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Public sitting

held on Friday 27 April 2012, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le vendredi 27 avril 2012, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. This sitting is now open. This morning the Court will hear the continuation of the first round of oral argument of Colombia. I give the floor to Maître Bundy. Vous avez la parole, Monsieur.

Mr. BUNDY: Merci bien, Monsieur le président.

1. THE GEOGRAPHICAL CONTEXT FOR MARITIME DELIMITATION

Introduction

1. Mr. President, Members of the Court, this morning Colombia will turn to the question of maritime delimitation between the Parties, which is really at the heart of the case.

2. My task this morning is to set the stage by addressing the geographical context within which the issue of delimitation falls to be carried out. I shall endeavour to do this by focusing on the issues that continue to divide the Parties in the light of Nicaragua's first round pleadings.

3. There are five main issues on which the Parties hold differing views:

(i) What are the relevant coasts of the Parties for delimitation purposes; and, equally important, what are the coasts that are not relevant?

(ii) The nature and significance of the San Andrés Archipelago as an historic, geographic, political and economic unit;

(iii) The implication for delimitation in this case of the presence of third States in the region;

(iv) The relevant area within which the delimitation should fall; and

(v) The legal status of Quitasueño and its role for delimitation purposes.

4. Now, I shall address the first four of those issues. The fifth — Quitasueño — will be the subject of a separate presentation by Professor Crawford, who will follow me.

5. With that overview, let me turn to the first issue — the coasts of the Parties that are relevant for delimitation in this case and those that are not.

1. The relevant coasts

6. The map that now appears on the screen shows the area of concern.

7. On the Nicaraguan side, there is the mainland coast and Nicaragua's offshore islands comprising, principally the Corn Islands in the south, the Miskito Cays in the north and a series of smaller islands lying in between. On the Colombian side, we have the islands comprising the San Andrés Archipelago. These include: San Andrés Island, Providencia, Santa Catalina, the Alburquerque Cays and East-Southeast Cays, Quitasueño, Serrana, Roncador, the Serranilla Cays and Bajo Nuevo.

8. With respect to the Nicaraguan side, Nicaragua's first round presentation focused on its mainland coast.

9. Colombia has been accused of ignoring that coast. But that is not the case. The relevant area in this case extends from Colombia's westernmost islands up to Nicaragua's mainland coast. It does not stop at Nicaragua's islands, as Mr. Reichler tried to suggest. While it is true that Colombia's provisional equidistance line is measured from Nicaragua's islands, not from its mainland, that is because the law provides that the equidistance line should be drawn from the base points from the nearest points on the baselines from which the Parties measure the breadth of their territorial sea. That is what was said in *Qatar/Bahrain*, that is what was said in *Cameroon/Nigeria* and that is what was said by the Arbitral Tribunal citing the Court's jurisprudence in *Guyana/Suriname*[1]. The nearest baselines of the two States are situated on their islands. That being said, Colombia has also pointed out in its written pleadings that, if Nicaragua's mainland coast was used for purposes of constructing the provisional equidistance line, that line would fall further to the west. Even if that line were thereafter adjusted at the second stage of the delimitation process, that is the relevant circumstances stage — say, in the order of magnitude as happened in *Libya* v. *Malta* or in *Jan Mayen-Greenland* — that line would still fall between the two groups of islands.

10. As for Nicaragua's islands, our opponents now say that those islands are an integral part of their mainland coast and, in all other respects, they are comparable to the Colombian Islands of

[1] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 94, para. 177; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 442, para. 290; *In the Matter of an Arbitration between Guyana and Suriname*, Award Dated 17 September 2007, p. 113, para. 352.

San Andrés Archipelago[2]. That is the assertion that was made earlier this week and in the Nicaraguan written pleadings.

11. Now, those assertions that the islands are an integral part of Nicaragua's mainland coast is contradicted by Nicaragua's original mainland-to-mainland single maritime boundary claim, which did not treat — in any way — Nicaragua's islands as being an integral part of its mainland coast, and the assertions of our colleagues on the other side are also not supported by the evidence.

12. Nicaragua's islands are not in any way comparable to the islands of the San Andrés Archipelago. The population of the main islands of Colombia's archipelago is more than ten times that of Nicaragua's islands. Nicaragua's islands are scattered along the coast, but are mainly concentrated in two groups: the Corn Islands in the south and the Miskitos Cays in the north. The Corn Islands lie opposite to Alburquerque and the East-Southeast Cays and the Miskitos Cays in the north face Quitasueño. A number of these islands — the Nicaraguan islands — lie more than 24 miles off the mainland coast. The islands of the San Andrés Archipelago, on the other hand, stretch from north to south across the entire extent of the delimitation area. Those islands, as I demonstrated yesterday, have been administered as a unit and, for the most part — as I will discuss this morning — have been accorded full equidistance treatment with third States in the region.

13. These are the relevant coasts between which the delimitation should take place. Nicaragua's relevant coasts face eastwards. Colombia's islands face westwards, towards Nicaragua, but Colombia's islands also project in a 360° radius as a consequence of geography and the law of maritime entitlement. The maritime entitlements of the projections from the Parties' coasts meet and begin to overlap in the area lying between the Parties' respective territory — in other words, between the westernmost string of Colombia's islands — Quitasueño, Santa Catalina, Providencia, San Andrés and the Alburquerque Cays — and Nicaragua's coasts. It is between those coasts that their projections start to meet and overlap.

The irrelevance of Colombia's mainland coast

14. That being said, I am having placed on the screen a map showing the entire south-west Caribbean stretching up to Colombia's mainland coast. The reason for portraying this area is

[2]RN, para. 4.24.

because the map illustrates one of the key issues that divides the Parties. That is the question of the relevance — or, I should really say, the complete irrelevance — of Colombia's mainland coast for delimitation purposes.

15. As the Court will no doubt recall, Nicaragua's Application requested you to determine the course of a single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining to the Parties.

16. Nicaragua's Memorial expanded on this request by specifying that Nicaragua was seeking a single maritime boundary in the form of a median line between the mainland coasts of the Parties (Submission No. 2).

17. The problem with that thesis is that Colombia's mainland coast cannot be considered to be either an "opposite coast" in the legal sense of the term in relation to Nicaragua, or as a relevant coast for delimitation purposes. That is because Colombia's coast lies much more than 400 nm from Nicaragua's coast, and there are two other States — Panama and Costa Rica — that are interposed in between.

18. And, it was for that reason — or for those reasons, I should say — that Colombia's Counter-Memorial pointed out that there was a fundamental defect in Nicaragua's position. Briefly stated, Nicaragua had ignored the distance between the two mainland coasts, as the Court can see on the screen — more than 400 miles apart — with the consequence that Nicaragua had no legal entitlements that overlapped with those generated by Colombia's mainland coast. Colombia's mainland coast is simply too far away to be a relevant coast.

19. Now, Nicaragua's Reply had no choice but to accept the correctness of what Colombia said, and it therefore conceded that there was no need for a delimitation of exclusive economic zones between the Parties, and between the mainland coasts of the Parties, precisely because they are separated by a distance of over 400 nautical miles[3].

20. Now, notwithstanding that concession in the Reply, Nicaragua has still struggled to keep Colombia's mainland coast in play.

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[3]RN, p. 59, para. 1.

21. In order to do this, Nicaragua was forced to change its entire delimitation case in its Reply. Now, I shall have more to say — I fear, a good deal more to say — on Nicaragua's new continental shelf claim later this morning in a separate presentation, in which I will show that it is no legal, procedural or substantive justification for that new continental shelf claim and that that new claim does not somehow resurrect Colombia's mainland coast in order to push Nicaragua's maritime claims even further to the east.

22. What I would note is that Nicaragua's counsel also appeared to have some hesitation about the relevance of Colombia's mainland coast. Both Dr. Oude Elferink and Mr. Reichler presented, earlier this week, a brand new "relevant area" that excluded Colombia's mainland coast [Monday, tab 4; Tuesday afternoon, tab 87]. I will come back to that shift of position a little later.

23. The plain fact, both geographically and legally, is that Colombia's mainland coast has no role to play in this case. The relevant coasts of Colombia are the coasts of the westernmost islands comprising the San Andrés Archipelago and Nicaragua's coast. It is these coasts which lie directly opposite to each other, with no third State in between.

2. The geographic unity of the San Andrés Archipelago

24. Nicaragua's pleadings have gone to considerable lengths to minimize the importance of Colombia's islands and to deny them their legal entitlements. Symptomatic of this approach is Nicaragua's constant refrain that Colombia's islands are situated on Nicaragua's continental shelf, as if it is only Nicaragua's coasts, and mainland coast, that generates maritime entitlements in this area[4]. In fact, Nicaragua's written pleadings went so far as to argue, "there is no Colombian coast opposite Nicaragua", and it also said that the San Andrés group of islands does not form part of the coastal front of Colombia[5].

25. Now that myopic approach is an exercise in refashioning geography taken to the extreme. Colombia's islands exist, they have coasts that face Nicaragua, they also have coasts that face east, and it is abundantly clear under paragraph 2 of Article 121 of the 1982 Convention and customary international law that, for purposes of legal entitlement, the territorial sea, contiguous

[4]RN, paras. 3.63, 5.4 and 5.27.

[5]*Ibid.*, para. 6.72; MN, p. 239.

zone, exclusive economic zone and continental shelf of an island are determined *in exactly the same way* as are the entitlements of other land territory.

26. Thus, when Professor Pellet asserted on Tuesday that, even in the sense of paragraph 2 of Article 121, there was abundant jurisprudence supporting the proposition that islands only are entitled to very limited maritime spaces, he not only put the cart before the horse — an expression that Professor Pellet is fond of using in his Cartesian way — he confused the question of the legal entitlements of the islands with the question of delimitation. In the *Qatar/Bahrain* case, your Court clearly stated that:

> "In accordance with Article 121, paragraph 2 of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. 2001*, p. 97, para. 185.)

27. The map now appearing on the screen illustrates the extent of the maritime entitlements generated by the islands of the San Andrés Archipelago. Of course, with all of its other neighbours except Nicaragua, Colombia has delimited the maritime area between the archipelago and those States. On Monday, Nicaragua took exception to this depiction. But the fact of the matter is that these are legal entitlements which Colombia's islands possess as a matter of law. It follows that it is simply question-begging for Nicaragua to assert that Colombia's islands fall on Nicaragua's continental shelf, as was repeated like a mantra during Nicaragua's first round pleadings. Colombia's islands have their own continental shelves, not to mention their own exclusive economic zones, their own contiguous zones and their own territorial seas.

28. Nicaragua also harps on the fact that Colombia's islands are small and that, with the exception of the islands of San Andrés, Providencia and Santa Catalina, all the other islands are mere **"**rocks**"** within the meaning of Article 121, paragraph 3, of the Convention. Nicaragua adds, for good measure, that the distances between Colombia's islands are what it calls "enormous"[6].

29. Let me take up these propositions in order to demonstrate how misguided they are.

30. As I explained yesterday, all of the islands comprising the San Andrés Archipelago have significant activities associated with them and are closely linked to the surrounding sea areas.

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[6]RN, paras. 4.14 and 5.3.

31. The islands that are most relevant to this delimitation are those that lie along the western side of the archipelago. They include, from north to south, Quitasueño, Santa Catalina, Providencia, San Andrés Island and the Alburquerque Cays.

32. And it is that series of islands that directly face Nicaragua, and it is for this reason that Colombia maintains that the delimitation properly falls to be effectuated between them and Nicaragua. Obviously, Nicaragua possesses no coast lying to the north, south or east of Colombia's islands, unlike France with respect to the Channel Islands — the Channel Islands are surrounded on three sides by French territory and the territorial seas overlap — or Canada, with respect to the islands of St. Pierre and Miquelon — again, you have Canadian territory on three sides of the islands and they are in such close proximity that the territorial seas overlap. Nicaragua's coast lies solely to the west.

33. Now, as you have heard, San Andrés Island is roughly 105 nautical miles from the Nicaraguan mainland, Providencia is some 125 miles away, and Quitasueño and the Alburquerque Cays are both over 100 nautical miles away. Consequently, there is a large body of water lying between the coasts of the Parties in this area where a maritime boundary carried out in accordance with the equidistance/relevant circumstances rule can readily be applied. This is not the situation of islands lying right off the coast, such as St. Martin's Island off of Myanmar, or Qit'at Jaradah, lying off of Qatar.

34. San Andrés Island is a very important island which serves as the commercial and administrative centre of the archipelago. It has a population of over 70,000. Its capital city, San Andrés, is also the capital of the Department of the Archipelago. It is the home of the Port Captaincy for maritime jurisdiction purposes, established as long ago as 1911 — that is under the Maritime General-Directorship of Colombia. The island has a vibrant economy based on fishing, tourism and agriculture, and a well-serviced airport.

35. To the north, Providencia is fringed by an extensive barrier reef, and Low Cay in the north has a lighthouse on it built and operated by Colombia. Providencia is the home of another maritime Port Captaincy; it has a permanent population of about 5,000, and also an airport. As you can see on the map, the Island of Santa Catalina lies just off the north coast of Providencia, and

it, too, is inhabited. The population of both islands are engaged as well in fishing, agriculture and tourism activities.

36. Now Nicaragua admits that San Andrés, Providencia and Santa Catalina all generate rights to a continental shelf and an exclusive economic zone[7].

37. To the south, the Alburquerque Cays consist of two principal islands — North Cay and South Cay —, and they cannot be considered to be rocks within the meaning of Article 121 (3) of the Convention. Dr. Oude Elferink was unimpressed by the photographs you see on the screen[8]. But the term "rocks" that appears in Article 121 (3) should be interpreted in accordance with its ordinary meaning — "rocks". These are not rocks. Yet even if they were *quod non*, yesterday I showed that they have supported considerable economic life on their own. And in addition, a Colombian marine infantry detachment, which is responsible for the control of fishing activities and the trafficking in illegal maritime contraband in the area, is permanently stationed on North Cay where there is a weather station and a lighthouse.

38. To the east of the Alburquerque Cays lie the East-Southeast Cays which have also been referred to in the speech I made yesterday. And they are also not "rocks". They have fresh water, a weather station, a lighthouse, a radio station, as well as a permanent detachment of Colombian marines. And they, too, were the focus of significant economic activities, as was pointed out yesterday.

39. North of Santa Catalina lies Quitasueño. It is a substantial feature comprising over 80 sq km. But because Quitasueño will be the subject of a separate presentation by Professor Crawford, I will not say more about it at this point.

40. Behind, or to the east of these features, lie four more sets of islands which are also part of the San Andrés Archipelago. These are Roncador, Serrana, the Serranilla Cays and Bajo Nuevo. Once again, these islands can not be considered to be "rocks". And once again, the factual record shows that they all supported economic life and that dozens of fishermen are able to stay on Bajo Nuevo.

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[7]RN, para. 5.3.

[8]CR 2012/9, p. 41, para. 11 (Oude Elferink).

41. Now in addressing the constituent features of the archipelago, Nicaragua also tries to paint a picture of disjointed islands separated by long distances. And I would suggest that that is a very misleading proposition.

42. It is obvious that the 200 nautical mile EEZ and continental shelf zones of Colombia's islands all overlap. Moreover, even if, for some purposes of argument, Roncador, Quitasueño and Serrana did not exist, which they obviously do, the islands of San Andrés, Providencia and Santa Catalina would still generate their own 200 nautical mile continental shelf and EEZ entitlements. As for their territorial seas and contiguous zone, as can be seen on the map on the screen and in your folders, those zones lie in close proximity to each other such that their contiguous zones overlap along the entire string of the westernmost islands.

43. Starting in the north, the contiguous zone of Quitasueño overlaps with that of Providencia and Santa Catalina; the contiguous zone of Providencia in turn overlaps with that of San Andrés Island; and the contiguous zones and territorial seas of San Andrés, Alburquerque Cays and the East-Southeast Cays all overlap with each other further south. Behind these islands, the contiguous zone of Serrana overlaps with that of Quitasueño, and that of Roncador overlaps with the contiguous zone of Serrana, again reinforcing the fact that these islands are not isolated features.

44. Now during the oral hearings on Costa Rica's Application to intervene, the distinguished Agent for Nicaragua took issue with this point stating that Colombia does not claim a contiguous zone[9]. With respect, that is incorrect. Article 101 of Colombia's Constitution provides that the islands of the San Andrés Archipelago are part of Colombia and that Colombia claims a contiguous zone, as well as a territorial sea, continental shelf and exclusive economic zone, with respect to its coastal territory in accordance with international law[10].

45. On Monday, Dr. Oude Elferink tried to paint a different picture. He claimed that this overlap you can see on the screen does not evidence the proximity of the islands to each other[11]. Now that was a surprising remark given that just a few minutes later, Professor Remiro Brotóns

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[9]CR 2010/16, p. 14, para. 20 (Argüello Gómez).

[10]For the reference to Colombia's Constitution, see Note 34 to Colombia's Counter-Memorial, p. 91.

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

stood at the podium and strenuously argued that the islands of the San Andrés Archipelago possessed a great proximity — "leur plus grande proximité" — to the coast of Nicaragua[12]. Mr. President, if the islands of the archipelago have a "grande proximité" to the Nicaraguan mainland coast, which is well over 100 nm away even at its nearest point, then their overlapping contiguous zones are most certainly proximate to each other. That is true geographically, and it is also true legally, given that Colombia exercises control over customs, fiscal, immigration and security matters within the contiguous zones of its islands in accordance with international law. In short, the evidence on the record shows that Colombia's islands are geographically, historically, economically and legally linked together, as well as being absolutely critical for security purposes in this part of the sea.

46. Unlike Nicaragua's mainland coast, the continental shelf and exclusive economic zone of Colombia's islands also overlap with the maritime entitlements generated by Colombia's mainland coast. In other words, all of the maritime areas lying east of the San Andrés Archipelago and of the islands of San Andrés and Providencia in the central part of the sea are within 200 nautical miles of Colombian territory.

3. The presence of third States in the region

47. Now that brings me to my third issue — the relevance of the presence of third States. And I can be fairly brief on this because the Court has already been exposed to the interests of two of the neighbouring States — Costa Rica and Honduras — as a result of the hearings on their Applications for permission to intervene.

48. Apart from Costa Rica and Honduras, however, there are two other States in the region that have maritime entitlements that did not apply to intervene — Panama and Jamaica. As the Court noted in its Judgment on Costa Rica**'**s Application, the protection of third States' interests by the Court is to be accorded whether they apply to intervene or not[13].

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[12]CR 2012/8, p. 42, para. 45 (Oude Elferink).

[13]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Costa Rica for Permission to Intervene, Judgment of 4 May 2011*, para. 86.

49. Let me start in the south. The Court will recall that the maritime areas in the south have been the subject of a series of delimitation agreements between Colombia, Costa Rica and Panama dating back over 35 years.

50. The Colombia-Panama agreement was concluded in 1976. As you can see, the boundary follows a step-like configuration between Panama's coast and the Alburquerque Cays, East-Southeast Cays, San Andrés Island, Providencia and Roncador. Now on Tuesday, Mr. Reichler argued that the line appears to give no weight to Roncador[14]. But that is clearly wrong. The agreement itself states that the line is based on a median line, adopting a step-like configuration only to "simplify the drawing of the line". And the well-respected publication by the United States State Department "Limits in the Seas" also observes that the geometry of the maritime boundary lends *no evidence* to the possibility that the Colombian offshore cays received less consideration or "weight" than the Panamanian mainland[15].

51. Clearly, both countries proceeded on the basis not only that Colombia possessed sovereignty over the islands, but also that the maritime areas in this part of the sea were subject to delimitation solely between Colombia and Panama. Nicaragua gave every appearance of sharing this view given that it never protested. Mr. Reichler argued that the agreement was *res inter alios acta* vis-à-vis Nicaragua, and that Nicaragua's silence cannot be construed as acquiescence[16]. But Nicaragua certainly knew how to protest boundary agreements covering areas where it genuinely felt it had an interest. With respect to the 1986 Colombia/Honduras agreement, for example, Nicaragua wrote a diplomatic protest to Colombia one month after the agreement was signed[17]. Thereafter, Nicaragua vigorously lobbied Honduras not to ratify the agreement and even brought a case against Honduras in front of the Central American Court. Nothing of the kind ever happened with respect to the Panama agreement. There is no evidence that Nicaragua considered itself to have a boundary relationship with Panama and the truth is that Nicaragua has never had any presence in this area to the east and south-east of the islands at any time.

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[14]CR 2012/10, p. 51, para. 69 (Reichler).

[15]CMC, p. 223, para. 4.144 and Note 115.

[16]CR 2012/10, p. 51, para. 70 (Reichler).

[17]Annex 70 to Nicaragua's Memorial in the *Honduras* case.

52. The Colombia/Costa Rica agreement was concluded in 1977, a year later. Mr. Reichler noted that that agreement has not been ratified by Costa Rica[18]. He is correct. However, Costa Rica has stated on numerous occasions that it has applied the 1977 Treaty in good faith and will continue to do so[19]. Moreover, there is a 1984 agreement between Colombia and Costa Rica dealing with delimitation in the Pacific which was ratified, and it referred to the fact that the maritime boundary between the two States in the Caribbean was "established". During the intervention hearings, Nicaragua also recognized that Costa Rica is bound to its obligations under the treaty as reflected in its consistent conduct for over 30 years[20].

53. The Colombia/Costa Rica agreement provided for a boundary that was, once again, a simplified equidistance line according the Alburquerque Cays full effect. Once again, Nicaragua has never had any presence in the maritime areas lying to the south, south-east and east of Alburquerque. As counsel for Costa Rica confirmed during the intervention hearings: "Colombia was the State with which Costa Rica had a boundary relationship in this part of the Caribbean."[21] Nicaragua has done nothing to dispel that notion.

54. If we turn to the north, there are the agreements concluded between Colombia and Honduras in 1986 and Colombia and Jamaica in 1993.

55. During the proceedings in the Honduras' intervention request, Nicaragua argued that Colombia's interests vis-à-vis Nicaragua were limited to areas falling south of the first sector of the Colombia/Honduras line — a line that runs roughly along the 15° parallel of latitude[22]. In other words, according to Nicaragua, Colombia was somehow precluded from claiming areas north of that line against Nicaragua by virtue of an agreement that Colombia had entered into with a third State.

56. The Court's Judgment on Honduras' Application to intervene firmly rejected that thesis. In its Judgment, the Court stated:

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[18]CR 2012/10, p. 51, para. 68 (Reichler).

[19]CMC, paras. 4.156-4.159.

[20]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Costa Rica for Permission to Intervene*, *Judgment of 4 May 2011*, para. 59.

[21]CR 2010/12, p. 35, para. 13 (Lathrop).

[22]Nicaragua's Written Observations on Honduras' Request for Permission to Intervene, para. 22; and also, CR 2011/19, p. 31, para. 46.

> "Between Colombia and Nicaragua, the maritime boundary will be determined pursuant to the coastline and maritime features of the two Parties. In so doing, the Court will place no reliance on the 1986 Treaty in determining the maritime boundary between Nicaragua and Colombia." (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment of 4 May 2011*, para. 73.)

57. That being said, neither Party in this case claims as against the other any maritime areas lying north of the Nicaragua/Honduras bisector line that the Court decided in 2007, however far that line is extended. It is the area lying south of the bisector, and up to the intersection with that bisector, that is in issue in this case.

58. Lastly, there is the 1993 Agreement between Colombia and Jamaica. That agreement followed earlier fishing agreements between the two countries that I discussed yesterday. In the east, the parties agreed a boundary delimitation based on equidistance principles. In the north, they established a Joint Régime Area. Third State activities were not authorized in the Joint Régime area, and no third State, including Nicaragua, has been present in this area or to the south of it without permission.

59. The delimitation practice involving third States in the region is relevant, I would suggest, for four main reasons.

60. First, the Court has obviously always taken care not to prejudice the actual or potential rights of third States in deciding delimitation questions. It follows that the existence of areas where third States have maritime interests is a factor to be borne in mind in considering the area to be delimited between Colombia and Nicaragua.

61. Second, it is evident from this practice -- the practice of neighbouring States -- that they consider that Colombia possesses sovereignty over all of the islands comprising the San Andrés Archipelago.

62. Third, none of these States considered that they had delimitation issues with Nicaragua either to the south, east or north-east of Colombia's islands, or in the neighbourhood of Serrana and Roncador, let alone Serranilla and Bajo Nuevo. There is no evidence, for example, that Nicaragua ever sought a delimitation with Panama in the areas over which its delimitation claims now stretch. With respect to Jamaica, Nicaragua pointed out during its case against Honduras that delimitation issues existed between it, Nicaragua and Jamaica, in the area of the Rosalind Bank, which, as you

can see is quite far north[23]. But Nicaragua never intimated that it had any delimitation issues with Jamaica in the areas covered by the Colombia/Jamaica Agreement.

63. Fourth, third States have also recognized that, due to the geographic characteristic of the area, it was equitable to accord the islands of the San Andrés Archipelago full, or substantially full, equidistance treatment in their delimitation agreements with Colombia.

64. During the intervention proceedings, it was suggested, on the Nicaraguan side, that these agreements were some kind of a plot in order to box Nicaragua in[24]. Now, Mr. President, it takes two to tango. Each of the other neighbouring States were also parties to these agreements. They clearly recognized that the areas being delimited had nothing to do with Nicaragua. This was no plot. This was practice that was fully in accordance with the law of the sea principles which emphasize that delimitation should be by agreement.

65. I should add that the use of equidistance principles where islands are involved is not unique to this part of the Caribbean. For example, the maritime boundary between the United Kingdom, with respect to the Cayman Islands, and Honduras, employs a simplified median line giving full effect to the Cayman Islands as well as to smaller features such as Swan Island and Gordo Cay lying off the Honduras mainland. The Honduras/Mexico agreement takes similar account of islands. The United States/Cuba delimitation gave full effect to the southernmost keys of the Florida Keys lying against Cuba's longer coast. And the boundary between the Turks and Caicos and the opposite, longer, coast of the Dominican Republic also closely track an equidistance line[25].

4. The delimitation area

66. Having canvassed the geographic setting in the region, I can now turn to my final point — which is the relevant area within which the delimitation should lie.

67. The map on the screen shows the delimitation area according to Nicaragua, at least as it was presented in Nicaragua's Memorial and Reply, and throughout the written phase of this case. It depicts an extraordinary expanse which founders on three main points.

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[23]CR 2007/5, p. 25, para. 73 (Pellet).

[24]CR 2010/16, p. 17, para. 28 (Argüello Gómez).

[25]RC, para. 7.50 and fig. R-7.9, p. 266.

68. First, that area stretches all the way across the sea right up to Colombia's mainland coast. As I have previously explained, Colombia's mainland coast cannot be viewed as a relevant coast due to the distances involved. Such an area may serve Nicaragua's purposes in visually trying to suggest that the maritime boundary should be located somewhere in the middle of the sea, but it has no underlying legal or factual support.

69. Second, Nicaragua's delimitation area clearly trespasses on to large parts of the sea where third States have actual or potential interests. In the south, that area laps up against the coast of Panama and amputates areas where both Panama and Costa Rica have entitlements. In the north, Nicaragua's area overlaps substantially with zones claimed by Jamaica, and gobbles up most of the Colombia-Jamaica Joint Régime Area. As I have said, apart from Nicaragua's claims in this case, Nicaragua has never shown any interest in any of these areas lying east of Colombia's islands, either with its own practice or in opening up discussions and negotiations with third States in the region.

70. Third, Nicaragua's position ignores the fact that the maritime entitlements of the Parties meet and begin to overlap between the westernmost islands of the San Andrés Archipelago and Nicaragua's coasts including the coasts of its islands. That is the area lying between the two Parties' respective territory; it is the area where the relevant coasts directly face each other; and it is the relevant area for delimitation purposes in this case.

71. Earlier this week, Nicaragua did not display this map and I can well understand why. It was however their position throughout eight years of these proceedings. Rather, in another example of the continuing shifting sands of Nicaragua's position, a new "relevant area" was shown to the Court on Tuesday afternoon — it is the one that shows up on the screen (tab 87 — PR-3e; Tuesday afternoon judges' folder).

72. Not only does that area depict Colombia's "relevant area" incorrectly — we have said that the relevant area does indeed go up to Nicaragua's mainland coast — it is still grossly exaggerated by virtue of the fact that it includes large maritime areas lying to the east of Colombia's islands.

73. Nicaragua says that this area to the east is an area of overlapping 200-nautical-mile entitlements. But those entitlements — as I have said — meet and begin to overlap to the *west* of

Colombia's islands, not to the east of them. Mr. President, Members of the Court, in situations involving delimitation between States with opposite coasts where there are no islands in close proximity to the mainland such that their territorial seas overlap, there is not a single precedent in the Court's jurisprudence, or in that of arbitral tribunals, where the area within which the delimitation was carried out did not fall between those two opposite coasts. I would also add that in numerous cases — one can mention *Libya/Tunisia*, *Libya/Malta*, *Cameroon* v. *Nigeria*, *Qatar* v. *Bahrain* and *Barbados-Trinidad & Tobago* — the relevant area within which the delimitation was effected was not based on overlapping 200-nautical-mile entitlements. Delimitation has always focused on the maritime areas lying between the relevant coasts that either face each other or are adjacent to each other, always, and that is where the equidistance/relevant circumstances rule should be applied.

74. Mr. President, Members of the Court, geography is what it is. Some States are landlocked and have no maritime entitlements. Others possess islands. Colombia's islands are not incidental features lying off a mainland coast, where the mainland coast has any relevance. Nor do they lie on the "wrong side" of any mainland-to-mainland median line because there is no such median line that is legally relevant in this case. Colombia's islands stand on their own at a significant distance from Nicaragua's coast, and they generate their own maritime entitlements.

75. Those entitlements, as I have said, begin to overlap with the entitlements generated by Nicaragua's coast in between. That is the relevant area within which application of the equidistance/relevant circumstances rule comes into play. In the north, the relevant area stops at the Court's bisector line between Nicaragua and Honduras. To the south, the interests of Costa Rica will need to be taken into account. As we have said, Colombia is fully confident that the Court is perfectly able to protect any interests of third States in this area by employing its normal practice of not specifying the precise end-point of the delimitation line, but, rather, by drawing an arrow instead.

76. Mr. President, that concludes my presentation on the overall geographic setting, including the relevant coasts for delimitation purposes and the relevant area. I would now be grateful if the floor could be given to Professor Crawford. Thank you very much.

The PRESIDENT: Thank you, Mr. Bundy, for your presentation. I invite Professor Crawford to the Bar. You have the floor, Sir.

Mr. CRAWFORD:

2. QUITASUEÑO

Introduction

1. Mr. President, Members of the Court, in this presentation I will demonstrate the territorial character of that part of the San Andrés Archipelago known as Quitasueño and its entitlement to maritime zones. You can see the Bank of Quitasueño shown on the screen, with the 34 islands shown in red. Quitasueño's character as territory is demonstrated in two reports based on expert surveys which have been tendered by Colombia[26]. Until this week Nicaragua has made no effort to respond to these with any countervailing factual arguments or expertise. The islands of Quitasueño, its associated low-tide elevations, its fringing reef and its surrounding waters are all claimed by Nicaragua to be subject to its sovereignty and jurisdiction. Yet, just as it has produced no evidence, Nicaragua has not performed a single administrative act on Quitasueño — in both respects quite unlike Colombia. There *was* a dispute concerning sovereignty over Quitasueño; it was a dispute between the United States and Colombia. Its existence was duly recorded in the 1928 Treaty, which equated the three features of Quitasueño, Roncador and Serrana and which, as Professor Kohen has demonstrated, negated any Nicaraguan claim to them. In fact the dispute with the United States was resolved in Colombia's favour in 1972.

2. This demonstration is in three parts. First I will trace the evolution of the law concerning the maritime zones of small features — a law now settled at least as concerns the definition of islands and their entitlement to territorial sea and contiguous zones. Secondly I will apply that law to the case of Quitasueño. Thirdly, I will deal with Mr. Oude Elferink's efforts to dismiss this feature — which I will call the "poor white coral trash" theory.

[26]Study on Quitasueño and Albuquerque prepared by the Colombian Navy, September 2008: CMC, Vol. II, Ann. 171, p. 603; Expert Report by Dr. Robert Smith, "Mapping the Islands of Quitasueño (Colombia) — Their Baselines, Territorial Sea, and Contiguous Zone," February 2010: RC, Vol. II, App. I, p. 2.

The definition of islands and their entitlement to maritime zones

3. Mr. President, Members of the Court, the modern law defining islands is clear, determinate, bright-line law. It is stated in Article 10 (1) of the 1958 Convention on the Territorial Sea and Contiguous Zone; it is stated in the same terms, in Article 121, paragraph 1, of the 1982 Law of the Sea Convention. In law, areas above high water are islands. There is no minimum size cited in either Convention. There is no requirement of human habitation or economic life, however those terms may be defined. A feature which is above water — higher than mean high tides — is in law an island and thus generates, at a minimum, a 12-mile territorial sea and an additional 12-mile contiguous zone. And since the land dominates the sea, the territorial sea thus generated — this zone of sovereignty and not merely of sovereign rights — takes priority over the EEZ and continental shelf claims of other States in a delimitation. This point was made by the International Tribunal on the Law of the Sea in the *Bangladesh/Myanmar* case, when it observed:

> "Bangladesh has the right to a 12 mile territorial sea around St. Martin's Island in the area where such territorial sea no longer overlaps with Myanmar's territorial sea. *A conclusion to the contrary* would result in giving more weight to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea."[27] (Emphasis added.)

4. As to the territorial sea of islands, the position under modern international law is clearly and accurately reflected in the 1982 Convention. Article 121, paragraph 1, defines "island" in simple geographic terms: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." This follows verbatim Article 10, paragraph 1, of the 1958 Geneva Convention on the Territorial Sea.

5. Mr. President, Members of the Court, your Court accepts without qualification or demur that this is the international law definition of "island". For example in *Qatar/Bahrain* you said:

> "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' . . . 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

[27] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, pp. 55-56, para. 169.

> equidistance line." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 195.)

6. I note four things about this passage.

(1) First, you expressly accepted the definition of "island" in Article 10 of 1958 and Article 121 of 1982 as applicable under general international law.

(2) Secondly, you took that definition to relate to the present facts and not to ancient definitions or to repute.

(3) Thirdly, as a question of fact, in doubtful cases it was to be determined by evidence.

(4) Fourthly, if a feature satisfies the definition, it can generate a base point or base points; it is to be "taken into consideration for the drawing of the equidistance line". *A fortiori*, it should be considered as part of a State's baseline for the determination of the territorial sea and contiguous zone.

7. The definition has clear advantages, which explains why it crystallized over the course of the twentieth century as an accepted rule[28]. It is a classic example of a bright-line rule. The feature in question needs to meet three specified criteria, and only those criteria, and each of these is objective: (1) the feature must be naturally formed — that is to say, a man-made installation, such as a podium, does not qualify as an island; (2) it must be surrounded by water; and (3) it must remain above water at high tide — in other words, it is not a drying feature exposed only at low tide. A feature is an island, or it is not, and one determines its status by determining whether or not it meets these three objective criteria. There are no intermediate positions; and there are no other criteria. For once the voice of doubt saying that international law is never certain, that it is always vague and indeterminate, that it can produce whatever outcome, these doubts are suppressed. Post-modernism meets its limit here: there *is* a determinate answer[29].

8. Earlier in the twentieth century, States might have agreed to take a different approach to islands. The United Kingdom at one time took a different position: it only regarded features as

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[28] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, pp. 55-56, para. 169. Also: D. P. O'Connell, *The International Law of the Sea*, Vol. 1 (Clarendon Press, Oxford, 1982, ed. I. Shearer), pp. 193-195 (referring principally to Art. 10 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 29 Apr.1958, 516 *UNTS* 205); R. R. Churchill & A. V. Lowe, *The Law of the Sea* (3rd ed., Manchester University Press, Manchester, 1999), 49; H. Dipla, "Islands", in R. Wolfrum (gen. ed.), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, 2008), para. 2.

[29] But cf. M. Koskenniemi, defining international law as a set of "argumentative patterns, allowing any substantive outcome": (2004) 36 *Studies in Transnational Legal Policy* 109, pp. 115-116.

islands if they had a certain size and separate significance. In its comment at the time of the 1930 Hague Conference the United Kingdom limited islands to areas "capable of effective occupation and use"[30]. But that position was rejected by others and abandoned by the United Kingdom itself by 1958[31]. The law, as it has crystallized in custom and as it has been adopted under the 1958 Convention accords all islands a territorial sea, irrespective of their size, economic independence, or other characteristics. As long as the feature is an island as identified in Article 10, a territorial sea appertains to it, even if it is — as Professor Lowe said — the size of a rostrum.

9. Just as clear is the law as expressed in the 1982 Convention. There is only one type of territorial sea. An Article 121, paragraph 3, rock generates a full entitlement of territorial sea and a contiguous zone. Its entitlement is reduced only by the express and limited exclusion of the other two main categories of maritime jurisdiction, the exclusive economic zone and continental shelf. Like all features subject to the régime of islands, a rock generates the territorial sea and a contiguous zone, and this means the territorial sea of the same breadth as projected from other land territory. To apply paragraph 2 of Article 121, as read in conjunction with paragraphs 1 and 3, "the territorial sea . . . [of a rock meeting the criteria of paragraph 1 is] determined in accordance with the provisions of this Convention applicable to other land territory".

10. It is worth recalling that during the Third Conference on the Law of the Sea there were clear alternatives to this position, and they were clearly rejected. A number of States participating in the drafting work proposed that the smallest features — the rocks of the eventual Article 121, paragraph 3 — should not be accorded any maritime entitlement at all. Malta proposed that islands of less than 1 km not be accorded a maritime entitlement[32]. Libya proposed that "small islands and rocks, wherever they may be, which cannot support human habitation or economic life of their own

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[30]See UK response to Point VI, of the Preparatory Work for the Hague Codification Conference of 1930, League of Nations Document C.74, M.39, 1929, v, reprinted in McNair, ed., *International Law Opinions* (1956) p. 379:

> "An island is a piece of territory surrounded by water and in normal circumstances permanently above high water. It does not include a piece of territory not capable of effective occupation and use. His Majesty's Government consider that there is no ground for claiming that a belt of territorial waters exists round rocks and banks not constituting islands as defined above . . ."

[31]E.g., by its accession without reservation to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 29 Apr. 1958, 516 *UNTS* 205 and the definition contained in Art. 10 thereof. The UK signed the Convention on 9 Sep. 1958 and ratified it on 14 Mar. 1960.

[32]Virginia Commentary, p. 328.

shall have no territorial sea . . ."[33] Romania would have withheld all maritime entitlement from "islets and small islands, uninhabited and without economic life"[34]. Turkey proposed excluding from any maritime entitlement "rocks and low-tide elevations"[35]. These proposals attracted little support. The Third Conference did not adopt them. The text of Article 121 recognizes that the territorial sea is an entitlement generated by every island, regardless of its characteristics or size. So long as a maritime feature exhibits the objective geographic criteria expressed in Article 121, paragraph 1, it is an island. For the purposes of the generation of the territorial sea and contiguous zone, there is one class of island and one class only.

11. The main relevant provision "applicable to other land territory", including all islands as defined, is Article 3 on the breadth of the territorial sea: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." This right is unqualified. There is no other, curtailed or diminished, "right to establish the breadth of the territorial sea". It is true that States did not always have the right to establish a 12-mile territorial sea. But a reduced territorial sea entitlement is not part of the law at the present day, or as it has existed for some time. All land territory generates a territorial sea, and the maximum breadth of the territorial sea to which a State is entitled is 12 nautical miles — subject of course to delimitation especially as concerns overlapping territorial sea claims of other islands.

The facts concerning the islands of Quitasueño

12. Mr. President, Members of the Court, I turn to the facts of Quitasueño. They were clearly and scientifically determined by the Colombian Navy when it conducted its survey of the islands in summer 2008, a document filed in the Counter-Memorial; they were confirmed as well when the independent geographic consultant, Dr. Robert Smith, conducted a further survey in November and December 2009. Dr. Smith's work within the Office of the Geographer and the Office of Oceans Affairs of the United States Department of State will be familiar to the Court. During his 30 years in those Offices he was responsible, among many other things, for the *Limits in*

[33] R. Platzöder (ed.), Third UN Conference on the Law of the Sea; Documents, Vol. IV, p. 347.

[34] Virginia Commentary, p. 330.

[35] *Ibid*., p. 333.

the Sea series. He also was the primary geographic and technical expert in determining the baselines and maritime limits of the United States. His expertise on questions of maritime entitlement and delimitation is extensive.

13. Now, Colombia's submission in the present proceedings of two surveys, conducted using recognized methods of geographical field research and covering the considerable length of an extended group of islands, would not in itself be remarkable. What is remarkable is the complete absence of any corresponding submission of any evidence by the Applicant in its written pleadings in respect of factual questions which the Applicant itself has raised. The other day, Professor Oude Elferink was reduced largely to speculation and innuendo.

14. Speaking of innuendo, I should deal briefly with Nicaragua's "gunboat" theory. It said, three or four times this week, that it was coerced into silence and inactivity over Quitasueño by the Colombian Navy[36], and it gave as an example the so-called Quitasueño mission of February 2012[37]. I have no time to deal with this spurious claim in detail — indeed, it does not deserve it. Just three points: one, the alleged mission took place well after the closure of the written pleadings and several years after Nicaragua received the Navy's survey; two, there was no notice to Colombia and the press reports of the alleged mission (which we sent to the Registrar) do not focus on Quitasueño; three, there was no actual contact with the Navy, just an alleged radio report wrongly interpreted to suggest that the Navy was in the vicinity. Mr. President, Members of the Court, I am constrained to say that this was not coercion, not even the whiff of coercion.

15. I now turn to the facts.

16. Quitasueño is a long bank, running some 57 km from north to south. Its southernmost point is less than 48 nautical miles from the northernmost point of the Providencia and Santa Catalina islands[38].

17. It comprises a variety of land features. The most comprehensive survey of the bank to date, that carried out by Dr. Smith, identified 34 features that qualify as islands because they are

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[36]CR 2012/8, pp. 19-20, paras. 23-28 (Argüello Gómez); *ibid.*, pp. 23-24, paras. 39-41; CR 2012/9, p. 50, para. 31 (Lowe).

[37]CR 2012/8, pp. 19-20, paras. 23-28 (Argüello Gómez).

[38]See CMC, p. 30, para. 2.25; CMC, Vol. III, fig. 2.8. See also RC, Vol. II, p. 93, fig. R-3.2.

permanently above the high-tide mark. They are dispersed along the length of the bank. Up and down the length of the bank, there is no gap between islands in excess of five nautical miles[39]. For much of the length of the bank, the concentration of islands is considerably closer. The bank also contains at least 20 identified low-tide elevations[40]. No low-tide elevation is located at more than one and three quarter nautical miles from the nearest island[41]. Most are much closer[42]. They would trigger Article 13, paragraph 1 of the 1982 UNCLOS Convention (Article 11 (1) of the 1958 Geneva Convention) which provides that

> "Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from . . . an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea."

18. Quitasueño contains a significant reef structure. The reef runs for over 22 nautical miles, forming the eastern edge of the bank[43]. Its widest break is about one tenth of a mile. The reef constitutes the eastern fringe of Quitasueño and is clearly marked on the chart[44]. Its seaward low-water line is an eligible baseline in accordance with Article 6 of the Convention[45].

19. A brief word is in order about the methods which the two survey teams employed, since they have been called into doubt. The surveys entailed the collection of raw data by the teams, both of which stayed for a number of days at the bank. The data consisted in observations and measurements of a large number of features, in order to verify that some of them remain permanently above the high-tide mark and which are low-tide elevations[46]. Observations in some instances were taken from a distance of some metres, as shallow waters and waves around them made it too dangerous for the researchers to land[47]. This is a bank strewn with shipwrecks[48]. In other parts of the bank, the researchers disembarked and approached the islands on foot.

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[39]See Island, QS 52 and Island QS 47 for the widest gap, fig. No. 7, Smith Report.

[40]RC, pp. 177-8, para. 5.36.

[41]Smith Report, p. 38, para. 6.5.

[42]The furthest is low-tide elevation QS 44, shown at p. 27, Smith Report.

[43]Smith Report, p. 38, para. 6.7.

[44]See Colombia Nautical Chart 416, reproduced as fig. No. 1, Smith Report.

[45]Smith Report, p. 38, para. 6.7.

[46]*Ibid.*, fold-out charts.

[47]E.g., QS 21, 33: Smith report, pp. 18, 23.

[48]See, e.g., shipwreck in upper right background of photograph: Smith Report, fig. 2, 4, p. 8.

20. Islands which they could approach on foot they measured on the spot[49]. The resultant measurement for a given feature constituted the datum which the experts then analysed. To analyse that data, they applied statistical methods recognized as appropriate for measuring the elevations of land features like those comprising the bank. The statistical analysis and the general data sets on which they relied — in particular, the astronomical tide data for the region — are fully described in the reports[50].

21. Instances where there was a doubt as to whether the feature was above water at high tide or a low-tide elevation, in such cases a "conservative approach" was taken and the feature was considered to be a low-tide elevation. If, for example, the elevation of the feature was close to the high-tide mark, it was excluded from the list of islands[51]. If two or more features were close enough together to present a matter of appreciation as to whether they were in truth one or two, they were counted as one[52].

Nicaragua's denial of the facts

22. Mr. President, Members of the Court, before Nicaragua instituted the present proceedings, Colombia had taken the sovereignty and resultant entitlements generated by the islands of Quitasueño to be largely uncontroversial. A difference had existed with the United States, from the time of the nineteenth century Guano Act[53] until its resolution under the 1972 Treaty[54]. But this was a difference concerning title; the practice throughout that period, as after, largely confirmed that the feature was capable of being subject to sovereignty. As to the pre-1972 practice, I refer to the 1928 Exchange of Notes between Colombia and the United States, whereby Colombians could continue their fishing activities while the United States would maintain and

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[49]Colombian Navy report team: 11 geographical features and low-tide elevations — QS 5, 7, 8, 9, 10, 11, 12, 15, 16, 18, 19 and 23, for which see CMC, Vol. II-A, Ann. 171, pp. 604-607. Smith Report team: 22 islands and low-tide elevations — QS 1, 2,, 4, 5, 15, 16, 17, 2, 22, 24, 25, 26, 27, 32, 35, 44, 45, 47, 51, 52 and 53, for which see RC, Vol. II, App. I, pp. 7-9, para. 2.3, and Ann. 5.

[50]Study on Quitasueño and Alburquerque prepared by the Colombian Navy, September 2008; CMC, Vol. II-A, Ann. 171, pp. 609-611; Smith Report, RC, Vol. II, App. 1, p. 9, para. 2.4.

[51]Smith Report, p. 9, para. 2.6.

[52]E.g., QS 8, 9, 10, 11, 13, 16, 27, 30: Smith Report, pp. 14-16, 21, 22; see also *ibid.*, pp. 10-11, para. 3.2.

[53]US Code, Title 48, Ch. 8, para. 1411.

[54]Treaty between Colombia and the United States of America concerning the Status of Quitasueño, Roncador and Serrana, Bogotá, 8 Sept 1972: 1307 United Nations, *Treaty Series (UNTS)* 379, reprinted as Ann. 3 in CMC, Vol. II-A.

operate the lighthouse. Nicaragua was officially notified of the Exchange of Notes and never protested it. As to the position after 1972, notwithstanding its formal reservation on the point, subsequent United States practice has recognized the competence as to fisheries around Quitasueño of the designated "Colombian authorities": I refer, for example, to the 1983 Exchange of Notes with Colombia, which has formed the basis for a very substantial subsequent practice[55].

23. The Counter-Memorial recounted this practice in detail[56]. Nicaragua, silent for some 44 years on the matter, said nothing to qualify the practice or to weaken the conclusions drawn from it. When Nicaragua did speak about Quitasueño, it claimed that Quitasueño "appertained to Nicaragua by virtue of the doctrine of *uti posseditis iuris*"; that is to say, Nicaragua, though starting in 1972, affirmed, by claiming them, that Quitasueño constituted or included land territory[57]. In its Memorial, Nicaragua noted the earlier practice, such as President Wilson's declaration in 1919 "reaffirming the appropriation of the cays and reserving them in order to establish navigational aids on them"[58].

24. So the assertion by Nicaragua that Quitasueño contains no islands came to light at a late date. Nicaragua expanded the point only towards the end of its Memorial[59]. Its pleading here, as in so many other respects, was hopelessly protean: it acknowledged the practice which accepted that these are territorial features under sovereignty; said nothing to show the faintest reservation about the practice; laid claim to the features; then, in one of many *volte-faces*, denied that anybody else could have them[60].

Mr. President, this would be an appropriate time to break, if it would be convenient to the Court.

The PRESIDENT: It seems that it is also convenient for you.

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[55]Agreement between Colombia and the United States of America on certain Fishing Rights in Implementation of the Treaty between Colombia and the United States of America of 8 September 1972, Concerning the Status of Quitasueño, Roncador and Serrana, Bogotá, 24 October 1983 and 6 December 1983, 2015 *UNTS* 3, *USTIAS* 10842: CMC, Vol. II-A, Ann. 8, p. 45.

[56]CMC, pp. 150-188, paras. 4.3-4.77.

[57]MN, p. 8, para. 19, in reference to Nicaragua's 1972 claim. See also *ibid.*, paras. 20, 23. For the 1972 Nicaraguan statement, see MN, Vol. II, Ann. 81, p. 261.

[58]*Ibid.*, p. 128, para. 2.148.

[59]*Ibid.*, para. 3.114.

[60]*Ibid.*, p. 251, para. 3.123.

Mr. CRAWFORD: Sir, my convenience is your convenience.

The PRESIDENT: We will take a 15-minute coffee break. The sitting is suspended.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and Professor Crawford, you can continue.

Mr. CRAWFORD:

25. Thank you, Sir. Mr. President, in Australia there is a saying that someone who wants the best of both worlds has "a bob each way", which is a reference to betting at the races. Nicaragua's initial position on Quitasueño was "a bob each way". If it was an island, it was their island; if it was not an island it was their shelf.

26. In the Reply Nicaragua, while repeating its statement of the facts without further evidence, came definitively down in favour of the proposition that Quitasueño was not an island. It said: "all the information available for nearly two hundred years indicates that this feature is a bank with no rocks or cays emerging at high tide"[61]. That had the advantage of describing accurately the issue between the Parties. The following points may be made in response.

27. First, the existence of Quitasueño as an island or of islands on Quitasueño, is not determined by what "information" may have been "available" in the past. Whether there is an island or islands present in a given area is not a question of history. It is a factual question. As you observed in *Qatar/Bahrain*, just because a feature "has never been reflected on nautical charts as an island but always as a low-tide elevation" in no way settles the matter[62]. It is a matter to be examined in view of expert evidence, admissible for determining a question of present fact.

28. But, even if the geography were a matter of historical record rather than observable fact, Nicaragua's version of history is wrong. The "information available for nearly two hundred years", which Colombia set out in the Counter-Memorial and noted again in the Rejoinder, indicates the

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[61]RN, p. 116, para. 4.27.

[62]*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 193.

opposite. Quitasueño was subject to claims of sovereignty — it is a valuable feature — and these claims of sovereignty were acknowledged by Nicaragua as such. Nicaragua refers to surveys carried out by the United Kingdom in the early nineteenth century and by Colombia itself in 1937[63] — the very sort of maps and surveys which you said in *Qatar/Bahrain* were not determinative of the geographic facts[64]. Even Foreign Secretary Chamberlain acknowledged the existence of "a small, solitary and quite uninhabitable rock" on the bank[65]. That is in the letter of 1926. The reason the United Kingdom took the position it did at that time, as reflected in the Chamberlain letter, was not because it thought Quitasueño was totally under water but because it was applying a different test for an island — the wrong test, in terms of international law, affirmed in 1958 and 1982.

29. Nor does Nicaragua offer any explanation as to why the United States legislated in respect of the islands as features potentially subject to appropriation for the purposes of exploiting their resources[66]. It refers to statements noting the presence of cays in Quitasueño — it even refers to cays there itself. Nicaragua invokes a twentieth century declaration where the United States refers to the feature in question as "a cay", that denomination was used also in the 1928 Treaty.

30. Nicaragua wonders why a British naval survey in the 1830s "did not find any cays on the bank"[67]. The concern of that survey was with navigational hazards. The reefs of Quitasueño are an infamous navigational hazard. Even for modern researchers, equipped with state-of-the-art positioning equipment and motorized sea craft, the approach to the whole feature requires extreme caution. The law of maritime jurisdiction, as it was in the 1830s, gave no reason for naval surveyors to enquire closely of such a dangerous place as Quitasueño. It is hardly surprising that the early surveyors in their wooden sailing ships did not get too close. The hazards of a lea shore, as Patrick O'Brien would have put it.

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[63]RN, pp. 117-8, paras. 4.28-4.29.

[64]*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 70-71, para. 100; p. 85, para. 148. See also, *ibid.* p. 99, para. 193.

[65]Letter of 7 July 1926: CMC, Vol. II, Ann. 47. See also, *ibid.* para. 4.29.

[66]E.g., the Guano Act: US Code, Title 48, Chap. 8, para. 1411.

[67]RN, p. 117, para. 4.28.

31. Mr. President, Members of the Court, geography is neither created nor erased by an old text. Nor does a geographical feature disappear because an observer failed to notice it. The legal consequences generated by geography may change over time. This is the case in respect of small territorial features at sea. The rule defining islands for purposes of maritime entitlement that I have recited is comparatively recent; so, too, the attribution of a 12-mile territorial sea to such a small feature. *But*, today, the entitlements generated by islands — including rocks — are clear and settled. No legal consequence flows from the fact that old observers did not find something which probably did not matter under the law of their day and for which they were not looking[68].

32. Nicaragua deprecates Colombia's modern surveys as a "belated discovery of 'islands' on the bank of Quitasueño" which "cannot change the conclusions on the status of Quitasueño as it appears from information and the practice of the Parties spanning almost two centuries"[69]. But there is nothing "belated" about a respondent State surveying its territory, when challenged by a persistent Applicant to prove the existence of a territorial or maritime entitlement[70]. A legally groundless attempt to disqualify a scientific survey does not address the merits of the survey or the conclusions it supports[71].

33. Nicaragua, in its Reply thus submitted a pleading that was by turns self-contradictory and non-responsive. It added nothing to the unsupported assertions which lie at the heart of the Memorial. Yet the stakes for Colombia in this attempt to strip a long-established area of jurisdictional authority from its control and radically to constrict its maritime spaces are high. This is why Colombia retained Dr. Robert Smith to provide an independent geographical assessment.

34. Mr. Elferink makes play of the fact that the height measurements of the islands above mean sea level were shown as accurate to the millimetre, a resolution which could not be achieved by the measuring device used. Well that is true. In fact, as Dr. Smith's Annex 5 makes clear, the

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[68] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), I.C.J. Reports 2002*, p. 514, para. 44 (indicating that the "weaknesses of the contemporary techniques employed in their preparation", though not in themselves grounds for rejecting old maps, nevertheless are reflected in such maps).

[69] RN, p. 119, para. 4.34. See also, *ibid.* p. 123, para. 4.42.

[70] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits*, Reply of Bahrain, 30 May 1999, Ann. 13.

[71] See RN, pp. 115-116, para. 4.25.

surveying ruler's accuracy is to the centimetre[72]. The apparent millimetre accuracy is a function of the method of calculation.

35. Mr. President, Members of the Court, the situation in which Colombia found it necessary to undertake two surveys of the cays of Quitasueño is unusual. It is ordinarily the party making factual allegations which adduces evidence in order to support its allegations. That is not the situation here — at least, it was not until this week. Nicaragua alleges that an island group — long addressed under Colombian legislation, long the subject of third State practice; and, at least for a time, subject to Nicaragua's own territorial claim — does not exist in law; but it furnishes no geographical evidence, no study, no research, no field report, no objective contemporary material whatsoever to back up its categorical contention.

36. But if the onus is on Colombia it has discharged that onus. It has shown the existence of numerous land features on Quitasueño which constitute islands under the modern law. It has shown the existence of numerous low-tide elevations within a few miles of those islands, and of a fringing reef that is similar to many others throughout the world that have been considered proper baselines. The result is a cumulative maritime domain which is by no means disproportionate to its importance in the region and which is, in all respects, supported by the modern law of the sea. This is a substantial feature, administered by Colombia, a feature significant for its fisheries but also for the responsibilities associated with its eponymous presence as a hazard to shipping. On the second day of a reply phase, one does not want to say too much about being denied sleep. Quitasueño, of course, means "avoid sleep". It is the Colombian Navy which maintains two lighthouses on the bank, without which many ships would be called on to abandon not merely sleep but hope as well!

Professor Oude Elferink's assault *in absentia* on Quitasueño

37. Mr. President, Members of the Court, I turn to address Professor Oude Elferink's assault on Quitasueño. Just as the so-called scientific expedition of February 2012 was subject to what might be described as coercion *in absentia*, so Professor Oude Elferink's assault on the Bank was an assault *in absentia*: he has never been there, he has never asked to go there. But he made four

[72]Smith Report, Ann. 5, seventh column, "In situ height observations".

points to which I should respond: first, high tides; second, the use of a tidal datum; thirdly, Colombia's charts; and fourthly, the "coral trash" theory of island deformation.

(a) *The meaning of* "high tide" *in the definition of* "island"

38. I turn first to the meaning of "high tide" in the law of the sea.

39. Nicaragua objects to the findings of Dr. Smith, that there exist a considerable number of features which are islands for purposes of the international law definition[73]. What Nicaragua seems to be saying is that international law contains a specific definition of "high tide" and that Colombia's appreciation of the facts was flawed, because it failed to follow that definition.

40. But international law has not articulated a definition for high tide; it has not settled on a general rule prescribing how States are to take tidal measurements. This emerges from the leading case, the decision of the United States Supreme Court in *United States* v. *Alaska* in 1997[74]. The question there was the status of the inaptly-named Dinkum Sands, which were a rather movable feature, not infrequently submerged. I say inaptly because, at least in Australian idiom, dinkum means "for real".

41. The Court did *not* consider that a feature was to be disqualified as an island simply because at one time or another it was washed over by waves or in some circumstances might otherwise be submerged. The United States as litigant in that case took an absolute position: the feature, in order to be an island, had to be permanently above water — meaning that water must never, even exceptionally, wash over the feature. This position the Special Master — who decided the case on the facts — "essentially rejected"[75]. The Special Master determined — and the Supreme Court accepted — that the correct standard is "somewhat more lenient . . "[76]. The correct standard is that "under which an island must 'generally', 'normally', or 'usually' be above mean high water"[77].

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[73]CR 2012/9, pp. 50-57, paras. 32-46 (Oude Elferink).

[74]521 *US* 1, 1997.

[75]521 *US* at p. 24.

[76]*Ibid.*.

[77]*Ibid*.

42. Mr. Oude Elferink took Colombia's expert evidence to task, because, according to his appreciation, the photographs show that the islands of Quitasueño, or at least some of them, sometimes to be over-topped by the waves: "That is", according to Mr. Oude Elferink, "they are not *permanently above water*"[78] — but the word "permanently" does not appear. Nicaragua, it seems, espouses a standard, like that advanced by the United States in the *Dinkum Sands* case but rejected by the Supreme Court.

43. Nor is it, evidently, a position on which the drafters of the 1958 Convention were able to agree. Early drafts of the text would have required that a feature be "permanently above [the] high-water mark"[79]. The United Kingdom proposed adding the phrase "in normal circumstances"[80]. The United States thought the combination of words — "permanently" and "in normal circumstances" was illogical — and, had no basis in international law. The United States said at the Conference in 1958 "there is no established state practice regarding the effect of [submerged] or abnormal or seasonal tidal action on the status of islands"[81]. On that consideration, both of those qualifying phrases were dropped, and the text took its adopted form. From the drafting history, the United States Supreme Court, interpreting the 1958 Convention, concluded as follows: "even if a feature would be submerged at the highest monthly tides during a particular season or in unusual weather, the feature might still be above 'mean high water' and therefore qualify as an island"[82].

44. The conclusion remains correct today: international law does not incorporate a law of tides or of tidal measurements. D.P. O'Connell noted that the definitions applied in practice were considerably diverse: highest astronomical tide, mean high-water spring tides, mean high-water neap tides, mean sea level, and so on[83]. Subsequent development has done nothing to qualify his conclusion.

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[78]CR 2012/9, p. 52, para. 37 (Oude Elferink); emphasis added.

[79]François, Report on the Régime of the Territorial Sea, *Yearbook of the International Law Commission*, 1952, Vol. II, p. 25, 36, UN doc. A/CN.4/53.

[80]Summary Records of the 260th mtg, *Yearbook of the International Law Commission*, 1954, Vol. I, p. 92.

[81]3 United Nations Conference on the Law of the Sea, Official Records: First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes, 1958, UN doc. A/CONF.13/C1./L.112, p. 242.

[82]521 *US* at pp. 26-27.

[83]O'Connell, *The International Law of the Sea*, 1982, Vol. I, p. 173.

(b) ***The appropriate tidal datum***

45. I move to the question of "the appropriate tidal datum". Just as Nicaragua has purported to fix Colombia's continental margin for it, so it has purported to tell us which tide datum to use. International law apparently rejects the use of the global Grenoble Tide Model FES 95.2 and obliges us instead to use an "Admiralty Total Tide Model"[84]. But there is no universal standard adopted by the international community dictating what model a country has to use.

46. The 1982 Convention allows the coastal State to use the technical standards it deems appropriate. The Colombian Hydrographic Service consists of competent hydrographers who are knowledgeable of charting standards: their Technical Report is at Annex 4, Appendix 1 of the Rejoinder. Their considered recommendations on the model should not be questioned by the Court.

47. In this context I would note that the 1993 International Hydrographical Association Manual provides:

> "Owing to the many varied tidal characteristics existing throughout the world, a precise, scientific definition for chart datum, which could be used universally, has not been agreed upon. (Over the past 200 years, different countries have adopted different methods for computing chart datum, depending usually on the type of prevailing tide.) As yet, only basic guidelines exist."[85]

48. Nicaragua wishes you to reject the tidal model applied by Colombia's expert in measuring the features of Quitasueño. But the Grenoble Tide Model applied by Dr. Smith is a model in wide international application. Nicaragua apparently believes that international law contains a precise technical prescription on how to measure tides. On that basis, it says that the Smith Report, having used the Grenoble Tide Model, is to be rejected[86].

49. For the reasons given, that is wrong, in principle anyway. But in the event there is sufficient scientific basis for the tidal datum adopted. I refer to two papers about tides in the Caribbean published in the internationally peer-reviewed *Journal of Geophysical Research*. The first was published in 1981, and it indicates that in the region of Quitasueño, mean tidal range is always below 50 cm[87]. A second paper, from 2011, confirms this finding of 30 years before, and

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[84]CR 2012/9, p. 51, paras. 33-34 (Oude Elferink)

[85]IHO Manual on Technical Aspects of the LOS Convention, 1993, p.68, para. 3.4.

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

[87] B. Kjerfve, "Tides of the Caribbean Sea", 1981, 86 *J Geophysical Res* 4243-4247.

compares the tidal harmonics and tide gauges and FES 2004, an updated addition of the FES 95.2 to which Mr. Oude Elferink referred. The paper concludes that there is very good agreement between observed and modelled tide, with harmonic amplitude differences below 1.5 cm[88]. Thus, the highest astronomical tide (HAT) computed from Admiralty Total Tide, with a difference of over half a metre when compared to the FES model, is inaccurate. Furthermore, the methodology to compute highest astronomical tide from the FES model is clearly set out in Dr. Smith's report, whereas how the highest astronomical tide was computed from Admiralty Total Tide was not demonstrated to the Court by Nicaragua. I should add that copies of these two public domain reports have been provided to Nicaragua and to the Registrar.

50. Incidentally, if we adopt the 0.8 m highest astronomical tide proposed by Nicaragua, then the lowest astronomical tide (LAT) would be nearly 0.8 m below main sea level (MSL), and not 0.29 m as proposed by Dr. Smith (see his Ann. 4). The result would be that most of Quitasueño's features would be classified as low-tide elevations.

51. To conclude, there is no basis in international law to reject the tidal measurements at Quitasueño. The measurements were conservative, accurate, and clear in their identification of multiple features on the bank qualifying as islands, under the legal definition.

(c) ***Colombia's charts***

52. I turn briefly to the question of Colombia's charts, on which Mr. Elferink heavily relied, in conjunction with reasoning about the critical date[89]. Apparently whatever the map depicts prevails over the geographic facts. This is not what you said or did in *Qatar* v. *Bahrain*, as I have shown. He further says that the earlier Colombian maps are "highly relevant for determining if there have been any *effectivités* in respect of specific islands. Colombia discovered the coral debris on Quitasueño only in 2008 and 2009."[90] But *effectivités* have nothing to do with the geographical facts, or with their ascertainment. I will return to the question of charts in more detail next week.

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[88]R. Torres & M. N. Tsimplis, "Tides and long-term modulations in the Caribbean Sea", 2011, 116 *J Geophysical Res* C10022.

[89]CR 2012/9, p. 58, para. 49 (Oude Elferink).

[90]*Ibid*.

(d) ***The "coral trash" theory***

53. Fourthly there is, surprisingly, the new coral trash theory, which if upheld will add powerfully to the world's stock of homeless people. Professor Elferink put it in the following terms: "An individual piece of coral debris, that is, a part of the skeleton of a dead animal, is not a naturally formed area of land."[91] Now of course there has been active debate about whether human intervention, using natural materials, such as landfill, gives rise to a "naturally formed area of land". One view is that it can do so over time. But there is no instance of which I am aware in which the insular character of a feature has been rejected because it was made of coral, a point made by Sir Derek Bowett: "Although such islands are in no sense geologically part of the seabed [he is talking about coral islands], they are nevertheless 'naturally formed' and it has never been doubted that they generate a territorial sea as do normal islands."[92] The 1982 Convention refers to coral islands — atolls — in Article 6, and again in Article 47, paragraphs 1 and 7. The fact that they were formed by the "skeletons of a dead animal" in no way relegates them. A significant number of islands are coral islands. The Maldives would be surprised, perhaps alarmed, to learn of the coral trash theory. They may fear that, having made one archipelago disappear, counsel for the other side will find it straightforward to do so with other archipelagos.

54. I should note that the IHO study clearly recognizes that coral can be used as a baseline, i.e., that it is natural[93].

55. Finally, as to coral debris, I ask you to look at the pictures. They reflect what Dr. Smith saw, coral rocks affixed to the substrate.

Conclusion

56. Mr. President, Members of the Court, for these reasons, Mr. Elferink's arguments fail. Quitasueño is legally as we have described it.

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

[92]D.W. Bowett, The legal regime of islands in international law (Oceana, 1979), p. 5.

[93]IHO Study, para. 4.6.1.4.

Mr. President, Members of the Court, thank you for your attention. I would ask you now to give the floor to my colleague, Mr. Bundy, who will address Nicaragua's claims in respect of delimitation. Thank you, Sir.

The PRESIDENT: Thank you very much, Professor Crawford and I give the floor to Mr. Bundy. You have the floor.

Mr. BUNDY: Thank you, Mr. President.

3. NICARAGUA'S MARITIME BOUNDARY CLAIMS

1. Introduction

1. Mr. President, Members of the Court, my task in this intervention is to address Nicaragua's claims.

2. I say "claims" quite deliberately because one of the remarkable aspects of this case is that Nicaragua's maritime claims, and the basis on which those claims have been formulated, have undergone a radical change at a very late stage of these proceedings. And this has fundamentally changed the subject-matter of the dispute which Nicaragua originally asked the Court to decide.

3. In its Application, Nicaragua requested the Court to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zones appertaining to the Parties[94].

4. That request was reiterated in Nicaragua's Memorial, where Nicaragua claimed a single maritime boundary based upon a median line between the mainland coasts of the Parties[95]. And the same claim was maintained again in Nicaragua's Written Statement on Colombia's Preliminary Objections[96], as well as in its oral arguments during the jurisdictional hearings[97].

5. As I pointed out earlier this morning, Colombia's Counter-Memorial showed that there was no legal foundation for Nicaragua's mainland-to-mainland median line claim.

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[94]Application of Nicaragua, para. 8.

[95]MN, para. 3.28 and Submissions, para. 9.

[96]Para. 3.40.

[97]CR 2007/17, p. 22, para. 6.

6. And in its Reply, Nicaragua was forced to accept this fact. This is what it said: "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."[98]

7. Now during the oral proceedings on Costa Rica's Application to Intervene, I recall Nicaragua's counsel commenting: "Some things are so blindingly obvious that they go undetected by even the most astute observers."[99] This is certainly one of those things. If there is no need for a delimitation of exclusive economic zones between the mainland coasts of the Parties because they are too far apart, there is obviously no basis for Nicaragua's mainland-to-mainland single maritime boundary claim. That claim evaporates.

8. It was not until Nicaragua's Reply that it recognized these shortcomings. And that is why Nicaragua had to abandon its single maritime boundary claim.

9. How has Nicaragua dealt with this problem? In its Reply, Nicaragua decided to change the entire nature of its claim, including its legal and factual basis. Having previously argued that geology and geomorphology were irrelevant, Nicaragua abandoned that position, gave up on its mainland-to-mainland median line claim, discarded the equidistance/relevant circumstances rule, and argued instead that the Court should only delimit a continental shelf boundary between the two States based on a division of geological margins that depends on a newly formulated Nicaraguan outer continental shelf claim and a hypothesis as to where the geological continental margins of the two Parties are located.

10. The scope of this change is really quite remarkable. By arguing, eight years after the case was introduced, that the Court should now restrict itself to a delimitation of geological or geomorphological continental margins lying more than 200 nautical miles from Nicaragua's coast, but well within 200 miles of Colombia's mainland coast and its islands, Nicaragua has not simply reformulated its claim; it has changed the very subject-matter of the case.

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[98]RN, p. 59, para. 1.

[99]CR 2010/13, p. 29, para. 1 (Reichler).

11. But that has hardly improved Nicaragua's position. While its former claim was legally baseless, the new claim is inadmissible, unprecedented, legally deficient and wholly unsubstantiated.

12. I intend to take up those four points presently. But before doing so, I would like to spend a few minutes on Nicaragua's original claim to place its new claim in perspective.

2. Nicaragua's original claim

(a) *Nicaragua's Application*

13. Nicaragua is the Applicant in this case. It instituted the proceedings on 6 December 2001 with the filing of its Application.

14. States that initiate proceedings before the Court think long and hard about the nature of the claim they intend to request the Court to decide. And Nicaragua is no exception. In its Application, Nicaragua indicated that its President had indicated as early as December 1999 that it would file a case against Colombia[100].

15. Thus Nicaragua was formulating the nature of the dispute it would bring before the Court at least two years before instituting these proceedings. The requests set out in Nicaragua's Application must therefore be taken as reflecting the considered position of Nicaragua as to the subject-matter of the dispute it wished the Court to decide.

16. With respect to maritime delimitation, the Application requested the Court

> "to determine the course of the single maritime boundary between the areas 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"[101].

There was no suggestion that Nicaragua sought only a geological continental shelf boundary or that Nicaragua considered that it possessed outer continental shelf rights extending more than 200 nautical miles from its coast.

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[100] Application of Nicaragua, para. 7.

[101] *Ibid.*, para. 8.

(b) ***Nicaragua's Memorial***

17. Now in April 2003, two years after the Application, Nicaragua submitted its Memorial. That pleading repeated the request set out in the Application for the Court to determine the course of the single maritime boundary between the Parties[102].

18. With respect to issues of principle, Nicaragua stated that the applicable legal principles were those "relating to cases involving single maritime boundaries", not those relating to the establishment of outer continental shelf limits or the division of geological margins[103].

19. Based on this reasoning, Nicaragua's ninth submission, in its Memorial, set out its formal request for the Court to adjudge and declare the following:

> "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."[104]

20. Now, equally significant was Nicaragua's treatment of geology and geomorphology in the Memorial. Nicaragua devoted 80 pages of its Memorial to the issue of maritime delimitation. However, its discussion of what it termed "the relevance of geology and geomorphology" was contained in one sentence. Given that Nicaragua's new outer continental shelf claim rests exclusively on geology and geomorphology, Nicaragua's views on the relevance of these elements in its Memorial deserves to be recalled. This is what Nicaragua had to say:

> "The relevance of geology and geomorphology
>
> 3.58. 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."

21. That is about as clear an expression of position as you can have.

3. Nicaragua's new claim in its Reply

22. Now, in complete contradiction, Nicaragua now asks the Court to determine the geological and geomorphological continental margin and continental shelf boundary between the two Parties. But it is not just any continental shelf boundary that Nicaragua asks the Court to decide. Rather, it is one that extends in places over 400 nautical miles from Nicaragua's coasts.

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[102]MN, para. 3.3; and Submissions at pp. 266-267.

[103]Application of Nicaragua, para. 8; MN, para. 3.37.

[104]MN, pp. 266-267.

23. And under Nicaragua's thesis, Nicaragua is entitled to enormous outer continental shelf rights, while Colombia is not even entitled to the 200-nautical mile entitlements that the law accords to both its islands and its mainland.

24. Having summarized the evolution of Nicaragua's claims in the case, now let me turn to the reasons why this new claim — the continental shelf claim -- is inadmissible, in addition to being unsupported legally and factually.

(a) ***Nicaragua's new claim is inadmissible***

25. With respect to the admissibility of Nicaragua's new continental shelf claim, Nicaragua said nothing in its first round of pleadings. Ignorance may be bliss, Mr. President, but it scarcely makes the issue go away.

26. The starting-point for considering the admissibility of Nicaragua's continental shelf claim is obviously Article 40, paragraph 1, of the Court's Statute, which provides that "the subject of the dispute" shall be set out and indicated in the Application. And Article 38, paragraph 2, of the Rules of Court further stipulates that, when cases are brought by Application, the Application shall specify the precise nature of the claim. And on several occasions, the Court has emphasized that it deems these provisions "essential from the point of view of legal security and the good administration of justice" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69)[105].

27. Nicaragua's Application did specify the subject-matter of the dispute and the nature of Nicaragua's claim. Nicaragua asked the Court to determine the course of the single maritime boundary in accordance with international law principles applicable to single maritime boundaries.

28. And it developed the same position in its Memorial. No request was made in those submissions for the Court to delimit solely a continental shelf boundary based on alleged outer continental shelf rights or overlapping margins. To the contrary, as I just showed you, Nicaragua insisted that geology and geomorphology were irrelevant. The subject-matter of the dispute, as well as its legal basis, remained the delimitation of a single maritime boundary.

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[105]See also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108; *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 38.

29. That position was further maintained in Nicaragua's pleadings on Colombia's jurisdictional objections. As Professor Pellet emphasized as late as 2007, during the oral hearings on the preliminary objections:

> "Est-il besoin de rappeler que celui-ci est fixé par le demandeur, dans sa requête, et précisé, toujours par celui-ci, dans le mémoire, et non pas par le défendeur?"[106]

30. That is all very well. Nicaragua's request for a single maritime boundary was the case set out in Nicaragua's Application and its Memorial. And it was therefore the case that Colombia answered when it filed its Counter-Memorial in November 2008.

31. It was only afterwards that the entire nature of the dispute that Nicaragua asked the Court to decide changed. The newly-formulated continental shelf claim raises a whole host of new issues, some of which go to the legal basis of the claim, others of which are technical, that the Court would have to decide if it entertained Nicaragua's request. Those issues have nothing to do with the subject-matter of the dispute it earlier asked the Court to decide or with the legal principles that Nicaragua itself argued were applicable.

32. Your Court has repeatedly held that a new claim that transforms the subject of the dispute originally submitted is inadmissible. This principle is implicit in Article 40 of the Statute and Article 38 of the Rules of Court, and it was upheld by the Permanent Court in its Order of 4 February 1933, in the *Prince von Pless Administration* case where the Permanent Court stated:

> "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 . . ." (*P.C.I.J., Series A/B, No. 52*, p. 14).

33. The same principle was upheld by the Permanent Court in the *Société Commerciale de Belgique* case, where the Permanent Court explained the position as follows:

> "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, [which is now Article 38] of the Rules which provide that the Application must indicate the subject of the dispute."

And the Permanent Court went on to say:

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[106]CR 2007/17, p. 22, para. 4 (Pellet).

> "it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société Commerciale de Belgique, Judgment, P.C.I.J., Series A/B, No. 78*, p. 173)[107].

34. Now pronouncements also reflect the views of this Court as was expressed in the Judgment on the preliminary objections in the *Certain Phosphate Lands in Nauru* case. In that case, the Court also noted, with respect to the question whether a new claim can be considered to have been 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 which is the subject matter of the Application'."[108]

35. In the 2010 Judgment in the *Diallo* case, your Court had occasion to canvass the jurisprudence on the issue of admissibility of a new claim introduced at a late stage of the proceedings. The question, you said, is whether "although formally a new claim, the claim in question can be considered as included in the original claim in substance" (*ibid*., para. 40, citing both the *Nicaragua* v. *Honduras* and *Certain Phosphate Lands in Nauru* cases). To answer that question, the Court drew upon its earlier jurisprudence in articulating two tests: either the additional claim must be implicit in the Application, or it must arise directly out of the question which is the subject-matter of the Application[109].

36. And Nicaragua's new continental shelf claim meets neither of those two tests.

37. As to whether the new claim is implicit in the Application, a key factor is whether the legal basis of the two claims is the same — a point that the Court emphasized in the *Diallo* case[110]. In the present case, Nicaragua's new continental shelf claim has an entirely different legal basis than its original, single maritime boundary claim.

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

[108] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67; *Territorial Sea and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110; *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p. 18, para. 41; and see also *Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p. 36 and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1979*, p. 203, para. 72.

[109] *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 41.

[110] *Ibid*., paras. 43-44.

38. With respect to its original claim, Nicaragua stressed that the choice of the pertinent method of delimitation is essentially dependent on geography[111]. And, as I said, at that stage, according to Nicaragua, "geological and geomorphological factors have no relevance"[112]. And, as Professor Pellet insisted during the preliminary objections phase of this case, the Court should adopt the two-step process — drawing a provisional equidistance line and taking into account any special circumstances — it systematically employs in delimitation cases[113].

39. Nicaragua's new claim turns that position on its head. Nicaragua no longer requests a single maritime boundary based on the equidistance/relevant circumstances rule; in fact, Mr. Reichler argued the other day that this is not a proper case for equidistance[114]. Instead, Nicaragua has introduced a continental margin boundary based on five new factors: first, the allegation that Nicaragua possesses continental shelf entitlements that extend more than 200 nm from its coast; second, a determination of where the foot-of-slope points are located for determining the outer limits of Nicaragua's continental margin; third, a determination of the outer limits of that continental margin measured from the foot of the slope, and also taking into account the constraint criteria in the Convention; fourth, a determination of where the foot-of-slope points are located and sediment thickness for determining Colombia's geological margin; and fifth, an equal division of these so-called overlapping geological margins.

40. Now the rules for determining those kinds of issues are entirely different from the rules that Nicaragua relied on in its Application and Memorial. They depend on whether Nicaragua has established any outer continental shelf entitlements up to the limits of the margin under Article 76 of the 1982 Convention. It depends on where the foot of the slope and geologic margins of both countries lie, and whether Colombia can be systematically deprived of its *ipso facto* rights to a 200-mile continental shelf, and whether the equidistance/relevant circumstances rule can be discarded in favour of a claim based on a division of alleged overlapping continental margins. And

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[111]MN, para. 3.14.

[112]*Ibid*., para. 3.58.

[113]CR 2007/19, p. 15, para. 9 (Pellet).

[114]CR 2012/10, p. 28, para. 4 (Reichler).

I would suggest that, seen in this light, Nicaragua's claim cannot possibly be said to have been implicit in its Application or its Memorial.

41. Nor, by the same reasoning, does Nicaragua's new claim arise directly out of the question that was the subject-matter of the Application. The two subject-matters are entirely different: one, the determination of a single maritime boundary based on geography and the equidistance/relevant circumstances rule; the second, the new one, a continental shelf margin boundary based on putative outer continental shelf rights, geology, geomorphology and an "equal division of margins" theory.

42. In order for the Court to determine the single maritime boundary between the Parties — which was, after all, the original subject-matter of this case — it does not need to decide whether Nicaragua has continental shelf rights beyond 200 nautical miles or where the outer limits of either Colombia's or Nicaragua's geological continental margins are situated. All it has to do is to apply the equidistance/relevant circumstances rule in the relevant area for delimitation.

43. On Monday, Nicaragua's distinguished Agent argued that Nicaragua originally requested the Court to delimit all maritime areas between the Parties on the basis of international law, and that this is what Nicaragua continues to request now[115]: and, with respect, that is not quite accurate. Nicaragua originally requested the Court to delimit a single maritime boundary on the basis of the legal principles relating to single maritime boundaries. Moreover, this Court — as I mentioned — has repeatedly held that it is not sufficient that there should be links of a *general* nature between the original claim and the new claim[116]. Thus, the mere fact that both claims can be said *generally* to involve some kind of delimitation is not enough. For they do not concern the delimitation of the same legal régimes; they are based on different principles and rules of law, and they have completely different factual premises. Nicaragua's new claim cannot be viewed as included in substance in its original claim.

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[115]CR 2012/8, p. 24, para. 43 (Argüello Gómez).

[116]*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 41; and see also *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 36 and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72.

44. For years, the subject-matter of the case was the delimitation of a single maritime boundary. And I might add that that was also the situation in the *Nicaragua* v. *Honduras* case where it was Nicaragua itself that emphasized that a single delimitation line is and should be the general rule[117]. Nicaragua's new continental shelf claim is wholly extraneous to the original subject-matter of the dispute. And for these reasons, Mr. President and Members of the Court, that new claim is inadmissible. The subject-matter of this dispute remains the delimitation of a single maritime boundary: and that delimitation should be carried out between the relevant coasts of the Parties, not the irrelevant ones.

(b) ***Nicaragua's new claim has no legal or factual basis in any event***

45. Now, even if Nicaragua's new claim was admissible *quod non*, it would still face insurmountable hurdles. Let me explain.

46. Legally, this is because Nicaragua has not established any entitlement to outer continental shelf limits under the 1982 Convention that could form the basis of its "division of continental margins" claim line. Factually, the so-called "evidence" that Nicaragua has adduced in its Reply is woefully deficient, and would not even begin to satisfy the Commission on the Limits of the Continental Shelf.

47. Colombia's Rejoinder pointed out that Nicaragua had not established any entitlement to outer continental shelf rights because Nicaragua, which is a party to the Convention, has not made any submission to the Commission, and the Commission has therefore not made any recommendations on the basis of which Nicaragua can establish the outer limits of its continental shelf beyond 200 nautical miles that will then be "final and binding" under Article 76, paragraph 8, of the 1982 Convention[118].

48. Professor Lowe agreed that a State's legal entitlements to maritime areas must be established before delimitation can be considered[119]. He also stated that sovereign rights over the continental shelf arise automatically by operation of law — in other words, such rights exist *ipso*

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[117]MN, *Nicaragua* v. *Honduras* case, p. 94, para. 15.

[118]RC, para. 4.45.

[119]CR 2012/9, p. 23, para. 10 (Lowe).

facto and *ab initio*[120], and that there is no distinction between those rights whether one is dealing with continental shelf rights within 200 nautical miles of the coast or beyond 200 nautical miles.

49. However, my good friend then went on to argue that the existence of a continental shelf is essentially a question of fact, which he seemed to think Nicaragua had established, because he asserted that the geology speaks for itself[121]. Professor Lowe added that, even if Colombia is not a party to the 1982 Convention, that cannot deprive Nicaragua, which is, of its rights under the Convention and under general international law[122].

50. While Nicaragua undoubtedly has rights under the Convention, as a party to that Convention, it also has obligations. One of those obligations concerns the requirements it must fulfil if it wishes to establish any outer continental shelf limits beyond 200 nautical miles from its coast.

51. Both Dr. Cleverly and Professor Lowe referred to Article 76, paragraph 1, of the Convention, which provides that the continental shelf of a coastal State extends beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend up to that distance[123].

52. Nicaragua's new claim beyond 200 nautical miles from its baselines is based on what it says is the outer edge of its continental margin. What Professor Lowe avoided grappling with is that paragraph 8 of Article 76 sets out what a coastal State must do — one that is party to the Convention — in order to establish that outer edge of the continental margin in order for the outer limits of the continental shelf to become final and binding. And he also failed to address the implications of these requirements for Nicaragua's new continental shelf claim, which depends on a determination of the outer limits of the continental margin. Since neither Dr. Cleverly nor Professor Lowe quoted paragraph 8, of Article 76, I think it is appropriate to recall what it says. It is on the screen. The Court will no doubt be familiar with it:

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[120]CR 2012/9, p. 24, para. 15 (Lowe).

[121]*Ibid.*, p. 26, paras. 25 and 28 (Lowe).

[122]*Ibid.*, p. 24, para. 13 (Lowe).

[123]*Ibid.*, p. 13, para. 14 (Cleverly); and *ibid.*, p. 26, para. 25 (Lowe))

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

53. Now, those obligations are mandatory for States parties to the Convention, and they are absolutely critical for the present case. Nicaragua's new claim is based on a division of what Nicaragua says are the outer limits of its continental margin with the outer limits of Colombia's continental margin. Consequently, Nicaragua's whole "division of overlapping continental margins" claim depends expressly on determining the limits of each Party's continental margin using geology and geomorphology. Under Nicaragua's case, this necessarily means that your Court is being asked to determine and validate the outer limits of Nicaragua's claimed outer continental shelf beyond 200 nautical miles for purposes of a continental shelf delimitation between the Parties in this case. You are being asked to determine and validate the outer limits of Nicaragua's margin beyond 200 nautical miles.

54. The Law of the Sea Tribunal in the *Bangladesh* v. *Myanmar* case was crystal clear that this was the Commission's job, not that of a tribunal. To quote the relevant passage where the Tribunal addressed the process for a coastal State to establish outer continental shelf limits under Article 76, paragraph 8, of the Convention, the Tribunal ITLOS said:

> "Although this is a unilateral act, the opposability with regard to other States of the limits thus established depends upon satisfaction of the requirements specified in article 76, in particular compliance by the coastal State with the obligation to submit to the Commission information on the limits of the continental shelf beyond 200 nm and the issuance by the Commission of relevant recommendations in this regard. It is only after the limits are established by the coastal State on the basis of the recommendations of the Commission that these limits become 'final and binding'."[124]

55. Now, in your Judgment in the *Nicaragua* v. *Honduras* case, this Court alluded to the same process, where it stated in that Judgment:

> "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 reviewed by the Commission on the Limits of the Continental Shelf established thereunder."

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[124] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, Judgment of 14 March 2012*, para. 407.

(*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 759, para. 319.)

56. Nicaragua has made no submission to the Commission, let alone had it subject to the Commission's examination, validation or correction, and issuance of recommendations on the basis of which Nicaragua could establish outer limits of the continental shelf margin that are final and binding. It follows that the putative outer limits of the margin that Nicaragua advances in this case for its claim are not, and cannot possibly be, opposable to Colombia.

57. All that Nicaragua has done is to file preliminary information. Dr. Oude Elferink asserted that this was done "in compliance with the requirements contained in the 1982 Convention"[125]. But that is not right. Preliminary information, by definition, will not even be considered by the Commission. Such information cannot be deemed to be in compliance with the Convention and it certainly does not meet the requirements of Article 76, paragraph 8. All it does is that it tolls in a sense the statute of limitations for making a filing pursuant to a decision that the State parties took in 2008. It is not in compliance with Article 76 of the Convention.

58. It is curious that Nicaragua did not file the preliminary information with its Reply, although the Reply does contain the technical annexes to that preliminary information. The preliminary information was dated August 2009 and the Reply was filed on 18 September 2009.

59. Notwithstanding this, the preliminary information that Nicaragua did ultimately file, I think, in April 2010 quite clearly states "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"[126].

60. That statement has conveniently been left out of the Nicaragua's Reply, and was not mentioned by Dr. Cleverly in his presentation the other day. It is also a vast understatement. The material that Nicaragua submitted, both as preliminary information, and under Annexes 16-18 to its Reply, is utterly insufficient to establish any outer continental shelf limits under the Commission's Guidelines, which are the fundamental source of instruction for the technical implementation of Article 76.

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[125]CR 2012/8, p. 27, para. 6 (Oude Elferink).

[126]Nicaragua's Preliminary Information to the Commission, August 2009, para. 21.

61. Let me start with Nicaragua's foot-of-the-slope points which control the entire course of what Nicaragua claims is the outer limit of its continental shelf — its continental margin and continental shelf.

62. I have to say Mr. President, I feel a little bit like, in undertaking this task, like Sir Elihu Lauterpacht. I could remember in 1984, in the *Libya/Malta* case, when he stood at this podium dealing with plate tectonics in the Libyan rift zone and geology and geomorphology, and he said he felt like Dr. Who in a time machine. But I will do my best. Nicaragua's foot-of-the-slope points, which control the entire course of what Nicaragua says of the outer limits of its margin shelf. There are five such points listed in Annex 18 to Nicaragua's Reply. Annex I to that annex states that four of those points are "in principle" suitable for inclusion in a full submission to the Commission. Mr. President, when somebody tells you that something is "in principle" suitable, you can be pretty sure that there are caveats attached. If there is one thing I learned when I moved to France, that one somebody says something is possible "en principe", *faites attention*. And that is certainly the case here. As for the fifth point — foot-of-slope 1 (FOS-1) — it is not even "in principle" suitable for an outer continental shelf submission, as Nicaragua concedes. And yet this unsuitable point (FOS-1) — one that Dr. Cleverly elected not to discuss on Tuesday — controls the entire southern limits of Nicaragua's claimed outer continental shelf margin.

63. To put the matter in as simple terms as I can, Nicaragua's foot-of-slope point 1 is based on a gridded bathymetric model, not a genuine "dataset" as Nicaragua misleadingly labels it. Section 5.2.3 of the Commission's Guidelines requires applicant States to provide a full technical description of the bathymetric database used for determining the foot of the slope, and Nicaragua has not provided any such description of the underlying data or any of that data. Moreover, the information Nicaragua does rely on uses an opaque mixture of shipboard measurements and satellite altimeter derived bathymetric data, the latter of which is, under Sections 4.2.6 and 5.2.3 of the Commission's Guidelines, are not regarded by the Commission as admissible. Thus, the first foot of the slope point is thoroughly unsubstantiated, and would not begin to pass muster with the Commission.

64. Nicaragua's other four foot-of-the-slope points suffer from similar defects. They do not comply with Sections 4.2.7 and 5.2.3 of the Commission's Guidelines because there is no full technical description of the database included either in Nicaragua's Reply or in its Preliminary Information. What is more, Nicaragua admits that foot-of-slope point 5 is based on limited data, and that it relies on what it says is "evidence to the contrary" for the identification of that point[127]. That "evidence to the contrary" is neither described nor substantiated in any way.

65. Nicaragua's technical annex to its Reply states that its foot-of-slope points "should be treated as indicative only". And it adds "there are issues with the data quality in a few areas"[128] — that is another understatement. This kind of information is hardly a valid basis on which to formulate a claim to outer continental shelf limits, and it would never be accepted as such by the Commission — which, typically, for each submission, engages in a detailed analysis and cross-checking of data before it is satisfied that there is a sufficient basis to issue recommendations.

66. Given that Nicaragua's foot of the slope points are fundamentally deficient, it follows that the outer limits of Nicaragua's alleged continental margin, which depend on those points, are also devoid of support. What is more, Nicaragua's construction of the 2,500 m plus 100-mile constraint line for its limits does not adequately conform with the criteria laid out by the Commission. In short, Nicaragua has not established any outer limits of its continental margin which are indispensible for its "division of margins" claim, its new claim in this case.

67. Professor Lowe argued that approval by the Commission does not create continental shelf rights and that the absence of such approval does not cancel continental shelf rights[129]. With respect, that argument misses the point.

68. Paragraph 8 of Article 76 makes it clear that the coastal State establishes the limits of its shelf — that is right, the coastal State establishes the limits of its shelf. But — and it is an important "but" — this can only be done after making a full submission to the Commission and on the basis of the Commission's subsequent recommendations. Then, and only then, do those limits become "final and binding". As the ITLOS Tribunal stated, before that time they are not opposable

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[127]RN, Ann. 1 to Ann. 18, p. 68.

[128]*Ibid.*, Vol. II, Ann. 1 to Ann. 18, p. 61.

[129]CR 2012/9, p. 33, para. 62 (Lowe).

to other States. Yet, Nicaragua's claim in this case precisely seeks to impose those limits on Colombia by making them the basis of its new continental shelf boundary claim line.

69. Nor is it a question of the Commission cancelling continental shelf rights. A party to the Convention has no continental shelf rights up to the outer limits of the margin beyond 200 nautical miles until the Article 76 procedures have been satisfied. Nicaragua is simply trying to short-circuit the obligations that are incumbent upon it as a party to that Convention.

70. Professor Lowe then argued that the pendency of a recommendation from the Commission did not preclude delimitation by ITLOS in the *Bangladesh* v. *Myanmar* case[130] —there is no pendency of any submission in this case, because Nicaragua has not made one. But he argued that the pendency of a recommendation by the Commission in *Bangladesh* v. *Myanmar* did not preclude the limitation by ITLOS. But that case bears no resemblance to our case.

71. In *Bangladesh-Myanmar*, the Tribunal did not need to determine the outer limits of either State's continental margin because the delimitation was between States with adjacent coasts. The Tribunal had already applied the "equidistance/relevant circumstances" rule to the delimitation of a single maritime boundary up to the 200-mile limit. For purposes of delimiting areas beyond, the Tribunal simply prolonged the delimitation line along the same azimuth using the same methodology, and then placed an arrow at the end of the line to indicate that it would continue until it reaches the area where the rights of third States may be affected. It did not have to determine any outer limits, outer edge of the margin to do that. Consequently, the Tribunal's delimitation line in *Bangladesh* v. *Myanmar* had nothing to do with geology and geomorphology. It was based on the equidistance/relevant circumstances rule that Nicaragua wants no part of in this case.

72. Our case is fundamentally different. It involves States with opposite coasts — albeit the wrong coast in Colombia's case — and a boundary claim by Nicaragua that does depend on identifying the outer limits of its margin.

73. Nicaragua is seeking to bypass the requirements set out in the Convention by having your Court do the Commission's job based on information that the Commission would never find

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[130]CR 2012/9, p. 53, para. 64 (Lowe).

acceptable. This is completely inappropriate, quite apart from the fact that it has nothing to do with the subject-matter of the dispute set out in Nicaragua's Application.

74. As for Nicaragua's description of Colombia's so-called foot-of-the-slope points and thickness of sediment calculations, which are used to calculate the supposed outer limit of Colombia's continental margin, that exercise lacks any legal validity or factual substantiation.

75. Legally, Dr. Oude Elferink suggested that Colombia's outer limits determined on the basis of paragraphs 4 to 7 of Article 76 would be located well within 200 nautical miles of Colombia's mainland coast: and accordingly, for its claim, that is what Nicaragua has said it has calculated.

76. But that is completely irrelevant. Paragraphs 4 to 7 of Article 76 only concern establishing the outer limits of the margin and the shelf beyond 200 miles, not within 200 miles. Colombia has an *ipso facto* entitlement to a continental shelf measured from its mainland, as well as from its islands: paragraphs 4 to 7 are irrelevant. As I said, Colombia has an *ipso facto* continental shelf, not to mention the EEZ rights, not simply from its mainland but from its islands, measuring 200 miles. And in this respect, Professor Lowe again repeated the error of his colleagues when he asserted that Colombia's islands lie on the natural prolongation of Nicaragua's landmass, not the natural prolongation of Colombia[131]. But that simply begs the question. Colombia's islands, as we have heard, have their own independent continental shelf entitlements and their own natural prolongation under international law.

77. My colleague then argued that the notion that 200-mile continental shelf rights prevail over a continental shelf entitlement based on the geological natural prolongation is baseless. Now that is not the view of States that have made outer continental shelf submissions.

78. There have been some 32 filings concerning the outer continental shelf made to the Commission that do not involve prior agreements, but which approach other States 200-mile limits — 18 full submissions, 14 submissions of Preliminary Information. In all but two of those 32 cases, the States concerned — and they include States such as France, Japan, New Zealand, the United Kingdom — have avoided encroaching on the 200-mile limits of other States: and

[131]CR 2012/9, p. 28, para. 33.

Nicaragua is one of the two exceptions. There is nothing in the Convention suggesting that the intention of Article 76 was to enable States by means of outer continental shelf submissions, and particularly ones that have not followed the procedures of the Convention, to encroach on other States 200-mile limits. I would suggest it is thus no accident that there is no other State in this part of the Caribbean that has made an outer continental shelf claim, because there are no maritime areas here that are beyond 200 nautical miles of the nearest land territory.

79. Factually, going back to Colombia's so-called geologic margin, the only "evidence" Nicaragua has furnished to calculate Colombia's continental margin is a single bathymetric profile used to "identify" one foot of slope point, and one sediment thickness illustration contained at figure 3-8 of the Reply. That one bathymetric profile is again based on information — it is known as ETOPO 2 for those who are interested — which would be considered inadmissible and wholly insufficient by the Commission under its Guidelines. The sediment thickness profile is said to be based on another dataset, which is actually not a "dataset". It is a grid of interpretive values derived from a mixture of datasets which are not provided by Nicaragua as the primary, underlying, detailed, data that the Commission would insist on. It too would be considered inadmissible by the Commission.

80. What is also extraordinary about Nicaragua's presentation on Colombia's continental margin is that Nicaragua posits 17 foot-of-slope points off Colombia's coast without giving any data whatsoever for 16 of them. The data for the 17th is utterly insufficient, as I said, but there is *nothing* for the other 16. Yet, those foot-of-slope points form the whole predicate for Nicaragua's location — which is supposed to be, it is purported to be — the limits of Colombia's geologic margin. And the limits of that margin — Colombia's geologic margin — in turn form the outer parameter to Nicaragua's "division of margins" claim line. The exercise is utterly superficial, legally and factually, groundless.

81. As I said, all this has led Nicaragua, in the Preliminary Information it submitted to the Commission, to admit that some of the data and profiles do not satisfy the exacting standards required by the Commission for a full submission as detailed in the Commission's Guidelines (Preliminary Information of Nicaragua, para. 21).

82. Mr. President, Members of the Court, if the data that Nicaragua relies on in this case would not satisfy the standards required by the Commission, how are they supposed to satisfy the Court? Does Nicaragua consider that the Court has less exacting standards?

83. Professor Lowe ended his intervention by stating that Colombia criticizes Nicaragua's methodology, but does not challenge Nicaragua's delimitation of its shelf or its conclusion[132].

84. And again, with the greatest respect to my good friend, that is pure wishful thinking. Colombia challenges *everything* about Nicaragua's new continental shelf claim. I have shown that that claim is inadmissible, that Nicaragua has not established any outer continental shelf entitlements up to the limits of what it says is the margin, that its conclusions on the limits of the margin are technically unsubstantiated and would be unacceptable to the Commission, that the outer limits of the margin posited by Nicaragua cannot be opposable to Colombia or indeed to any other State, and that Nicaragua's speculation as to the limits of Colombia's margin are legally irrelevant and wholly undocumented.

4. Conclusions

85. Mr. President; I come to my concluding remarks.

86. In its oral arguments on jurisdiction, Nicaragua's counsel stressed the following:

> "dans toute affaire de délimitation maritime, la Cour voudra certainement procéder comme elle le fait désormais systématiquement :
>
> — tracer une ligne provisoire d'équidistance ;
>
> — prendre en considération les «circonstances spéciales» qui pourraient être de nature à ajuster cette ligne ;"[133]

Nicaragua's new claim does nothing of the kind.

87. The real question is: Why has Nicaragua advanced such a radically different, and inherently untenable, claim so late in its Reply?

88. And I have to say, Nicaragua's written pleadings, and its pleadings earlier this week, have shed little light on this question. In its Reply, Nicaragua acknowledged that the Court's

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[132]CR 2012/9, p. 36, para. 79.

[133]CR 2007/19, p. 20, para. 9 (Pellet).

Judgment on jurisdiction did not affect Nicaragua's request for a maritime delimitation. That is obviously right. There was nothing in the Court's Judgment on jurisdiction that in any way justified Nicaragua changing the entire subject-matter of the case.

89. The real explanation for Nicaragua's shift of position lies elsewhere. What we do know is that, after the filing of Colombia's Counter-Memorial, Nicaragua realized that its initial single maritime boundary claim was groundless legally. At the same time, Nicaragua has been desperate to try to keep Colombia's mainland coast in play in order to push the delimitation line as far east as possible at the expense of the legal entitlements of Colombia's islands and even its mainland coast. And the result we have is this new continental shelf claim.

90. Perhaps Nicaragua believes the Court will simply "split the difference", and that it is thus tactically expedient for it to advance a new claim lying far to the east of its original claim, which was already exaggerated. Colombia trusts the Court will not be misled. This Court has made it abundantly clear in the past that maritime delimitation is not some exercise in distributive justice[134], and that their geography is not to be refashioned[135]. Delimitation is a legal process, and the Court has repeatedly articulated the governing rule that applies — the "equidistance/special circumstances" rule.

91. At the end of the day, Nicaragua is left with no positive case. Its original single maritime boundary claim line has been discredited and abandoned. Its new continental shelf claim is inadmissible, legally flawed, and factually unsubstantiated.

92. The relevant coasts for delimitation between the Parties do not include Colombia's mainland coast. The relevant coasts remain the coasts between the western string of islands forming the San Andrés Archipelago and Nicaragua's coast. There is no reason why the rules of delimitation that have been developed by this Court and articulated by arbitral tribunals (and even endorsed by Nicaragua at the jurisdictional phase of this case) cannot be applied in this context.

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[134] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 40, para. 46.

[135] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 49, para. 91.

93. Now, since that is a matter that Professor Crawford will address in the next presentation, Mr. President, and given the time, I wonder if Professor Crawford and the rest of us might be fortified by some lunch before we turn to this presentation. Thank you to the Court for its attention.

The PRESIDENT: Thank you very much for your presentation. I wish you all *bon appétit*. The Court will meet again this afternoon between 3 p.m. and 6 p.m. when Colombia will conclude its first round of oral argument. The Court is adjourned.

The Court rose at 12.55 p.m.

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