. Despite the fact that Nicaragua had never considered that Quitasueño was not capable of appropriation in sovereignty, there is now a major difference between the Parties as to the status of Quitasueño: according to Colombia it has the status of a group of islands and other features as defined in the law of the sea; for Nicaragua, on the other hand, it is a submerged bank; it can have no maritime zones of its own, and is incapable of appropriation.[203]

3.3. In its Application, Nicaragua was more equivocal. Sovereignty over "the Roncador, Serrana, Serranilla and Quitasueño keys" was claimed subject to the proviso "(in so far as they are capable of appropriation)."[204] This proviso was not specific to Quitasueño. It may be noted that in 1972 when the Nicaraguan Congress by a Formal Declaration claimed sovereignty over the three features, Quitasueño, Roncador and Serrana (but not Serranilla),[205] it listed Quitasueño first and likewise made no distinction as between the three features.[206]

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[203] See NR, paras. 4.25-4.43.

[204] Nicaraguan Application, para. 2.

[205] Formal Declaration of 4 October 1972, NM, Vol. II, Annex 81.

[206] The Formal Declaration is cited by the Court in its *Preliminary Objections, Judgment of 13 December 2007*, para. 27.

All were apparently capable of being claimed in sovereignty by Nicaragua (as they had been by the United States).[207]

3.4. In its *Memorial*, Nicaragua tried to avoid the implications of the Formal Declaration, which was annexed but not cited in the text. Although it asserted that "there are no islands on this bank",[208] Nicaragua glossed over the fact that in its own diplomatic practice it has treated all three features as subject to its sovereignty and declined to draw any legal distinction between them.[209] Moreover, in its Submissions it was not nearly as categorical and chose to leave the door open to its claim of sovereignty over Quitasueño:

> "If the Court were to find that there are features on the bank of Quitasueño that qualify as islands under international law, the Court is requested to find that sovereignty over such features rests with Nicaragua."[210]

3.5. In its *Counter-Memorial*, Colombia addressed the status of Quitasueño in detail, emphasising its constant, and vis-à-vis Nicaragua exclusive, exercise of jurisdiction over Quitasueño and its surrounding waters,[211] and the non-exercise by Nicaragua of any such authority.[212] It also showed that

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207 Unlike the Executive branch, which by now did make a distinction: see NM Annexes 34 and 35 (Nicaragua's protests to US and Colombia of 7 Oct. 1972).

208 NM, para. 3.114; cf. NM, para. 2.187, 3.123.

209 See e.g., Nicaraguan Memorandum of 23 June 1971 (NM, Vol. II, Annex 31).

210 NM, Submissions, (3), p. 265.

211 See Section D below.

212 CCM, para. 3.115.

Quitasueño was always referred to as part of the Archipelago. Notable examples were the Foreign Minister's Reports to Congress in 1892 and 1894,[213] when reporting on the Government's actions in light of the guano exploitation activities carried out by United States citizens:

> "Certain merchants from the United States have arrived at the cays of Roncador and Quitasueño, in the Colombian Archipelago of Providencia, and extracted, without the Government's permission, large quantities of the guano that lies on those islets and that is one of the assets of the Republic. Our Legation at Washington has denounced these facts that violate the territory and defraud the Nation from a source of riches the exploit of which must be attended to as soon as possible. That the islets are of Colombia's domain cannot be doubted, since they are part of the Archipelago of Providencia…"[214]

And the Report of Foreign Minister Holguin in 1896,[215] who referred to

> "the islands of the Archipelago of San Andrés, formed by three groups of islands … the first of these groups being formed by the islands of Providencia and Santa Catalina and the cays of Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo..."[216]

The same position was taken in other official statements, earlier and later.[217] In light of statements such as these, there cannot be

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213 CCM, para, 2.55, Annexes 85 and 87.
214 CCM, para. 2.55, Annex 85.
215 CCM, Vol. II, Annex 89.
216 CCM, Vol. II, Annex 89.
217 See e.g., CCM, paras. 4.10 (1892), 4.12 (1893), 4.17-4.18 (1895), 4.21 (1914), 4.25 (1919).

any doubt that it was considered part of the Archipelago prior to the Treaty of 1928/1930. As to *effectivités* over Quitasueño, likewise there can be no doubt: the record contains no indication of any Nicaraguan act, whereas Colombia has long exercised sovereignty and jurisdiction over it, in particular through the regulation of fisheries and the administration and running of the two lighthouses, without Nicaragua ever objecting or protesting these activities. This long-standing position is discussed further in Section D below.

3.6. The *Counter-Memorial* also recounted how the United States claimed sovereignty over Roncador, Quitasueño and Serrana, and how it was agreed that these features would be excluded from the scope of the Treaty, on the ground that "both Governments have claimed rights of sovereignty over these cays".[218] The Olaya-Kellogg Agreement was officially communicated to Nicaragua by the Colombian Minister in Managua prior to the approval of the 1928/1930 Treaty, without occasioning comment or protest.[219] Thus when Article I(2) of the 1928/1930 Treaty provided that the three features were not considered as included in that Treaty on the ground that "sovereignty over [them] is in dispute between Colombia and the United States of America", and Nicaragua made no observation, it was natural and obvious to conclude (1) that Nicaragua itself had no claim to the three features; (2) that without Article I(2), the three features would have been

[218] Olaya-Kellogg Agreement, 10 April 1928: CCM, Vol. II, Annex II, preamble.

[219] CCM, para. 4.42; Annex 49.

considered as included in the Treaty; and (3) that "*el dominio*" or "sovereignty"[220] over the three features was an issue, implying that they were capable of appropriation in sovereignty.

3.7. Colombia annexed to its *Counter-Memorial* a Navy Study of September 2008, identifying a significant number of high-tide elevations – i.e., islands – and even more low-tide elevations, on Quitasueño.[221]

3.8. In its *Reply*, Nicaragua did not address the Navy Study on its merits. While repeating its submission in the alternative,[222] it unequivocally denies that Quitasueño is capable of appropriation in international law.[223]

3.9. In this Chapter, Colombia will outline the settled definition of an island in the international law of the sea (Section C), then describe the facts of the geomorphology of the area and the presence of numerous high tide elevations (Section D), before turning to review the rather considerable legal history of Quitasueño and its relevance to this dispute (Section E).

C. The Applicable Law

3.10. The modern consensus on islands as subjects of sovereignty, and specifically on the definition of islands, is as

220 The French translation has "la possession": CCM, para. 5.18.
221 CCM, Vol. II, Annex 171.
222 NR, p. 239, para. (2).
223 NR, paras. 4.27-4.43.

set out in Article 10(1) of the 1958 Geneva Convention on the Territorial Sea:

> "Article 10
>
> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. The territorial sea of an island is measured in accordance with the provisions of these articles."

Article 10(1) is repeated verbatim in Article 121(1) of UNCLOS. Article 121 as a whole reads:

> "Article 121 Regime of islands
>
> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

Article 10(1) has been cited by the Court as an undoubted rule of customary international law.[224] Colombia is a party to the 1958 Geneva Continental Shelf Convention, according to Article 1(b) of which, an island is entitled to a continental shelf. The definition of island is presumed to be that contained in

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[224] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 40, at p. 99, para. 195.

Article 10(1) of the 1958 Geneva Convention on the Territorial Sea.[225] Article 121(1) is subject to a qualification concerning "rocks" in Article 121(3). The crucial point however is that rocks are a kind of island; they meet the definition in Article 121(1) but, if they are unable to "sustain human habitation or economic life of their own" they have no exclusive economic zone or continental shelf. But it follows from the express language of Article 121 that rocks, i.e., small features which are above water at high tide, generate at least a territorial sea and a contiguous zone, "determined in accordance with the provisions of this Convention applicable to other land territory".

3.11. In accordance with the position under customary international law (and reflected in these treaty provisions), there is no minimum size for an island; the only criteria are that the feature in question must be (a) naturally formed, (b) surrounded by water and (c) above water at high-tide. The position, which began to be articulated in the work for the 1930 Hague Codification Conference, is summarised by O'Connell in the following terms:

> "Provided that a feature corresponds with the definition of an island, it generates a territorial sea irrespective of its size or character. From time to time suggestions have been made that only islands capable of habitation ought to be entitled to territorial waters, because the freedom of the sea means freedom of utilization, and useless restrictions on utilisation derogate from

[225] DW Bowett, *The Legal Regime of Islands in International Law*, Oceana Publications, Dobs Ferry, New York / Sijtoff & Noordhoff, Netherlands, 1979, p. 33.

> that principle. It has been suggested that isolated rocks serve no function in the economics of the sea, nor any useful role in enabling a mariner to denote where the territorial sea begins, unless it is close to the coast. However, at the Third Law of the Sea Conference the effort to distinguish between features was confined to excluding from the calculation of the EEZ or continental shelf, but not from that of the territorial sea, rocks which cannot sustain human habitation or economic life of their own."[226]

3.12. The position adopted in 1958 was further consolidated and definitively confirmed – as concerns the territorial sea and the contiguous zone – in 1982. The interpretation which follows from its express language is further confirmed, if confirmation is needed, by the *travaux* of Article 121.[227] Before settling on and confirming the "automatic" language of Article 10(1) of the 1958 Geneva Convention, UNCLOS III considered most possible alternatives, including:

- a minimum size requirement (Malta proposed 1 km^2);[228]
- a distinction between larger islands and "islets and small islands, uninhabited and without economic life", the latter deprived of any maritime entitlement (Romania);[229]
- the exclusion of any maritime entitlement for "rocks and low-tide elevations" (Turkey);[230]

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[226] DP O'Connell, *The International Law of the Sea*, ed., IA Shearer, Oxford, OUP, 1982, Vol. I, p. 194.

[227] These are usefully summarised in M Nordquist, ed., *Virginia Commentary,* Kluwer, The Hague, 1995 Vol. III, 321-339.

[228] Virginia Commentary, 328.

[229] Virginia Commentary, 330.

[230] Virginia Commentary, 333.

- the exclusion of non-adjacent rocks, except for safety zones (14 African countries).[231]

None of these proposals was adopted.

3.13. Whether a feature is above water at high-tide is quite simply a matter of fact. In *Qatar/Bahrain*, a dispute arose over the status of a small feature, Qit'at Jaradah, which the United Kingdom in 1947 (consistently with its position at that time) had not considered entitled to a territorial sea. The Court treated the question of status as a pure question of fact, applying Article 10(1) of the Geneva Convention on the Territorial Sea/UNCLOS Article 121(1):

> "195. The Court recalls that the legal definition of an island is 'a naturally formed area of land, surrounded by water, which is above water at high-tide' (1958 Convention on the Territorial Sea and Contiguous Zone, Art. 10, para. 1; 1982 Convention on the Law of the Sea, Art. 121, para. 1). The Court has carefully analysed the evidence submitted by the Parties and weighed the conclusions of the experts referred to above, in particular the fact that the experts appointed by Qatar did not themselves maintain that it was scientifically proven that Qit'at Jaradah is a low-tide elevation. On these bases, the Court concludes that the maritime feature of Qit'at Jaradah satisfies the above-mentioned criteria and that it is an island which should as such be taken into consideration for the drawing of the equidistance line."[232]

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231 Virginia Commentary, 330.

232 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 40, at p. 99, para. 195.

Having found that Qit'at Jaradah was an island and capable of appropriation, the Court went on to deal, in turn, with the issue of sovereignty over Qit'at Jaradah,[233] and with the issue of delimitation of maritime zones relative to it.[234]

3.14. Three points emerge from the Court's handling of this aspect of the case.

(1) Whether a feature qualifies as an island or a low-tide elevation is a question of present-day fact. That some other government may not have recognized that feature as an island at some earlier point of time is not decisive, or even particularly relevant. Nor is it decisive that the feature in question "has never been reflected on nautical charts as an island but always as a low-tide elevation".[235] Expert evidence is admissible in determining the question of fact.

(2) The Court accepted the categorical distinction between an island (however small) and a low-tide elevation. Sovereignty over islands is determined by the international law of land territory (title and/or *effectivités*). By contrast, sovereignty over low-tide elevations is determined by the law of the sea, i.e., by maritime delimitation. Thus in *Qatar v Bahrain*, sovereignty over a low-tide elevation, Fasht ad Dibl,

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233 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 40, at pp. 99-100, para. 197.

234 *Ibid.,* pp. 104-109, para. 219.

235 *Ibid.,* p. 99, para. 193.

located within Qatar's territorial sea was with Qatar.[236] Likewise in *Malaysia/Singapore*, the status of South Ledge, a low-tide elevation, was held to depend on the maritime delimitation still to occur between Middle Rocks and Pedra Branca/Pulau Batu Puteh.[237]

(3) Even tiny features which qualify as islands "should as such be taken into consideration for the drawing of the equidistance line." How much weight they are given in the delimitation process depends on the circumstances, a matter discussed in Chapter 6.[238]

3.15. In the present case the feature in issue, Quitasueño, is not a low-tide elevation but includes numerous high-tide elevations or islands as defined in Article 10(1) of the Territorial Sea Convention/Article 121(1) of UNCLOS. This will now be demonstrated in fact, and relevant consequences drawn.

D. Existence of Islands and Low-tide Elevations on Quitasueño and their Legal Consequences

3.16. In its *Counter-Memorial*, Colombia presented the results of a survey of Quitasueño carried out by the Colombian

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[236] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, pp. 101-102, paras. 204-206.

[237] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008,* paras. 297-299, esp. para. 299: "the Court concludes that for the reasons explained above, sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located."

[238] See below, paras. 6.35, 6.41-6.43, 6.63-6.70.

Navy.[239] This demonstrated the presence on Quitasueño of at least 8 high-tide elevations, plus many more low-tide elevations.[240]

3.17. In its *Reply*, Nicaragua gives three reasons for dismissing the Navy Report: first, that it is "belated";[241] secondly, that it contradicts earlier surveys: it "cannot change the conclusions on the status of Quitasueño as it appears from information and the practice of the Parties spanning almost two centuries",[242] and thirdly, that "the technical report prepared by the Colombian Navy in September 2008 confirms that there are not even small cays on Quitasueño".[243]

3.18. As to the first reason, the Navy Report was produced in the *Counter-Memorial*, which was the first opportunity Colombia had to do so. By contrast the expert report which the Court relied on in *Qatar-Bahrain* was produced in its third written pleading on the merits.[244] The time to produce evidence of a claim is in the pleadings, up to and including the Rejoinder.

3.19. Secondly, it is not the case that earlier surveys ignored the presence of at least some high-tide elevations. The

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239 CCM, Vol. II, Annex 171, "Study on Quitasueño and Alburquerque", prepared by the Colombian Navy, September 2008.

240 See CCM, para. 8,21 and Figure 2.8, Vol. III, p. 15.

241 See NR, para. 4.34.

242 See NR, para. 4.34.

243 See NR, para. 4.35.

244 See *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Bahraini Reply, 30 May 1999, Annex 13.

Chamberlain letter of 1926[245] was based on "what is believed to be the only detailed examination of this extensive reef ever made by a properly equipped surveying vessel, together with the results of a running survey performed quite recently by another of His Majesty's ships". Foreign Secretary Chamberlain referred to "a small, solitary and quite uninhabitable rock" as "normally visible above the surface of the sea": this high-tide elevation, according to British views at the time, was not entitled to a territorial sea because it was uninhabitable.[246] But this is not the position under modern international law, which considers as an island any high-tide elevation, irrespective of size, as the Court confirmed in *Qatar/Bahrain*.[247] The same point can be made as to earlier, more cursory surveys.

3.20. In light of Nicaragua's continued denial of the facts, Colombia has commissioned a further expert report, by Dr Robert W Smith, which is annexed to this Rejoinder.[248] Dr Smith served from 1975-2006 in the Office of the Geographer, United States Department of State. He is a well-known authority on the law of the sea, notably on technical aspects of maritime delimitation. He was editor and main author of the

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[245] Analysed in CCM, para. 4.99; for the letter of 7 July 1926 see CCM, Vol. II, Annex 47.

[246] See CJ Colombos, *The International Law of the Sea*, 6th ed., Longmans, London, 1967, p. 122. In this tradition, rocks, even if above water at high-tide, were equated with low-tide elevations rather than islands: *ibid.*, 125.

[247] See above, paras. 3.13, 3.14.

[248] RW Smith, "Mapping the Islands of Quitasueño (Colombia). Their Baselines, Territorial Sea, and Contiguous Zone", February 2010, Appendix 1 (hereafter also referred to as Smith Report).

State Department's publication, *Limits in the Seas*. His *curriculum vitae* is Annex 1 to the Report.

3.21. Dr Smith was asked to express an independent opinion on the following questions: "(1) what features exist, particularly islands and low-tide elevations, on Quitasueño, and (2) how the principles of the law of the sea may apply to determining maritime jurisdiction from their baselines."[249] He spent 3 days surveying Quitasueño in November 2009 with logistical support from the Colombian Navy. Full details are provided in the Report; his conclusions are summarised below. It is sufficient for the moment to say that they fully confirm the presence of islands on Quitasueño.

3.22. The two missions of 2008 and 2009 are the only two surveys of Quitasueño which combine modern techniques (GPS readers, aerial survey, accurate tide tables, etc.) with precise information as to the requirements of the applicable law.[250] On technical questions of fact such as this, there is every reason to prefer more recent to older processes – as, again, this Court did in *Qatar-Bahrain* (where earlier opinions were also negative).[251]

3.23. Thirdly, it is not the case that the Colombian Navy Report "confirms that there are not even small cays on Quitasueño",[252] if by "cays" is meant islands within the meaning

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249 Smith Report, para. 1.1.
250 See above, para. 3.16.
251 See above, paras. 3.13-3.14.
252 See NR, para. 4.35.

of Article 10(1) of the Territorial Sea Convention. Evidently the description of something as a cay is not decisive. Under international law, the relevant criterion is that of Article 10(1), repeated in UNCLOS Article 121(2). By that criterion, Quitasueño is the site of several islands, as the 2008 and 2009 Reports show, and as will now be described in more detail by reference to the Smith Report.

(1) ISLANDS AND LOW-TIDE ELEVATIONS ON QUITASUEÑO

3.24. In response to the first question Dr Smith identified 54 features as low-tide elevations or high-tide elevations (i.e. islands); each of them was measured and photographed. For 22 of them, he and his team were able to land: others were measured from a boat, due to coral formations or wave conditions.[253] He concluded that 34 of the 54 features are high-tide elevations, i.e. "islands in accordance with international law";[254] the other 20 are low-tide elevations. Of the 34 islands, he was able to land on 19, thus assuring precision of measurement.[255] The result is shown in Figure 7 to Dr Smith's Report and in **Figure 3.1** to this Rejoinder.

3.25. The total number of legally relevant features is not precise. In many cases, closely related features were treated as one (e.g. QS 9, QS 11, QS 13, QS 16, QS 27, QS 35, QS 38, QS 39).[256] Some could not be approached closely due to wave

253 Smith Report, para. 2.3.
254 Smith Report, para. 3.2.
255 Smith Report, para. 3.2.
256 Smith Report, para. 3.2.

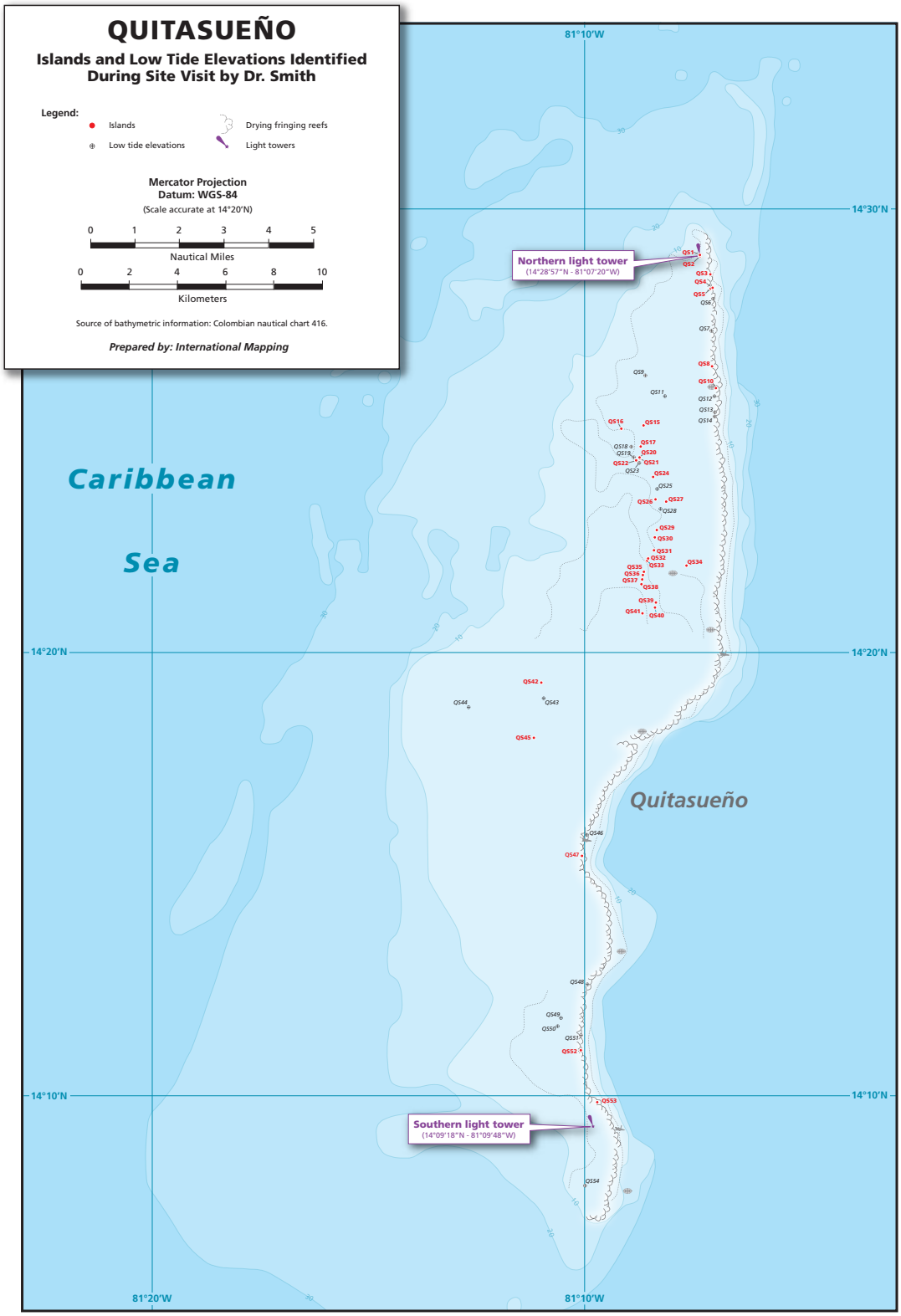

Figure R-3.1, See full size Map Vol. II - page 93

conditions, thus measurements were more approximate (e.g. QS 46, QS 50, QS 54). When in doubt, features were classified as low-tide elevations.[257] Dr Smith comments:

> "due to the danger of navigating close to the breaking waves at the eastern reef, as evidenced by the several wrecked ships that clearly are visible at different locations along the reef, on site measurements were not possible. Visual inspection from our boat about 50+ meters from this area caused us to firmly believe that many features were at or slightly above tidal datum all along the reef. To me, the Quitasueño reef is similar in nature to many others throughout the world and to those used when discussing reefs as legal baselines."[258]

3.26. There is a high level of concordance between the 24 points identified in the Navy Report of 2008[259] and points identified by Dr Smith.[260] The reason why Dr Smith identified 30 more features is explained by the greater time taken and the attempt to be comprehensive. But as Dr Smith explains, it was not in the end possible to be completely comprehensive, given wave conditions and the nature of this very large coral bank with so many individual features above water at some or all tides.

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257 Smith Report, para. 2.6.

258 Smith Report, para. 2.7.

259 CCM, Vol. II, Annex 171, "Study on Quitasueño and Alburquerque," prepared by the Colombian Navy, September 2008.

260 Annex 5 to the Smith Report contains the survey data, including the coordinates for the 54 features. 23 points are common to the 2 Reports and have identical or virtually identical coordinates. One point, Q4, is on the Navy's list but not on the Smith list. Dr Smith's point QS27 (Smith Report, p.18) identifies as one point positions which the Navy classified as two (Q12 and Q13).

(2) LEGAL CONSEQUENCES OF THESE FACTS

3.27. The question is, then, how to characterize Quitasueño in light of these facts. That it is not globally a mere low-tide elevation is clear. Nor, contrary to the position taken by Nicaragua, is it a submerged bank, if by this phrase Nicaragua means totally submerged.

3.28. One option is simply to treat it as a collection of at least 34 islands, each of which is entitled, at least, to a territorial sea and continuous zone in accordance with the rules identified above. It should be noted that the low tide elevations identified by Dr Smith are all close to other features which qualify as islands. Thus the reason all 54 features can be used is that the low-tide elevations are all well within 12 nm of the islands.

> "[T]he furthest any of the low-tide elevations is from land is QS 44 which is only 1.62 miles from QS 45."[261]

Figure 3.2 illustrates the territorial sea and contiguous zone generated by these features.

3.29. There is a further possibility, still within the context of territorial sea and contiguous zone, by reference to fringing reefs. These are the subject of special provision in Article 6 of UNCLOS which states:

> "In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the

[261] Smith Report, para. 6.5.

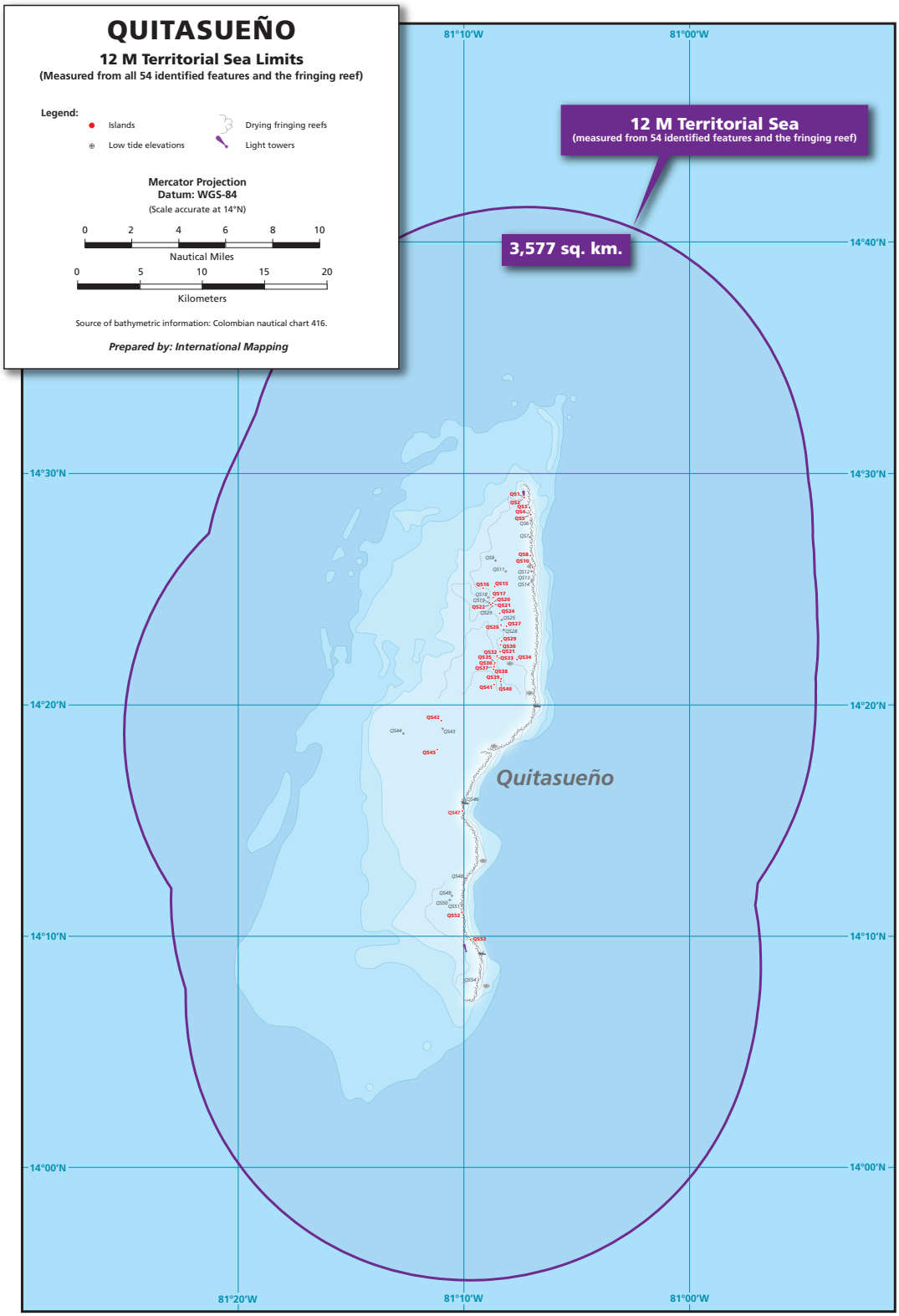

Figure R-3.2, See full size Map Vol. II - page 94

> seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State."

There is such a reef on Quitasueño.[262]

3.30. There is also one low-tide elevation on which a lighthouse is located (QS1), which could under Article 7(4) be used to initiate a system of straight baselines in conjunction with the fringing eastern reef and the outer islands.

3.31. Thus there is no reason to believe that the application of the international law rules concerning delimitation would produce any different result if Quitasueño was subjected to standard processes applicable to a collection of islands, or to a regime of straight baselines.

E. Quitasueño as a Unit

3.32. In the *Channel Islands* arbitration, the question arose as to the status of the Eddystone rock, a feature more than 12 nm off-shore on which was built a famous Lighthouse.[263] There was some doubt whether the Lighthouse had been constructed on an island or a low-tide elevation. Moreover the case arose for decision in 1977, half-way through UNCLOS III, at a time when the eventual settlement of Article 121 was still contested. The Court of Arbitration, without deciding whether the feature

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[262] Smith Report, para. 4.9.

[263] *Arbitration Award relating to the Continental Shelf boundary in the Western Channel approaches (France, United Kingdom), Court of Arbitration, 30 June 1977*, 54 ILR 6.

was an island or a low-tide elevation, held that it could be used as a basepoint for continental shelf delimitation. In particular, despite earlier British practice to the contrary (pursuant to the then-British thesis reflected in the Chamberlain letter of 1926[264]), Great Britain in its modern practice had consistently treated it as an island, and France had "acknowledged the relevance of the Eddystone as a basepoint" in 1964-5.[265]

3.33. For present purposes the case is significant in several ways:

(1) What matters is the "contemporary" practice of the claimant State, measured against the current definition of an island. In other words, what is its status at the time the delimitation is performed?

(2) Even if the Eddystone was only a rock, the way it had been treated by other States was sufficient to justify its use as a continental shelf basepoint.

3.34. In the case of Quitasueño, there have been no negotiations between Nicaragua and Colombia over maritime delimitation, so that aspect of the decision on this point is irrelevant. But until recently, Nicaragua itself had treated Quitasueño as capable of appropriation in sovereignty, and Colombia's own practice has been consistent. Nicaragua now can only sustain the contrary proposition by a factual

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264 Above, paragraph 3.19.

265 54 ILR 6, para.140.

misrepresentation, viz., that Quitasueño is entirely underwater, a "submerged bank".

3.35. State practice concerning Quitasueño was described in the Counter-Memorial. To recall:

(1) Quitasueño is a single, large bank, with a fringing reef and many high-tide and low-tide elevations.[266]

(2) Both before and after 1928, Colombia has always considered it as part of the Archipelago.[267]

(3) Prior to 1980 it was never shown as Nicaraguan on Nicaraguan official maps.[268] By contrast it was shown as Colombian on many maps, including maps current at the time of the 1928/1930 Treaty.[269]

(4) Colombia regulated fishing around Quitasueño, by issue of permits, under strict regulations and measures to ensure the conservation of resources, etc., and no other State did so.[270]

(5) Colombia has conducted operations relating to the control of unauthorized fishing, search and rescue work, patrolling and anti-narcotics interdiction operations in and around Quitasueño.[271]

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266 CCM, paras. 2.25-2.29.
267 CCM, paras. 2.68-2.72.
268 See CCM, paras. 2.96-2.97.
269 See CCM, paras. 275-2.85.
270 See CCM, paras. 3.32-3.42, 3.106.
271 See e.g., CCM, paras. 3.81.

(6) Colombia has enacted environmental legislation extending to Quitasueño.[272]

(7) Colombia has operated and maintained lighthouses and other navigational aids on Quitasueño.[273]

3.36. The controversy with the United States over the three features was also recounted in detail in the *Counter-Memorial*. Again, to summarise:

(1) The United States was aware from the 19th century onwards that Colombia considered Quitasueño part of the Archipelago and claimed it as such.

(2) During the course of the dispute, the United States made no relevant distinction between Quitasueño and the other cays; all were the subject of its claim to sovereignty.

(3) The United States was on record internally as doubting the validity of its own claim and as ready to concede to Colombia if pressed.

(4) It was only in 1971 that the United States, for the first time since 1856, considered that Quitasueño was different and that it was not capable of appropriation in sovereignty, despite the fact that the United States had long purported to grant guano extraction concessions to its citizens. These concessions were objected to and protested by Colombia that, in turn, continued to exercise its jurisdiction over it. Despite that suggestion by the

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272 See e.g., CCM, paras. 3.89.

273 See e.g., CCM, paras. 3.133-3.154.

United States, Colombia's position that it was capable of appropriation never wavered.[274] Functionally, the effect of the United States change of position was to encourage Colombia to concede more by way of access to United States' fishing vessels.

(5) Colombia having done so, in practice the United States has accepted the continuing exercise of Colombian authority over the waters around Quitasueño, as well as its operation of the lighthouse ownership of which was transferred to it "in perpetuity" in 1972. As recalled in the *Counter-Memorial*, that lighthouse was later replaced by the Colombian Navy, that subsequently also installed another lighthouse in the southern end of Quitasueño.[275]

(6) In particular, in 1981, shortly after the ratification of the 1972 Agreement, the United States acknowledged "Colombia's incontestable de facto presence and enforcement activities in the area, over a long period of time".[276]

(7) In 1983 was concluded the Colombia-United States Exchange of Notes on the implementation of fishing rights in the areas adjacent to the three cays,[277] including

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[274] See, e.g., NM, Annex 33b, Colombia's note in the 1972 Exchange of Notes concerning the status of Quitasueño, annexed to the 1972 Vazquez-Saccio Treaty. The US Note is at NM Annex 33a.

[275] CCM, para. 2.29.

[276] US Aide Memoire of 16 July 1981, CCM Annex 60; cited and analysed CCM, para. 4.58(3).

[277] CCM, Annex 8. It is noteworthy that the 1983 Exchange of Notes was registered with the UN Secretary-General and as such, appears in the UNTS (2015 UNTS 3) and the US treaty series: 35 UST 3105, TIAS 10842.

Quitasueño, pursuant to which Colombia and the United States have held meetings to agree on bans and other preservation measures;[278] and United States-vessels continue to notify and obtain permits from Colombia when they intend to fish in the areas of the cays.[279] There was no protest or Nicaraguan reaction in this regard.

3.37. This practice, of which the foregoing are examples, is incontrovertible evidence of long-standing Colombian interest and presence, and of Nicaraguan absence and disinterest, in Quitasueño. But it goes further than that: it goes to the status of Quitasueño as an entity in itself. The Quitasueño fishery has been regulated and managed by Colombia with the express recognition or at least acquiescence of other States. Quitasueño has never been treated as simply part of the high seas, not even by the United Kingdom (despite the Chamberlain letter). Even the exchanges with the United Kingdom originated in the turtle fishing activities in Quitasueño of British subjects from the Cayman Islands, facilitated by its reef formations and features. As for Nicaragua, it was in large part silent. The Nicaraguan assertion of coerced exclusion from natural resources actively claimed by it is contrary to all the evidence and is entirely without foundation.

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278 CCM, paras. 4.62-4.77, Annexes 11, 12, 13, 15, 16.

279 CCM, Annexes 11, 12, 13, 15, 16.

3.38. In international law, State practice, especially consistent practice over time, is of high value. A State which silently acquiesced in the exercise of authority by another State should not be permitted subsequently to claim the territory concerned on a wholly different and new hypothesis. It must be stressed that the status of Quitasueño (as of the other two features) vis-à-vis Nicaragua was settled – at the latest – by 1928. It cannot have been determined by reference to a continental shelf doctrine which had its origins in 1945 and was only definitively accepted by States as a whole in 1958.

F. Conclusions

3.39. For these reasons:

(1) Quitasueño is a group of islands, low-tide elevations with a fringing reef constituting distinctive and substantial maritime feature and as such is capable of appropriation in international law.

(2) As with the other cays it appertains to Colombia.

(3) Quitasueño is entitled to the full range of maritime zones.

PART TWO

MARITIME DELIMITATION

Chapter 4

NICARAGUA'S FUNDAMENTAL CHANGE OF POSITION

A. Nicaragua's Abandonment of Its Single Maritime Boundary Claim

4.1. Nicaragua's Application introducing the proceedings before the Court requested the Court to determine the single maritime boundary (continental shelf and EEZ) between the two countries. That this represented Nicaragua's considered position with respect to delimitation was confirmed in Nicaragua's *Memorial* where Nicaragua repeatedly emphasized that it was seeking the determination of a single maritime boundary which Nicaragua argued should be based on a median line between the mainland coasts of the Parties. As was stated at paragraph 3.28 of the *Memorial*:

> "In accordance with the provisions of the Law of the Sea Convention and, in so far as relevant, the principles of general international law, Nicaragua claims a single maritime boundary based upon the median line dividing the areas where the coastal projections of Nicaragua and Colombia converge and overlap."[280]

4.2. Nicaragua has now radically changed its position. It has abandoned its request for the Court to delimit a single maritime boundary based on a mainland-to-mainland median line; it has

[280] NM, para. 3.28; and see NM, para. 24, 3.3, 3.37, 3.44, 3.49-3.50, 3.137-3.141, and Submissions para. (9).

discarded its reliance on geography in favour of an outer continental shelf claim based exclusively on geology and geomorphology; and it has introduced a brand new claim to divide equally what is alleged to be the overlapping *physical* continental shelves of the Parties' mainland coasts. None of this has any validity in fact or in law.

(1) VINDICATION OF COLOMBIA'S POSITION

4.3. Colombia's *Counter-Memorial* addressed the case that Nicaragua had advanced in its Application and *Memorial*. In that pleading, Colombia demonstrated that Nicaragua's approach was fundamentally misguided given that Nicaragua's single maritime boundary claim fell within an area where Nicaragua had no legal entitlement. This was because the mainland coasts of the Parties are more than 400 nautical miles apart, and Nicaragua's claimed median line boundary was thus situated more than 200 nautical miles from the mainland coast and baselines of Nicaragua. As Colombia pointed out, there are no areas subject to the delimitation of a single maritime boundary (including of the water-column or EEZ) where one State has no legal entitlement.[281] The position was illustrated on Figure 7.1 to Colombia's *Counter-Memorial* which is reproduced for convenience here as **Figure R-4.1**.

4.4. In a quite cavalier manner, Nicaragua now (and belatedly) admits that what Colombia said is correct – namely, that there can be no single maritime boundary involving an EEZ

[281] CCM, paras. 7.8-7.16.

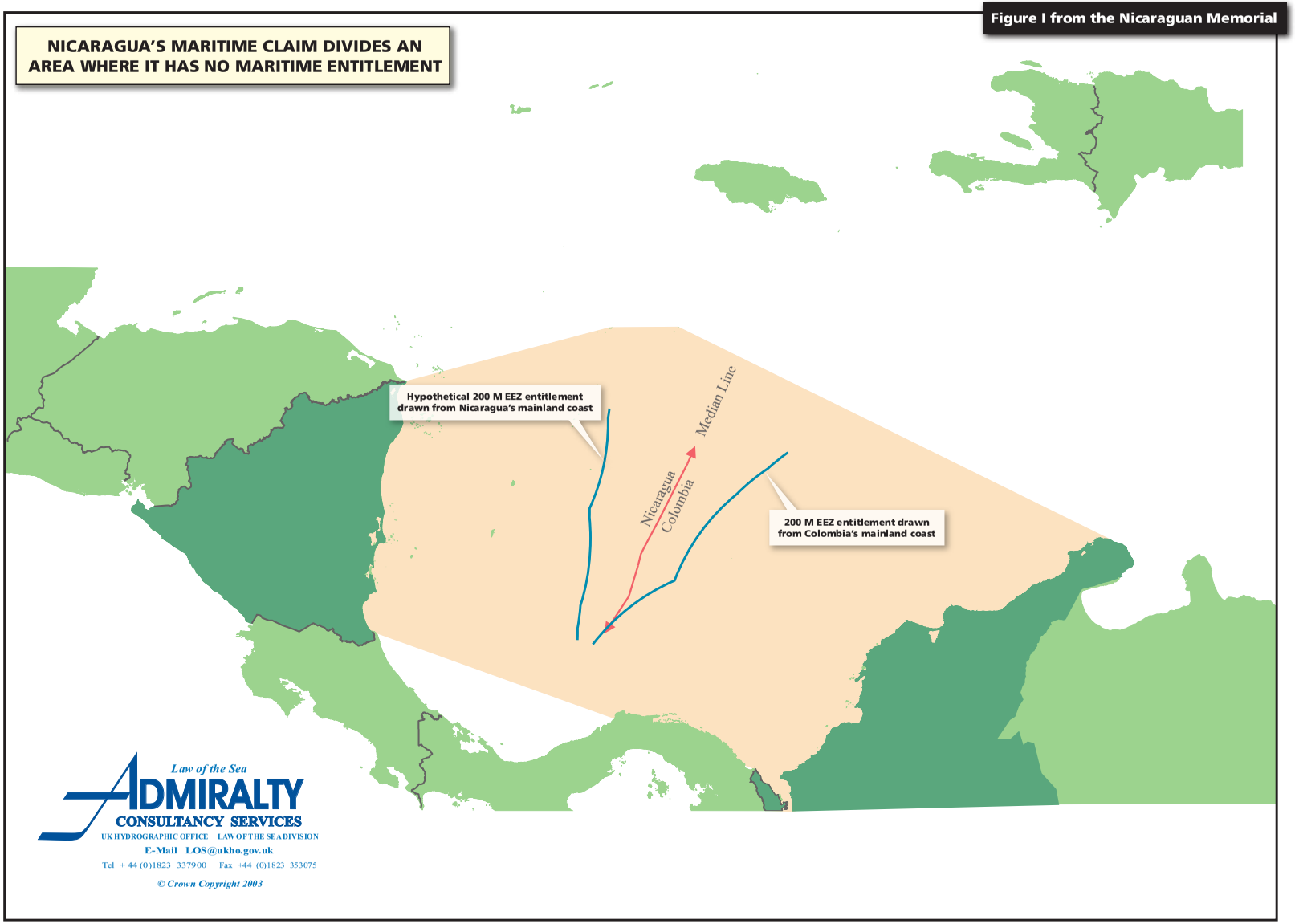

Figure R-4.1, See full size Map Vol. II - page 95

delimitation between the mainland coasts of the Parties because they are separated by a distance of more than 400 nautical miles. In the words of the Nicaraguan *Reply*:

> "There is no need for a delimitation of exclusive economic zones claimed respectively by Nicaragua and Colombia because the mainland coasts of the two States are separated by a distance of more than 400 nautical miles."[282]

4.5. This remarkable *volte face* is only partly correct. Nicaragua is right in agreeing with Colombia that there can be no delimitation of a single maritime boundary between the mainland coasts of the Parties because of the distances involved. That is precisely why Colombia has underlined the fact that its mainland coast has no relevance to the delimitation. But there most certainly is still a need for the delimitation of the single maritime boundary, including the EEZ, between the truly relevant coasts of the Parties – the coasts of the Colombian islands comprising the San Andrés Archipelago and the opposite coast of Nicaragua.

4.6. Notwithstanding this, the Nicaraguan *Reply* now advances a totally new and even more exaggerated claim to the effect that the Court should only delimit the Parties' respective continental shelves, not a single maritime boundary. Nicaragua maintains that the Court's Judgment on jurisdiction provoked her to review her general position and to undertake a more detailed analysis of the delimitation including additional

[282] NR, para. 1 to p. 59 and para. 2.10.

geological and hydrographic studies, and hence now to move to claim only a continental shelf boundary.[283] However, the Court's Judgment on jurisdiction had no bearing at all on this and provides no justification for Nicaragua's change of position.

4.7. As will be demonstrated, this new claim is untenable and inadmissible. Moreover, Nicaragua's assertion that a continental shelf delimitation will completely delimit the areas belonging to the Parties and "in this respect it will be the only pertinent or single maritime boundary affecting the Parties" is unintelligible and misconceived.[284] What Nicaragua is now seeking from the Court is (i) no delimitation of the exclusive economic zone or column of water, rather (ii) recognition of a claim to extended continental shelf rights under Article 76 of the 1982 Convention - a position that is incompatible with the fact that Colombia is not a Party to the Convention and that there are no areas of outer continental shelf in this part of the western Caribbean Sea, and the ambit of which would in any event fall to be submitted to and considered by the United Nations Commission on the Limits of the Continental shelf, not the Court; (iii) a determination of Colombia's own physical continental shelf extending from its mainland (but ignoring the continental shelf entitlements of its islands) which is irrelevant given the existence of Colombia's 200 nautical mile continental shelf and EEZ entitlements as a matter of law; and (iv) a delimitation

283 NR, para. 25.
284 NR, para. 26.

based on a division of allegedly overlapping physical continental shelves. None of this has any merit.

(2) THE IRRELEVANCE OF GEOLOGY AND GEOMORPHOLOGY

4.8. Despite Nicaragua's new-found reliance on geology and geomorphology to support alleged rights to an outer continental shelf at Colombia's expense, it is worth recalling what Nicaragua had to say about geology and geomorphology in its *Memorial*. The relevant passage reads as follows:

> "The position of the Government of Nicaragua is that geological and geomorphological factors have no relevance for the delimitation of a single maritime boundary within the delimitation area. As demonstrated by the pertinent graphics, the parties have overlapping legal interests within the delimitation area, and it is legally appropriate that these should be divided by means of an equidistance line."[285]

4.9. That was the sum total of Nicaragua's submissions on what its *Memorial* characterized as "The Relevance of Geology and Geomorphology". Notwithstanding this, in its *Reply* Nicaragua accuses Colombia of "having no adequate appreciation either of the geomorphology of the seabed in the delimitation area or of the law relating to entitlement to shelf areas".[286]

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[285] NM, para. 3.58.
[286] NR, para. 3.15.

4.10. This is an extraordinary argument. Not only does it ignore the fact that it was the Nicaraguan *Memorial* that emphasized the irrelevance of geology and geomorphology; it also fails to appreciate that Nicaragua's previous position was that geographical factors were predominant for delimitation. As Nicaragua rightly noted in its *Memorial*: "The judicial authorities always insist that the choice of the pertinent method of delimitation 'is essentially dependent on geography'".[287] Colombia did not address the geomorphology of the seabed or the law of entitlement to extended continental shelf rights in its *Counter-Memorial* because they were not raised in Nicaragua's Application or its *Memorial* and they are irrelevant to the case.

4.11. Nicaragua's new continental shelf claim now falls well within 200 nautical miles of Colombia's coasts, including the coasts of both its islands and its mainland. This can be seen on **Figure R-4.2** which is based on Figure 3.10 to the Nicaraguan *Reply*. However, the Court has made it clear that, under the distance formula encapsulated in the 1982 Convention and reflected in customary international law, a State has a legal entitlement to maritime rights out to a distance of 200 nautical miles from its coast regardless of the geology or geomorphology of the continental shelf. As the Court observed in its Judgment in the *Libya-Malta* case:

> "The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it

[287] NM, para. 3.14.

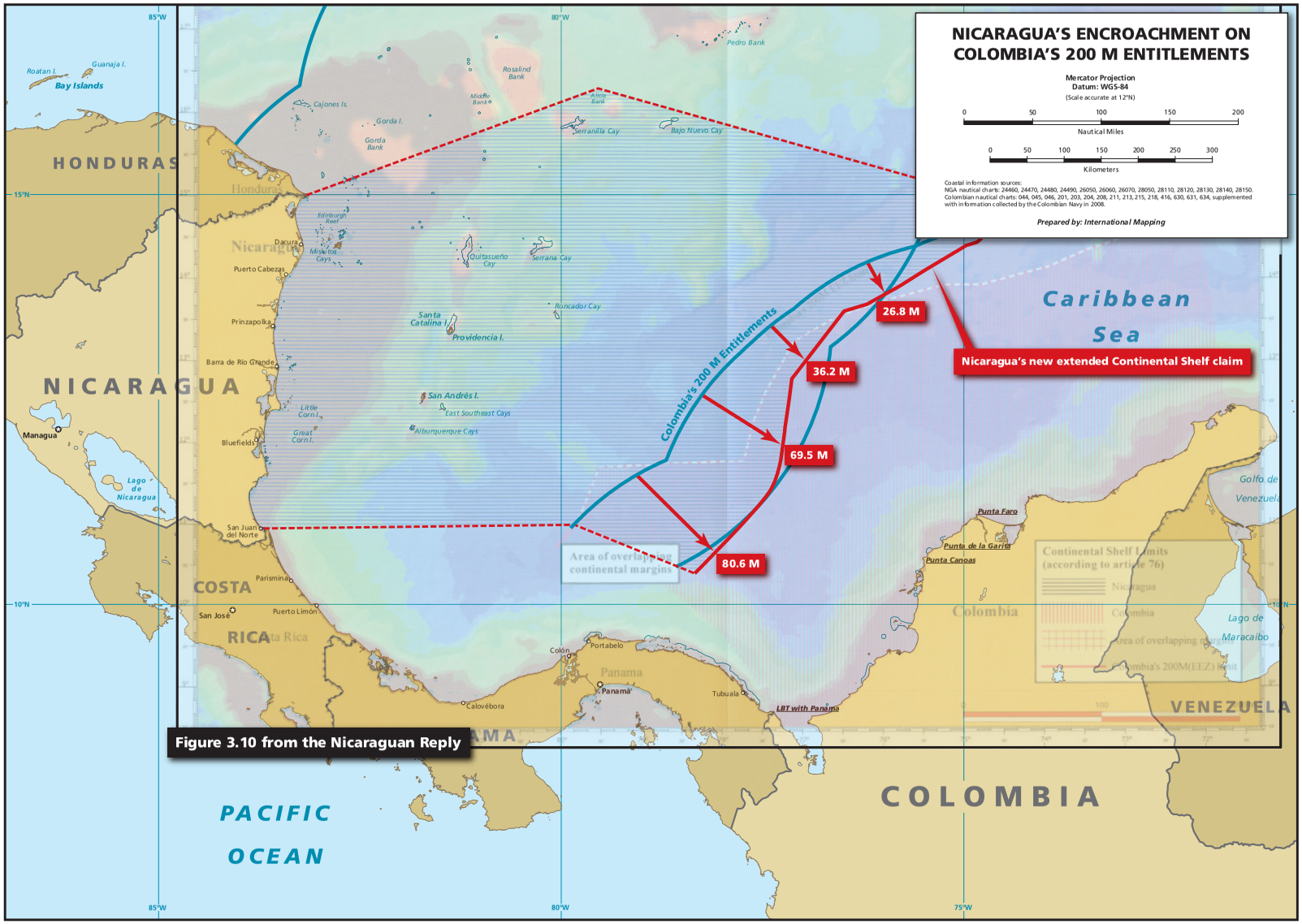

Figure 3.10 from the Nicaraguan Reply

Figure R-4.2, See full size Map Vol. II - page 96

> extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial."[288]

And the Court added:

> "Neither is there any reason why a factor which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purposes of delimitation."[289]

4.12. Given that Nicaragua's new claim rests entirely on these kinds of geological and geomorphological factors and falls within 200 nautical miles of Colombia's coasts, it is legally irrelevant and provides no basis for delimitation in the present case.

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

[289] *Ibid*., p. 35, para. 40.

(3) NICARAGUA'S NEW CLAIM IS EVEN MORE EXTREME THAN THE CLAIM ADVANCED IN ITS *MEMORIAL*

4.13. There is a further striking aspect of Nicaragua's new position which results from its continental shelf claim. While Nicaragua did not provide the co-ordinates of its mainland-to-mainland equidistance line in its *Memorial*, a comparison between Figure 1 to the Nicaraguan *Memorial* and Figure 3-11 of the *Reply* shows that Nicaragua is now claiming a boundary much further to the east (*i.e.*, towards the mainland Colombian coast) than was claimed in the *Memorial*. This can be seen on **Figure R-4.3**. This new, more aggressive, claim is some 100 nautical miles closer to Colombia's mainland coast than Nicaragua's previous claim and results in Nicaragua claiming a large additional expanse (over 53,000 km²) over and above what it had previously claimed.

4.14. Neither claim has any legitimacy and both are hugely inflated. Nonetheless, the introduction at the *Reply* stage of the proceedings of an even more extreme claim highlights the artificial and arbitrary approach to delimitation adopted by Nicaragua and casts serious doubts on the credibility of Nicaragua's claims in general.

B. Nicaragua's New Continental Shelf Claim Is Inadmissible: The Issue for the Court Remains the Delimitation of a Single Maritime Boundary

4.15. Article 40, paragraph 1, of the Court's Statute provides, that in a case brought by application, "the subject of the dispute"

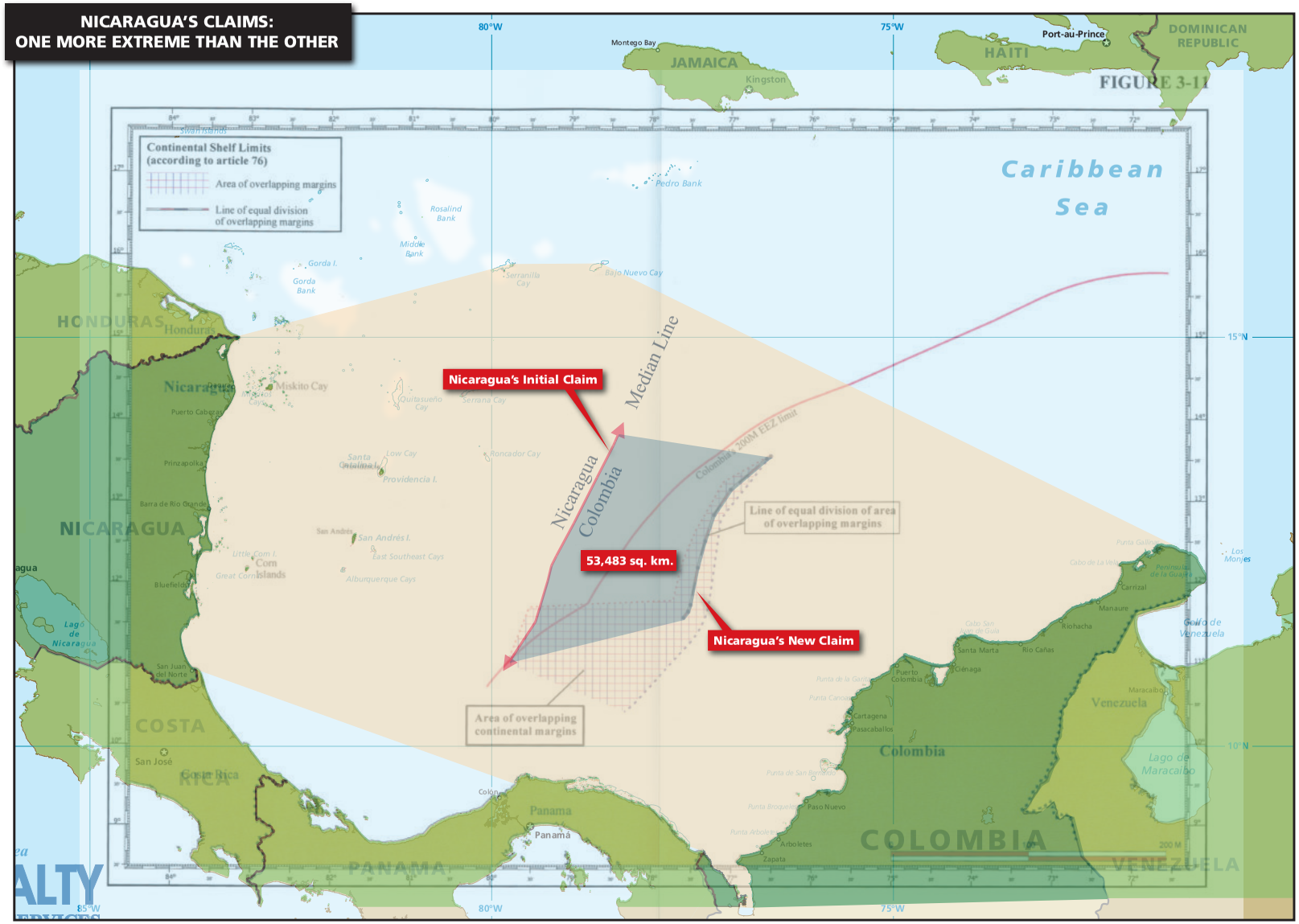

Figure R-4.3, See full size Map Vol. II - page 97

shall be indicated. Article 38, paragraph 1, of the Rules of Court follows up on this by providing that, when proceedings before the Court are instituted by means of an application pursuant to Article 40 of the Statute, "the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute". Paragraph 2 of Article 38 of the Rules further provides that the application "shall also specify the *precise nature of the claim*, together with a succinct statement of the facts and grounds on which the claim is based."[290]

4.16. In so far as the issue of maritime boundaries is concerned, Nicaragua's Application made it clear that Nicaragua considered the subject of the dispute was the delimitation of a single maritime boundary. This was reflected in Nicaragua's Application as follows:

> "Second, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the area of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary."[291]

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290 Emphasis added.

291 Nicaraguan Application, para. 8.

4.17. Nicaragua's request for a single maritime boundary was repeated several times in its *Memorial*.[292] Nicaragua further indicated that the type of delimitation requested in the present proceedings "is essentially the same as that requested in the *Gulf of Maine* case and the applicable law is similar."[293] The *Gulf of Maine* case, it will be recalled, involved the delimitation of a single maritime boundary extending only to a distance of 200 nautical miles from the coasts of the Parties. The Nicaraguan *Memorial* also specified the precise nature of its claim in its last submission as follows:

> "the appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a single maritime boundary in the form of a median line between these mainland coasts."[294]

4.18. The Court has noted that "[t]here is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it."[295] As pointed out above, however, the subject of the dispute presented by Nicaragua in its Application, and the nature of its claim, has completely changed in the Nicaraguan *Reply*. No longer does Nicaragua request the delimitation of a single maritime boundary – a proposition which it had previously identified as the "central question" in its

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[292] See note 280 above.
[293] NM, para. 3.8.
[294] NM, Submissions, para. 9.
[295] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. 1998,* p. 447, para. 29.

Memorial[296] – and no longer does Nicaragua claim that that the "appropriate form of delimitation" should be a mainland-to-mainland median line. Nicaragua also abandons its earlier position that "geological and geomorphological factors have no relevance for the delimitation of a single maritime boundary within the delimitation area."[297]

4.19. Instead, Nicaragua's *Reply* advances a much more exaggerated claim that the Court should determine a continental shelf boundary between the two Parties arrived at exclusively on the basis of geological and geomorphological factors. Nicaragua nowhere explains why it has so fundamentally changed its claim or why it could not have made such a claim in its Application if the delimitation of the outer continental shelf had been its real intention. What is clear is that the *Reply* has gone far beyond the limits of the claim set out in the Nicaraguan Application, and has now submitted a dispute which is fundamentally different in character from the subject-matter of the original dispute.

4.20. The Court (and its predecessor) has held on a number of occasions that a new claim which changes the subject of the dispute originally submitted is inadmissible. As the Permanent Court of International Justice observed in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)* -

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296 NM, para. 3.37.
297 NM, para. 3.58

> "under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein...."[298]

4.21. This principle was further elaborated by the Court in its Judgment on the preliminary objections in the *Phosphate Lands in Nauru* case. There, the Court upheld a preliminary objection introduced by Australia that a new claim raised by Nauru relating to the overseas assets of the British Phosphate Commission not mentioned in its Application was inadmissible.[299] In upholding this objection, the Court cited the reasoning of the Permanent Court in its Judgment in the case concerning the *Société Commerciale de Belgique* where the Permanent Court held:

> "It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules [now Article 38 (1) of the Rules] which provide that the Application must indicate the subject of the dispute...."

The Permanent Court then continued –

> "it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the

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[298] *P.C.I.J., Series A/B*, No. 52, p. 14.

[299] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 267, paras. 70-71.

> submissions into another dispute which is different in character."[300]

4.22. That is precisely what Nicaragua has done in its *Reply*. The entire character of the dispute originally submitted by Nicaragua has changed from a case concerning the delimitation of a single maritime boundary based on a mainland-to-mainland median line where geology and geomorphology had no role to play into a dispute over Nicaragua's entitlement to an extended continental shelf beyond 200 nautical miles from its baselines and a request for the delimitation of the continental shelves of the Parties based exclusively on geological and geomorphological factors.

4.23. Although Nicaragua does not advance such a position in its *Reply*, to the extent it may subsequently try to argue that there is a link between the original claim made in the Application and the new claim advanced in the *Reply* in so far as both could be said to relate to maritime delimitation, such an argument would be erroneous. The Court has clearly stated that for a claim to be held to have been, as a matter of substance, included in the original claim –

> "it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the Application .... or must arise 'directly out of the question

[300] *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78,* p. 173.

> which is the subject matter of the Application'".[301]

4.24. There is nothing implicit about Nicaragua's new continental shelf claim in the Application or, indeed, in the Nicaraguan *Memorial*. Moreover, the question of Nicaragua's entitlement to an extended continental shelf, and the delimitation of that shelf based on geological and geomorphological factors cannot be said to arise directly out of the question that was the subject-matter of the Application, which was the delimitation of a single maritime boundary based solely on geographical factors.

4.25. Even at the jurisdictional objections stage of the case, Nicaragua continued to emphasize that the subject-matter of the dispute was the delimitation of a single maritime boundary. This was expressed very clearly in Nicaragua's Written Statement dated 24 January 2004 responding to Colombia's preliminary objections. At paragraph 3.41 of that pleading, and after citing the *Prince von Pless, Phosphate Lands in Nauru* and *Société Commerciale de Belgique* cases referred to above, Nicaragua stated the following:

> "In view of both the context of the Application itself and the clarification made in the *Memorial*, it will be apparent:

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[301] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 266, para. 67, citing *Temple of Preah Vihear, Merits, I.C.J. Reports 1962,* p. 36 and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, I.C.J. Reports 1974,* p. 203, para. 72.

> - that the subject-matter of the dispute is the determination of a single maritime boundary between the areas of continental shelf and exclusive economic zones appertaining respectively to Colombia and Nicaragua."

4.26. The position could not be clearer. The subject-matter of the dispute before the Court is the delimitation of a single maritime boundary not, under Nicaragua's new claim, whether it is entitled to an outer continental shelf and the delimitation of that shelf with the physical continental shelf of Colombia. To apply the Court's words from its Judgment on the preliminary objections in the *Nauru* case to Nicaragua's new claim, if the Court "had to entertain such a dispute on the merits, the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application."[302]

4.27. This can be seen by considering a host of questions that Nicaragua's new claim gives rise to that do not arise out of, or bear any relation to, Nicaragua's original claim and which present issues that more properly fall within the purview of the United Nations Commission. These include, but are not limited to:

- whether there is any scope for extended continental shelf claims in this part of the Caribbean (which there is not);

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[302] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 266, para. 68.

- the question whether Nicaragua has any entitlement at all to an extended continental shelf in the area, particularly in circumstances where the claim has not been submitted to, let alone considered by, the United Nations Commission on the Limits of its Continental Shelf;
- whether Nicaragua has satisfied the appurtenance test for claiming an extended continental shelf;
- whether the location and scientific validity of the foot-of-the-slope points that Nicaragua posits for determining the extent of its own and Colombia's continental shelves have an established scientific basis;
- the relevance and sufficiency of the bathymetric and geomorphological profiles that Nicaragua has submitted in support of its extended continental shelf claim;
- the issue of plate boundaries and plate tectonics raised in the *Reply*;
- the relevance and validity of thickness of sediment calculations and the calculation of outer continental shelf limits for both Parties based on the Hedburg formula and the "Irish" test;
- and the relevance, or more accurately lack thereof, of positing a geological limit to the continental shelf off Colombia's mainland coast when that coast, as well as the coasts of Colombia's islands, generate automatic continental shelf and EEZ entitlements extending to a distance of 200 nautical miles regardless of the

geological and geomorphological characteristics of the sea-bed and subsoil.

4.28. All of these matters are wholly extraneous to the original claim and would lead the Court into areas not even remotely contemplated in the Application or in Nicaragua's *Memorial* (or even in its pleadings on the jurisdictional objections). Their consideration would result in a basic and fundamental transformation of the subject-matter of the dispute originally submitted in the Application and hitherto addressed by the Parties (and by the Court at the jurisdictional phase).

4.29. In this respect, it is worth recalling that in the *Costa Rica-Nicaragua* case, Nicaragua itself argued that a claim advanced by Costa Rica relating to subsistence fishing along the San Juan River not raised in Costa Rica's Application was inadmissible because the claim did not arise "directly out of the question which is the subject-matter of that Application".[303] Unlike in this case, however, the actions giving rise to the new claim of Costa Rica only arose after the institution of the proceedings, and the claim was thus raised by Costa Rica in its Memorial. Nicaragua did not raise an admissibility objection in its Counter-Memorial, but rather addressed the claim on its merits. It was only in the Rejoinder that Nicaragua argued that the claim was not admissible.

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[303] Rejoinder of Nicaragua in the *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, para. 6.30 quoting *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, ICJ Reports 1974,* p. 203, para. 72.

4.30. In the light of these factors, the Court did not accept Nicaragua's objection to admissibility. The Court also observed that there was a sufficiently close connection between the claim relating to subsistence fishing and the Application because Costa Rica, in addition to invoking the relevant treaty, had also invoked "other applicable rules and principles of international law" in its Application.[304] In contrast, and as already shown, the facts of the present case are very different.

4.31. What is more, Nicaragua's position on the applicable law has also changed as a result of its new claim. In its Application and *Memorial*, Nicaragua stressed that the applicable law in the case comprises "principles of general international law" and that "these principles include the principles of maritime delimitation relating to cases involving single maritime boundaries".[305] To the extent that Nicaragua no longer claims a single maritime boundary, its view of the applicable law is now primarily based on the interpretation and application of Article 76 of the Law of the Sea Convention relating to rights to the outer continental shelf and a division of that shelf based on natural prolongation.[306] This is yet another element of Nicaragua's new claim which is removed from the position it adopted in its Application and which underscores the fundamentally changed nature of the subject-matter of the dispute now advanced by

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[304] *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009,* paras. 134-139.
[305] NM, para. 3.37.
[306] NR, paras. 3.29 and ff.

Nicaragua as compared with the dispute it originally submitted to the Court in its Application and *Memorial*.

4.32. These considerations also distinguish Nicaragua's new claim in this case from the issue that the Court was confronted with in the *Nicaragua-Honduras* case where, in its submissions during the oral hearings, Nicaragua requested the Court to decide the question of sovereignty over the islands and cays within the area in dispute.

4.33. The Court ruled that this request was admissible (a matter which Honduras had not contested) because the claim relating to sovereignty over the islands in the area in dispute was "inherent in the original claim relating to the maritime delimitation between Nicaragua and Honduras in the Caribbean Sea."[307] As the Court explained:

> "To draw a single maritime boundary line in an area of the Caribbean Sea where a number of islands and rocks are located the Court would have to consider what influence these maritime features might have on the course of that line. To plot that line the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area. The Court is bound to do so whether or not a formal claim has been made in this respect. Thus, the claim relating to sovereignty is implicit in and arises directly out of the question which is the subject-matter of Nicaragua's Application, namely the delimitation of the disputed areas of the territorial

[307] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007,* p. 35, para. 115.

> sea, continental shelf and exclusive economic zone."[308]

4.34. In contrast, Nicaragua's new continental shelf claim in this case is in no way "implicit in" the question that was the subject-matter of Nicaragua's Application and does not "arise out of" that question. The request for a single maritime boundary based on geographical factors submitted in the Application and the *Memorial* did not depend on a determination of the legitimacy of extended continental shelf rights under Article 76 of the 1982 Convention. Nor did the dispute presented in the Application hinge on the identification of the limits and division of the Parties' alleged natural prolongations defined on geological and geomorphological grounds. These are matters that are related solely to Nicaragua's new claim, but which had nothing to do with the subject-matter of the single maritime boundary dispute originally submitted to the Court.

4.35. In these circumstances, Nicaragua's new extended continental shelf claim, as well as its request for the Court to delimit the continental shelf boundary between the Parties, is inadmissible. The subject-matter of the case introduced in the Application over which the Court has jurisdiction remains the delimitation of a single maritime boundary between the Parties. That was the issue that Nicaragua consented to address in its

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[308] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007,* p. 35, para. 114.

Application and *Memorial*, and it is the case that Colombia responded to in its *Counter-Memorial*. There are no grounds for now changing the entire basis of the case.

C. Nicaragua's New Continental Shelf Claim Has No Merit

4.36. While Colombia's principal position is that Nicaragua's new claims to extended continental shelf rights and a delimitation of the continental shelf based on those claims are inadmissible, Colombia will demonstrate in this section that the claim raised in Nicaragua's *Reply* is without merit in any event, it being recalled that Colombia's *Counter-Memorial* already demonstrated the invalidity of Nicaragua's original single maritime boundary claim.

(1) THERE ARE NO AREAS OF EXTENDED CONTINENTAL SHELF IN THE WESTERN CARIBBEAN

4.37. As **Figure R-4.4** shows, there are no areas of outer continental shelf within this part of the Caribbean Sea given that there are no maritime areas that lie more than 200 nautical miles from the nearest land territory of the riparian States. Indeed, prior to the filing of Nicaragua's *Reply*, no State in the region (including Nicaragua) had ever suggested that an extended continental shelf exists in this part of the Caribbean. This can be seen on **Figure R-4.5**. It follows that there are no areas of extended continental shelf in this region and no basis for Nicaragua's outer continental shelf claim which, apart from being factually and procedurally deficient, is legally irrelevant

Figure R-4.4, See full size Map Vol. II - page 98

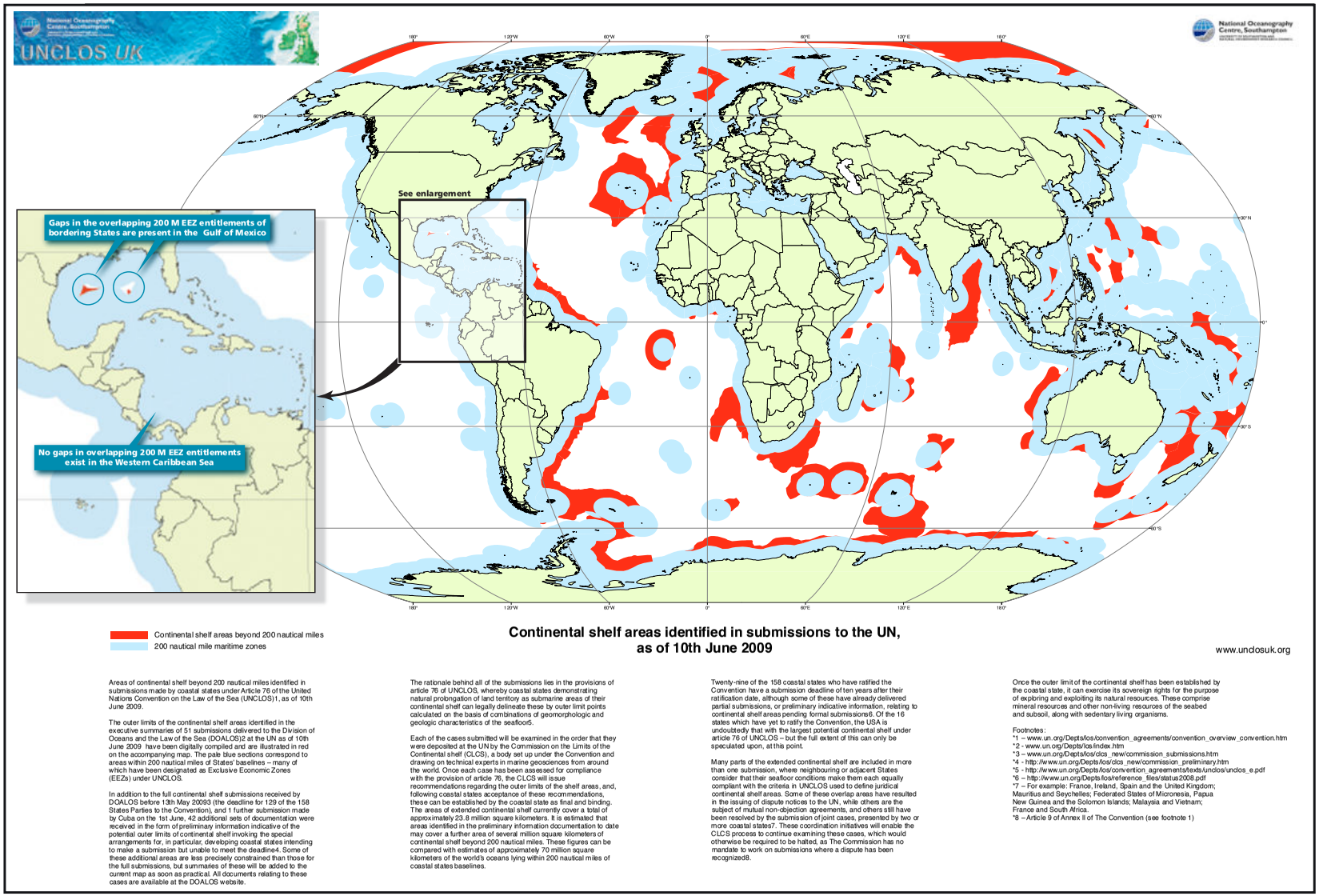

Figure R-4.5

Figure R-4.5, See full size Map Vol. II - page 99

to questions of both entitlement and delimitation in this dispute.

(2) ARTICLE 76 OF THE UNITED NATIONS CONVENTION

4.38. Nicaragua purports to base its extended continental shelf claim on Article 76 of the 1982 Convention. Colombia has previously pointed out that it is not a party to the Convention and that Article 76 is thus not binding on it as a matter of conventional law.

4.39. Despite the fact that Colombia is not a party to the 1982 Convention, Nicaragua's *Reply* argues that Colombia has accepted that Article 76 is reflective of customary international law.[309] This misrepresents what Colombia said about the applicable law in its *Counter-Memorial*. There, Colombia indicated only that the relevant provisions of the Convention dealing with baselines and a State's entitlement to maritime areas, and specifically the delimitation provisions of Articles 74 and 83, reflected well-established principles of customary international law.[310] Colombia made no mention of extended continental shelf rights under Article 76, and no such rights were at issue at the time given that Nicaragua had not yet invented its outer continental shelf claim.

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309 NR, para. 2.5.

310 CCM, Part III, Introduction, p. 306, para. 4.

(3) THE OUTER LIMITS OF AN EXTENDED CONTINENTAL SHELF CLAIM MUST BE SUBMITTED TO THE UNITED NATIONS COMMISSION, NOT THE COURT, AND MUST BE BASED ON THE COMMISSION'S RECOMMENDATIONS

4.40. Nicaragua assumes that it has extended continental shelf rights out to the edge of its margin beyond 200 nautical miles - indeed, it says that this is a "simple truth" notwithstanding the fact that its claim trespasses onto areas falling within 200 nautical miles of Colombia's coast (not to mention the coasts of other States in the region).[311] Actually, the "simple truth" is that Nicaragua did not even think to mention such rights in its Application or its *Memorial*. Moreover, those purported rights have never been recognized or submitted to the United Nations Commission, let alone accepted or made subject to the Commission's recommendations, despite the fact that Nicaragua is a party to the 1982 Convention and is bound by such procedures.

4.41. Article 76(8) of the 1982 Convention provides that:

- Information on the limits of the continental shelf beyond 200 nautical miles from the baseline "shall" be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II to the Convention.
- The Commission "shall" make recommendations to the coastal State on matters related to the establishment of such outer limits.

311 NR, para. 2.20.

- Limits of the shelf established by the coastal State "on the basis of" these recommendations shall be final and binding.[312]

4.42. Article 76, coupled with the Commission's Rules of Procedure, makes it mandatory for a coastal State to make an extended continental shelf submission to the Commission, for the Commission to make recommendations on that submission, and for the coastal State then to establish the outer limits of its shelf "on the basis of" the Commission's recommendations. Rule 45 stipulates that the coastal State "*shall*" submit particulars of its claims to the Commission. Nicaragua cannot be deemed to have established any rights to an extended continental shelf unless and until these steps are followed, and the Commission will not even examine such claims unless the relevant parties consent.

4.43. On 7 April 2010, Nicaragua submitted what it called "Preliminary Information" on its outer continental shelf to the Commission on the Limits of the Continental Shelf.[313] Curiously, that document was dated August 2009, before the Nicaragua *Reply* was filed. But it was not filed with the *Reply* and, as noted above, it was only received by the Commission on 7 April 2010.

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[312] Moreover, Article 76(10) provides that the provisions of Article 76 are without prejudice to questions of delimitation.

[313] The document may be found at: http://www.un.org//depts/los/clcs_new/submissions_files/preliminary/nic_preliminaryinformation2010.pdf (last visited 5 June 2010).

4.44. Nicaragua recognizes that the Preliminary Information it has sent to the Commission shall not be considered by the Commission until Nicaragua makes a full submission complying with the requirements of Article 76 of the 1982 Convention, the Commission's Rules of Procedure and its Scientific and Technical Guidelines.[314] Nicaragua has made no such submission; in fact, it is not even certain that it will ever do so. Nicaragua expressly states in its Preliminary Information that it "intends to consider the further implementation of article 76 for the area of the southwestern part of the Caribbean Sea which is the subject of this submission of preliminary information after the International Court of Justice will have rendered its judgment on the merits in the case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia)."[315]

4.45. It follows that Nicaragua, which by its own admission has not yet made such a submission to the Commission complying with Article 76, or had it subject to the Commission's recommendations, has not established any entitlement to extended continental shelf rights, let alone to rights which encroach on Colombia's 200-mile continental shelf and EEZ entitlements which exist as a matter of law. That being the case, Nicaragua cannot merely assume that it possesses such rights in this case or ask the Court to do the Commission's job based on rudimentary and incomplete technical information.

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314 *Preliminary Information* of Nicaragua to the CLCS, para. 5.

315 *Preliminary Information* of Nicaragua to the CLCS, para. 27.

4.46. In this connection, it is worth recalling what the Court had to say about delimitation beyond 200 miles in its Judgment in the *Nicaragua-Honduras* case. The relevant passage was cited in Colombia's *Counter-Memorial*,[316] but has been ignored by Nicaragua in its *Reply*. The fact that Nicaragua was a party to that case makes Nicaragua's silence on the matter even more surprising. To recall the Court's words:

> "It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and received by the Commission on the Limits of the Continental Shelf established thereunder".[317]

4.47. It should also be borne in mind that the Commission will not consider any extended continental shelf submissions unless neighbouring States with potential claims in the area consent. Thus, if a neighbouring State does not give its consent, the Commission will take no action with the result that a State (including Nicaragua) will not have established extended continental shelf limits that are final and binding (recalling that such limits, in any event, are without prejudice to questions of delimitation and would not be binding on Colombia in any event).

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316 CCM, para. 7.18.

317 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007,* p. 90, para. 319.

(4) NICARAGUA HAS NOT PROVED THE LIMITS OF ITS OWN CONTINENTAL MARGIN AND THE OUTER LIMIT OF COLOMBIA'S MARGIN FROM ITS MAINLAND COAST IS IRRELEVANT

4.48. Nicaragua's new continental shelf boundary claim is based on what it alleges is an equal division of overlapping geological continental margins.[318] This methodology involves a number of basic fallacies in addition to the other shortcomings which have been discussed.

4.49. First, Nicaragua's delimitation line presupposes that Nicaragua has established the outer limits of an extended continental shelf beyond 200 nautical miles from its baselines. Legally, as explained above, Nicaragua has no recognized or accepted extended continental shelf rights in the area. Even the Nicaraguan *Reply* concedes that a description of the status of preparation and intended date of making a full submission to the Commission are still to be provided.[319] Factually, Nicaragua has not proved its case despite the fact that Nicaragua purports to base the identification of its continental margin on publicly available sources. Significantly, none of this information is annexed to Nicaragua's *Reply* and the sources referenced at paragraph 3.37 of the Nicaraguan *Reply* cannot be readily accessed and are not, as Nicaragua asserts, "freely and widely available". If they were so, why has Nicaragua not furnished them?

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[318] NR, para. 3.46.
[319] NR, para. 3.38.

4.50. What Nicaragua does submit with its *Reply* are three thin annexes (Annexes 16-18, Vol. II) which would not begin to satisfy the requirements of a submission made to the United Nations Commission.

4.51. Annex 16 is a list of 70 co-ordinates purporting to define the outer limits of Nicaragua's continental shelf. Absolutely no information is given to justify the number or choice of these coordinates and why they were selected to the exclusion of others.

4.52. Annex 17 contains a similar list of co-ordinates said to define the outer limits of Colombia's continental shelf. In addition to suffering the same lack of explanation as is the case for the co-ordinates of Nicaragua's shelf, the table is meaningless because all of the points listed fall closer than 200 nautical miles to Colombia's mainland coast or to the coasts of its islands. Colombia has continental shelf rights extending 200 miles from its coasts *ipso facto* and *ab initio* without any limitation dictated by the purported limits of its physical continental shelf. To posit a physical limit to Colombia's continental shelf extending from its mainland (and Nicaragua pays no attention to the fact that Colombia's islands also generate a continental shelf) is without object.

4.53. Annex 1 to Annex 18 of the Nicaraguan *Reply* is labelled "Preliminary Technical Description of the Outer Limits of the Nicaraguan Continental Shelf". The information and figures

provided therein are virtually identical to what Nicaragua has filed as Preliminary Information with the Commission. Even taken at face value, the information provided is incapable of demonstrating any outer continental shelf entitlement, and the material does not comprise the technical data that Nicaragua envisages eventually submitting to the United Nations Commission - hence, the reason for Nicaragua labelling its annex as "Preliminary Technical Description" only. As Nicaragua acknowledges in its Preliminary Information, "some of the data and the profiles described below do not satisfy the exacting standards required by the CLCS for a full submission, as detailed in the Commission's Guidelines".[320]

4.54. The tentative manner in which the data set out in this Annex is presented is revealing. With respect to Nicaragua's choice of five foot-of-the-slope points from which it measures the outer limits of its outer continental shelf, Annex 1 states:

> "Four of these are based on the data derived from the marine trackline database GEODAS [which is not provided] and are *in principle* suitable for inclusion in a full submission to the CLCS."[321]

4.55. Quite apart from the fact that Nicaragua qualifies its description by noting that four of the points are only "in principle" suitable, the fifth point is casually dropped from discussion. The Annex then goes on to state:

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320 *Preliminary Information* of Nicaragua to the CLCS, para. 21.

321 NR, Annex 1 to Annex 18, p. 61. Emphasis added.

> "there are issues with the data quality in a few areas [which ones?], especially navigation [what does this mean?] and the final submission to the CLCS will evaluate the data quality and present new data where necessary [no evaluation has been presented in this case]. The picks presented in this submission of preliminary information should be treated as indicative only."[322]

As frankly admitted in Nicaragua's Preliminary Information, "Nicaragua intends to acquire additional survey data in order to complete the information to be submitted to the Commission in accordance with article 76 of the Convention".[323] This again demonstrates that the technical material submitted by Nicaragua in the present case is incapable of supporting a claim to outer continental shelf rights.

4.56. Nicaragua's approach to the issue is truly remarkable. In effect, Nicaragua is not only asking the Court to substitute itself for the Commission, it is also requesting the Court to endorse its outer continental shelf claim based on incomplete, unannexed and "indicative" materials that would never be acceptable to the Commission. Nicaragua admits that some of the data is either of questionable quality or only "in principle" suitable, and no evaluation of this data is presented at all.

4.57. Second, Nicaragua also gratuitously posits where it says the outer limit of Colombia's continental margin lies.[324] This is

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322 NR, Annex 1 to Annex 18, p. 61.

323 *Preliminary Information* of Nicaragua to the CLCS, para. 24.

324 NR, paras. 3.24-3.28.

a necessary pre-condition for the establishment of Nicaragua's delimitation line which is said to be based on an equal division of the overlapping margins of the Parties. However, any identification of the limits of Colombia's continental margin is completely irrelevant. As can be seen from Figure 3-10 to the Nicaraguan *Reply*, Nicaragua places the "continental shelf limits" of Colombia in an area which lies well within 200 nautical miles of Colombia's mainland coast, and which also takes no account of Colombia's islands which also generate 200 nautical mile continental shelf and EEZ entitlements in their own right regardless of the geology and geomorphology.

4.58. As the Court so clearly stated in its Judgment in the *Libya-Malta* case, the geological or geophysical characteristics of the continental shelf within 200 nautical miles of a State's coast are completely immaterial to issues of entitlement and delimitation.[325] Colombia has a legal entitlement to continental shelf and EEZ rights extending to 200 nautical miles from its mainland coasts and its islands whatever the geological or geomorphological characteristics of the area. Consequently, there is no basis for delimitation in this case to be based on a so-called equal division of overlapping continental margins.

4.59. Third, Nicaragua even goes so far as to argue that its outer continental shelf rights should take precedence over Colombia's EEZ rights. Nicaragua's *Reply* recognizes that its

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[325] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 35, paras. 39 and 40.

outer continental shelf claim lies within 200 nautical miles of Colombia's coast and that "the final section of the continental shelf of Nicaragua is subjacent to the exclusive economic zone of Colombia".[326] However, this does not stop Nicaragua from arguing that there is no reason why Nicaragua should renounce her rights to the areas of continental margin of her natural prolongation which are subjacent to Colombia's EEZ. In a passage which is remarkable for its economy of reasoning and vagueness, Nicaragua then asserts: "A more legally cogent approach would involve the determination of a single boundary line of equal division within the areas of overlap of the respective continental margins."[327] By this means, Nicaragua appears to present the astonishing argument that Colombia's EEZ should be limited (and delimited) by reference to geological and geomorphological factors arguably related to outer continental shelf claims that have nothing to do with a State's right to the EEZ or column of water. The argument is utterly untenable.

(5) EXTENDED CONTINENTAL SHELF CLAIMS DO NOT TRUMP 200 NAUTICAL MILE ENTITLEMENTS

4.60. For the same reasons, Nicaragua's unproven claim to an extended continental shelf does not, and cannot, take precedence over the existing legal 200 nautical mile entitlements of Colombia measured from its mainland and insular territory. Colombia has an existing legal entitlement to a continental shelf

326 NR, para. 3.47.
327 NR, para. 3.49.

and EEZ extending to a distance of 200 nautical miles from its coasts.

4.61. State practice demonstrates that States have been careful to limit their extended continental shelf claims submitted to the United Nations Commission to areas that lie beyond 200 nautical miles from the nearest territory of another State precisely because 200 nautical mile entitlements exist as a matter of law.

4.62. In the northern Pacific Ocean, for example, Japan's Submission to the Commission on the Limits of the Continental Shelf typifies this practice. Japan's submission covers seven different regions. The southernmost region (the Southern Kyushu-Palau ridge Region), in which Japan claims extended continental shelf rights based on the natural prolongation along a ridge extending from Oki-no-Tori Shima Island, encompasses a zone that is limited to areas that lie more than 200 nautical miles from the nearest territory of the Republic of Palau and of the Federated States of Micronesia, thus avoiding any trespass into the 200 nautical mile areas appertaining to those States **(Figure R-4.6)**.

4.63. Japan has exercised similar restraint with respect to the other outer continental shelf areas it claims as well. Thus, in both the Minami-lo To Island region and the Ogasawara region, Japan's claim does not cross over into areas lying within 200 nautical miles of territory belonging to the United States.

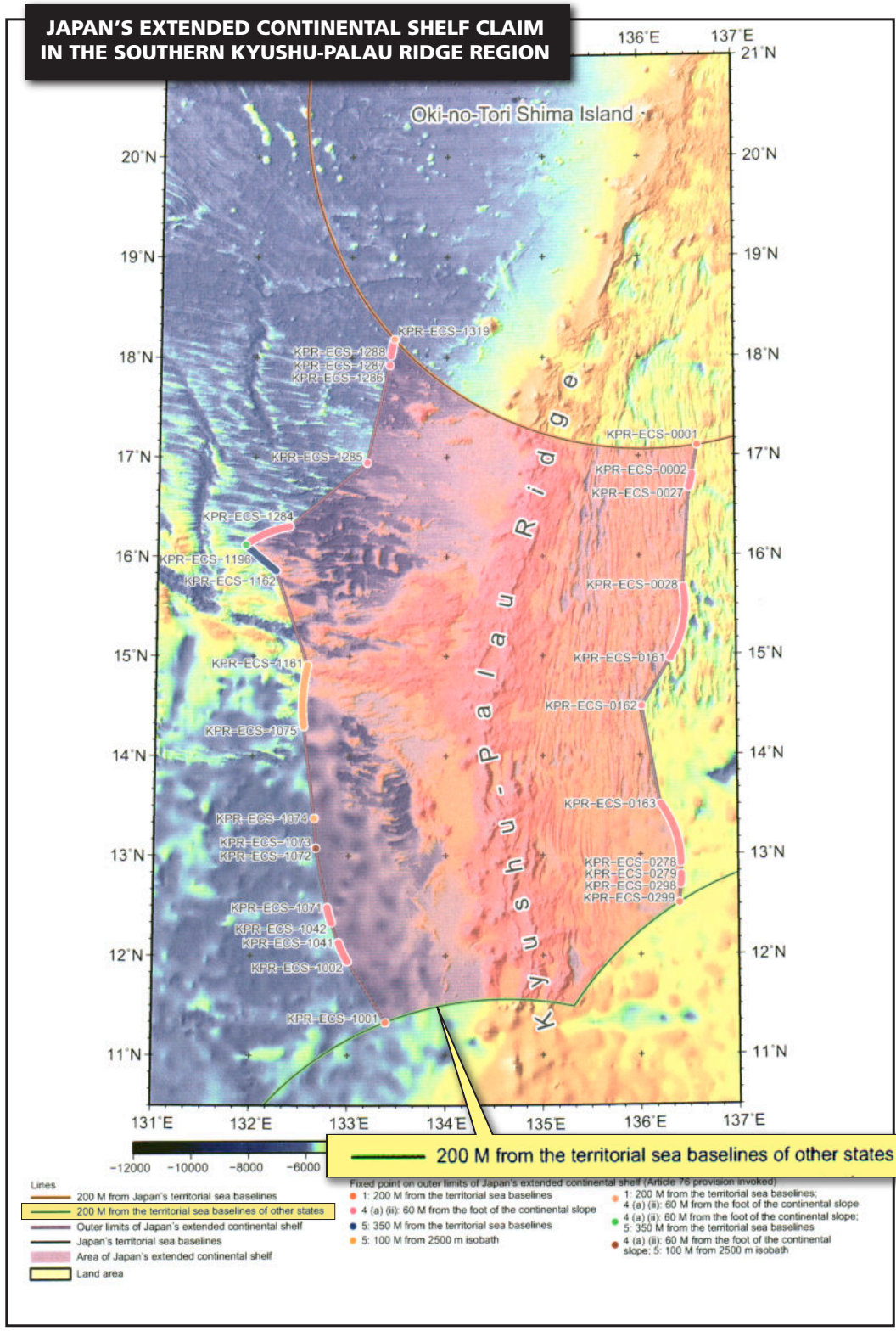

Figure R-4.6, See full size Map Vol. II - page 100

4.64. Further south, France's outer continental shelf Submission with respect to New Caledonia also respects the 200 nautical mile entitlements of Australia in the area as can be seen on **Figure R-4.7.** In this respect, the French Submission states: "The extension is limited in the west by the area under Australian jurisdiction (EEZ)". The Submission also notes that, with respect to areas "beyond 200 nautical miles, a potential overlap of claims exists between the continental shelves of France, Australia and New Zealand."[328]

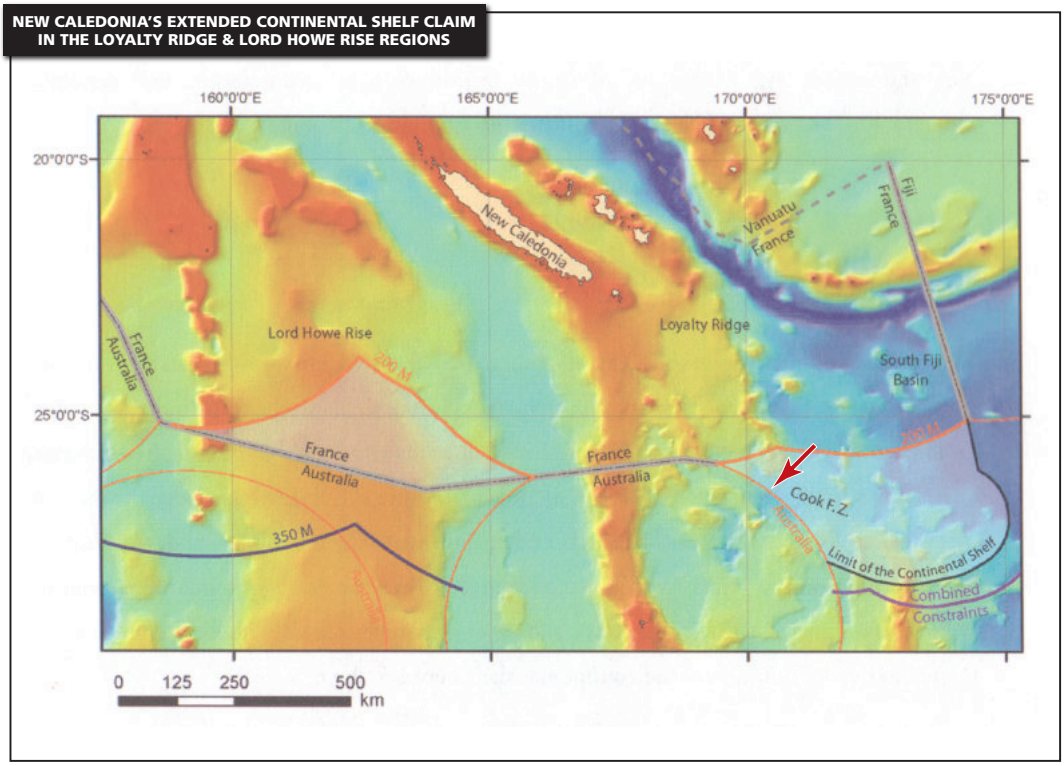

Figure R-4.7, See full size Map Vol. II - page 101

328 Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/fra07/fra_executive summary_2007.pdf (last visited 5 June 2010).

4.65. New Zealand has followed the same practice and has avoided introducing outer continental shelf claims that lie within 200 nautical miles of another State. Thus, in the southern region claimed by New Zealand, the claim ends at the 200 nautical mile entitlement of Australia's Macquarie Island as shown on **Figure R-4.8**. In the northern region, New Zealand's claim avoids trespassing on the 200 nautical mile entitlements of Fiji and Tonga.[329]

4.66. The practice of Sri Lanka with respect to its outer continental shelf claim in the Indian Ocean is the same. In its 2009 submission to the Commission on the Limits of the Continental Shelf, Sri Lanka noted that its extended continental shelf claim was situated exclusively seaward of the 200 nautical mile limits of neighbouring coastal States.[330] The position is illustrated in **Figure R-4.9** where the outer continental shelf claim of Sri Lanka clearly does not trespass on the 200 mile entitlements of other states.

4.67. In the eastern Atlantic Ocean, France, Ireland, Spain and the United Kingdom have made a joint submission to the Commission with respect to extended continental shelf rights in the area of the Bay of Biscay and the Celtic Sea. These claims

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[329] Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/nzl_exec_sum.pdf?bcsi_scan_8896DBBFDB1B0269=0&bcsi_scan_filename=nzl_exec_sum.pdf (last visited 5 June 2010).

[330] Available at: http://www.un.org/depts/los/clcs_new/submissions_files/submission_lka_43_2009.htm (last visited 5 June 2010).

NEW ZEALAND'S EXTENDED CONTINENTAL SHELF CLAIM DOES NOT TRESPASS INTO THE 200 M EEZ ENTITLEMENTS OF NEIGHBORING STATES

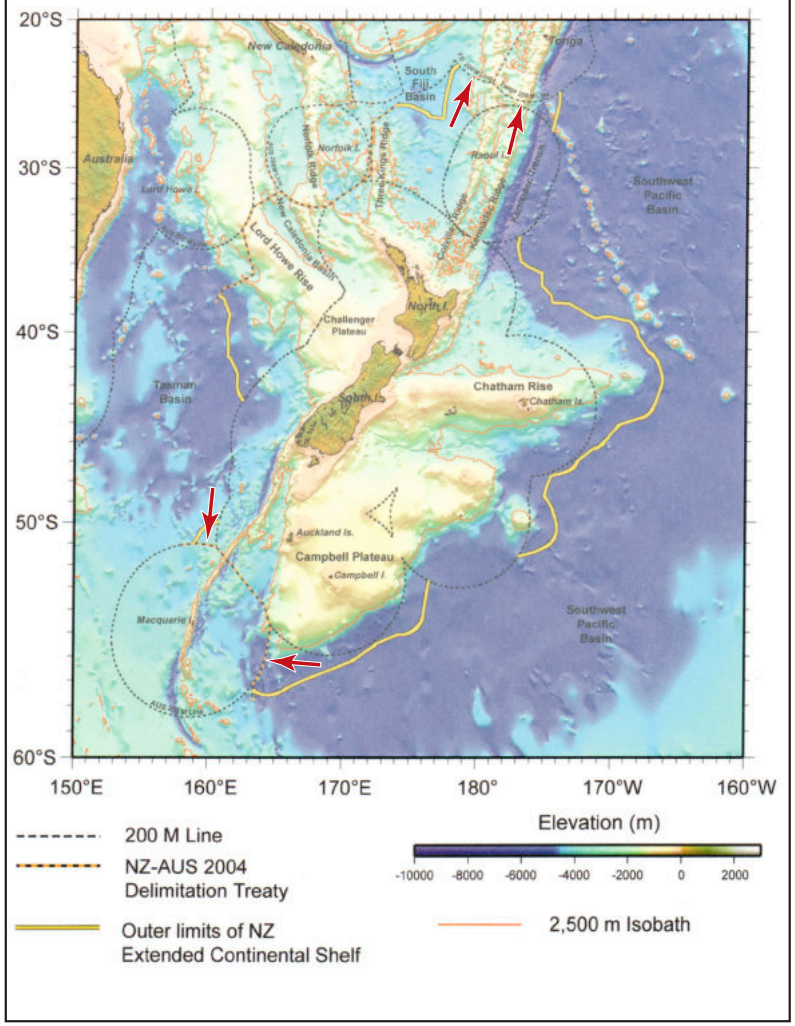

Figure R-4.8, See full size Map Vol. II - page 102

SRI LANKA'S EXTENDED CONTINENTAL SHELF CLAIM DOES NOT TRESPASS INTO THE 200 M EEZ ENTITLEMENTS OF NEIGHBORING STATES

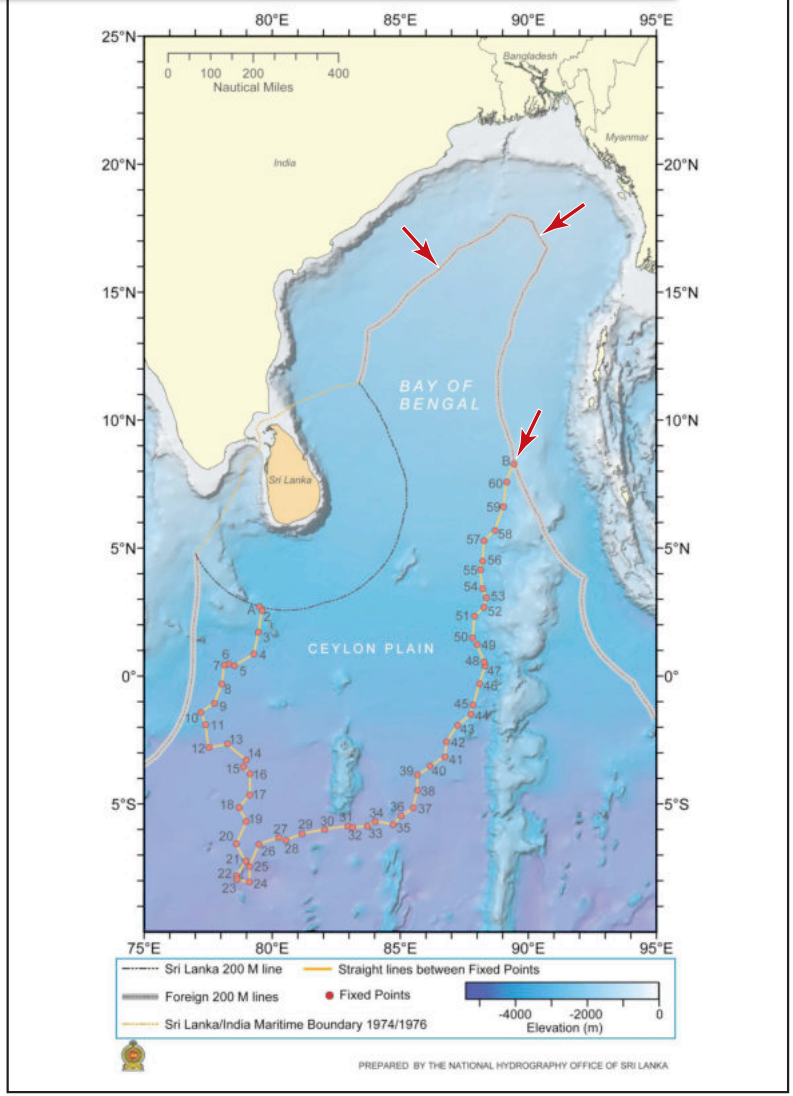

Figure R-4.9, See full size Map Vol. II - page 103

were expressly limited to areas lying beyond 200 nautical miles from the baselines of each State as is evident from the map reproduced as **Figure R-4.10**.[331]

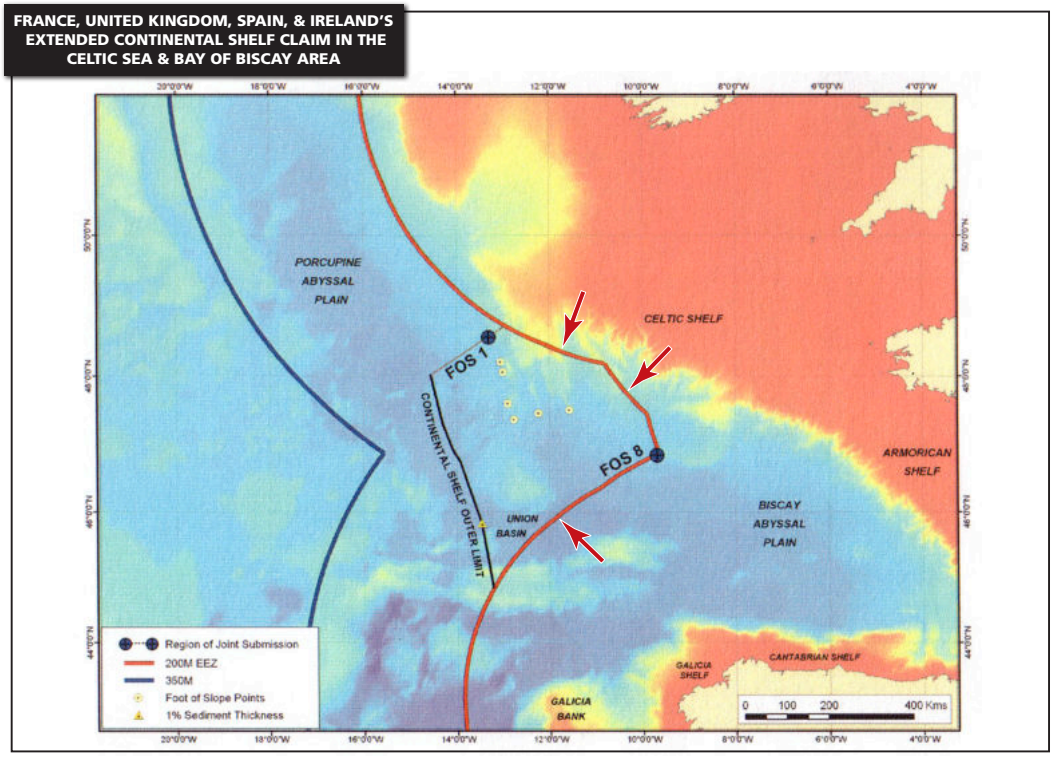

Figure R-4.10, See full size Map Vol. II - page 104

4.68. In the Gulf of Mexico, Mexico has identified two polygon shaped areas in which it could claim outer continental shelf rights. These can be seen on the inset to **Figure R-4.5** above. Mexico's submission to the Commission has initially been limited to the Western Polygon where it has a delimitation agreement with the United States. With respect to the Eastern

331 Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/frgbires06/joint_submission_executive_summary_english.pdf (last visited 5 June 2010).

Polygon, Mexico reserved the right to make a second submission at a later date. Significantly, the parameters of the Eastern Polygon are delineated by the 200 nautical mile legal entitlements of Mexico, the United States and Cuba demonstrating Mexico's intention not to claim outer continental shelf rights within areas subject to the sovereign rights of other States.[332]

4.69. It is evident that the practice of those States which do claim extended continental shelf rights runs counter to the proposition advanced by Nicaragua that there is no priority when extended continental shelf claims trespass into areas falling within 200 nautical miles of another State. Contrary to Nicaragua's new claim, States have taken care to tailor their extended continental shelf claims so as not to trespass onto areas lying within 200 nautical miles of another State.

D. Conclusions

4.70. Nicaragua now concedes that what Colombia said in its *Counter-Memorial* is correct - namely, that there can be no single maritime boundary based on a mainland-to-mainland median line in this case because of distances involved. As for Nicaragua's outer continental shelf claim and its request that the Court only delimit the Parties' continental shelf, this is an entirely new claim advanced for the first time in the *Reply*. The

[332] Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/mex07/part_i_executive_summary.pdf (last visited 5 June 2010).

claim is fundamentally incompatible with Nicaragua's previous request for the delimitation of a single maritime boundary. Given that the subject-matter of the new claim does not arise out of the claim advanced in the Application, it is inadmissible.

4.71. The new continental shelf claim also lacks any merit. Nicaragua has neither demonstrated nor established any entitlement to outer continental shelf rights, and no such rights exist in this part of the Caribbean. Moreover, there is no basis for effecting a continental shelf delimitation based on the physical characteristics of the shelf when the area claimed by Nicaragua falls within 200 nautical miles of Colombia's mainland and insular territory.

4.72. Having abandoned its previous claim for a single maritime boundary based on a mainland-to-mainland median line – a claim which the Colombian *Counter-Memorial* showed was unsustainable – Nicaragua is left with no positive delimitation claim once its new outer continental shelf claim is dismissed, as Colombia submits it must be. Notwithstanding Nicaragua's fundamental change of position, the dispute to be decided by the Court, remains the delimitation of a single maritime boundary. As will be discussed in the next chapter, that delimitation falls to be established in the area lying between the San Andrés Archipelago and the Nicaraguan coast.

Chapter 5

THE AREA OF DELIMITATION

5.1. This Chapter addresses the area within which the delimitation of the single maritime boundary falls to be carried out.

5.2. Section A first demonstrates that the mainland coast of Colombia is irrelevant to the delimitation because of its location more than 400 nautical miles from Nicaragua's coast beyond the area of concern. It then goes on to discuss the maritime entitlements generated by Colombia's islands forming the San Andrés Archipelago. Based on the area where the legal entitlements projecting from the Parties' truly relevant coasts meet, Section A shows that the delimitation area lies between the coasts of the Parties that stand in an opposite relationship to each other – i.e., the area situated between the westernmost chain of Colombia's islands (San Andrés, Providencia, Santa Catalina, Alburquerque and Quitasueño) and the opposite Nicaraguan coast. With respect to Nicaragua's own islands, Nicaragua has taken a contradictory position in its pleadings, a point that will also be brought out in this section.

5.3. Section B then turns to the presence of third States and third State delimitations in the region. These elements constitute relevant circumstances to be taken into account in

identifying the delimitation area relevant to the case. As will be discussed in Chapter 8, they are also relevant in assessing what neighbouring States have considered an equitable delimitation to be in situations where their coasts face Colombia's islands.

A. The Delimitation Concerns the Area Lying between Nicaragua's Coast and Colombia's San Andrés Archipelago

(1) THIS IS NOT A CASE OF DELIMITATION BETWEEN MAINLAND COASTS

5.4. Colombia demonstrated in its *Counter-Memorial* that its mainland coast is not a relevant coast for the delimitation of a single maritime boundary because it lies well over 400 nautical miles from the nearest Nicaraguan territory. Nicaragua now accepts that point. However, Nicaragua persists in trying to keep the Colombian mainland coast in play by introducing a request for a continental shelf delimitation based on an "equal division" of the natural prolongations of the Colombian and Nicaraguan mainland coasts. In the words of the Nicaraguan *Reply*:

> "Nicaragua's request has been limited in this *Reply* to a continental shelf delimitation since this is the only area where the entitlements of the Parties emanating from their mainland coasts meet and overlap and has need of a delimitation".[333]

[333] NR, para. 5.1.

5.5. It is this new claim alone, according to the Nicaraguan *Reply*, that renders both of the Parties' mainland coasts "relevant coasts". In other words, the only way for Nicaragua to plead for the relevance of Colombia's mainland coast is to assert that the delimitation must now be based on dividing the natural prolongations of the Parties, not on the establishment of a single maritime boundary. The convoluted logic of this proposition is expressed in the following way:

> "In fact, as Nicaragua has shown, the only area in this case that requires a delimitation is where the Parties' continental shelf entitlements overlap, so the only relevant coasts are the two mainland coasts."[334]

5.6. However, Colombia's mainland coast is also completely irrelevant to Nicaragua's continental shelf claim. This is because Nicaragua has not demonstrated any legal entitlement to continental shelf rights situated more than 200 nautical miles from its coast, there are no areas of outer continental shelf in this part of the Caribbean, and natural prolongation is irrelevant to Colombia's 200 nautical mile entitlements measured from its mainland and its islands. It is unnecessary, therefore, to consider any issue of natural prolongation from Colombia's mainland coast, and that coast still has no role to play in the present delimitation dispute.

5.7. This basic geographic fact – the lack of relevance of Colombia's mainland coast – distinguishes this case from other

[334] NR, para. 6.27.

cases on which Nicaragua relies in an attempt to enclave Colombia's islands in what Nicaragua calls its own continental shelf.

5.8. For example, the Nicaraguan *Reply* argues that the present case is similar to the delimitation concerning the Channel Islands in the *Anglo-French Arbitration* where the islands were enclaved.[335] As can readily be shown, however, the two situations are not at all analogous.

5.9. The delimitation between France and the United Kingdom in the English Channel involved primarily a delimitation between broadly equivalent mainland coasts which lay between 18 and 100 miles apart. The result was a mainland-to-mainland equidistance boundary except for the treatment of the Channel Islands. In the present case, the maritime boundary does not fall to be delimited between the mainland coasts of the Parties given that those coasts are too far apart, but rather between the islands comprising Colombia's San Andrés Archipelago and Nicaragua's opposite coast.

5.10. It is evident that the position and location of the San Andrés Archipelago is in no way comparable to that of the Channel Islands. The latter were a relatively compact group situated on the "wrong" side of the mainland-to-mainland median line boundary just a few miles off the French mainland coast. In fact, the distance between the Channel Islands and the

335 NR, paras. 5.18-5.25.

French mainland coast was so restricted that it involved the delimitation of the territorial sea between them for which the Court of Arbitration had no jurisdiction. Moreover, the Channel Islands were immediately surrounded on three sides by French mainland territory. The Channel Islands were thus enclaved as special or relevant circumstances that were unique to the particular geographic situation.

5.11. The San Andrés Archipelago, on the other hand, is located over 100 nautical miles from the mainland coast of Nicaragua even at its nearest point, and the Archipelago also lies opposite to a series of Nicaraguan islands. Unlike the Channel Islands, Colombia's islands are not situated in close proximity to the Nicaraguan mainland. Indeed, they would have to be closer to the Nicaraguan coast than Nicaragua's own islands, such as the Islas Mangles (Corn Islands), even to begin to resemble the geographic relationship between the Channel Islands and the French coast. Nor are they surrounded on three sides by Nicaraguan mainland territory. And they are not located on the "wrong" side of any mainland-to-mainland median line because such a line does not exist in this case due to the irrelevance of Colombia's mainland coast.

5.12. It was the fact that the Channel Islands lay on the "wrong" side of the median line that was the main reason for enclaving the islands in the *Anglo-French Arbitration*. As the Court of Arbitration observed, if the Channel Islands were permitted to divert the course of the mid-Channel median line, a

distortion of the boundary would result which would be creative of inequity.[336] This element does not exist in this case due to the absence of any mainland-to-mainland median line, and because Colombia's string of islands stand on their own right with their own legal entitlements. As the Court of Arbitration emphasized, the case it was presented with -

> "is quite different from that of small islands on the right side of or close to the median line, and it is also quite different from the case where numerous islands stretch out one after another long distances from the mainland.[337]"

5.13. It is not surprising, therefore, that the Nicaraguan *Reply* is obliged to concede that, "in certain respects the situations are not exactly comparable."[338] What is puzzling, on the other hand, is that just three paragraphs later in its *Reply*, Nicaragua contradicts itself by asserting that "the situation of the three islands [San Andrés, Providencia and Santa Catalina] in the present case is entirely similar."[339] As has been shown, it is not.

5.14. Nicaragua also cites the 1971 Italy-Tunisia Agreement as an example of State practice where islands have been enclaved (actually only partially enclaved). In its customarily ambitious way, Nicaragua asserts that this situation is also "remarkably similar" to the delimitation it proposes between itself and

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336 *Case concerning the Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 20 June 1977,* 18 RIAA 94, para. 199.

337 *Ibid.*

338 NR, para. 5.18.

339 NR, para. 5.21.

Colombia, a proposition that cannot even remotely be sustained.[340]

5.15. Once again, the dominant feature of the Italy-Tunisia agreement was that the delimitation was based on a median line boundary between the coasts of Sicily and Tunisia including the small islands lying just off those coasts.[341] The coasts of Tunisia and Sicily are only about 75 miles apart. The four Italian islands that were partially enclaved actually straddled the median line - hence the reason why they were partially enclaved with no Tunisian maritime areas extending beyond them.

5.16. In contrast, there is no mainland-to-mainland median line in this case. Even Nicaragua has abandoned its previous argument that such a line is relevant given that it now admits that its single maritime boundary claim is untenable, and Nicaragua's new "division of natural prolongations" theory also does not depend on any mainland-to-mainland median line.

5.17. Nicaragua also neglects to draw attention to the northern two-thirds of the delimitation agreed between Italy and Tunisia. There, the delimitation was an equidistance boundary between small islands lying on *both* sides of the line. If anything, therefore, this aspect of the Italy-Tunisia example supports Colombia's case which is also based on an equidistance line

340 NR, para. 6.116.

341 This is evident from Article I of the Agreement which states that the boundary "shall be the median line" with the exception of four small Italian islands which straddle that line. J. Charney and L. Alexander, eds., *International Maritime Boundaries,* Vol. II, p. 1621.

drawn between its own islands and the islands belonging to Nicaragua on the other side.

5.18. The plain fact is that Colombia's islands do not straddle, or lie on the "wrong side" of, any median line. Rather, the islands stand on their own right with all the maritime entitlements that international law accords to coastal territory projected out to a distance of 200 nautical miles.

5.19. Nicaragua's *Reply* purports to find it strange that Colombia's mainland coast has gone missing. Nicaragua hypothesizes that this may be the first instance of a Party seeking to ignore its coast.[342]

5.20. Colombia has fully explained the reasons why its mainland coast has no role to play in the present delimitation and why Nicaragua's attempts to inject that coast into the equation are erroneous and contrived. This does not mean that Colombia is in any way reticent about its mainland coast. To the contrary, that coast was treated a relevant coast in Colombia's maritime boundary agreements with Panama, Jamaica, the Dominican Republic and Haiti. But the Colombian mainland coast is not a relevant coast vis-à-vis Nicaragua, and that is why it is not discussed by Colombia.

342 NR, para. 2.17.

5.21. Curiously, Nicaragua now asserts that it is Colombia that is seeking only an exclusive economic zone delimitation.[343] This is wrong on two counts. First, Colombia has presented its case for the delimitation of a single maritime boundary, not simply the delimitation of the Parties' exclusive economic zones. Second, a single maritime boundary is precisely what Nicaragua itself was requesting in its Application and in its *Memorial*, and even in its written submissions during the preliminary objections stage of the case.

5.22. Given that Nicaragua has abandoned its mainland-to-mainland single maritime boundary claim, and has failed to establish any outer continental shelf entitlements by which it seeks to put Colombia's mainland coast into play, the conclusion must be that Colombia's mainland coast remains irrelevant to the present delimitation because of its distance from the Nicaraguan coast.

5.23. The relevant coasts of Colombia for purposes of this case are those associated with its islands comprising the San Andrés Archipelago. As the next section will show, those islands generate maritime entitlements of their own, and (as Chapter 6 will demonstrate) they also provide relevant basepoints for plotting the delimitation line vis-à-vis the opposite Nicaraguan coast.

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343 NR, para. 6.45.

(2) COLOMBIA'S ISLANDS GENERATE THEIR OWN MARITIME ENTITLEMENTS

5.24. Under international law, Colombia's islands generate maritime rights and entitlements extending out to a distance of 200 nautical miles from their baselines in exactly the same manner as other land territory. This is made clear by Article 121(2) of the 1982 Convention which provides that:

> "Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory."

5.25. Nicaragua admits that the islands of San Andrés, Providencia and Santa Catalina are full-fledged islands that are entitled to generate continental shelf and exclusive economic zone rights of their own.[344] This cannot be questioned. All three islands are populated and the islands host important political, economic and social institutions. The photographs of San Andrés, including its principal city, Providencia and Santa Catalina, reproduced at **Figures R-5.1d and 5.1e** hereto, speak for themselves. Clearly, islands such as these are entitled to the full suite of maritime entitlements recognized by international law.

5.26. With respect to the other islands comprising the Archipelago, however, Nicaragua asserts that they are "rocks"

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[344] NR, para. 5.3.

Figure R-5.1d, See full size Map Vol. II - page 108

Figure R-5.1e, See full size Map Vol. II - page 109

under Article 121(3) of the 1982 Convention with no human habitation or economic life of their own.[345] This is no more than a bald assertion with no facts to back it up. At several places in the Nicaraguan *Reply*, it is asserted that Chapter IV of the *Reply* shows that "there can be no doubt that the cays located on Roncador and Bajo Nuevo as well as the other small features claimed by Colombia in the area are at most rocks in the sense of Article 121(3) of the 1982 Law of the Sea Convention".[346] But if one turns to Chapter IV of the *Reply*, no such showing is made. All that chapter addresses is Serranilla, Bajo Nuevo and Quitasueño.[347] Nothing at all is said with respect to Alburquerque, Serrana, Roncador or the East-Southeast Cays.

5.27. A mere glance at the photographs that Colombia included in its *Counter-Memorial* shows unequivocally that the islands not dealt with in Nicaragua's *Reply* - Alburquerque, Serrana, Roncador, and the East-Southeast Cays - cannot possibly be considered to be mere "rocks".

5.28. The Alburquerque Cays are heavily vegetated with coconut trees, rubber trees and bushes as can be seen on **Figure R-5.1a**. There is a well-presented coral formation around them along with a colourful and varied presence of sea species. The islands are home to an active tourist presence, there is a

345 NR, para. 5.3.
346 NR, para. 5.17; and see also para. 6.29.
347 NR, paras. 4.9-4.14 for Serranilla and Bajo Nuevo, and paras. 4.25 - 4.43 for Quitasueño.

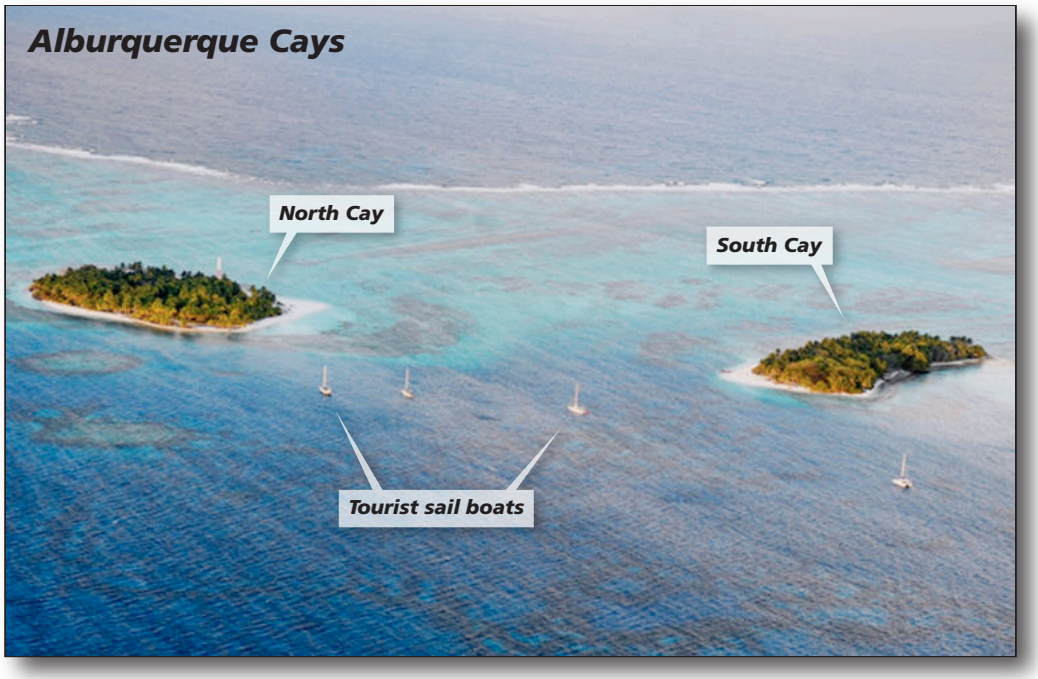

Figure R-5.1a, See full size Map Vol. II - page 105

Colombian Marine detachment located there as well as weather and radio stations.[348]

5.29. Serrana is a longer atoll as the photograph attached in **Figure R-5.1a** also shows. The island is full of vegetation. Fresh water is present, a variety of installations manned by Colombian personnel are stationed there, and the islands are frequented by fishermen. The islands also have a historical economic importance given that guano was exported from them. All of this was described in the Colombian *Counter-Memorial*.[349] None of it is addressed by Nicaragua. Again, a glance at the photograph is sufficient to show that Serrana cannot possibly be characterized as a "rock".

5.30. The same can be said about Roncador. Once again, as the photograph of the island included on **Figure R-5.1b** reveals, the island is vegetated, and there are facilities on it including a lighthouse, solar panels, communication installations and a heliport, along with a detachment of the Colombian Marine Infantry. The island is also used by small industrial fishing vessels.[350] It is not a "rock" and Nicaragua has not shown otherwise.

5.31. The East-Southeast Cays are also not rocks as the photographs of them clearly reveal. Coconut trees and other foliage is present on the islands, fishermen for whom there are

348 CCM, paras. 2.15-2.17.
349 CCM, paras. 2.22-2.24 and Annex 120.
350 CCM, para. 2.21.

Figure R-5.1b, See full size Map Vol. II - page 106

shelters use them, there is a well for fresh water, the Colombian Marine Infantry is present, and there is a weather station, lighthouse and radio station.[351]

5.32. The same can be said about Serranilla and Bajo Nuevo. The largest of the Serranilla Cays (Beacon Cay) has trees and vegetation as shown on the photographs included in **Figure R-5.1c**.[352] There is a lighthouse operated by Colombian personnel, a detachment of the Colombian Marine Infantry which controls fishing and illicit drug-trafficking activities in the area stationed there, weather and radio stations and landing facilities for small aircraft.[353]

5.33. Bajo Nuevo consists of three cays on one of which is situated a light structure operated by the Colombian Navy. This can be seen on the photograph included on Figure 2.10 to Colombia's *Counter-Memorial* reproduced in **Figure R-5.1c**. In addition, Serranilla and Bajo Nuevo are both frequented by Jamaican fishermen who have been[354] and continue to be allowed to fish in their waters under permits issued by Colombia and pursuant to Colombian fishing regulations.

5.34. Each of these islands generates territorial sea, contiguous zone, continental shelf and column of water entitlements based on the distance formula projected in a 360° direction. The

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351 CCM, Figure 2.5 and paras. 2.18-2.20.

352 See also, CCM, Figure 2.9

353 CCM, para. 2.30.

354 CCM, para. 2.31 and CCM, paras. 4.169-4.185 including Annexes 63 and 64.

Figure R-5.1c, See full size Map Vol. II - page 107

Nicaraguan *Reply* attempts to criticize Colombia's nautical charts relating to some of these islands.[355] These criticisms are unwarranted as the technical explanation contained in Appendix 2 demonstrates.[356]

5.35. With respect to Quitasueño, Colombia's *Counter-Memorial* contained a Navy Report demonstrating that there were several features within the Quitasueño bank which qualify as islands because they are above water at high tide. Apart from these features, Quitasueño as a whole is a substantial feature covering a large area, with numerous low-tide elevations and a fringing reef on the east, which can be used as part of Quitasueño's baselines. Quitasueño has been, and continues to be, an active fishing area of considerable economic importance regulated by Colombia.[357] There is a 1983 Fishing Agreement and subsequent conservation measures agreed between Colombia and the United States relating to the Quitasueño area.[358]

5.36. As discussed in Chapter 3, Colombia is furnishing with this Rejoinder an expert report prepared by a former senior official with the Office of the Geographer of the State Department of the United States, Dr Robert W Smith. That report demonstrates that there are as many as 34 individual features within the bank that qualify as islands. The Smith

355 NR, paras. 4.10-4.13.
356 Appendix 2: Colombia's Official Nautical Charting of the San Andrés Archipelago.
357 CCM, paras 2.25-2.29.
358 CCM, paras. 4.62-4.77.

report also shows that there are at least 20 low-tide elevations situated on Quitasueño well within 12 nautical miles of the island features that are above water at high tide.[359] Moreover, the islands within Quitasueño possess a fringing reef which, as reflected in Article 6 of the Law of the Sea Convention, is able to constitute the baseline of Quitasueño from which its maritime entitlements are measured. As **Figure R-5.2** shows, when the actual baseline of Quitasueño is taken into account, Quitasueño is actually a substantial feature. The area situated within Quitasueño's baselines is some 83 km².

5.37. **Figure R-5.3** illustrates the 200 nautical mile maritime entitlements generated by the radial projection of Colombia's islands in accordance with the distance principle without prejudice to the question of delimitation. These islands are entitled to the maritime areas that appertain to them in conformity with general international law.

5.38. While Nicaragua pays lip service to the principle that islands possess maritime entitlements in their own right,[360] its recognition of this reality is entirely ephemeral. Nicaragua's appreciation of the legal and geographic context in which the need for delimitation arises is tainted by a self-centered view that only its mainland coast and islands generate continental shelf entitlements and that Colombia's islands should be

[359] Appendix 1: Expert Report by Dr. Robert Smith "Mapping the Islands of Quitasueño (Colombia) – Their Baselines, Territorial Sea, and Contiguous Zone".
[360] NR, para. 5.12.

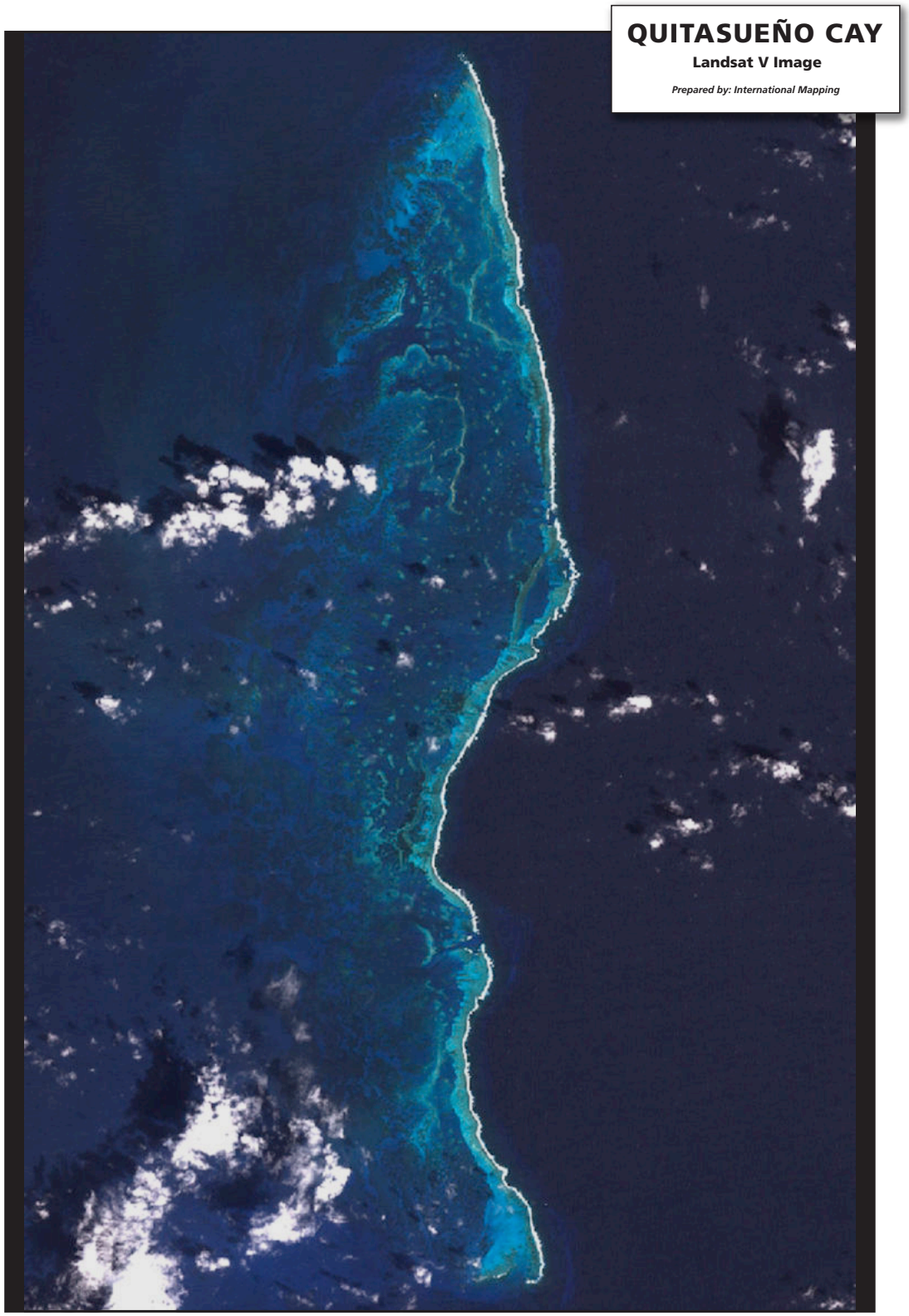

Figure R-5.2, See full size Map Vol. II - page 110

Figure R-5.3, See full size Map Vol. II - page 111

virtually ignored by means of according them no more than three- and twelve-mile enclaves within Nicaragua's continental shelf.

5.39. Examples of this approach are littered throughout the Nicaraguan *Reply*. Thus, one finds statements such as the following which place the myopic nature of Nicaragua's position in sharp focus.

> "The islands of San Andrés and Providencia are not only sited on the natural prolongation of the mainland territory of Nicaragua that reaches beyond 300 nautical miles in this area, but are also well within her 200-nautical-mile exclusive economic zone based on the distance principle."[361]

And again:

> "As shown in (Figures 1.2, 3.2 and 3.7) the various island features form part of the natural prolongation of Nicaragua."[362]

And still again:

> "The islands and other maritime features claimed by Colombia are located on the continental shelf of Nicaragua and approximately 200 nautical miles distant from the area where the continental shelf of Colombia terminates."[363]

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361 NR, para. 5.4.

362 NR, para. 3.63. Elsewhere, Nicaragua asserts that it is only the "natural prolongation of the mainland territory of both Parties" that meets and overlaps giving rise to the need for delimitation. NR, para. 3.2.

363 NR, para. 5.27.

5.40. This line of argument is based on the fundamental misconception that Colombia's islands somehow fall, like unwelcome intruders, exclusively on Nicaragua's continental shelf or within its EEZ. It also ignores the fact that the distance principle applies equally to Colombia's islands. Thus, the reality of the situation is very different from what Nicaragua seeks to portray. Colombia's islands have their own legal entitlements to continental shelf and column of water rights just as any other land territory. This is recognized by Article 121(2) of the 1982 Convention and customary international law. But for the presence of Nicaragua's islands and its mainland coast, Colombia's islands would actually generate even larger maritime spaces to the west out to a distance of 200 nautical miles. It is thus no more accurate to say that Colombia's islands are situated on Nicaragua's continental shelf and within its EEZ than to say that Nicaragua's islands and part of its mainland territory are situated on the continental shelf and within the EEZ of Colombia.

5.41. In arriving at an equitable delimitation, it is axiomatic that geography must not be refashioned. This precept has formed a cornerstone of the Court's jurisprudence ever since the *North Sea* cases were decided. There, the Court articulated the following basic principle:

> "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more

> than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy."[364]

5.42. The same point was made by the Court in its Judgment in the *Libya-Malta* case where the Court referred to:

> "The principle that there is to be no refashioning geography, or compensating for the inequalities of nature."[365]

5.43. Political and natural geography are what they are, and the existence of particular geographic configurations in an area to be delimited is neither equitable nor inequitable. As the Chamber in the *Gulf of Maine* case recalled:

> "The facts of geography are not the product of human action amenable to positive or negative judgment, but the result of natural phenomena, so that they can only be taken as they are."[366]

5.44. By its very nature, delimitation between States with opposite coasts situated less than 400 nautical miles apart, as is the case between Colombia's islands and Nicaragua's relevant coast, entails some degree of curtailment of the legal entitlements that each State would otherwise enjoy if the other

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[364] *North Sea Continental Shelf Cases, Judgment, I.C.J. Reports 1969,* pp. 49-50, para. 91.

[365] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 39, para. 46.

[366] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 271, para. 37.

State did not exist. This is due to the actual geographic facts of the area to be delimited. What the Arbitration Tribunal said in the *Guinea-Guinea Bissau Maritime Delimitation* case with respect to States with adjacent coasts applies equally to States with opposite coasts; namely that:

> "Whatever method of delimitation is chosen, the likelihood is that both will lose certain maritime areas which are unquestionably situated opposite and in the vicinity of their coasts. This is the cut-off effect."[367]

(3) THE RELEVANT DELIMITATION AREA IS THE AREA BETWEEN THE PARTIES' RELEVANT COASTS

5.45. In the present case, given the irrelevance of Colombia's mainland coast, the geographic facts dictate that the delimitation falls to be established between the string of Colombian islands which make up the San Andrés Archipelago, on the one hand, and the coast of Nicaragua facing the Archipelago, on the other. In particular, the islands of San Andrés, Providencia, Santa Catalina, Alburquerque and Quitasueño lie directly opposite Nicaragua's own islands and thus must be taken into account. The maritime projections from both Parties' coasts necessarily meet and begin to overlap in the area lying between the westernmost islands of the Archipelago and Nicaragua's coast. This is the relevant area for delimitation purposes in this case. It is illustrated on **Figure R-5.4**.

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[367] *Guinea-Guinea Bissau Maritime Delimitation,* 77 I.L.R. 636, at p. 681, para. 103.

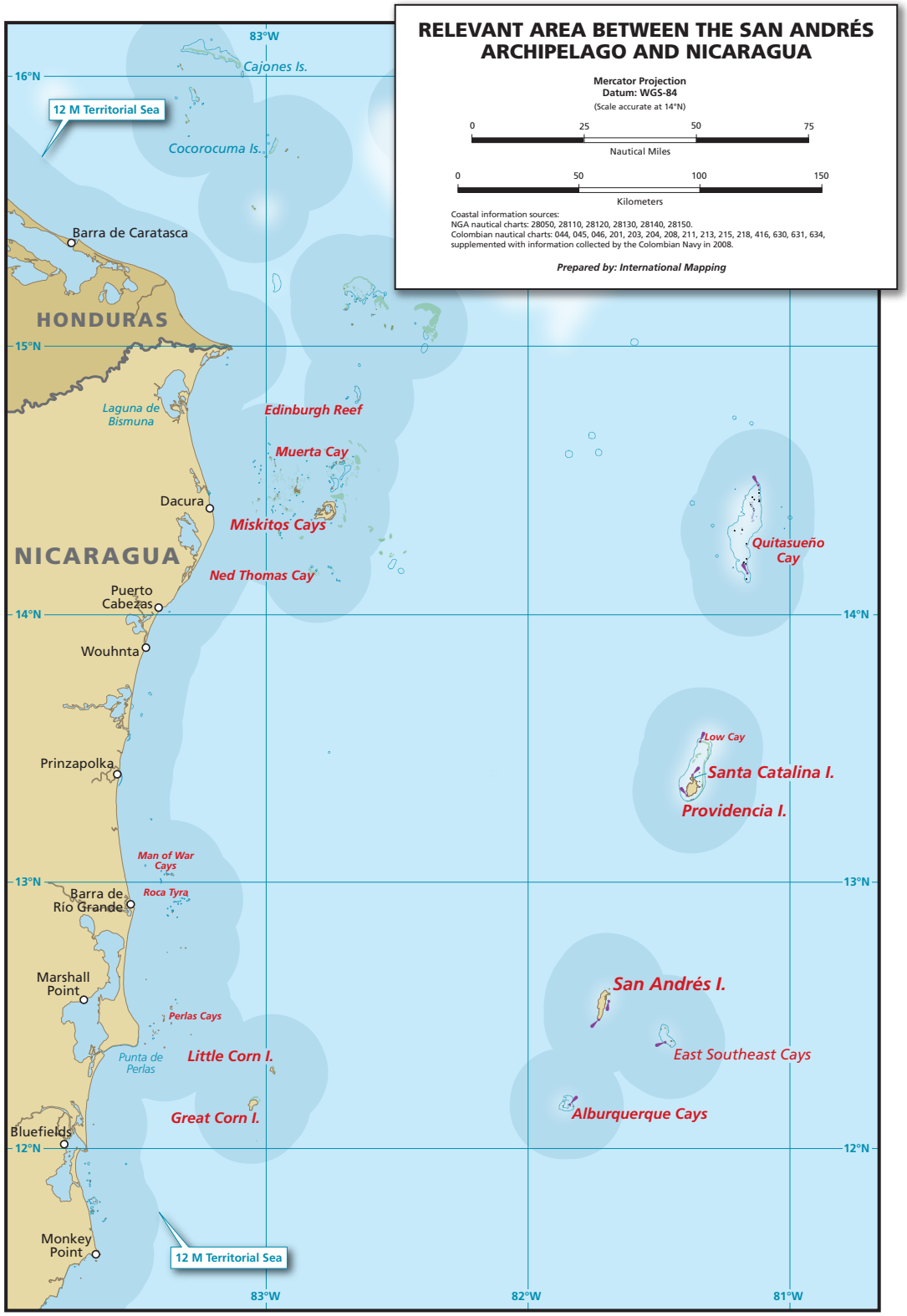

Figure R-5.4, See full size Map Vol. II - page 112

5.46. Figure 6-8 to Nicaragua's *Reply* presents a distorted depiction of the relevant area described by Colombia by limiting that area to a zone lying between Colombia's westernmost islands and Nicaragua's islands. This is not what **Figure R-5.4** shows, which is a reproduction of a figure previously produced in Colombia's *Counter-Memorial* (Figure 8.1). Nicaragua fails to appreciate that the relevant area is not dependent solely on the basepoints on the islands that dictate the course of the provisional equidistance line. Rather, the relevant area is the maritime area between Colombia's westernmost islands and Nicaragua's coast. As noted above, the eastward projection of Nicaragua's coasts and the western projection of the coasts of Colombia's islands meet within this area.

5.47. On the other hand, as can be seen from Figure 3-1 to Nicaragua's *Memorial*, Nicaragua also posits a much more ambitious relevant area that extends far to the east of Colombia's islands and stretches right up to the mainland coasts of Colombia and Panama. Even Nicaragua's rebuttal position, which is based on a hypothetical EEZ entitlement extending 200 nautical miles from its own islands, is portrayed in such a manner as to swallow up Colombia's islands (with the exception of Bajo Nuevo) and cut in front of the mainland coasts of Costa Rica and Panama. This can be seen very clearly on Figure 4-5 to the Nicaraguan *Reply*.

5.48. However, the maritime areas lying east of the Islands of San Andrés, Providencia, Santa Catalina, Alburquerque and Quitasueño have nothing to do with Nicaragua.

5.49. **Figure R-5.5**, shows that this central part of the western Caribbean Sea is bordered by the San Andrés Archipelago on the north, northwest and west, by Panama (and, to a lesser extent, Costa Rica) on the south, and by the Colombian mainland coast to the east. Nicaragua has no coast directly abutting this area, and has never displayed any presence in it. Nicaragua cannot even produce its own nautical charts of the area or the islands situated therein. Moreover, it was only in 1967, almost 40 years after the 1928/1930 Treaty was concluded, that Nicaragua began to show any interest in licensing petroleum activities. However, all of these activities were situated on or near the 82°W meridian and in the vicinity of Quitasueño and all were protested by Colombia.[368] They never extended into areas lying south or east of the Archipelago which Nicaragua now claims.

5.50. Colombia has a delimited boundary with Panama in the southern reaches of this area which can be seen on **Figure R-5.5**. Significantly, Nicaragua never protested this agreement – further evidence of its lack of interest in the area.[369] All of the maritime areas within this central sea region lie much closer to the territory of Colombia than they do to Nicaragua. In fact, all

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368 CCM, Annexes 54-59.

369 See CCM, para. 8.40.

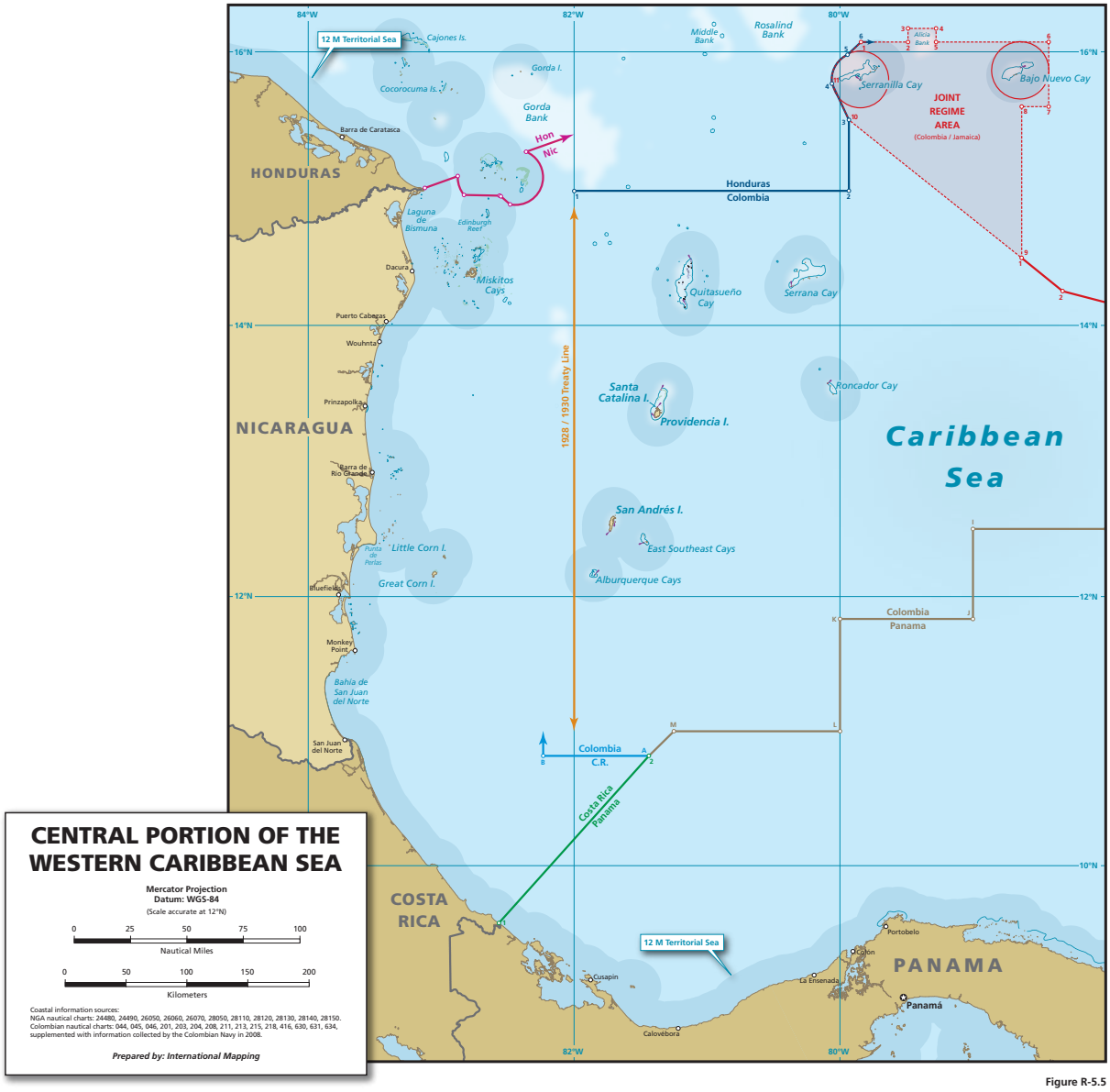

Figure R-5.5

Figure R-5.5, See full size Map Vol. II - page 113

of the maritime areas lying east of San Andrés, Providencia and Santa Catalina, and south of the 13°N parallel of latitude (which passes between San Andrés Island and Providencia) lie closer to Panama and, for the most part, to Costa Rica than they do to Nicaragua. Nicaragua's "relevant area" clearly trespasses on areas where it has no coastal presence, but where the rights and interests not simply of Colombia, but also of third States, are directly involved. This point has been brought home by Costa Rica's Application to Intervene.

5.51. This is an additional reason why the relevant area to be delimited between Colombia and Nicaragua only concerns the area falling between the westernmost islands of the San Andrés Archipelago and the opposite Nicaraguan coasts. It is in this area that the maritime projections of the coasts of the Parties meet without trespassing on the actual or potential rights of third States. Reduced to its essentials, the present case is a case of delimitation between opposite coasts which face each other across this area.

(4) NICARAGUA'S INCONSISTENT POSITION WITH RESPECT TO ITS OWN ISLANDS

5.52. Turning to Nicaragua's own islands lying within the relevant area, Nicaragua's pleadings have adopted a strikingly inconsistent position. Nicaragua's *Memorial* contained almost no information regarding its coastal geography including the characteristics of its islands. The position expressed in Nicaragua's *Memorial* was that the boundary should be

delimited on the basis of a mainland-to-mainland equidistance line with Nicaragua's islands having no role to play or providing any basepoints for that line. In short, Nicaragua conceded its islands to be irrelevant.

5.53. Even Nicaragua's new extended continental shelf claim takes no account of its islands. As previously noted, that claim is based on a division of allegedly overlapping continental margins.

5.54. Elsewhere in the *Reply*, however, Nicaragua suddenly discovers its islands. Thus, Chapter IV of the *Reply* contains a section (Section III) labelled "Nicaragua's Undisputed Islands and Maritime Features". There, the argument is made that the Islas Mangles (Corn Islands) and Miskito Cays are an integral part of the Nicaraguan mainland coast and that, in all other respects, they are comparable to the Islands of San Andrés and Providencia.[370]

5.55. Nicaragua's islands are not an integral part of its mainland coast: indeed, Nicaragua itself ignored them for purposes of its original mainland-to-mainland median line claim, and it continues to ignore them for purposes of its continental shelf claim. Nicaragua acknowledges that the more important of these islands - the Islas Mangles (Corn Islands) - are located some 26 nautical miles from the mainland coast,

[370] NR, para. 4.24.

which means that the territorial seas of the islands and the mainland do not even overlap.[371]

5.56. The population of the Islas Mangles (Corn Islands) is estimated by Nicaragua to be in the range of 7,400. No statistics are given for the Miskito Cays. This pales in comparison to the population of Colombia's islands which totals some 70,000 inhabitants.[372]

5.57. As noted above, this does not prevent Nicaragua from advancing an equally untenable position pursuant to which Nicaragua contends that, if its continental shelf claim is not accepted, Colombia's islands should be enclaved within Nicaragua's hypothetical 200-nautical mile exclusive economic zone.[373] As illustrated on Figure 4-5 to Nicaragua's *Reply*, this "Potential EEZ Entitlement" is actually measured from Nicaragua's islands. Thus, Nicaragua has no hesitation in according its islands a full 200 nautical mile reach for purposes of its rebuttal position, but it ignores the fact that Colombia's much more important islands are entitled to the same maritime rights.

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371 NR, para. 4.17.
372 NR, para. 4.17; CCM, para. 2.1.
373 NR, para. 6.3.

B. The Position of Third States

(1) The need to take into account the presence of third States

5.58. The Court has always been sensitive to the actual or potential rights of third States bordering the area to be delimited. This is particularly the case in semi-enclosed seas where third States are almost inevitably present, as is the case here. In deciding delimitation disputes, the Court has thus been careful not to trespass onto areas within which third States have potential rights, and such areas have been excluded from the area to be delimited.

5.59. In the *Tunisia-Libya* case, for example, the Court refrained from identifying the end-point of the delimitation to avoid any prejudice to third States. As the Court held:

> "The extension of this line northeastwards is a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with third States."[374]

Similarly, in the *Libya-Malta* case, the Court also avoided prolonging the delimitation line into areas claimed by a third State (Italy). While not pronouncing itself on the validity of Italy's claims, the Court observed:

> "The present decision must, as then foreshadowed, be limited in geographical scope

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

> so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights."[375]

5.60. In the *Cameroon-Nigeria* case, the Court exercised similar caution. After noting that "in particular in the case of maritime delimitation where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient",[376] the Court added:

> "It follows that, in fixing the maritime boundary between Cameroon and Nigeria, the Court must ensure that it does not adopt any position which might affect the rights of Equatorial Guinea and Sao Tome and Principe."[377]

5.61. More recently, in the *Romania-Ukraine* case, the Court was also careful not to extend either the relevant area or the delimitation line into areas where third States had claims. After indicating that "the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand, " the Court stated:

> "The Court notes that the delimitation will occur within the enclosed Black Sea, with Romania being both adjacent to, and opposite Ukraine, and with Bulgaria and Turkey lying to the south. It

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375 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 26, para. 21.

376 *Ibid*.

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

> will stay north of any areas where third party interests could become involved." [378]

5.62. There are compelling reasons in this case for the Court to take similar account of the presence of third States in the region in determining the delimitation area, and to exercise comparable restraint. The area to be delimited between Colombia's islands and Nicaragua does not exist in a vacuum. To the south, Costa Rica and Panama front this part of the Caribbean; in the north, Jamaica and Honduras have interests.

(2) THE PRESENCE OF THIRD STATES AND EXISTING DELIMITATION AGREEMENTS BEARING ON THE IDENTIFICATION OF THE DELIMITATION AREA

5.63. Colombia's *Counter-Memorial* set out in detail the existing delimitation agreements which have an impact on, and must be borne in mind in identifying, the area to be delimited between Colombia and Nicaragua.[379] The boundaries resulting from these agreements are shown on **Figure R-5.5** above.

5.64. For its part, Nicaragua's *Memorial* acknowledged that:

> "The only consistent principle to emerge from the case law is the principle that the Court lacks competence to make determinations which may affect the claims of third States".

Nicaragua then added:

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[378] *Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009,* p. 36, para. 112.

[379] CCM, paras. 8.33-8.56.

> "It must be obvious that such an inhibition does not involve a recognition by the Court of the legal validity of the third State claims."[380]

5.65. Regrettably, Nicaragua has failed to heed this principle. Nicaragua's *Memorial* advanced a delimitation area that encroached not only onto areas that could be of potential interest to Costa Rica, Jamaica and even Honduras to the north and west beyond the territorial sea of Serranilla Cay, it also extended the delimitation area right up to Panama's coast.

5.66. As for the Nicaragua *Reply*, it totally ignores the presence of third States and of actual or potential third State entitlements that are relevant to identifying the area to be delimited. Nicaragua proceeds on the assumption that the present delimitation is to take place in geographic isolation with no account being taken of third States in the region.

5.67. Nicaragua's disregard for the maritime rights of neighbouring States is illustrated by Figure 3-1 to its *Reply*, which is labelled "The Delimitation Area according to Nicaragua". Once again, that figure shows that Nicaragua views the relevant area as extending right up to the coast of Panama in the east, within a relatively short distance (much closer than 200 nautical miles) of the coasts of Panama and Costa Rica in the south, and into areas in the vicinity of Serranilla and Bajo Nuevo in the north in which Jamaica has legal entitlements pursuant to a joint regime agreed with Colombia and where

380 NM, para. 3.92.

Honduras also has interests pursuant to its 1986 Treaty with Colombia.

5.68. Even if the delimitation agreements concluded between Colombia and third States are not binding on Nicaragua *per se*, neither do those agreements confer any rights on Nicaragua. As the Application to Intervene submitted by Costa Rica illustrates, such third States have potential maritime entitlements in the same general area extending, as against Colombia, out to the limits of their bilateral arrangements or, as against Nicaragua, extending out to a distance of 200 nautical miles from their coasts.

5.69. The Court should avoid delimiting any areas between Colombia and Nicaragua that potentially prejudice or trespass onto these rights. Colombia has taken this factor into account as a relevant circumstance in putting forward what it views as the appropriate delimitation area – an area that lies between the relevant, opposite coasts of the Parties where third States are not present – and in claiming an equidistance-based boundary the end points of which are specifically left open subject to third States' interests and claims. Nicaragua has not.

Chapter 6

APPLICATION OF THE PRINCIPLES AND RULES OF DELIMITATION: ESTABLISHING THE PROVISIONAL EQUIDISTANCE LINE AS THE FIRST STEP IN THE DELIMITATION

A. Introduction

6.1. Maritime delimitation is a legal process involving the application of what are now well-settled principles and rules of law. As the Court noted in the *Libya-Malta* case:

> "The justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application."[381]

6.2. One of the major contributions to the law of maritime delimitation has been the articulation by the Court of the precept that the "equidistance/special circumstances" rule applicable to territorial sea delimitation is virtually synonymous with the "equitable principles/relevant circumstances" rule that the Court had earlier identified as applying to the delimitation of the continental shelf and the column of water.

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[367] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 39, para. 45.

6.3. While each case must be assessed on its own facts, consistency and predictability have been considerably enhanced by the evolution of a consistent line of jurisprudence emanating from the Court, and from arbitral tribunals, holding that maritime delimitation involves essentially a two-step process.

- First, it is necessary to calculate a provisional equidistance line plotted from the appropriate basepoints on the coasts of the respective parties.
- Second, the relevant circumstances characterizing the delimitation area are then assessed in order to determine whether they justify the adjustment of the provisional equidistance line in order to produce an equitable result.

6.4. The delimitation methodology set out in Colombia's *Counter-Memorial* respects these principles. Colombia plotted the provisional equidistance line between the relevant coasts of the Parties using the nearest basepoints on the Parties' respective coasts that face each other, and then examined whether there were any circumstances warranting a modification of that line.[382]

6.5. Nicaragua's *Memorial* appeared to accept the same basic methodology, although it advanced a wholly irrelevant mainland-to-mainland median line as the first step in arriving at

[382] CCM, Chapter 9.

its single maritime boundary claim. Nonetheless, as a matter of principle, the Nicaraguan *Memorial* recognized that:

> "According to the jurisprudence of the Court, such an equidistance line is to be considered provisional in the sense that it is subject to a process of adjustment resulting from any relevant circumstances."[383]

6.6. Nicaragua's whole approach, as well as its appreciation of the law, has changed with the filing of its *Reply*. This is due to the introduction of a brand new continental shelf claim based on the geology and geomorphological of the continental margin rather than on the relevant geographical context. The Nicaraguan *Reply* thus states that:

> "The position of Nicaragua, as explained in Chapter III above, is that in a delimitation of the continental shelf, such as has been requested by Nicaragua, where the distance principle is not involved but only the natural prolongation of the land territory, *the question of a provisional equidistance line has no role to play.*"[384]

6.7. This position is far removed from the law of maritime delimitation and runs counter to the rules that now exist governing how the delimitation process should operate. There is no reason, nor any need, for the Court to depart from its well-developed practice with regard to delimitation in this case. Nicaragua' case is like a throw-back in time to much earlier

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383 NM, para. 3.51.

384 NR, para. 6.49 (emphasis added).

cases in which the Parties argued geology and geomorphology at length to no avail. It has no place in the present case.

B. Equidistance as the First Step

6.8. In its *Counter-Memorial*, Colombia rehearsed the large body of jurisprudence that exists supporting the principle that maritime delimitation involves the two-step process mentioned above. Colombia pointed out that as early as the *North Sea* cases, the Court recognized that there was much less difficulty in applying a median line boundary between opposite States.[385] As the Court indicated -

> "a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them."[386]

6.9. Since that time, the law has developed with even greater clarity. Given Nicaragua's apparent reliance on this jurisprudence to support its argument that there is no scope for plotting an equidistance line as the first step in this case, it is necessary to review the relevant precedents once more.

(1) LIBYA-MALTA

6.10. In 1985, when the *Libya-Malta* case was decided, the Court had no hesitation in starting with the median line between

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[385] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 36, para. 57.

[386] *Ibid.,* p. 37, para. 58.

Libya and Malta as the provisional delimitation line despite the fact that Malta was a group of islands. That line was then adjusted somewhat to the north to take into account the relevant geographical circumstances characterizing the case.

6.11. Nicaragua's *Reply* argues that the *Libya-Malta* case "confirms that the establishment of a provisional equidistance line in any case is not a mechanical process." It then cites a passage from the Court's Judgment for the proposition that, even as a preliminary step, the Court did not accept that the equidistance method is one that "must be used."[387]

6.12. In making this argument, Nicaragua overlooks the fact that, later in the same Judgment, the Court went on to state that:

> "It will first make a provisional delimitation using a criterion and a method both of which are clearly destined to play an important role in producing a final result."[388]

6.13. The criterion or method in question, as to which the Court said it had little doubt, was linked to the distance formula relating to the extent of a State's title to maritime areas in order to arrive in the first place at a provisional result which was "consistent with the concepts underlying the attribution of legal title."[389]

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387 NR, para. 6.63.

388 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 46, para. 60.

389 *Ibid.,* pp. 46-47, para. 61.

6.14. The method being referred to by the Court in this context was the median line. Accordingly, the Court carried out the delimitation between Libya and Malta in two stages: first, it identified the median line; second, it adjusted that line to take into account the relevant geographic circumstances. The result is depicted on **Figure R-6.1.**

(2) GREENLAND-JAN MAYEN

6.15. The Court adopted a similar approach in the *Jan Mayen* case, another case involving a small island – in this instance, with a temporary population of just 25 scientists – facing the much longer coast of Greenland. As for the mainland coast of Norway, it was ignored because it was too far away, just as the mainland coast of Colombia is too far away in this case. The Court therefore started with a provisional median line between Jan Mayen and Greenland which gave full effect to Jan Mayen. As the Court noted:

> "It is of course this prima facie equitable character which constitutes the reason why the equidistance method, endorsed by Article 6 of the 1958 Convention, has played an important role in the practice of States. The application of that method to delimitations between opposite coasts produces, in most geographical circumstances, an equitable result."[390]

[390] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 67, para. 65.

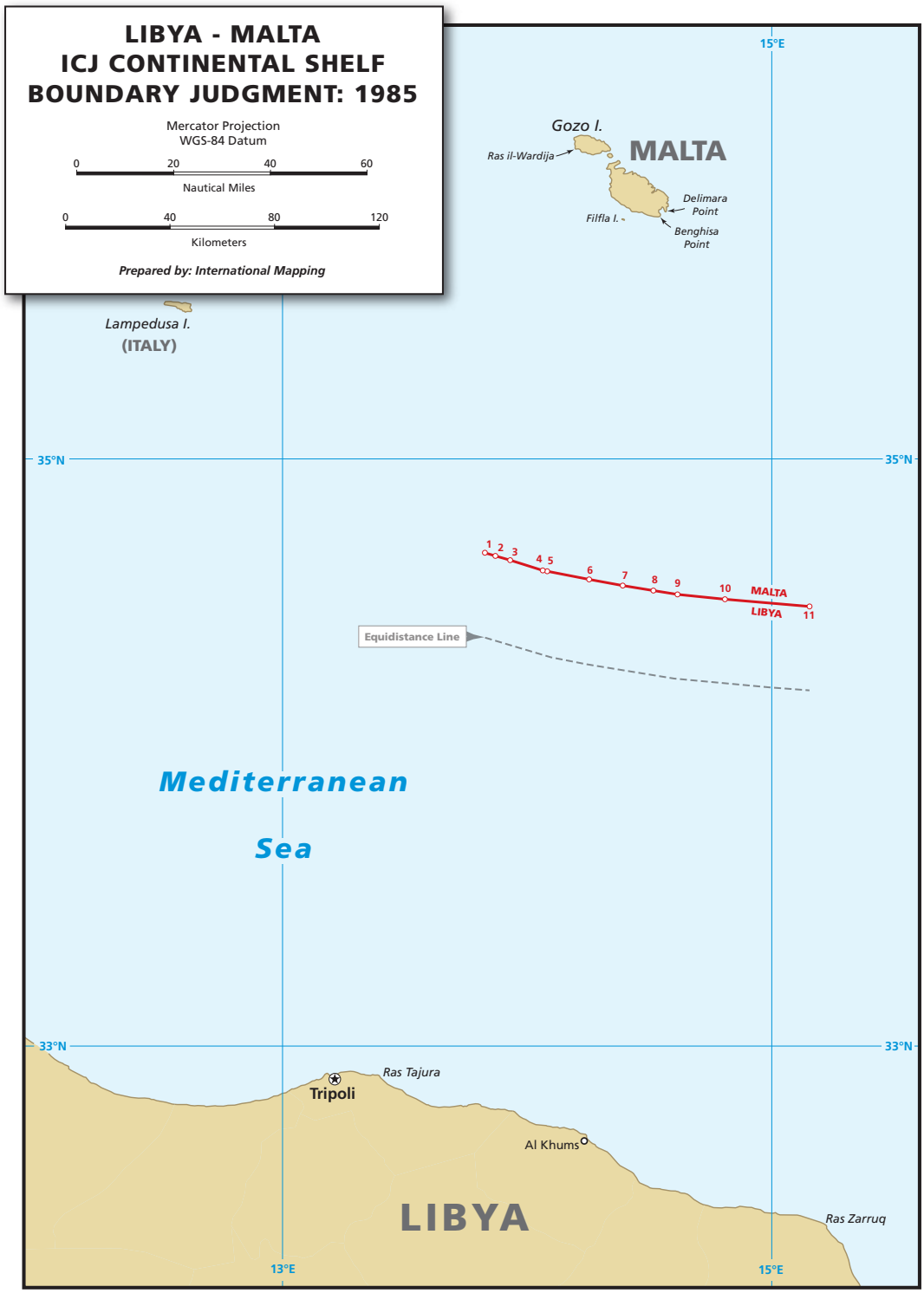

Figure R-6.1, See full size Map Vol. II - page 114

6.16. It is true that the Court then adjusted this line at the second stage of the process in order to take account of the relevant circumstances of the case. For present purposes, however, the important point is that the Court started with an equidistance line as the first step.

6.17. Nicaragua asserts that the case "substantially hinged around a very special circumstance" – the Capelin fisheries, which the Court "attempted to distribute in the most equitable fashion" – and that in the present case there are no resources of this kind necessitating anything like the same kind of solution.[391]

6.18. Three points may be made in response. First, the Court adjusted the median line in only one of the three delimitation zones it had identified in order to take into account access to the fish resources. In the other two zones, fish were not an issue and did not influence the course of the boundary. Second, this element in no way detracts from the fact that, as a matter of principle, the Court considered that the median line between the island and the mainland was the appropriate starting point for delimitation. Third, under Nicaragua's alternative theory – pursuant to which it argues that it should receive a full 200-mile entitlement subject only to the enclaving of Colombia's islands – Greenland should have received its full 200-nautical mile entitlement too. Clearly, this did not happen, notwithstanding

[391] NR, para. 5.26 (1).

the fact that according Greenland a full 200 nautical mile continental shelf and fishing zone would not have reached up to Jan Mayen's 12-mile territorial sea. Thus, it makes no difference that the opposite coasts of the Parties in this case are "insufficiently far apart" for Nicaragua to enjoy a full 200-mile extension of maritime rights. Colombia's opposite coasts of its islands do not enjoy such rights towards Nicaragua either, and neither did the mainland coast of Greenland even though it was located more than 200 nautical miles from Jan Mayen. The resulting delimitation line actually accorded to Jan Mayen the equivalent of roughly a three-quarters equidistance effect despite its small size as can be seen on **Figure R-6.2**.

(3) QATAR-BAHRAIN

6.19. In the *Qatar-Bahrain* case, the Court articulated a principle which has since became an integral part of the law of maritime delimitation. This was the principle that the "equidistance/special circumstances rule" is closely related to the "equitable principles/relevant circumstances rule" in cases of maritime delimitation. In the words of the Judgment:

> "The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the

Figure R-6.2, See full size Map Vol. II - page 115

> exclusive economic zone, are closely interrelated."[392]

6.20. On the basis of that principle, the Court once again employed the equidistance method as the starting point for the delimitation of a single maritime boundary, as the Nicaraguan *Reply* acknowledges.[393]

6.21. Nicaragua attempts to distinguish the case by arguing that the geographic context in *Qatar-Bahrain* is "plainly different" from the present case, and that the Court in the former case did not use a tiny feature known as the Fasht al Jarim for purposes of plotting the equidistance line.[394]

6.22. Each case obviously presents its own set of geographic and other circumstances and is, in this sense, unique. But that does not detract from the force of the statement of principle the Court laid down in *Qatar-Bahrain:* namely, that the "equidistance/special circumstances" and "equitable principles/relevant circumstances" rules are closely related. It is the assimilation of these two rules that provides the underlying predicate for using an equidistance or median line as the first step in delimitation.

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[392] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 111, para. 231.

[393] NR, para. 6.64.

[394] *Ibid.,* para. 6.65. It should be recalled, however, that the Court did give full effect to the small Qatari island of Janan despite the fact that it faced a significantly longer stretch of coast of Bahrain.

(4) CAMEROON-NIGERIA

6.23. The Nicaraguan *Reply* then takes aim at the *Cameroon-Nigeria* case. It argues that the similarity between the two rules referred to above "does not prove a presumption in favour of the equidistance method."[395] The *Reply* then goes on to assert:

> "To the contrary, it only highlights the fact that mention of equidistance was carefully avoided when dealing with the delimitation of the more extensive maritime areas."[396]

6.24. If, by this statement, Nicaragua is referring to the difference in language appearing in Article 15 of the 1982 Convention (dealing with the delimitation of the territorial sea) and Articles 74(1) and 83(1) (dealing with the delimitation of the exclusive economic zone and the continental shelf), then it is precisely on this point that the Court has effectively held that both formulae lead to the application of the same delimitation methodology. As the Court explained in *Cameroon-Nigeria*:

> "The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the

395 NR, para. 6.66.
396 *Ibid.*

> adjustment or shifting of that line in order to achieve an "equitable result".[397]

6.25. In other words, the Court clearly did consider that there was a presumption in favour of equidistance, at least as a first step in the process. By positing the equidistance line as the provisional line, subject to a second step whereby the relevant circumstances are considered in order to determine whether they justify an adjustment to the equidistance line, the Court was able to reflect equitable principles while at the same time providing a degree of consistency and predictability to the process that recourse to equidistance produces.

6.26. The advantages of employing equidistance in this manner have been cogently summarized by Professor Weil. He writes:

> "To the simplicity and objectivity of the method must be added the fact that, even though it does not always lead to an equitable result in itself, it *does* produce a line which is *prima facie* equitable. A method which divides the overlapping areas more or less equally respects, *prima facie*, the equal right of the two countries to a certain physical area of maritime jurisdiction and thus, again *prima facie*, avoids an unreasonable encroachment of one State upon the other. A line of equidistance is especially to be recommended as a starting point in that it lends itself particularly well to any adjustments which

[397] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 441, para. 288.

> may prove necessary in order to meet the requirement of an equitable result".[398]

(5) ROMANIA-UKRAINE

6.27. Notwithstanding the precedents discussed above, Nicaragua argues that Colombia's error lies in assuming that equidistance always has to form the starting point for delimitation. In support of this proposition, the Nicaragua *Reply* cites the *Romania-Ukraine* case. Nicaragua maintains that, in that case, the Court did not start with the establishment of a "provisional equidistance line", but rather it established only "*a provisional delimitation line*, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place".[399]

6.28. What Nicaragua fails to point out, however, is that in the same paragraph of the Court's Judgment from which it cites, the Court went on to state:

> "So far as opposite coasts are concerned, *the provisional line will consist of a median line* between the two coasts."[400]

In another passage omitted by Nicaragua, the Court then added:

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[398] P. Weil, *The Law of Maritime Delimitation - Reflections* (Grotius Publications, Cambridge, 1989), p. 206.

[399] NR, para. 6.68 (emphasis in Nicaragua's version), citing the *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009,* p. 37, para. 116.

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

> "In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line."

And it continued:

> "At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data."[401]

6.29. Once again, therefore, the Court unequivocally endorsed the two-step process for delimitation, the first step of which is the plotting of the provisional equidistance line in keeping with what the Court termed its "settled jurisprudence".

(6) OTHER PRECEDENTS

6.30. Arbitral tribunals, including those recently established pursuant to Annex VII of the 1982 Convention, have followed the Court's lead. For example, the Tribunal in the *Barbados-Trinidad and Tobago* case, which involved a delimitation between islands, referred to the governing rule in the following way:

> "The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a

[401] *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009,* p. 37, para. 118.

> convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result… This approach is usually referred to as the 'equidistance/relevant circumstances' principle."[402]

6.31. The Tribunal in the *Guyana-Suriname* arbitration adopted a similar approach. The Tribunal explained the position is its Award as follows:

> "The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in light of relevant circumstances in order to achieve an equitable solution."[403]

(7) CONCLUSIONS AS TO THE ESTABLISHMENT OF THE PROVISIONAL EQUIDISTANCE LINE AS A FIRST STEP

6.32. The equidistance-relevant circumstances rule in question applies equally to delimitations between States with adjacent or quasi-adjacent coasts (as in the *Qatar-Bahrain*, *Cameroon-Nigeria*, *Romania-Ukraine and Guyana-Suriname cases*), as

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[402] *Award in the Matter of an Arbitration between Barbados and the Republic of Trinidad and Tobago, 11 April 2006,* para. 242.

[403] *Award in the Matter of an Arbitration between Guyana and Suriname, 17 September 2007,* para. 342.

well as to delimitations between States with opposite coasts (*Libya-Malta, Denmark-Norway* with respect to delimitation between Jan Mayen and Greenland, *Romania-Ukraine*, *Barbados-Trinidad and Tobago*). If anything, equidistance is an even more appropriate starting point for opposite coasts delimitation - precisely the situation that exists in the present case. As the Court noted in its Judgment in *Libya-Malta* (citing with approval from the *North Sea* cases):

> "The Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts."[404]

To which the Court added:

> "It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result."[405]

6.33. In view of the overwhelming weight of the precedents, it is astonishing to find the Nicaraguan *Reply* asserting the contrary. According to Nicaragua:

> "In the light of the jurisprudence of the Court and international tribunals, Nicaragua finds that the conclusion of the *Counter-Memorial* that the basic rule of maritime delimitation law as a first

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[404] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 47, para. 62.

[405] *Ibid*.

> step requires the plotting of an equidistance line is not correct."[406]

6.34. It is the Nicaraguan *Reply* that is in error. The "settled jurisprudence" clearly points to the existence of such a rule. As discussed above, the identification of an equidistance line as a first step in the delimitation process has consistently been used in cases involving opposite States ever since *Libya-Malta*, and also more recently in cases involving adjacent or quasi-adjacent coasts.

6.35. Nicaragua next argues that an equidistance line as a starting point "could have merit" where the area to be delimited is between two opposite and similar coasts.[407] But the case law makes no such distinctions. The provisional equidistance line is clearly not limited to situations where the coasts of the Parties are opposite and similar. It has been used in situations where a small island (or islands) face a significantly longer mainland coast, as in the *Libya-Malta* and *Jan Mayen* cases, as well as in delimitations between islands which are different in size, as in the *Barbados-Trinidad and Tobago* arbitration. To the extent that coastal lengths may be considered to constitute a relevant circumstance calling for some adjustment to be made to the provisional line, this can be, and has been, accommodated at the second stage of the process - the relevant circumstances stage.

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406 NR, para. 6.69.

407 NR, para. 6.72.

That is precisely how the matter was dealt with in all three of the cases mentioned above.

6.36. In the present case, there is no reason for the Court to depart from its well-established practice. The plotting of an equidistance line based on geometrical criteria and objective data is a straightforward task. It can readily be carried out using basepoints situated on the relevant opposite coasts of the Parties as Colombia has done.

C. Even Where the Plotting of a Provisional Equidistance Line Is Not Practical, Equidistance Remains the Rule

6.37. There may be exceptional geographic situations where the plotting of the provisional equidistance line is not practical due to the lack of appropriate basepoints from which to plot such a line. The *Nicaragua-Honduras* case is one such example. There, the land boundary between the Parties met the sea in a delta region formed by the River Coco at a point where the general direction of the coast changed radically. As the Court noted, "[a]ll deltas are by definition geographical accidents of an unstable nature and suffer changes in size and form in relatively short periods of time."[408]

6.38. In *Nicaragua-Honduras,* Nicaragua itself explained that, because of the particular characteristics of the area where the

[408] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007,* p. 14, para. 32.

land boundary intersected with the coast, "the technical method of equidistance is not feasible."[409] For its part, the Court observed that "neither Party has as its main argument a call for a provisional equidistance line as the most suitable method of delimitation."[410] The Court then went on to observe that the geographical and geomorphological difficulties resulting from the characteristics of the land boundary terminus -

> "are further exacerbated by the absence of viable basepoints claimed or accepted by the Parties themselves at Cape Gracias a Dios."[411]

As the Court then explained:

> "Given the set of circumstances in the current case it is impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties' mainland coasts."[412]

6.39. It was for these reasons that the Court concluded that the equidistance method was not practical, and it adopted a coastal bisector instead. Yet the bisector method is essentially no more than a simplified version of equidistance based on coastal fronts instead of specific basepoints. Nonetheless, the Court went on

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409 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007,* p. 27, para. 84.

410 *Ibid.,* p. 75, para. 275.

411 *Ibid.*, p. 75, para. 278.

412 *Ibid.,* p. 76, para. 280.

to emphasize that, "*at the same time equidistance remains the general rule.*"[413]

6.40. Similar problems for the construction of a provisional equidistance line do not exist in this case. Both Parties have coasts that front the area to be delimited, and the selection of the basepoints on those coasts from which to plot the equidistance line can be identified based on objective data, as Colombia has done.[414] Given that "equidistance remains the general rule," that rule can be readily applied in the present case.

6.41. Neither the size of Colombia's islands nor the characteristics of Nicaragua's coast including its offshore islands makes any difference at this initial stage of the process. Application of the equidistance method as the first step in the delimitation exercise has been used without any difficulty even in situations involving islands facing mainland coasts both in the case precedents and frequently even as the final boundary in State practice, as will be discussed in Chapter 7.

6.42. As already recalled, in the *Libya-Malta* case equidistance was applied as the first step notwithstanding the fact that the basepoints on one of the party's coast lay on an island (Malta) while the other party (Libya) had a much longer mainland coast.

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413 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007,* p. 77, para. 281 (emphasis added).

414 See CCM, paras. 9.19-9.31 and Figure 9.2 thereto.

Even though that provisional line was subsequently adjusted to take into account the relevant circumstances (the difference in coastal lengths), Malta, which consisted of a compact group of islands as opposed to the long string of Colombian islands comprising the San Andrés Archipelago, still received substantially more than half-effect in the final delimitation.

6.43. Equidistance also formed the starting point in the *Denmark-Norway* delimitation between Jan Mayen and Greenland. Despite Jan Mayen's small size and very limited human presence, it still received the equivalent of about a three-quarters equidistance effect in Zone 1 of the delimitation, and an even greater effect in Zones 2 and 3.

6.44. In neither case was equidistance abandoned, as Nicaragua argues it should be here.

D. Colombia's Delimitation Respects, and Is Consistent with, the Law

6.45. Colombia's delimitation position set out in its *Counter-Memorial* fully respects the principles alluded to above. After reviewing the applicable principles and rules of international law, Chapter 9 of Colombia's *Counter-Memorial* set out the criteria for plotting the provisional equidistance line as the first step in the delimitation. Colombia then identified the relevant basepoints on both Parties' coasts from which the equidistance line should be calculated, and depicted the resulting course of

that line on Figure 9.2 to the *Counter-Memorial* which is reproduced here as **Figure R-6.3**.

6.46. On the Colombian side, basepoints are to be found on the Alburquerque Cays, San Andrés Island, Providencia Island, Santa Catalina Island and Quitasueño. On the Nicaraguan side, the nearest basepoints are situated on the Islas Mangles (Corn Islands), Roca Tyra, the Miskitos Cays and Edinburgh Reef. Colombia selected these basepoints because, consistent with what the Court said in the *Qatar-Bahrain* case (which formula was cited with approval in the Court's Judgment in *Cameroon-Nigeria* and which was also employed by the Tribunal in the *Guyana-Suriname* arbitration):

> "The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured."[415]

6.47. Nicaragua complains that in this case an equidistance line should not be applied because the mainland coasts of the Parties are more than 400 nautical miles apart, and that such a line of delimitation of the exclusive economic zone "does not lie between them and no purpose would be served by using an

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[415] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 94, para. 177. And see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment I.C.J. Reports 2002,* p. 442, para. 290. And, for similar treatment of basepoints, see *In the matter of an Arbitration between Guyana and Suriname, Award dated 17 September 2007,* p. 113, para. 352.

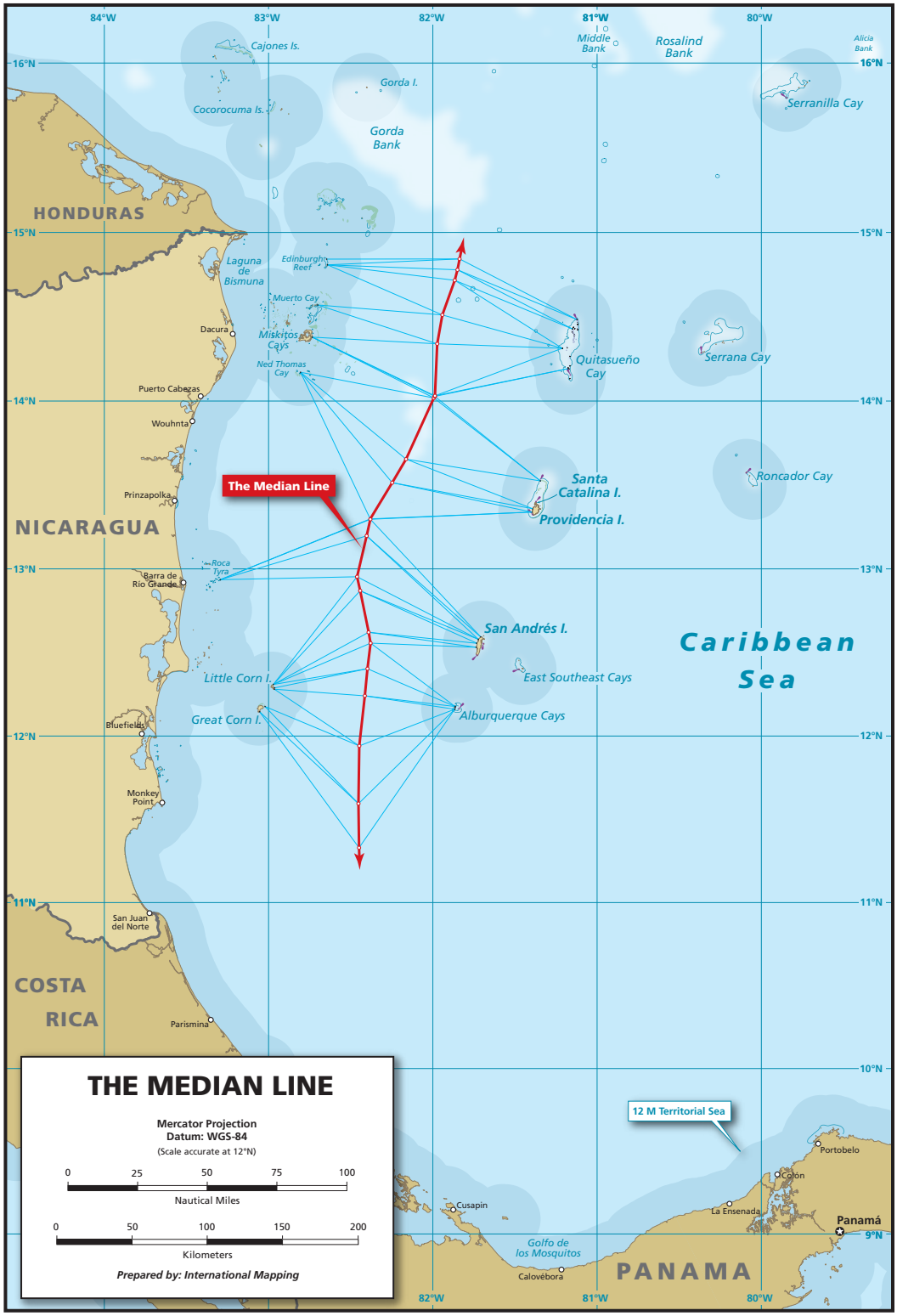

Figure R-6.3, See full size Map Vol. II - page 116

equidistance line as a starting point for any such delimitation."[416] This argument is a complete *non-sequitur*.

6.48. Of course, in its *Memorial* Nicaragua did consider that an equidistance line was relevant – albeit the wrong equidistance line using the irrelevant mainland coast of Colombia – for purposes of advancing a mainland-to-mainland median line claim. But just because Colombia's mainland coast is too far away, and thus not relevant, does not mean that an equidistance line should be abandoned or cannot be established between the truly relevant coasts of the Parties – the coasts of the western San Andrés Archipelago island group and the opposite Nicaraguan coast.

6.49. The Nicaraguan *Reply* also accuses Colombia of "arbitrarily" placing an equidistance line between what it calls "minor features".[417] But Colombia's methodology is in no way arbitrary: it is based on the normal way an equidistance line is plotted – that is, calculated from the nearest basepoints on the baselines of the Parties from which they measure their territorial seas. The basepoints selected by Colombia lie on actual land territory or on low-tide elevations falling within the territorial sea of islands comprising the San Andrés Archipelago. They are a direct function of natural and political geography, it being recalled that geography is not to be refashioned in any event. Moreover, Colombia's islands are not "minor features". They

416 NR, para. 6.58.
417 NR, para. 6.58.

form part of a substantial political unit having important social, economic and security components, and a population of over 70,000.

6.50. As previously noted, Nicaragua also hypothesizes that an equidistance line could only have merit as a starting point if it lies between two opposite and similar coasts.[418] Colombia has already shown that this argument runs counter to the case law as well as to State practice. But Nicaragua does not stop there. It then goes on assert that:

> "In the present case, and under the scenario put forward by Colombia, the exercise is indefensible *since there is no Colombian coast opposite Nicaragua's...*"[419]

Nicaragua also disputes that the islands of San Andrés and Providencia could be said collectively to constitute a "coast".[420] The Nicaraguan *Reply* then asserts in the same vein that "it is appropriate to disregard all basepoints on islands and cays claimed by Colombia in establishing the provisional line", as well as the basepoints on its own insular features.[421] Based on these false premises, Nicaragua argues in favour of enclaves around Colombia's islands as its version of "provisional lines".[422]

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418 NR, para. 6.72.
419 *Ibid.*
420 *Ibid*.
421 NR, para. 6.78.
422 NR, para. 6.82.

6.51. This is refashioning geography taken to an extreme: islands having a vibrant social, economic and political life with over 70,000 inhabitants, and supporting important fishing activities around each of them, cannot be said to have no coast and no basepoints. It is self-evident that, as a matter of legal entitlement, these islands have the same rights to a territorial sea, contiguous zone, continental shelf and exclusive economic zone as any other land territory. Those entitlements are measured from basepoints on the coasts of each of the islands. Contrary to Nicaragua's assertion that its enclave lines are "geometrically objective" and take due account of the projection of Nicaragua's coast,[423] enclaves are in no way appropriate and take no account of the legitimate maritime entitlements generated by the islands. Moreover, they have never been used in similar geographic circumstances, as Chapter 7 will show. Why, it might be asked, are islands such as Jan Mayen, Malta and Barbados, not to mention the examples of State practice referred to in the next chapter, entitled to such rights while Colombia's islands are not?

6.52. Notwithstanding these realities, the Nicaraguan *Reply* attempts to use the Court's treatment of Serpents' Island in the *Romania-Ukraine* as support for its argument that Colombia's islands should be ignored for purposes of drawing an equidistance line here. In referring to *Romania-Ukraine,* the *Reply* asserts:

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[423] NR, para. 6.83.

> "In that case, the Court established an equidistance line, which however, did not take into account certain points along the coasts of the two parties, including Serpents' Island of Ukraine."[424]

6.53. The reason why basepoints on Serpents' Island were not used for equidistance purposes in *Romania-Ukraine* was due to the fact that the delimitation in that case took place in an entirely different geographic context from that which exists in this case.

6.54. The dominant factor in *Romania-Ukraine* influencing the delimitation was the presence of the mainland coasts of the Parties which stood in both an opposite and adjacent relationship to each other with the opposite mainland coasts separated by a distance of only some 200 nautical miles. Serpents' Island lay about 20 nautical miles off the Ukrainian coast and was thus not considered to be one of a cluster of fringe islands constituting the "coast" of Ukraine.[425]

6.55. Given that Serpents' Island was not deemed to form part of the mainland coastal configuration, it was not used to provide basepoints for equidistance purposes.[426] Moreover, the Court also observed that any maritime entitlements of Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coast because of the southern limit of the

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424 NR, para. 6.57.

425 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009,* p. 45, para. 149.

426 *Ibid.,* p. 56, para. 186.

relevant area which stopped where the presence of third States came to play. It thereby followed that any possible entitlements generated by the island were "fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself."[427]

6.56. The same considerations do not apply here. The location of Colombia's islands is such that their maritime entitlements that project towards the west – i.e., towards Nicaragua – are not subsumed by the entitlements generated by Colombia's mainland coast. Colombia's mainland coast is not relevant due to its remoteness. Colombia's islands, on the other hand, generate their own maritime entitlements. This being the case, there is no reason why basepoints located on those islands should not be used for purposes of plotting the provisional equidistance line.

6.57. Nicaragua also cites the example of the tiny rock of Fifla which was not used in order to establish the provisional equidistance line in the *Libya-Malta* case.[428] Once again, however, the situation was not analogous to the present case.

6.58. It was not disputed in *Libya-Malta* that Fifla was a rock. It was referred to as such in the Court's Judgment ("the

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[427] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009,* p. 56, para. 187.

[428] NR, para. 6.77.

uninhabited rock of Fifla"),[429] and it was actually used by the British Navy for target practice during the Second World War. As such, it had no entitlement beyond a territorial sea (or, at most, a contiguous zone) in any event. Moreover, Fifla lay less than three miles off the coast of the mainland of Malta, well within the territorial sea of the latter. Given its proximity to the main coast of Malta, it was precisely the kind of minor coastal feature the distorting effect of which could be eliminated by using the coast of the main island of Malta instead. The result was still the use of equidistance between a small island on the one hand and a longer mainland coast on the other as the first step in the exercise.

6.59. Nicaragua also refers to the fact that the "very small island" of Qit'at Jaradah was disregarded for purposes of drawing the equidistance line in the *Qatar-Bahrain* case.[430] But, once again, the geographic context of that case was very different from the present case.

6.60. Qit'at Jaradah was no more than an uninhabited and tiny sand spit, without any vegetation, a very small part of which (measuring a mere 12 metres by 4 metres) was above water at high tide.[431] Earlier British Admiralty charts had depicted it as a low-tide elevation, although the Court found it to be an island

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

[430] NR, para. 6.75.

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

based on an expert report filed by Bahrain in the case. As an "insignificant maritime feature" lying close to the Parties coasts, it was thus not used as a basepoint for equidistance purposes, and the delimitation line passed between Qit'at Jaradah and Fasht ad Dibal, the latter of which was a low-tide elevation situated within Qatar's territorial sea.[432]

6.61. Nicaragua then refers to the fact that the Tunisian island of Djerba had no effect on the delimitation between Tunisia and Libya.[433] However, as Nicaragua itself recognizes, the Court did not adopt an equidistance line in that case between the adjacent coasts of the Parties, and neither party had in fact argued in favour of equidistance. The delimitation line in the first sector was based on other overriding factors such as the conduct of the parties in granting petroleum licenses, the perpendicular from the general direction of the coast and the fishing practices of the Parties' colonial predecessors.[434]

6.62. It follows that none of the examples that Nicaragua seeks to rely on detract from the well-established principle – the "settled jurisprudence" – that the first step in the delimitation should be the establishment of the provisional equidistance line. Nicaragua's contention that it is appropriate to disregard all basepoints on Colombia's islands and cays has no support in the

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[432] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* pp. 104-108, paras. 219-220.
[433] NR, para. 6.79.
[434] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Judgment, I.C.J. Reports 1982,* pp. 85-86, para. 121.

law given the independent maritime entitlements of those islands.[435] If a coast radiates out in all directions for entitlement purposes when it stands alone, there is no reason for it to cease to do so when it meets the projection of the coast of another State. Here, the projection from the coasts of Colombia's islands meets the projection from Nicaragua's coasts in the area between the westernmost of Colombia's islands and Nicaragua. Colombia has thus fully followed the methodology endorsed by the Court and arbitral tribunals in constructing an equidistance line as the first step in this area.

E. Nicaragua's Mainland Coast

6.63. Nicaragua complains that Colombia's provisional equidistance line only takes into account Nicaragua's islands as providing basepoints but ignores Nicaragua's mainland coast. As the Nicaraguan *Reply* asserts: "Colombia errs by ignoring Nicaragua's mainland coast in the construction of her provisional equidistance line."[436]

6.64. As previously explained, Colombia has adopted the principle articulated in the *Qatar-Bahrain* and *Cameroon-Nigeria* cases, as well as in the *Guyana-Suriname* arbitration, according to which it has used the nearest basepoints on the Parties' coasts from which the breadth of their respective territorial seas is measured for plotting the line. Given that

435 NR, para. 6.79.
436 NR, para. 6.7; and see NR, para. 6.31.

Nicaragua itself claims that its islands form an integral part of its mainland coast, Colombia's methodology is sound.

6.65. It is perfectly possible, however, to construct an equidistance line between Colombia's islands (recalling that even Nicaragua admits that at least the islands of San Andrés, Providencia and Santa Catalina "constitute relevant coast[s]"[437]) and Nicaragua's mainland coast without taking account of Nicaragua's islands.

6.66. The result of using Nicaragua's mainland coast for the purpose of constructing a provisional equidistance line is illustrated on **Figure R-6.4**. As can be seen, this has the effect of shifting the equidistance line westwards.

6.67. Consistent with the Court's approach in both the *Libya-Malta* and *Jan Mayen* cases, the question would then arise whether that equidistance line should be adjusted to take into account the relevant circumstances characterizing the delimitation area of which the coastal geography of the Parties, including Nicaragua's mainland coast, may be one such element. This is a matter that is addressed in greater detail in Chapter 8 where the relevant circumstances are addressed.

6.68. For present purposes, it may be noted that if this islands-to-mainland equidistance line, as illustrated in **Figure R-6.4**,

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[437] NR, para. 6.30.

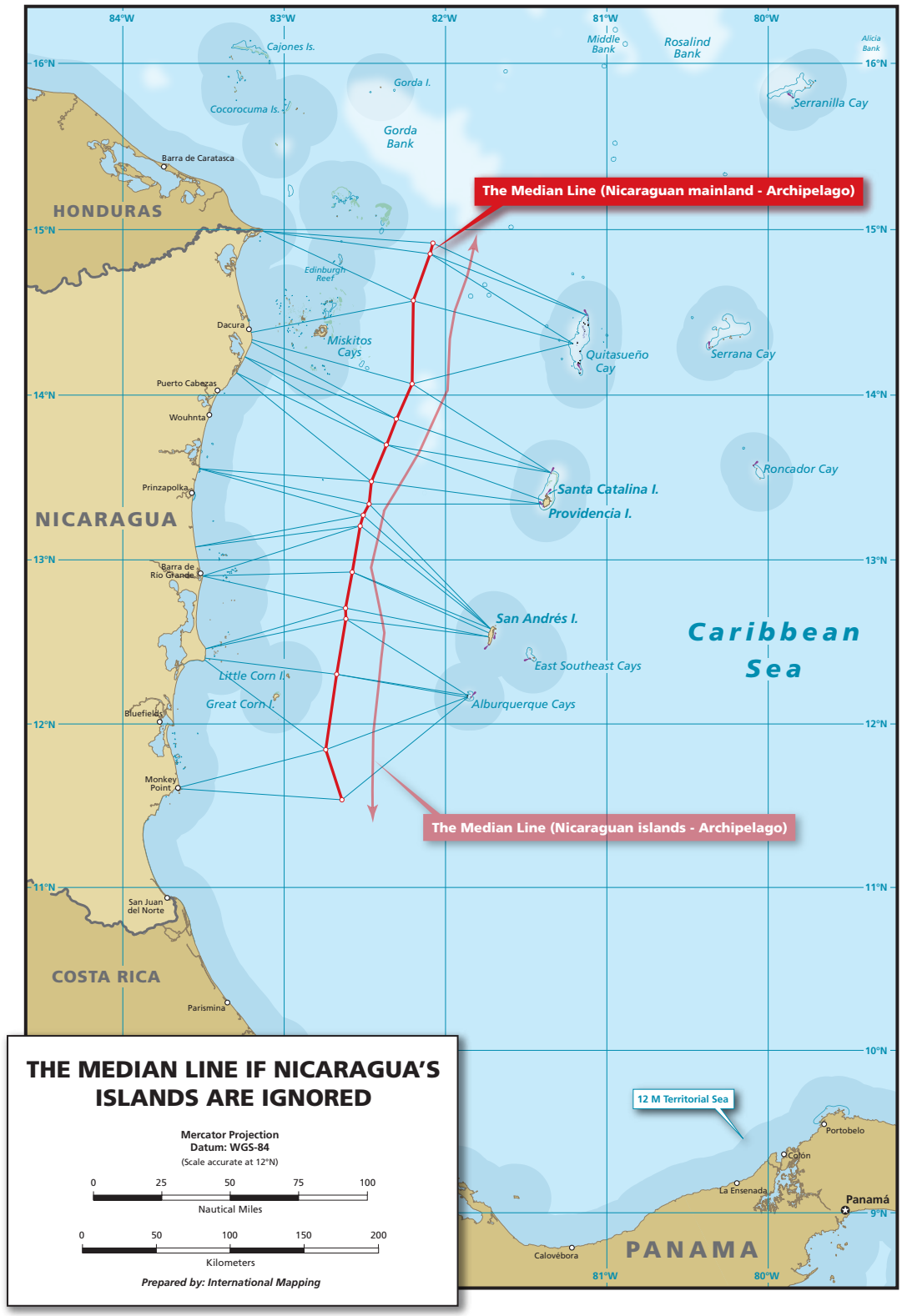

Figure R-6.4, See full size Map Vol. II - page 117

was shifted so as to accord Colombia's islands a three-quarter effect – as was more or less the practical result in both the *Libya-Malta* and *Jan Mayen* cases – the resulting line would lie in broadly the same area as Colombia's equidistance line that uses Nicaragua's islands as basepoints. In any event, there is certainly no justification for according Nicaragua's islands a greater equidistance effect than Colombia's islands.

6.69. The foregoing discussion shows that there is nothing "arbitrary" or inappropriate about Colombia's methodology. The establishment of the provisional equidistance line produces a line that is prima facie equitable as the starting point for the delimitation. That line can then be assessed in the light of all the relevant circumstances which, in this case, include the past conduct of the Parties evidencing where they have exercised maritime jurisdiction, the significance of the 82°W meridian, security and stability considerations, traditional access to the fishing resources of the area, the presence of third States and coastal geography.

6.70. All of these factors should be balanced up in the equation for purposes of achieving an equitable result. Should, for example, the Court consider that some adjustment of an islands-to-mainland median line is warranted to take into account Nicaragua's mainland coast while at the same time respecting the other relevant circumstances, this can readily be achieved using the same methodology that the Court has

adopted in the past without departing from the basic two-step process that the Court has identified as a general rule applicable to maritime delimitation.

F. Nicaragua's Claims Ignore the Law

6.71. In contrast, Nicaragua completely ignores the well developed principles of maritime delimitation. Nicaragua has conceded that its mainland-to-mainland single maritime boundary is not tenable and has abandoned that position. Its new continental shelf claim (equal division of overlapping continental margins) is not grounded on coastal geography, takes no account of the "equidistance/special circumstances" or "equitable principles/relevant circumstances" rule, and does not follow the two-step approach to delimitation by first plotting the provisional equidistance line, and then considering whether there are any relevant circumstances calling for the shifting of that line.

6.72. To compound its errors, the Nicaraguan *Reply* makes no mention of the relevant basepoints which should control the course of the equidistance line, although it criticizes Colombia's choice of basepoints. Nicaragua simply bases itself on geology and geomorphology. This is frankly admitted in the Nicaraguan *Reply* when it states:

> "The position of Nicaragua, as explained in Chapter III above, is that in a delimitation of the continental shelf, such as has been requested

> [belatedly] by Nicaragua, where the distance principle is not involved but only the natural prolongation of the land territory, the question of the provisional equidistance line has no role to play."[438]

6.73. Equally untenable is Nicaragua's assertion that "it has to be questioned whether there could be an equidistance line in the present case which might serve as a starting point that is 'appropriate for the geography of the area in which the delimitation is to take place'."[439] In this case, the equidistance line - whether an islands-to-islands equidistance line or an islands-to-mainland equidistance line - can readily be identified based on objective geographic criteria as the first step in the delimitation exercise.

G. Conclusions

6.74. As has been demonstrated, it is entirely appropriate and consistent with the law, including the jurisprudence dealing with delimitations involving islands, for the equidistance line to be posited as the provisional line.

6.75. Nicaragua itself had argued in its *Memorial* that the median line between the Parties' coasts was the appropriate starting point, although it mistakenly used the Colombian mainland coast as a relevant coast for this purpose when that

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438 NR, para. 6.49.

439 NR, para. 6.58.

coast is not germane. Just because Nicaragua now admits that the mainland coasts of the Parties are too far apart, it does not follow that "no purpose would be served by using an equidistance line as a starting point for any such delimitation".[440]

6.76. Contrary to Nicaragua's assertion, Colombia's equidistance line is not "arbitrarily-placed",[441] but is based on clearly identified basepoints on the opposite and relevant coasts of the Parties. Nor does Nicaragua's argument that there is no Colombian coast opposite Nicaragua's reflect the actual geography of the area.[442] As has been seen, Nicaragua assumes that for a provisional equidistance line to be applied, there must be "two opposite *and similar coasts*".[443] This argument is clearly wrong, and the Court has had no problem in establishing the provisional equidistance line in cases such as *Jan Mayen* and *Libya-Malta* where the relevant coasts of the Parties were dissimilar. In the present case, Colombia's provisional equidistance line has been established between the islands of both Parties. As has been noted, however, it is also possible to draw a provisional equidistance line between Colombia's islands and Nicaragua's mainland coast. In either case, the equidistance line methodology can be readily applied.

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440 NR, para. 6.58.
441 NR, para. 6.51.
442 NR, para. 6.72.
443 *Ibid.,* (Emphasis added).

Chapter 7

NICARAGUA'S ENCLAVE THEORY

A. Introduction

7.1. The initial position adopted by Nicaragua in this case centered around its contention that a single maritime boundary should be delimited between the mainland coasts of the Parties. As for Colombia's islands, the Nicaraguan *Memorial* argued that they should be enclaved by either three-mile or twelve-mile limits. Nicaragua justified its approach using the erroneous argument that "the relationship between the mainland coasts of Nicaragua and the islands cannot be characterized as merely opposite",[444] and that "the San Andrés Group does not form part of the coastal front of Colombia."[445]

7.2. While the single maritime boundary claim has been abandoned in favour of a new continental shelf claim, Nicaragua still maintains that Colombia's islands should be enclaved within Nicaragua's continental shelf. Nicaragua complains in this respect that Colombia disputes that Nicaragua should enjoy at least a 200 nautical mile limit regardless of the presence of

444 NM, para. 3.11.
445 *Ibid*., section heading at p. 239.

the islands, which Nicaragua contends should not "block" its entitlement.[446] This is mere question begging.

7.3. As Chapter 5 demonstrated, Nicaragua's argument ignores the fact that, under international law, Colombia's islands both individually and collectively also possess coasts that generate their own independent entitlements to continental shelf and column of water rights. Thus, Colombia's islands do possess a coastal front and they do lie opposite Nicaragua's coast. It proves nothing for Nicaragua to assert that Colombia's islands should be enclaved within Nicaragua's own continental shelf since, as a matter of legal right, entitlement to continental shelf rights (as well as column of water rights) does not exclusively rest in Nicaragua, but in Colombia as well. Consequently, the entire premise from which Nicaragua starts is fundamentally misplaced.

7.4. The Nicaraguan *Reply* also advances two fall-back positions in response to Colombia's equidistance based delimitation methodology. The first is that, even if the present delimitation is limited to a single maritime boundary lying within 200 nautical miles and not a continental shelf boundary, the resulting boundary should still enclave Colombia's islands as was the case with respect to the Channel Islands in the *Anglo-French* arbitration.[447] The second is that, even if Colombia's islands are not to be fully enclaved, then just two of those

446 NR, para. 6.12.
447 NR, para. 6.3.

islands (San Andrés Island and Providencia) should receive no more than a thin sliver of maritime area corresponding to their "coastal front" extending eastwards out to a distance of 200 nautical miles, as was accorded to the islands of St. Pierre and Miquelon in the *Canada-France* arbitration.[448]

7.5. The gist of Nicaragua's argument, repeated at several places in the *Reply*, boils down to the contention that Colombia's islands should not be allowed to act as an "impenetrable wall" against the natural prolongation or projection of Nicaragua's coasts, particularly its mainland coast.[449]

7.6. None of these contentions has any merit and, as Colombia will show, the solutions adopted in the cases on which Nicaragua relies for enclaves or partial enclaves took place in geographic circumstances that bear no relation to the present case.

B. Islands Have Never Been Enclaved in the Situation that Exists in the Present Case

(1) THE BASIC GEOGRAPHIC FACTS

7.7. Apart from its legal shortcomings, Nicaragua's enclave position ignores the relevant geography of the area. As has been shown, the San Andrés Archipelago comprises a large number

[448] NR, para. 6.90 and Figure 6-11 thereto.
[449] NR, paras. 6.5, 6.10 and 6.12, and Chapter VI(II) generally.

of islands having their own legal entitlements and extending northeast to southwest over a considerable distance. The islands constitute an important geographic, economic, political and social unit within Colombia, with three of the islands having a significant population and almost all of the islands accommodating manned installations and other facilities.

7.8. It follows that the present delimitation does not concern a compact group of islands located in close proximity to another State such that their territorial seas overlap or the mainland coast is "blocked" beyond being accorded a very small area of territorial sea if islands are not enclaved. San Andrés Island and Alburquerque are both roughly 100 miles from the Nicaraguan mainland coast. Providencia and Santa Catalina are even further away (some 121 nautical miles). Quitasueño is a large feature comprising some 34 individual islands and 20 low-tide elevations as confirmed by the Smith Report. Quitasueño as a whole is situated some 115 miles from Nicaragua's coast. Serrana Cay and Roncador are 165 and 186 miles respectively from the Nicaraguan mainland coast, Serranilla is 196 miles away and Bajo Nuevo is 266 nautical miles away.

7.9. As can be seen on **Figure R-7.1**, Providencia and Santa Catalina (together with Low Cay) lie in close proximity to each other with the result that the territorial seas of each overlap. Providencia and San Andrés Island lie only about 47 nautical miles apart along a broad north-northeast to south-southeast

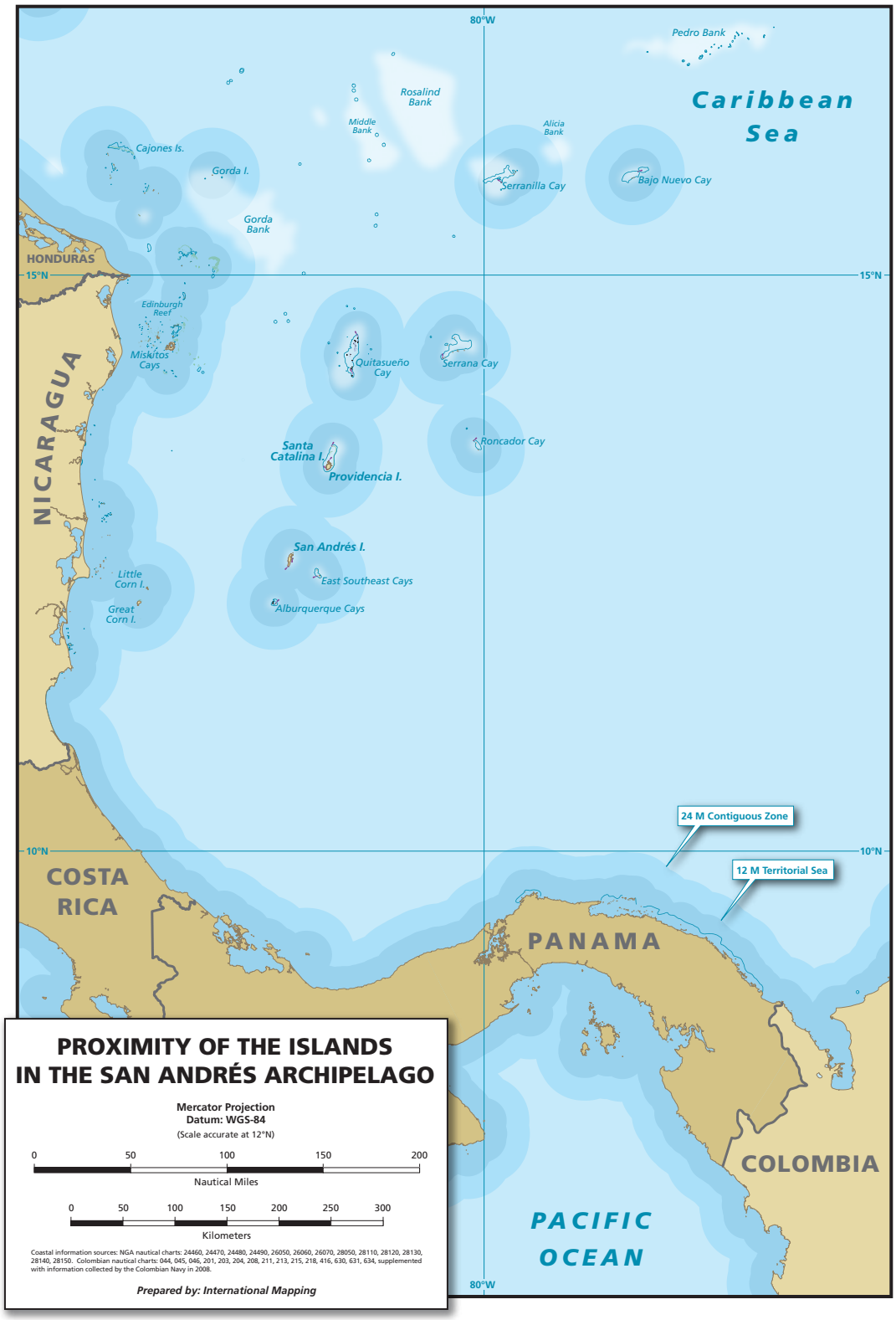

Figure R-7.1, See full size Map Vol. II - page 118

axis. If 24-mile contiguous zones are posited for these islands, the result is that these zones also meet and overlap due to their proximity.

7.10. Alburquerque is located about 20 nautical miles south-southwest of San Andrés Island and about 25 nautical miles from East-Southeast Cays. The nearness of these three sets of islands to each other is such that their territorial seas also meet and overlap. The southern edge of Quitasueño lies about 37 nautical miles north of Low Cay, which is situated just north of Santa Catalina. Once again, the 24-mile contiguous zones of these features would meet and overlap because of the relatively short distance between them. Quitasueño also lies less than 45 nautical miles from Serrana, and Serrana lies only some 45 nautical miles from Roncador. Contrary to the impression Nicaragua tries to convey, therefore, these are not islands that are widely dispersed or separated by long distances. Not only do their continental shelf and EEZ entitlements overlap with each other, so also do 24-mile belts equivalent to their contiguous zones.

7.11. Given the irrelevance of Colombia's mainland coast, the delimitation by necessity falls to be established between the westernmost islands of the Archipelago and Nicaragua's coast, as Colombia has shown in Chapters 5 and 6. For its part, the provisional equidistance line does not even come close to infringing on Nicaragua's territorial sea or its contiguous zone.

In fact, Nicaragua only enacted legislation providing for a contiguous zone in March 2002 after it had initiated these proceedings.[450]

(2) THIS SITUATION DISTINGUISHES THE PRESENT CASE FROM THE EXAMPLES CITED BY NICARAGUA

(i) The Anglo-French Arbitration

7.12. The only example that Nicaragua can cite where islands have been fully enclaved concerns the Channel Islands in the *Anglo-French* Arbitration. Not surprisingly, therefore, the Nicaraguan *Reply* cites this example for its proposition that islands should not "block" the frontal projection of a longer, opposite mainland coast.[451]

7.13. In making this argument Nicaragua again asserts that Colombia's islands are "on the wrong side" of the median line.[452] However, Colombia has already shown that this argument presupposes the existence and relevance of a mainland-to-mainland median line between the Parties which is simply not the case given that those coasts are more than 400 nautical miles apart. Colombia's islands are also not situated close to the Nicaraguan mainland. Unlike the case with the Channel Islands off the coast of France, the territorial seas of Colombia's islands do not meet and overlap with the territorial

450 NM, Annex 67.
451 NR, para. 5.18.
452 NR, para. 5.21.

sea of either Nicaragua's own islands or its mainland coast. Nor are Colombia's islands surrounded on three sides by Nicaragua mainland territory. In fact, Colombia's islands face third States to the north and south, and, to the east, they face Colombia's mainland coast, not Nicaragua.

(ii) Greenland-Jan Mayen

7.14. The next precedent cited by Nicaragua is the *Denmark-Norway* case involving the delimitation between Greenland and the island of Jan Mayen. Contrary to Nicaragua's fall-back position, according to which Nicaragua should receive a full 200-nautical mile EEZ and continental shelf subject only to Colombia's islands being enclaved, the mainland coast of Greenland was not accorded a full 200 nautical miles in the Court's Judgment. As the Court explained:

> "Nor do the circumstances require the Court to uphold the claim of Denmark that the boundary line should be drawn 200 miles from the baselines on the coast of eastern Greenland, i.e., a delimitation giving Denmark maximum extension of its claim to continental shelf and fishery zone."

In a passage that is particularly relevant to the present case, the Court then elaborated on its reasoning as follows:

> "The coast of Jan Mayen, no less than that of eastern Greenland, generates potential title to the maritime areas recognized by customary law, i.e., in principle up to a limit of 200 miles from its baselines. To attribute to Norway merely the residual area left over after giving full effect to

> the eastern coast of Greenland would run wholly counter to the rights of Jan Mayen and also to the demands of equity."[453]

7.15. In the final analysis, as noted in Chapter 6, Jan Mayen received more or less a "three-quarters effect" equidistance line, and Greenland was accorded maritime areas that extended significantly less than 200 nautical miles from its coast.[454] While Nicaragua tries to distinguish this case by arguing that the main coast of Norway was irrelevant to that case,[455] the same reasoning applies here; Colombia's mainland coast is also irrelevant to the present delimitation.

(iii) Libya-Malta (Italy's Claims)

7.16. Nicaragua then refers to the treatment of Malta in the *Libya-Malta* case – and to Italy's claims which extended south of Malta – to support the proposition that the entitlement of Sicily was not blocked by the presence of Malta, but rather extended south of that island.[456]

7.17. Several points can be made in response to show that this example is of no assistance to Nicaragua's enclave theory.

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[453] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 69, para. 70.
[454] See para. 6.18 above.
[455] NR, para. 5.26 (1).
[456] NR, para. 6.13.

7.18. First, Italy's claims advanced during the oral hearings on its request to intervene in the *Libya-Malta* case did not seek to enclave Malta. They extended well to the east and west of Malta leaving a gap of some 70 nautical miles (much wider than Malta's coastal front) to be delimited exclusively between Libya and Malta as is illustrated on **Figure R-7.2**. If similar "gaps" were accorded to Colombia's islands, there would be no room for Nicaragua to claim maritime areas to the north, south or east of the islands.

7.19. Second, the Court in no way endorsed the legitimacy of Italy's claims which neither Malta nor Libya accepted. It simply took note of them, , and refrained from delimiting areas where a third State had indicated it had claims as part of its customary practice of avoiding the delimitation of areas where third States may have interests.

7.20. Third, under Nicaragua's thesis, Libya should have been entitled to a delimitation according to it a full 200-nautical mile continental shelf by virtue of having a longer mainland coast. This is what Nicaragua argues it is entitled to under its fall-back position in this case. Clearly, however, such a proposition was not accepted by the Court, which made only a relatively modest (18 nautical miles) adjustment to the *Libya-Malta* median line to take account of differences in coastal lengths.

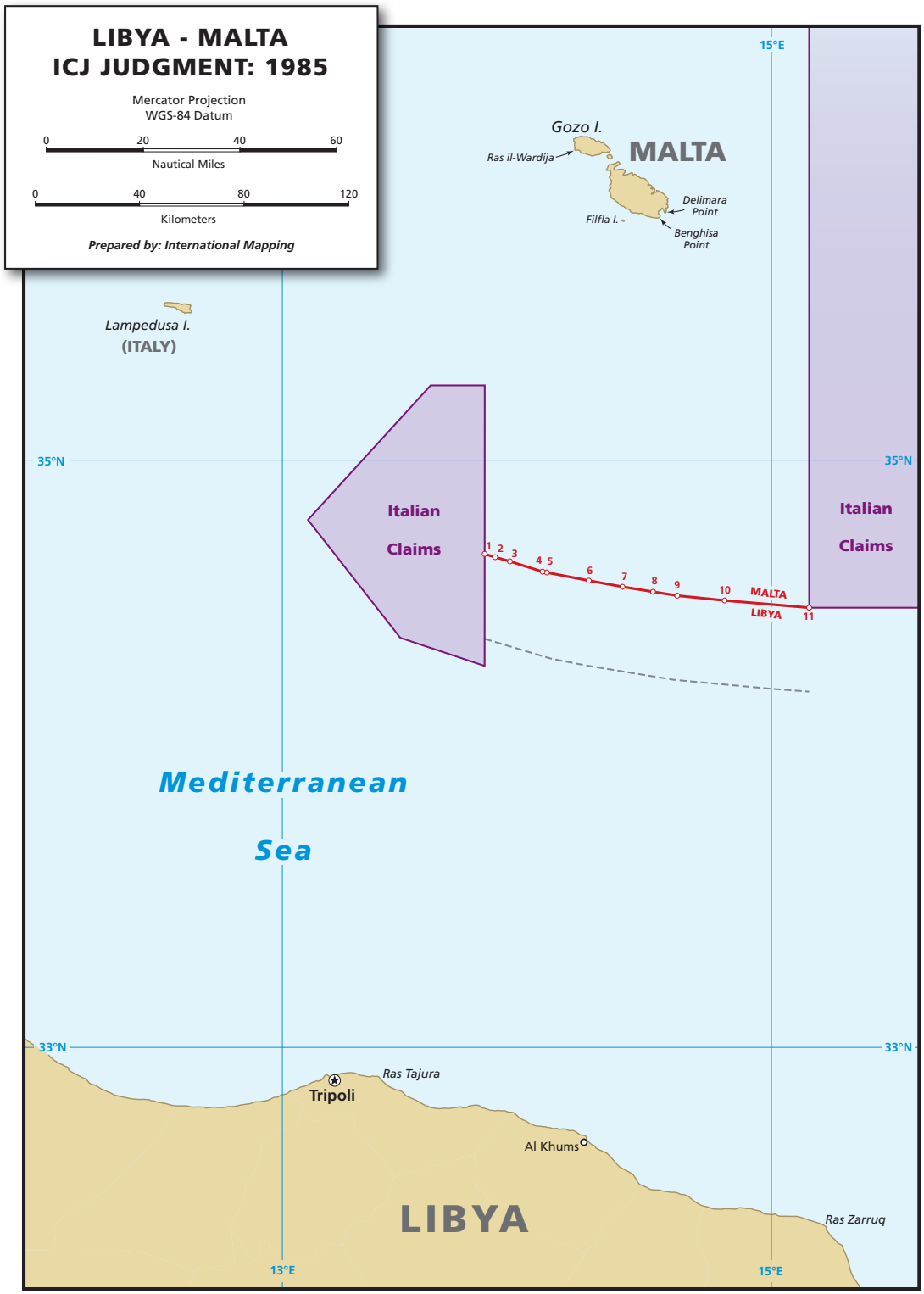

Figure R-7.2, See full size Map Vol. II - page 119

(iv) France-Canada Arbitration

7.21. Nicaragua next relies on the *France-Canada* Arbitration for its alternative proposition that, at most, Colombia's islands should only receive a thin corridor of maritime entitlements beyond three and twelve mile enclaves projecting to the east and corresponding to the lengths of the east-facing coastal fronts of San Andrés Island and Providencia.[457] This argument, which is illustrated on Figure 6-11 to Nicaragua's *Reply*, is entirely spurious and misrepresents the solution adopted by the Court of Arbitration in the *France-Canada* case.

7.22. Even in the *France-Canada* arbitration, where the geographic circumstances were much different than those that exist in this case by virtue of the fact that the French islands stood in a relationship of adjacency with the coast of Newfoundland because of their proximity, the Court of Arbitration accorded an additional twelve nautical miles around most of the seaward side of St. Pierre and Miquelon from the limit of their territorial seas - or a 24-nautical mile maritime belt of EEZ corresponding to the contiguous zone - in addition to the 200-nautical mile projection of their coastal front seaward. As the Court of Arbitration explained:

> "A reasonable and equitable solution for the western sector would be to grant to Saint Pierre and Miquelon an additional twelve nautical miles from the limit of its territorial sea, for its

[457] NR, para. 6.90.

> exclusive economic zone. That area will have the extent of the contiguous zone referred to in Article 33 of the 1982 Convention on the Law of the Sea, which grants to the coastal State jurisdiction to prevent infringement of its customs, fiscal, immigration or sanitary regulations."[458]

7.23. Notwithstanding this, Nicaragua asserts that the *France-Canada* situation is "geographically similar" to the present case.[459] However, the geographic circumstances of the two cases are in fact very different, and they lend no support for a similar solution being adopted in this case.

7.24. The islands of St. Pierre and Miquelon were separated from the Canadian coast of Newfoundland by a mere 10 nautical miles. There was thus no room for the French islands to "project" towards the Canadian coast beyond a median line delimiting the territorial seas between those coasts. It was for this reason that the Court of Arbitration observed: "the prevailing and overall relationships is one of adjacency",[460] a designation which hardly fits the relationship between Colombia's islands and Nicaragua. Even the nearest of Colombia's islands are more than ten times farther away from

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458 *Case concerning Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon), 1992,* 31 I.L.M., p.1170, para. 69.

459 NR, para. 6.21.

460 *Case concerning Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon), 1992,* 31 I.L.M., p. 1162, para. 35.

Nicaragua's mainland coast than were St. Pierre and Miquelon from Newfoundland.

7.25. Geographically, as can be seen from **Figure R-7.3**, the coast of the Burin Peninsula on Newfoundland extended as far out to sea as the larger of the two French islands, Miquelon, and almost as far as the smaller island of St. Pierre. It was natural, therefore, for that peninsula not to be "blocked" by the islands because of its "adjacent" relationship. This is in sharp contrast with the present case where the coast of Nicaragua is over 100 nautical miles away from the nearest coasts of Colombia's islands and is therefore not an "adjacent" coast nor similarly "blocked".

7.26. In the *France-Canada* arbitration, it was also significant that Canada possessed coasts belonging to Nova Scotia to the west and southwest of the French islands which lay within 60 nautical miles of the Newfoundland coast. Canada had adopted a closing line between Cape Breton (Nova Scotia) to the southwest tip of Newfoundland which the Court of Arbitration recognized represented Canada's coastlines lying inside the Gulf of St. Lawrence that were "in direct opposition" to St. Pierre and Miquelon.[461] In effect, therefore, Canada's coasts surrounded

[461] *Case concerning Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon), 1992,* 31 I.L.M., p. 1161, para. 29.

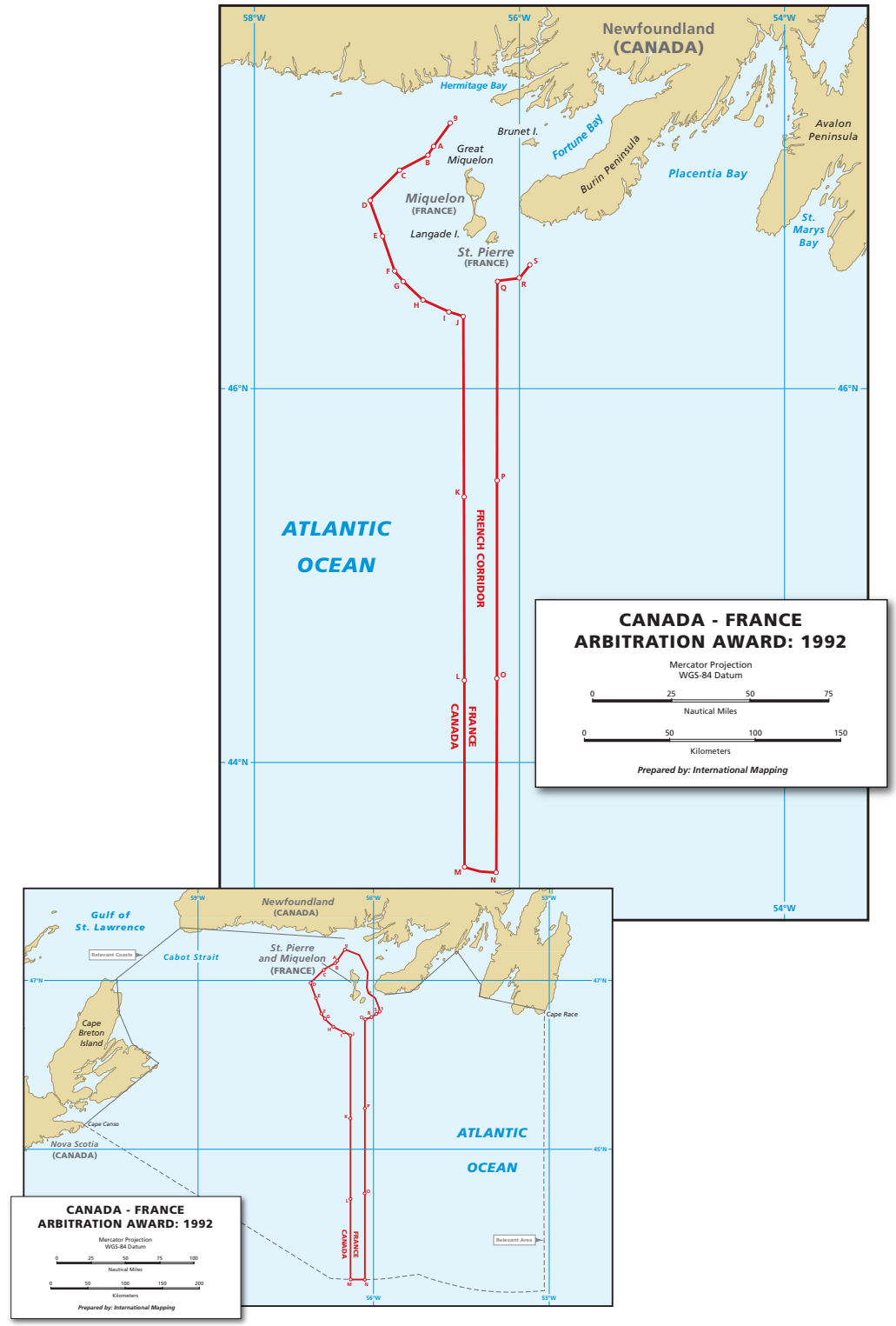

Figure R-7.3, See full size Map Vol. II - page 120

the islands of St. Pierre and Miquelon on three sides as is also evident with reference to **Figure R-7.3**.[462]

7.27. This situation does not even remotely exist in the present case where Colombia's islands stretch over a long distance well off the Nicaraguan coast, and where third States lying to the north and south of Colombia's islands have recognized that those islands are entitled to full effect in maritime delimitation agreements concluded with Colombia.

7.28. There are accordingly no grounds for Nicaragua's attempt to graft the *St. Pierre and Miquelon* solution onto the present case. The geographic situations bear no relationship to each other.

7.29. Moreover, even if (*quod non*) one were to draw 24-nautical mile belts around Colombia's islands that lie directly opposite Nicaragua (San Andrés, Providencia, Santa Catalina, Low Cay, Alburquerque and Quitasueño), those belts would overlap with each other and there would be no gaps in between. This is shown on **Figure R-7.1** above. In fact, the westernmost islands comprising the San Andrés Archipelago are more than twice as far from Nicaragua's coast than they are from each other, and Serrana and Roncador are three times farther away from Nicaragua than they are from each other. Thus, even if the

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462 *Case concerning Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon), 1992,* 31 I.L.M., p. 1160, para. 22.

approach adopted by the Court of Arbitration was applied in the present case where the geographic facts do not justify such an approach, there would still be no room for enclaving Colombia's islands since, from north to south, Colombia's islands are not separated by distances exceeding 48 nautical miles.

(v) Dubai-Sharjah (Abu Musa)

7.30. The Nicaraguan *Reply* also refers to the treatment of the island of Abu Musa in the *Dubai-Sharjah* arbitration to support the contention that Colombia's islands should be enclaved. Once again, Nicaragua fails to appreciate the different geographic and political context which characterized that case, although it does acknowledge that San Andrés Island is more than twice as large as Abu Musa and that Providencia is about one and one-half times as large - a difference which Nicaragua curiously asserts is "not much of a difference".[463]

7.31. The *Dubai-Sharjah* case involved primarily a delimitation between the adjacent coasts of two Emirates forming part of the United Arab Emirates. The presence of Abu Musa off the coast of Sharjah affected only part of the boundary. Sovereignty over Abu Musa was (and still is) disputed between Iran and Sharjah, whose mainland coasts lie opposite each other across the Gulf. As the Charney and Alexander study on *International Maritime Boundaries* notes:

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[463] NR, para. 6.103.

> "The boundary dispute before the tribunal involved the adjacent boundary between Dubai and Sharjah and not the opposite boundary between the United Arab Emirates and Iran. Nevertheless, the tribunal found that because the island is located at a point approximately equidistant from the opposite coastlines the only equitable solution was to enclave it and otherwise to disregard it in the maritime boundary delimitation."[464]

7.32. The present context is obviously different. This delimitation does not involve adjacent coasts, and Colombia's mainland coast is not a relevant coast. Colombia's islands also lie over 100 nautical miles from Nicaragua's mainland coast, which contrasts with the situation of Abu Musa which is situated just 35 miles from Sharjah and 43 miles from Iran. Abu Musa's size is just 4 square miles, and it has a population of about 800 persons.[465] Both of these figures are much smaller than the corresponding figures for Colombia's islands that face Nicaragua.

7.33. Given the fact that Abu Musa more or less straddled a median line between the opposite mainland coasts of the Emirates and Iran, the tribunal's delimitation did not fully enclave the island. Rather, the 12-mile arc of territorial sea accorded to Abu Musa extended less than one-quarter of the

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[464] J. Charney and L. Alexander eds., *International Maritime Boundaries,* Vol. III, p. 2385.

[465] *Dubai-Sharjah Border Arbitration of 19 October 1981*, 91 ILR 543 at pp. 663 and 668.

way around the island, and the entitlements of Dubai did not extend beyond, or seaward of, the island. This can be contrasted to the total enclaves that Nicaragua asserts in this case.

7.34. It was the particular geographic characteristics of the case which led Abu Musa to be partially enclaved in the *Dubai-Sharjah* arbitration. As Charney and Alexander explain:

> "This solution was similar to those adopted in maritime boundary agreements concluded for other situations in the Persian Gulf. They involved other small islands that intersected the equidistant line: the islands of Al-Arabiya and Farsi in the Saudi Arabian-Iran Agreement.... and Dayinah in the Abu Dhabi-Qatar agreement...."[466]

7.35. In short, Nicaragua is unable to cite any precedent involving comparable geographic situations to support its thesis that Colombia's islands should be enclaved. Nicaragua's claim rests on a false premise - that the islands are situated on Nicaragua's continental shelf - when the islands generate their own legal entitlements. The islands do not sit immediately off Nicaragua's coast such that they give rise to a territorial sea delimitation or a "blocking" of that coast, as was the case with respect to the Channel Islands and St. Pierre and Miquelon. Not only do the continental shelf and EEZ entitlements of Colombia's islands overlap with each other, so also do their

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[466] J. Charney and L. Alexander eds., *International Maritime Boundaries,* Vol. III, at p. 2385, citing the *Dubai-Sharjah* Award, 91 ILR at p. 677.

entitlements to a contiguous zone overlap and stretch over considerable distances. Colombia's islands are thus readily distinguishable from situations where a compact group of islands lies just a few miles off another State's coast.

C. Small Islands Have Frequently Received Full Effect in Maritime Delimitations

(1) STATE PRACTICE GENERALLY

7.36. Colombia's *Counter-Memorial* set out a number of examples of State practice where islands have received a full equidistance effect when they faced either opposite mainland coasts or other islands lying off a mainland coast.[467] While Nicaragua's *Reply* attempts to distinguish some of these examples, this section will show that Nicaragua's arguments are untenable, and that there are numerous examples of State practice where relatively small islands have received full effect when situated opposite longer, mainland coasts.

(i) India-Maldives

7.37. The first example cited in Colombia's *Counter-Memorial* was the delimitation between India and the Maldives pursuant to which the relevant Maldive islands received full equidistance treatment in the southern sector of the delimitation

[467] CCM, paras. 9.47-9.55.

despite the fact that they lay opposite a much longer, continental coast of India.[468] This can be seen on **Figure R-7.4**.

7.38. Nicaragua argues that the Maldives do not bear any resemblance to the San Andrés Archipelago because the Maldives are a "tightly knit group of islands".[469] This is not borne out by the geographic facts, including the nature of the atolls that provided basepoints on the Maldives side for the equidistance boundary.

7.39. The Maldive atolls are almost all less than two metres above water – indeed, the Maldives is the lowest lying country in the world – and most of the islands have fringing coral reefs and sandbars, and can be walked across in just ten minutes. Many of the small islands situated within the atolls are uninhabited. Less than one-third of one percent of the area covered by the Maldives is actual land territory (a total of 115 square miles stretching over some 500 miles). Notwithstanding this, the boundary between the northernmost of the Maldives and the mainland coast of India was still agreed to be the median line.

(ii) Australia-New Caledonia

7.40. The Nicaraguan *Reply* concedes that the delimitation between Australia and New Caledonia is mostly effected

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468 CCM, para. 9.47.

469 NR, para. 6.118.

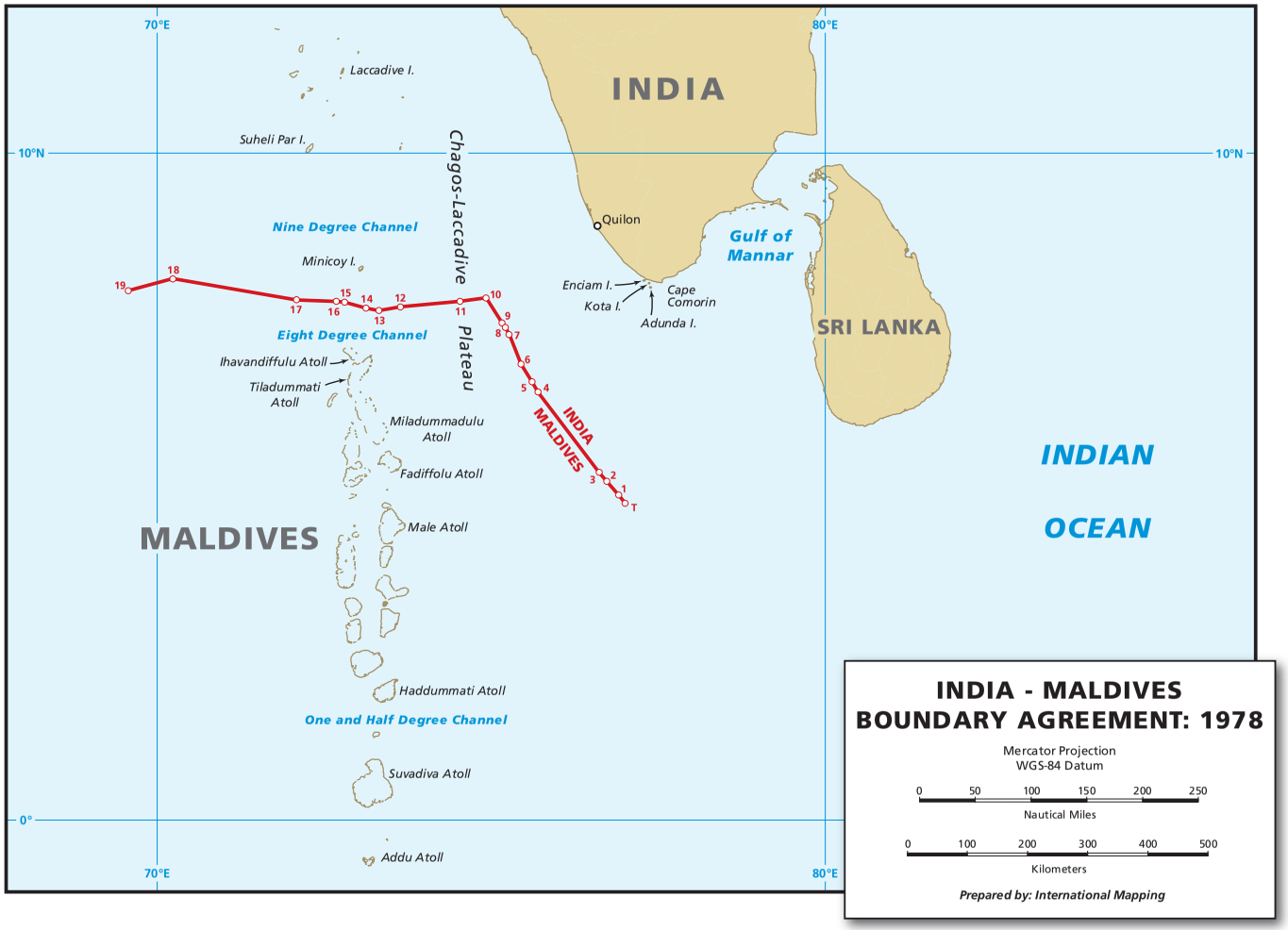

Figure R-7.4, See also in Vol. II - page 121

between a number of small islands. Nonetheless, the *Reply* goes on to assert that the mainland coasts of both States were treated broadly equally in the boundary agreement.[470]

7.41. This assertion is misleading. The mainland coast of Australia and the main island of New Caledonia are separated by well over 400 nautical miles (actually some 600 nautical miles) as can be seen on **Figure R-7.5**. Those coasts played no role in the delimitation because of the distances involved, just as the mainland coast of Colombia has no role to play here. As Article 1 of the delimitation agreement makes clear, the boundary was delimited between a number of small French and Australian islands situated between the two main coasts, not between those coasts themselves.[471] As Charney and Alexander's study concludes:

> "Thus, the usual geographic factors such as coastal configuration, concavities, or the general direction of the coasts were not the question in the delimitation of the instant boundary."[472]

(iii) India-Thailand

7.42. The Nicaraguan *Reply* has no answer to this example of State practice other than to assert (without any demonstration)

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[470] NR, para. 6.119.

[471] J. Charney and L. Alexander eds., *International Maritime Boundaries,* Vol. I, p. 911. The Charney and Alexander study notes that the single maritime boundary was "based mostly on equidistance", and that it "runs between a series of small islands or reefs on both sides". *Ibid.,* pp. 906-907.

[472] *Ibid.,* p. 907.

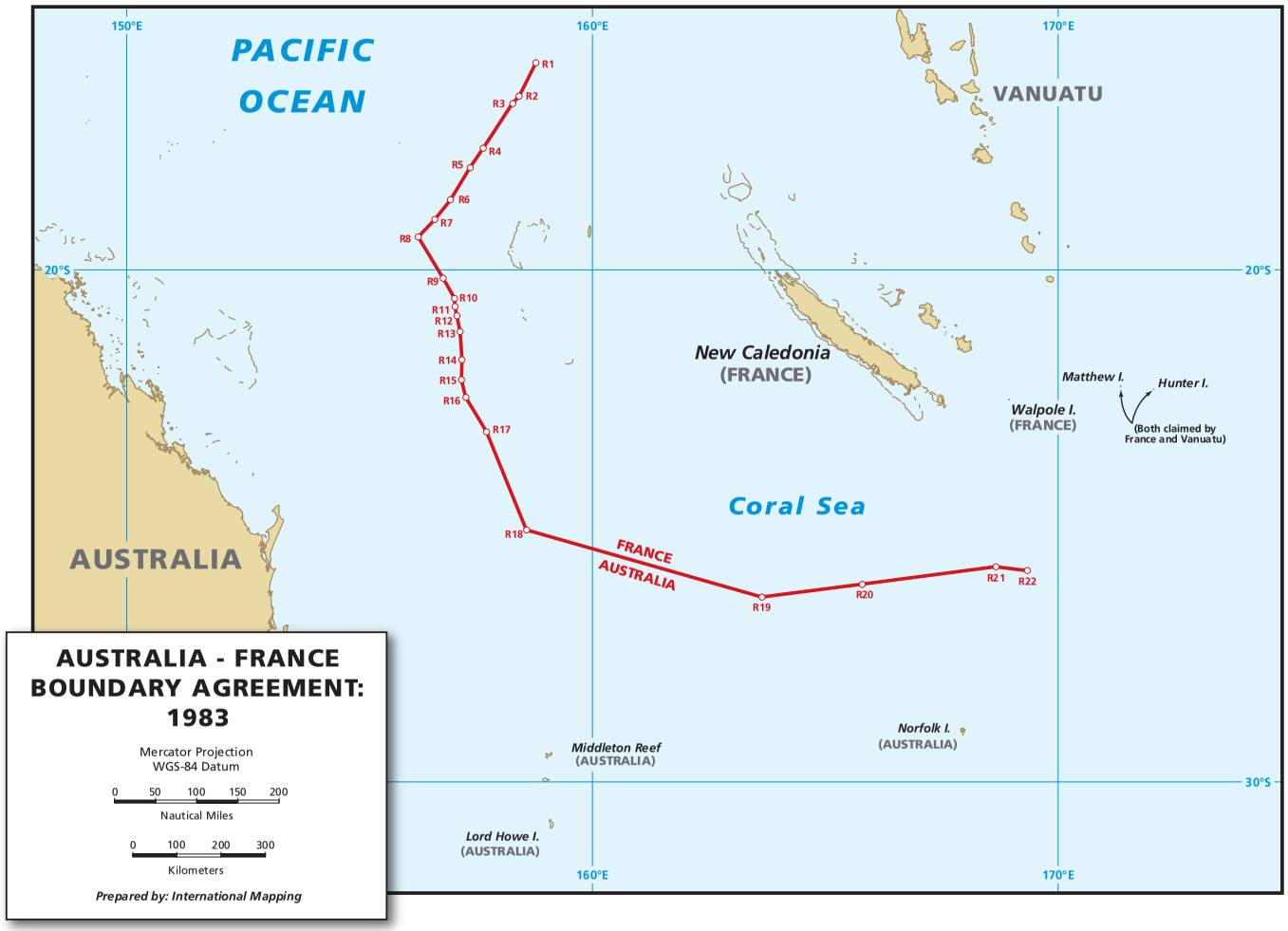

Figure R-7.5, See also in Vol. II - page 121

that "the geography of that delimitation again bears little resemblance to the present case." Notwithstanding this contention, Nicaragua admits that the delimitation line, which was based on equidistance, lies between the Nicobar Islands of India, on the one hand, and certain islands of Thailand, on the other, despite the fact that, as illustrated by **Figure R-7.6**, behind the Thai islands lay the mainland coast of Thailand which was not taken into account in the delimitation.[473]

7.43. This is precisely Colombia's point. Notwithstanding the fact that there was a mainland Thai coast behind its islands which faced islands belonging to another State (just as there is a mainland Nicaraguan coast behind its own islands which face Colombia's islands), the delimitation still followed an equidistance line between the two sets of islands. Colombia's methodology does the same thing.

(iv) Aves Island

7.44. The Nicaraguan *Reply* devotes more space to trying to distinguish the treatment that Aves Island received in both the United States (Puerto Rico and U.S. Virgin Islands)-Venezuela (Aves) and France (Martinique and Guadeloupe)-Venezuela agreements.[474] Yet Nicaragua has no answer to the plain fact that, in both agreements, the small island of Aves did receive full equidistance treatment. Moreover, Nicaragua's assertion

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473 NR, para. 6.120.

474 NR, paras. 6.121-6.125.

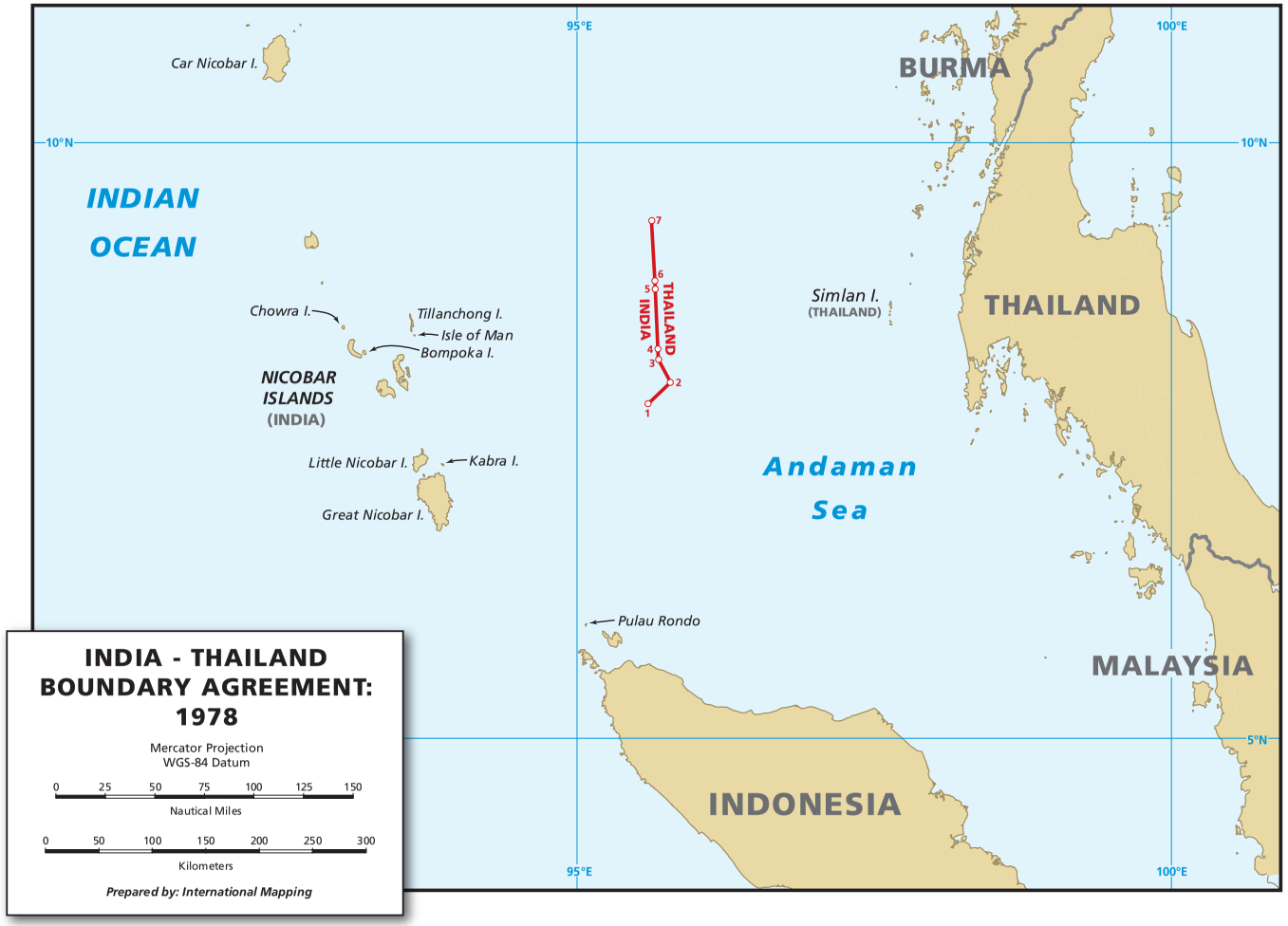

Figure R-7.6, See also in Vol. II - page 122

that, "there can be no doubt that giving full weight to the small cay of Aves vis-à-vis the large islands of Guadeloupe and Dominica [*sic*] would not have been the outcome of a delimitation effected by a third party", is no more than pure speculation.[475] Clearly, the States concerned considered that they were achieving an equitable result.

7.45. In addition to these agreements, there are a considerable number of other examples of State practice discussed below that show small islands being accorded full equidistance effect in situations where they face longer mainland coasts, as well as in cases where they lie between two mainland coasts that are separated by less than 400 nautical miles.

(v) Sao Tome and Principe-Equatorial Guinea/Gabon

7.46. Sao Tome and Principe has entered into maritime boundary agreements with both Equatorial Guinea and Gabon. The delimitations in question are illustrated on **Figure R-7.7**. Both were based on equidistance/median line principles.[476]

7.47. In the Sao Tome and Principe/Equatorial Guinea agreement, the small island of Principe was not enclaved, but rather received full equidistance effect vis-à-vis both the longer mainland coast of Equatorial Guinea and the coast of the large

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[475] NR, para. 6.125.

[476] See, *International Maritime Boundaries,* Vol. IV, p. 2647 for the 1999 Sao Tome and Principe/Equatorial Guinea Agreement, and Vol. V, p. 3683 for the 2001 Sao Tome and Principe/Gabon Agreement.

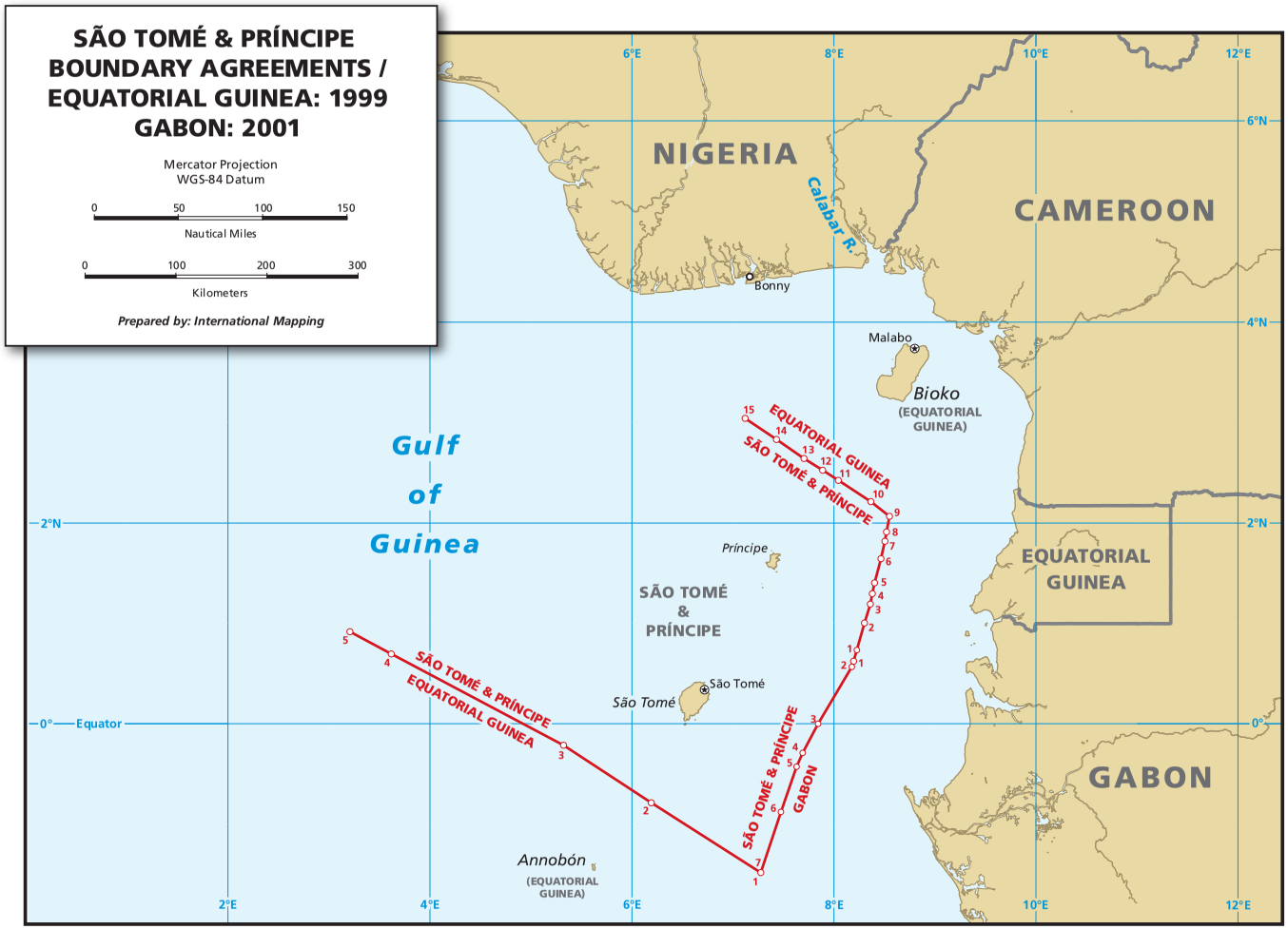

Figure R-7.7, See also in Vol. II - page 122

island of Bioko. This was in spite of the fact that the distance between the islands of Sao Tome and Principe and the territory of Equatorial Guinea was much less than 200 nautical miles.[477]

7.48. In the Sao Tome and Principe/Gabon agreement, the boundary is also an equidistance line between the islands of Sao Tome and Principe and the long mainland coast of Gabon. Once again, neither island was enclaved, as Nicaragua argues should be the case for Colombia's islands, despite the fact that both Sao Tome and Principe lie less than 200 nautical miles off the Gabonese coast.

(vi) Cape Verde-Senegal/Mauritania

7.49. The maritime boundaries between the Cape Verde Islands and the opposite mainland coasts of Senegal and Mauritania are both based on equidistance as referred to in the relevant treaties.[478] In fact, as **Figure R-7.8** shows, which is based on the map appearing in *International* Maritime *Boundaries*, if anything the Cape Verde islands received *more* than full equidistance in the delimitation with Mauritania.[479]

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[477] In the southern sector of the boundary, the delimitation was also a median line between the island of Sao Tome and the small Equatorial Guinea island of Annobon.

[478] See, *International Maritime Boundaries,* Vol. III, p. 2287 for the 1993 Agreement between Cape Verde and Senegal, and Vol. V, p. 3702 for the 2003 Agreement between Cape Verde and Mauritania.

[479] *Ibid.,* Vol. V, p. 3701.

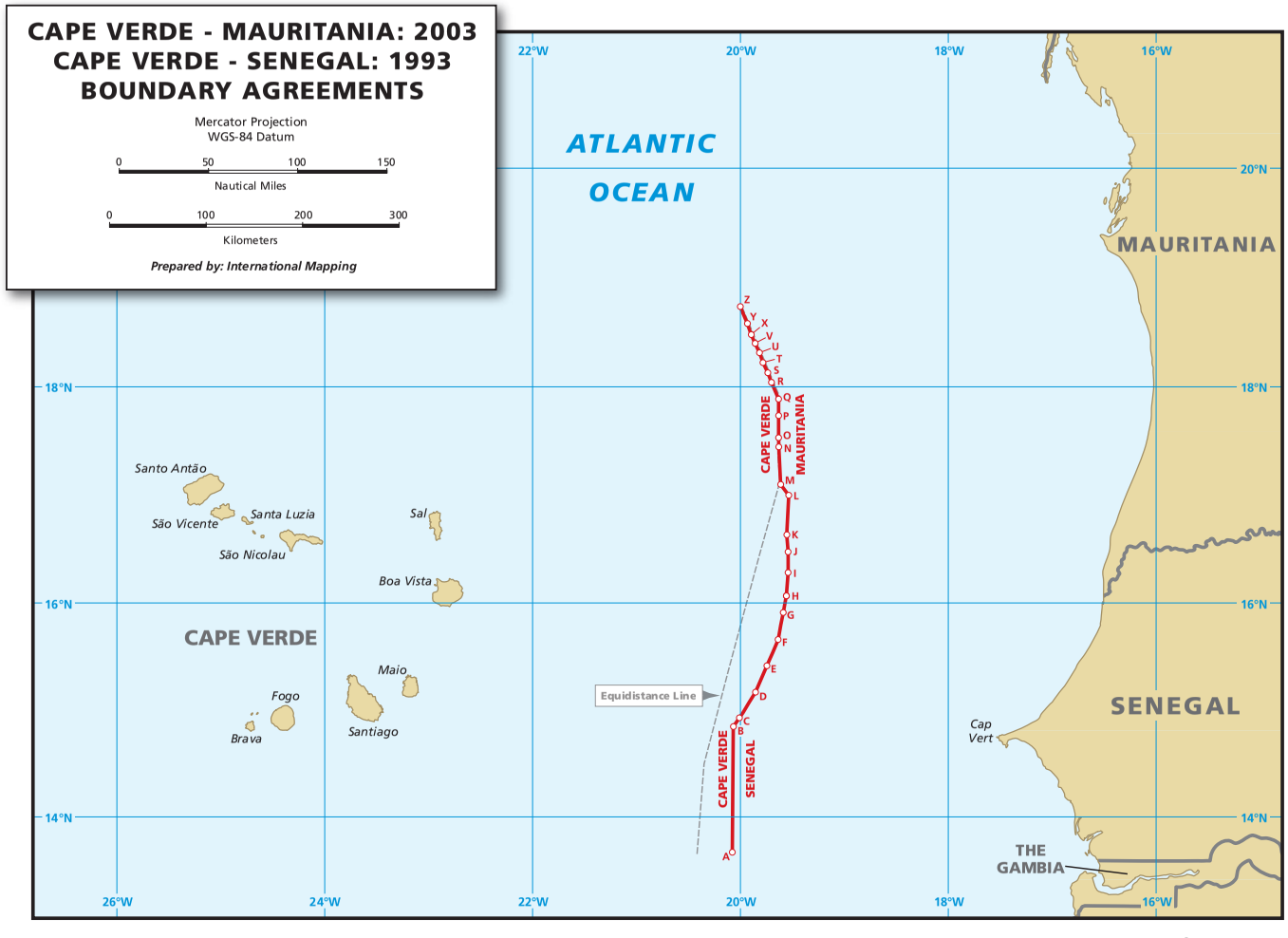

Figure R-7.8, See also in Vol. II - page 123

(vii) Dominican Republic-United Kingdom (Turks & Caicos Islands)

7.50. Most of this agreement concerned the maritime area lying between the very small Turks Islands and the much longer coast of the Dominican Republic as can be seen on **Figure R-7.9**. Despite the fact that the distance separating the relevant coasts of the parties was less than 100 nautical miles, the boundary neither enclaved the Turks Islands, nor "wrapped around" those islands as Nicaragua argues should be the case for Colombia's islands under its fall-back position. The delimitation line departed very marginally from a strict equidistance line, but otherwise accorded the Turks and Caicos extensive maritime projections to the north, east and south (on the west, the islands faced Great Inagua Island belonging to the Bahamas).[480]

(viii) Indonesia-Malaysia (Straits of Malacca)

7.51. In this example of State practice, illustrated on **Figure R-7.10**, the delimitation did fall primarily between the opposite and broadly equivalent mainland coasts of Malaysia and Sumatra which lay less than 400 nautical miles apart. However, two small Malaysian islands (Palak and Jurak) situated well off the Malaysian coast were accorded a full equidistance treatment

[480] J. Charney and L. Alexander eds., *International Maritime Boundaries,* Vol. III, pp. 2235-2241.

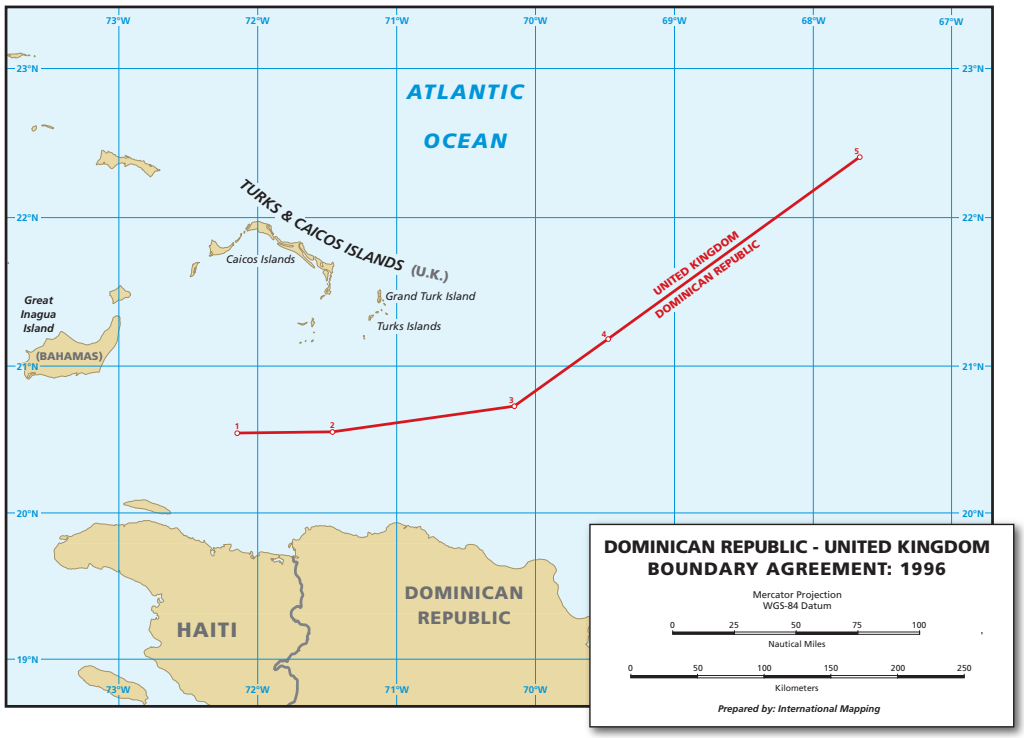

Figure R-7.9, See full size Map Vol. II - page 123

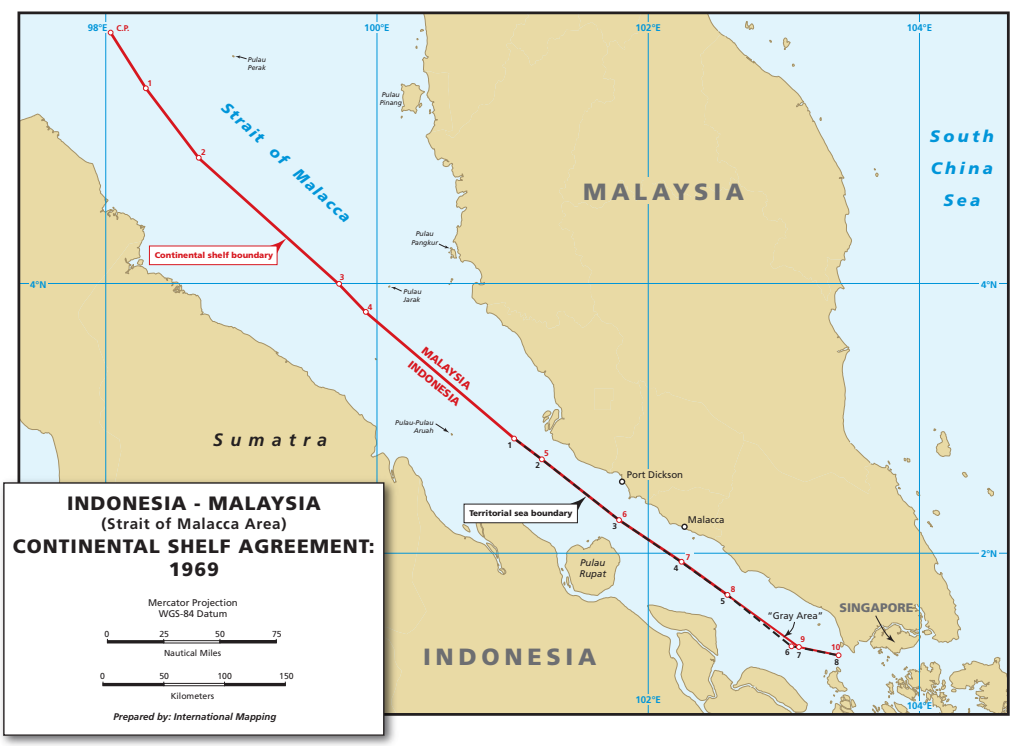

Figure R-7.10, See full size Map Vol. II - page 124

for purposes of the boundary line, and were not enclaved or even partially enclaved.[481]

(2) REGIONAL PRACTICE IN THE SOUTHWEST CARIBBEAN

7.52. The Colombian *Counter-Memorial* also reviewed in some detail a number of delimitation agreements concluded by all of the other riparian States bordering the southwest Caribbean Sea. These include agreements that Colombia has signed with Panama, Costa Rica, Jamaica, Honduras, Haiti and the Dominican Republic. Only the agreement with Costa Rica has not been ratified by Costa Rica's Legislative Assembly. However, as Colombia pointed out in its *Counter-Memorial*, and as is confirmed in Costa Rica's Application to Intervene, both Parties have complied with the Agreement in good faith for some 33 years.[482]

7.53. These agreements were premised not only on the fact that Colombia was sovereign over all the islands at issue in this case, but also on the belief that Colombia's islands were by and

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[481] J. Charney and L. Alexander eds., *International Maritime Boundaries,* Vol. I, p. 1021.

[482] CR, Vol. II, Annexes 1-3: Diplomatic Note DM 14082-2000 from the Minister of Foreign Affairs of Colombia to the Minister of Foreign Affairs of Costa Rica, 29 May 2000 (Annex 1); Diplomatic Note DM 073-2000 from the Minister of Foreign Affairs of Costa Rica to the Minister of Foreign Affairs of Colombia, 29 May 2000 (Annex 2); Report to Congress by the Minister of Foreign Affairs of Costa Rica, 2000-2001 (Annex 3). See also, Costa Rica's Application to Intervene, p. 1; CCM, para. 8.41 and CCM Annex 17.

large entitled to receive full equidistance treatment for delimitation purposes.[483]

7.54. Nicaragua's *Reply* exhibits an acute sensitivity to these agreements which Nicaragua asserts "form part of her [Colombia's] policy to hem in Nicaragua's maritime zones by the 82°W meridian".[484] Nicaragua also contends that State practice is not relevant for the delimitation of maritime boundaries with another State that is not a party to those bilateral agreements.[485] The first part of this argument is erroneous; the second misunderstands the relevance of the agreements in question.

7.55. As for the contention that Colombia's boundary agreements with its neighbours form part of a policy to hem Nicaragua in by the 82°W median, the fact of the matter is that none of the agreements with either Panama, Costa Rica or Jamaica have anything to do with the 82°W meridian and that meridian is not mentioned in the agreements. Nicaragua also ignores the fact that these agreements were not simply the product of Colombia's initiatives; they also involved the considered position of the other riparian States with respect to what constituted an equitable boundary in the geographic circumstances characterizing this part of the Caribbean.

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[483] See e.g., CR, Vol. II, Annex 3; CCM, Chapter 4, Section F, and paras. 8.34-8.56.
[484] NR, para. 7.27.
[485] NR, para. 7.28.

7.56. The 1976 Colombia-Panama agreement covers areas lying exclusively to the south and east of the islands of Alburquerque, San Andrés, East-Southeast Cays, Providencia and Roncador. The westernmost point on the boundary line lies on the 81°15'W meridian, not the 82°W meridian.

7.57. It is telling that Nicaragua never protested this agreement. This is entirely consistent with Nicaragua's total lack of interest in areas lying to the east of the islands mentioned above until it initiated these proceedings. Now, of course, it claims extended continental shelf rights over the very areas covered by the Colombia-Panama agreement. Where, it might be asked, was Nicaragua during the 25 years between the date when the Colombia-Panama agreement was concluded and the filing of Nicaragua's Application?

7.58. The 1977 Colombia-Costa Rica delimitation agreement, which has been fully respected by both Colombia and Costa Rica, also has nothing to do with the 82°W meridian. Once again, the agreement in question makes no mention of that meridian, and the westernmost segment of the boundary actually extends along the 82°14'W meridian which is further west.[486]

7.59. As for the 1993 agreement between Colombia and Jamaica, a mere glance at the map reveals that it only concerns areas lying in the vicinity of the Serranilla Cays and Bajo Nuevo

[486] See, CCM, paras. 4.152-4.153, Annex 5 and Figure 4.3; CR Figure R-5.5.

– including the establishment of a Joint Regime Area – far away from the 82°W meridian or from Nicaragua.

7.60. In fact, the only bilateral agreement that makes mention of the 82°W meridian is the Colombia-Honduras agreement where that meridian forms the western endpoint of the line. However, there are also two other segments of that agreement covering areas north of the 15°N parallel that lie to the west and southwest of Serranilla and also to its north.

7.61. As for Nicaragua's argument that these agreements are not relevant because it is not a party to them, this misses the point. Regardless of the fact that Nicaragua is not a party, the agreements in question comprise a body of regional State practice evidencing the fact that the other States in the region do not subscribe to Nicaragua's enclave theory and that for the most part, Colombia's islands have been accorded full effect.

D. Conclusions

7.62. When considered along with the other examples of State practice that have been discussed above, what stands out is the fact that Nicaragua cannot cite a single example of State practice where islands have been enclaved in the way that Nicaragua now argues that Colombia's islands should be here. Moreover, the jurisprudence that Nicaragua cites in the form of the *France-Canada* and *Anglo-French* arbitrations relates to geographic

circumstances that are vastly different from the relevant geographic facts in this case.

7.63. In contrast, Colombia has shown that even small islands have often been accorded a full equidistance effect. This is evident by State practice generally and in this part of the Caribbean in particular. Moreover, in cases such as *Jan Mayen* and *Libya-Malta*, islands have been accorded a significant equidistance effect that bears no relation to Nicaragua's novel enclave theory.

Chapter 8

REFLECTING THE RELEVANT CIRCUMSTANCES

A. Introduction

8.1. In Chapter 6, Colombia canvassed the legal authorities which stand for the principle that maritime delimitation involves a two-step process: first, plotting the provisional equidistance line; second, consideration of the relevant circumstances to assess whether they justify an adjustment being made to the provisional line. Having set out Colombia's position on the appropriate methodology and criteria for establishing the provisional equidistance line in Chapter 6, Colombia will now turn to the relevant circumstances in order to ascertain whether such circumstances confirm the equitable nature of Colombia's provisional line or warrant some degree of shifting of that line.

8.2. Before doing so, it is necessary to offer some comments on Nicaragua's approach to the notion of relevant circumstances in order to place the Parties' divergent positions on this issue in perspective.

8.3. It is remarkable in this respect, that the new continental shelf claim advanced in Nicaragua's *Reply* makes no mention of the role that relevant circumstances play in the case. Chapter III

of the *Reply*, in which Nicaragua sets out its positive case under the heading "The Delimitation of the Continental Shelf Area", does not include a single reference to relevant circumstances. In fact, Nicaragua's continental shelf claim does not even refer to the first step in the process – the establishment of the provisional equidistance line – let alone the second step.

8.4. For Nicaragua, the only factors that are relevant concern the location of the outer limits of Nicaragua's putative extended continental shelf rights based on Article 76 of the 1982 Law of the Sea Convention, and the limits of Colombia's physical continental shelf lying off its mainland coast. According to Nicaragua, nothing else matters other than the equal division of these alleged overlapping continental margins. In short, Nicaragua's case rests on geology and nothing but geology. As discussed in Chapter 4, such an approach bears no relation to the law of maritime delimitation. Nor does it reflect the maritime entitlements (both continental shelf and EEZ) that Colombia's islands give rise to in their own right, the presence and interests of third States in the region or the other relevant circumstances characterizing the area that are discussed in this Chapter.

8.5. The only place where Nicaragua purports to address the "relevant circumstances" is in Chapter 6 of the *Reply* where Nicaragua takes issue with Colombia's delimitation line.[487] There, Nicaragua's contends that there are no relevant

[487] NR, para. 6.84 and paras. 6.131-6.146.

circumstances that justify an adjustment being made to its so-called "provisional lines" which are actually no more than its three- and twelve-mile enclaves around Colombia's islands. Not only are these "provisional lines" incompatible with the legal precepts discussed earlier in this Rejoinder, they fail to take into account the relevant conduct of the Parties, the geographic circumstances that characterize the area and the way in which third States in the region have recognized the legal entitlements generated by Colombia's islands in bilateral delimitation agreements.

B. The Absence of Any Nicaraguan Presence in the Waters of the San Andrés Archipelago

8.6. Nicaragua cannot point to any presence at any time either on Colombia's islands at issue in the present case, or within the maritime areas lying between those islands. Moreover, Nicaragua has not produced any evidence that it sought to exercise jurisdiction over the waters lying within the San Andrés Archipelago or to act in a constructive manner by enacting fish conservation or anti-pollution measures, or in undertaking security operations to interdict drug trafficking in this area.

8.7. In short, whatever Nicaraguan maritime activities of an official nature that exist in the delimitation area are limited to isolated episodes of relatively recent vintage that either fall close to the 82°W meridian or, for a short period at the end of

the 1960's and early 1970's, were located around Quitasueño when Nicaragua issued oil exploration permits in that area all of which were promptly protested by Colombia.[488] As to areas lying further east – for example, east of the islands of San Andrés, Providencia, Santa Catalina, Alburquerque and Quitasueño or between those islands – there is nothing; no evidence of any Nicaraguan State activities of any kind either with respect to resource management, conservation measures or maintenance of safety and security.

8.8. In contrast, not only has Colombia acted *à titre de souverain* with respect to each of the islands of the Archipelago,[489] it has also been the sole Party to regulate fishing, implement conservation measures, operate lighthouses and beacons, carry out naval patrols, interdict drug trafficking, publish maritime charts, engage in marine scientific research, and otherwise exercise jurisdiction over all the waters lying within Colombia's exclusive economic zone between the islands comprising the San Andrés Archipelago - that is, from Bajo Nuevo in the northeast, to Alburquerque in the southwest.

8.9. While this was fully documented in the Colombian *Counter-Memorial*, the relevant facts may be summarized as follows:

- Appendix 7 to Volume II-B of the *Counter-Memorial*

[488] See CCM, Annexes 54-59.

[489] See para. 1.4 and Chapter 2, above, in particular, paras. 2.22, 2.88-2.89.

tabulates 163 individual naval operations that Colombia has carried in the waters of the San Andrés Archipelago which include routine patrols as well as drug interdiction operations carried out by Colombian naval forces and in conjunction with third States.

- Appendix 5 to Volume II-B lists 91 instances where Colombia has licensed fishing vessels for operations in the waters of the San Andrés Archipelago. These include numerous vessels flying the flag of Nicaragua, as well as those flagged by the United States, the United Kingdom, Russia, Honduras, Jamaica, Belize, Venezuela, the Dominican Republic, Cayman Islands and Panama.[490]

- Various scientific surveys have also been commissioned by Colombia throughout the waters lying between the islands comprising the Archipelago. These include geodetic controls, hydrographic surveys and geomorphological, oceanographic, meteorological and chemical studies of the waters and the seabed for purposes of protecting the living resources of the area.[491]

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[490] Also tabulated in Appendix 6 to Volume II-B of the Colombian Counter-Memorial are arrangements made with US vessels for fishing around Quitasueño, Serrana and Roncador. For examples of fishing permits granted by the Colombian authorities, see also, e.g., CCM Annexes 147, 148, 150, 153, 156, 169, and, in particular, Annexes 163, 166, 167, 168 concerning Nicaraguan fishing vessels.

[491] CCM, Appendices 10 and 12, Vol. II-B.

- Colombia has also listed in its *Counter-Memorial* all the nautical charts it has issued for the islands and the waters of the Archipelago.[492]

8.10. Nicaragua is clearly conscious of its total absence from any of the waters lying within the San Andrés Archipelago and thus tries to excuse its lack of presence in this area on the grounds that, while *effectivités* can have a role to play in cases involving territorial disputes, such roles "have not been generally accepted in cases of maritime delimitation."[493]

8.11. In considering this argument, it must be recalled that, as early as the 1969 North Sea cases, the Court stated the following:

> "[T]here is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce the result rather than reliance on one to the exclusion of others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case."[494]

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[492] CCM, Appendix 11, Vol. II-B.

[493] NR, para. 7.17.

[494] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 50, para. 23.

8.12. In the Tunisia-Libya case, the Court also adverted to the principle that: "Historic titles must enjoy respect and be preserved as they have always been by long usage."[495]

8.13. As the Court pointed out, the notion of historic rights or historic waters did clearly apply in a maritime context even though distinct legal regimes govern the question of historic rights as opposed to continental shelf rights under customary international law. In the Court's words:

> "The first régime is based on acquisition and occupation, while the second is based on the existence of rights '*ipso facto* and *ab initio*'."[496]

8.14. Colombia has effectively exercised jurisdiction over all of the waters lying within the San Andrés Archipelago for a considerable period of time. Colombia has been the only State to carry out economic and regulatory activities in these waters in an open and transparent manner, and vessels of numerous other States, including a number of ships flying the Nicaraguan flag, have recognized Colombia's jurisdiction in this area by applying for and being granted fishing permits.

8.15. The Nicaraguan *Reply* labours under the mistaken impression that Colombia is relying on this state of affairs for the identification of specific line of delimitation. Nicaragua

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[495] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 73, para. 100.

[496] *Ibid.,* p. 74, para. 100. Of course, occupation is a form of *effectivités*.

consequently argues that there is no "tacit agreement" with respect to any particular line in the manner addressed in the Court's judgment in the Nicaragua-Honduras case, and that no line – such as the 82°W meridian – has been recognized in practice.[497]

8.16. The relevance of the 82°W meridian will be discussed in the next section. For present purposes, it must be recalled that Colombia does not rely on the absence of any Nicaraguan presence in the waters lying between Colombia's islands or on Colombia's exercise of jurisdiction in these waters for purposes of establishing a particular delimitation line. Colombia's delimitation line is based on application of the equidistance-relevant circumstances rule. However, it is also axiomatic that maritime delimitation involves the application of equitable principles and that the overall aim of delimitation is to achieve an equitable result. It is entirely appropriate to test the delimitation claims put forward by the Parties by reference to the touchstone of equity (applied *infra legem*) and in the light of all the relevant circumstances, including the conduct of the Parties with respect to the areas in dispute in fields such as resource management, control of contraband and marine scientific research.

8.17. Nicaragua's continental shelf claim, as well as its fall-back position calling for a delimitation line that accords

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[497] NR, paras. 7.14-7.15.

Nicaragua a full 200-nautical mile exclusive economic zone, both fall within an area where Nicaragua has never had any presence of any kind. A delimitation line that amputates areas where Colombia has a long-standing track record of exercising jurisdiction in a constructive manner, but where Nicaragua can show nothing, cannot be said to accord with equitable principles or to produce an equitable result that will contribute to the maintenance of peace and stability in the region.

C. The Relevance of the 82°W Meridian

8.18. The Nicaraguan *Reply* argues that Colombia fails to take into account the Court's Judgment on the Preliminary Objections in so far as the relevance of the 82°W meridian is concerned.[498] Of course, Colombia's *Counter-Memorial* had already indicated that it was mindful of the Court's finding that:

> "115. The Court considers that, contrary to Colombia's claims, the terms of the Protocol... [are] more consistent with the contention that the provision in the Protocol was intended to fix the western limit of the San Andrés Archipelago at the 82nd meridian."[499]

That is why Colombia has formulated its claim both in its *Counter-Memorial* and in this Rejoinder by reference to customary international law and the two-step delimitation process discussed earlier. As Colombia has also pointed out,

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498 NR, Chapter VII.

499 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 34, para. 115.

however, this does not preclude the 82°W meridian from constituting a relevant circumstance to be considered at the second stage of the delimitation exercise in order to achieve an equitable result.[500]

8.19. Notwithstanding this, the Nicaraguan *Reply* continues to take aim at a false target by accusing Colombia of "using the 82°W meridian at each possible stage of the process of establishing the maritime border between the Parties, when its only real purpose was circumscribing the extent of the Archipelago."[501]

8.20. This is a distortion of Colombia's position. Unlike Nicaragua, following the Court's Judgment, Colombia based its position on the equidistance-relevant circumstances rule in conformity with well-established principles of international law. The plotting of the equidistance line obviously has nothing to do with any particular meridian of longitude, but rather is based on objective criteria – namely, the relevant basepoints on the Parties' opposite coasts. Nor, as Colombia explained in its *Counter-Memorial*, does the provisional line require any adjustment in the light of the relevant circumstances. Rather, the relevant circumstances (including the significance of the 82°W meridian as the western limit of the San Andrés Archipelago and as the limit to the areas in which the Parties'

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500 CCM, paras. 9.60-9.64.

501 NR, para. 7.8.

exercised their respective jurisdiction) confirm the equitable nature of the provisional equidistance line.

8.21. For evident reasons, the equidistance line does not coincide with the 82°W meridian since the former is a function of basepoints located on the Parties' coasts while the latter is a line of longitude. The course of the equidistance line can be seen on **Figure R-8.1** facing this page. The southern three-quarters of the line lies somewhat to the west of the 82°W meridian because it is controlled by basepoints on San Andrés Island, Providencia, Santa Catalina and Alburquerque, on the one hand, and the Islas Mangles (Corn Islands) and Roca Tyra, on the other. The northern part of the line actually falls somewhat to the east of that meridian as a result of the basepoints on each Party's coasts. This is no more than the product of nature and the relevant coastal geography of the Parties which are the key elements in the establishment of any equidistance line.

8.22. Given that Colombia's position has been formulated by reference to established legal principles, Nicaragua's intemperate characterization of that position as "preposterous" is out place.[502]

8.23. Having wrongly criticized Colombia for "using the 82nd meridian at each possible stage of the process", Nicaragua also

[502] NR, p. 15, para. 33.

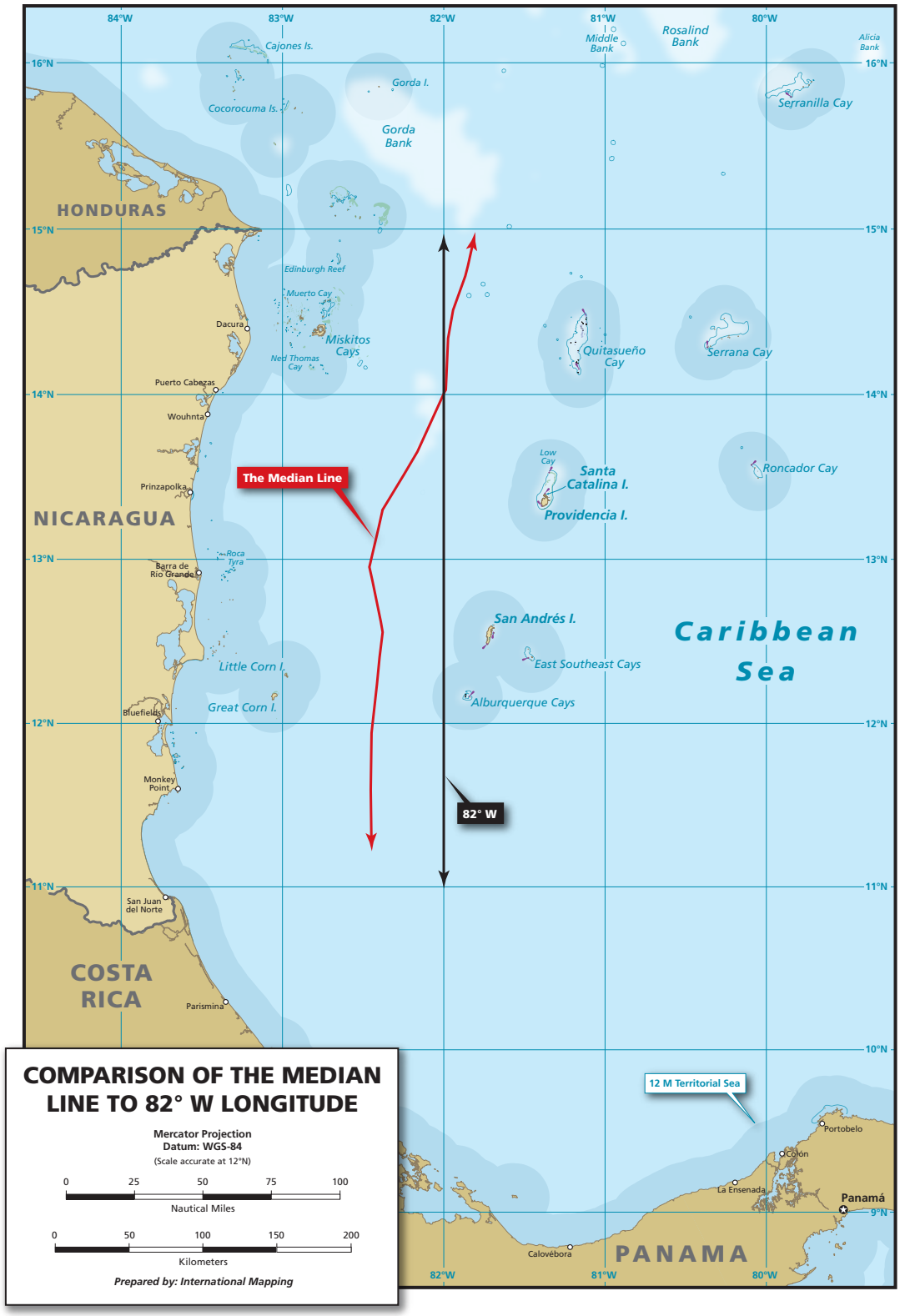

Figure R-8.1, See full size Map Vol. II - page 125

contradicts itself by complaining that, by its "newly fashioned" median line, "Colombia seeks to acquire more maritime space than she had ever claimed before, including in her earlier pleadings before this Court."[503] Apparently, Colombia is damned when she relies on the 82°W meridian and damned when she does not.

8.24. The fact of the matter is that the position expressed in Colombia's *Counter-Memorial* respects the delimitation methodology articulated by the Court and by arbitral tribunals, while Nicaragua's position does not. It ill-behooves Nicaragua to complain that Colombia is now claiming more when Nicaragua itself – and, unlike Colombia, without the slightest justification based on the Court's Judgment on the Preliminary Objections – has introduced a brand new continental shelf claim that had never seen the light of day before the filing of its *Reply* (and which still has not seen the light of day as far as the United Nations Commission is concerned), and which lies 100 nautical miles to the east of Nicaragua's already exaggerated, original single maritime boundary claim.

8.25. With respect to the role of the 82°W meridian as a relevant circumstance to be taken into account at the second stage of the delimitation process, this revolves around two main factors.

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[503] NR, para. 6.8.

8.26. The first is based on the premise that, while not effecting a general delimitation between the Parties, the 82°W meridian does fix the western limit of the San Andrés Archipelago as the Court held in its Judgment on the Preliminary Objections.[504] This is a proposition with which Nicaragua agrees.[505] That being the case, it is entirely natural that the delimitation should fall generally between the western limit of the Archipelago as defined in the 1928/1930 Treaty, on the one hand, and Nicaragua's territory, on the other. This is what the equidistance line achieves; it falls between the limits of the territory of both States.

8.27. The fact that the 82°W meridian lies in the same general area as the equidistance line – i.e., between the relevant and opposite coasts of the Parties – confirms the overall equitableness of the equidistance line as the appropriate delimitation. What would not be compatible with the 1928/1930 Treaty would be a delimitation line lying to the east of Colombia's islands that results in Nicaragua having sovereign rights within areas that fall inside the limits of Colombia's Archipelago and between its islands. This is a matter that the Nicaraguan *Reply* fails to grapple with.

8.28. The second relevant factor concerns the manner in which the Parties have exercised their sovereign rights in the area

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[504] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 34, para. 115.

[505] NR, para. 7.3.

based on their control and interdiction of fishing vessels and in taking other lawful measures relating to safety and security.

8.29. Nicaragua's pleadings tell an incomplete and thus distorted story when it comes to this issue. Nicaragua argues that Colombia has imposed the 82°W meridian as a limit by force.[506] The *Reply* goes so far as to append a separate section requesting the Court to declare that Colombia is not acting in accordance with its obligations under international law in this respect.[507] The unfounded nature of Nicaragua's request for a "Declaration" will be addressed in Chapter 9 below. For present purposes, it is necessary to correct the one-sided version of events that Nicaragua has presented.

8.30. While the Nicaraguan *Reply* asserts that "the Colombian military forces have imposed unlawful restrictions on Nicaragua's exercise of her own sovereignty east of the 82nd meridian",[508] it fails to point out that its own forces have also intercepted and detained Colombian vessels within the same area to the west of Quitasueño. There are five such incidents recorded in the annexes which Nicaragua filed with its *Memorial*.[509] Each of these was protested by Colombia. But the significant aspect of this element of the conduct of the Parties is

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506 NR, para. 7.26.
507 NR, p. 237, para. 8.
508 NR, para. 7.16.
509 NM, Annexes 49-50, 53, 55 (referring to two incidents) and 57.

that all of these incidents occurred either on the 82°W meridian or within a few miles of it.

8.31. **Figure R-8.2** depicts in red the locations where Nicaragua has intercepted or detained Colombian vessels operating in the area, and in green locations where Colombia has stopped private vessels fishing in contravention of Colombian law. It can be seen that all of these incidents have occurred on or close to the 82°W meridian in the northeastern part of the relevant area between Quitasueño and the opposite Nicaraguan islands.

8.32. Nicaragua never carried out any naval patrols or engaged in monitoring foreign vessels east of San Andrés Island, Providencia or Quitasueño or south of Alburquerque and East-Southeast Cays. This is consistent with Nicaragua's total absence from this area. Instead, its concerns have centered precisely around the 82°W meridian. As for Colombia's practice, since there were no Nicaraguan flagged vessels ever operating east of the islands without having received a Colombian permit, interdiction activities of the Colombian Navy have also taken place in areas lying between the 82°W meridian and Quitasueño, as can be seen on the map.

8.33. The picture that emerges is that the only area which, as a practical matter, has given rise to disputes between the Parties is the area lying between the north-westernmost of Colombia's

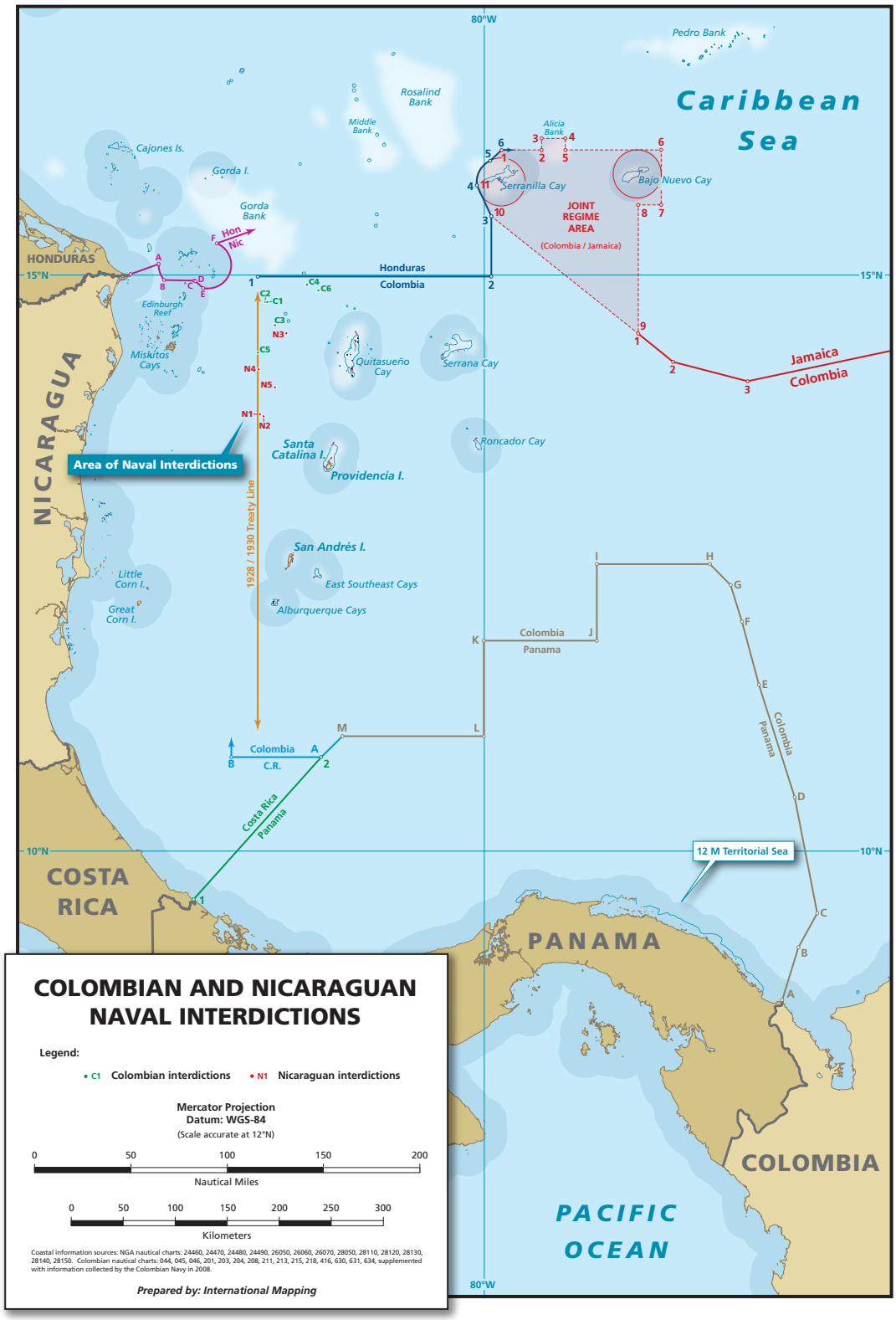

Figure R-8.2, See full size Map Vol. II - page 126

islands and Nicaragua along or next to the 82°W meridian. In addition to constituting the western limit of the San Andrés Archipelago, the 82°W meridian is also a relevant circumstance in so far as it confirms where the genuine area of dispute lies in which the delimitation falls to be established - the area between the Parties' relevant coasts. This is where the equidistance line lies.

D. Resource and Security Factors

(1) RESOURCE MANAGEMENT AND CONTROL

8.34. Nicaragua acknowledges that "since the North Sea Continental Shelf cases, it has been recognized that the incidence of natural resources in the disputed area may constitute a relevant circumstance affecting a delimitation."[510] With the adoption of the regime of the exclusive economic zone, preservation of the living resources situated within the EEZ has become more important, and a coastal State now possesses sovereign rights not only to explore and exploit the natural resources in the EEZ, but also the right – and, indeed, the obligation – to conserve and manage those resources.

8.35. The waters of the San Andrés Archipelago lying east of the 82°W meridian host a fragile ecosystem where the over-fishing of certain species is a major concern. Unlike Nicaragua, Colombia has taken a number of concrete steps, both by itself

[510] NM, para. 3.60.

and in conjunction with other States, to preserve and protect the living resources of these waters. These measures are documented in Colombia's *Counter-Memorial*. Since they have been ignored in Nicaragua's *Reply*, it is appropriate to summarize them here if only to underscore the fact that Colombia has been, and continues to be, the sole Party in this case that is effectively managing the living resources of the area.

8.36. In the first place, Colombia's delimitation agreements with its neighbours emphasize the importance placed by the parties to those agreements on the preservation of the ecosystem of this part of the Caribbean. For example, the 1976 Agreement between Colombia and Panama, records -

> "The adoption of satisfactory measures for the preservation, conservation and exploitation of the existing resources in those waters and the prevention, control and elimination of pollution therein to be in their mutual interest."[511]

8.37. The 1977 Agreement between Colombia and Costa Rica evidences a similar concern. No less than four articles (Articles III, IV, V and VI) set out the Parties' agreement to coordinate and co-operate in enacting preservation measures relating to species that migrate beyond their respective jurisdictions and to control pollution and exchange scientific research.[512]

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511 CCM, Annex 4, p. 27.

512 CCM, Annex 5, pp. 32-33.

8.38. With respect to States outside of the region, on 8 September 1972 Colombia and the United States concluded a treaty pursuant to which the United States renounced any claims to sovereignty over Quitasueño, Roncador, and Serrana.[513] By Article 3 of the Treaty, United States' nationals and vessels were granted the right to continue to fish in the waters of Quitasueño, Roncador and Serrana, subject to reasonable conservation measures applied by the Government of Colombia in accordance with an Exchange of Notes of the same date.[514] The parties also agreed to exchange views periodically on the desirability of bilateral or multilateral action of a conservation nature.[515]

8.39. In implementation of this agreement, on 24 October and 6 December 1983, Colombia and the United States conducted a further Exchange of Notes, whereby they agreed that the latter would provide annually to Colombia a list of U.S. fishing vessels which intended to fish in the areas covered by the 1972 Agreement.[516] Such vessels were required to report their arrival in and departure from such areas to Colombian authorities and to provide a statement regarding the quantity and species of their catch.

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513 CCM, paras. 4.52-4.56 and Annex 3.
514 CCM, Annex 3, pp. 18-20.
515 CCM, Annex 3, pp. 18-20.
516 CCM, Annex 8.

8.40. Further consultations on conservation measures took place between the signatories to the 1972 Treaty in January 1987 resulting in the issuance of a Joint Statement on 23 January 1987. The Joint Statement voiced concern over the depletion of certain species, particularly conch, in the waters around Quitasueño, and agreed on a temporary ban on the taking of conch within the area described in paragraph 5 of the 1983 Exchange of Notes relating to Quitasueño.[517]

8.41. Those actions were followed on 6 October 1989 by the adoption of Agreed Minutes pursuant to which the Colombia and the United States agreed to continue the temporary ban on conch fishing around Quitasueño, to adopt a three month closed season (from 1 July through 30 September of each year) for conch fishing in the waters adjacent to Roncador and Serrana, and to prohibit the capturing of spiny lobsters of less than a specified size. A ban on factory vessels operating in the treaty waters was also agreed.[518]

8.42. Further regulations were adopted by the Colombian Ministry of Agriculture in 1990. These extended the fishing ban for conch in the area of Quitasueño between the 14° to 14°40'N latitudes and the 81° to 81°30'W longitudes. With respect to the rest of the area of the San Andrés Archipelago, the regulations imposed a closed season on conch fishing generally during the months of July through September as well as a ban on the

517 CCM, Annex 11.
518 CCM, Annexes 12 and 13.

possession of conch weighing less than 225 grams. A size limitation was also placed on the capture of spiny lobsters throughout the Archipelago, and a restriction imposed on the use of certain kinds of dive equipment and nets, and on fishing operations carried out by factory ships.[519]

8.43. Pursuant to an Agreed Minutes between Colombia and the United States dated 18 May 1994, the United States authorized the Navy and Coastguard of Colombia to board U.S. vessels to verify compliance with conservation regulations, in exercise of its jurisdiction with respect to fishing in the San Andrés Archipelago. This was confirmed by a Diplomatic Note dated 6 August 1996.[520] The parties also agreed to create an *ad hoc* scientific group to discuss data relating to fishing activities reported by the delegations of both countries and to develop an action plan for evaluating the fishing resources of the area and problems threatening their sustainable development.[521]

8.44. Colombia also entered into fishing agreements with Jamaica in 1981 and 1984 under which Jamaican fishing vessels were accorded the right to undertake fishing activities in areas around the Serranilla Cays and Bajo Nuevo. The agreements specified the particular species of fish that such vessels were authorized to catch, the size of vessels that were allowed to fish and the maximum annual catch that was permitted. They also

519 CCM, Annex 151.
520 CCM, Annex 68.
521 CCM, Annex 15.

obligated crew members of Jamaican vessels to obtain identification cards issued by the Colombian Consulate in Jamaica.[522]

8.45. Colombia and Jamaica also agreed a Joint Regime Area in their 1993 Maritime Delimitation Treaty as depicted on **Figure R-5.5** at page 188. Amongst other things, the 1993 Agreement provided that the parties would adopt measures relating to marine scientific research, the protection and preservation of the marine environment and conservation of the living resources within the Joint Regime Area.[523]

8.46. The evidence thus shows that Colombia has consistently exercised sovereign rights over the management and conservation of the living resources located within its exclusive economic zone in the waters of the San Andrés Archipelago. For its part, Nicaragua has produced no evidence that it engaged in any similar activities in maritime areas lying east of the 82°W meridian, or between Colombia's islands, despite the fact that, as a party to the 1982 Convention on the Law of the Sea, Nicaragua was under an obligation to: (i) determine the allowable catch of the living resources within areas claimed to form part of its EEZ (Article 61(1)), (ii) ensure through proper conservation and management the maintenance of those living

[522] CCM, Annexes 7 and 9, in particular Articles III and VIII(d) thereof; also, second para. in preamble of Annex 9 in reference to two-year renewal in 1982 of the 1981 Agreement, pursuant to Art. XIV. See also, CCM Annexes 63 and 64.

[523] CCM, Annex 14.

resources so that they were not endangered by over-exploitation (Article 61(2), and (iii) promote the optimum utilization of such resources (Article 62).

8.47. In its *Reply*, Nicaragua attempts to excuse its inaction by asserting that Nicaragua was under "special constraints" in furnishing the Court with information on these matters.[524] To this end, Nicaragua argues that it has been unable to explore the area and thus to be able to provide the Court with a full study of the resources in question.[525] However, this does not excuse Nicaragua's inaction because, if it had considered it had rights over that area, it should have at least issued relevant legal and administrative regulations.

8.48. At the State level, there is no evidence Nicaragua ever attempted to carry out any marine scientific research in the maritime areas it now claims. Nor did Nicaragua produce any laws or regulations dealing with the protection of the living resources situated therein. There are no grounds for blaming this inactivity and lack of interest on Colombia. In short, Nicaragua complains that its rights have been infringed, but unlike Colombia it never sought to implement such rights in practice and it never respected the obligations it was putatively under to conserve and manage the resources of the areas which it now asserts should form part of its exclusive economic zone.

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524 NR, para. 6.136.

525 NR, para. 6.138.

8.49. Nicaragua also overlooks the documentary evidence that Colombia has produced showing that Nicaraguan flagged vessels have frequently applied for and been granted permits by Colombia to fish in the waters of the San Andrés Archipelago subject to complying with Colombia's conservation measures. Annexes 139, 140, 163, 166, 167, 168 and 169 to Colombia's *Counter-Memorial* contain specific permits granted to Nicaraguan flagged vessels to this effect.

(2) COLOMBIA'S UNDERTAKING OF SECURITY MEASURES

8.50. With respect to Colombia's undertaking of security operations throughout the waters lying within the San Andrés Archipelago, Nicaragua's *Reply* raises two arguments. The first is that Colombia has introduced "no evidence to support her assertions".[526] The second is that, since the waters beyond the territorial sea in the exclusive economic zone are not a zone of sovereignty, Colombia has no right to exercise general "police" powers or to interdict contraband unrelated to specific economic rights she might enjoy in such areas.[527] The first argument is simply wrong. The second mischaracterizes the relevant legal context within which Colombia's activities have taken place.

8.51. As for the questions of evidence, the *Counter-Memorial* contains numerous documentary annexes attesting to Colombia's implementation of security measures in the waters

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526 NR, para. 6.141.
527 NR, para. 6.142.

of the Archipelago both with respect to controlling illegal fishing and in connection with the interdiction of drug-running and the transport of other contraband.[528] The former activity is critical to the conservation and management of the living resources in the area, as was discussed in the previous section. The latter is of central importance not only to Colombia but to the international community at large in the light of the fact that this part of the Caribbean has been a route for illegal drug-smuggling.

8.52. As noted above, Appendix 7 to Volume II-B of Colombia's *Counter-Memorial* contains a descriptive list of some 163 individual naval operations that Colombia has undertaken within the maritime areas falling within the San Andrés Archipelago. These activities range from routine patrols relating to surveillance duties, to fighting contraband and drug-trafficking, controlling illegal fishing and generally exercising sovereignty and sovereign rights over the islands and the adjacent waters. Many of these were carried out unilaterally by Colombia's Naval forces; others were performed as part of exercises carried out with other States, particularly the United States.

8.53. With respect to joint Colombian-United States operations, it will be recalled that, pursuant to the 1983 Agreement between those two States, the United States granted

[528] See, e.g., CCM, Annexes 130-132, 165, 209-214; Vol. II-B, Appendices 7 and 8.

to Colombian authorities the right to board United States flagged vessels fishing in the areas covered by the 1972 Treaty for purposes of inspecting the vessels' documentation granting it permission to fish in the area concerned. With the subsequent increase in drug trafficking in the area, Colombia and the United States expanded their joint interdiction efforts in 1997 by concluding an Agreement to Suppress Illicit Traffic by Sea.[529]

8.54. The 1997 Agreement applied to waters lying beyond the territorial sea of any State and provided, in relevant part, that each party would authorize the other party, on request, to board and search one of its flagged vessels when either party had reasonable grounds to suspect that the targeted vessel was involved in illicit drug-trafficking. As such, the Agreement was consistent with the obligations and goals set out in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances to which Colombia is a party and which is referred to in the Preamble of the 1997 Agreement. The Agreement also noted the parties' agreement to develop and share tactical information in order to track suspect vessels or aircraft.

8.55. As the documentary annexes furnished by Colombia (but ignored by Nicaragua) demonstrate, Colombia and the United States have cooperated closely in implementing this Agreement within the waters of the San Andrés Archipelago. For example,

[529] Annex 4: 1997 Agreement to Suppress Illicit Traffic by Sea between Colombia and the United States.

Annex 165 to the *Counter-Memorial* contains an Operational Order from the Colombian Navy Command for San Andrés and the western bank of Quitasueño for purposes of detecting ships engaged in illegal fishing activities, drug-trafficking, arms trafficking and smuggling. The Order specifically instructed those conducting the operation to apply the provisions of the 1997 Agreement with the United States.[530]

8.56. The list of Colombian Naval operations included in Appendix 7 to the *Counter-Memorial* records seven different occasions where Colombian naval vessels collaborated with their United States counterparts in drug interdiction activities within the Archipelago's waters.[531] In addition, there are numerous other listings relating to Colombian anti-narcotics missions carried out without third party assistance. [532] The location of these operations show that they were carried out both to the east and west of the main islands of San Andrés, Providencia and Santa Catalina and to the south of Quitasueño.

8.57. Colombia has also engaged in numerous search and rescue missions carried out by its naval forces in waters now claimed by Nicaragua but where Nicaragua can show no similar

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[530] CCM, Annex 165, p. 576.

[531] Both before and after the 1997 Agreement, see the entries for 17/01/1986 (p. 195), 18/04/1995 (p. 212), 30/05/1998 (p. 229), 28/08/1998 (p; 230), 09/09/1998 (p. 231), 23/09/1998 (p. 231) and 13/01/1999 (p. 234) to Appendix 7 to the CCM.

[532] See relevant entries in CCM Appendix 7, pp. 199, 202-203, 207, 210, 212-213, 215-216, 218, 221-222, 227-228, 230-232, 234 and 237-239.

conduct. Reference may be made to the following specific examples:

- Search and rescue operations in August 1969 relating to a towboat located southwest of Alburquerque;[533]
- Investigation of a steamship which ran aground on a shoal in the vicinity of Serrana in September 1971;[534]
- Search and rescue in the vicinity of San Andrés Island in June 1979 of a number of Nicaraguan vessels coming from Nicaragua with refugees onboard;[535]
- Search and rescue in September 1982 of a Nicaraguan flagged vessel near Providencia;[536]
- Search and rescue of a motorboat drifting near Alburquerque in July 1983;[537]
- Search and rescue of a sailboat near Quitasueño in June 1986;[538]
- Assistance in October 1988 to the crew of a motorboat apparently stolen by two Nicaraguan crewmembers to escape that country, subsequently escorted to the 82°W meridian by Colombian forces;[539]

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533 CCM, Annex 135.
534 CCM, Annex 136.
535 CCM, Appendix 7, p. 185.
536 CCM, Appendix 7, p. 193.
537 CCM, Annex 145.
538 CCM, Annex 146.
539 CCM, Annex 149.

- Assistance in August 1990 to a Nicaraguan flagged vessel in distress west of Alburquerque;[540]
- Search and rescue and logistical support in February 1991 between various of the Colombian islands;[541]
- Search and rescue operations in April 1992 for a motorboat which had declared an emergency at a position about 150 nautical miles southwest of San Andrés Island;[542]
- Search and rescue operations carried out in July 1993 with respect to a motorboat south of San Andrés Island and west of the East-Southeast Cays;[543]
- Search and rescue operations carried out at Quitasueño in June 1994;[544]
- Search and rescue operations in the general area of the Cays of the Archipelago in December 1994;[545]
- Support to a vessel with motor problems around Quitasueño in August 1997;[546]
- Rescue of Honduran fishermen near Serranilla in October 1997;[547]

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540 CCM, Annex 152.
541 CCM, Appendix 7, p. 203.
542 CCM, Annex 155.
543 CCM, Annex 158.
544 CCM, Appendix 7, p. 209.
545 CCM, Appendix 7, p. 210.
546 CCM, Appendix 7, p. 222.
547 CCM, Appendix 7, p. 225.

- Various search and rescue operations carried out with respect to Panamanian and Colombian flagged vessels in December 1998 and January 1999 around and west of Quitasueño;[548]
- Aid to a vessel in the area of Quitasueño in May 1999;[549] and
- Rescue of a Honduran vessel that had caught fire in the vicinity of Serrana in September 1999.[550]

8.58. These incidents show a consistent presence of Colombian naval forces in the waters of the Archipelago falling to the east of the provisional equidistance line and east of the 82°W meridian and attest to their contribution to security and safety in the region. Suffice it to note that Nicaragua cannot point to a single competing activity undertaken in furtherance of security in the same area.

8.59. Legally, Nicaragua's assertion that Colombia has no right to exercise general police powers to interdict contraband unrelated to the specific economic rights she might enjoy in the area is inconsistent with the position it took in its *Memorial* and incorrect as a matter of law.

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548 CCM, Appendix 7, p. 232-233.
549 CCM, Appendix 7, p. 235.
550 CCM, Appendix 7, p. 236.

8.60. While Nicaragua's *Reply* now tries to downplay the relevance of security interests, it should be recalled that the Nicaraguan *Memorial* took a different view. As stated in the *Memorial*:

> "International tribunals have given firm recognition to the relevance of security considerations to the assessment of the equitable character of the delimitation."[551]

8.61. Under international law, as reflected in Article 62 of the 1982 Convention, a coastal State is entitled to enact laws and regulations not only dealing with licensing of fishermen, fixing quotas of catch, regulating fishing seasons and the age and size of particular species that may be caught and other such rights, but also to implement enforcement procedures. Unlike Nicaragua, this is precisely what Colombia has done.

8.62. The management and conservation of the living resources of the exclusive economic zone has an obvious economic importance, but economic considerations and security interests are closely interrelated. Many of the inhabitants of the San Andrés Archipelago depend on fishing for their livelihoods. Failure of others to respect regulations that Colombian fishermen themselves are subject to risks friction in the area and maritime incidents. Colombia has taken positive steps to control this situation as is evidenced by the fact that it has not

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[551] NM, para. 3.69.

experienced any serious incidents with its other neighbours in the region.

8.63. A coastal State also has the right not simply to exercise sovereignty over its territorial sea, but also to prevent infringement of its customs, fiscal, immigration and security laws and to punish infringement with its laws and regulations within a distance of 24 nautical miles of its baselines corresponding to a contiguous zone. Unlike the EEZ, there is no obligation for a State to proclaim a contiguous zone or to publish charts indicating its limits.

8.64. Consistent with Article 17 of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, States are also encouraged to co-operate in agreeing arrangements to board and search vessels flagged by another State suspected of illicit drug trafficking. The 1997 Agreement between Colombia and the United States is precisely such an agreement which has been actively implemented in the waters around the San Andrés Archipelago lying beyond the territorial sea of Colombia's islands.

8.65. Nicaragua also overlooks the fact that intelligence sharing and the tracking of vessels or aircraft suspected of being involved in illegal activities is also an important security and policing matter. Such actions are not limited to areas over which a State exercises sovereignty, and Colombia has actively

engaged in such operations within the San Andrés Archipelago in order to safeguard its essential security interests.

E. Geographic Factors and Proportionality

8.66. The provisional equidistance line lies midway between the westernmost of Colombia's islands and Nicaragua's easternmost islands as illustrated on **Figure R-8.3.** It fully respects the conduct of the Parties as described in the previous sections. The question next arises whether, when considering the other factors discussed above, there are any geographic circumstances that militate in favour of an adjustment being made to this line in order to produce an equitable result, bearing in mind that it is not the purpose of maritime delimitation to refashion geography or to render alike what nature has created differently.

8.67. Colombia does not consider that any adjustment is required either on geographic or other grounds. From north to south, the islands of Quitasueño, Santa Catalina, Providencia, San Andrés and Alburquerque form a long chain. Those islands are in turn "backed up" by Serrana, Roncador, Serranilla, Bajo Nuevo and the East-Southeast Cays which lie to their east and northeast. All of these islands generate maritime entitlements under international law.

8.68. **Figure R-8.3** shows that, quite apart from continental shelf and exclusive economic zone entitlements, even the

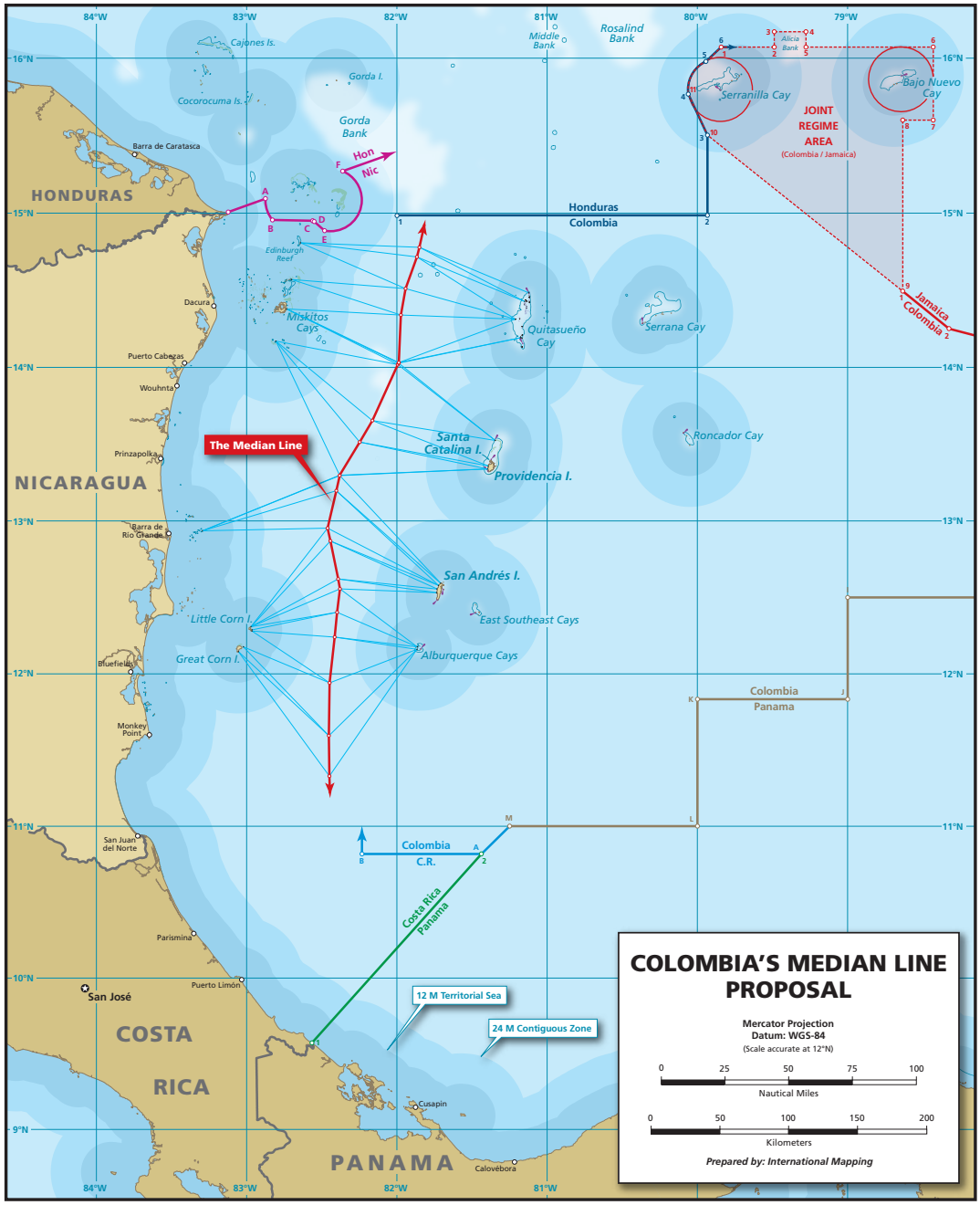

Figure R-8.3, See full size Map Vol. II - page 127

minimum entitlements of Colombia's islands to a territorial sea and 24-mile contiguous zone meet and overlap. Serrana and Roncador lie behind Colombia's western islands, and their 24-mile belts (not to mention their 200-mile EEZ and continental shelf entitlements) also overlap with each other and, in the case of Serrana, with that of Quitasueño. In addition, the territorial seas and contiguous zone entitlements of Alburquerque, San Andrés and East-Southeast Cays meet and overlap, as can be seen on the figure.

8.69. Nicaragua complains that the alignment of Colombia's islands along a north- south axis "exacerbates the inequitable nature of Colombia's equidistance line."[552] If anything, the opposite is the case. This alignment, when coupled with the proximity of Colombia's islands to each other and the activities that Colombia has engaged in with respect to resource management, conservation, safety and security, reinforces the equitable nature of adopting an equidistance-based boundary. Some nine sets of basepoints that are situated on several of Colombia's islands control the course of the line. A similar number of basepoints are located on Nicaragua's islands.[553] This is far more than can occur with mainland coasts, as was illustrated in the Romania-Ukraine case where just two or three

[552] NR section heading at p. 206; para. 6.127.

[553] The relevant basepoints can be seen on Figure 9.2 to Colombia's Counter-Memorial. Also CR, Figures R-6.3 and R-8.3.

sets of basepoints on the Parties' respective coasts actually the course of the entire equidistance line.[554]

8.70. While Nicaragua's mainland coast does not provide any basepoints for the equidistance line because of the presence of the Islas Mangles (Corn Islands), Roca Tyra, the Miskitos Cays and Edinburgh Reef lying off that coast, it has already been shown on **Figure R-6.4** at page 230 that an equidistance line drawn between Colombia's islands and Nicaragua's mainland coast lies considerably to the west of the islands-to-islands equidistance line. It follows that Colombia's line accords to Nicaragua more substantial maritime areas within the relevant area than would an equidistance line using the Nicaraguan mainland coast instead. It also follows that the maritime areas appertaining to Nicaragua under Colombia's equidistance line are more extensive than those appertaining to Colombia within the delimitation area between the relevant coasts of the Parties.

8.71. Even if it was considered appropriate – *quod non* – to make some adjustment to an islands-to-mainland equidistance line to take account of disparities in coastal lengths, Colombia has shown that a modified equidistance line giving Colombia's islands roughly the same effect as Jan Mayen received vis-à-vis Greenland or that Malta received vis-à-vis Libya would fall in the same general area as Colombia's equidistance line.

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[554] Nicaragua's argument that the relation of Colombia's islands to each other is "similar" to the relation of Serpent's Island to the mainland coast of Ukraine is absurd, as has been shown at paras. 6.52-6.56 above.

8.72. The Court has made it clear that maritime delimitation is not an exercise in distributive justice or in drawing lines according to "nice calculations of proportionality".[555] In situations where the rights of third States come into play along the perimeter of the area to be delimited, the Court has also shied away from applying proportionality because, to borrow the Court's words -

> "there is the probability that future delimitations with third States would overthrow not only the figures for shelf areas used as a basis for calculations but also the ratios arrived at."[556]

8.73. Nicaragua accepts that "proportionality as such cannot produce a delimitation."[557] Nicaragua also has no interest in applying a proportionality test (or perhaps more accurately, a disproportionality test) to its own continental shelf claim for the obvious reason that such a claim, in addition to its other legal defects, is grossly disproportionate. Nevertheless, the Nicaraguan *Reply* states:

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

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555 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 40 para. 46 and p. 45, para. 58.
556 *Ibid.,* p. 53, para. 74.
557 NR, para. 3.57.

> defined in Article 76 of the 1982 Law of the Sea Convention."[558]

8.74. What Nicaragua fails to appreciate is that its own claims and enclave proposals artificially impose a completely unjustified limit on the entitlements of all of Colombia's islands. There is nothing equitable about such an approach particularly when considered in the light of the activities Colombia has engaged in throughout the waters of the Archipelago with respect to resource management, security and safety.

8.75. In contrast, Colombia's method reflects the legal principles governing maritime delimitation as well as the relevant circumstances. The equidistance line between the relevant opposite coasts of the Parties affords to Nicaragua a greater maritime area between those coasts than it does to Colombia while, at the same time, delimiting the area by means of a line that is constituted by reference to where the projections from each Party's coasts meet. An equidistance line in this case thus does produce an equitable result.

F. The Interests of Third States

8.76. Colombia has addressed the relevance of the actual or potential interests of third States in the region in Chapter 5 in connection with the identification of the relevant area. Colombia is sensitive to the fact that delimitation in the present

[558] NR, para. 3.61.

case should not prejudice such interests. It was for this reason that Colombia did not specify any end-points for its delimitation line in its *Counter-Memorial*, but rather placed arrows on the north and south of its equidistance line to show that the terminal points of any delimitation depend on the rights of third States. It also explains why Colombia has no objection to Costa Rica's intervention in the case.

8.77. As the *Counter-Memorial* explained, Colombia has concluded delimitation agreements with Panama, Costa Rica, Jamaica and Honduras. The agreement with Costa Rica has not been ratified by Costa Rica, but Costa Rica has made it clear that it complies with the provisions set out in the agreement.[559] Colombia does not claim any maritime areas against third States beyond the limits of the boundaries set out in those agreements.

8.78. In the north, Colombia's equidistance line does not impact on the boundary the Court delimited between Nicaragua and Honduras. Areas lying to the south of that line, however, are able to be delimited between Colombia and Nicaragua. In the south, Colombia also placed an arrow on its equidistance line. As Colombia noted: "There is a question how far the median line should be prolonged to the south given the potential interests of third States in the region". It is clear, therefore, that Colombia has taken the actual or potential rights that third States may have into account. As previously pointed out,

[559] See, CCM paras. 4.155-4.162 and Annexes 17, 18, 67, 69; CR Annexes 1-3; and, Costa Rica's Application to Intervene, para. 12.

moreover, the delimitation treaties concluded between Colombia and its neighbours are important relevant circumstances both for identifying the delimitation area and for arriving at an equitable result.

8.79. The delimitation practice of Colombia and third States in this part of the Caribbean Sea also shows that Costa Rica, Panama, Jamaica and Honduras have all concluded boundary treaties with Colombia that presuppose that the islands in question belong to Colombia and that, for the most part, they are entitled to full, or substantially full, equidistance effect for purposes of achieving equitable delimitations.[560] All of those agreements are consistent with Colombia's delimitation methodology in this case; none of them supports Nicaragua's enclave theory.

8.80. It is also apparent that no other States in the region consider that there are any areas of outer continental shelf beyond 200 nautical miles from their territory in the region, and none have made extended continental shelf submissions to the United Nations Commission. This is another element of regional State practice which is fundamentally at odds with Nicaragua's new outer continental shelf claim.

8.81. The delimitation agreements between Colombia and other States have played an important role in contributing to the

[560] See paras. 7.55-7.63 above and CCM, paras. 8.33-8.56, 9.65-9.70.

maintenance of peace and stability and in fostering cooperation in the fields of resource conservation and the fight against pollution in the region. As a result of these agreements, there have been no maritime incidents involving Colombia and its other neighbours in this part of the Caribbean.

8.82. Nicaragua's claims, on the other hand, completely ignore the interests of third States. The delimitation area posited by Nicaragua cuts right across the coasts of Panama and Costa Rica in the south and impinges on areas relevant to Jamaica in the north. With its new continental shelf claim, Nicaragua claims areas that lie much closer to third States, as well as to Colombian territory, than they do to Nicaragua and in which Nicaragua has never displayed any official presence or taken any conservation or security enhancing measures. Nicaragua's approach to delimitation is plainly misconceived both with respect to the area that it advances as the "delimitation area" and with respect to its claim lines. There is, in short, nothing equitable about Nicaragua's claim which, amongst its other shortcomings, fails to take account of the presence of third States as a relevant circumstance.

G. Conclusions

8.83. The provisional equidistance line that Colombia has put forward in Chapter 6 produces a result that is prima facie equitable. An assessment of the relevant circumstances characterizing the area confirms the equitable nature of that line.

8.84. Unlike Nicaragua's exaggerating claims and its enclave theory, the equidistance line respects the conduct of the Parties in relation to the management and preservation of the resources of the area as well the essential security interests that Colombia has been active in protecting. It lies in the same general area as the 82°W meridian, which constitutes the western limit of the San Andrés Archipelago and which also broadly represents the easternmost limit of State activities that Nicaragua has carried out in the area. The equidistance line also respects the interests of third States in the region.

8.85. For these reasons, Colombia does not consider that any adjustment of the provisional equidistance line is called for in order to achieve an equitable result in this case.

PART THREE

OTHER MATTERS

Chapter 9

NICARAGUA'S REQUEST FOR A DECLARATION

9.1. Part III of Nicaragua's *Reply*, entitled "Declaration", sketches a claim for a generic declaration that Nicaragua is entitled to damages.[561] This entitlement is said to arise from what Nicaragua variously describes as Colombia's enforcement of the maritime boundary around the 82° meridian,[562] "a blockade against Nicaragua's access to the natural resources located east of the 82nd meridian,"[563] and the "illicit[] use[] by Colombia for her unjust enrichment and to the detriment of Nicaragua … [of] over 100,000 square kilometres of maritime spaces."[564]

9.2. This claim by Nicaragua lacks any basis. Since 1930, when the 1928/1930 Treaty entered into force, Colombia has strictly complied with it. The Treaty clearly set out the 82°W meridian as a limit and Colombia depicted it as such since the first map it issued in 1931 (which Nicaragua did not protest or object to).[565] Colombia exercised its jurisdiction in a peaceful manner, and in conformity with international law, up to that limit. This exercise of jurisdiction by Colombia was not

561 NR, pp. 235-238.
562 NR, p. 236, para. 3.
563 NR, p. 236, para. 5.
564 NR, p. 237, para. 6.
565 See CPO, Vol. III, Maps 4 and 4 *bis,* and CCM, Vol. III, Figures 2.12 and 2.13.

challenged by Nicaragua until 1967, 37 years after the Treaty was concluded.

9.3. While the Court in 2007 held that the 1928/1930 Treaty did not "effect a general delimitation of the maritime spaces between Colombia and Nicaragua;"[566] it also held that the relevant provision in the 1930 Protocol was "intended to fix the western limit of the San Andrés Archipelago at the 82nd meridian."[567] That being so, there can be no basis for any claim of Colombian responsibility for conduct carried out in good faith within the limits of an Archipelago long administered by it as an entity, and now once again acknowledged to appertain to it.

9.4. Nicaragua has limited the exercise of jurisdiction to the west of the 82°W meridian, pursuant to the 1928/1930 Treaty, except for a few incidents that elicited Colombia's timely protests. It never made a determinate claim to a maritime boundary to the east of the 82°W meridian, until it made its untenable claim to an all-purpose line, ignoring the Archipelago, in the *Memorial*. (That claim it no longer sustains.) By contrast there is necessarily an equidistance line between points of the parties' respective coasts, and its course is for the most part even further west than the 82°W meridian.

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566 *Territorial and Maritime Dispute (Nicaragua v. Colombia) Preliminary Objections, Judgment of 13 December 2007,* p. 35, para. 116.

567 *Ibid.,* p. 34, para. 115.

9.5. In addition to its being based on a wrong premise, Nicaragua's claim lacks an essential element. No specification of damages is attempted for any of these alleged wrongs. Indeed it is not clear that Nicaragua appreciates that its three claims are quite different one from the other.

9.6. The use or misuse of the law of State responsibility in the case of boundary disputes has already been a matter for consideration by the Court, both in land and maritime cases. Two examples may be given.

9.7. In *Cameroon v Nigeria*, the Court was faced with claims for unspecified damages by Cameroon for boundary incidents and occupation of disputed areas by Nigeria, as well as with a Nigerian counter-claim for damages against Cameroon. The Court found the counterclaim admissible,[568] but summarily and unanimously dismissed both the responsibility claims and the counterclaim on the ground that they had not been sufficiently substantiated.[569] The Court evidently, and rightly, set a high standard of proof of State responsibility in boundary cases.

9.8. In the *Fisheries Jurisdiction case (Federal Republic of Germany v Iceland)*, the Federal Republic of Germany sought a declaration that it was entitled to damages for Iceland's

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[568] *Land and Maritime Boundary between Cameroon and Nigeria, Order of 30 June 1999, I.C.J. Reports 1999,* p. 983.

[569] See e.g. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 303, 452-3.

harassment of Federal Republic of Germany-registered fishing vessels and crews. The Court refused the declaration in the following words:

> "76. The documents before the Court do not however contain in every case an indication in a concrete form of the damages for which compensation is required or an estimation of the amount of those damages. Nor do they furnish evidence concerning such amounts. In order to award compensation the Court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. Such an award must be based on precise grounds and detailed evidence concerning those acts which have been committed, taking into account all relevant facts of each incident and their consequences in the circumstances of the case. It is only after receiving evidence on these matters that the Court can satisfy itself that each concrete claim is well founded in fact and in law."[570]

The Court declined to make "an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence".[571]

9.9. If the Court had "only limited information" as to damages in that case, in the present case it has none. Moreover the Federal Republic of Germany had sought and obtained provisional measures expressly enjoining the enforcement of the

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[570] See e.g. *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, 203-205, paras. 71-76.

[571] *Ibid.,* p. 205, para. 76.

50 nm fisheries zone.[572] Further, Iceland's conduct in defence of its putative fisheries zone contravened a *status quo* agreement between the parties and was probably wrongful independently of the opposability of maritime zones.

9.10. Under these circumstances, there is no basis whatever for a finding of Colombian responsibility with respect to fisheries enforcement, still less is there any basis for Nicaragua's absurd "unjust enrichment" claim. Where two States disagree as to a maritime boundary, it is counterfactual, and would be highly counterproductive, to treat the eventual adjudicated boundary as having existed "from the beginning" and to award damages to the winning party in a given sector for earlier use of the disputed resources by the other party in that sector. Even less, when the party that has been enforcing its maritime and fisheries jurisdiction has done so, in good faith, on the basis of a treaty-fixed limit to its territory.

9.11. The question-begging character of Nicaragua's claim for a declaration can be seen from the way it is formulated:

> "Colombia is not acting in accordance with her obligations under international law by preventing and otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82nd meridian."[573]

In truth, Colombia has peacefully exercised maritime and

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[572] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972,* p. 30.

[573] NR, p. 237, para. 8.

fisheries jurisdiction over the waters of the Archipelago up to the 82°meridian, the western limit of the Archipelago.

9.12. It should be noted that incidents only began to arise in the area as of 1967 when Nicaragua for the first time sought to carry out activities to the east of the limit of the San Andrés Archipelago, as fixed by the 1930 Protocol, by granting oil exploration permits east of the 82°W meridian in the vicinity of Quitasueño.

9.13. For their part, all the hydrocarbon exploration activities or fishing by Colombian vessels or vessels affiliated to Colombian companies, have scrupulously observed the 82°W meridian.

9.14. As pointed out in Chapter 8, for the most part, Nicaraguan-flagged vessels have respected or complied with Colombian laws and regulations by seeking (and being granted) permits to fish east of the 82°W meridian. When Nicaraguan vessels have occasionally been detected carrying out fishing activities in areas located to the east of the 82°W meridian without permits, Colombian authorities have abided by the regulations and procedures in force for that type of situation. See further **Figure R-8.2**. at page 289.

9.15. For these factual and legal reasons, as well as because of its extreme vagueness and indeterminacy, Nicaragua's request

for a declaration should be dismissed. Pending the resolution of the dispute over maritime delimitation, neither party is internationally responsible simply for maintaining a claim – whether or not that claim is vindicated in the result.[574]

[574] Cf. Judge *ad hoc* Gaja's comment in the jurisdictional phase of the present case: "the adoption by Colombia of a wide interpretation of the scope of the 1928 Treaty as including maritime delimitation, even if incorrect, cannot conceivably constitute a material breach [of that Treaty]".

SUMMARY

Colombia's sovereignty over the cays

1. The Archipelago of San Andrés is formed by the islands of San Andrés, Providencia and Santa Catalina; the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque, and the group of cays of the East-Southeast, together with appurtenant features.

2. The islands and cays of the Archipelago were considered as a group during the colonial and post-colonial periods. The islands of San Andrés, Providencia, Santa Catalina, Mangle Grande (Great Corn) and Mangle Chico (Little Corn); the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque, East-Southeast and other adjacent islets, cays and shoals were traditionally considered as an archipelago and were geographically, politically, economically and historically interrelated.

3. Pursuant to the 1803 Royal Order the San Andrés Archipelago was an integral part of the Viceroyalty of Santa Fe (New Granada). Colombia, the successor State, exercised sovereignty over all the islands, islets and cays of the Archipelago, including Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, East-Southeast and Alburquerque. This situation was recognized by third States, including Nicaragua, in particular in its response to the Loubet Award. The only

exception was the Nicaraguan claim to the Islas Mangles (Corn Islands).[575]

4. In the 1928/1930 Treaty, Nicaragua expressly recognized "the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina and *all* the other islands, islets and cays that form part of the said Archipelago of San Andrés". For its part, Colombia recognized Nicaraguan sovereignty over the Mosquito Coast and the Islas Mangles (Corn Islands). That Treaty, which is still in force, resolved the question of sovereignty as between the Parties as to all maritime features in the Caribbean Sea, likewise to the west and the east of the 82°W meridian.[576]

5. The 82°W meridian limit was included in the 1930 Protocol at Nicaragua's insistence, and with a view to protecting itself against potential claims by Colombia to islets and cays off the Nicaraguan coast and to the west of the meridian, including the Miskito cays. The 82°W meridian was conceived by the signatories of the Protocol as a *general* limit between Colombia and Nicaragua.

6. Although the 1928/1930 Treaty stated that the cays of Roncador, Quitasueño and Serrana were in dispute between Colombia and the United States, that fact bore no relation to any claim or entitlement of Nicaragua. Colombia and the United

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575 See CCM, paras. 4.114-4.133; above, paras. 2.10-2.11, 2.45.

576 See CCM, Chapter 5; above, paras. 2.53-2.69.

States agreed on a regime for the three cays by the Olaya-Kellogg Agreement of 10 April 1928, the terms of which were officially communicated by Colombia to Nicaragua well before the ratification of the 1928/1930 Treaty. Nicaragua made no reaction, treated the dispute as settled by the 1928/1930 Treaty, and for at least 40 years made no claim to any part of the Archipelago.

7. Between 1969 and 2003, Nicaragua purported to claim progressively different parts of the Archipelago. Its general claim to the Archipelago as a whole has already been rejected by the Court, and its serial claims to specific features are entirely lacking in legal or historical support. In the absence of any indicia of title or the slightest measure of *effectivités*, it argues that the cays were appurtenant to the Mosquito Coast (unless proved by Colombia to belong to the Archipelago). But (a) this claim is inconsistent with the 1928/1930 Treaty; (b) it is contradicted by all the available evidence; (c) it ignores Nicaragua's onus to substantiate its claims. Its second argument – its claim that the cays are located on the "Nicaraguan" continental shelf – besides being factually inaccurate and temporally challenged (the continental shelf doctrine came far too late to affect sovereignty over the islands) ignores the fundamental premise that "the land dominates the sea" and not vice-versa.

8. The 1972 Treaty between the United States and Colombia concerning the status of Roncador, Quitasueño and Serrana replaced the Olaya-Kellogg Agreement of 1928. Although the United States and Colombia put on record diverging views over the status of Quitasueño, there was no disagreement as to which government had actual authority over these three cays and the surrounding waters. The subsequent practice shows a clear and continuous acceptance by the United States, as well as by third States including those in the immediate region, of Colombia's authority in the area, including the waters around Quitasueño.[577]

9. Despite Nicaragua's characterisation of Quitasueño as a "submerged bank", it contains a number of islands, as that term is defined in Article 10(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone and in Article 121(1) of the UNCLOS, which reflect customary international law. This is confirmed by a further expert report by Dr Robert Smith annexed to this Rejoinder. In any event, Quitasueño as a group of islands and low-tide elevations with a fringing reef constituting distinctive and substantial maritime feature and as such is capable of appropriation in international law. This has been recognized by the 1928 Treaty. It is also capable of generating, as a minimum, a territorial sea and contiguous zone, and of acting as an EEZ/continental shelf basepoint.[578]

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[577] See CCM, paras. 4.51-4.77; above, paras. 3.35-3.36.

[578] See e.g., CCM, paras. 4.58(2), 4.97-4.102; above, Chapter 3, paras. 5.35-5.36, and for the Smith Report see Appendix 1.

10. In short, Nicaragua has failed to make out a coherent alternative case for sovereignty over any of the cays – its primary case (its claim to the Archipelago as a whole) having failed at the Preliminary Objections stage. In essentials the case is reduced to one about maritime delimitation between the Colombian islands and cays and Nicaragua's easternmost islands and cays.

The maritime boundary

11. As to the maritime boundary, in its *Memorial* Nicaragua proposed a mainland-to-mainland median line which did not effect a delimitation between the relevant coasts of the Parties and which fell in an area where Nicaragua has no legal entitlement.

12. Tacitly conceding this, Nicaragua's *Reply* presents a new and fundamentally different claim. Without any explanation for its change of position, the Nicaraguan *Reply* now states that Nicaragua has "decided that her request to the Court should be for a continental shelf delimitation"[579] – as if the scope of a case once submitted to the Court could be unilaterally redefined by the Applicant.

13. Nicaragua asks the Court to accept the proposition that it possesses extended continental shelf rights stretching well beyond 200 miles from its coasts. This claim is advanced

[579] NR, p.12, para. 26.

despite the facts that (a) nowhere in the western Caribbean is there any continental shelf beyond 200 nm from the nearest coasts; (b) even if there were any such areas, Nicaragua has made no submission to the United Nations Annex II Commission regarding such alleged rights; (3) the Commission has neither considered the matter nor issued any recommendations relating to it; (4) Nicaragua's maritime claim intrudes well into the area of the EEZ appurtenant to Colombia's (longer) mainland coast, yet Nicaragua offers no explanation for how its alleged seabed rights could coexist with Colombia's unquestionable EEZ rights to the water column and seabed or supersede Colombia's entitlement to a 200 nautical mile continental shelf from its territory.

14. Quite apart from formal considerations, including the inadmissibility of a new outer continental shelf claim at this late stage of the proceedings, Nicaragua's new and exaggerated claim suffers from insurmountable defects. Procedurally, extended continental shelf claims fall to be submitted to and considered by the Annex II Commission based on a full submission. Nicaragua has not made such a submission. Factually, the meagre information furnished by Nicaragua does not begin to support any entitlement to outer continental shelf rights. Legally, there are no areas of outer continental shelf in this part of the Caribbean Sea because the areas concerned all lie within 200 nautical miles of the territory of other littoral States bordering the region, including within the overlapping 200-

nautical miles zones of Colombia's insular and mainland territory.

15. Nicaragua's new claim, like its old abandoned one, falls in areas where Nicaragua has no legal entitlement and is based on a purported equal division alleged overlapping of physical continental shelves that is at odds with the well established principles and rules of international law governing maritime delimitation reflected in the equidistance-relevant circumstances rule.

16. As to delimitation around the Archipelago, Nicaragua proposes that Colombia's islands be enclaved at 3 or 12 nautical miles, lest they act as an "impenetrable wall" against the natural prolongation or projection of Nicaragua's coasts, particularly its mainland coast.[580] But distant offshore islands such as these (100-270 nautical miles away from Nicaragua's mainland coast) have never been enclaved either by international courts and tribunals or in State practice. The *Channel Islands* decision of 1976, on which Nicaragua primarily relies, is utterly incomparable.[581]

17. In contrast, Colombia's approach to delimitation has been presented squarely within the established legal principles of maritime delimitation as those principles have been articulated by the Court and arbitral tribunals. Colombia has

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580 NR, paras. 6.5, 6.10 and 6.12, and Chapter VI(II) generally.

581 See CCM, paras. 7.35-7.57; above, Chapter 7.

shown that the area within which the maritime projections of the Parties' coasts meet and begin to overlap is situated in the area lying between the islands comprising the San Andrés Archipelago and Nicaragua's coast – including islands – taking into account the actual and prospective rights of third States in the region. Colombia has then applied the equidistance-relevant circumstances rule to the delimitation of that area using clearly identified basepoints on the coasts of each Party to construct the provisional equidistance line.

18. At the second stage of the process, Colombia has taken into account the relevant circumstances characterizing the case to assess whether those circumstances confirm the equitableness of the provisional line or call for any adjustment. In the light of the past conduct of the Parties and the relevance of the 82°W meridian as the western limit of the San Andrés Archipelago, Colombia shows that an equidistance based delimitation produces an equitable result.

19. Nicaragua's claim neither accords with the modern international law of maritime delimitation nor does it produce an equitable result. Nicaragua rejects the equidistance-relevant circumstances rule in favour of an outer continental shelf claim which is procedurally inadmissible, legally flawed and factually unsupported. Nicaragua's attempt to enclave islands which lie between 106 (Alburquerque) and 266 (Bajo Nuevo) nautical miles from its coast is unprecedented and unsustainable.

Nicaragua ignores the fact that Colombia has consistently exercised jurisdiction throughout all the waters of the Archipelago. Nicaragua also pays no attention to the presence of third States in the region or the positions such States have taken regarding the legal entitlements of Colombia's islands are entitled. Given the geographic facts, and taking into account the conduct of the Parties and the relevance of the 82°W meridian as a relevant circumstance, a median line (in fact drawn from Nicaragua's offshore islands as well as the islands and cays of the Archipelago: see **Figure R-8.3** at page 307) cannot be said to produce a disproportionate result calling for any adjustment. Such a line respects the legal methodology for delimitation articulated by the Court in its jurisprudence and accords to each Party appropriate and substantial maritime areas generated by its relevant coasts and baselines.[582]

Conclusion

20. This case is essentially about maritime delimitation. But the issues of maritime delimitation in this case are not merely about resources: they raise vital issues both of fidelity to the law and the future of people. As to the law, they are about applying the well-established principles and rules relating to maritime delimitation. As to the future, they are about maintaining the traditional living space of a substantial, long-established, Colombian community, as well as preserving security in an essential area of the south-western Caribbean.

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582 See CCM, Chapters 8-9; above, Chapters 6, 8.

SUBMISSIONS

For the reasons set out in the *Counter-Memorial* and developed further in this Rejoinder, taking into account the Judgment on Preliminary Objections and rejecting any contrary submissions of Nicaragua, Colombia requests the Court to adjudge and declare:

(a) That Colombia has sovereignty over all the maritime features in dispute between the Parties: Alburquerque, East-Southeast, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo, and all their appurtenant features, which form part of the Archipelago of San Andrés.

(b) That the delimitation of the exclusive economic zone and the continental shelf between Nicaragua and Colombia is to be effected by a single maritime boundary, being the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the Parties is measured, as depicted on Figure 9.2 of the *Counter-Memorial*, and reproduced as **Figure R-8.3** of this Rejoinder.

(c) That Nicaragua's request for a Declaration (NR, pp. 240-1) is rejected.

Colombia reserves the right to supplement or amend the present submissions.

JULIO LONDOÑO PAREDES
Agent of Colombia

The Hague, 18 June 2010

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