INTERNATIONAL COURT OF JUSTICE

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

(NICARAGUA v. COLOMBIA)

PRELIMINARY OBJECTIONS OF THE REPUBLIC OF COLOMBIA

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Chapter 1

INTRODUCTION

1.1. Colombia respectfully affirms that the International Court of Justice (the Court) cannot adjudicate on the matters brought by Nicaragua's Application of 16 September 2013. In accordance with Article 79 of the Rules of Court, this Pleading sets out Colombia's preliminary objections to the jurisdiction of the Court and also to the admissibility of the claims in Nicaragua's Application.

1.2. In its Application, Nicaragua has requested the Court to adjudge and declare,

> "First: The precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012.
>
> Second: The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast."[1]

[1] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia),* Application of the Republic of Nicaragua instituting proceedings against the Republic of Colombia, 16 Sept. 2013 ("Application"), p. 8, para. 12.

1.3. In its Application, Nicaragua purports to base the jurisdiction of the Court on two grounds. The first is that

> "[t]he jurisdiction of the Court in this case is based on Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá) of 30 April 1948."[2]

As an additional ground,

> "Nicaragua submits that the subject-matter of the present Application remains within the jurisdiction of the Court established in the case concerning the Territorial and Maritime Dispute (*Nicaragua v. Colombia*) of which the Court was seised by the Application dated 6 December 2001, submitted by Nicaragua, in as much as the Court did not in its Judgment dated 19 November 2012 definitively determine the question of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles from the Nicaraguan coast, which question was and remains before the Court in that case."[3]

1.4. Colombia submits that neither of the grounds which Nicaragua invokes affords it jurisdiction in the instant case. Moreover, its Application is barred by the *res judicata* effect of the Court's Judgment of 19 November 2012. Nicaragua's Application also fails jurisdiction and admissibility on other grounds as detailed below.

1.5. Chapter 2 of this pleading reviews the history of this dispute beginning in 2001, the Judgment of the Court of 19 November 2012 in *Territorial and Maritime Dispute*, and

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[2] Application, at para. 8.

[3] *Ibid*., at para. 10.

Colombia's denunciation of the Pact of Bogotá on 27 November 2012.

1.6. Chapter 3 presents Colombia's first preliminary objection. It demonstrates that the Court lacks jurisdiction under the Pact of Bogotá because Colombia submitted its letter of denunciation of the Pact of Bogotá on 27 November 2012 and, in accordance with Pact Article LVI, the denunciation had immediate effect with respect to any new applications brought against Colombia.

1.7. Chapter 4 presents Colombia's second preliminary objection. It demonstrates that Nicaragua's effort to found jurisdiction for this case on an alleged continuing jurisdiction after the Court's Judgment of 19 November 2012 fails because, in the absence of an express reservation of all or some of its jurisdiction in that Judgment, the Judgment does not grant the Court a continuing or perpetual jurisdiction.

1.8. Chapter 5 presents Colombia's third preliminary objection. It demonstrates that because Nicaragua's claim here is identical to its claim in the previous case, the Judgment of 19 November 2012 constitutes a *res judicata* which bars a reopening and relitigation of the claim.

1.9. Chapter 6 presents Colombia's fourth preliminary objection. It demonstrates that the Court lacks jurisdiction over a claim which is, in fact, an attempt to appeal and revise the

Court's Judgment of 19 November 2012 without complying with the requirements of the Statute.

1.10. Chapter 7 presents Colombia's fifth preliminary objection which demonstrates that the first and second requests of Nicaragua's Application are inadmissible because the Commission on the Limits of the Continental Shelf (hereafter "CLCS") has not made the requisite recommendation.

1.11. Chapter 8 summarizes Colombia's objections to jurisdiction and admissibility, and is followed by Colombia's submissions.

Chapter 2

HISTORY OF THE PROCEEDINGS IN THE TERRITORIAL AND MARITIME DISPUTE (NICARAGUA *v.* COLOMBIA) CASE, THE JUDGMENT OF 19 NOVEMBER 2012, AND ITS AFTERMATH

A. The Phases of Adjudication and the Preceding Judgments

2.1. On 6 December 2001, Nicaragua instituted proceedings against Colombia in respect of a dispute relating to title to territory and maritime delimitation in the Caribbean Sea.

2.2. Within the time-limit afforded to it by the Rules of Court, on 21 July 2003 Colombia raised preliminary objections which were decided in a Judgment dated 13 December 2007. The Court upheld Colombia's objection to its jurisdiction in so far as it concerned sovereignty over the islands of San Andrés, Providencia and Santa Catalina. The Court specifically said:

> "In the light of the foregoing, the Court finds that it can dispose of the issue of the three islands of the San Andrés Archipelago expressly named in the first paragraph of Article I of the 1928 Treaty at the current stage of the proceedings. That matter has been settled by the Treaty. Consequently, Article VI of the Pact is applicable on this point and therefore the Court does not have jurisdiction under Article XXXI of the Pact of Bogotá over the question of sovereignty over the three named islands. Accordingly, the Court upholds the first preliminary objection raised by Colombia in so far as it concerns the Court's jurisdiction as regards the

> question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina."[4]

2.3. The Court also concluded that it had jurisdiction under Article XXXI of the Pact of Bogotá – the same jurisdictional basis sought by Nicaragua in its present Application – to adjudicate the dispute concerning sovereignty over a group of Colombian islands in the Caribbean – different from those already mentioned – and upon the maritime delimitation between the Parties.[5]

2.4. On 25 February 2010 and 10 June 2010, respectively, the Republic of Costa Rica and the Republic of Honduras each filed an Application for permission to intervene pursuant to Article 62 of the Statute of the Court. In separate judgments dated 4 May 2011, the Court denied permission to intervene to either Costa Rica or Honduras, because, in its opinion, each had failed to demonstrate that it possessed an interest of a legal nature which might be affected by the decision in the main proceedings.[6]

2.5. The written proceedings on the merits consisted of two full rounds of pleadings. After the closing of this phase, public hearings were held between 23 April and 4 May 2012.

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[4] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 861, para. 90.

[5] *Ibid.*, p. 876, para. 142 (3) *(a)* and *(b)*.

[6] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011,* p. 348 at p. 373, paras. 90-91; *Ibid.*, *Application by Honduras for Permission to Intervene* p. 420 at p. 444, paras. 75-76.

2.6. In its Application in that case, Nicaragua 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."[7]

Throughout both the written and oral proceedings, Nicaragua requested the Court to make a full delimitation of all of its overlapping maritime entitlements with those of Colombia.

2.7. In its Memorial, Nicaragua requested the Court to effect a delimitation between "the mainland coasts of Nicaragua and Colombia" by means of a "single maritime boundary in the form of a median line between these mainland coasts."[8]

2.8. In its Reply, Nicaragua expressly defined the coordinates on the limits of its alleged continental shelf beyond 200 nautical miles from its coast, requesting the Court to adjudicate upon its alleged entitlements in said area.[9]

2.9. At the hearing of 23 April 2012, in the opening statement made by the Agent of Nicaragua in the oral proceedings – which was quoted by the Court in its Judgment – regarding the method

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[7] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Application of Nicaragua, p. 8, para. 8.

[8] *Ibid.,* Memorial of Nicaragua (Vol. I), pp. 266-267, Submission (9).

[9] *Ibid.,* Reply of Nicaragua (Vol. I), pp. 239-240, Submission (3).

and extent of the delimitation to be effected, Nicaragua submitted:

> "On a substantive level, Nicaragua originally requested of the Court, and continues to so request, that *all maritime areas* of Nicaragua and Colombia be delimited on the basis of international law; that is, in a way that guarantees to the Parties an equitable result.
>
> (…)
>
> But whatever method or procedure is adopted by the Court to effect the delimitation, *the aim of Nicaragua is that the decision leaves no more maritime areas pending delimitation between Nicaragua and Colombia*. This was and is the main objective of Nicaragua since it filed its Application in this case."[10]

2.10. At the hearing of 1 May 2012, Nicaragua insisted on a delimitation of all maritime entitlements between itself and Colombia, emphasizing that the appropriate form of delimitation was "a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties."[11] This Submission I(3) was deliberated by the Court in terms of its admissibility, and also, in terms of its merits.

2.11. For its part, Colombia, at all stages of the proceedings in the merits, rejected Nicaragua's contention on what was to be

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[10] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 671, para. 134; *Ibid., Public Sitting 23 April 2012, CR2012/8*, pp. 24-25, paras. 43-44 (Nicaraguan Agent). (Emphasis added)

[11] *Ibid., Public Sitting 1 May 2012, CR2012/15 Corr.*, p. 50, Final Submission I(3) (Nicaraguan Agent).

understood as the appropriate form of delimitation. Colombia argued that the delimitation was to be effected between Nicaragua's mainland coast and the entitlements generated by Colombia's islands in the Caribbean.[12]

2.12. Colombia also requested the Court to draw a single maritime boundary delimiting the exclusive economic zone and the continental shelf between both States.[13]

2.13. After the closing of the oral proceedings, on 19 November 2012, the Court delivered its Judgment on the merits.[14]

2.14. The Judgment of 19 November 2012 on the merits of the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* consists of six sections and the operative part. The order in which the questions at issue were addressed by the Court bears relevance to the object and substance of these preliminary objections.

2.15. Section I dealt with geography.[15] It is a descriptive chapter that served as a basis both for determining sovereignty

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[12] See, *inter alia*, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Counter-Memorial of Colombia (Vol. I), p. 425, Submission *(b)*; Rejoinder of Colombia (Vol. I), p. 337, Submission *(b)*; *Public Sitting 4 May 2012, CR2012/17*, p. 39, Final Submission *(c)* (Colombian Agent).

[13] *Ibid., Public Sitting 4 May 2012, CR2012/17*, p. 39, Final Submission *(c)* (Colombian Agent).

[14] *Ibid., Judgment, I.C.J. Reports 2012*, pp. 624-720.

[15] *Ibid., Judgment, I.C.J. Reports 2012*, pp. 637-641, paras. 18-24.

over the cays in dispute as well as for drawing the maritime delimitation between Nicaragua and Colombia.

2.16. In it, the Court described the distance of San Andrés, Providencia and Santa Catalina in relation to both the Nicaraguan and Colombian mainland coasts. It said:

> "The islands of San Andrés, Providencia and Santa Catalina are situated opposite the mainland coast of Nicaragua. San Andrés is approximately 105 nautical miles from Nicaragua. Providencia and Santa Catalina are located some 47 nautical miles north-east of San Andrés and approximately 125 nautical miles from Nicaragua. All three islands are approximately 380 nautical miles from the mainland of Colombia."[16]

2.17. Section II dealt with sovereignty over the seven islands in dispute.[17] In this regard, the Court noted:

> "… under the terms of the 1928 Treaty, Colombia has sovereignty over 'San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago'…"[18]

2.18. With respect to the sovereignty over the other islands of the San Andrés Archipelago claimed by Nicaragua, the Court confirmed Colombia's sovereignty, stating that:

> "Having considered the entirety of the arguments and evidence put forward by the Parties, the Court

[16] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 638, para. 22.
[17] *Ibid*., pp. 641-662, paras. 25-103.
[18] *Ibid*., p. 646, para. 42.

> concludes that Colombia, and not Nicaragua, has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla."[19]

2.19. Section III, dealt with the admissibility of Nicaragua's claim for a delimitation of an alleged continental shelf extending beyond 200 nautical miles from its coasts.[20]

2.20. The Court held that the fact that it was a new claim – having only been introduced in the Reply – did not "in itself, render the claim inadmissible."[21] The Court concluded that the claim to an extended continental shelf fell within the dispute between the Parties relating to maritime delimitation and did not transform the subject-matter of that dispute but, rather, arose directly out of that dispute. The new submission still concerned the delimitation of the continental shelf – although on different legal grounds – and, thus, the Court held that the claim contained in Nicaragua's final submission I(3) was admissible.[22]

2.21. Section IV dealt with the "Consideration of Nicaragua's claim for a delimitation of a continental shelf extending beyond 200 nautical miles."[23] Here, the Court examined the question as to whether it was in a position to determine "a continental shelf boundary dividing by equal parts the overlapping entitlements to

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19 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 662, para. 103.
20 *Ibid*., pp. 662-665, paras. 104-112.
21 *Ibid.*, pp. 664-665, para. 109.
22 *Ibid.*, p. 665, para. 112.
23 *Ibid.*, pp. 665-670, paras. 113-131.

a continental shelf of both Parties" as requested by Nicaragua in its final submission I(3).[24]

2.22. The Court analysed the jurisprudence referred to by Nicaragua in support of its claim for a continental shelf delimitation, in particular, the Judgment of 14 March 2012 rendered by ITLOS in the case concerning the *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* and the Judgment of 8 October 2007 in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*.

2.23. With regard to the Judgment by ITLOS, the Court summarized the geographical circumstances and consequent conclusions of the Tribunal, evidencing essential differences with the geographical context in the case under adjudication. The Court recalled that in the ITLOS Judgment, the Tribunal did not determine the outer limits of the continental shelf beyond 200 nautical miles; it extended the line of the single maritime boundary beyond the 200-nautical-mile limit until it reached the area where the rights of third States may be affected. In doing so, the Tribunal underlined that, in view of the fact that a thick layer of sedimentary rocks covers practically the entire floor of the Bay of Bengal, the Bay presents a "unique situation" as

[24] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 665, para. 113.

acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea.[25]

2.24. The Court concluded that,

> "…given the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention."[26]

The Court observed that Nicaragua had submitted to the Commission only "Preliminary Information" which, by its own admission, fell short of meeting the requirements incumbent upon coastal States, to submit information on the limits of the continental shelf beyond 200 nautical miles in accordance with Article 76(8) of UNCLOS. The Court noted that Nicaragua provided the Court with the annexes to this "Preliminary Information" and stated that the "Preliminary Information" in its entirety was available on the Commission's website, providing the necessary reference.[27]

2.25. The Court recalled:

> "…that in the second round of oral argument, Nicaragua stated that it was 'not asking [the Court] for a definitive ruling on the precise location of the outer limit of Nicaragua's continental shelf'. Rather, it was 'asking [the Court] to say that Nicaragua's continental shelf entitlement is divided from Colombia's continental shelf entitlement by a

[25] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 668, para. 125.
[26] *Ibid.*, pp. 668- 669, para. 126.
[27] *Ibid.*, p. 669, para. 127.

> delimitation line which has a defined course'. Nicaragua suggested that 'the Court could make that delimitation by defining the boundary in words such as "the boundary is the median line between the outer edge of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia's 200‑mile zone"'.
>
> This formula, Nicaragua suggested, 'does not require the Court to determine precisely where the outer edge of Nicaragua's shelf lies'. The outer limits could be then established by Nicaragua at a later stage, on the basis of the recommendations of the Commission."[28]

2.26. The Court proceeded to examine this "general formulation" proposed by Nicaragua and decided that since Nicaragua had

> "…not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it."[29]

2.27. Therefore, after evaluating Nicaragua's evidence, the Court concluded that "Nicaragua's claim contained in its final submission I(3) cannot be upheld."[30]

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[28] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 669, para. 128.
[29] *Ibid*., p. 669, para. 129.
[30] *Ibid.*, p. 670, para. 131 and p. 719, para. 251 (3).

2.28. In Section V of the Judgment, entitled "Maritime Boundary", the Court considered the maritime delimitation to be effected between Nicaragua and Colombia. It followed its usual three-stage procedure and proceeded to make a final delimitation between all overlapping maritime entitlements of the Parties by means of a "single maritime boundary" line.[31]

2.29. For the purposes of determining the "single maritime boundary", the Court determined the relevant coasts of the Parties, that is, those coasts the projections of which overlapped.[32] The Court found that the relevant coast of Nicaragua was its whole mainland coast "which projects into the area of overlapping potential entitlements and not simply those parts of the coast from which the 200-nautical mile entitlement will be measured", with the exception of the short stretch of coast near Punta de Perlas facing due south and therefore not abutting the area of overlapping entitlements.[33]

2.30. The Court held that,

> "[d]epending on the configuration of the relevant coasts in the general geographical context, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand."[34]

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[31] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* pp. 670-717, paras. 132-247 and pp. 719-720, para. 251 (4) and (5).

[32] *Ibid*., pp. 674-681, paras. 140-154.

[33] *Ibid.*, p. 678, para. 145.

[34] *Ibid.,* p. 682, para. 157.

2.31. The Court concluded and described the relevant area as follows:

> "The relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap. It follows that, in the present case, the relevant area cannot stop, as Colombia maintains it should, at the western coasts of the Colombian islands. Nicaragua's coast, and the Nicaraguan islands adjacent thereto, project a potential maritime entitlement across the sea bed and water column for 200 nautical miles. That potential entitlement thus extends to the sea bed and water column to the east of the Colombian islands where, of course, it overlaps with the competing potential entitlement of Colombia derived from those islands. Accordingly, the relevant area extends from the Nicaraguan coast to a line in the east 200 nautical miles from the baselines from which the breadth of Nicaragua's territorial sea is measured."[35]

2.32. The Court recalled that

> "…the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap. Accordingly, if either Party has no entitlement in a particular area, whether because of an agreement it has concluded with a third State or because that area lies beyond a judicially determined boundary between that Party and a third State, that area cannot be treated as part of the relevant area for present purposes."[36]

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[35] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 683, para. 159.

[36] *Ibid.*, pp. 685-686, para. 163.

2.33. In addition to addressing the relevant area, the Court made several references to the entitlements generated by the Colombian islands in the Caribbean Sea. The Court recalled that "*[t]he Parties agree that San Andrés, Providencia and Santa Catalina are entitled to a territorial sea, exclusive economic zone and continental shelf.*"[37]

2.34. Then, in examining the overall geographic context as a relevant circumstance, the Court agreed with Colombia that

> "…any adjustment or shifting of the provisional median line *must not have the effect of cutting off Colombia from the entitlements generated by its islands in the area to the east of those islands.*"[38]

Later in its consideration of what adjustments were required to the provisional median line – in order to produce an equitable result and prevent said cut-off effect – the Court reiterated that "those islands generate an entitlement to a continental shelf and exclusive economic zone."[39]

2.35. As for Serranilla and Bajo Nuevo, the Court indicated that it was not called upon to determine the scope of their maritime entitlements. In any event, in terms of the relevant area defined in the case, i.e., that within 200 nautical miles of Nicaragua's coast, the Court also noted that the 200-nautical-mile entitlements projecting from San Andrés, Providencia and

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[37] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, pp. 686-688, para. 168. (Emphasis added)
[38] *Ibid.*, p. 704, para. 216. (Emphasis added)
[39] *Ibid.*, p. 708, paras. 229-230.

Santa Catalina would entirely overlap any similar entitlement found to appertain to Serranilla or Bajo Nuevo.[40]

2.36. The Court concluded that, taking into account all the circumstances of the case, including the need to avoid a cut-off effect on either State – and the ensuing requirement for San Andrés, Providencia and Santa Catalina not to be cut off from the entitlement to an exclusive economic zone and continental shelf to their east, even in the area within 200 nautical miles of their coasts but beyond 200 nautical miles of the Nicaraguan baselines[41] – the result achieved by the application of the line provisionally adopted in the previous section of the Judgment did not produce such a disproportionality as to create an inequitable result.[42]

2.37. In determining the course of the maritime boundary, the Court considered that

> "…it must take proper account both of the disparity in coastal length and the need to avoid cutting either State off from the maritime spaces into which its coasts project. In the view of the Court, an equitable result which gives proper weight to those relevant considerations is achieved by continuing the boundary line out to the line 200 nautical miles from the Nicaraguan baselines along lines of latitude."[43]

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[40] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 689, para. 175.
[41] *Ibid.*, pp. 716-717, para. 244.
[42] *Ibid.*, p. 717, para. 247.
[43] *Ibid.*, p. 710, para. 236.

2.38. The resulting line was illustrated on sketch-map No. 11 ("Course of the maritime boundary"), accompanying the Judgment.[44]

2.39. For the purposes of the present proceedings, the relevant paragraphs of the operative part of the Judgment with respect to maritime delimitation read as follows:

> "251. For these reasons,
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> The Court,
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> (…)
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> (2) By fourteen votes to one,
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> *Finds* admissible the Republic of Nicaragua's claim contained in its final submission I(3) requesting the Court to adjudge and declare that '[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties';
>
> in favour: *President* Tomka; *Vice-President* Sepulveda-Amor; *Judges* Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Sebutinde; *Judges* ad hoc Mensah, Cot; against: *Judge* Owada;
>
> (3) Unanimously,
>
> *Finds* that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I(3);
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> (4) Unanimously,
>
> *Decides* that the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of

[44] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 714.

Nicaragua and the Republic of Colombia shall follow geodetic lines connecting the points with co-ordinates:

Latitude north Longitude west

1. 13° 46′ 35.7″ 81° 29′ 34.7″

2. 13° 31′ 08.0″ 81° 45′ 59.4″

3. 13° 03′ 15.8″ 81° 46′ 22.7″

4. 12° 50′ 12.8″ 81° 59′ 22.6″

5. 12° 07′ 28.8″ 82° 07′ 27.7″

6. 12° 00′ 04.5″ 81° 57′ 57.8″

From point 1, the maritime boundary line shall continue due east along the parallel of latitude (co-ordinates 13° 46′ 35.7″ N) until it reaches the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured. From point 6 (with co-ordinates 12° 00′ 04.5″ N and 81° 57′ 57.8″ W), located on a 12-nautical-mile envelope of arcs around Alburquerque, the maritime boundary line shall continue along that envelope of arcs until it reaches point 7 (with co-ordinates 12° 11′ 53.5″ N and 81° 38′ 16.6″ W) which is located on the parallel passing through the southernmost point on the 12-nautical-mile envelope of arcs around East-Southeast Cays. The boundary line then follows that parallel until it reaches the southernmost point of the 12-nautical-mile envelope of arcs around East-Southeast Cays at point 8 (with co-ordinates 12° 11′ 53.5″ N and 81° 28′ 29.5″ W) and continues along that envelope of arcs until its most eastward point (point 9 with co-ordinates 12° 24′ 09.3″ N and 81° 14′ 43.9″ W). From that point the boundary line follows the parallel of latitude (co-ordinates 12° 24′ 09.3″ N) until it reaches the 200-nautical-mile limit from the baselines from

> which the territorial sea of Nicaragua is measured;…".[45]

2.40. All of the above may be summarized as follows: (i) the Court declared admissible Nicaragua's submission on its alleged continental shelf beyond 200 nautical miles from its coast; (ii) it analysed that submission on its merits; and, (iii) in the operative part of the Judgment, it made a final delimitation of all overlapping entitlements, deciding in full, on all the submissions presented by the Parties. The decisions consisted in: (a) finding "admissible the Republic of Nicaragua's claim contained in its final submission I(3)"; (b) finding "that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I(3)"; and, (c) deciding that "the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia shall follow geodetic lines connecting the points with co-ordinates" which were indicated in the operative part of the Judgment.

B. Colombia's Denunciation of the Pact of Bogotá

2.41. Colombia denounced the Pact of Bogotá, on 27 November 2012. On that date, the Minister of Foreign Affairs of Colombia transmitted to the depository, the General Secretariat of the Organization of American States (OAS), a

[45] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, pp. 718-720, para. 251.

notification of denunciation pursuant to Article LVI of the Pact.[46]

2.42. Article LVI of the Pact of Bogotá, which governs withdrawal from the treaty, provides that:

> "ARTICLE LVI
>
> The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it, but shall continue in force for the remaining signatories. *The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.*
>
> *The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification.*"[47]

2.43. The full terms of the Note of 27 November 2012, wherein the Minister stated that Colombia's denunciation of the Pact took effect "as of today" (27 November 2012) with regard to the procedures that were initiated *after* its notice – in conformity with Article LVI – are as follows:

> "I have the honour to address Your Excellency, in accordance with article LVI of the American Treaty on Pacific Settlement, on the occasion of notifying the General Secretariat of the Organization of American States, as successor of the Pan American Union, that the Republic of

[46] Annex 1: Diplomatic Note N° GACIJ 79357 from the Minister of Foreign Affairs of Colombia to the Secretary-General of the Organization of American States, 27 Nov. 2012.

[47] Annex 18: Text of the Pact of Bogotá, in the Four Authentic Languages, English, Article LVI. (Emphasis added)

> Colombia denounces as of today from the 'American Treaty on Pacific Settlement', signed on 30 April 1948, the instrument of ratification of which was deposited by Colombia on 6 November 1968.
>
> *The denunciation from the American Treaty on Pacific Settlement is in force as of today with regard to procedures that are initiated after the present notice*, in conformity with Article LVI, second paragraph, providing that '[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification'."[48] (Emphasis added)

2.44. According to the Note and pursuant to the text of the second paragraph of Article LVI of the Pact, while the withdrawal did not have any effect with respect to pending procedures, i.e., procedures initiated prior to the transmission of the notification, it did have an immediate and full effect with regard to any procedures that any Party might want to initiate

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[48] Annex 1. The original text in Spanish reads as follows:

> *"Tengo el honor de dirigirme a Su Excelencia, de conformidad con el artículo LVI del Tratado Americano de Soluciones Pacíficas, con ocasión de dar aviso a la Secretaria General de la Organización de Estados Americanos, a su digno cargo, como sucesora de la Unión Panamericana, que la República de Colombia denuncia a partir de la fecha el "Tratado Americano de Soluciones Pacíficas", suscrito el 30 de abril de 1948 y cuyo instrumento de ratificación fue depositado por Colombia el 6 de noviembre de 1968.*
>
> La denuncia del Tratado Americano de Soluciones Pacíficas rige a partir del día de hoy respecto de los procedimientos que se inicien después del presente aviso, *de conformidad con el párrafo segundo del artículo LVI el cual señala que 'La denuncia no tendrá efecto alguno sobre los procedimientos pendientes iniciados antes de transmitido el aviso respectivo'."* (Emphasis added).

subsequent to the transmission of the notification, that is, 27 November 2012.

2.45. On 28 November 2012, the Department of International Law of the Secretariat for Legal Affairs of the OAS informed States Parties to the Pact and the Permanent Missions of the Member States that on 27 November 2012 it had received Note GACIJ No. 79357 by which the Republic of Colombia "denounced" the American Treaty on Pacific Settlement "Pact of Bogotá", signed in Bogotá, 30 April 1948. The OAS note reads as follows:

> "The Department of International Law of the Secretariat for Legal Affairs of the Organization of American States (OAS) has the honor to greet the High Contracting Parties to the American Treaty on Pacific Settlement (Pact of Bogotá) and the other Permanent Missions before the OAS with the object of notifying that on 27th November, 2012 it received from the Republic of Colombia the note GACIJ No. 79357, attached to the present one, by which the latter withdrew from said Treaty, adopted on 30 April 1948 during the Ninth International American Conference."[49]

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[49] Annex 2: Note Nº OEA/2.2/109/12 from the Department of International Law, Secretariat for Legal Affairs to the High Contracting Parties to the American Treaty on Pacific Settlement (Pact of Bogotá) and to the other Permanent Missions to the OAS, 28 Nov. 2012. The original text in Spanish reads as follows:

> *"El Departamento de Derecho Internacional de la Secretaría de Asuntos Jurídicos de la Organización de los Estados Americanos (OEA) tiene el honor de saludar a las Altas Partes Contratantes del Tratado Americano de Soluciones Pacíficas (Pacto de Bogotá) y a las demás Misiones Permanentes ante la OEA con el objeto de poner en su conocimiento que con fecha 27 de noviembre de 2012 recibió por parte de la República de Colombia la Nota GACIJ No. 79357, adjunta a la presente, mediante la cual denuncia dicho Tratado*

2.46. It is noteworthy that after receipt of the relevant depositary notification issued by the OAS Secretary-General on 28 November 2012 and circulated among all States Parties to the Pact of Bogotá with Colombia's Note attached, no State – including Nicaragua – advanced any objection at the time nor within the framework of the OAS, to the terms or mode of Colombia's withdrawal from the Pact of Bogotá.

2.47. Having presented the general background of the case, according to Article 79 of the Rules of Court, Colombia's Preliminary Objections are set out in full in the following chapters.

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adoptado el 30 de abril de 1948 durante la Novena Conferencia Internacional Americana."

Chapter 3

FIRST OBJECTION: THE COURT LACKS JURISDICTION UNDER THE PACT OF BOGOTÁ *RATIONE TEMPORIS*

A. Introduction

3.1. In instituting these proceedings, Nicaragua has put forward, as its principal basis of jurisdiction, Article XXXI of the Pact of Bogotá. On the face of its Application, several issues do not appear to be in contention: first, that Nicaragua is a party to the Pact; second, that Colombia, which had been a party to the Pact, lawfully and effectively denounced it, on 27 November 2012, in accordance with its terms; third, that Colombia's notification of denunciation stated that, in accordance with Article LVI of the Pact, "the denunciation... shall apply as of today with respect to proceedings which may be initiated subsequent to the present notice..."; and, fourth, that Nicaragua's Application has been lodged after the date of the transmission of the notice of denunciation. The essential point of difference is that Nicaragua avers in its Application that "in accordance with Article LVI of the Pact, that denunciation will take effect after one year, so that the Pact remains in force for Colombia until 27 November 2013."[50] In doing so, Nicaragua errs in its interpretation of Article LVI.

[50] Application, para. 9.

3.2. The conclusion in 1948 of an American treaty on pacific settlement, which included under certain conditions acceptance of the compulsory jurisdiction of a permanent international judicial institution, the International Court of Justice, was considered a significant step by the American States and was not undertaken lightly: the Pact contained a number of important safeguards, one of which was the right to terminate that acceptance with immediate effect.

3.3. Colombia will show that the Court is without jurisdiction under Article XXXI of the Pact of Bogotá because Colombia's notification of denunciation of the Pact was transmitted to the General Secretariat of the Organization of American States on 27 November 2012. From the date of transmission (27 November 2012), Colombia no longer accepted the jurisdiction of the Court under Article XXXI of the Pact. As the present case was instituted by Nicaragua on 16 September 2013, long after 27 November 2012 (the date on which Colombia's consent to the jurisdiction of the Court under Article XXXI of the Pact ceased to have effect as provided in its Article LVI), the Court has no jurisdiction over this case.

3.4. After a brief introduction to the features and organization of the Pact of Bogotá (Section B (1) and the Appendix), Section B (2) *(a)* and *(b)* of the present Chapter will consider Article LVI in accordance with the general rule for the interpretation of treaties in Article 31 of the Vienna Convention on the Law of Treaties (hereafter "VCLT"). Section B (2) *(c)* then considers

supplementary means that are reflected in Article 32 of the VCLT, for the purpose of confirming the meaning reached by application of the general rule. Section C discusses the denunciation of the Pact of Bogotá by Colombia and the practice of the Parties to the Pact as regards denunciation of the Pact under Article LVI thereof. Section D concludes that the Court does not have jurisdiction in respect of the present proceedings, since they were instituted after the transmission of Colombia's notice of denunciation of the Pact.

B. The Pact of Bogotá Allows Parties to Withdraw from the Treaty by Unilateral Denunciation

(1) The relevant features of the Pact of Bogotá

(a) The structure of the Pact of Bogotá

3.5. The Pact of Bogotá was concluded on 30 April 1948 during the Ninth International Conference of American States (the conference at which the Charter of the Organization of American States was also adopted).[51] There are currently

[51] The Pact has been considered by the Court at the jurisdictional phases of earlier cases: *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832. The Pact was also the basis for the Court's jurisdiction in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659; *Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213*; Maritime Dispute (Peru* v. *Chile), Judgment,* 27 Jan. 2014. In addition to the present proceedings, Nicaragua has invoked the Pact as a principal basis of jurisdiction in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* and in the *Alleged Violations of Sovereign Rights and Maritime Spaces in the*

14 Parties, out of the 35 Members of the Organization of American States (OAS). Two States — El Salvador in 1973 and Colombia in 2012 — having denounced the Pact.

3.6. The Pact of Bogotá has eight chapters and 60 articles:

- Chapter One.	General Obligations to Settle Disputes by Pacific Means
- Chapter Two.	Procedures of Good Offices and Mediation
- Chapter Three.	Procedure of Investigation and Conciliation
- Chapter Four.	Judicial Procedure
- Chapter Five.	Procedure of Arbitration
- Chapter Six.	Fulfilment of Decisions
- Chapter Seven.	Advisory Opinions
- Chapter Eight.	Final Provisions

3.7. As apparent in the chapter titles and as described in more detail in the Appendix to the present chapter, the Pact of Bogotá deals with a number of distinct substantive and procedural obligations. Four of the eight chapters of the Pact — Chapters Two, Three, Four and Five — deal with specific *procedures* for dispute settlement. The remaining four Chapters deal with other undertakings and obligations of the treaty partners such as, for

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Caribbean Sea (Nicaragua v. *Colombia)* case. On 25 February 2014 it was invoked against Nicaragua by Costa Rica in the *Certain Activities carried out by Nicaragua in the Border Area* (the proceedings of which were joined with those of the *Construction of a Road in Costa Rica along the San Juan River* case on 17 Apr. 2013) and in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* case.

example, the non-use of force;[52] the obligation to settle international controversies by regional procedures before referring them to the Security Council;[53] the obligation not to exercise diplomatic representation with regard to matters that are within the domestic jurisdiction of a State party;[54] the exercise of the right of individual or collective self-defense, as provided for in the Charter of the United Nations;[55] ensuring the fulfillment of judgments and awards;[56] and the possibility of resorting to advisory opinions.[57] Chapter Eight contains the final provisions.

(b) The Pact's jurisdictional provision

3.8. Article XXXI of the Pact, upon which Nicaragua relies, provides:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> a) The interpretation of a treaty;
>
> b) Any question of international law;

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52 Article I.
53 Article II.
54 Article VII.
55 Article VIII.
56 Article L.
57 Article LI.

> c) The existence of any fact which, if established, would constitute the breach of an international obligation;
>
> d) The nature or extent of the reparation to be made for the breach of an international obligation."

3.9. Article XXXI refers to and adopts the language of Article 36(2) of the Statute of the International Court of Justice (the 'Optional Clause', which provides for the 'compulsory jurisdiction' of the Court through a system of interlocking declarations). Article XXXI has a similar effect, though limited to the Parties to the Pact, as would a series of interlocking Optional Clause declarations. At the same time, as the Court has said, the commitment under Article XXXI is "an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4 of the Statute."[58]

3.10. As a provision of a treaty, the application of Article XXXI is subject to the conditions prescribed in other provisions of the Pact. Under the Pact, the commitment to submit to the procedures specified in the Pact applies only where "a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct

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[58] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p.69, at p. 85, para. 36.

negotiations through the usual diplomatic channels."[59] This restriction is contained in Article II. Other restrictions are contained in Article IV (other procedures initiated),[60] Article V (matters which by their nature are within domestic jurisdiction)[61] and Article VI (matters already settled between the parties, by arbitral award, by decision of an international court or governed by earlier treaties).[62] Indeed Article XXXIV specifically mentions that if the Court, for reasons stated in Articles V, VI and VII of the Pact, declares itself without jurisdiction, such controversy shall be declared ended.[63]

3.11. Yet another such restriction, central to the present case, is *ratione temporis;* it is contained in the last sentence (second paragraph) of Article LVI of the Pact (the denunciation clause).

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[59] This restriction was discussed by the Court in *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 85, para. 36.

[60] Article IV reads: "Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded."

[61] Article V reads: "The aforesaid procedures may not be applied to matters which, by their nature, are within the domestic jurisdiction of the state. If the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties."

[62] Article VI reads: "The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

[63] See *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at pp. 84-85, para. 35.

(2) THE LAW AND PROCEDURE OF DENUNCIATION UNDER THE PACT OF BOGOTÁ

(a) The provision: Article LVI, first and second paragraphs

3.12. Article 54 of the VCLT provides, in relevant part, that "The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty. . . ." As will be recalled, Article LVI of the Pact of Bogotá provides for denunciation of the Pact:

> "The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.
>
> The denunciation shall have no effect with respect to pending *procedures* initiated prior to the transmission of the particular notification." (Emphasis added)

3.13. Article LVI of the Pact has two paragraphs. The first paragraph sets forth the right of a State Party to denounce the Pact, the modalities for exercising such a right and the effect of denunciation. The second paragraph specifically addresses the effect of notice of denunciation on the "procedures" under Chapters Two to Five of the Pact. The second paragraph of Article LVI reads:

> "The denunciation shall have no effect with respect to pending *procedures initiated prior to the*

> *transmission* of the particular notification." (Emphasis added)

The equally authentic French, Portuguese and Spanish texts are to the same effect:

> *"La dénonciation n'aura aucun effet sur les* procédures en cours entamées avant la transmission *de l'avis en question."*
>
> *"A denúncia não terá efeito algum sôbre os* processos pendentes e iniciados antes *de ser transmitido o aviso respectivo."*
>
> *"La denuncia no tendrá efecto alguno sobre los* procedimientos pendientes iniciados antes *de transmitido el aviso respectivo."*[64]

(b) The ordinary meaning of Article LVI in its context and in the light of its object and purpose: judicial procedures cannot be initiated after the transmission of the notification of denunciation

3.14. The rules of interpretation in Articles 31 to 33 of the VCLT reflect customary international law and as such are applicable to the interpretation of the Pact of Bogotá. Under Article 31(1),

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

3.15. Article LVI of the Pact is to be interpreted in accordance with the rules set forth in Articles 31 to 33 of the VCLT.

[64] Annex 18: Text of the Pact of Bogotá, in the Four Authentic Languages (English, French, Portuguese, Spanish). (Emphasis added)

Article LVI, and in particular its second paragraph, need to be interpreted in accordance with their ordinary meaning, to secure for the provision an *effet utile*, and to avoid a result which is 'manifestly absurd or unreasonable'.

3.16. It is clear, from the text of the second paragraph of Article LVI, that, during the year following transmission of the notification of the denunciation, *no new procedures*, including judicial ones, may be initiated. Any other interpretation that might allow procedures to be initiated *after* the transmission of the notification would deprive the second paragraph of *effet utile*. If the intention was to allow the initiation of new procedures, it would have been sufficient simply to refer to pending procedures and it would have been unnecessary to *limit* the pending procedures to those that were "*initiated prior"* to the "*transmission*" of the denunciation notification. Thus, the effect of giving notice of denunciation is that, while the Pact itself only ceases to be in force for the denouncing State one year later, *no new* procedures (including proceedings before the International Court of Justice) may be instituted against the denouncing State after the date of the transmission of the notification of denunciation to the Secretary-General of the OAS.

3.17. As will be shown below, this results from a good faith interpretation of the terms of the Pact in their context and in the light of the Pact's object and purpose. The meaning is also

confirmed by the *travaux préparatoires* which will be addressed in subsection *(c)* below.

3.18. As noted above, the Pact has eight chapters. The reference to pending "*procedures"* in the second paragraph of Article LVI refers to four of them: Chapter Two (*Procedures* of Good Offices and Mediation), Chapter Three (*Procedure* of Investigation and Conciliation), Chapter Four (Judicial *Procedure*) and Chapter Five (*Procedure* of Arbitration). All of these Chapters deal with specific *procedures* that may be initiated against a State Party during the pendency of its consent to such initiation.

3.19. The effect of denunciation under Article LVI must be understood taking account of both of its paragraphs, each addressing specific issues affected by denunciation.[65] The first paragraph provides that denunciation takes effect with one year's notice as regards the Pact as a whole, which – as has been seen above[66] – includes important rights and obligations unconnected to any specific procedure that may be initiated under the Pact. The second paragraph of Article LVI, as explained above, deals specifically with *procedures* that can be initiated under the Pact. Chapters Two, Three, Four and Five deal with these procedures. The second paragraph protects procedures that were initiated before the transmission of notification of denunciation and hence are pending at that moment. Efforts to initiate any of the

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65 Vienna Convention on the Law of Treaties, Article 31(1).

66 See para. 3.7. above.

procedures in Chapters Two, Three, Four and Five *after* the date of notification fall outside the protective mantle of the second paragraph of Article LVI and are devoid of legal effect.

3.20. The second paragraph of Article LVI makes a distinction between pending procedures initiated before the transmission of the notification of denunciation and procedures initiated after the transmission. The second paragraph is clear that denunciation has no effect with respect to procedures that are pending at the time of transmission of the notification of denunciation, having been initiated prior to the transmission of the notification of denunciation. *A contrario*, denunciation *does* have effect as regards any other procedures *not pending* at the time of transmission of the notification because they purported to be initiated *after* the transmission of the notification.

3.21. Hence the second paragraph of Article LVI includes provisions with regard to specific *procedures* under the Pact:

- As regards those already pending at the time of transmission of the notification of denunciation, the denunciation has no effect. This conforms to the normal position with regard to international litigation. Jurisdiction is to be determined at the moment of the institution of the proceedings and is not affected by the subsequent withdrawal of consent to jurisdiction,

whether given in the compromissory clause of a treaty or by declaration under Article 36(2) of the Statute.[67]

- Any proceedings which a party to the Pact (whether the denouncing State or any other party) may try to commence after transmission of the notification of denunciation fall outside the denouncing State's consent to jurisdiction, which terminates with immediate effect upon transmission of the notification.

3.22. Thus, Article LVI provides two different *dates* for the effect of denunciation. The effect for the *procedures* under Chapters Two, Three, Four and Five is immediate, while the effect for the other undertakings and obligations of the Pact occurs only one year after the date of denunciation.

3.23. This interpretation results clearly from the application of the general rule on the interpretation of treaties of Article 31 of

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[67] As Rosenne says, "once a State has given its consent to the referral of a dispute to the Court, it may not withdraw that consent during the pendency of the proceedings for which it was given if another State has acted on the basis of that consent and has instituted proceedings before the Court." In: S. Rosenne, *The Law and Practice of the International Court*, 1920-2005 (4th ed., 2006), p. 569; see also pp. 785-789, 939-945. The case-law includes *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111 at p. 123; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports I957*, p. 125 at p. 142; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 392 at p. 416, para. 54; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 at p. 28, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412 at p. 438, para. 80.

the VCLT. There is therefore no necessity for recourse to the *travaux préparatoires*. Nor should this interpretation of the second paragraph of Article LVI occasion any surprise. States frequently take care to ensure that their consent to the jurisdiction of an international court or tribunal may be terminated with immediate effect. This is, for example, expressly the case with a number of declarations of acceptance of the Court's jurisdiction under the Optional Clause, in which States reserve the right to terminate their acceptance of the Court's jurisdiction with immediate effect.[68] For example, the United Kingdom's declaration of 5 July 2004 includes the following:

> "1. The Government of the United Kingdom of Great Britain and Northern Ireland accept as compulsory ipso facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance…
>
> 2. The Government of the United Kingdom also reserve the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the

[68] States reserving the right to terminate their optional clause declarations with immediate effect include Botswana (1970), Canada (1994), Cyprus (1988), Germany (2008), Kenya (1965), Madagascar (1992), Malawi (1966), Malta (1966, 1983), Mauritius (1968), Nigeria (1998), Peru (2003), Portugal (2005), Senegal (1985), Slovakia (2004), Somalia (1963), Swaziland (1969), Togo (1979) and the United Kingdom (2005). See Tomuschat in Zimmermann et al (eds.), *The Statute of the International Court of Justice. A Commentary* (2nd ed., 2012), pp. 678-680, Article 36, MN 74 (Tomuschat refers to denunciation with immediate effect as "the price to be paid for adherence by States to the optional clause. And it corresponds to the logic of a jurisdictional system which is still largely based on unfettered sovereignty." – p. 678).

> moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added."

3.24. A comparison between the language of the second paragraph of Article LVI and denunciation provisions in some other multilateral treaties involving dispute settlement procedures also reveals that it is not unusual for treaties to separate the effect of denunciation in general from the effect on procedures available under the treaty. Thus the way in which the Parties to the Pact drafted the second paragraph of Article LVI, in order to clearly distinguish between pending procedures that had been initiated *prior* to the denunciation and those initiated *after* the denunciation is, in no sense, unusual.

3.25. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958[69] (the "New York Convention") deals with the effect of denunciation in Article XIII, consisting of three paragraphs. Paragraph (1) deals with the effect of denunciation on the New York Convention. Paragraph (3) deals specifically with pending proceedings, indicating precisely the date of the institution of such proceedings:

> "1. ... Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General
>
> (...)

[69] 330 UNTS 38.

> 3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement *proceedings have been instituted before the denunciation takes effect*." (Emphasis added)

For the New York Convention, the relevant date is the *date on which the denunciation takes effect*. Note how precisely the New York Convention specifies that date in Article XIII (1).

3.26. Similarly, the Additional Protocol to the European Convention on State Immunity of 16 May 1972[70] provides in Article 13(2) that:

> "Such denunciation shall take effect six months after the date of receipt by the Secretary-General of such notification. The Protocol shall, however, continue to apply to *proceedings introduced* in conformity with the provisions of the Protocol *before the date on which such denunciation takes effect.*" (Emphasis added)

3.27. Article 31(2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004[71] addresses the effect of denunciation on the Convention itself and then deals with its effect on pending proceedings. Here again, the Convention specifies clearly the relevant date of the institution of a proceeding not affected by denunciation:

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[70] Additional Protocol to the European Convention on State Immunity (Basel, 16 May 1972), Council of Europe, 1495 UNTS 182.

[71] UN Doc. A/RES/59/38, Annex.

> "Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The present Convention shall, however, continue to apply to any question of jurisdictional immunities of States and their property arising in *a proceeding instituted* against a State before a court of another State prior to the *date on which the denunciation takes effect* for any of the States concerned." (Emphasis added)

3.28. In the same vein, the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990[72] and the Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966[73] provide for the general effect of

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[72] European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990), Council of Europe, ETS No. 141, Article 43 – Denunciation:

> "1. Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
> 2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.
> 3. The present Convention shall, however, continue to apply to the enforcement under Article 14 of confiscation for which a *request has been made* in conformity with the provisions of this Convention *before the date on which such a denunciation takes effect*. (Emphasis added)

[73] 999 UNTS 171. Article 12 provides:

> "1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.
> 2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to *any communication submitted* under article 2 *before the effective date of denunciation.*" (Emphasis added)

denunciation on the two treaties and then for the specific effect on the pending proceedings, indicating the precise relevant dates.

3.29. As in the treaties covered above, the Pact of Bogotá in Article LVI addressed the general effect of denunciation and the effect on the pending procedures separately in its first and second paragraphs. Again, as in the treaties referenced above, Article LVI of the Pact dealing with denunciation is very specific about the relevant date of the initiation of the pending procedures. Under the Pact, only those proceedings initiated *prior to the transmission of the notification of denunciation* are unaffected by denunciation.

3.30. In 1948, the American States, for whom consent to the compulsory jurisdiction of the International Court of Justice was a new and major departure, decided to reserve their freedom to withdraw such consent with immediate effect should circumstances so require, but to do so without effect on pending proceedings. That is precisely what was achieved by the second sentence of Article LVI.

3.31. This is also consistent with the State practice of the parties to the Pact. Of the sixteen States that ratified or acceded to the Pact,[74] two have denounced it, namely El Salvador in 1973, and Colombia in 2012. Colombia's denunciation

[74] Bolivia, Brazil, Chile, Colombia (denounced 2012), Costa Rica, Dominican Republic, Ecuador, El Salvador (denounced 1973), Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay.

essentially matches that of El Salvador so far as concerns judicial procedures instituted subsequent to the transmission of the denunciation. The final paragraph of El Salvador's notice of denunciation, which is dated 24 November 1973, reads:

> "Lastly, my Government wishes to place on record that if El Salvador is now denouncing the Pact of Bogotá for the reasons expressed – *a denunciation that will begin to take effect as of today*, it reaffirms at the same time its firm resolve to continue participating in the collective efforts currently under way to restructure some aspects of the system in order to accommodate it to the fundamental changes that have occurred in relations among the states of the Americas."[75]

3.32. As in the case of Colombia's notification of denunciation, no other State Party to the Pact – Nicaragua included – lodged any objection with the OAS or, in fact, expressed any reaction whatsoever within the OAS to the terms or mode of El Salvador's withdrawal from the Pact of Bogotá.

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[75] Annex 3: Diplomatic Note from the Minister of Foreign Affairs of El Salvador to the Secretary-General of the Organization of American States, 24 Nov. 1973. (Emphasis added) In the original, in Spanish, the paragraph reads:

> *"Finalmente, mi Gobierno deja constancia de que, si El Salvador, por las razones expuestas, denuncia ahora el Pacto de Bogotá,* denuncia que ha de principiar a surtir efectos a partir del día de hoy, *reitera al mismo tiempo su firme propósito de continuar participando en los esfuerzos colectivos que actualmente se realizan para reestructurar algunos aspectos del sistema, a fin de acomodarlo a los cambios fundamentales que han ocurrido en las relaciones entre los Estados americanos."* (Emphasis added)

(c) The ordinary meaning is confirmed by the travaux préparatoires

3.33. The interpretation above results clearly from the application of the general rule on the interpretation of treaties of VCLT Article 31. There is therefore no necessity for recourse to the *travaux préparatoires*. Nevertheless, such recourse is permitted under Article 32 of the VCLT in order to confirm the ordinary meaning resulting from the application of the general rule. The *travaux* confirm the ordinary meaning.

3.34. The extended exercise that began at Montevideo in 1933 and culminated in the adoption of the Pact of Bogotá in 1948 was intended to update the various instruments for peaceful settlement in the Americas[76] by systematizing in a single instrument the different mechanisms for pacific dispute settlement in the existing treaties.

3.35. The pre-1936 treaties referring to conflict resolution and their procedures were unsystematic in a number of ways. One, of 1902, concerning compulsory arbitration, had only six ratifications. The other, of 1929, also dealing with arbitration, had more ratifications, but they were accompanied by reservations with respect to the scope of the arbitration clause. With the exception of the Treaty on Compulsory Arbitration (1902)[77] and the General Treaty of Inter-American Arbitration

[76] Pact of Bogotá, Arts. LVIII and LVIX.

[77] Treaty on Compulsory Arbitration, Mexico, 29 Jan. 1902. See Annex 17: Inter-American Treaties from 1902 to 1936, Clauses of Denunciation.

(1929),[78] the other pre-1936 regional treaties did not have rigorous and comprehensive compulsory dispute settlement provisions, such as that found in the Pact of Bogotá.

3.36. With respect to termination, Article 22 of the Treaty on Compulsory Arbitration signed on 29 January 1902 provided in relevant part that

> "…[i]f any of the signatories wishes to regain its liberty, it shall denounce the Treaty, but the denunciation will have effect solely for the Power making it, and then only after the expiration of one year from the formulation of the denunciation. When the denouncing Power has any question of arbitration pending at the expiration of the year, the denunciation shall not take effect in regard to the case still to be decided."[79]

This provision clearly prescribed that the termination of the treaty obligations, including arbitration procedures already

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[78] General Treaty of Inter-American Arbitration, Washington, 5 Jan. 1929, in Annex 17.

[79] General Treaty of Inter-American Arbitration, Washington, 5 Jan. 1929, in Annex 17. In Spanish:

> *"...Si alguna de las signatarias quisiere recobrar su libertad, denunciará el Tratado; más la denuncia no producirá efecto sino únicamente respecto de la Nación que la efectuare, y sólo después de un año de formalizada la denuncia. Cuando la Nación denunciante tuviere pendientes algunas negociaciones de arbitraje a la expiración del año, la denuncia no surtirá sus efectos con relación al caso aun no resuelto."*

The 1902 treaty was not included among the agreements that the Juridical Committee should take into account for the construction of the draft treaty for the coordination of the Inter-American peace agreements to be submitted to the Seventh International American Conference through Resolution XV, approved on 21 December 1938. In Annex 13, *Text of Document C: Report to Accompany the Draft Treaty for the Coordination of Inter-American Peace Agreements and Draft of an Alternative Treaty*, at p. 81-83.

initiated, were to take effect after a year. On the other hand, Article 9 of General Treaty of Inter-American Arbitration signed at Washington on 5 January 1929 provided in relevant part that

> "[t]his treaty shall remain in force indefinitely, but it may be denounced by means of one year's previous notice at the expiration of which it shall cease to be in force as regards the Party denouncing the same, but shall remain in force as regards the other signatories."[80]

This provision, which does not deal with the pending procedures, is similar to the remaining treaties up to 1936.[81]

3.37. In the context of a regional law-making effort to secure region-wide subscription to a comprehensive dispute resolution mechanism, the challenge for the conveners of the conference begun at Montevideo was to secure a draft which would attract

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[80] In Spanish:

"...Este tratado regirá indefinidamente, pero podrá ser denunciado mediante aviso anticipado de un año, transcurrido el cual cesará en sus efectos para el denunciante, quedando subsistente para los demás signatarios.".

[81] See in Annex 17, excerpts of the following on denunciation: Treaty of Compulsory Arbitration, 29 Jan. 1902, Article 22; Treaty to Avoid or Prevent Conflicts Between the American States (The Gondra Treaty), 3 May 1923, Article IX; General Convention of Inter-American Conciliation, 5 Jan. 1929, Article 16; General Treaty of Inter-American Arbitration, 5 Jan. 1929, Article 9; Protocol of Progressive Arbitration, 5 Jan. 1929; Anti-War Treaty of Non-Aggression and Conciliation (The Saavedra-Lamas Pact), 10 Oct. 1933, Article 17; Additional Protocol to the General Convention on Inter-American Conciliation, 26 Dec. 1933; Convention on Maintenance, Preservation and Reestablishment of Peace, 23 Dec. 1936, Article 5; Additional Protocol Relative to Non-Intervention, 23 Dec. 1936, Article 4; Treaty on the Prevention of Controversies, 23 Dec. 1936, Article 7; Inter-American Treaty on Good Offices and Mediation, 23 Dec. 1936, Article 9; Convention to Coordinate, Extend and Assure the Fulfillment of the Existing Treaties Between the American States, 23 Dec. 1936, Article 8.

wide subscription, and, at the same time, assuage the various concerns of the States in the region.

3.38. On 27 December 1937, the Director General of the Pan-American Union sent a communication to the U.S. Under-Secretary of State, describing the main failures of the Treaty to Avoid or Prevent Conflicts between the American States of 1923 (Gondra Treaty) and suggesting that the U.S. Government "consider the possibility of taking the initiative at the forthcoming Conference at Lima in *recommending additions to the existing treaties of peace* with the view of increasing their usefulness."[82]

3.39. On 15 November 1938, the United States submitted to the American States a draft 'Project for the Integration of American Peace Instruments',[83] for discussion during the Eighth American International Conference which was to be held in Lima from 9 to 27 December 1938. This US Project did not include any language approximating what would eventually become the second paragraph of Article LVI of the Pact of Bogotá.

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[82] Annex 9: Memorandum from the General Director of the Pan-American Union, to the United States Under Secretary of State, 27 Dec. 1937, at p. 6. (Emphasis added)

[83] Annex 5: Delegation of the United States of America to the First Commission at the Eighth International Conference of American States, Lima, Perú, *Draft on Consolidation of American Peace Agreements, Topic 1. Perfecting and Coordination of Inter-American Peace Instruments,* 15 Nov. 1938, at p. 1.

3.40. One month later, however, on 16 December 1938, during the Lima Conference, the United States submitted an amended second draft of its Project.[84] This new draft contained the language that would eventually become the second paragraph of Article LVI of the Pact of Bogotá (hereafter "the U.S. Proposal"). This language was highlighted in the original text in order to indicate that it represented a new provision by comparison with the earlier texts.[85] Article XXII of the US Proposal read:

> "ARTICLE XXII: The present treaty shall remain in effect indefinitely, but may be denounced by means of one year's notice given to the Pan American Union, which shall transmit it to the other signatory governments. After the expiration of this period the treaty shall cease in its effects as regards the party which denounce it, but shall remain in effect for the remaining high contracting parties. *Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given.*"[86] (Italics in original).

3.41. Thus, what became the second paragraph of Article LVI of the Pact of Bogotá had its origin in the proposal by the United States of 16 December 1938, a proposal made with the evident intention of ensuring that a State that was party to the Pact could withdraw its consent to be bound by any of the procedures –

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[84] Annex 6: Delegation of the United States of America to the Eighth International Conference of American States, *Projects Presented by the United States, Topic 1, Treaty of Consolidation of American Peace Agreements,* 16 Dec. 1938, at pp. 193-194.

[85] In the English version of the US Proposal, all new matters were in italics while in the Spanish version the new text appears in bold.

[86] Annex 6, at p. 203.

whichever they might be – as of the date of notification, even though the effects of denunciation on the general substantive obligations of the Pact itself would take effect after one year.

3.42. This formulation was not found in the treaties on pacific settlement of disputes concluded prior to 1936. The drafting of this proposal was clear and deliberate and was manifestly intended to ensure the right to cease to be bound by compulsory procedures with immediate effect.[87]

3.43. On 19 December 1938, Green H. Hackworth, then Legal Adviser to the U.S. Department of State and a member of the U.S. delegation, and later a Judge and President of the Court, explained at the meeting of Sub-Committee 1 of Committee I of

[87] The idea to consolidate existing American treaties on the peaceful settlement of disputes was prominent at the Montevideo Conference of 1933. In particular, Resolution XXXV of 23 Dec. 1933 noted "the advantages that the compilation and articulation into a single instrument would offer, for all provisions which are scattered in different treaties and other relevant principles for the prevention and pacific settlement of international conflicts", and resolved that a Mexican draft "Code of Peace" would be put to the consideration of member States through the Pan-American Union. This draft, which was the first proposal for the coordination of Inter-American peace treaties, did not contain any provisions relating to termination, denunciation, or withdrawal. See Annex 7: Seventh International Conference of American States, Montevideo, 3-26 Dec. 1933, Resolution XXXV, *Code of Peace*, Approved 23 Dec. 1933, at p. 51.

The draft "Code of Peace" was submitted to the States at the Inter-American Conference for the Consolidation of Peace, held in Buenos Aires in 1936, but no significant progress was made on that occasion. See Annex 8: Inter-American Conference for the Maintenance of Peace, Buenos Aires, 1-23 Dec. 1936, Resolution XXVIII, *Code of Peace*, Approved 21 Dec. 1936.

the Lima Conference that "all new matter had been underlined."[88]

3.44. The U.S. delegation thus deliberately drew attention to the new language which was not part of the previous Inter-American instruments. All the negotiating States were, accordingly, made aware of the change which was being introduced and which modified the effect of denunciation in contrast to what it had been in the earlier multilateral instruments.

3.45. Of the various drafts related to the coordination and consolidation of American peace agreements presented to the Lima Conference, only that presented by the United States addressed the matter of denunciation.[89]

3.46. On 21 December 1938, the Lima Conference adopted Resolution XV, which made particular mention in its preamble of the draft "on the Consolidation of American Peace Agreements", submitted by the United States, because it structured the "process of pacific solution of differences

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[88] Annex 10: Delegation of the United States of America to the Eighth International Conference of American States, Lima, 9-27 Dec. 1938, *Report of the Meetings of Sub-Committee 1 of Committee I, Consolidation of American Peace Instruments and Agreements, 19 Dec. 1938*, at p. 5. It is to be noted that the U.S. delegation highlighted in italics the additions, which include the second paragraph of what became Art. LVI (see Annex 6, Art. XXII at p. 203).

[89] Annex 4: Comparative Chart of Drafts presented by American States to the First Commission at the Eighth International Conference of American States, Lima, Peru, Dec. 1938.

between American States through the consolidation, in a single instrument, of the regulations contained in the eight treaties now in force."[90] By Resolution XV the Lima Conference submitted various projects on inter-American dispute settlement procedures to the International Conference of American Jurists for it to integrate them into a single instrument.[91]

3.47. In March 1944, the Inter-American Juridical Committee published two drafts for distribution to American States for their consideration; both drafts contained the U.S. Proposal.[92]

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[90] Annex 11: Eighth International Conference of American States, Lima, 9-27 Dec. 1938, *Resolution XV, Perfection and Coordination of Inter-American Peace Instruments*, Approved 21 Dec. 1938, p.1, Consideration 4.

[91] Annex 11,p. 2, para. 2.

[92] The two drafts were Annex 12, Inter-American Juridical Committee, *Text of Document A: Draft Treaty for the Coordination of Inter-American Peace Agreements*, Minutes of the Inter-American Juridical Committee, 1944, pp. 53-68 (integrating existing Inter-American agreements on pacific dispute settlement, but made no changes to their texts); and Annex 13, *Text of Document B: Draft of an Alternative Treaty Relating to Peaceful Procedures*, at pp. 69-79 (proposed new material based upon the various drafts submitted in Lima in 1938). The US proposal was contained in Article XXXII of the *Draft Treaty for the Coordination of Inter-American Peace Agreements* (Document A) which read:

> "The present treaty shall remain in effect indefinitely, but it may be denounced by means of notice given to the Pan American Union one year in advance, at the expiration of which it shall cease to be in force as regards the Party denouncing the same, but shall remain in force as regards the other signatories. Notice of denunciation shall be transmitted by the Pan American Union to the other signatory governments. Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given."

The US proposal was contained in Article XXVIII of the *Draft of an Alternative Treaty Relating to Peaceful Procedures* (Document B) which read:

3.48. In September 1945, the Inter-American Juridical Committee submitted its "Preliminary draft for the Inter-American System of Peace". The report attached to it states that "Part VII of the Preliminary Draft of the Juridical Committee, entitled 'Final Provisions' follows the general lines already approved by the American States."[93] In Part VII, Final Provisions, Article XXIX includes the U.S. Proposal in a formula similar to that contained in the final version of the Pact of Bogotá. It reads:

> "Article XXIX.
>
> (…)
>
> [Paragraph 3] The present treaty shall remain in effect indefinitely, but it may be denounced by means of notice given to the Pan American Union one year in advance, at the expiration of which it will cease to be in force as regards the party denouncing the same, but shall remain in force as regards the other signatories. Notice of the denunciation shall be transmitted by the Pan American Union to the other signatory governments. Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given."[94]

> "This treaty will be valid indefinitely, but maybe denounced through notice of one year in advance to the Pan-American Union, [and] the other signatory Governments. The denunciation will not have any effect on procedures pending and initiated prior to the transmission of that notice."

[93] Annex 14: Inter-American Juridical Committee, *Draft of an Inter-American Peace System and an Accompanying Report, Article XXIX,* 4 Sept. 1945, Article XXIX, at p. 22.

[94] Annex 14, at pp. 11-12.

3.49. On 18 November 1947, a fourth (and final) draft project on the integration of Inter-American peace instruments was published by the Inter-American Juridical Committee and distributed to the American States for their consideration. Article XXVI of the fourth draft retained the US Proposal:

> "Article XXVI...
>
> (...)
>
> [Paragraph 3] The present treaty shall remain in effect indefinitely, but it may be denounced by means of notice given to the Pan American Union one year in advance, at the expiration of which it shall cease to be in force as regards the Party denouncing the same, but shall remain in force as regards the other signatories. Notice of denunciation shall be transmitted by the Pan American Union to the other signatory governments. Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given."[95]

3.50. The Ninth International Conference of American States took place in Bogotá, Colombia, from 30 March to 2 May 1948. The Conference approved the first part of Article XXVI (Paragraph 3) referring to denunciation. The second part of Article XXVI (Paragraph 3) was sent to the Drafting Committee. On 29 April, at the last session of the Third

[95] Annex 15: Inter-American Juridical Committee, *Inter-American Peace System: Definitive Project Submitted to the Consideration of the Ninth International Conference of American States in Bogota, Article XXVI,* 18 Nov. 1947, Article XXVI, p. 9.

Commission's Drafting Committee,[96] the then Article LV (now Article LVI) was divided into two paragraphs:

> "This treaty will be in force indefinitely, but it may be denounced through advance notice of one year, and will cease to have effect for the party making the denunciation, and remains in force for the other signatories. The denunciation will be made to the Pan-American Union, which will transmit it to the other contracting parties.
>
> The denunciation will not have any effect on proceedings pending and initiated prior to the transmission of the respective notice."[97]

3.51. As can be seen, the U.S. Proposal of 1938 on the matter of denunciation was almost identical to the final text adopted in the Pact of Bogotá. But it had an important structural modification: the separation of the single paragraph in the original into two paragraphs to better reflect the different subject matters of each paragraph. The second paragraph makes abundantly clear that only those pending proceedings that were initiated prior to the transmission of the denunciation notice remain unaffected. Of the other drafting changes introduced by the Drafting Committee in 1948, the principal change was the replacement of the expression "before notice of denunciation is given" by the expression "prior to the transmission of the particular notification". That was a change which served to emphasize that the critical date was that of transmission. Both the reference of the second paragraph to the Drafting Committee

[96] Annex 16: Minutes of the Second Part of the Fourth Session of the Coordination Commission, Ninth International Conference of American States, 29 Apr. 1948, p. 537.

[97] *Ibid.*, p. 541.

and the change made by that Committee confirm that specific attention was paid to the second paragraph and its drafting.

3.52. The chart below shows the modifications undergone by the paragraph in question in the inter-American treaty context.

The development of the second paragraph of Article LVI of the Pact of Bogotá

U.S. PROPOSAL FOR THE TREATY ON THE CONSOLIDATION OF AMERICAN PEACE CONVENTIONS, 1938	PACT OF BOGOTÁ,1948
"ARTICLE XXII: The present treaty shall remain in effect indefinitely, but may denounced by means of one year's notice given to the Pan American Union, which shall transmit it to the other signatory governments. After the expiration of this period the treaty shall cease in its effects as regards the party which denounce it, but shall remain in effect for the remaining high contracting parties. *Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given*." (Emphasis added)	"ARTICLE LVI: The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties. *The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification*." (Emphasis added).

3.53. Thus, the *travaux préparatoires* of the Pact of Bogotá confirm the ordinary meaning of Article LVI: Article LVI is structured in two paragraphs separating the deferred general

effect of denunciation on the Pact's other obligations, from the immediate effect on procedures initiated after denunciation.

C. Colombia's Denunciation of the Pact of Bogotá was in Accordance with the Requirements of the Pact of Bogotá

3.54. Colombia denounced the Pact, with immediate effect, on 27 November 2012. On that date, the Minister of Foreign Affairs of Colombia transmitted to the depositary, the General Secretariat of the Organization of American States, a notification of denunciation pursuant to Article LVI of the Pact. It will be convenient to set it out again:

> "I have the honor to address Your Excellency, in accordance with article LVI of the American Treaty on Pacific Settlement, on the occasion of notifying the General Secretariat of the Organization of American States, as successor of the Pan American Union, that the Republic of Colombia denounces as of today from the 'American Treaty on Pacific Settlement', signed on 30 April 1948, the instrument of ratification of which was deposited by Colombia on 6 November 1968.
>
> The denunciation from the American Treaty on Pacific Settlement is in force as of today with regard to procedures that are initiated after the present notice, in conformity with Article LVI, second paragraph..."[98]

[98] Annex 1. The original text in Spanish says:

"Tengo el honor de dirigirme a Su Excelencia, de conformidad con el artículo LVI del Tratado Americano de Soluciones Pacíficas, con ocasión de dar aviso a la Secretaria General de la Organización de Estados Americanos, a su digno cargo, como sucesora de la Unión

3.55. In her Note, the Minister of Foreign Affairs stated unequivocally that Colombia's denunciation of the Pact took effect "as of today", that is, 27 November 2012,

> "with regard to the procedures that are initiated after the present notice, in conformity with Article LVI, second paragraph, providing that '[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification'."

3.56. According to the Note and in accordance with the second paragraph of Article LVI of the Pact, while the withdrawal could not have had any effect with respect to pending *procedures* initiated prior to the transmission of the notification, the withdrawal had immediate effect with regard to any *procedures* initiated subsequent to the transmission of the notification on 27 November 2012.

3.57. On 28 November 2012, the Department of International Law of the Secretariat for Legal Affairs of the Organization of

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> *Panamericana, que la República de Colombia denuncia a partir de la fecha el 'Tratado Americano de Soluciones Pacíficas', suscrito el 30 de abril de 1948 y cuyo instrumento de ratificación fue depositado por Colombia el 6 de noviembre de 1968.*
>
> *La denuncia del Tratado Americano de Soluciones Pacíficas rige a partir del día de hoy respecto de los procedimientos que se inicien después del presente aviso, de conformidad con el párrafo segundo del artículo LVI el cual señala que 'La denuncia no tendrá efecto alguno sobre los procedimientos pendientes iniciados antes de transmitido el aviso respectivo'."*

American States informed the States Parties to the Pact and the Permanent Missions of the other Member States of the OAS that on 27 November 2012 it had received Note GACIJ No. 79357 by which the Republic of Colombia "denounced" the American Treaty on Pacific Settlement "Pact of Bogotá", signed in Bogotá, 30 April 1948.[99] No State Party to the Pact reacted to that Note.

D. Conclusion

3.58. For the reasons set out in the present chapter, and in accordance with the terms of the first and second paragraphs of Article LVI of the Pact of Bogotá, the International Court of Justice does not have jurisdiction in respect of the proceedings commenced by Nicaragua against Colombia on 16 September 2013, since the proceedings were instituted after the transmission of Colombia's notice of denunciation of the Pact.

[99] Annex 2.

APPENDIX TO CHAPTER 3
THE PACT OF BOGOTÁ

3A.1. Chapter One is entitled "General obligation to settle disputes by peaceful means", and contains a number of undertakings of a general nature. In Article I, the Parties,

> "solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures."

3A.2. Under Article II, the Parties "recognize the obligation to settle international controversies by regional procedures before referring them to the Security Council", and

> "Consequently, in the event that a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

3A.3. The commitment to submit to the procedures under the Pact applies only where a controversy arises between two or more signatory states which, in the opinion of the parties, cannot

be settled by direct negotiations through the usual diplomatic channels.[100]

3A.4. Articles III and IV states the Parties' freedom to choose the procedure that they consider most appropriate, although no new procedure may be commenced until the initiated one is concluded. Article V excludes the application of the Pact's procedures to matters within domestic jurisdiction.

3A.5. According to Article VI:

> "The aforesaid procedures … may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

3A.6. Article VII restricts recourse to diplomatic protection, providing as follows:

> "The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective state."

3A.7. The last provision in Chapter One concerns the right of individual and collective self-defense, and reads:

> "Neither recourse to pacific means for the solution of controversies, nor the recommendation of their use, shall, in the case of an armed attack, be ground

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[100] This restriction in Article II was discussed by the Court in *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69.

> for delaying the exercise of the right of individual or collective self-defense, as provided for in the Charter of the United Nations."

3A.8. Chapters Two and Three cover "Procedures of Good Offices and Mediation", and "Procedure of Investigation and Conciliation" respectively, while Chapter Five deals with "Procedure of Arbitration".

3A.9. Chapter Four, entitled "Judicial Procedure", consists of seven articles, the first of which, Article XXXI, is the provision relied upon by Nicaragua as the basis for the jurisdiction of the Court in the present proceedings. It is set out and discussed in these pleadings' Chapter 3 *supra*.[101]

3A.10. Chapter Six of the Pact, consisting of a single article (Article L), makes special provision for ensuring the fulfillment of judgments and awards. It reads:

> "If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice or by an arbitral award, the other party or parties concerned shall, before resorting to the Security Council of the United Nations, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfillment of the judicial decision or arbitral award."

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[101] Chapter 3, at paras. 3.8-3.10.

3A.11. Chapter Seven, also a single article, makes special provision for seeking advisory opinions from the Court:

> "The parties concerned in the solution of a controversy may, by agreement, petition the General Assembly or the Security Council of the United Nations to request an advisory opinion of the International Court of Justice on any juridical question.
>
> The petition shall be made through the Council of the Organization of American States."

3A.12. Chapter Eight (Final Provisions) has the following articles:

- Art. LII ratification
- Art. LIII coming into effect
- Art. LIV adherence; withdrawal of reservations
- Art. LV reservations
- Art. LVI denunciation
- Art. LVII registration
- Art. LVIII treaties that cease to be in force as between the parties .[102]
- Art. LVIX excludes application of foregoing article to procedures already initiated or agreed upon on the basis of such treaties

3A.13. Finally, Article LX provides that the Treaty shall be called the "Pact of Bogotá."

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[102] Treaty to Avoid or Prevent Conflicts between the American States, of 3 May 1923; General Convention of Inter-American Conciliation, of 5 Jan. 1929; General Treaty of Inter-American Arbitration and Additional Protocol of Progressive Arbitration, of 5 Jan. 1929; Additional Protocol to the General Convention of Inter-American Conciliation, of 26 Dec. 1933; Anti-War Treaty of Non-Aggression and Conciliation, of 10 Oct. 1933; Convention to Coordinate, Extend and Assure the Fulfilment of the Existing Treaties between the American States, of 23 Dec. 1936; Inter-American Treaty on Good Offices and Mediation, of 23 Dec. 1936; Treaty on the Prevention of Controversies, of 23 Dec. 1936.

Chapter 4

SECOND PRELIMINARY OBJECTION: THE JUDGMENT OF 19 NOVEMBER 2012 DOES NOT GRANT THE COURT A CONTINUING JURISDICTION

A. Introduction

4.1. In addition to relying on Article XXXI of the Pact of Bogotá, Nicaragua's Application advances a second basis of jurisdiction, which is based on the contention

> "…that the subject-matter of the present Application remains within the jurisdiction of the Court established in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*), of which the Court was seised by the Application dated 6 December 2001, submitted by Nicaragua, in as much as the Court did not in its Judgment dated 19 November 2012 definitively determine the question of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles from the Nicaraguan coast, which question was and remains before the Court in that case."[103]

4.2. The premise of this contention is that jurisdiction over the present Application is simply a perpetuation of the jurisdiction over the 2001 Application. Hence, according to Nicaragua, the Court remains seised of the 2001 Application in *Territorial and Maritime Dispute* despite the fact that the Court's

[103] Application, para. 10.

final Judgment of 19 November 2012 fully dealt with the subject-matter of those proceedings and brought an end to the case, and the case was thereafter removed from the list of pending cases.

4.3. The notion that the subject-matter of Nicaragua's Application remains within the jurisdiction of the Court established in *Territorial and Maritime Dispute* is devoid of merit. Nicaragua cites no provision of the Court's Statute or the Rules of Court, and no legal authority, for its contention. In addition to ignoring the fact that the Court's Judgment of 19 November 2012 fully delimited the maritime areas between the Parties – a decision that has the preclusive effect of *res judicata* [104] – Nicaragua's claim to jurisdiction disregards the consensual basis of jurisdiction in international law. Other than the routine sequencing of the phases of a case – for example, reserving issues of compensation to a subsequent phase –, the Court can preserve jurisdiction over a claim which it has already decided only in the exceptional case where it has expressly reserved jurisdiction as to subsequent events which may affect the very basis of its judgment. By contrast, the Judgment of 19 November 2012 fully exhausted the Court's jurisdiction without any such reservation.

[104] Chap. 5, *infra*.

B. There Is No Jurisdictional Basis for Nicaragua's Claim under the Statute

4.4. Article 36 of the Statute of the Court sets out the basis of the Court's jurisdiction. The claims advanced in Nicaragua's Application do not fall within any of the bases of jurisdiction provided for therein (special agreement, treaty, convention, optional clause declarations or *forum prorogatum*).

4.5. The Statute provides for only two procedures by which the Court can exercise continuing jurisdiction in a case without the need for an independent basis of jurisdiction. The first concerns requests for the interpretation of a judgment under Article 60; the second concerns applications for revision under Article 61. With respect to the former, the Court has made it clear that "'[its] jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case'…".[105] With respect to the latter, the Court has noted that a two-stage procedure applies without the need for a separate basis of jurisdiction: a first stage limited to considering the admissibility of the application and a second stage, if the application is admissible, devoted to its merits.[106]

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[105] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, *Judgment of 11 Nov. 2013*, p. 15, para. 32.

[106] *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 398, para. 18.

4.6. Nicaragua does not purport to seek either an interpretation of the Court's Judgment of 19 November 2012 or its revision, notwithstanding the fact, discussed in Chapter 6 below, that Nicaragua's Application is tantamount to a request to revise the Judgment in *Territorial and Maritime Dispute* without complying with the conditions laid out in Article 61. It follows that Nicaragua has not provided any legal basis for its second basis of jurisdiction.

C. The Court's Jurisdiction Is Preserved Only When the Parties or the Court Expressly So Provide

4.7. Apart from interpretation and revision, there are only three situations where the Court can exercise a continuing jurisdiction over a case. The first is where the parties to the original case specifically agree to the possibility of returning to the Court after it has rendered its judgment. The second arises where the Court, in its Judgment, expressly reserves jurisdiction over specific issues arising in connection with the original case for a subsequent phase of the proceedings. The third is an exceptional case, for example, one in which non-compliance with a respondent's unilateral commitment – which, in the Court's view, has caused the object of the dispute to disappear – will affect the very "basis" of the Court's Judgment. That was the situation confronted by the Court in the *Nuclear Tests* cases.

4.8. Examples of the first two situations may be found in the current list of pending cases published on the Court's website –

it being recalled that *Territorial and Maritime Dispute* is not listed as a pending case. There are two cases listed as pending where there are no on-going proceedings and the Court is not currently deliberating its judgment. The first is the case concerning the *Gabčíkovo-Nagymaros Project*; the second is *Armed Activities on the Territory of the Congo*.

4.9. In *Gabčíkovo-Nagymaros*, the Court's jurisdiction continues to be established because of a specific provision that the parties included in their Special Agreement, which was the basis of the Court's original jurisdiction. Article 5 of the Special Agreement provided that, following the transmission of the Court's Judgment in the case, the parties would immediately enter into negotiations on the modalities for its execution. If the parties were unable to reach agreement within six months, Article 5 went on to provide that "either party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."[107] Thus, unlike in the present case, the possibility of returning to the Court following its Judgment was explicitly agreed by the parties.

4.10. In the *Armed Activities* case, the Court held in its *dispositif* that both Uganda and the Democratic Republic of the Congo were under an obligation to make reparations to the other party and that, failing agreement between the parties, the question of reparation "shall be settled by the Court, and [the

[107] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Special Agreement, 2 July 1993*, p. 8, Art. 5 (3).

Court] reserves for this purpose the subsequent procedure in the case."[108] The Court made no such reservation in the *Territorial and Maritime Dispute* case.

4.11. The Court adopted a similar approach to compensation in the *Corfu Channel* case. After finding that it had jurisdiction to assess the amount of compensation and stating that "further proceedings on this issue are necessary",[109] the Court held in the operative part of the Judgment that the assessment of the amount of compensation was reserved for future consideration, with the procedure on that subject regulated by an Order issued on the same day.[110] Similarly, in *Military and Paramilitary Activities in and against Nicaragua*, the Court found it appropriate to determine the nature and amount of the reparation due "in a subsequent phase of the proceedings", and held in its *dispositif* that, failing agreement between the parties, the issue of reparations was reserved for "the subsequent procedure in the case."[111]

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[108] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 281-282, paras. 345 (6) and (14).

[109] *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at p. 26.

[110] *Ibid*., p. 36.

[111] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Merits, Judgment, I.C.J. Reports 1986*, pp. 142-143, para. 284 and p. 149, para. 292 (15). And see a number of other cases where the Court has similarly reserved its jurisdiction in express terms: *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 693, para. 165 (8); *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 45, para. 90 (6); *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits), Judgment of September 13th, 1928, P.C.I.J., Series A, No. 17*, p. 64 (8) and (9).

4.12. In contrast with the cases discussed above, the Court did not reserve any issue for future consideration in the *Territorial and Maritime Dispute* case. As will be demonstrated in the next section, the Court ruled upon Nicaragua's claims in their entirety. The reasoning of the Court makes this clear, as does the operative part of the Judgment where the Court (i) did not uphold Nicaragua's submission requesting the delimitation of the continental shelf beyond 200 nautical miles from its baselines, (ii) fully delimited the maritime areas between the Parties and (iii) did not reserve any issue for a subsequent phase of the proceedings.

4.13. The Judgments in the *Nuclear Tests* cases also confirm the principle that the Court does not retain jurisdiction after a judgment on the subject-matter of the dispute unless the Court has *expressly* reserved jurisdiction over the case. As noted above, the Judgments in those cases corroborate that the Court will make such a reservation – in terms of an express monitoring clause – only in an exceptional situation as, for example, was present in *Nuclear Tests* where the non-compliance of a party's unilateral commitment – which the Court had ruled had caused the object of the dispute to disappear – will affect the very basis of its Judgments. In such an exceptional case, the Court may empower the applicant to "request an examination of the situation in accordance with the provisions of the Statute."[112]

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[112] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63.

4.14. In the *Nuclear Tests (New Zealand* v. *France)* case, the Court explained, at paragraph 63, the situation in the following way:

> "Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request."[113]

4.15. In *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court`s Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v*. France) *Case*, the Court agreed with New Zealand that paragraph 63 of its Judgment of 20 December 1974 could not have intended to confine the Applicant's access only to the legal procedures provided in Articles 40(1), 60 and 61 (as France had argued)[114] which would have been available to it in any event. The Court stated that:

> "Whereas by inserting the above-mentioned words

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[113] *Nuclear Tests Case (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63.

[114] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v*. France) *Case, I.C.J. Reports 1995*, pp. 300-301, para. 40.

> [the Applicant could request an examination of the situation in accordance with the provisions of the Statute] in paragraph 63 of its Judgment, the Court did not exclude a special procedure, in the event that the circumstances defined in that paragraph were to arise, in other words, circumstances which 'affected' the 'basis' of the Judgment;"[115]

The Court dismissed New Zealand's request on the ground that a procedure available under paragraph 63 of the Judgment of 20 December 1974 "appears to be indissociably linked … to the existence of those circumstances; and … if the circumstances in question do not arise, that special procedure is not available."[116] The Court found that New Zealand's "Request for an Examination of the Situation" did not fall within the provisions of paragraph 63 of that Judgment.[117]

4.16. The present case bears no similarity to the *Nuclear Tests* cases. In its Judgment of 19 November 2012, the Court not only did not make any express reservation with respect to Nicaragua's claim; nothing in the Judgment even hints at such an intention. The conclusion that Nicaragua had not established its claim to a continental shelf beyond 200 nautical miles, and the corresponding rulings in the *dispositif*, fully exhausted the Court's jurisdiction. By deciding that it "cannot uphold"

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115 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v*. France) *Case, I.C.J. Reports 1995*, pp. 303-304, para. 53.

116 *Ibid.*, p. 304, para. 54.

117 *Ibid.*, p. 306, para. 65.

Nicaragua's claim,[118] and by otherwise fully delimiting the maritime boundary between the Parties, the Court plainly indicated that nothing more was left to decide in this respect. When the Court also concluded that Nicaragua had "not established" its claim as to the outer continental shelf,[119] the Court did not qualify its finding by allowing Nicaragua to make another attempt to establish its claim to the outer continental shelf at "a later stage". Nor does the Judgment even contemplate a reconsideration of the Nicaraguan claim in future proceedings. As the next Chapter fully deals with Colombia's objection to jurisdiction on the basis of *res judicata*, for present purposes it suffices to briefly set out, as the following section does, some factual and legal considerations on the basis of which the Judgment of 19 November 2012 fully decided the subject-matter of the dispute introduced by Nicaragua in its Application of 6 December 2001, and that there is therefore no question of a continuing jurisdiction that could attach to the subject-matter of Nicaragua's Application of 16 September 2013.

D. The Judgment of 19 November 2012 Fully Decided the Subject-Matter of the Dispute Introduced by Nicaragua with Its Application of 6 December 2001

(1) THE JUDGMENT OF 19 NOVEMBER 2012

4.17. Both the reasoning and operative part of the Court's Judgment in *Territorial and Maritime Dispute* show that the

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[118] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports* 2012, p. 719, para. 251 (3).

[119] *Ibid.*, p. 669, para. 129.

Court fully dealt with and decided the subject-matter of the dispute that Nicaragua introduced by means of its Application dated 6 December 2001. It follows that nothing was left for a future determination, and that the Court does not possess a continuing jurisdiction over the continental shelf claim advanced in Nicaragua's Application in the present case.

4.18. As was noted in Chapter 2, during the course of the proceedings, Nicaragua changed its claim from a request for the Court to delimit the single maritime boundary between the parties to a request for the Court to delimit the continental shelf lying more than 200 nautical miles from Nicaragua's baselines. While Colombia raised an objection to the admissibility of Nicaragua's new claim, the Court found the claim to be admissible. As the Court stated at paragraph 111 of its Judgment:

> "In the Court's view, the claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute. Moreover, it arises directly out of that dispute."[120]

4.19. With respect to the merits of Nicaragua's extended continental shelf claim, the Court observed that Nicaragua "has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile

[120] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 665, para. 111.

entitlement to the continental shelf, measured from Colombia's mainland coast" and that, consequently, "the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it."[121] The Court consequently concluded that Nicaragua's claim contained in its final submission I(3) "cannot be upheld", a conclusion that formally appears in the *dispositif* where the decision was unanimous.[122]

4.20. In the light of that "decision", the Court indicated that it "must consider what maritime delimitation it is to effect", bearing in mind that "there can be no question of determining a maritime boundary between the mainland coasts of the Parties, as these are significantly more than 400 nautical miles apart."[123] In order to determine what the Court was called on to decide, the Court found it necessary to turn to the Nicaraguan Application and Nicaragua's submissions. In its Application, it will be recalled, Nicaragua asked the Court

> "to determine the course of the single maritime boundary between the areas of continental shelf

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[121] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 669, para. 129.

[122] *Ibid.*, p. 670, para. 131 and p. 719, para. 251 (3). The use of the formula "cannot uphold" is also important as it states a rejection by the Court of a given claim or submission on the merits. A recent example of this is the *Frontier Dispute* Judgment wherein the Court, by using the same language of the *Territorial and Maritime Dispute* case, decided not to uphold (i.e., rejected) certain territorial claims and submissions made by Burkina Faso and Niger. See: *I.C.J., Frontier Dispute (Burkina Faso/Niger), Judgment, 16 April 2013*, p. 42, para. 98 and p. 50, para. 114(1).

[123] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 670, para. 132.

> 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."[124]

The Court found that this request "was clearly broad enough to encompass the determination of a boundary between the continental shelf and exclusive economic zone generated by the Nicaraguan mainland and adjacent islands and the various maritime entitlements appertaining to the Colombian islands."[125]

4.21. As for Nicaragua's final submissions, the Court found they called upon the Court "to effect a delimitation between the maritime entitlements of the Colombian islands and the continental shelf and exclusive economic zone of Nicaragua"[126] – a conclusion that the Court considered was confirmed by the statement made by Nicaragua's Agent in opening the oral proceedings that Nicaragua's aim was for the Court's decision to leave "no more maritime areas pending delimitation between Nicaragua and Colombia."[127]

4.22. The Court then proceeded to carry out a full and final delimitation of the maritime areas where the parties had overlapping entitlements. That the Court viewed this as dealing

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[124] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Application, 6 December 2001*, p. 8, para. 8.
[125] *Ibid.*, *Judgment, I.C.J. Reports 2012*, p. 670, para. 133.
[126] *Ibid.*, pp. 670-671, para. 134.
[127] *Ibid.*

completely with the subject-matter of the dispute brought by Nicaragua is confirmed by the Court's statement that

> "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent…"[128]

4.23. Thus, when the Court set out the course of the maritime boundary between the Parties at paragraph 237 of its Judgment, after having decided that Nicaragua's submission I(3) could not be upheld, it described both Point A and Point B situated at the end of the 200-nautical-mile parallels as "endpoints". In other words, the Court clearly viewed its decision as final and comprehensive. The operative part of the Judgment, where each of the parallel lines is defined as extending "until it reaches the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured", bears this out.[129] Indeed, had the Court not intended to adjudicate and thus not to dispose of the entire subject-matter of the claims, it would have refrained from stating endpoints of the delimitation lines and deferred to the competence of the CLCS, as it did in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*.[130] Moreover, any perpetuation of the Court's jurisdiction to entertain Nicaragua's

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[128] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 671, para. 136; citing *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 23, para. 19.

[129] *Ibid.*, pp. 719-720, para. 251 (4).

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

renewed claim to delimit areas of continental shelf lying more than 200 nautical miles from its baselines would completely upset the Court's analysis of the relevant coasts and the relevant area, and its application of the disproportionality test, which formed an integral part of its Judgment. The inescapable conclusion is that the boundary decided by the Court fully disposed of the subject-matter of the proceedings in *Territorial and Maritime Dispute.*

4.24. The case that Nicaragua began in 2001 came to an end with the delivery of the Judgment on 19 November 2012. When the Court ruled in the operative part of its Judgment that "it cannot uphold the Republic of Nicaragua's claim contained in its final submission I(3)",[131] it exhausted its jurisdiction over Nicaragua's claim without any qualification, condition or reservation. The finding that Nicaragua's claim cannot be upheld concludes section IV of the Judgment of 19 November 2012 on "Consideration of Nicaragua's claim for delimitation of a continental shelf extending beyond 200 nautical miles."[132]

4.25. Indeed, Nicaragua itself has publicly stated that all relevant maritime boundaries have been resolved. In its submission to the CLCS of June 2013 – that is, after the Court delivered its Judgment – Nicaragua stated:

> "...Nicaragua wishes to inform the Commission that there are no unresolved land or maritime

[131] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 719, para. 251 (3).
[132] *Ibid.*, pp. 665-670, paras. 113-131.

disputes related to this submission."[133]

4.26. Once the Court has decided a claim in a final judgment, it has exhausted its mandate for the adjudication of that dispute. The Court has no residual or inherent power which could enable a State to resubmit the same claim by characterizing it as only a later stage of the same proceeding, but not a new proceeding. When the claim is dealt with, whether on grounds of jurisdiction or merits, the proceedings and the consent to jurisdiction on which they were based are terminated and cannot be revived by a new application. Accordingly, once jurisdiction is exhausted, as it was by the Judgment of 19 November 2012, the case is removed from the list of pending cases, as occurred with respect to *Territorial and Maritime Dispute*.

(2) THERE IS NO CONTINUING JURISDICTION OVER THE SUBJECT-MATTER OF NICARAGUA'S APPLICATION

4.27. The concept of some sort of self-perpetuating jurisdiction, as claimed by Nicaragua, is incompatible with the fundamental principle of *res judicata*, as set out in Colombia's third objection to jurisdiction discussed in the next Chapter. Paragraph 10 of the Nicaraguan Application, however, rests on the assumption that dismissal of a claim still leaves a kind of

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[133] Republic of Nicaragua, Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea, 1982. Part I: Executive Summary, 24 June 2013, p. 2, para. 8. Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nic66_13/Executive%20Summary.pdf (Last visited: 4 Aug. 2014)

self-perpetuating jurisdiction, such that even after it has been decided, the Court can again be seised of the *same* claim – until the claim is finally amended so far as to have a chance of prospering. That proposition has no merit.

4.28. The Court has never reserved jurisdiction over a claim that it had "not upheld" or otherwise decided for the purpose of permitting the applicant State to amend the legal or factual basis in a fresh application. As demonstrated above, whenever the Court has reserved determination of an issue for a later stage of the proceedings, it has done so with respect to elements of the claim not yet determined,[134] and never for the purpose of reconsidering a claim that it had rejected or found not to be "established" – as in the Judgment of 19 November 2012.[135]

4.29. Not only would a self-perpetuated jurisdiction over a claim decided by the Court run counter to the principle of *res judicata*, it would deprive the other party of the right to terminate its consent to jurisdiction. If a ruling not upholding a claim could preserve the jurisdiction of the Court, this would allow a State to renew its application – with the benefit of the judicial guidance of the Court's reasoning in the previous case – and to bring the same claim again, even if consent to jurisdiction had lapsed in the interim. This kind of continuing or perpetual jurisdiction would even enable a State to bring an immature or unsubstantiated claim solely for the purpose of preserving

[134] See paras. 4.7-4.16 above.

[135] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 669, para. 129.

jurisdiction *ad futurum*. However, no party should be harassed by serial applications pursuing the same claim.

E. Conclusion

4.30. While it is within the Court's power to preserve jurisdiction over all or part of the subject-matter of a case it has decided, it did not do so in the instant case. To the contrary, the Court fully dealt with, and decided, the subject-matter of the dispute brought by Nicaragua with its Application of 6 December 2001. With its Judgment of 19 November 2012, the Court exhausted its jurisdiction in the case. Consequently, Nicaragua cannot bring a claim on the subject-matter of the Judgment of 19 November 2012, based on the contention that its present Application remains under the jurisdiction of the Court which had been established in the prior case.

Chapter 5

THIRD PRELIMINARY OBJECTION: THE COURT LACKS JURISDICTION IN THIS CASE BECAUSE NICARAGUA'S CLAIM IS BARRED BY *RES JUDICATA*

A. Introduction

5.1. Nicaragua's final submission I(3) in *Territorial and Maritime Dispute* asked the Court to adjudge and declare that

> "(3) [t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties."[136]

5.2. In its Judgment of 19 November 2012, the Court found the claim contained in Nicaragua's final submission I(3) admissible[137] but unanimously found "that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I(3)."[138]

5.3. In its Application to the Court of 16 September 2013 ("Application"), which initiated the present case, Nicaragua described the "Subject of the Dispute" as follows:

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[136] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Public Sitting 1 May 2012*, *CR 2012/15*, p. 50 (Nicaraguan Agent).

[137] *Ibid., Judgment, I.C.J. Reports 2012*, p. 665, para. 112 and p. 719, para. 251 (2).

[138] *Ibid*., p. 719, para. 251 (3).

> "The dispute concerns the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia. Nicaragua requests the Court to: (1) determine the precise course of the boundary of the continental shelf between Nicaragua and Colombia in accordance with the principles and rules of international law, and (2) indicate the rights and duties of the two States in relation to the area of overlapping claims and the use of its resources pending the precise delimitation of the line of the boundary."[139]

In Section V of its Application, under the heading "Decision Requested", Nicaragua has requested the Court to adjudge and declare, *inter alia*,

> "*FIRST:* The precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012.
>
> *SECOND:* The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast."[140]

5.4. As is apparent on its face, the first request in this Application is no more than a reincarnation of Nicaragua's claim

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[139] Application, para. 2.

[140] Application, para. 12.

contained in its final submission I(3) in *Territorial and Maritime Dispute* ("I(3) claim"). In that case, Nicaragua presented detailed arguments in support of its I(3) claim and Colombia joined issue with it on grounds of admissibility and of substance. Since the Court, in its Judgment of 19 November 2012 upheld the admissibility of Nicaragua's I(3) claim but did not uphold it on the merits, Nicaragua's Application of 16 September 2013 is barred by the doctrine of *res judicata*.

5.5. Nicaragua's second request stands or falls on the disposition of its first request. Inasmuch as the I(3) claim was found admissible but not upheld in *Territorial and Maritime Dispute* and that Judgment constitutes a *res judicata*, nothing is "pending". Hence the second request invites the Court to engage in a hypothetical, which has no object.

B. The Parties' Written and Oral Submissions in *Territorial and Maritime Dispute* Regarding Nicaragua's I(3) Claim

(1) The issues raised in the Application of 16 September 2013 were extensively argued by Nicaragua and Colombia in the written submissions preceding the Judgment in *Territorial and Maritime Dispute*

5.6. Throughout the proceedings in *Territorial and Maritime Dispute*, there were two constants in Nicaragua's pleadings that are relevant to the Court's consideration of its jurisdiction in this case. First, Nicaragua maintained that the relevant area within which the delimitation should be effected was the entire maritime area situated between the Parties' mainland coasts.

This area was depicted on Figure I in Nicaragua's Memorial and Figure 3-1 in its Reply. It manifestly comprised areas within which Nicaragua, in its present Application, asks the Court now to determine a continental shelf boundary. (For ease of reference, the relevant figures are reproduced following this page.) Second, Nicaragua claimed a continental shelf boundary that lay beyond 200 nautical miles from its baselines. However, the Court will recall that, after its 2001 Application, Nicaragua's position on continental shelf delimitation with Colombia evolved through the several phases of that case. It is useful to follow those changes of position in order to appreciate the significance of Nicaragua's I(3) claim. In its Application to the Court of 6 December 2001, Nicaragua's second request to the Court was "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."[141] Nicaragua maintained that claim in its Memorial, arguing that "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."[142]

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[141] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application*, 6 December 2001, p. 8, para. 8.

[142] *Ibid., Judgment, I.C.J. Reports 2012*, p. 634, para. 15.

Figure I from the Nicaraguan Memorial
The Delimitation Area
Median Line
Nicaragua
Colombia
Law of the Sea
ADMIRALTY
CONSULTANCY SERVICES
UK HYDROGRAPHIC OFFICE LAW OF THE SEA DIVISION
E-Mail LOS@ukho.gov.uk
Tel +44 (0)1823 337900 Fax +44 (0)1823 353075
© Crown Copyright 2003

Figure 1

FIGURE 3-1

Figure 3-1 from the Nicaraguan Reply

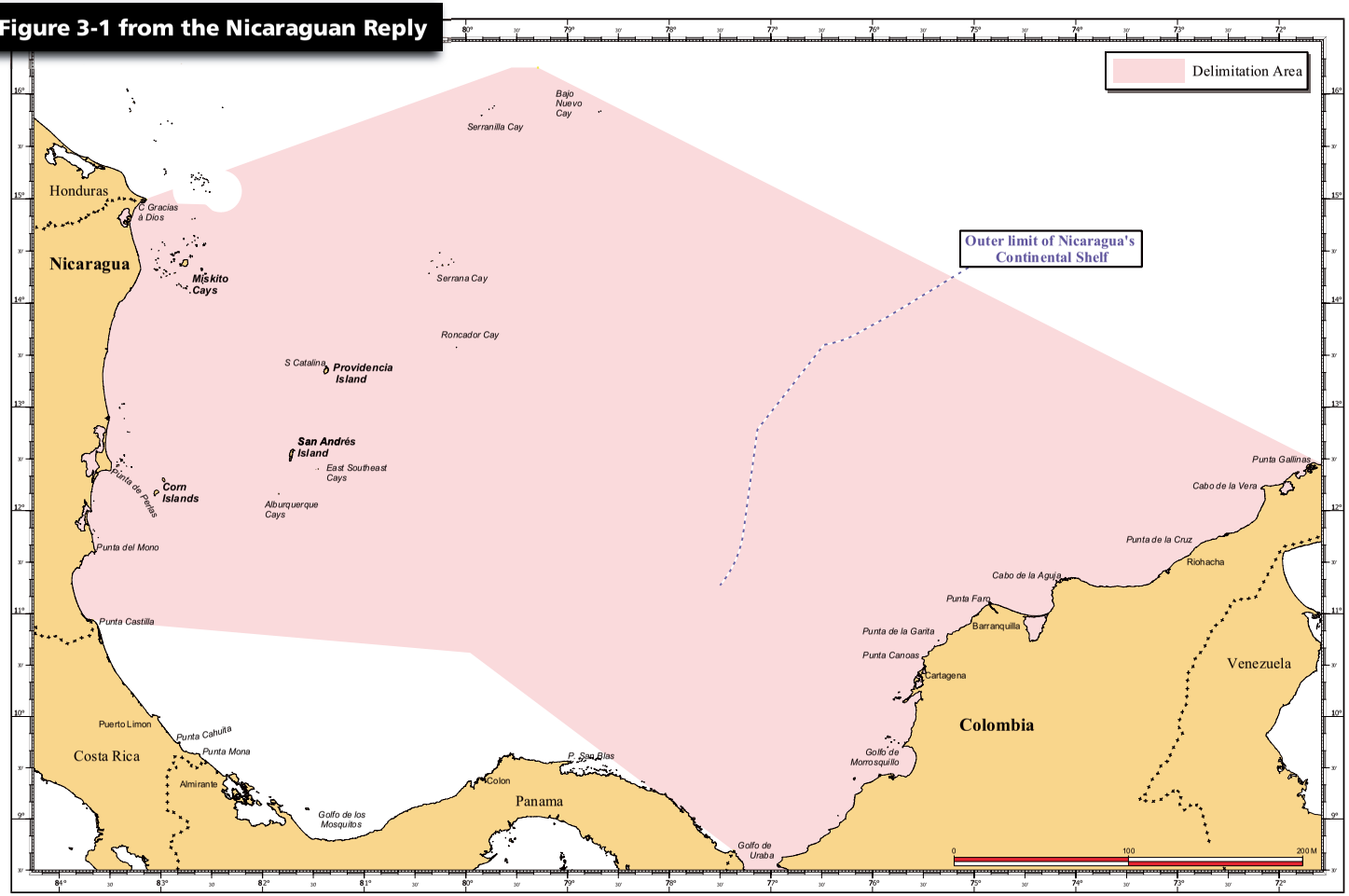

Figure 2

Based on NM Figure 1

The Delimitation Area according to Nicaragua

5.7. In its Memorial, Nicaragua eschewed the relevance of geological and geomorphological factors. It stated:

> "The position of the Government of Nicaragua is that geological and geomorphological factors have no relevance for the delimitation of a single maritime boundary within the delimitation area. As demonstrated by the pertinent graphics, the parties have overlapping legal interests within the delimitation area, and it is legally appropriate that these should be divided by means of an equidistance line."[143]

Indeed, Figure I in Nicaragua's Memorial, labeled "The Delimitation Area" showed a shaded area extending from the respective mainland coasts of Nicaragua and Colombia with a median line just beyond the 200-nautical-mile line from Colombia's baselines.

5.8. Colombia, in its Counter-Memorial, joined issue on this point, noting that "the two mainland coasts lie more than 400 nautical miles apart in the area covered by Nicaragua's claim."[144] Colombia proceeded to rebut Nicaragua's claim to areas more than 200 nautical miles from the relevant baselines of the parties, relying on the Court's judgments in *Nicaragua* v. *Honduras* and *Gulf of Maine*.[145]

5.9. In Nicaragua's Reply, filed on 18 September 2009, Nicaragua changed its submission. It no longer requested the

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[143] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Memorial of Nicaragua, Vol. I, pp. 215-216, para. 3.58.

[144] *Ibid.,* Counter-Memorial of Colombia, Vol. I, p. 313, para. 7.12.

[145] *Ibid*., at pp. 319-321, paras.7.18-7.20.

delimitation of a single maritime boundary, but rather a continental shelf boundary between the mainland coasts of the Parties following a specific set of co-ordinates that lay more than 200 nautical miles from Nicaragua's baselines and which depended on the identification of the outer limits of its extended continental shelf.[146] As evidence in support of this new submission, Nicaragua annexed certain technical information, including the Preliminary Information it had provided to the CLCS and a delimitation of its claimed shelf with that of Colombia.[147]

5.10. In its Reply, Nicaragua also rejected Colombia's position that Nicaragua did not have an entitlement beyond 200 nautical miles from baselines, insisting that "Article 76 of the Convention establishes the bases of entitlement to the continental margin *and entitlement is logically anterior to the process of delimitation*."[148] Contrary to the position it had taken in its Memorial, Nicaragua then proceeded to argue on the basis of "geological and other evidence determining the outer limit of the respective continental margins of Nicaragua and Colombia."[149] Specifically, Nicaragua contended:

> "For Nicaragua, there is clear topographical and geological continuity between the Nicaraguan land mass and the Nicaraguan Rise which is a shallow area of continental crust extending from Nicaragua to Jamaica. Its southern limit is sharply defined by

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146 *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Reply of Nicaragua, Vol. I, Chapter III.

147 *Ibid.*, Vol. I, at p. 90, para. 3.38.

148 *Ibid.*, pp. 79-80, para. 3.14. (Italics in original)

149 *Ibid.,* p. 81, para. 3.20.

> the Hess escarpment, separating the lower Nicaraguan Rise from the deep Colombian Basin. This therefore represents the natural prolongation of the Nicaraguan landmass."[150]

5.11. On the basis of the geological and geomorphological data it had adduced, Nicaragua submitted that

> "Nicaragua has an entitlement extending to the outer limits of the continental margin. In the case of an overlap with a continental margin of Colombia, then the principle of equal division of the areas of overlap should be the basis of the maritime delimitation."[151]

5.12. At that phase, Nicaragua's emphasis was on geological evidence: "The principle of equal division must operate within the framework of the geological and other evidence determining the outer limit of the respective continental margins of Nicaragua and Colombia."[152] There followed the technical information which Nicaragua declared it was to submit to the CLCS "within the next months."[153] Nicaragua proceeded to elaborate on that information. On that basis, it indicated precise coordinates for the maritime boundary, in paragraph 3.46 of its Reply. Hence, Nicaragua had afforded itself ample opportunity, from its Application in 2001 to its Reply in 2009, that is eight years, and, moreover, had fully used it to attempt to substantiate

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150 *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Reply of Nicaragua, Vol. I, pp. 84-85, para. 3.28.

151 *Ibid*., p. 88, para. 3.34.

152 *Ibid.*, p. 89, para.3.36.

153 *Ibid*., at p. 90, para. 3.38.

its claim *vis-à-vis* Colombia for an extended continental shelf and its case for its delimitation beyond 200 nautical miles from Nicaragua's baselines.

5.13. In its Rejoinder, Colombia drew the Court's attention to the fact that Nicaragua had shifted its argument from one based on a mainland-to-mainland median line relying on geography to one based on

> "…an outer continental shelf claim based exclusively on geology and geomorphology; and it has introduced a *brand new claim* to divide equally what is alleged to be the overlapping *physical* continental shelves of the Parties' mainland coasts."[154]

Colombia pointed out that "what Nicaragua is now seeking from the Court is… (ii) recognition of a claim to extended continental shelf rights under Article 76 of the 1982 Convention…".[155] Colombia challenged not only the admissibility of the new continental shelf claim[156] but also its merits.[157] Colombia concluded in its Rejoinder:

> "The new continental shelf claim [of Nicaragua] also lacks any merit. Nicaragua has neither demonstrated nor established any entitlement to outer continental shelf rights, and no such rights exist in this part of the Caribbean. Moreover, there is no basis for effecting a continental shelf delimitation based on the physical characteristics

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154 *Territorial and Maritime Dispute (Nicaragua v. Colombia*), Rejoinder of Colombia, Vol. I, pp. 113-114, para. 4.2. (Emphasis added)

155 *Ibid.*, Vol. I, p. 117, para. 4.7.

156 *Ibid*., at pp. 122-136, paras. 4.15-4.35.

157 *Ibid.*, at pp. 136-156, paras. 4.36-4.69.

> of the shelf when the area claimed by Nicaragua falls within 200 nautical miles of Colombia's mainland and insular territory."[158]

5.14. It is, thus, clear that the issues raised in Nicaragua's Application of 16 September 2013 were joined and extensively argued by both parties in their respective written submissions.

(2) THE ISSUES RAISED IN THE APPLICATION OF 16 SEPTEMBER 2013 WERE EXTENSIVELY ARGUED BY NICARAGUA AND COLOMBIA IN THE ORAL PHASE PRECEDING THE JUDGMENT IN *TERRITORIAL AND MARITIME DISPUTE*

5.15. The essential claim of Nicaragua's new Application was also extensively argued in the oral phase of *Territorial and Maritime Dispute*. Nicaragua requested that all maritime areas of Nicaragua and Colombia be delimited on the basis of international law. It is worth recalling again that the Court, in its Judgment, quoted at length the opening statement of the Agent of Nicaragua, which had made that clear during the oral proceedings:

> "On a substantive level, Nicaragua originally requested of the Court, and continues to so request, that all maritime areas of Nicaragua and Colombia be delimited on the basis of international law; that is, in a way that guarantees to the Parties an equitable result.
>
> (…)

[158] *Territorial and Maritime Dispute (Nicaragua v. Colombia*), Rejoinder of Colombia, Vol. I, at p. 157, para. 4.71.

> But whatever method or procedure is adopted by the Court to effect the delimitation, the aim of Nicaragua is that the decision leaves no more maritime areas pending delimitation between Nicaragua and Colombia. This was and is the main objective of Nicaragua since it filed its Application in this case. (See sketch-map No. 2, p. 663)."[159]

5.16. At the hearing on 24 April 2012, Dr. Cleverly undertook to "describe in more detail the geological and geomorphological aspects, particularly of the continental shelf."[160] He proceeded to present geomorphological and bathymetric data purporting to prove Nicaragua's claim to an extended continental shelf well into the 200-nautical-mile shelf and exclusive economic zone of mainland Colombia.

5.17. Dr. Cleverly was followed by Professor Lowe, who sought to provide a legal basis for Nicaragua's claim "that Nicaragua's landmass continues under the sea in a north-easterly direction for about 500 nautical miles, overlapping Colombia's 200-nautical-mile zone."[161] He proceeded to argue that the alleged overlap between Nicaragua's extensive claim and Colombia's entitlement to 200 nautical miles of continental shelf should be divided by equitable principles, in the instant case by a median line.

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[159] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 670, para. 134.

[160] *Ibid., Public Sitting, 24 April 2012*, *CR 2012/9,* p. 10, para. 2 (Cleverly).

[161] *Ibid.*, p. 26, para. 28 (Lowe).

5.18. Thus, in its first round of oral argument, Nicaragua argued the factual and legal grounds for exactly the same claim as in its current Application.

5.19. While Colombia did not object to the Court's jurisdiction to entertain what was, in effect, a new Nicaraguan claim, Colombia did object to its admissibility. Colombia contended that inasmuch as it was a *new* claim and changed the basic subject-matter of the dispute originally introduced in Nicaragua's Application, it was inadmissible.[162]

5.20. Notwithstanding its objection to admissibility, Colombia fully engaged this issue not only in its Rejoinder, but also in its oral argument. On 26 April 2012, Professor Crawford, after remarking that Nicaragua's claim was new and not expressed in its original Application, observed that the data submitted by Nicaragua, its so-called "tentative data,"

> "…would not constitute a proper basis for a continental shelf submission to the Annex II Commission. Unless Nicaragua intends to posit the view, as the principal judicial organ, to be considerably less exacting than the members of that Commission when you consider evidence of a claim, tentative data do not establish Nicaragua's case. Absent proof of overlapping potential entitlement, there is no basis for any delimitation."[163]

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[162] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 4 May 2012, CR 2012/17*, p. 38, para. 28(3), and p. 39, para. 1(a) (Colombian Agent).

[163] *Ibid., Public Sitting 26 April 2012, CR 2012/11,* p. 25, para. 22 (Crawford).

5.21. On 27 April 2012, Mr. Bundy, on behalf of Colombia, returned to the question of whether Nicaragua, in making a claim to an extended continental shelf, had fulfilled the obligations prescribed by Article 76 of UNCLOS. He elaborated on the critical obligation in Article 76(8).[164] Mr. Bundy drew attention to Nicaragua's submission to the CLCS (which it had, for some reason, not filed with the Court in its Reply):

> "…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.'
>
> …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."[165]

Mr. Bundy then proceeded to review the substance of Nicaragua's data and to rebut it.

5.22. In the second round of oral argument, Mr. Cleverly, on 1 May 2012, sought to defend the quality of the data which Nicaragua had submitted to the CLCS, on which Nicaragua was

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[164] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 27 April 2012, CR 2012/12*, p. 54, para. 52 ff, drawing attention, in particular, to para. 407 of the judgment of ITLOS in *Bangladesh v. Myanmar* (see para. 54, at p. 55). That holding tracked the ICJ judgment in *Nicaragua v. Honduras* as noted by Mr. Bundy at p. 55, para. 55.

[165] *Ibid.*, p. 56, paras. 59-60 (Bundy).

relying for its I(3) claim before the Court. Rather than being "tentative", he assured the Court, "they are established scientific fact."[166] He stated that "the data included were rigorously collected by scientific research cruises."[167] He further explained that the deficiency was not in the data themselves but in the "metadata".[168]

5.23. Mr. Cleverly was followed by Professor Lowe who elaborated Nicaragua's restrictive understanding of Article 76 of UNCLOS and the CLCS' role in it: "the CLCS has no role in establishing an entitlement to a continental shelf: it merely determines the precise location of the outer limits of a pre-existing entitlement."[169] Professor Lowe said that although

> "UNCLOS States parties have agreed that they will regard the Commission's seal of approval as giving definitive force to the boundary—'final and binding'… that does not mean that everyone else must pretend that the continental margins of the world, surveyed and marked on nautical maps, charts, atlases, and even on Google Earth, do not exist."[170]

Professor Lowe reaffirmed Nicaragua's request that the Court delimit the boundary of the extended continental shelf well within Colombia's 200-nautical-mile zone.

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166 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 1 May 2012, CR 2012/15*, p. 11, para. 4 (Cleverly).
167 *Ibid*., at p. 16, para. 24.
168 *Ibid*.
169 *Ibid.*, p. 19, para. 15 (Lowe).
170 *Ibid*., at p. 22, para. 26.

5.24. On 4 May 2012, Mr. Bundy, on behalf of Colombia, devoted the bulk of his presentation to a refutation of Nicaragua's claim to an extended continental shelf and, in particular, to Nicaragua's evidence based on geology and geomorphology purporting to support its claim.[171] He was particularly detailed with respect to the geologic and geomorphologic claims in Nicaragua's revised case.[172]

5.25. In its oral arguments, Nicaragua had insisted that it was not asking for a definitive ruling on the precise location of the outer limits of its continental shelf, but rather for the Court to say that Nicaragua's shelf was divided from that of Colombia by a delimitation line that has a defined course.[173] But at the end of the oral hearing, Nicaragua's final submission I(3) requested a continental shelf boundary dividing by equal parts overlapping entitlements to a continental shelf of both Parties.[174] Hence, Nicaragua's claim in its various formulations (i) required Nicaragua to establish that it was entitled to a continental shelf lying more than 200 miles from its baselines and (ii) requested the delimitation of that continental shelf and Colombia's continental shelf entitlement.

5.26. Thus, the written and oral pleadings show that the Parties, the legal basis and the remedy sought in the Nicaraguan Application of 16 September 2013 are identical in all these

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171 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 4 May 2012*, *CR 2012/16*, at p. 42, paras. 33ff (Bundy).

172 *Ibid*., p. 45, paras. 51ff.

173 *Ibid., Judgment, I.C.J. Reports 2012*, p. 669, para. 128.

174 *Ibid*., p. 636, para. 17.

respects to those in the I(3) claim which had already been extensively argued by Nicaragua and Colombia in *Territorial and Maritime Dispute*.

C. The Court's Judgment of 19 November 2012 Did Not Uphold Nicaragua's I(3) Claim

(1) The Court upheld the admissibility of Nicaragua's I(3) claim in its Judgment of 19 November 2012

5.27. As will be recalled, Colombia had requested that the Court dismiss Nicaragua's final submission I(3) for an extended continental shelf on the ground that it was new and transformed the subject-matter of the dispute.[175] In its Judgment of 19 November 2012, the Court rejected Colombia's admissibility objection, deciding that the claim contained in Nicaragua's final submission I(3) was admissible.[176]

5.28. The Court held that while "from a formal point of view, the claim made in Nicaragua's final submission I(3)"[177] was new, it did not transform "the subject-matter of the dispute brought before the Court";[178] the claim was "implicit in the Application or must arise directly out of the question which is

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[175] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 4 May 2012, CR 2012/17*, p. 38, para. 28(3) (Nicaraguan Agent), and p. 39, para. 1(a) (Colombian Agent).

[176] *Ibid., Judgment, I.C.J. Reports 2012*, p. 665, para. 112.

[177] *Ibid.*, p. 664, para. 108.

[178] *Ibid*., p. 664, para. 109.

the subject-matter of the Application";[179] and "the claim to an extended continental shelf [fell] within the dispute between the Parties."[180] The Court provided a fully reasoned explanation of its decision to uphold the admissibility of Nicaragua's Submission I(3):

> "109. …The fact that Nicaragua's claim to an extended continental shelf is a new claim, introduced in the Reply, does not, in itself, render the claim inadmissible. The Court has held that 'the mere fact that a claim is new is not in itself decisive for the issue of admissibility' (*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). Rather, 'the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings' (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010 (II)*, p.657, para. 41).
>
> 110. For this purpose it is not sufficient that there should be a link of a general nature between the two claims. In order to be admissible, a new claim must satisfy one of two alternative tests: it must either be implicit in the Application or must arise directly out of the question which is the subject-matter of the Application (*ibid*.).
>
> 111. The Court notes that the original claim concerned the delimitation of the exclusive economic zone and of the continental shelf between the Parties. In particular, the Application defined the dispute as 'a group of related legal issues subsisting between the Republic of

[179] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 665, para. 110.
[180] *Ibid*., p. 665, para. 111.

> Nicaragua and the Republic of Colombia concerning title to territory and maritime delimitation'. In the Court's view, the claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute. Moreover, it arises directly out of that dispute. What has changed is the legal basis being advanced for the claim (natural prolongation rather than distance as the basis for a continental shelf claim) and the solution being sought (a continental shelf delimitation as opposed to a single maritime boundary), rather than the subject-matter of the dispute. The new submission thus still concerns the delimitation of the continental shelf, although on different legal grounds.
>
> 112. The Court concludes that the claim contained in final submission I(3) by Nicaragua is admissible."[181]

Having decided that it had jurisdiction over Nicaragua's I(3) claim and that the claim was admissible, there was no impediment for the Court to rule on the merits of Nicaragua's claim. Indeed, it was obliged to do so.

(2) THE COURT DID NOT UPHOLD NICARAGUA'S I(3) CLAIM ON THE MERITS

5.29. After holding Nicaragua's I(3) claim admissible, the Court proceeded to examine the claim in detail in section IV of its Judgment (paragraphs 113 to 131). The Court took account of the arguments of the Parties, the relevant provisions of

[181] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 664-665.

UNCLOS and in particular Article 76, its own jurisprudence and the Judgment of 14 March 2012 rendered by ITLOS in the *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal(Bangladesh/Myanmar)*.

5.30. The Court concluded that Nicaragua had not established that it had a continental shelf margin overlapping with Colombia's 200-nautical-mile entitlement to a continental shelf; consequently, it did not uphold Nicaragua's claim contained in its final submission I(3). The Court said:

> "128. The Court recalls that in the second round of oral argument, Nicaragua stated that it was 'not asking [the Court] for a definitive ruling on the precise location of the outer limit of Nicaragua's continental shelf'. Rather, it was 'asking [the Court] to say that Nicaragua's continental shelf entitlement is divided from Colombia's continental shelf entitlement by a delimitation line which has a defined course'. Nicaragua suggested that '*the Court could make that delimitation by defining the boundary in words such as "the boundary is the median line between the outer edge of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia's 200‑mile zone*". *This formula, Nicaragua suggested, "does not require the Court to determine precisely where the outer edge of Nicaragua's shelf lies*". *The outer limits could be then established by Nicaragua at a later stage, on the basis of the recommendations of the Commission.*'
>
> 129. However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to

> overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it.
>
> 130. In view of the above, the Court need not address any other arguments developed by the Parties, including the argument as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one party can affect a 200-nautical-mile entitlement to the continental shelf of another party.
>
> 131. The Court concludes that Nicaragua's claim contained in its final submission I(3) cannot be upheld."[182]

Thus, in its *dispostif*, the Court found unanimously that "it cannot uphold the Republic of Nicaragua's claim contained in its final submission I(3)."[183]

5.31. It is evident that Nicaragua had not discharged its burden of proving that it had a continental margin extending far enough to overlap with Colombia's 200-nautical-mile continental shelf entitlement, measured from its mainland coast. This failure resulted in the rejection of Nicaragua's argument that the relevant area for delimitation should extend up to the mainland coast of Colombia. As the Court stated: "The relevant area comprises that part of the maritime space in which the potential

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[182] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 669- 670, paras. 128-131. (Emphasis added)

[183] *Ibid.*, p. 718, para. 251.

entitlements of the parties overlap."[184] Given that Nicaragua had not established any continental shelf entitlement beyond 200 nautical miles from its baselines, and a coastal State has no entitlement to an exclusive economic zone beyond the same 200-nautical-mile limit, the Court concluded that there were no overlapping entitlements between the Parties situated more than 200 nautical miles from Nicaragua's baselines that could be delimited. The Court explained the position in the following way:

> "Leaving out of account any Nicaraguan claims to a continental shelf beyond 200 nautical miles means that there can be no question of determining a maritime boundary between the mainland coasts of the Parties, as these are significantly more than 400 nautical miles apart. There is, however, an overlap between Nicaragua's entitlement to a continental shelf and exclusive economic zone extending to 200 nautical miles from its mainland coast and adjacent islands and Colombia's entitlement to a continental shelf and exclusive economic zone from the islands over which the Court has held that Colombia has sovereignty…".[185]

To which the Court later added:

> "Accordingly, the relevant area extends from the Nicaraguan coast to a line in the east 200 nautical miles from the baselines from which the breadth of Nicaragua's territorial sea is measured."[186]

This is the area depicted on sketch-map No. 7 to the Court's Judgment.

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[184] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 683, para. 159.
[185] *Ibid*., p. 670, para. 132.
[186] *Ibid*., p. 683, para.159.

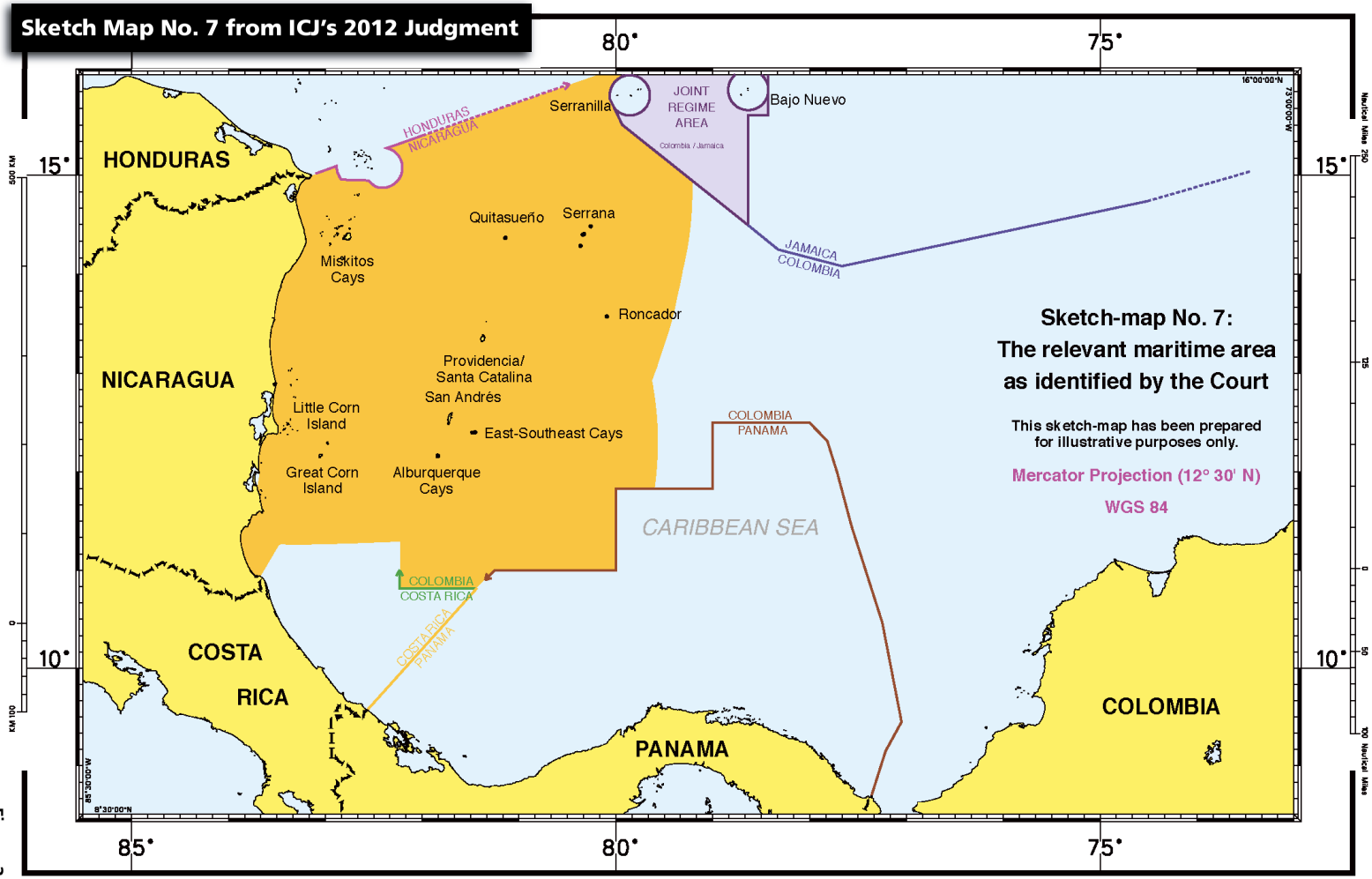
Sketch Map No. 7 from ICJ's 2012 Judgment
80°
75°
85°
15°
10°
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
HONDURAS
NICARAGUA
Serranilla
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
JAMAICA
COLOMBIA
Quitasueño
Serrana
Miskitos Cays
Roncador
Providencia/ Santa Catalina
San Andrés
Little Corn Island
East-Southeast Cays
Great Corn Island
Alburquerque Cays
COLOMBIA
PANAMA
CARIBBEAN SEA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Sketch-map No. 7:
The relevant maritime area as identified by the Court
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
Nautical Miles
KM

Figure 3

5.32. These decisions appeared in the operative part of the Judgment, and as such they are final and binding and have the force of *res judicata*. Accordingly, having refused to uphold Nicaragua's claim to an extended continental shelf beyond 200 nautical miles from its baselines, the Court unanimously decided the course of the maritime boundary between the Parties in the operative part of the Judgment and did not extend the continental shelf boundary beyond 200 nautical miles from Nicaragua's baseline.[187] Thus the Court:

> "(4) Unanimously,
>
> *Decides* that the line of the *single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia* shall follow geodetic lines connecting the points with co-ordinates:
>
> | Latitude north | Longitude west |
> |---|---|
> | 1. 13° 46′ 35.7″ | 81° 29′ 34.7″ |
> | 2. 13° 31′ 08.0″ | 81° 45′ 59.4″ |
> | 3. 13° 03′ 15.8″ | 81° 46′ 22.7″ |
> | 4. 12° 50′ 12.8″ | 81° 59′ 22.6″ |
> | 5. 12° 07′ 28.8″ | 82° 07′ 27.7″ |
> | 6. 12° 00′ 04.5″ | 81° 57′ 57.8″ |
>
> From point 1, the maritime boundary line shall continue due east along the parallel of latitude (co-ordinates 13° 46′ 35.7″ N) *until it reaches the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured*. From point 6 (with co-ordinates 12° 00′ 04.5″ N and 81° 57′ 57.8″ W), located on a 12-nautical-mile envelope of arcs around Alburquerque, the maritime boundary line

[187] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 719, para. 251 (4).

> shall continue along that envelope of arcs until it reaches point 7 (with co‑ordinates 12° 11′ 53.5″ N and 81° 38′ 16.6″ W) which is located on the parallel passing through the southernmost point on the 12‑nautical‑mile envelope of arcs around East‑Southeast Cays. The boundary line then follows that parallel until it reaches the southernmost point of the 12‑nautical‑mile envelope of arcs around East‑Southeast Cays at point 8 (with co‑ordinates 12° 11′ 53.5″ N and 81° 28′ 29.5″ W) and continues along that envelope of arcs until its most eastward point (point 9 with co‑ordinates 12° 24′ 09.3″ N and 81° 14′ 43.9″ W). From that point the boundary line follows the parallel of latitude (co‑ordinates 12° 24′ 09.3″ N) *until it reaches the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured*; …".[188]

5.33. In sum, the Court held that Nicaragua's claim to an extended continental shelf was admissible, which meant that the claim fell within the Court's jurisdiction. It is important to recall that the Court, itself, emphasized that "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent."[189] In exercising that jurisdiction, the Court concluded by not upholding Nicaragua's submission.

5.34. Thus the Court, by deciding that the claim was admissible and not upholding it on the merits but then

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[188] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 719-720, para. 251 (4). (Emphasis added)

[189] *Ibid.*, p. 671, para. 136 citing *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports, 1985,* p. 23, para. 19.

unanimously deciding "the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia",[190] produced a *res judicata*.

D. The Court's Judgment With Respect to Nicaragua's I(3) Claim is *Res Judicata*

(1) THE LAW

5.35. *Res judicata* bars reopening a judgment in circumstances in which there is an identity between "the three traditional elements… *persona, petitum, causa petendi*".[191] There are affirmative and defensive consequences to the principle of *res judicata*. The affirmative consequence is that the substance of the holding is definitive and binding. The defensive consequence relates to the protection of a respondent from being harassed again and again by an applicant, who has had its day in court, at considerable cost to the respondent, but has failed to vindicate its claim. This latter consequence, which is addressed to the protection of the respondent, implements the maxims *ne bis in idem* and *nemo bis vexari pro una et eadem causa*.

5.36. The applicability of *res judicata* to the decisions of the Court has been confirmed by the Court both by reference to

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[190] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 719-720, para. 251 (4).

[191] *Interpretation of Judgments Nos. 7 and 8 Concerning the Case of The Chorzów Factory (Germany v. Poland)*, *PCIJ Series A. No. 13, Judgment No. 11 of 16 December 1927*, at p. 20. Dissenting Opinion by M. Anzilotti at p. 23.

Article 60 of the Statute and by reference to Article 38(1)(c) "the general principles of law recognized by civilized nations."[192] In the *Chorzów Factory* Case Judgment of 16 December 1927, the Permanent Court of International Justice stated:

> "The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force between the Parties; so that the legal question thus established cannot again be called in question insofar as the legal effects ensuing therefrom are concerned."[193]

5.37. In its Judgment in the *Genocide Case (Bosnia and Herzegovina* v. *Serbia and Montenegro)* of 26 February 2007, the Court dealt explicitly with its conception of *res judicata*. It held:

> "115. …The fundamental character of that principle [*res judicata*] appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that *the decisions of the Court are not only binding on the parties, but are final*, in the sense that they cannot be reopened by the parties as

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[192] *Interpretation of Judgments Nos. 7 and 8 Concerning the Case of The Chorzów Factory (Germany v. Poland), PCIJ Collection of Judgments, Series A.—No. 13, Judgment No. 11 of 16 December 1927,* at p. 20. Dissenting Opinion by M. Anzilotti at p. 27. Indeed, in the negotiations for the establishment of the Permanent Court, the Minutes record that *res judicata* was expressly mentioned as a general principle of law to which Article 38 of the Statute referred. Minutes of the Advisory Committee of Jurists, at p. 335.

[193] *Ibid., Judgment No. 11 of 16 December 1927*, at p. 20.

> regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment…"[194]

5.38. That analysis makes clear that the legal force of a *res judicata* is such that it may even overcome a deficiency in the standing of one of the parties that subsequently comes to light:

> "123. The operative part of a judgment of the Court possesses the force of *res judicata*. The operative part of the 1996 Judgment stated, in paragraph 47 (2) *(a)*, that the Court found 'that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute'. That jurisdiction is thus established with the full weight of the Court's judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is, for the reason given in the preceding paragraph, to call in question the force as *res judicata* of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent's objection to jurisdiction based on its contention as to its lack of status in 1993."[195]

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[194] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 90, para. 115. (Emphasis added)

[195] *Ibid.*, p. 43, at p. 94, para. 123.

5.39. In the first sentence of the quoted paragraph from the *Genocide Case* (Bosnia and Herzegovina *v.* Serbia and Montenegro), the Court held that "[t]he operative part of a judgment of the Court possesses the force of *res judicata.*" In the same Judgment, the Court further held:

> "138. …That principle [*res judicata*] signifies that once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case."

5.40. In its Judgment of 19 January 2009 on the request for interpretation by Mexico in the *Avena* case, the Court was, again, at pains to emphasize that whatever was in the operative clause of a judgment constituted *res judicata.* In his Declaration in that case, Judge Abraham stated:

> "It is one thing to include in the *reasoning* of a judgment legally superfluous comments, observations or propositions apparently beyond the scope proper of the jurisdiction exercised by the Court…
>
> It is in any case another to include in the *operative clause* of a judgment observations falling outside the scope of the jurisdiction being exercised by the Court. The reason for this is that, while superabundant elements in the reasoning have no force as *res judicata*, everything in the operative clause of a judgment is in principle *res judicata*. Superfluous points in the reasoning may be

> permissible; superfluous statements in the operative clause are not. It follows that each and every part of the operative clause must fall strictly within the scope of the Court's jurisdiction."[196]

(2) BECAUSE THE ISSUES RAISED IN NICARAGUA'S APPLICATION OF 16 SEPTEMBER 2013 HAVE ALREADY BEEN DECIDED BY THE COURT IN ITS JUDGMENT, THEY ARE *RES JUDICATA*

5.41. The "main grounds on which Nicaragua's claim is based",[197] insofar as they relate to the delimitation that Nicaragua seeks, are set out in sub-paragraphs *(a)* through *(e)* of paragraph 11 of the Application in the instant case. To be more precise, what Nicaragua calls "grounds" details the *petitum* (object) and *causa petendi* (legal ground) of its present claim. Each of those grounds, as will be shown, was previously raised by Nicaragua in *Territorial and Maritime Dispute* and each was decided in the Court's Judgment of 19 November 2012.

(a) The First Ground in Nicaragua's Application

5.42. Nicaragua's first argument (sub-paragraph *(a)*) is that "Nicaragua is entitled under UNCLOS and under customary international law to a continental shelf extending throughout its continental margin."[198] Nicaragua argued precisely the same

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[196] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), I.C.J Reports 2009,* (Declaration of Judge Abraham), at p. 28 (*in original)*.

[197] Application, para. 11.

[198] Application, para. 11*(a)*.

point in the earlier case. For example, in its Reply, Nicaragua contended that: "In accordance with the provisions of Article 76 of the 1982 Law of the Sea Convention, Nicaragua has an entitlement extending to the outer limits of the continental margin."[199] In its Judgment, the Court referred specifically to Nicaragua's argument, stating:

> "In its Reply, Nicaragua contended that, under the provisions of Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS), it has an entitlement extending to the outer edge of the continental margin."[200]

5.43. Thus, Nicaragua's first "ground" was fully considered and decided by the Court in its Judgment of 19 November 2012 and, because of the identity of *persona*, *petitum* and *causa petendi*, is barred by *res judicata*.

(b) The Second Ground in Nicaragua's Application

5.44. The second ground for the claim raised in Nicaragua's Application (sub-paragraph *(b)*) reads: "That [Nicaragua's] entitlement to a continental shelf extending throughout its continental margin exists *ipso facto* and *ab initio*."[201] This argument was also raised by Nicaragua and considered by the Court in the previous case. In oral argument, counsel for Nicaragua maintained on several occasions that Nicaragua's

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[199] *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Reply of Nicaragua, Vol. I, p. 79, para. 3.12.; p. 88 para. 3.34.

[200] *Ibid., Judgment, I.C.J. Reports 2012,* p. 662, para. 105.

[201] Application, para. 11*(b)*.

continental shelf entitlement extending to the outer limit of its margin exists *ipso facto* and *ab initio*.[202] Nor did the Court fail to take account of this argument. In its Judgment, the Court referred to the fact that both Parties "agree that coastal States have *ipso facto* and *ab initio* rights to the continental shelf." But the Court went on to note that:

> "However, Nicaragua and Colombia disagree about the nature and content of the rules governing the entitlements of coastal States to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[203]

That was also an issue that the Court decided in its Judgment with respect to Nicaragua's claim, as will be explained below.

5.45. Thus, it follows that Nicaragua's second "ground" was fully considered and decided by the Court in rendering its Judgment of 19 November 2012 and, because of the identity of *persona*, *petitum* and *causa petendi*, is barred by *res judicata*.

(c) The Third Ground in Nicaragua's Application

5.46. Nicaragua's third ground (sub-paragraph *(c)*) is that: "That continental margin includes an area beyond Nicaragua's 200-nautical-mile maritime zone and in part overlaps with the

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[202] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 24 April 2012, CR 2012/9*, p. 22, para. 4, p. 24, para. 18, para. 26, para. 27 and p. 32, para. 59 (Lowe).

[203] *Ibid., Judgment, I.C.J. Reports 2012*, p. 666, para. 115.

area that lies within 200 nautical miles of Colombia's coast."[204] This issue was a cornerstone of Nicaragua's claim set out in its Reply and in its oral argument in *Territorial and Maritime Dispute.*

5.47. Nicaragua's Reply contained two sections devoted to what it called "Overlapping Continental Margins" and the relation of Nicaragua's claim to the areas of continental shelf and exclusive economic zone of Colombia.[205] Figures 3-10 and 3-11 in the Reply, reproduced below, depicted what, in Nicaragua's view, was the "Area of overlapping continental margins." As can be seen, Nicaragua maintained that its continental margin extended beyond 200 nautical miles from its baselines and overlapped with the continental shelf that lies within 200 nautical miles of Colombia's coast. In oral argument, counsel for Nicaragua contended that Nicaragua's continental shelf extended for almost 500 nautical miles overlapping with Colombia's 200-nautical-mile entitlement, giving rise to the need for delimitation.[206]

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[204] Application, para. 11*(c)*.

[205] *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Reply of Nicaragua, Vol. I, Chapter III (Section VI D.), p. 92, paras. 3.45-3.46 and Section VII, pp. 92-96, paras. 3.47-3.56.

[206] *Ibid., Public Sitting 24 April 2012, CR 2012/9*, p. 26, para. 28 (Lowe).

Figure 3-10 from the Nicaraguan Reply

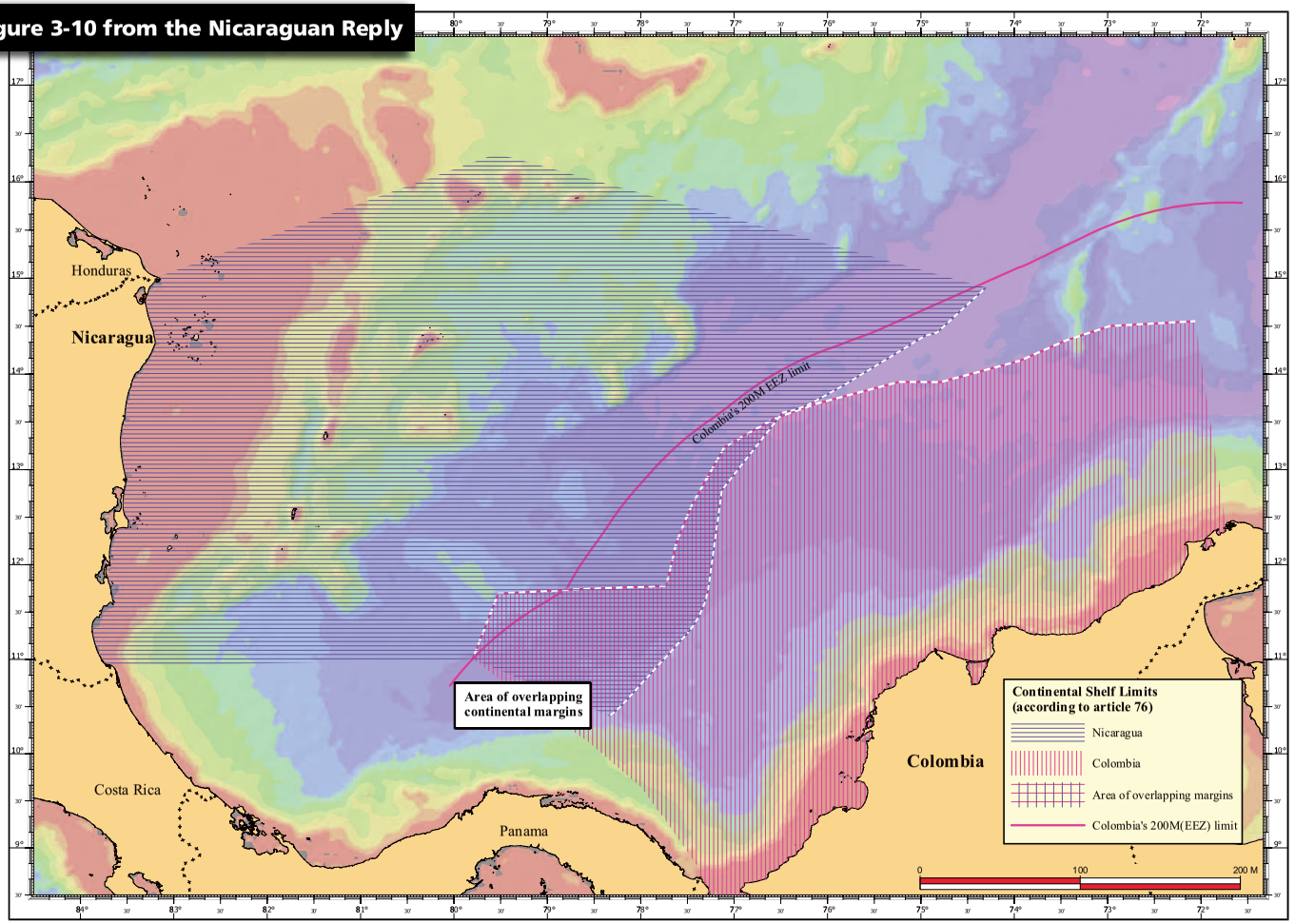

Figure 4

Area of Overlapping Continental Margins

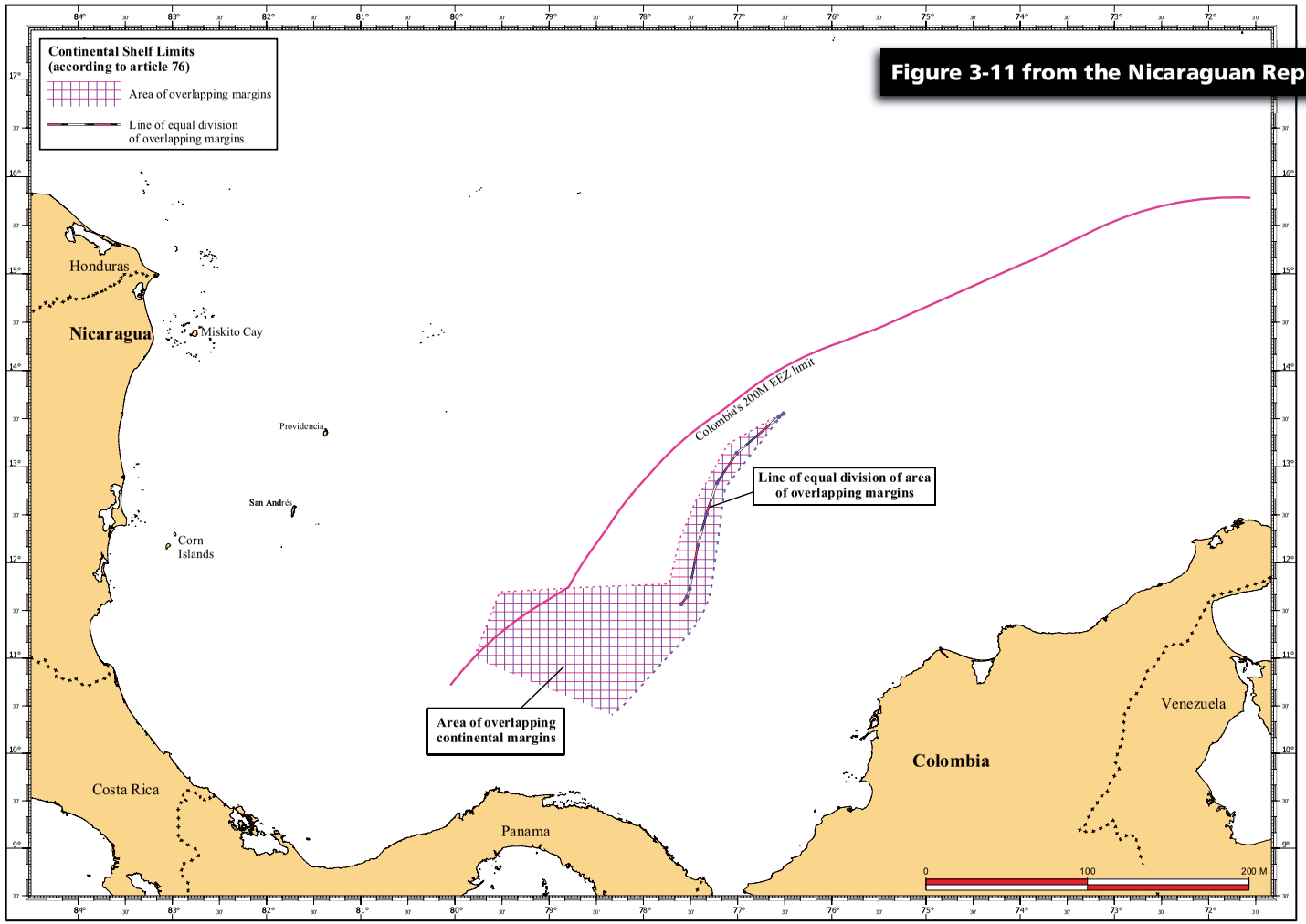

Figure 5

Delimitation of the Continental Shelf

5.48. Nicaragua also asserted in its Reply that "[t]he extent of the natural prolongation of the Nicaraguan continental shelf in the area of delimitation is a physical fact that can be verified scientifically with data that are in the public domain."[207] Nicaragua added that entitlements to continental shelf areas in accordance with Article 76 of UNCLOS "depend upon the geological and geomorphological evidence."[208] Nicaragua appended and discussed the evidence that it maintained established its continental margin beyond 200 nautical miles in its Reply and in oral argument.[209]

5.49. The Court did not accept that Nicaragua had established that it has a continental margin that extends beyond the 200-nautical-mile limit such that it overlaps with Colombia's 200-nautical-mile entitlement to a continental shelf, measured from Colombia's mainland coast.[210] Accordingly, the Court did not uphold Nicaragua's I(3) claim.

5.50. Thus, Nicaragua's third "ground" in the instant case was fully considered and decided by the Court in its Judgment of 19 November 2012 and, because of the identity of *persona*, *petitum* and *causa petendi*, is barred by *res judicata*.

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[207] *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Reply of Nicaragua, Vol. I, p. 12, para. 27.

[208] *Ibid.*, p. 99, para. 3.65.

[209] *Ibid*., pp. 89-90, paras. 3.37-3.40 and Annexes 16-18 to the Reply (Vol. II); see also *Ibid., Public Sitting 24 April 2012, CR 2012/9,* pp. 10-21, paras. 1-38 (Cleverly).

[210] *Ibid., Judgment, I.C.J. Reports 2012,* p. 669, para.129.

(d) The Fourth Ground in Nicaragua's Application

5.51. The fourth ground on which Nicaragua's Application is based reads: "The area of overlap must be delimited so as to achieve an equitable result, using a method that will preserve the rights of third states."[211] Aside from the fact that this presupposes that there is an area of overlap of continental shelf beyond 200 nautical miles from Nicaragua's baselines, a proposition that Nicaragua tried but failed to establish in the prior case, its fourth ground is a repetition of an argument which Nicaragua unsuccessfully pressed in the previous case.

5.52. In its Reply, Nicaragua clearly stated that the delimitation it was requesting in areas situated beyond 200 nautical miles was "a line dividing the areas where the coastal projections of Nicaragua and Colombia converge and overlap in order to achieve an equitable result."[212] Counsel for Nicaragua advanced the same contention in oral argument. For example, Professor Lowe stated that "the delimitation of maritime boundaries must achieve an equitable solution",[213] and that "what is important is to have the area of overlap delimited so as to achieve an equitable result."[214] Once again, Nicaragua's Application does no more than repeat grounds that were fully rehearsed, addressed and decided in the first case.

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211 Application, para. 11*(d)*.

212 *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Reply of Nicaragua, Vol. I, p. 78, para. 3.11, and see p. 88, para. 3.35 and p. 100, para. 3.66 of the Reply where Nicaragua repeated the same point.

213 *Ibid., Public Sitting 24 April 2012, CR 2012/9,* p. 22, para. 4 (Lowe).

214 *Ibid.*, p. 36, para. 76.

5.53. In this regard, Nicaragua's Application differs from the situation which the Court confronted in the *Haya de la Torre* case. In that case, Colombia had requested the Court to adjudge and declare that Colombia was not bound, in the execution of the Court's earlier Judgment in the *Asylum* case, to deliver Mr. Haya de la Torre to the Peruvian authorities. The Court, however, noted that in the *Asylum* case, Peru had not demanded the surrender of the refugee. Accordingly, the Court stated that "[t]his question was not submitted to the Court and consequently was not decided by it."[215] As the Court further explained:

> "As mentioned above, the question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new; it was raised by Peru in its Note to Colombia of November 28th, 1950, and was submitted to the Court by the Application of Colombia of December 13th, 1950. There is consequently no *res judicata* upon the question of surrender."[216]

5.54. By contrast, the question, or "dispute" regarding the delimitation of the continental shelf beyond 200 nautical miles from Nicaragua's baselines set forth in Nicaragua's Application was raised in the earlier case and was explicitly decided by the Court in its Judgment of 19 November 2012. Because of the identity of *persona*, *petitum* and *causa petendi* in the prior case and the instant case, the question of delimitation beyond 200 miles is *res judicata*.

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[215] *Haya de la Torre, Judgment of June 13th, 1951, I.C.J. Reports 1951*, p. 71, at p. 79.

[216] *Ibid.*, p. 80.

(e) The Fifth Ground and Second Request in Nicaragua's Application

(i) The Second Request in the Application is the same as I(3) in *Territorial and Maritime Dispute*

5.55. The fifth "Legal Ground" in Nicaragua's Application reads as follows:

> "During the period prior to the drawing of the *definitive* boundary beyond 200 nautical miles from Nicaragua's coast, each Party must conduct itself in relation to the area of overlapping continental shelf claims and the use of its resources in such a manner as to avoid causing harm to the interests of the other. That duty flows (i) from the duty of good faith under general international law, and (ii) more specifically from the duties of good faith and due regard for the interests of other States, owed by States in exercise of rights on sea areas beyond their territorial sea; and (iii) from the duties of good faith and co-operation owed by States before the Court."[217]

5.56. This ground is supposed to provide a legal basis for Nicaragua's second request which asks the Court to adjudge and declare:

> "*The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf* claims and the use of its resources, *pending the delimitation of the maritime boundary* between

[217] Application, para. 11*(e)*. (Emphasis added)

> them beyond 200 nautical miles from Nicaragua's coast."[218]

5.57. Here again, the Court is presented with a legal reincarnation, for the second request in Nicaragua's Application of 16 September 2013 materially reproduces and relies on the same arguments as in its final submission I(3) in *Territorial and Maritime Dispute.* In its Judgment in *Territorial and Maritime Dispute*, the Court recalled that

> "…in the second round of oral arguments, Nicaragua stated that it was 'not asking (the Court) for a definitive ruling *on the precise location of the outer limit of Nicaragua's continental shelf*'. Rather it was 'asking (the Court) to say that Nicaragua's continental shelf entitlement is divided from Colombia's continental shelf entitlement by a delimitation line which has a defined course'. Nicaragua suggested that '*the Court could make that delimitation by defining the boundary in words such as "the boundary is the median line between the outer edge of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia's 200-mile zone*".' This formula, Nicaragua suggested, 'does not require the Court to determine precisely where the outer edge of Nicaragua's shelf lies'. The outer limits could be then established by Nicaragua at a later stage, on the basis of the recommendations of the Commission."[219]

5.58. Nicaragua's final submission, to which the Court referred in the above quotation, had been preceded by Professor's Lowe's

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[218] Application, para. 12. (Emphasis added)

[219] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 669, para. 128. (Emphasis added)

elaboration of Nicaragua's reading of the words "final and binding" in connection to the outer limits established by coastal States upon a CLCS recommendation. In Nicaragua's view, as Professor Lowe explained it, the fact that those limits are "final and binding" when fixed following a recommendation by the CLCS,

> "is not a statement that the Commission's recommendations are a precondition of the existence of any coastal State rights over its continental shelf beyond 200 miles – that no such rights exist until the Commission has completed its work, perhaps decades from now."[220]

5.59. On the basis of its proposal that the CLCS recommendation has no effect on a coastal State's entitlement to a continental shelf beyond 200 nautical miles, Nicaragua asked the Court to fix the boundary as "the *median line* between the outer edge of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia's 200-mile zone."[221]

5.60. Nicaragua's theory was that in the absence of a CLCS recommendation and even in the absence of evidence enabling the Court to establish the precise location of the outer limit of Nicaragua's continental shelf beyond 200 nautical miles, but solely on the basis of Nicaragua's assurance of its belief, the

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[220] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 1 May 2012, CR 2012/15,* p. 21, para. 22.

[221] *Ibid., Judgment, I.C.J. Reports 2012,* p. 669, para. 128. (Emphasis added)

Court could proceed to effect a delimitation merely by declaring the applicable principle, by reference to which "[t]he outer limits could be then established by Nicaragua at a later stage…".[222]

5.61. Nicaragua's request, Professor Lowe insisted, was entirely altruistic: when the Court had declared the basic principles proposed and its submission on how they should be applied, the Parties would then be able to implement their *rights and duties* in their respective sea areas:

> "It is all very well to mock or express exasperation at changes in position. But this is not a typical adversarial case. It is a case where the two sides have a common interest in working towards the finding of a final, equitable boundary *so that they can get on with the management and exploitation of their marine resources and the implementation of their rights and duties in their respective sea areas. We have tried to be helpful by indicating what we regard as the basic principles, accepted by both sides, and making our submissions as to how those principles can be applied in order to reach an equitable result.*"[223]

5.62. Because the question is whether Nicaragua's second Request is barred by *res judicata*, the point of this analysis is not to show the absurdity of Nicaragua's request but only to show that we have been here before. Nicaragua's second request, like the first, is barred by *res judicata* because, *inter alia*, the second

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[222] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* p. 669, para. 128.

[223] *Ibid., Public Sitting 1 May 2012, CR 2012/15,* p. 26, para. 53 (Lowe). (Emphasis added)

claim in Nicaragua's Application of 16 September 2013 is the same and is supported by the same arguments as Nicaragua's final submission I(3) in *Territorial and Maritime Dispute*.

(ii) The Second Request is barred by *res judicata*

5.63. The reasons why Nicaragua's second request is barred by *res judicata* may be set out briefly.

a. Nicaragua's Second Request is the same as its Submission I(3) in the previous case

5.64. Just as in Nicaragua's final submission I(3) in *Territorial and Maritime Dispute*, Nicaragua, in its Application of 16 September 2013, again asks the Court to adjudge and declare the "principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf…".[224]

b. Nicaragua's Second Request invokes the same legal arguments as in the previous case

5.65. The legal basis invoked in support of Nicaragua's second submission in the Application of 16 September 2013 is identical to the one supporting Nicaragua's final submission I(3) in *Territorial and Maritime Dispute*, namely that, in the absence of evidence as to the outer limit of Nicaragua's continental shelf, it is still possible to presuppose the existence of overlapping maritime entitlements.

[224] Application, para. 12 (Second Submission).

c. Nicaragua's Second Request invokes the same rationale as in the previous case

5.66. The argument which Nicaragua developed to support its second claim is identical to the rationale invoked for Nicaragua's request for a declaration of general principles and their mode of application in *Territorial and Maritime Dispute.* In the latter, the ostensible rationale was to allow the parties to "get on with the management and exploitation of marine resources and the implementation of their rights and duties in their respective areas."[225] In the current case, the ostensible rationale is that each Party "conduct itself in relation to the area of overlapping continental shelf claims and the use of its resources in such a manner as to avoid causing harm to the interests of the other."[226] A State cannot evade the consequences of *res judicata* by juggling a few words.

d. The issues in Nicaragua's Second Request were fully joined by Colombia in the previous case

5.67. Nor was this a marginal issue for Colombia in the prior proceedings. Colombia joined issue and strongly opposed Nicaragua's proposition. In this regard, by first clarifying that the essence of Nicaragua's argument "seems to be that Nicaragua has a continental shelf entitlement beyond 200 nm even if the outer edge of the margin has not been established",[227]

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225 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 1 May 2012, CR 2012/15,* p. 26, para. 53 (Lowe).

226 Application, para. 11*(e)*.

227 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 4 May 2012, CR 2012/16*, p. 50, para. 75 (Bundy).

Mr. Bundy, Counsel for Colombia, clarified that, while a continental shelf may extend to the outer edge of the margin:

> "…a State party to the Convention has to establish that outer edge under both the substantive and procedural framework of Article 76.
>
> 77. And I would suggest that ITLOS made this point clear in the judgment in *Bangladesh/Myanmar*, if I can quote from paragraph 437 of that Judgment:
>
> > '*Entitlement* to a continental shelf beyond 200 nautical miles should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose'".[228]

5.68. Then, for the reasons previously established, Mr. Bundy went on to clarify that the relevant paragraphs of *Bangladesh/Myanmar*, upon which Nicaragua sought to rely to support its final submission, were simply not applicable to the case at hand:

> "79. In *Bangladesh/Myanmar* both parties were parties to the 1982 Convention. Here, obviously, Colombia is not. Moreover, both Bangladesh and Myanmar had made full, and fully substantiated outer continental shelf submissions to the Commission. Each party claimed that there was an outer continental shelf and that the outer continental shelf appertained to it, but *there was no dispute over the existence of a physical continental*

[228] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 4 May 2012, CR 2012/16*, p. 51, paras. 76-77 (Bundy).

> *shelf in the Bay of Bengal extending more than 200 nm from the land territory of each of the two parties.*
>
> 80. That was a critical factor for the Tribunal in deciding whether to exercise its jurisdiction to determine the boundary beyond 200 nm. At several junctures in its judgment, the Tribunal underscored the fact that '[T]he Parties do not differ on the scientific aspects of the sea-bed and subsoil of the Bay of Bengal'[116]; that both parties' submissions contained data indicating their entitlement to the continental margin beyond 200 nm[117]; that the scientific evidence was what the Tribunal termed 'uncontested'[118], and that the Bay of Bengal itself presents a unique situation with respect to the existence of an extended continental shelf, as was acknowledged during the negotiations at the Third United Nations Conference on the Law of the Sea."[229]

e. The issues in Nicaragua's Second Request were fully discussed by the Court in its Judgment of 19 November 2012

5.69. Far from being a marginal issue for the Court in *Territorial and Maritime Dispute*, Nicaragua's final submission I(3) as well as the legal arguments and rationale designed to support it were fully analyzed by the Court, as illustrated by the Court's use of the words "even using the general formulation proposed by it" at paragraph 129 of the 2012 Judgment,

> "However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to

[229] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Public Sitting 4 May 2012, CR 2012/16*, p. 51, paras. 79-80 (Bundy). (Emphasis added)

> overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, *even using the general formulation proposed by it.*"[230]

5.70. These highlighted words indicate that the Court, after exhausting every possible method, including the one most favorable to Nicaragua, had to declare itself incapable of delimiting the boundary requested by Nicaragua in an area beyond 200 nautical miles without a recommendation by the CLCS providing evidence about the precise location of the outer limit of the continental shelf beyond 200 nautical miles which Nicaragua was claiming.

f. The substance of the Second Request was explicitly decided by the Court in its Judgment of 19 November 2012

5.71. Finally, and decisive for the present case, the Court rejected Nicaragua's proposition on the basis that it was not in a position to delimit the continental shelf boundary between Nicaragua and Colombia absent evidence that the former "has a continental margin that extends far enough to overlap with Colombia's 200-nautical mile entitlement to the continental shelf."[231]

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[230] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* p. 669, para. 129. (Emphasis added)

[231] *Ibid.*

5.72. The question of rights and obligations, between Colombia and Nicaragua, in the continental shelf beyond 200 nautical miles was finally characterized and decided in the 2012 Judgment as one necessarily requiring the implementation of the procedure of Article 76. The prior implementation of the Article 76 procedure was deemed necessary for the purpose of establishing the overlapping entitlement that could possibly presuppose a delimitation dispute.

5.73. In rejecting Nicaragua's request, the Court affirmed the well-established rule according to which "the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned."[232] Subsequently the Court underlined the applicability of this rule at paragraphs 140 and 141 of the 2012 Judgment.

5.74. Accordingly, the Judgment of 19 November 2012 constitutes *res judicata* with respect to Nicaragua's second request in its Application of 16 September 2013.

g. Nicaragua's presupposition of overlapping entitlements is designed to circumvent the effect of the *res judicata* of the Judgment of 19 November 2012

5.75. Before concluding the discussion of the bar by *res judicata* of Nicaragua's second Request, Colombia would draw attention to a stratagem practised by Nicaragua in its Application. By presupposing the existence of overlapping

[232] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009,* para.77.

entitlements without completing the required procedure of UNCLOS Article 76, Nicaragua is trying to circumvent the very essence of the 2012 Judgment in an effort to secure Nicaragua's alleged rights in the continental shelf beyond 200 nautical miles without previously establishing the outer limits of its continental shelf.

5.76. The question, or "dispute", regarding the delimitation of the continental shelf beyond 200 nautical miles from Nicaragua's baselines set forth in Nicaragua's Application was raised in the earlier case and was explicitly decided by the Court in its Judgment of 19 November 2012. The question of delimitation beyond 200 miles is therefore *res judicata*; for that reason, in addition to Nicaragua's second Request also being barred by *res judicata*, there is no object to it.

h. Nicaragua's attempt in its Application to circumvent the *res judicata* of the Judgment in *Territorial and Maritime Dispute* is precluded by the Court's jurisprudence

5.77. Notwithstanding Article 38(2) of the Rules of Court, which directs that an application "shall also specify the precise nature of the claim" and Practice Direction II, admonishing the party which is filing the proceedings "to present clearly the submissions and arguments," Nicaragua's Application in the present case contains minimal information as to facts or jurisdictional bases for its claim. But Nicaragua claims, *inter alia*, that the Court was not in a position to delimit the extended continental shelf in the earlier Judgment because Nicaragua had not at the time established an entitlement to such an extended

continental shelf. Of course, Nicaragua's written submissions and oral arguments in the earlier proceeding clearly demonstrate that Nicaragua then believed that it had established both on legal grounds and by submission of data its entitlement to an extended continental shelf.[233] In its new Application, Nicaragua claims that it has established (we assume *again*) such an entitlement based on a final submission it made to the CLCS in June 2013 – yet still without fulfilling the procedure and obligations under Article 76 of UNCLOS, which include, significantly, the review and recommendation of the CLCS. But, that aside, according to Nicaragua's assertion, the Court could now be in a position to do what it could not do in the earlier decision. Nicaragua purports to justify its position on the basis of alleged new geological and geomorphological facts which it itself failed to provide the Court in the earlier proceeding.

5.78. The Court has already made clear that an effort such as this, designed to circumvent the doctrine of *res judicata,* will not succeed. In the *Genocide Case (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court discussed the rigorous procedure under Article 61 of the Statute, especially with regard to new facts in the context of its relationship with *res judicata*:

> "This [the principle of *res judicata*] does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the decision must

[233] Application, para. 4.

> remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, *those restrictions must be rigorously applied*."[234]

5.79. Nicaragua has instituted a new proceeding before the Court and sought to base the Court's jurisdiction on Article XXXI of the Pact of Bogotá. But Nicaragua also submitted that "the subject-matter of the present Application remains within the jurisdiction established in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, of which the Court was seised by the Application dated 6 December 2001, submitted by Nicaragua."[235] Nicaragua does not explain how the Court's jurisdiction in the earlier case remains established and continues as valid to the new Application,[236] if Nicaragua is not asking for interpretation (Article 60 of the Statute) or revision (Article 61 of the Statute) of the 2012 Judgment. The new Application is seeking neither and instead presents new proceedings. Nicaragua's muddled bases of jurisdictional claims are an attempt to get around the *res judicata* bar not only under the Statute and the practice of the Court but also under the Pact

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234 *Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment*, I.C.J. Reports 2007, p. 43 at p. 92, para. 120. (Emphasis added)

235 Application, para. 10.

236 Application, Section IV.

of Bogotá under which Nicaragua has purported to institute this case.[237]

E. Conclusion: Nicaragua's Claim in this Case is Barred by *res judicata*

5.80. In its Application, Nicaragua admits that it had already "sought a declaration from the Court describing the course of the boundary of its continental shelf throughout the area of the overlap between its continental shelf entitlement and that of Colombia."[238] This is the same claim that Nicaragua is making in the present Application. During the 11 years of the proceedings in the earlier case, Nicaragua had its day in Court, with ample opportunity to make its case and provide evidence and facts to substantiate its claim, but it was unsuccessful. Nicaragua admits that, with respect to its 2001 Application, it had submitted "Preliminary Information to the Commission on the Limits of the Continental Shelf on 7 April 2010",[239] while during the proceedings it took the view that it had established the legal and factual basis of its claim but that the "Court considered that Nicaragua had not then established that it has a continental margin that extends beyond 200 nautical miles from [its] baselines."[240] This means that Nicaragua did not meet its burden of proof and the Court did not uphold Nicaragua's claim.

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237 Nicaragua's effort to circumvent the requirements of Article 61 of the Statute is discussed in Chapter 6 *infra*.

238 Application, para. 4.

239 *Ibid*.

240 *Ibid*.

Nicaragua cannot come back and take another shot at the same claim which the Court decided that it could not uphold. Nicaragua is proposing that the Court view itself, not as an adjudicative body whose decisions constitute *res judicata* and, as such, foreclose bringing the same claim again, but rather as a non-adversarial administrative agency, whose refusal to decide because of insufficient evidence or information does not bar a claimant from repairing the information-deficit and reapplying again and again. This repeated effort by Nicaragua is in violation of the principle of *res judicata*, is unfair and vexatious to Colombia and depreciates the dignity of final judgments of the Court.

5.81. For the above reasons, Nicaragua's Application is barred by *res judicata*.

Chapter 6

FOURTH PRELIMINARY OBJECTION: THE COURT LACKS JURISDICTION OVER A CLAIM THAT IS AN ATTEMPT TO APPEAL AND REVISE THE COURT'S JUDGMENT OF 19 NOVEMBER 2012

A. Introduction

6.1. As Chapter 5 has shown, in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Nicaragua had asked the Court to delimit the continental shelf between the Parties situated in areas lying beyond 200 nautical miles from Nicaragua's baselines. The Court did not uphold Nicaragua's submission. It did, however, effect a full and final delimitation of the maritime boundary between the Parties, including the continental shelf and the exclusive economic zone. This decision of the Court is "final and without appeal" under Article 60 of the Court's Statute.

6.2. The Statute provides for only two procedures by which a judgment of the Court can be revisited. The first, under Article 60, involves a request for interpretation in the event of a "dispute as to the meaning or scope of the judgment". The second, under Article 61, involves a request to revise a judgment based on the discovery of a new fact.

6.3. In its present application, Nicaragua is inviting the Court to revisit a judgment effecting a full and final delimitation of the

maritime boundary between the Parties, including the continental shelf and exclusive economic zone, and to determine the delimitation of the continental shelf which Nicaragua had requested from the Court in the earlier case and which the Court had not upheld. The Statute affords no jurisdictional basis for what is in effect an appeal from its earlier Judgment in contravention to Article 60 of the Court's Statute (Section B).

6.4. Nicaragua's Application also attempts to revise the Court's Judgment without complying with the conditions for revision set forth in Article 61 of the Statute. While the Court in its earlier Judgment ruled that Nicaragua had not established a continental shelf entitlement beyond 200 nautical miles that could overlap with Colombia's entitlement, Nicaragua's Application in this case asserts that now Nicaragua is able to establish that entitlement on the basis of new information that it submitted to the CLCS in June 2013, after the 2012 Judgment had been rendered. On this basis, Nicaragua argues that the Court should proceed to delimit the areas of overlap that it did not delimit in its 2012 Judgment:

> "Nicaragua submitted its final information to the Commission on the Limits of the Continental Shelf on 24 June 2013. Nicaragua's submission to the Commission demonstrates that Nicaragua's continental margin extends more than 200 nautical miles from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and also (i) traverses an area that lies more than 200 nautical miles from Colombia and also (ii) partly

> overlaps with an area that lies within 200 nautical miles of Colombia's coast."[241]

6.5. Thus, Nicaragua is in effect seeking not only an appeal from the Court's earlier Judgment, but also a revision of that Judgment based on supposedly new facts without labelling it as such and without fulfilling the prerequisite conditions of Article 61 of the Statute. Regardless of the question of the technical sufficiency of Nicaragua's June 2013 submission to the CLCS, the Statute affords no jurisdictional basis for allowing the Court to consider a claim that is a disguised attempt to revise one of its judgments without meeting the legal requirements for the admissibility of a request for revision (Section C).

B. Nicaragua's Attempt to Appeal the Judgment Has No Basis in the Statute

(1) JUDGMENTS OF THE COURT ARE FINAL AND WITHOUT APPEAL

6.6. Article 60 of the Statute of the Court provides that:

> "The decision of the Court is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

6.7. The first sentence of this Article reflects the principle of *res judicata* discussed in Chapter 5 above. As noted, it was adopted by the Advisory Committee of Jurists and included by the Assembly of the League of Nations in the Statute of the

[241] Application, p. 4, para. 5.

Permanent Court of International Justice virtually without debate, and has remained unchanged in the Statute of this Court.[242] As noted in Chapter 5,[243] the fundamental character of the principle appears from the terms of the Court's Statute and the United Nations Charter. To recall the words of the Court in the *Genocide* case:

> "The fundamental character of that principle [*res judicata*] appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purpose of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose."[244]

6.8. The Court went on to elaborate on the principle of *res judicata* and the finality of its judgments. In a passage that exposes the fundamental jurisdictional deficiencies in Nicaragua's new Application, the Court referred to two purposes, one general, the other specific, that underlie the principle:

> "First, the stability of legal relations requires that litigation come to an end. The Court's function,

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[242] As stated in fn 192 in Chapter 5 *supra,* in the negotiations for the establishment of the Permanent Court, the Minutes record that *res judicata* was expressly mentioned as a general principle of law to which Article 38 of the Statute referred. Minutes of the Advisory Committee of Jurists, at p. 335.

[243] Chapter 5, Section D (1) *supra*.

[244] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, at p. 90, para. 115.

> according to Article 38 of its Statute, is to 'decide', that is, to bring to an end, 'such disputes as are submitted to it'. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes."[245]

(2) NICARAGUA'S APPLICATION IS TANTAMOUNT TO AN APPEAL

6.9. The first of the two procedures by which a judgment of the Court can be revisited involves a request for interpretation under the second sentence of Article 60. Nicaragua has not asserted that there is a dispute as to the meaning or scope of the judgment and has not requested an interpretation of the 2012 Judgment. Even if Nicaragua had done so, it would not have availed it: any interpretation of a prior judgment of the Court does not entail overturning the *res judicata* effect of what was previously decided with final and binding force. As the Court explained in its recent judgment in the *Cambodia* v. *Thailand* interpretation case:

> "…its role under Article 60 of the Statute is to clarify the meaning and scope of what the Court decided in the judgment which it is requested to interpret... Accordingly, the Court must keep strictly within the limits of the original judgment and cannot question matters that were settled therein with binding force, nor can it provide

[245] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J., Reports 2007,* pp. 90-91, para. 116.

answers to questions the Court did not decide in the original judgment."[246]

6.10. Notwithstanding this, the issue that Nicaragua asks the Court to decide in its Application of 16 September 2013 is the same as the one decided in the 2012 Judgment: the issues raised in both cases have already been determined by the Court in a judgment that is final and without appeal.

6.11. Nicaragua's Application states that the dispute concerns the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from its baselines and, on the other hand, the continental shelf of Colombia.[247] Nicaragua therefore requests the Court to adjudge and declare the precise course of the maritime boundary between the Parties in the areas of continental shelf beyond the boundaries determined by the Court in its Judgment of 19 November 2012.

6.12. But in the prior case, Nicaragua also indicated that the dispute concerned the delimitation of the continental shelf with Colombia beyond 200 nautical miles from its baselines, and Nicaragua formally requested the Court to delimit the maritime boundary in this area by means of its Submission I(3). The Court considered the Parties' pleadings on this issue, and ruled

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[246] *I.C.J. Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) (*Cambodia* v. *Thailand), Judgment of 11 Nov. 2013,* p. 25, para. 66.

[247] Application, p. 1, para. 2.

on Nicaragua's Submission I(3) in the operative part of its Judgment. Nicaragua's Application, and the claim set forth therein, have already been raised by Nicaragua before the Court, fully argued by the Parties in the written and oral proceedings and decided by the Court in its Judgment.

6.13. In other words, the subject-matter of the "dispute" that Nicaragua seeks to introduce in its Application — its claim for the delimitation of a continental shelf boundary between the Parties in areas lying beyond 200 nautical miles from its baselines — and the grounds on which that claim is based are all identical to what Nicaragua submitted in the earlier case. Those issues were considered by the Court and decided in its Judgment of 19 November 2012. Pursuant to Article 60 of the Statute, that Judgment is final and without appeal. By trying to re-litigate matters that have been decided with the force of *res judicata*, Nicaragua is actually trying to appeal the Court's Judgment. As such, its Application contravenes Article 60 of the Statute and does violence to the principle that, in the interests of the stability of legal relations, matters, once decided, should not be argued again. Indeed Nicaragua itself recognized the finality of the Judgment of 19 November 2012. In its Application of 26 November 2013, Nicaragua admitted in paragraph 19 that: "In conformity with Articles 59 and 60 of the Court's Statute,

this Judgment is final and without appeal…"[248] The Court lacks jurisdiction over a claim that is tantamount to an appeal.

C. Nicaragua Also Seeks to Revise the Court's Judgment without Meeting the Requisites of the Statute

6.14. As noted above, the second procedure whereby a judgment of the Court can be revisited involves a request for revision of a judgment under Article 61 of the Statute based on the discovery of a new fact. Nicaragua's new Application is not only an appeal from the Court's 2012 Judgment, but is also a disguised attempt to revise that Judgment based on the alleged discovery of new facts; but Nicaragua seeks to accomplish this without complying with the strict conditions laid out in Article 61 for the admissibility of a request for revision.

(1) The statutory requirements for revising a Judgment based on the discovery of a new fact are cumulative

6.15. If a party to a case believes that new elements have come to light subsequent to the decision of the Court which tends to show that the Court's conclusions may have been based on incorrect or insufficient facts, its only recourse is to file a request for revision under Article 61 of the Statute. As the Court put it in its Judgment in the *Genocide* case:

> "The Statute provides for only one procedure in such an event: the procedure under Article 61,

[248] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Application of Nicaragua, 26 Nov. 2013*, p. 14, para. 19.

> which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article."[249]

6.16. The conditions governing applications for revision are set out in Article 61(1) of the Statute. It provides:

> "An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."

6.17. In its Judgment in the *Application for Revision of the Judgment of 11 September 1992* in the *El Salvador* v. *Honduras* case, a Chamber of the Court spelled out the five conditions that must be met in order for an application for revision to be admissible. These are:

> "(*a*) the application should be based upon the 'discovery' of a 'fact';
>
> (*b*) the fact the discovery of which is relied on must be 'of such a nature as to be a decisive factor';
>
> (*c*) the fact should have been 'unknown' to the Court and to the party claiming revision when the judgment was given;
>
> (*d*) ignorance of this fact must not be 'due to negligence'; and

[249] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J., Reports 2007,* p. 92, para. 120.

(*e*) the application for revision must be 'made at latest within six months of the discovery of the new fact' and before ten years have elapsed from the date of the judgment."[250]

6.18. An application for revision is only admissible if all of these conditions are satisfied. In the words of the Court: "If any one of them is not met, the application must be dismissed."[251] Given that revision is an exceptional procedure, the Court has also emphasized that: "In the interests of the stability of legal relations, those restrictions must be rigorously applied."[252]

(2) NICARAGUA'S APPLICATION IS BASED ON CLAIMED "NEW FACTS"

6.19. As noted above, Nicaragua's Application purports to adduce a new fact, or facts, which purportedly justify the Court revising its 2012 Judgment in which it had effected a full and final delimitation of the maritime boundary between the Parties, including the continental shelf and the exclusive economic zone. But Nicaragua's Application does not acknowledge that it is

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[250] *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003,* pp. 398-399, para. 19.

[251] *Ibid,* p. 399, para. 20; citing *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia, Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003,* p. 12, para. 17.

[252] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 92, para. 120.

actually applying for a revision. This can be seen by placing the previous case and the new case in comparative perspective.

(i) In the previous case, Nicaragua asserted that it had a continental shelf entitlement extending beyond 200 nautical miles from its baselines that overlapped with Colombia's 200-miles-entitlement. It based this contention on technical data said to be taken from the public domain, and submitted as part of its Preliminary Information to the CLCS on 7 April 2010.[253] While Nicaragua stated that it was well advanced in its preparations for making a full submission to the Commission, it maintained that the information it furnished with its Reply was sufficient in itself to establish its continental shelf rights beyond 200 nautical miles.[254] Annex 18 and Figure 3.7 of Nicaragua's Reply also listed co-ordinates which purported to define the outer limits of Nicaragua's continental shelf.[255]

(ii) The Court did not accept this argument, concluding that Nicaragua had not established a continental shelf entitlement beyond 200 nautical miles. Consequently, the Court did not uphold Nicaragua's Submission I(3).

(iii) In its Application in the present case, Nicaragua states that it submitted its final information to the CLCS on 24

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253 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Reply of Nicaragua, Vol. I, p. 70, para. 2.20 and pp. 89-90, paras. 3.37-3.40.

254 *Ibid.*, Vol. I, para. 2.20 and pp. 89-90, paras. 3.37-3.40.

255 *Ibid.,* Vol. II, Part I, p. 53, Annex 18 and Vol. II Part II, p. 10, Figure 3-7.

June 2013 after the Court had rendered its Judgment. In contrast to what Nicaragua filed in its earlier case, Nicaragua considers that the "final information" it provided in its CLCS Submission in June 2013 "demonstrates that Nicaragua's continental margin extends more than 200 nautical miles" from its baselines.[256] In footnote 4 of its Application, Nicaragua refers to the Executive Summary of its CLCS Submission in support of its contention. The Executive Summary refers to the Court's Judgment of 19 November 2012 and acknowledges that "[t]he Court did not determine the boundary of the continental shelf of Nicaragua and Colombia beyond this 200 nautical miles limit, *as requested by Nicaragua* and observed that Nicaragua had only submitted preliminary information to the Commission."[257] It then states that: "Following the judgment of the International Court of Justice and after undertaking a thorough assessment and review of the scientific data of the areas concerned, Nicaragua had completed its full submission."[258] In Table 1 of the

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256 Application, p. 2, para. 5.

257 Republic of Nicaragua, *Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea, 1982*. Part I: Executive Summary, 24 June 2013, p. 2, para. 5. Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nic66_13/Executive%20Summary.pdf (Last visited: 4 Aug. 2014). (Emphasis added)

258 Republic of Nicaragua, *Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea, 1982*. Part I: Executive Summary, 24 June 2013, p. 2, para. 6. Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nic66_13/Executive%20Summary.pdf (Last visited: 4 Aug. 2014).

Executive Summary, the co-ordinates of a series of 164 points which are said to define the outer limits of Nicaragua's extended continental shelf are listed. A small-scale map is included showing the location of these points.

(iv) These points differ, albeit not greatly, from the points that Nicaragua submitted to the Court in its Reply in the earlier case referred to above. This can be seen in **Figure 6**, which shows the differences in the two lines. To the extent that the points defining the purported outer limits of Nicaragua's continental margin listed in the Executive Summary on which Nicaragua now relies do differ from the points identified in the earlier case, they must be based on different facts – i.e., new facts – than those presented to the Court in the earlier case.

6.20. Thus, it appears that Nicaragua has supplied the Commission with claimed "new facts", not included in its Preliminary Information and not submitted during the earlier case, that it now believes are decisive in supporting its claim to an extended continental shelf beyond 200 miles.

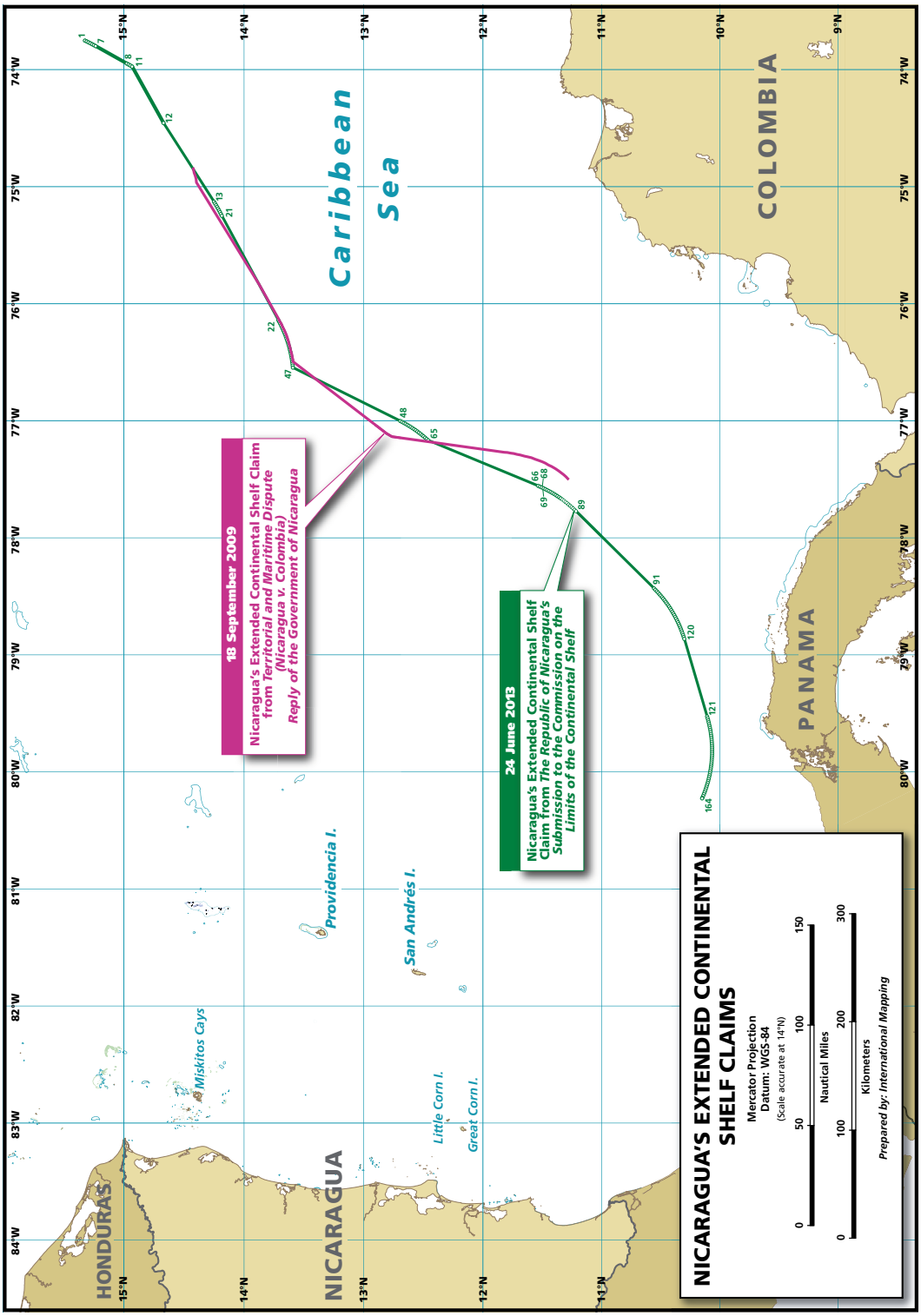
NICARAGUA'S EXTENDED CONTINENTAL SHELF CLAIMS
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150
Nautical Miles
0 100 200 300
Kilometers
Prepared by: International Mapping
18 September 2009
Nicaragua's Extended Continental Shelf Claim from Territorial and Maritime Dispute (Nicaragua v. Colombia) Reply of the Government of Nicaragua
24 June 2013
Nicaragua's Extended Continental Shelf Claim from The Republic of Nicaragua's Submission to the Commission on the Limits of the Continental Shelf
Caribbean Sea
NICARAGUA
HONDURAS
COLOMBIA
PANAMA
Miskitos Cays
Providencia I.
San Andrés I.
Little Corn I.
Great Corn I.

Figure 6

(3) THE ONLY FORM OF ACTION BY WHICH NICARAGUA MAY LODGE SUCH AN APPLICATION IS THAT OF ARTICLE 61

6.21. The only procedure by which Nicaragua may re-open the Court's previous judgment on the basis of the discovery of claimed new facts is by means of a request for revision in accordance with the requirements of Article 61. Nicaragua has not availed itself of this procedure.

6.22. Nor is the reason why it has failed to do so reasonable: if it had requested a revision, Nicaragua could not have satisfied the conditions laid down in Article 61 for the admissibility of such a request. In order for a request for revision to be admissible, Nicaragua would have had to show that such facts were of a decisive nature (which is dubious given that the two "outer limits" are not far apart – see **Figure 6**); that they were unknown to the Court and Nicaragua when the Judgment was given; and that the application for revision was being made within six months of their discovery. Even if Nicaragua had been able to satisfy these conditions, which is more than doubtful, Nicaragua would also have had to show that its ignorance of the claimed new facts during the original proceedings was not due to its own negligence. It is clear that Nicaragua would not have been able to make that showing. Yet, that is a further requisite for a party seeking to revise a judgment.

(4) NICARAGUA HAS FAILED TO SATISFY THE REQUIREMENTS OF ARTICLE 61

6.23. It may be recalled that Nicaragua became a party to the 1982 United Nations Convention on the Law of the Sea in May 2000. As of that date, therefore, Nicaragua knew, or should have known, that if it wished to claim a continental shelf extending more than 200 nautical miles from its baselines, it would have to satisfy the criteria and obligations set forth in Article 76 of the Convention.

6.24. On 6 December 2001, Nicaragua then initiated proceedings against Colombia by its Application filed with the Registry. During the proceedings that ensued, Nicaragua had ample opportunity to substantiate its claim to a continental shelf extending more than 200 nautical miles from its baselines. For the first eight years of the proceedings, Nicaragua took the position that geological and geomorphological factors were completely irrelevant to the delimitation it was requesting (a mainland-to-mainland median line), even though that delimitation lay more than 200 nautical miles from its coast. As Nicaragua's Memorial stated:

> "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."[259]

[259] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Memorial of Nicaragua, Vol. I, p. 215, para. 3.58.

6.25. When Nicaragua changed its position in its Reply, it tried to establish its right to a continental shelf extending more than 200 miles by submitting technical and scientific documentation from the Preliminary Information it had provided to the CLCS based on materials said to exist in the public domain. But, as the Court noted in its Judgment, even Nicaragua admitted that this information "falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles...".[260] During the 11 years of proceedings, there was nothing to prevent Nicaragua from producing more evidence on this issue if it had so wished.

6.26. It follows that Nicaragua had a full opportunity to prove its case with respect to an extended continental shelf entitlement and to fulfill its treaty obligations under UNCLOS, but failed. As a consequence, the Court did not uphold its submission for a continental shelf boundary in areas lying beyond 200 nautical miles from its baselines. To the extent that Nicaragua failed to substantiate its claim to an extended continental shelf in a timely manner, it has no one to blame but itself. This means that to the extent that the claimed new facts Nicaragua now seeks to introduce in the present case based on its June 2013 submission to the Commission were unknown to it when the Judgment was given, it was due solely to Nicaragua's own negligence.

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[260] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 669, para. 127.

6.27. In this connection, it is pertinent to recall what the Court said about the ability of a party, during the original proceedings, to ascertain "facts upon which an application for revision is based" in order to determine whether such party has been negligent. The case in question concerned Tunisia's request to revise the Court's 1982 Judgment in the *Tunisia* v. *Libya* continental shelf case based on the discovery by Tunisia of the co-ordinates of certain offshore petroleum concessions after the Judgment was given. The Court observed:

> "The Court must however consider whether the circumstances were such that means were available to Tunisia to ascertain the details of the co-ordinates of the concession from other sources: and indeed whether it was in Tunisia's own interests to do so. If such be the case, it does not appear to the Court that it is open to Tunisia to rely on those co-ordinates as a fact that was 'unknown' to it for the purposes of Article 61, paragraph 1, of the Statute."[261]

6.28. In *Tunisia* v. *Libya,* the Court found that the new facts upon which Tunisia's request rested could have been obtained by Tunisia during the prior proceedings and that it was in Tunisia's interests to obtain them. Accordingly, the Court rejected the request for revision because one of the "essential conditions" of admissibility for a request for revision – namely, "ignorance of a new fact not due to negligence" – was lacking.[262]

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[261] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985,* pp. 204-205, para. 23.

[262] *Ibid*, pp. 206-207, para. 28.

6.29. Nicaragua is in the same, if not a worse, position. During the prior proceedings, not to mention before instituting them, Nicaragua had more than 10 years to acquire and submit the information it now relies on in its Application as well as to meet its obligations under Article 76, and it would have been in Nicaragua's own interest to acquire that information and comply with UNCLOS if it considered it to be important. Nicaragua failed to do so. That failure was due to Nicaragua's own negligence, and it would have been fatal to the admissibility of any request for revision under Article 61 of the Statute.

6.30. Rather than filing a request for revision, Nicaragua has filed a new Application alleging that it can now demonstrate that it has a continental shelf entitlement extending beyond 200 nautical miles from its coast based on information it submitted to the CLCS, after the 2012 Judgment was rendered. Nicaragua has taken this route because it knows that it could not satisfy the conditions of admissibility for a request for revision based on its alleged discovery of a claimed new fact or facts. This is a transparent attempt to evade the requirements of Article 61 of the Statute.

6.31. If, on the other hand, the submission that Nicaragua made to the CLCS in June 2013 does not contain any claimed new facts, the only other logical interpretation is that Nicaragua's present Application is based on a reassessment of data that Nicaragua had previously filed with its Preliminary

Information and submitted to the Court in the prior case. In this case, the Court would still lack jurisdiction to consider Nicaragua's claims, for Nicaragua would simply be trying to re-argue evidence that was fully canvassed by the Parties in the original case and ruled on by the Court in its Judgment.[263] That would be tantamount to an appeal, which as explained in Section B of this Chapter, is prohibited by Article 60 of the Statute.

6.32. Thus, Nicaragua, by its present Application is in reality inviting the Court either to revise its Judgment based on claimed new facts that were not introduced in the earlier case or to re-open its Judgment based on old facts that the Court has already considered. Regardless of whether Nicaragua's present Application is based on claimed new facts or a reassessment of old facts, it represents an attempt to evade the requirements of the Statute.

D. Conclusions

6.33. There is no jurisdictional basis for the Court to entertain what is in reality an attempt by Nicaragua to appeal the Court's Judgment of 19 November 2012, or to revise that Judgment under the guise of a fresh case. Trying to submit a new case in order to re-litigate issues that were argued in the earlier case and decided with the force of *res judicata* in the 2012 Judgment violates Article 60 of the Statute. By the same token, trying to

[263] See Chapter 5, Section B, *supra*.

secure revision of the 2012 Judgment by advancing new claims based on alleged facts that were only supposedly discovered after that Judgment had been rendered without satisfying the conditions imposed by Article 61 of the Statute for revision is not in conformity with the Statute. It follows that Nicaragua's claim should be dismissed for lack of jurisdiction on these grounds as well.

Chapter 7

PRELIMINARY OBJECTION TO ADMISSIBILITY OF THE FIRST AND SECOND REQUEST IN NICARAGUA'S APPLICATION

A. Introduction

7.1. If Colombia's objections to jurisdiction in the previous chapters are rejected, Colombia objects, in the alternative, to the admissibility of Nicaragua's Application. More specifically, it is Colombia's submission that both the first and the second request set out in Nicaragua's Application to the Court[264] are inadmissible.[265]

7.2. Nicaragua's First Request is inadmissible because of Nicaragua's failure to secure the requisite CLCS recommendation.

7.3. Nicaragua's Second Request is inadmissible as a consequence of the inadmissibility of its first request. Even considering the second request independently of the first, it would also be inadmissible because, if it were to be granted, the

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[264] Application, para. 12.

[265] Because it concerns admissibility, the present objection is submitted, and is to be envisaged, only in the perspective of the hypothetical situation in which the Court – contrary to Colombia's main prayer – were to find that it has jurisdiction. As a consequence, the present objection to admissibility and the arguments supporting it should not be misconstrued as indicating in any manner acceptance by Colombia of the main tenets on which Nicaragua's application is based.

decision of the Court would be inapplicable and would concern a non-existent dispute.

B. The Inadmissibility of Nicaragua's First Request

(1) A STATE CANNOT ESTABLISH A CONTINENTAL SHELF WITHOUT AN ENTITLEMENT

(a) The need for an entitlement

7.4. In order to exercise the rights described in UNCLOS Article 77, the coastal State must have an entitlement to the shelf, based on "sovereignty over the land territory."[266]

7.5. Entitlement, a term of art, is defined differently as regards the continental shelf inside and outside the 200-nautical-mile line.

(b) Entitlement within 200 nautical miles of the baselines from which the territorial sea is measured

7.6. Inside 200 nautical miles, entitlement is automatic *ipso jure*. UNCLOS Article 76(1) states:

> "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea… to a distance of 200 nautical miles from the baselines…".

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[266] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Judgment of 14 March 2012, para. 409.

(c) Entitlement beyond 200 nautical miles

7.7. Outside 200 nautical miles, the potentiality of entitlement is recognized by UNCLOS Article 76(1) up to the outer edge of the continental margin, provided the conditions set out in paragraphs 4, 5 and 6 of that article for determining such outer edge are satisfied.

(2) IN ORDER TO ESTABLISH ITS CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES A STATE REQUIRES A RECOMMENDATION BY THE CLCS

7.8. ITLOS stated in the *Bangladesh/Myanmar* judgment*:* "the limits of the Continental shelf beyond 200 nautical miles can be established only by the coastal State."[267] But the finality and the binding effect of the exercise of this exclusive right of the coastal State is conditioned on compliance with Article 76 of UNCLOS.[268] The Court has specified in 2007 and again in 2012 that "any claim of continental shelf rights [by a State party to UNCLOS] must be in accordance with article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental shelf established thereunder."[269]

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[267] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Judgment of 14 March 2012, para. 407.

[268] *Ibid*.

[269] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007,* p. 759, para. 319 quoted with approval by the Court in *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 668-669, para. 126.

7.9. The establishment by the coastal State of the outer limits of its continental shelf "on the basis of the recommendations" of the CLCS (i.e., delineated in conformity with such recommendations) is "final and binding" under Article 76(8) and, consequently, to use the language of the *Bangladesh/Myanmar* judgment, opposable "to other States."[270]

7.10. Under the second sentence of Article 76(8), the CLCS recommendations are to resolve *"matters related to the establishment of the outer limits"* of the continental shelf. Such matters include the existence of the prerequisites for the delineation of the outer limit of the continental shelf.

7.11. The recommendation of the CLCS is thus the prerequisite for transforming an inherent[271] but inchoate right into an entitlement whose external limit is "final and binding" under Article 76(8) and opposable *erga omnes*. The language used in Article 76(8) and Annex II, Articles 4, 7 and 8 is mandatory: States parties to UNCLOS, who want to establish the limit of their continental shelf beyond 200 nautical miles, must follow the procedure of the CLCS.

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[270] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal(Bangladesh/Myanmar)*, ITLOS Judgment of 14 March 2012, para. 407.

[271] UNCLOS Article 77(3).

(3) THE CLCS HAS NOT MADE A RECOMMENDATION

7.12. In the present case, the CLCS has not made the requisite recommendation concerning Nicaragua's Submission. Nor has it "consider[ed] and qualif[ied]" it according to Article 5(a) of Annex I to its Rules of Procedure.

7.13. During its thirty-fourth session held in January-March 2014, the CLCS had an opportunity to consider such Submission, but decided not to do so and, thus, not to move the procedure forward towards a recommendation. After listening to the presentation of the representative of Nicaragua and considering all relevant documents,

> "the Commission decided to defer further consideration of the submission and the communications until such time as the submission was next in line for consideration, as queued in the order in which it was received."[272]

7.14. The CLCS is thus very far from entering into the merits of Nicaragua's Submission. Comparing the decision on the Nicaraguan Submission with that taken three days later on the Submission of the Federated States of Micronesia in respect of the Eauripik Rise confirms this. This decision was to have a subcommission consider the Submission at a future session when it came "in line for consideration, as queued in the order in

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[272] Doc. CLCS/83 of 31 March 2014, Progress of the work in the Commission on the Limits of the Continental Shelf, Statement by the Chair, para. 83. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/284/31/PDF/N1428431.pdf?OpenElement (Last visited: 4 Aug. 2014)

which it was received."[273] In Nicaragua's case, no mention is made of the establishment of a subcommission, which, in the practice of the CLCS, is the first step towards examination of the merits of a submission.

(4) IN THESE CIRCUMSTANCES, THE ICJ CANNOT DELIMIT THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES

(a) In the absence of a CLCS recommendation, the ICJ cannot take up Nicaragua's Application

7.15. The ICJ cannot consider the Application by Nicaragua because the CLCS has not ascertained that the conditions for determining the extension of the outer edge of Nicaragua's continental shelf beyond the 200-nautical mile line are satisfied and, consequently, has not made a recommendation.

7.16. The present case must be distinguished from the *Bangladesh/Myanmar* case, as well as the recent *Bangladesh*/*India* case.[274] In the former case, the ITLOS could decide on delimitation notwithstanding the impossibility of delineating the external limit of Myanmar's continental shelf due to the denial of Bangladesh's consent to the consideration by the CLCS of Myanmar's submission. In *Bangladesh/Myanmar* the

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[273] Doc. CLCS/83 of 31 March 2014, Progress of the work in the Commission on the Limits of the Continental Shelf, Statement by the Chair, para 86. (See link in fn 272)

[274] *Award in the Matter of the Bay of Bengal Maritime Boundary between the People's Republic of Bangladesh and the Republic of India, 7 July 2014*. Available at: www.pca-cpa.org/showfile.asp?fil_id=2705 (Last visited: 4 Aug. 2014)

delimitation sought was between States with adjacent coasts. Therefore, it was not necessary for ITLOS to determine the "outer limits" of the continental shelf and to await for the CLCS to make recommendations on the subject. The delimitation line adopted for the areas within 200 nautical miles was simply extended indefinitely along the same bearing. The position of the Arbitral Tribunal in *Bangladesh*/*India* was similar.[275] In contrast, in our case, Nicaragua's Application requests a continental shelf delimitation between opposite coasts, which cannot be done without first identifying the extent, or limit, of each State's shelf entitlement.

7.17. It follows that Nicaragua's application is inadmissible because the CLCS has not determined whether, and if so how far, Nicaragua's claimed outer continental shelf beyond 200 nautical miles extends.

(b) Even though Colombia is not a Party to UNCLOS, Nicaragua, as a State Party, is still obliged to comply with all of the requirements of Article 76

7.18. Even though Article 76(8) is not binding treaty law between Nicaragua and Colombia inasmuch as Colombia is not party to UNCLOS, Nicaragua must still secure a recommendation of the CLCS as a prerequisite for claiming that

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[275] *Award in the Matter of the Bay of Bengal Maritime Boundary between the People's Republic of Bangladesh and the Republic of India, 7 July 2014,* para. 76. It should also be recalled that the Award underlines that both Parties agreed that there is a continental shelf beyond 200 nautical miles in the Bay of Bengal and that they both have entitlements to such continental shelf. (*Ibid*., paras. 78 and 438).

it has a continental shelf beyond 200 nautical miles. In paragraph 126 of its Judgment in *Territorial and Maritime Dispute* of 2012 – which begins with a quotation from the *Nicaragua* v. *Honduras* Judgment of 2007 – the Court stated:

> "…that 'any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder'… Given the object and purpose of UNCLOS, as stipulated in its Preamble, *the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention.*"[276]

7.19. Thus the obligations set out in Article 76 (in particular, to submit an application to the CLCS and to establish the continental shelf beyond 200 nautical miles on the basis of the recommendations of the CLCS) apply to all States parties to UNCLOS even when their claim concerns an area to which a State that is not a party to UNCLOS has an entitlement.

7.20. All United Nations member States, including non-parties to UNCLOS, and therefore also Colombia, are to be notified of the submissions deposited with the CLCS. The duty to notify is

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[276] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 668-669, para. 126; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007,* p. 759, para. 319. (Emphasis added)

assigned to the UN Secretary-General under Article 50 of the CLCS Rules of Procedure.

7.21. Moreover, under Annex III to the CLCS Rules of Procedure, all States receiving the notification may present comments on which the submitting State may then comment.[277] As Nicaragua itself remarked in answering the question put to the parties by Judge Bennouna in the case concluded with the Judgment of 19 November 2012, non-parties to the UNCLOS "have a role in the work of the Commission"[278] and have taken advantage of the possibility to comment relatively often. In particular, on various occasions, the United States[279] and other non-party States[280] have done so. Colombia has taken advantage of this possibility to comment through the communications it presented, like other Caribbean States, in reaction to the submission by Nicaragua. [281]

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[277] CLCS Rules of Procedure, section II 2a (v).

[278] Written reply of the Republic of Nicaragua to the question put by Judge Bennouna at the public sitting held on the afternoon of 4 May 2012, 11 May 2012, para. 18.
Available at: http://www.icj-cij.org/docket/files/124/17752.pdf (Last visited: 4 Aug. 2014)

[279] See CLCS.01.2001.LOS/USA of 18 March 2002, CLCS.02.2004.LOS/USA of 9 Sept. 2004 containing the reactions of the United States to the submissions of the Russian Federation and Brazil, Available at: http://www.un.org/Depts/los/clcs_new/commission_submissions.htm (Last visited: 4 Aug. 2014)

[280] See CLCS.01.2001.LOS/CAN of 26 Feb. 2002 and CLCS.01.2001.LOS/DNK of 26 Feb. 2002 containing respectively the reactions of Canada and Denmark - when they had not yet become bound by the Convention - to the submission made by the Russian Federation.
Available at:
http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm (Last visited: 4 Aug. 2014)

[281] Annex 21: Communication from the Governments of Colombia Costa Rica and Panamá to the Secretary-General of the United Nations, New York,

7.22. The role recognized for non-parties to UNCLOS in the work of the CLCS is further confirmation of the view that a non-Party can claim the inadmissibility of a request to the ICJ for delimitation of an area of continental shelf beyond 200 nautical miles when the procedure before the Commission has not reached its conclusion with the adoption of a recommendation concerning the coastal State's entitlement.

7.23. It follows that Colombia is entitled to rely on the lack of a recommendation of the CLCS in order to show that Nicaragua's request to the ICJ for delimitation is inadmissible.

(5) CONCLUSION

7.24. For all of the above reasons, Nicaragua's First Request is inadmissible.

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23 Sept. 2013; Annex 22: Note No S-DM-13-035351 from the Acting Colombian Foreign Minister to the Secretary-General of the United Nations, 24 Sept. 2013; Annex 27: United Nations General Assembly Document No A/68/743, Note Verbale from the Permanent Mission of Colombia to the Secretary-General of the United Nations with Annex (6 Feb. 2014), 11 Feb. 2014; Annex 26: Note from the Governments of Colombia, Costa Rica and Panamá to the Secretary-General of the United Nation, 5 Feb. 2014.
See also, Annex 19: Note No MCRONU-438-2013 from the Permanent Mission of Costa Rica to the Secretary-General of the United Nations, 15 July 2013; Annex 20: Note No LOS/15 from the Permanent Mission of Jamaica to the United Nations, 12 Sept. 2013; Annex 23: Note No DGPE/DG/665/22013 from the Minister of Foreign Affairs of Panamá to the Secretary-General of the United Nations, 30 Sept. 2013; Annex 24: United Nations General Assembly Document No A/68/741, Note from the Permanent Representative of Costa Rica to the Secretary-General of the United Nations, (20 Jan. 2014), 7 Feb. 2014; Annex 25: Note No DGPE/FRONT/082/14 from the Minister of Foreign Affairs of Panamá to the Secretary-General of the United Nations, 3 Feb. 2014.

C. The Inadmissibility of Nicaragua's Second Request

(1) Inadmissibility as a consequence of inadmissibility of (or lack of jurisdiction over) the First Request

7.25. The Second Request set out in Nicaragua's Application asks the Court to "adjudge and declare":

> "The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast."[282]

7.26. This request seems to be an attempt to induce Colombia to engage in a discussion based on the assumption that there are overlapping continental shelf claims beyond 200 nautical miles from Nicaragua's coasts. Colombia declines to engage in such discussion, and wishes, at the outset, to state that in its view there are no overlapping claims beyond 200 nautical miles from the baselines of Nicaragua. Whether there are or not, Nicaragua had its opportunity to present its case and failed. The issue has been definitively decided by the Judgment of 19 November 2012 and is *res judicata*.

7.27. The Second Request of Nicaragua is inadmissible as an automatic consequence of the Court's lack of jurisdiction over, or of the inadmissibility of, its First Request. If, as submitted by

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[282] Application, para. 12.

Colombia, the Court has no jurisdiction to decide on the request for the delimitation of seabed areas beyond 200 nautical miles from the Nicaraguan coast, or if the request to that effect is inadmissible, there cannot be jurisdiction, or the request cannot be admissible, to decide whatever issue pending a decision on such delimitation.

(2) THE REQUEST IS INADMISSIBLE BECAUSE, IF GRANTED, THE COURT'S DECISION WOULD BE WITHOUT OBJECT

7.28. Even if we consider the Second Request independently of the Court's jurisdiction to decide on the First Request, or of that request's admissibility, strong considerations compel the conclusion that the Second Request is inadmissible.

7.29. The request is for the statement by the Court of the principles and rules that determine the rights and duties of the two States in the area of overlapping continental shelf claims and the use of its resources which would apply "pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast."[283] In other words: *pending the decision on Nicaragua's First Request*.

7.30. But there would be no time-frame within which to apply the decision on the Second Request pending the decision on the First Request, as the Court would deal with both requests simultaneously. Consequently, the request is inadmissible

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283 Application, para. 12.

because, even if the Court were to accept it, its decision would be without object.

(3) THE REQUEST IS A DISGUISED, BUT UNFOUNDED, REQUEST FOR PROVISIONAL MEASURES

7.31. As it concerns a determination of principles and rules to be applied *pending the decision* on the First Request, the Second Request has the appearance of a disguised request for provisional measures. As it is well known, provisional measures may be indicated by the Court – since the *LaGrand* judgment with binding effect[284] – in order to preserve the respective rights of either party, pending the final decision, and thus prior to such decision.[285] But Nicaragua does not submit any argument to support the presence of the necessary conditions for granting provisional measures. In particular, it does not specify which rights should be preserved and whether and why there would be urgency to take the decision. Moreover, the determination of applicable principles and rules may hardly be seen as a "measure" or even as a "provisional arrangement" which parties by agreement may adopt, under Articles 74(3) and 83(3) of UNCLOS, pending agreement on delimitation. Even if the Second Request were to be read as a request for provisional measures, it would fail.

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[284] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at pp. 501-506, paras. 98-110.

(4) THE REQUEST IS INADMISSIBLE BECAUSE IT CONCERNS A NON-EXISTENT DISPUTE

7.32. The Second Request cannot succeed also if envisaged as asking the Court to give a solution to a dispute between the parties.

7.33. There is no evidence of an opposition of views between Nicaragua and Colombia concerning a hypothetical legal regime to be applied pending the decision on the maritime boundary beyond 200 nautical miles of Nicaragua's coast. Consequently, the Second Request would concern a non-existent dispute. For this reason also, it is inadmissible.

(5) CONCLUSION

7.34. For all of the above reasons, Nicaragua's Second Request is inadmissible.

Chapter 8

SUMMARY OF PRELIMINARY OBJECTIONS

8.1. As explained above, the Court is without jurisdiction over Nicaragua's Application of 16 September 2013 or, in the alternative, Nicaragua's Application of 16 September 2013 is inadmissible, for the following reasons:

First, the Court lacks jurisdiction under the Pact of Bogotá – the principal basis on which Nicaragua purports to found jurisdiction – because Colombia submitted its notice of denunciation of the Pact of Bogotá on 27 November 2012 and, in accordance with Pact Article LVI, the denunciation had immediate effect with respect to any applications brought against it after 27 November 2012.

Second, while Nicaragua also seeks to found jurisdiction in the present case on the basis of jurisdiction on which the Court's Judgment of 19 November 2012 was based, this effort fails because, in the absence of an express reservation of all or some of its jurisdiction in that Judgment, the Judgment does not grant the Court a continuing or perpetual jurisdiction over the dispute which it there decided.

Third, the Court also lacks jurisdiction because of the *res judicata* of the prior Judgment. Nicaragua's claim in its Application of 16 September 2013 is identical to its claim I(3) in the prior case where it was extensively argued in both the

written and oral pleadings. In its Judgment of 19 November 2012, the Court found that claim admissible but did not uphold it. Consequently, that Judgment constitutes a *res judicata* which bars reopening and relitigation of the claim by means of a new application.

Fourth, the Court lacks jurisdiction over Nicaragua's Application because it is, in fact, an attempt to appeal and revise the Court's Judgment of 19 November 2012, without complying with (and, indeed, without being able to comply with) the requirements of the Statute.

Fifth, even if one were to assume, *quod non*, that the Court had jurisdiction under the Pact of Bogotá or that it has retained jurisdiction on the basis of its prior Judgment, the present Application would be inadmissible because the CLCS has not made the requisite recommendation. The Second Request of Nicaragua is also inadmissible, for its connection with the First and for other reasons.

SUBMISSIONS

The Republic of Colombia requests the Court to adjudge and declare, for the reasons set forth in this Pleading,

1. That it lacks jurisdiction over the proceedings brought by Nicaragua in its Application of 16 September 2013; or, in the alternative,

2. That the claims brought against Colombia in the Application of 16 September 2013 are inadmissible.

Colombia reserves the right to supplement or amend the present submissions.

CARLOS GUSTAVO ARRIETA PADILLA
Agent of Colombia

14 August 2014

VOLUME II: LIST OF ANNEXES AND FIGURES

ANNEXES

FIGURES

I. FIGURES IN CHAPTER 5

II. FIGURE IN CHAPTER 6