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International Court of Justice

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Cour internationale de Justice

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Public sitting

held on Friday 27 April 2012, at 3 p.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le vendredi 27 avril 2012, à 15 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is open and I give the floor to Professor James Crawford. You have the floor, Sir.

Mr. CRAWFORD:

1. APPLICATION OF THE PRINCIPLES AND RULES OF MARITIME DELIMITATION TO THE PRESENT CASE

1. Mr. President, Members of the Court, my colleague Mr. Bundy has set out the geographical context and traced the evolution of Nicaragua's mutable claim for maritime delimitation. In this presentation I will briefly discuss the applicable principles and rules and identify the provisional equidistance line between the Parties, the first step in any delimitation. After that, Mr. Bundy and I will address relevant circumstances in the delimitation area, and the extent to which they may confirm or require adjustments to that line.

The principles and rules of maritime delimitation

2. Mr. President, Members of the Court, this Court and the various tribunals which have dealt with questions of delimitation have developed a standard approach to the settlement of such questions. This approach is by now familiar.

3. First, it is necessary to be clear about what area it is that you are called upon to delimit. Mr. Bundy has already discussed the coasts which define the relevant area. The opposing coasts of Colombia, that is to say, the west-facing coasts of the archipelago and the east-facing coast of Nicaragua, define the eastern and western limits of the relevant area.

4. Courts and tribunals then have taken care to consider the situation in view of its particular geography and other circumstances. The variation between cases is considerable, and so the process of analysis which has emerged is not a Procrustean bed: it would be a mistake to attempt to conform every delimitation to an inflexible, fixed standard. Delimitation is, nevertheless, a process having a definite form not to be abandoned lightly. The steps applied by courts and

tribunals delimiting maritime areas between opposing coasts follow to a degree a methodical approach that has contributed to predictability, as you stressed in *Libya/Malta*[1].

5. To identify the median line is, in principle, a straightforward task of measurement. No doubt the base points must first be identified from which the measurement is to be taken. Where the delimitation is in an area bounded by opposing coasts, the court or tribunal must identify the relevant base points on the baselines of those coasts. So there are three steps:

— identify the base points;

— plot the equidistance or median line;

— identify relevant circumstances which may justify adjustments in that line.

I refer the Court to your statement of principle in *Cameroon/Nigeria*[2], which has been echoed by the various Tribunals, in particular the Annex VII Tribunals in *Barbados/Trinidad and Tobago*[3] and *Guyana/Suriname*[4], the relevant passages are quoted in our Rejoinder and I will not repeat them[5].

6. This, Colombia submits, is the proper method for delimiting the maritime area between the archipelago and Nicaragua's coasts.

7. Before applying that method to the present facts, I will briefly recall the cases which, over the last several decades, have established this method because our opponents have been rather ready to get rid of method and to adopt an idiosyncratic approach.

Equidistance as the starting-point

8. First, there is the equidistance or median line, the constant starting-point. It is true that in the *North Sea* cases you noted the inequity that could arise for an adjacent State in the middle of a concave coast[6] — we saw the same thing in *Bangladesh/Myanmar* — but you contrasted the

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[1] *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985,* pp. 46, para. 60; see also, *ibid.*, p. 39, para. 45.

[2] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288.

[3] Award of 11 April 2006, para. 242.

[4] Award of 17 September 2007, para. 342.

[5] RC, paras. 6.24, 6.30, 6.31.

[6] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 38, para. 58.

situation of States with opposite coasts, where "[l]ess difficulty" is produced by the equidistance line[7].

9. In the maritime delimitation you were called on to effect between Libya and Malta — another case involving opposite coasts. You said that, to identify the median line "is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 47, para. 62).

10. The method was applied again in another opposite coast situation, *Jan Mayen*, which involved the opposite coast of a relatively small and distant island dependency and a long mainland coast. But you treated those coasts as equal — there was no assumption that Jan Mayen was located as an excrescence on the continental shelf of Greenland. You said: "it is in accord with precedents to begin with the median line as a provisional line and then to ask whether 'special circumstances' require any adjustment or shifting of that line" (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 61, para. 51, citing *Gulf of Maine* and *Libya/Malta*; and quoted in *Qatar* v. *Bahrain, I.C.J. Reports 2001,* p. 40, pp. 110-111 para. 227). You will recall that in that case Denmark had argued that the 200 mile EEZ was "its" zone, due to its much longer continental coastline, just as Nicaragua has done here. You roundly rejected that argument. The median line was the first step in determining the delimitation between the zones generated from the opposing coastlines. As you said: "it is proper to begin the process of delimitation by a median line provisionally drawn" (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 62, para. 53).

11. *Romania* v. *Ukraine* was a hybrid case, partly between adjacent coasts, partly opposite coasts, with a disputed junction between the two segments but you still described the establishment of the provisional equidistance line as "the first stage of the Court's approach" and as "[i]n keeping with [your] settled jurisprudence on maritime delimitation" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* p. 101, para. 118).

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[7] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 36, para. 57.

12. In short, it has been your constant approach to start with the median or equidistance line, as the presumptively equitable delimitation of entitlement between opposite coasts. The next step is to consider what, if any, special circumstances may require an adjustment in that line.

Consideration of special circumstances, if any

13. You indicated what is meant by special circumstances, for example in the *Jan Mayen* case, where you said:

> "special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle . . . This concept [i.e., the concept of special circumstances] can be described as a fact necessary to be taken into account in the delimitation process." (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 62, para. 55.)

In *Qatar/Bahrain*, you said as follows: "For the delimitation of the maritime zones beyond the 12-mile zone [the Court] will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), I.C.J. Reports 2001,* p. 111, para. 230.) By 2001, there was no need to question the principle which already had taken form in earlier cases.

14. You said the same thing in *Cameroon/Nigeria*, as I have said.

Nicaragua's rejection of the consistent approach

15. Yet Nicaragua, in the face of the Court's consistent approach and the wide subscription which that approach has received from other tribunals, suggesting in its Reply that here the equidistance principle is not appropriate at all and should be abandoned. It asserts "that there is an absence of a presumption in favour of an equidistance line"[8], that plotting such a line is "not correct" as the first step[9]. It contends that, in the relevant cases, "mention of equidistance was carefully avoided when dealing with the delimitation of the more extensive maritime areas"[10]. If by this Nicaragua means that courts and tribunals start by plotting the equidistance line *only* where

[8] RN, p. 176, para. 6.67.

[9] *Ibid.*, p. 177, para. 6.69.

[10] *Ibid.*, p. 176, para. 6.66. See also, p. 165, para. 6.49.

a question arises of overlapping territorial sea or inshore waters, and *not* where the more extensive jurisdictions of the EEZ or continental shelf are concerned, then it is plainly incorrect. Colombia has already set out the clear position of this Court — in cases wide and narrow — that the relevant principles for delimitation are cognate between the different maritime jurisdictions. In *Qatar/Bahrain,* you said:

> "the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001*, p. 111, para. 231).

And you have never qualified that proposition. Thus despite considerable variations in coastal geography, there has been a standard starting-point, and that is the equidistance line.

16. Even Nicaragua applied it[11], at least when advancing its original maritime claim but now it has abandoned it in favour of a venture of its own[12].

17. A brief word is now in order about the proper function of equitable considerations when delimiting the relevant area between opposite coasts.

18. Maritime delimitation is not subject to a principle of equality of distribution. It takes geography as the starting point. There is no "doctrine of the just and equitable share". That is, as you have said, "wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law" in respect of delimitation, namely that the rights of a State in its maritime areas exist "by virtue of its sovereignty over the land, and as an extension of it in the exercise of sovereign rights" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969,* p. 22, para. 19. See also *Jan Mayen Case, I.C.J. Reports 1993*, p. 67, para. 64). Of course, equitable considerations play a role, "[t]he delimitation itself must indeed be equitably effected" (*I.C.J. Reports 1969*, p. 22, para. 20) — as you said in the *North Sea* cases. And in that regard, you consider relevant circumstances as possible bases for adjusting the median line. As geography is the starting point in the analysis, geography can produce unwarranted results, as can other factors. But here we are not

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[11]MN, pp. 204-208, paras. 3.37-3.42.

[12]RN, p. 12, paras. 25-26.

dealing with an "extraordinary, unnatural or unreasonable" archipelago (*ibid.*, p. 23, para. 24) — a merely incidental feature in the delimitation between other areas. We are dealing with a substantial territorial community, the coastlines of which are the relevant coasts on the Colombian side.

19. The process is *not* one of adjusting the circumstances and, in particular, it is not a matter of changing the geography or effacing its effects in pursuit of some vision of equal entitlement — *a fortiori* in pursuit of some vision of total proprietorship. The geography of the relevant area, as you said in *Cameroon* v. *Nigeria* "is a given": "[i]t is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* pp. 443-445, para. 295). That is just as true of an archipelago made up of predominantly small features as it would be of a mainland coast.

The principle applied: identifying the relevant base points

20. My colleague Mr. Bundy has identified the relevant coasts. It then falls to identify precisely the base points on the baselines of those coasts.

21. As you said in *Qatar* v. *Bahrain*:

> "The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. It can only be drawn when the baselines are known." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001,* p. 94, para. 177.)

You applied the same method in *Cameroon-Nigeria,* when you referred to *Qatar-Bahrain* with approval. Article 15 defines the median line as that line, "every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 442, para. 290).

22. The precise manner in which that basic principle is applied will depend, of course, on the coastal geography. It may be noted that neither State has enacted a system of straight baselines in respect of the relevant opposing coasts, so that issue does not arise.

23. Article 6 provides that a State setting out its base points for a delimitation, when these fall on the low-water line of a fringing reef, is to refer to "the appropriate symbols on charts [which

it] officially recognize[s]". Colombia in the present proceedings has produced hydrographic charts of the relevant area and has undertaken two detailed studies, which I have discussed, in order to focus on the particular coastal geography. On the basis of the charts and the improved data made available by the surveys, Colombia has set out the base points on its side of the relevant area for measurement of the median line.

24. In respect of the Nicaraguan side, analysis is impeded by the lack of data in Nicaragua's pleadings, in this respect as in others. Nicaragua has advanced a series of mutable maritime claims, but has undertaken scarcely any of the detailed work which courts and tribunals, in other cases, have found indispensable. Colombia is thus confronted with a scantily-pleaded geography. This has made it necessary to piece together the details of Nicaragua's coastal front, a task ordinarily belonging to the opposing State. Colombia has done so on the basis of publically available data as concerns Nicaragua's coastal islands.

Colombia's base points

25. But, first, the base points on Colombia's side. This map was Figure 9.2 in the Counter-Memorial. The three frames comprising the map represent the parts of the archipelago relevant to the delimitation. The northernmost part, Quitasueño, is represented in the frame to the left. The middle frame represents the islands of Santa Catalina, Providencia and Low Cay. The right frame represents San Andrés Island and the Alburquerque Cays.

26. Starting at the north, Colombia has identified four base points on Quitasueño, denoted Q1, Q4, Q18 and Q22, one island, three low-tide elevations, the latter covered by Article 6 of the 1982 Convention. The facts which establish their eligibility are confirmed in the geographic surveys to which I have referred.

27. My colleague Mr. Bundy has already addressed what must pass for Nicaragua's response to Colombia's proposed base points; it is a global response, which seeks to reject, *grosso modo*, the entire relevant coastal front on the Colombian side. But it is a global response that contains no analysis of the base points as such. Colombia stands by the data with which it has identified the base points, and stands by the application of the rules and principles to that data.

28. Moving south from Quitasueño, we come to the Providencia and Santa Catalina islands in the central section of the archipelago. The west coast of Providencia furnishes two base points, located on the "normal" baselines — the low-water line on the coast, marked on the map now displayed. From the two Providencia base points, the central segment of the equidistance line can be positioned. Approximately eight nautical miles to the north of Santa Catalina, Low Cay furnishes a further base point.

29. Finally, the southern section of the archipelago contains six further base points, four on San Andrés Island, two on the Alburquerque Cays. The four base points on San Andrés Island are located on the island's west coast. The two southernmost base points are marked A3 and A4 on the map now displayed.

30. These are the base points which control the position of the equidistance line from the Colombian side. I now turn to the Nicaraguan base points, which can be identified briefly.

Nicaragua's base points

31. As we have said, the entire equidistance line between Colombia and Nicaragua is controlled by base points located on the offshore islands and cays appurtenant to Nicaragua's Caribbean mainland shore. The relevant islands and cays are named in red on the map now displayed. Edinburgh Reef, the Miskito Cays and nearby features generate the Nicaraguan base points for the northern part of the equidistance line. The southern sector of the equidistance line is controlled by base points on Great Corn Island and Little Corn Island.

Nicaragua's rejection of the coasts

32. It is important to recall now exactly what Nicaragua has said about the coasts. It has rejected the equidistance line as a starting point, and it did so in the following terms:

> "In the present case, and under the scenario put forward by Colombia, the exercise is indefensible, since *there is no Colombian coast opposite Nicaragua's*, and even if San Andrés and Providencia could be said to collectively constitute a 'coast' — which Nicaragua disputes — the area located between them and the Nicaraguan mainland represents no more than 50% of the area to be delimited, and the two 'coasts' are entirely dissimilar."[13]

[13]RN. p 179, para. 6.72.

33. There are two points here. First, Nicaragua categorically rejects the equidistance principle as applicable in these circumstances. Under Nicaragua's theory, that equidistance is only relevant where the coasts in question are "similar". Even there, its acknowledgment of equidistance is grudging; it allows that equidistance "as a starting point *could have merit*"[14]. This subverts the principle of equidistance/special circumstances as consistently applied in maritime delimitation cases: Nicaragua would introduce a new criterion, a limiting factor absent from the decided cases. According to Nicaragua, the coasts must be "similar" if equidistance is to be the proper starting-point. This "similar coasts" theory is a complete novelty, unsupported by any authority whatever. It would mean that in any delimitation between a continental coast and a group of offshore islands, equidistance is ignored. It is as if the delimitation has *already* occurred — the continental winner takes all or almost all, and the only question is what limited tolerance is to be afforded to the insular losers who are begging at the continental gate. If Nicaragua is right with its "similar coasts" theory the coastal maps of the world will have to be redrawn with a sign "BEWARE. CONTINENTAL COAST. ISLANDS ARE WARNED NOT TO APPROACH WITHIN 200 MILES OR YOU WILL LOSE EVERYTHING YOU POSSESS!" Far from being the Mosquito Coast, this is apparently the Crocodile Coast — with large bites!

34. That is not how maritime delimitation has occurred between mainland and insular coasts, either diplomatically or in judicial practice. The coasts of Nigeria and Bioko are not similar; nor are the coasts of Nigeria and Sao Tome e Principe. Yet the delimitations and cognate arrangements there have not followed the "similar coasts" theory. I can give many other examples and in my second speech this afternoon I will take you to more of the diplomatic practice -- something that Mr. Reichler assiduously avoided. Nor did you regard the theory of similar coasts as having the slightest relevance in dealing with Equatorial Guinea's intervention in *Cameroon/Nigeria*. The coasts of Libya and Malta are not similar; yet you treated them as *pro tanto* entitled to equal respect. Under the "similar coasts" theory Libya would have got a whole lot more.

35. But, secondly and most strikingly, Nicaragua completely revises the geography. If Nicaragua's pleading is taken at face value, then, in its words, "there is no Colombian coast

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[14]RN, p. 179, para. 6.72; emphasis added.

opposite Nicaragua's"[15]. We have already seen that Nicaragua seeks to excise Quitasueño from the map of the western Caribbean. Now, it seems, Nicaragua has taken its pen to the map and eliminated not just the northern part but the archipelago as a whole! In its territorial claim it failed to see 80,000 Colombian citizens, whose future was regarded as a matter subject to a proprietorial claim; in its maritime claim, it fails to see their coasts. It should consult an optician.

36. In its attempt to disqualify the coasts, Nicaragua refers to a number of situations, each of which is completely inapposite to the geography of the western Caribbean. In particular, it refers to *Romania* v. *Ukraine* and the treatment there of Serpents' Island; it refers to the rocky outcrop of Fifla which the Court ignored in *Libya/Malta*; the sand bar of Qit'at Jaradah in the *Qatar* v. *Bahrain* case; and the Tunisian island of Djerba in *Tunisia/Libya*. But the features in the first three of these cases were minor features, and their geographic relation to the mainland coasts was entirely dissimilar to that of the Nicaraguan coastal islands and Colombia's relatively distant archipelago. As for the Tunisian island of Djerba, its presence was outweighed by the conduct of the parties in respecting a *de facto* line. I would only make here three general observations.

37. First, Nicaragua contends that the archipelago is a mere minor or insubstantial feature, like Filfla or Serpents' Island. Second, it contends that the archipelago, which is separated by significant maritime spaces, is adjacent to its own coast[16]. These contentions cannot be justified on the facts. Finally, it ignores that, with the exception of *Tunisia/Libya*, where the coastal configuration of the two adjacent States and their substantial practice indicated a special approach[17], the equidistance method nevertheless was the method applied to the delimitation in each of the cases in which Nicaragua pleads for its disapplication. Simply put, Nicaragua's examples do nothing to overturn the consistent position that the equidistance line is the starting line for a maritime delimitation; they do not affect the identification of the relevant coasts; and they do not affect the identification of the relevant base points. The equidistance method is the method consistent with your jurisprudence; it applies as between the relevant coasts of Nicaragua and the

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[15]RN, p. 179, para. 6.72; emphasis added.

[16]RN, p. 183, para. 6.80. See also *ibid*., p. 186, para. 6.88.

[17]*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* pp. 85-86, para. 121.

archipelago; and Colombia's base points are the proper base points for the measurement of the median line.

The course of the median line

38. With the relevant base points established, it then falls to trace the median line between them. This is a straightforward exercise in measurement. The map now displayed represents the relevant area and the median line resulting from the application of the legal principles to the geography. The median line is represented by a red line, running from the south to the north-east. For reference and comparison, an orange line denotes the 82nd W meridian.

39. The southern portion of the median line runs between the Alburquerque Cays and San Andrés Island on Colombia's side; and the Little and Great Corn Islands on Nicaragua's side. The arrow at the southern extremity of the line denotes the proximity of that line in the region to potential third State interests.

40. In the middle of the line, the relevant base points are those of San Andrés Island, Providencia and Santa Catalina, including Low Cay on Colombia's side; Little Corn Island and Roca Tyra on Nicaragua's side. The median line, for most of its southern portion, follows a north-south course.

41. The control points for the line further north shift its course to the east. These are the line segments between Quitasueño on Colombia's side and the Miskito Cays and Edinburgh Reef on Nicaragua's. The line continues until it reaches the area of potential third State rights, again denoted by an arrow.

42. Mr. President, Members of the Court, once the median line has been identified, it falls to consider circumstances which might call for an adjustment of it. We propose to do this in this song and dance routine between two advocates with Mr. Bundy first addressing several circumstances which confirm the median line as the proper line between Nicaragua and Colombia. Circumstances other than geographical circumstances. I will return, with your permission, Mr. President, then to discuss the crucial geographical circumstances.

Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you, Professor Crawford. I invite Mr. Bundy to take the floor.

Mr. BUNDY: Thank you, Mr. President.

2. THE RELEVANT CIRCUMSTANCES

1. Introduction

1. Mr. President, Members of the Court, as Professor Crawford indicated in this part of our presentation, we will address the second step in the delimitation process. This involves identifying the relevant circumstances characterizing the area to be delimited and assessing whether they confirm the equitable nature of the provisional equidistance line or whether that line needs to be adjusted in order to achieve an equitable result.

2. It will be apparent that the Parties take a very different approach to dealing with the relevant circumstances, and, indeed, the entire delimitation process. Colombia has taken pains to respect the two-step approach to delimitation that the Court has articulated under the rubric of the "equitable principles/relevant circumstances" or "equidistance/special circumstances" rule. In other words, as we have heard, Colombia has first calculated the provisional equidistance line, and then examined the relevant circumstances to ascertain whether they should have an effect on that line. As Colombia has shown, and will endeavour to do so this afternoon, consideration of the relevant circumstances in this case does indeed confirm the equitable nature of an equidistance line drawn between the relevant base points on the Parties' coasts.

3. Nicaragua, on the other hand, rejects the Court's consistent approach to delimitation. Equidistance obviously plays no role in Nicaragua's new claim, which is based on geology and nothing but geology: and it does not take into account the relevant circumstances of the relevant area.

4. Not only is Nicaragua's approach to delimitation divorced from the practice of the Court, it is also inconsistent with Nicaragua's previous view of the applicable methodology. Earlier today, the Court will recall, that I pointed out that even in 2007 — six years after the case was introduced — Nicaragua was vigorously arguing in this very room that the Court will certainly want to proceed, as it now systematically does — in other words, drawing a provisional equidistance line; and then taking into consideration "special circumstances" which may be such as to adjust that line.

5. That position has obviously been abandoned.

6. Notwithstanding Nicaragua's ever-changing position, in the present case, the relevant circumstances fall broadly into two categories: geographic factors; and the conduct of the Parties and that of third States in the region. I shall start by discussing the conduct of Colombia and Nicaragua, as well as that of third States which sheds light on where an equitable delimitation should be situated: and following my presentation, as Professor Crawford said, he will take up the geographic circumstances.

7. But with respect to both sets of circumstances, the basic questions remain the same: do those circumstances confirm that a delimitation based on the application of equidistance methodology between the western string of Colombia's islands and Nicaragua produces an equitable result, which they do; and can Nicaragua's claims stretching far to the east be reconciled with a proper application of the principles and rules of maritime delimitation taking into consideration the relevant circumstances, which they cannot.

2. The nature and role of the relevant circumstances

8. The Court first pronounced on the notion of relevant circumstances in its Judgment in the *North Sea* cases. The relevant passage is well known, but it is useful to quote it again, given that it reflects an important statement of principle. The Court said:

> "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to the different considerations naturally varies with the circumstances of the case." (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 50, para. 93.)

9. In the *Libya/Malta* case, the Court repeated the point stating: "there is assuredly no closed list of considerations" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 40, para. 48); in *Tunisia/Libya*, those circumstances included the conduct of the Parties and in fact the conduct of their colonial predecessors as well as geographic factors; in *Greenland and Jan Mayen*, they included access to fishing resources; and in the *Guyana/Suriname*

award, the Arbitral Tribunal said that international courts and tribunals are not constrained by a finite list of special circumstances[18].

10. Notwithstanding Nicaragua's new claim, the subject-matter of the present dispute does remain the delimitation of a single maritime boundary involving the continental shelf *and* the column of water.

11. There can be no doubt that geographic factors are of importance for this exercise. The provisional equidistance line is, after all, the product of geography — namely, the base points on the Parties' coasts that control that line. But the relevant circumstances in this case encompass other factors as well, it is these that I would like to turn to.

3. Colombia's exercise of jurisdiction and control

12. As is the case with respect to the *effectivités* that Colombia performed over the islands, the evidence regarding the administration, management and control by Colombia over the waters within the San Andrés Archipelago all goes in one direction. Colombia carried out a wide spectrum of such activities; Nicaragua did not.

13. Now I assure the Court that I do not intend to rehearse all the evidence that has been set out in the written pleadings. It is extensive and well documented. Instead, I will highlight some of the essential elements of this practice — a practice that stands in sharp contrast to the absence of any similar conduct on the part of Nicaragua.

(i) Co-operation with third States on the management and conservation of fish resources

14. Let me start with the management and conservation of the living resources. Here, Colombia has engaged both in co-operative initiatives with other States in the region and has adopted its own conservation measures. Why is this important?

15. Under international law, a coastal State not only has the sovereign rights for the purpose of exploring and exploiting the natural resources of the waters superjacent to the sea-bed and of the sea-bed and subsoil, it also has obligations to conserve and manage the resources, living or non-living, situated in the column of water.

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[18] Award in the Matter of an Arbitration between Guyana and Suriname, 17 Sep. 2007, para. 302.

16. It follows that the delimitation of a single maritime boundary in the present case will not simply result in a delimitation of areas where the Parties may exercise sovereign rights, it will also delimit areas where the Parties have legal duties to conserve and manage the associated resources. That is one factor that distinguishes the exclusive economic zone from the continental shelf. With respect to the former, Article 56 of the Convention specifically mentions a coastal State's *duties*, as well as its rights, with respect to the column of water; with respect to the latter, the continental shelf, Article 77 only speaks of a coastal State's rights over the continental shelf.

17. Given this situation, and bearing in mind that the overall objective of maritime delimitation is to achieve an equitable result, Colombia believes that it is appropriate for the Court to ask itself whether an equidistance-based boundary respects, and is consistent with, the long-standing practice of the Parties in exercising jurisdiction and managing and conserving the natural resources in the area in dispute, and whether the Parties' respective claims can be reconciled with that practice.

18. In considering that question, one fact again stands out from the evidence that has been adduced in the pleadings. It has been Colombia, and Colombia alone, that has not only exercised jurisdiction over all of the waters lying east of the 82nd degree meridian including between all the islands of the San Andrés Archipelago, but has also been engaged in the conservation and management related to the resources of these waters. And I would note that none of the evidence that Colombia produced to document these activities has been challenged by the other side.

19. With respect to practice involving co-operation with other States, each of Colombia's agreements with Panama, Costa Rica, Jamaica and even the United States — which was not in fact a delimitation agreement with the United States — all contain provisions pursuant to which the parties have agreed to co-operate in implementing measures for the preservation, conservation and exploitation of the resources in the waters that are subject to those agreements. They have also agreed to undertake marine scientific research and to fight against pollution[19].

20. Colombia has entered into agreements with Jamaica also regulating the quantity of fish that may be caught to preserve the resources around Serranilla and Bajo Nuevo[20] — a point that I

[19]CMC, Anns. 4.5 and 14.

[20]RC, para. 8.44 and CMC, Anns. 7 and 9.

mentioned yesterday — and with the United States to conserve the conch and spiny lobster species in the waters adjacent to Quitasueño, Roncador and Serrana[21]. In fact, Colombia and the United States have an agreement which allows Colombian officials to board United States flagged vessels to verify their compliance with Colombia's conservation regulations within the waters of the San Andrés Archipelago[22]. Colombia has also enacted internal regulations for the same purpose[23].

21. These facts are telling in and of themselves. But they are even more significant when viewed against Nicaragua's claims advanced in this case. Both of Nicaragua's claims — its original mainland-to-mainland median line single maritime boundary claim and its new continental shelf claim — extend far to the east of the islands of the archipelago. The necessary implication of these claims is that Nicaragua now considers that it has a boundary relationship with both Panama and Costa Rica in the south and the east, and with Jamaica in the north. Yet we have no evidence that Nicaragua, let alone Panama, Costa Rica or Jamaica, ever acted on that assumption, either by discussing delimitation questions, or by entering into agreements relating to the protection of the marine environment and the conservation of its living and non-living resources. As I noted earlier today, Nicaragua had no reaction to the Colombia-Panama agreement in the east, Costa Rica considered that Colombia was its delimitation partner in the south, and Nicaragua's discussions with Jamaica were focused on the areas around the Rosalind Bank lying to the north of our area of concern.

22. Nicaragua has not produced any evidence showing that it had any interest in these issues, or that it enacted any legislation or regulations relating to these areas dealing with such critical matters as the conservation and management of the fish resources, the protection of the marine environment, the control of contraband, and the carrying out of marine scientific research. Nor has there been any evidence that Nicaragua engaged in co-operation with neighbouring States on these types of matters in the areas it now claims.

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[21]RC, paras. 8.38-8.41.

[22]*Ibid*., paras. 8.53-8.56.

[23]*Ibid*., para. 8.42.

(ii) Fishing regulation by Colombia

23. With respect to the regulation of fishing by Colombia, the Colombian Maritime Authority has been tasked with the responsibility for exercising surveillance over the maritime activities throughout the waters of the archipelago. Vessels desiring to fish in these waters, in addition to obtaining a fishing licence from the relevant authority, must also have a navigation permit issued by the Colombian Maritime Authority (DIMAR). The issuance of Colombian regulations governing fishing in the area is long-standing, dating back to the 1920s.

24. Colombia has produced extensive evidence demonstrating that foreign vessels have respected these regulations[24]. These include a number of vessels flying the Nicaraguan flag, which have routinely been granted such permits on application, as well as vessels flagged by the United Kingdom, the United States, Russia, Honduras, Jamaica, Belize, Venezuela, the Dominican Republic, Panama and the Cayman Islands, amongst others. A list of 91 instances where Colombia has licensed foreign fishing vessels in the waters of the archipelago may be found in Appendix 5 to Colombia's Counter-Memorial[25].

25. Due to the special features of the western Caribbean, one of the largest fishing potential capacity in the area is actually in the waters close to Nicaragua's mainland coast, and in the vicinity of the Corn Islands and the Miskito Cays. In fact, over 87 per cent of Central-American exports of the spiny lobster to the United States come from Nicaragua and Honduras[26]. Colombia's claim in this case does not prejudice Nicaragua's ability to harness that potential at all.

26. As to the areas east of the 82nd meridian, the fishing resources are concentrated between the cays of Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo. Those waters, it has been documented, are rich in lobster, conch, turtles and white fish in general. Since time immemorial, artisanal fishing has constituted an important, in fact absolutely critical, activity for the subsistence of the archipelago's inhabitants[27]. As for industrial fishing, it is a structural element of the archipelago's economy as it accounts for the vast majority of exports from the San Andrés Archipelago.

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[24]CMC, paras. 3.29-3.42.

[25]See also, CMC, para. 3.41 including the list of licensing of foreign fishing vessels in App. 5.

[26]CMC, para. 9.76.

[27]CMC, Ann. 87.

(iii) Implementation of security measures

27. Let me now turn to security issues. In its Memorial, Nicaragua acknowledged the relevance of these kinds of factors. In Nicaragua's words — and I quote from their Memorial: "International tribunals have given firm recognition to the relevance of security considerations to the assessment of the equitable character of the delimitation."[28] Yet, once again, it has been Colombia, not Nicaragua, that has been active in this domain.

28. In an earlier presentation, I referred to the fact that all of Colombia's islands possess a contiguous zone, and that many of these zones overlap with each other. The exercise by Colombia of control over the infringement of its customs, fiscal, immigration and sanitary laws within these zones all obviously have important security ramifications. Nicaragua's claims seek to deny to Colombia its rights over these zones.

29. But security issues also exist with respect to the waters of the archipelago more widely. As the Court indicated in the *Greenland-Jan Mayen* case, security interests can relate to all maritime areas[29]. Moreover, the notion of security interests for States today has became a broader concept than it was in years past when the defence of territory was perhaps the primary concern. For example, States now have essential security interests that relate to the tracking and control of trafficking in arms, or in drugs, piracy and illegal immigration before their territory is reached.

30. One element relating to security that is particularly pertinent in the present case concerns the control of illicit drug trafficking in this part of the Caribbean. It is an area which has a past record of being an important conduit for contraband headed north. Colombia is a party to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 17 of that Convention encourages States to co-operate in agreeing arrangements to board and search vessels flagged by another State suspected of illegal drug trafficking. In 1997, Colombia entered into such an agreement with the United States, which is implemented throughout the waters of the San Andrés Archipelago beyond the territorial sea of the islands. In addition to permitting Colombia to board United States flagged vessels suspected of drug smuggling, the 1997 Agreement also provides that the Parties will develop and share tactical

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[28]MN, para. 3.69.

[29]*Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 75, para. 81.

information to track suspicious vessels. Concrete evidence of this has been put into practice, and that may be found under Appendix 7 to Colombia's Counter-Memorial. Those documents show that these kind of operations have been carried out both, mainly to the east, but also just to the west of San Andrés Islands and Providencia, and south of Quitasueño. Numerous other operations conducted by the Colombian Navy are also documented in Colombia's pleadings[30]. These kind of operations are not only of benefit to Colombia, but they are a benefit to the international community as well.

(iv) Search and Rescue Operations and Marine Scientific Research

31. Colombia has engaged, as I mentioned yesterday, in numerous search and rescue operations in waters that Nicaragua now claims. Yesterday I focused on these examples when they took place in the territorial seas of the islands. But there are other examples further out to sea, in the middle of the archipelago. I do not intend to recount them now but I would respectfully refer the Court to Colombia's Rejoinder, where at least 18 individual missions are listed.

32. Colombia has undertaken hydrographic surveys and the preparation of literally scores of maritime charts relating to the area[31]. Again, this exercise is not simply for the benefit of Colombia, but to the international community in general. Colombia has furnished evidence of the kinds of marine scientific research and hydrographic studies it has carried out in the waters of the archipelago[32]. Nicaragua can show nothing similar.

(v) Naval Patrols

33. In exercising its rights and duties with respect to these maritime areas, Colombia has also carried out scores — in fact, even hundreds of naval operations within the waters situated east of the 82° meridian. At least 163 such examples can be found in Appendix 7 to Colombia's Counter-Memorial. They range from routine patrols, to the interdiction of illegal cargo, and the control of fishing, etc. And a number of these operations have actually been carried out jointly with other States.

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[30]See the list, CMC, p. 300, para. 8.56.

[31]CMC, App. 11.

[32]*Ibid*., Apps. 10 and 12.

34. Nicaragua has tried to excuse its absence from the areas it now claims by arguing that "Colombia has consistently used her enormous superior military forces to impose [the 82° meridian] as a limit on Nicaraguan vessels"[33]. Let me respond to that argument by making four points to show why the argument does not withstand scrutiny; and Professor Kohen will then return to the issue later when he talks about and addresses Nicaragua's request for declaratory relief.

35. First, Nicaragua appears to have a selective memory. In its case against Honduras, Nicaragua responded to similar Honduran complaints — i.e., that Honduras was being prevented by superior Nicaraguan forces — Nicaragua responded by stressing that it was simply protecting the jurisdiction of its country[34]. Colombia was doing no different.

36. Second, the vast majority of Nicaraguan and other flagged vessels respected Colombian law by applying for, and receiving, fishing permits to operate in the waters of the archipelago, provided they did not engage in overfishing. I have already referred to these, and specific examples of the issuance of such permits are included in considerable detail and length in our written pleadings[35].

37. Third, Nicaragua never took any interest in adopting regulations to manage and conserve the resources of the sea, or to control pollution, which did not depend on a physical presence in the area. Mr. President, Members of the Court, you can show your concern and interest in maritime areas by enacting legislation and regulations relating to the conservation of the resources, the control of pollution and the types of issues I have been discussing. No evidence of any of that by Nicaragua.

38. Fourth, it was not only Colombia that was engaged in naval interdictions; Nicaragua did the same thing, although the important point to note is that all of its activities took place in areas that were situated next to the 82° meridian, particularly when Colombian vessels strayed to the west of that meridian[36].

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[33]RN, para. 35.

[34]Nicaragua's Reply in the *Nicaragua* v. *Honduras* case, para. 7.60.

[35]CMC, App. 5, pp. 64, 65, 92, 95, 96, 97 and 98.

[36]MN, Anns. 49-50, 53, 55 and 57.

4. The Relevance of the 82° Meridian

39. That brings me to my final point — the significance of the 82° meridian of longitude as a relevant circumstance. In Colombia's view, the 82° meridian constitutes a relevant circumstance to be taken into account in determining whether the provisional equidistance line requires any degree of adjustment and where an equitable delimitation generally should lie.

40. Contrary to the impression that our colleagues have sought to create, in addressing the role of the 82° meridian, Colombia has been fully mindful of what the Court had to say about that line in its Judgment on the preliminary objections. There, the Court found that the terms of the 1930 Protocol were more consistent with the notion that the provisions of the Protocol were intended to fix the western limits of the San Andrés Archipelago at the 82° meridian, rather than effecting a delimitation of the maritime boundary[37].

41. That is why Colombia's delimitation position is today based on the principles and rules of international law as those principles exist — the "equidistance/relevant circumstances" rule.

42. Mr. Crawford showed you this map [on screen]. It shows both the equidistance line — or the provisional equidistance line — and the 82° meridian. Now, obviously the course of the equidistance line is dictated by the base points on the nearest baselines of the Parties and thus is not the same as the meridian.

43. But, nonetheless, it is not surprising that the 82° meridian does fall in the same general area as the equidistance line. To the extent that the purpose of the 82° meridian was to fix the western limits of the San Andrés Archipelago, and in this manner to divide the archipelago from the Nicaraguan archipelago consisting mainly of the Corn Islands and Miskitos Cays, it was natural for that limit to fall between the territory of the two States — in other words, between the two sets of islands, or two sets of archipelagos. That, of course, is what an equidistance line also does; it delimits maritime areas between the territories of the two States. Hence, the location of the two lines in the same general area.

44. After the Parties concluded the 1928/1930 agreement, both Parties respected the 82° meridian for purposes of exercising jurisdiction for almost four decades, close to 40 years, without incident. That important fact was not mentioned in Nicaragua's first round pleadings, which

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[37] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 867, para. 115.

tended to focus on much more recent events. It was only in the late 1960s that Nicaragua began to disturb the *status quo* in the north.

45. In his presentation on Monday afternoon, Professor Pellet tried to truncate the extent of the 82° meridian that was agreed pursuant to the 1930 Protocol to cover only the islands of San Andrés, Providencia and Santa Catalina. This is the map he used.

46. Curiously, despite his fondness for its spelling, Professor Pellet did not even place Alburquerque or the East-Southeast Cays on the map. His focus was solely on the northern islands of the San Andrés Archipelago. No doubt that was because Nicaragua's Reply itself had indicated that the group of islands comprising Alburquerque and the East-Southeast Cays did have "a certain proximity and possible connection" with the San Andrés group[38]. So, at least we have a small concession by the other side.

So Professor Pellet's 82° meridian extends south at least as far so as to include Alburquerque and the East-Southeast Cays.

47. What about the islands lying further north?

48. As Professor Kohen explained yesterday, in 1929 Colombia informed Nicaragua of the terms of the Olaya-Kellogg Agreement, between the US and Colombia, which established a special régime for Quitasueño, Roncador and Serrana, which were in dispute between Colombia and the United States. Colombia informed Nicaragua of this and of its claims, pursuant to that agreement, to those three islands, before the 1928 Treaty was considered and approved by the Nicaraguan Congress and before the 1930 Protocol emerged. Nicaragua thus knew of Colombia's claims over those specific islands when the 1930 Protocol was concluded, but did not raise the slightest negative reaction. And, as I have said, for almost 40 years thereafter Nicaragua also never reacted. It respected the 82° meridian in practice.

49. Thus, we can also extend Professor Pellet's version of the 82° meridian to the north so as to include Roncador, Serrana and Quitasueño, to the east of that meridian, since they were well known that Colombia claimed them as of 1930 and Nicaragua did not react.

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[38]RN, para. 1.74.

50. Now, as you can see on the map, Professor Pellet has also drawn some dashed parallel lines to the north of Providencia and to the south of San Andrés in an effort to box in Colombia's islands. But these are completely fictitious. Nicaragua knew how to draw parallels of latitude to indicate areas that were of concern to it and to circumscribe its area of interest when it wanted to. That is what it did in connection with its reaction to the Loubet Award, as can be seen from the addition that has now been put on the screen. That red boxed-in area was the area that Nicaragua indicated in reaction to the Loubet Award that was of interest to them. It had a meridian, but it also had parallels of latitude in the north and south, circumscribing its area of interest.

51. Nothing of the kind was included with the 1930 Protocol. The 82° meridian has a north-south axis that extended from south of Alburquerque to north of Quitasueño. It was respected by the Parties in exercising their maritime jurisdiction for nearly 40 years afterwards without problems.

52. Now that respect by the Parties for the 82° meridian is also in line with the manner in which they have depicted the situation cartographically. I am not going to go through all the maps, I assure you, but I will show just two, to give a sample of what there is.

53. This map on the screen shows how Nicaragua's General Directorate of Cartography officially depicted Nicaragua in 1967 — that is just two years before Professor Remiro Brotóns' critical date. Quite clearly, the map did not extend east of the islands of San Andrés and Providencia where Nicaragua now purports to have claims. In fact, the labelling on the map clearly indicates that the islands there to the east belong to Colombia. This map hardly suggests that Nicaragua considered at the time that it had sovereign rights extending far to the east of the 82° meridian.

54. Cartographically, Colombia's position represents the other side of the coin. It has consistently shown the San Andrés Archipelago and the waters in between as appertaining to it.

55. The map on the screen will be familiar to the Court since it was produced during the preliminary objections phase and I think it made another appearance yesterday. It was an official map of Colombia dated 1931 — just after the 1930 Protocol.

The Court will see that the entire archipelago is depicted as Colombian. And in contrast, the Republic of Nicaragua is indicated as falling to the west of the 82° meridian, as can be seen if we highlight that meridian on the map so that it is easier to see.

56. In its Judgment on the Preliminary Objections, the Court indicated that this map, as well as other similar maps produced by Colombia, could be read either as identifying a general maritime delimitation between the two States or as only a limit between the archipelagos. And given the ambiguous nature of the dividing line depicted on the map, the Court concluded that it could not be deemed to prove that both Parties believed that the 1928 Treaty and 1930 Protocol effected a general delimitation of their maritime boundary[39].

57. Nonetheless, what the maps do show is that, at a minimum, the 82° meridian was considered, since the beginning, as a line between the territories of both States. This is illustrated not only by the maps that I have displayed, but also numerous others that are included in the pleadings.

58. And in this context, the question arises whether it would comport with equitable principles and with the aim of achieving an equitable result for Nicaragua's claims to sovereign rights extending over a vast area that encircles Colombia's islands and encompasses all the waters in between, to be accepted given the role of the 82° meridian as a limit to the islands and the territory of both States in the west.

59. If that is the limit of your territory and it is a dividing line between the territory, is it really equitable when that line has been respected for decades to have sovereign rights extending way to the east? Colombia feels very strongly that it would not be. There is nothing equitable about a claim that is inconsistent with the recognized limits of the Parties' territory and inconsistent with their past conduct. As Colombia has shown, it has not only consistently exercised jurisdiction over the waters of the San Andrés Archipelago lying east of the 82° meridian, it has also complied with its obligations to conserve and manage the resources of the area and it has co-operated with other States in this and other respects. And the result has been a maritime area that is peaceful and well-managed.

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[39] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 868, para. 118.

60. And in Colombia's view, the factors I have discussed deserve to be taken into account in determining where an equitable solution lies. Now Nicaragua may choose not to discuss these elements, as happened with its first round presentation, but they are relevant circumstances which, on the one hand, confirm the equitable nature of a delimitation based on equidistance principles and, on the other hand, underscore the inequitable nature of Nicaragua's claims.

61. Mr. President, that concludes my presentation, and I would be grateful — perhaps this might be a good time for the pause, but obviously it is up to the Court — at the appropriate time, if Professor Crawford could be called on to continue Colombia's presentation. Thank you to the Court.

The PRESIDENT: Thank you, Mr. Bundy. The Court will take 15 minutes' break. After that, Professor Crawford, you will be given the floor. The hearing is suspended for 15 minutes.

The Court adjourned from 4.05 p.m. to 4.25 p.m.

The PRESIDENT: Please be seated. The hearing is resumed and I give the floor to Professor Crawford. You have the floor, Sir.

Mr. CRAWFORD: Thank you, Mr. President.

3. GEOGRAPHIC RELEVANT CIRCUMSTANCES

1. Mr. President, Members of the Court, I am now going to discuss the geographic circumstances relevant to the delimitation, before setting out Colombia's main conclusions in respect of the boundary.

The geography of the area

2. Geography holds a position of central importance in maritime delimitation. You have affirmed the key role of geography and you have cautioned against any approach that would refashion or ignore it. In *Cameroon* v. *Nigeria* you said as follows:

> "The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* pp. 443-445, para. 295.)

And in the *Gulf of Maine* case you said "the facts of geography are not the product of human action amenable to positive or negative judgment, but the result of natural phenomena, so that they can only be taken as they are" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 271, para. 37). This was the Chamber's response to pleas from the opposing parties to ignore, on the one hand, a considerable part of the Nova Scotian peninsula and on the other hand the entirety of Cape Cod. To ignore them would have been to delimit the Gulf on the basis of hypothetical coasts which the parties wished they had, instead of the real coasts geography has given them. Geography is not an optional consideration. It is not something that you cannot see. It is not a choice for the Court or other tribunal to pay it heed or to set it aside at discretion. It is, instead, a "fact" and on the basis of that fact the delimitation is to be effected.

3. This leads me to stress once more the geographic configuration of the area which the Court is called upon to delimit.

4. The geographic configuration of the archipelago as a unit; and its place in the wider geographic configuration of the maritime area to which it belongs is the key factor. The archipelago measures nearly 300 miles from south-west to north-east[40]. It consists of diverse insular formations, including atolls with fringing reefs, extensive banks with permanent land features, smaller and larger cays, and principal islands containing sierras, running north to south, and ranging in elevation from 100 to 360 m. The map in the slide now displayed shows the configuration of the archipelago, with its territorial sea and contiguous zones denoted by shading. All of these features are well offshore: the closest to the mainland being 97.8 miles away, the furthest 260.7 miles away.

5. As we have said, the archipelago is not one of the small maritime spaces which exist around the globe, known only to a few scientists or occasional sojourners, on the political margins

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[40]CMC, Vol. III, p. 1, fig. 2.1.

of the States to which they appertain. It is not a single small island. It is an expanse of insular territory and associated waters, comprising a major feature of the western Caribbean.

6. This brings me to the place the archipelago occupies in the geographical configuration of the region as a whole. Nearly 200 nautical miles to the south of the archipelago is the Central American isthmus, where Costa Rica and Panama have their Caribbean coasts. Closer to the north are the maritime entitlements of Honduras and Jamaica. The northern and southern limits of the relevant area are not the principal subject-matter of the present controversy, but both must be taken into account in order to establish the proper limits of the eventual delimitation. In its written pleadings Nicaragua, it will be recalled, paid them no heed at all. It ignored the effect of proximate third States, and it did so both in its first delimitation claim[41]; and in its Reply delimitation claim[42].

7. Mr. Reichler on Tuesday was more careful, and you will recall the map he showed you of overlapping potential entitlements in relation to the exclusive economic zone. His area of the EEZ took into account Colombia's agreements with third States, in the sense that, as far as one could see, it stopped at the boundaries Colombia has negotiated with third States such as Costa Rica, Panama and Jamaica. I will come back to this later.

8. And then there is the mainland of Nicaragua. This lies some 100 miles to the west of the nearest point on the archipelago. Roncador and Serrana are separated from the mainland by approximately 186 and 165 miles of sea. These are considerable distances in the context of maritime delimitation. The archipelago is far enough from Nicaragua that no question arises between the two States as to potential overlapping territorial seas, nor, for that matter, contiguous zones.

9. The distance between Nicaragua's coastal islands and the archipelago, though less than that of the mainland coast, is still considerable. It ranges from 66 miles: Alburquerque Cay to Little Corn Island, to 95 miles: Providencia to Ned Thomas Cay; you can see the distances on the screen.

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[41]MN, Vol. I, fig. I.

[42]RN, Vol. II, figs. 6-10.

10. Of course, we have heard endlessly from our colleagues opposite, of the Nicaraguan mainland coast. This is an important feature of the geography of the region. But it should be noted that the mainland coast, shielded, as it were, behind the set of islands, does not contain any base points controlling the median line. As I have shown, the controlling points from north to south are the Edinburgh Reef, Miskito Cays, Roca Tyra and the Corn Islands. These features are up to 30 nm from the Nicaraguan mainland. One effect of the island is to project the Nicaraguan coast — on whose length Nicaragua's whole argument depends — further east into the Caribbean than it would be if only the mainland fronted the sea in this sector.

Similar and dissimilar geography in past delimitations

11. Geographic circumstances rather similar to those in the present case have existed and exist between a number of States. A common approach to delimitation under such circumstances has been to adopt the equidistance line as the final delimitation, thus giving full equidistance effect even to very small island features.

12. For example, there is the 1978 delimitation between Thailand and India. Both sides of the delimitation area are bounded by islands. India's Nicobar Islands are located on the western side of the area; a small island group of Thailand's coastal islands are located on the eastern side. The mainland coast in this geographic configuration is not the starting-point for measuring the position of the median line. It is measured from Thailand's coastal islands. The resultant median line is the final delimitation; the mainland coast of Thailand, though forming a backdrop to this, did not call for any adjustment of the median line. India's Nicobar Islands generated full equidistance effect[43].

13. Full equidistance effect was also respected in the delimitation between Australia and France of the maritime area near New Caledonia. The southern segments of that delimitation involves median lines, which accord full equidistance effect to small Australian features — Middleton Reef, which, I can assure you, is not much more than a low-tide elevation; in fact for a considerable time Australia classified it as a low-tide elevation, and Norfolk Island[44]. This, too, is

[43]RC, Vol. II, p. 122, fig. R-7.7.

[44]RC, Vol. II, p. 121, fig. R-7.5.

a situation in which a significant land mass — New Caledonia — lies on the opposing side of mid-ocean islands; but does not reduce the equidistance effect.

14. Turning, or returning, to the Caribbean, virtually full effect has been accorded to the famous Isla de Aves. This is a small insular feature of Venezuela, well beyond the 200-nautical-mile limit of the Venezuelan mainland. It faces substantial United States insular territory in Puerto Rico and the Virgin Islands[45]. It was also accorded full equidistance effect in the delimitation between Venezuela and the Netherlands, where Isla de Aves fronted against Saba and Saint Eustachius Islands[46].

15. Then we have the case of the Florida Cays, as now shown on the screen[47]. You will see that none of the delimitation is governed by the Florida coast: the tiny feature of the Dry Tortugas, with a total area of 143 acres, governs the entire western segment of the line out to Point 27 -- the construction lines are shown on the graphic. The island of Providencia is about 30 times as large as the Dry Tortugas.

16. These delimitations are especially relevant, as they are the solutions adopted in geographical circumstances most similar to those which exist between Nicaragua and Colombia in the present case. The States accepted in these geographic circumstances that the proper delimitation was that giving full equidistance effect to their opposing insular features. These opposing insular features generated overlapping maritime entitlements, and the solution was an equidistance line. The presence in some cases of a larger mainland coast, behind the relevant islands, did not lead to an adjustment in the equidistance line, let alone the abandonment of equidistance, which is what Nicaragua argues for here .

17. By contrast, all the cases Nicaragua relies on concerned coastal islands. For example:

— Filfla (2.4 nautical miles from Malta)

— The Channel Islands (between 8 and 23 nautical miles from the French coast)

— St Pierre and Miquelon (between 9 and 11 nautical miles from the Canadian coast)

— Serpents Island (about 9 miles from the Ukrainian coast)

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[45]CMC, p. 400, paras. 9.50-951; RC, p. 259, para. 7.44.

[46]CMC, pp. 400-401, para. 9.52.

[47]Maritime Boundary Agreement between the United States of America and the Republic of Cuba, signed 16 December 1977, provisional application from 1 January 1978 (reprinted in *Limits in the Seas,* Vol. 110).

— St Martin's Island (7 miles from the coast of Bangladesh).

The islands of the San Andres Archipelago are like none of these. They are — taken collectively and individually — relatively distant mid-oceanic islands in a rather confined area.

18. Even where the opposing coasts really are dissimilar — even where an island chain faces a mainland coast — full effect, or nearly full effect, has generally been given to the islands. Let me give several examples.

19. India, from the south-west coast of the subcontinent, and the Maldives, which present fringing reefs and sandbars towards India, both generate entitlements into the same maritime area. The overlapping entitlements of India and the Maldives as between Points 1 and 10 on Figure 7 are incontestably generated by dissimilar coasts. Nonetheless, the delimitation has been effected with an equidistance line. The islands of the Maldives facing India were accorded full equidistance treatment[48].

20. The small islands of São Tomé and Príncipe present insular coasts facing the mainland of Equatorial Guinea and Gabon. The delimitation between São Tomé and Príncipe and the full length of the African mainland coast, which is opposite, consists of an equidistance line. The tiny islands are accorded full equidistance effect for the entire length of the line, which was subject to no adjustment[49].

21. Similarly the Cape Verde Islands generate overlapping entitlements with both Senegal and Mauritania. Notwithstanding the disparity between the island coasts and the continental mainland, the starting-point was the equidistance line. Along segments comprising a significant part of the line, the delimitation has been adjusted, not in favour of the mainland coast, but in favour of the insular — the Cape Verdean coast[50]. It has certainly not been abandoned.

22. The Turks and Caicos are separated from the north coast of the Dominican Republic by less than 100 nautical miles. The insular features of the Turks and Caicos fronting the maritime area are extremely small. Hispaniola, the island the eastern part of which constitutes the Dominican Republic, is the second largest island in the Caribbean. The Turks and Caicos

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[48]RC, pp. 254-255, paras. 7.37-7.39.

[49]RC, pp. 261-2.63, paras. 7.46-7.48.

[50]RC, pp. 263, para. 7.49.

nonetheless are accorded very nearly full effect in the delimitation. The delimitation line is adjusted off the median only slightly against the smaller islands[51].

23. In one delimitation after another, the practice supports the approach which Colombia believes to be appropriate — in no case does the practice support Nicaragua's radical abandonment of the equidistance line in circumstances such as the present. In no case does it support the practice of widespread enclaving. The Nicaraguan Reply restricts itself to the speculative assertion that no "delimitation effected by a third party" would have relied on the equidistance line[52], and in oral argument Mr. Reichler suggested that these were all political deals without regard to entitlement. Apparently Nicaragua believes that these agreements were concluded in a legal vacuum — that the parties had no regard to the rules or principles of delimitation. But the parties plainly had the rules in mind. For example, the Netherlands-Venezuela treaty expressly took account of "the current provisions of international law and the development of the new law of the sea"[53]. France and Venezuela "bas[ed] themselves on the relevant rules and principles of international law and [took] into account the work of the Third United Nations Conference on the Law of the Sea"[54]. France and Australia, in the Coral Sea delimitation, took a similar approach[55]. The Cape Verde-Senegal delimitation was adopted taking account of the United Nations Convention[56], the Turks and Caicos-Dominican Republic delimitation "in accordance with the principles of international law"[57]. This is all State practice and is fit to be taken into account, whatever else may have motivated the parties to reach agreement.

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[51]RC, p. 265, para. 7.50.

[52]RN, pp. 205-206, para. 6.125.

[53]Boundary Delimitation Treaty between the Republic of Venezuela and the Kingdom of the Netherlands, concluded 31 March 1978, entered into force 15 December 1978, preamble: 1140, United Nations, *Treaty Series* (*UNTS)* 323, 324.

[54]Delimitation Treaty between the Government of the French Republic and the Government of the Republic of Venezuela, concluded 17 July 1980, entered into force 28 January 1983, preamble: 1319 *UNTS* 219.

[55]Agreement on maritime delimitation (Australia-France), concluded 10 January 1982, entered into force 10 January 1983, preamble: 1329 *UNTS* 107, 108.

[56]Treaty on the delimitation of the maritime frontier (Cape Verde-Senegal), concluded 17 February 1993, entered into force 25 March 1994, preamble: 1776 *UNTS* 305, 306.

[57]Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Dominican Republic concerning the delimitation of the Maritime Boundary between the Dominican Republic and the Turks and Caicos Islands, 2 August 1996, preamble.

24. As to the suggestion that no tribunal would consider Colombia's bilateral practice with other States, this is to ignore the jurisprudence of the Court[58]. Of course, each instance of coastal geography is unique, and each delimitation entails geographic considerations particular to its setting. In a number of delimitations between islands and mainland coasts, the equidistance line, according to the established method, has been set down as the first step; but, then, in acknowledgement of a disparity in coastal fronts, the line has been adjusted in favour of the mainland coast[59]. So adjustments occur. We accept that. The two main cases may be briefly recalled here.

25. First, there was *Libya/Malta*. The Court, in accordance with the general method, set down the median line between these opposing coasts[60]. It then undertook a careful consideration of relevant circumstances. The overall configuration of the geography, and the disparity in the lengths of the opposing coasts, were central considerations[61]. They favoured an adjustment to shift the median line to the north — to increase the area appertaining to Libya. Other considerations, effective State presence, use of resources, prior agreements, though in principle relevant, did not affect the specific adjustment here. The provisional median line is now shown; the adjusted line is shown in red. This was a relatively modest adjustment — 18 nautical miles in favour of the long mainland coast[62].

26. The other case in which a smaller island faced a long mainland coast is *Jan Mayen*. Jan Mayen is a small insular dependency of Norway, far distant from Norway's mainland coast. It generates its own maritime entitlements. Your starting point, again, was to plot the equidistance line and then to consider relevant circumstances which might call for a reduction in equidistance effect. As in *Libya/Malta*, a long mainland coast faced a considerably shorter insular coast. A difference between the cases is that Malta is a significant political entity — an independent State

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[58]See, e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p.* 48, para. 65; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, pp. 63-64, para. 58; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 78-79, para. 109.

[59]RC, pp. 243-245, paras. 7.16-7.20; *ibid*., pp. 242-243, paras. 7.14-7.15.

[60]*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* pp. 46, 48, paras. 60, 65.

[61]*Ibid.*, pp. 48-51, paras. 64-71.

[62]RC, p. 244, para. 7.20; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* pp. 51-55, paras. 71-75.

with its own population and a developed economy. The island of Jan Mayen, by contrast, is a barren feature, of interest apparently only to scientists. This did not lessen the potential entitlement of the island. The adjustment is shown on the map on the screen. The equidistance effect of Jan Mayen was substantially preserved, even though it was reduced in view of the circumstances[63].

27. In neither the *Jan Mayen* case nor in *Libya/Malta* did the mainland coast enjoy an exclusive privilege to a 200-nautical-mile EEZ. The solution to a disparity between coasts was to adjust the median line; not to exclude the entitlement generated from the small insular territory. These were cases of overlapping EEZs, resulting from the clear rule that insular and mainland territories alike generate the 200-mile entitlement[64]. A rule which, incidentally, Nicaragua accepts as concerns the three main islands of the archipelago. That rule is embodied in Article 121 of the 1982 Convention; and there is no principle and no warrant under the modern law of delimitation to disapply it.

28. In both cases, that is, *Libya/Malta* and *Jan Mayen*, it was a question as to the magnitude of the adjustment called for. In both cases, the Court adopted an adjustment which reflected the geographical circumstances, including the differences in coastal lengths but preserving a significant entitlement as generated from small insular baselines. The final delimitations in the two cases are represented in the map now displayed. The reduction was calibrated having regard to the disparity of the coasts — it came and it went, and it came again. It was not a sharp reduction, but a relative one, reflecting the opposing coastal configurations which defined the area to be delimited.

29. Nor was this result arrived at through a mechanical application of coastal front ratios: you explicitly rejected that approach. In *Libya/Malta,* you said that it would "go far beyond the use of proportionality as a test of equity", if you were to "use the ratio of coastal lengths as of itself determinative of the seaward reach and area . . .", (case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 45, para. 58). In *Jan Mayen* you similarly cautioned,

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[63] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993,* pp. 64-81, paras. 59-93.

[64] *Ibid.*, p. 69, para.70.

> "[i]t is not a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coast" (case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38, p. 68, para. 68).

Coastal lengths and their disparities are factors, but there is no question of applying a "predetermined arithmetical ratio" (*Libya/Malta, Judgment, I.C.J. Reports 1985*, p. 55, para. 75).

30. Nor is the disparity of coasts to be taken in isolation from the circumstances as a whole. In *Libya/Malta* you affirmed what has been said in the *North Sea* cases: "there is assuredly no closed list of considerations". Whether an adjustment is needed and whether, if needed, what magnitude it should assume are matters addressed on a holistic view of the setting in which the delimitation takes place (*Libya/Malta,* p. 40, para. 48, citing *North Sea Continental Shelf Cases, I.C.J. Reports 1969,* p. 50, para. 93). But the point I would stress is that the order of magnitude of adjustment from equidistance in these two cases bears no relation whatever to that sought by Nicaragua in the present case.

31. Mr. President, Members of the Court, the cases I have been dealing with cover a range of geographic circumstances which are sufficiently like that in the present case to guide you here. The approach in these cases in geographical circumstances akin to that in the present case has been to adopt the equidistance line either as the final delimitation or as a starting point for a modest adjustment.

32. In response to that, Nicaragua relies principally on two cases, *St. Pierre et Miquelon*; and, endlessly, the *Anglo-French Continental Shelf* case. I should therefore deal with them in a little more detail.

Nicaragua's inapplicable precedents

33. First, St. Pierre and Miquelon. The coastal islands of St. Pierre and Miquelon are comparative latecomers to Nicaragua's case. They made their appearance as part of the new delimitation claim in the Reply[65].

[65]RN, pp. 151-155, paras. 6.16-6.23; p. 187, paras. 6.89-6.90.

34. Nicaragua asserts that the circumstances in the present case are "geographically similar" to those in *St. Pierre et Miquelon*[66]. This is in aid of Nicaragua's argument about what it calls a "defensive wall" or "wrap around" effect[67]. But to say that the French islands offshore of Newfoundland and Nova Scotia are similar to the San Andrés Archipelago is an object lesson in the dangers of disregarding geography.

35. At their closest, the islands are separated from Canada's Burin Peninsula by a distance not exceeding the breadth of a single territorial sea belt. For much of the rest of their eastern and northern coasts, the islands would generate a potential territorial sea entitlement overlapping largely with that projected from the Canadian coasts. This is an obvious case of adjacency — to the point of embeddedness. It is nothing at all like the relation between the San Andrés Archipelago and Nicaragua. Even at its closest point, Colombia's archipelago is of an order of magnitude further from Nicaragua than St. Pierre and Miquelon are from Canada — over *ten times* the distance[68]. The Court of Arbitration recognized the adjacency of the French islands as a cardinal fact: "the prevailing and overall relationship", it said, "is one of adjacency"[69]. This was both a factual observation and a legal assessment. The islands are close to Canada, and their proximity is "*the prevailing and overall relationship*". Relevantly, the French islands were considered part of the south-facing coastal frontage of Newfoundland itself.

36. Nicaragua would have the Court believe that the overall geographic configuration is the same as that in the present case. In its Reply, it says that "in this setting" — by which it means in the setting of the present proceedings —

> "the mainland coast of Colombia (like that of France in the arbitration with Canada) plays no role, and . . . beyond Colombia's small islands (like St. Pierre and Miquelon) there would be nothing but the open waters of the Caribbean Sea up to the outer limit of Nicaragua's maritime zones"[70].

This is a striking confusion between two utterly dissimilar geographic settings. "[B]eyond [St. Pierre and Miquelon]'s small islands" the Court of Arbitration was hardly able to find any

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[66]RN, p. 153, para. 6.21.

[67]RN, pp. 145-156, paras. 6.9-6.24; esp. pp. 155-156, paras. 6.23-6.24.

[68]RC, pp. 247-248, para. 7.24.

[69]Case concerning *Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon)*, *International Law Reports (ILR)*, 1992, Vol. 95, p. 662, para. 35.

[70]RN, p. 152, para. 6.17; emphasis added.

"*open waters*" at all. It had to search the full circumference around the islands before it found a small "coastal opening" to the south[71]. From the coasts of the San Andrés Archipelago, there is open water in every direction. To the east, one of the archipelago's two long coastal fronts, the water is open all the way to the Colombian mainland, which is within 400 miles from all parts of the archipelago but beyond 400 miles from all Nicaraguan coasts. To the north and south, there is no obstruction until one reaches the coasts of third States. Even to the west, the direction in which the archipelago faces Nicaragua, there is a considerable distance. The French islands could not present a starker contrast. They do not face open sea on three sides, but face mainland coasts almost all around. Where they do face open sea, they present their shortest side. This is a small set of insular features, nearly completely embraced by the concavity created by the coasts of a single long opposing State.

37. The Court of Arbitration explicitly recognized this aspect of the geography. It said as follows:

> "But the coastlines that France wants to exclude form the concavity of the Gulf approaches and all of them face the area where the delimitation is required, generating projections that meet and overlap, either laterally or in opposition."[72]

Lest there be any doubt as to what the Court of Arabitration meant by this, one need only look a little earlier in the Award. According to the Court, "The French islands of St Pierre-et-Miquelon are within a concavity framed exclusively by Canadian coasts."[73] The potential maritime zones of St. Pierre and Miquelon ran into overlapping Canadian entitlements not merely in one direction or two; but in three directions. If the coastal frontage of St. Pierre and Miquelon is considered as a whole, as much as 90 per cent faced proximate Canadian coasts. The contrast with the San Andrés Archipelago, where not even half the coast faces Nicaragua — and at a far greater distance — is obvious. It is quite simply untenable to equate St. Pierre and Miquelon and the archipelago. The unusual solution which the Court of Arbitration fashioned for the waters of the Gulf Approaches — the mushroom stalk, as it is called — has no applicability in the geographical circumstances of the present case.

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[71] *ILR*. Vol. 95, pp. 671-672, para. 70.

[72] Case concerning *Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon)*, *ILR*., 1992, Vol. 95, p. 661, para. 29, quoted at Nicaragua Reply, p. 153, para. 6.20.

[73] *Ibid.*, *ILR*. Vol. 95, p. 661, para. 26.

38. This brings us to the *Anglo-French Continental Shelf* case where, again, an unusual solution was adopted in circumstances nothing like the present. Nicaragua gives pride of place in its pleadings to the *Anglo-French Continental Shelf* case[74]. It calls it the "classic example" in support of the delimitation it insists the Court should adopt[75].

39. And the most striking thing about the Channel Islands and the San Andrés Archipelago is their comprehensive geographic dissimilarity. The Channel Islands are close to the French coasts — so close that the opposing coasts generate overlapping territorial sea zones. They are nestled within a concavity of France — you might think a very favourable situation — in almost every direction; they face French coastal fronts, with immediate access to cheese and baguettes. The Channel Islands are located in a narrowing strait, a mere 100 nautical miles at its widest, 18 nautical miles at its narrowest[76]. They display no relevant likeness to the San Andrés Archipelago with its entirely different geography.

40. The proximity of the Channel Islands to the opposing coasts of France and the United Kingdom merits some further observations. First, there is the geographic relation of the San Andrés Archipelago to Colombia. Nicaragua says that the San Andrés Archipelago is "wholly detached geographically from Colombia"[77] — which is correct if "Columbia" is confined to the Colombian mainland. But of course Colombia is not so confined; it includes the Archipelago as an integral part. This is yet another illustration of Nicaragua's propensity to state its case in completely question-begging, circular terms.

41. The archipelago is a prime example of what the Court of Arbitration called "the case where numerous islands stretch out one after another long distances from the mainland"[78]. The Court of Arbitration was deliberately contrasting that situation with that of the Channel Islands, which are not "numerous islands stretch[ing] out . . . long distances from the mainland". They are

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[74]MN, p. 190, para. 3.11; p. 196, para. 3.23; p. 208, para. 3.43; pp. 240-243, paras. 3.103-3.105; RN, p. 128, para. 5.9; pp. 132-135, paras. 5.18-5.25; pp. 149-151, paras. 6.14-6.15; p. 155, para. 6.23; p. 180, para. 6.74; p. 182, para. 6.79; pp. 187-191, paras. 6.91-6.99.

[75]RN, p. 132, para. 5.18.

[76]*Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic,* 30 June 1977, 18 United Nations, *Reports of International Arbitral Awards (RIAA)*, p. 18, para. 3.

[77]MN, p. 243, para. 3.105.

[78]18 *RIAA*, p. 94, para. 199.

a small cluster ensconced within a French concavity and not far from the opposing British coast. The archipelago is nothing like them.

42. The problem for Nicaragua is that, for its argument here to work, the archipelago must be in close proximity to one, or preferably both, of two opposing mainland coasts. There is nothing Nicaragua can say about the opposing mainland coasts — because there are no mainland coasts in opposition to each other in the present case. Yet so important is it to Nicaragua's case that the San Andrés Archipelago be seen as analogous to the Channel Islands that it is repeated over and over again[79]. But repeating it does not make it so. Nicaragua's islands are at some distance from the coast of Nicaragua, but there are extensive maritime areas to the east of the Nicaraguan islands before the archipelago is reached. It is inexplicable to describe the entitlement here as a mere "beach front"[80]. Colombia's archipelago is in no meaningful sense "adjacent" to the Nicaraguan mainland. Nor is it adjacent to the coastal islands of Nicaragua. The dissimilarity with the Channel Islands is stark.

43. Finally, there is the median line. As I noted a moment ago, the substantial distance between mainland coasts means that there is, quite simply, no median line here, except that between the archipelago and Nicaragua. *That* median line is important. It is the first step in the delimitation. It is not the sort of median line that concerned the Court of Arbitration in the *Channel Islands*, a *mainland-to-mainland* median line in relatively confined waters. The mainland-to-mainland line was central to the reasoning of the Court of Arbitration; the islands were "on the wrong side" of that median line. To talk of islands being on the "wrong side" of a median line in a case in which there is no median line is unintelligible. The absence of a mainland-to-mainland median line in the present case is yet another factor which renders the *Channel Islands* arbitration irrelevant.

44. Mr. President, Members of the Court, this fact, the absence of a mainland-to-mainland median line, is ground already covered in the present proceedings, one would have thought covered to exhaustion. But Nicaragua reverts to its former argument — the one it expressly abandoned at

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[79]See, e.g., MN, p. 15 (title to Chap. I: "The Mosquito Coast and Adjacent Islands . . ."); *ibid*., p. 176, para. 2.251; RN, p. 24, para. 1.6; p. 40, para. 1.51; p. 167, para. 6.52; p. 170, para. 6.58; p. 178, para. 6.69; p. 183, para. 6.80; p. 203, para. 6.118.

[80]RN, p. 135, para. 5.24.

the beginning of its Reply[81] — about a median line between the mainland coasts of Colombia and Nicaragua: and you will have noticed that one of the final graphics of Mr. Reichler had that innominate statusless line shown on the screen. Nicaragua claims that there is a median line between the mainland coasts which "Colombia tries to brush aside": "the Archipelago 'is not only "on the wrong side" of the median line but wholly detached from Colombia'"[82]. This is completely unsupportable. Nicaragua in these proceedings advanced a median line claim, withdrew it, attempted to replace it with a novel maritime claim, contradicting the withdrawn claim, and, then produced a composite claim to both the EEZ and outer continental shelf — both, said Winnie the Pooh. This is pleading by trampoline, impossible to pin down. We faced what is now their claim for the first time this week. A median line between mainland coasts, "[a]s stated in the Nicaraguan Memorial" was never relevant to these proceedings. Nicaragua abandoned it. There should be no call now for Colombia to address it again — even though Mr. Reichler showed it in one of his last graphics. To repeat, the median line which matters in the present proceedings is the median line between the archipelago and Nicaragua. To refer to the archipelago as existing on the "wrong side" of a median line — which has no other function but to incriminate, so to speak, the archipelago — is to refashion geography out of recognition.

Minor straddling features

45. Mr. President, Members of the Court, Nicaragua refers to a number of cases in which minor features were disregarded when settling the median line through a delimitation area, and contends that those cases, too, are controlling.

46. This is an argument based upon minor straddling features as they are called. The first deficiency in Nicaragua's argument likening the archipelago to minor straddling features can be succinctly expressed: the archipelago is not minor; and, it does not straddle.

47. The main example of a minor straddling feature which Nicaragua contends should disqualify the archipelago from generating its full maritime rights is Abu Musa. Abu Musa is a small island in the Gulf close to Dubai and Sharjah — the two emirates which were parties to the

[81]RN, p. 12, paras. 25-26.

[82]*Ibid.*, p. 133, para. 5.21, quoting MN, pp. 242-243, para. 3.105.

arbitration. Abu Musa is also close to Iran, a third State which claims the island; and the position of Iran was obviously highly relevant to the case. It is located approximately half way between the opposing coasts of Sharjah and Iran. The distances in the area are modest; Abu Musa is only 35 miles from Sharjah[83]. It is not far from the location of the provisional equidistance line which extended laterally from the coasts of the two emirates. Again, the geographic circumstances of the case bear little resemblance to those in the present case.

48. The Court of Arbitration concluded that Abu Musa should not affect the equidistance line: and it said as follows:

> "Certain islands are clearly capable of giving rise to 'special circumstances' and thus to the invocation of equitable considerations where their existence would otherwise produce a distortion of the equidistance line or an exaggerated effect which would be inequitable. It may thus be necessary, in the delimitation of a boundary, *to abate the effect of an island which forms an incidental special feature*."[84]

In the circumstances of that case, the Court of Arbitration concluded that it was indeed necessary "to abate the effect" of Abu Musa, which formed an incidental special feature. Now, one tribunal's "special feature" might be perfectly ordinary and unspecial to another. But the word "incidental" has a definite meaning. It means that one thing exists in subordinate conjunction with another thing. For a feature to be "incidental," it must be "incidental" *to something*. The subordinate entity in *Sharjah/Dubai* was the small island of Abu Musa. That to which it was subordinate — that to which it was *incidental* — was either the mainland coast or the provisional equidistance line which that coast generated. Nothing like this can be said of the San Andrés Archipelago, for the simple reason that there is nothing to which it is subordinate in that way. The only equidistance line here is the line which the archipelago itself generates. That is not a line to which the archipelago is a merely "incidental" feature. It is a line that results from the entitlement projected from the archipelago itself, or as a minimum from the three main islands which Nicaragua concedes have that entitlement. There is no mainland coast to which the archipelago is "incidental": the mainland coast of Colombia is hundreds and hundreds of miles away. The maritime jurisdiction which the archipelago generates, though it overlaps in the eastern parts with the maritime jurisdiction

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[83] 91 *ILR*, p. 543, 663.

[84] *Ibid.* p. 676, emphasis added.

generated by the mainland coast of Colombia, is in no sense incidental to that mainland coast in the relevant area.

49. The San Andrés Archipelago is, in short, a significant territorial feature generating maritime entitlements of its own. It is not to be disregarded in the delimitation like a small unpopulated coastal feature. It is entitled to full equidistance effect subject to delimitation, or at least the three main islands are so entitled.

50. Serpents' Island in the Black Sea is another small feature which the Court did not take into account when considering possible adjustments to the delimitation. It is a small, barren feature, belonging to Ukraine located approximately 20 nautical miles from Romania's mainland coast and less from the Ukraine's. It is a singular feature not immediately adjacent to the coast; it is not a cluster of islands like that which the *Eritrea/Yemen* tribunal did take into account[85]; you excluded Serpents' Island from the coastal configuration for the purposes of identifying base points[86]. Nor did you treat it as a relevant circumstance which would have called for an adjustment to the provisional equidistance line[87]. Any entitlement which Serpents' Island might have generated would have been subsumed within the coastal projections from Ukraine's mainland[88]. The disparity again with the San Andrés Archipelago is obvious and requires no further comment.

51. In *Libya/Malta,* the rock of Filfla was disregarded in setting the equidistance line between the principal Maltese coast and the Libyan mainland. It is less than 3 miles from the principal Maltese coast[89]. It is hard to understand how the Court's treatment of Filfla carries any lesson for the proper treatment of the archipelago. A barren rock is not an archipelago with 80,000 inhabitants, millions of visitors per year, and a self-sustaining economy of regional significance.

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[85] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, *RIAA*, Vol. XXII, pp. 367-368, paras. 139-146.

[86] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* p. 109, para. 149.

[87] *Ibid.*, p. 122, para. 187.

[88] RC, pp. 223-225, paras. 6.52-6.56.

[89] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 20, para. 15 and p. 48, para. 64.

52. Nicaragua also refers to Qit'at Jaradah[90]. This is a sandbar near the opposing coasts of Bahrain and Qatar in very confined waters. The Court did not use it as a base point for the equidistance line[91]. But this minor coastal projection says nothing about the delimitation in the present case[92]. You called Qit'at Jaradah "a very small island, uninhabited and without any vegetation"[93]. It does approximately straddle the equidistance line between the principal coasts involved, had it been given effect in plotting that line, its effect would have been manifestly disproportionate[94].

53. The key deficiency in Nicaragua's arguments likening the San Andrés Archipelago to these various minor straddling features, coastal projections and other miscellaneous inshore islands can be briefly put: not one of the special cases on which Nicaragua relies concerned a geographic configuration bearing any resemblance to the area of the western Caribbean. Moreover, the varied cases relied on defy distillation into any principle relevant here. Nicaragua picks piecemeal from sundry judgments and awards addressing geographic circumstances which, individually, have no bearing in the present case; and, taken together, support no coherent argument at all.

Colombia's conclusions in respect of delimitation

54. Mr. President, Members of the Court, that brings me to Colombia's conclusions in respect of the delimitation between the San Andrés Archipelago and Nicaragua.

55. Your consideration of the merits of the present dispute has been greatly complicated by the way in which Nicaragua has pleaded its case — the Nicaraguan trampoline, as I have called it. I analysed these tergiversations yesterday and will not repeat what I said then, except to say that this has put us in a difficult position to reply — not knowing even yet precisely what Nicaragua's claim is nor how it is articulated. So what I say now is unavoidably preliminary, and we reserve

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[90]RN, pp. 180-181, paras. 6.75-6.76.

[91]*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001,* pp. 104-109, para. 219.

[92]RC, pp. 226-227, para. 6.60.

[93]*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001,* p. 104, para. 219.

[94]*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001,* p. 104, para. 219.

the right to comment further next week in light of clarifications, or dare I say it, further mutations in Nicaragua's position on Tuesday.

56. Nor will I repeat what Mr. Bundy has said about the fundamental inadmissibility of Nicaragua's claim to continental shelf within 200 miles of Colombia's coast, except to make two points. The first is that Nicaragua's claim depends not merely on the principle of the existence of Nicaragua's continental shelf within 200 nm of Colombia's coast, it depends on its precise location. Yet that is a matter for the Annex II Commission. The second point is that the position in *Bangladesh/Myanmar* was quite different; it did not require the Tribunal to do more than draw a lateral line in the area of undisputed continental shelf. The position here, I say, is quite different. It is exacerbated by the fact that Nicaragua in the present case has furnished the Court with nothing approaching the data necessary to consider an extended continental shelf claim.

57. But quite apart from its inadmissibility, Nicaragua's claim as now presented remains obscure and uncertain in many respects. Let me mention one or two of them, and let me start with the EEZ, since Mr. Reichler, for all his extravagant ratios, did at least make some attempt to address the issues. Professor Lowe on the other hand made an unnaturally prolonged speech about natural prolongation, a speech full of the *ab initio*, the *nullum temporis*, the *ex lege*, but remarkably light on detail.

58. The graph now on the screen comes from Mr. Reichler's presentation of this week. One supposes that it shows Nicaragua's EEZ claim, but it raises many more questions than it answers. For example, on what basis is Nicaragua claiming to exclude Colombia from what I will call the outer area, the pink area of 35,000 and some square kilometres which is within 200 nm of Colombia's coasts but beyond 200 nm from Nicaragua's? How does Nicaragua have standing to obtain a determination that waters to which Nicaragua has no right, no conceivable right, constitute high seas and not Colombian EEZ, as they would otherwise do? Above all, there is the question how an infinitesimal distribution of maritime rights to Colombia's archipelago can possibly be consistent with the legal principles I have outlined.

59. There are as many more questions one might ask about the intrusive continental shelf claim unveiled by Professor Lowe this week. How can it possibly be considered proportionate — or does proportionality not apply to continental shelf claims based on geomorphology beyond

200 nm? If it does not apply, how can that be consistent with the so-called unitary character of the continental shelf, which Professor Lowe stressed so much? After all, the principle of proportionality has been applied to the sea-bed in claims within 200 nm. What are the lateral limits of the continental shelf claim, and how can it interrelate with EEZ rights of Colombia and third States? What would be the implications, in terms of Article 61 of the Court's Statute, of the extremely likely scenario of the Annex II Commission disallowing or varying the Nicaraguan claim on the basis of which the Court would have hypothetically acted? It may be more than ten years more. All things considered, Nicaragua's claim is tantamount to throwing a very large rock into a peaceful, orderly, treaty-regulated pool — though Nicaragua would no doubt say it is not a rock, it is a piece of coral!

60. Even if Nicaragua were to make a full submission to the Annex II Commission, if it insisted on the same result, that would be, to our knowledge, an unprecedented result. Nicaragua's extended continental shelf would deprive Colombia of significant parts of its automatic entitlement to 200-nm zone. Such an intrusion States, in making their continental shelf claims, have almost all avoided. My colleague Mr. Bundy has mentioned the practice in this respect; it is extensive; it is virtually uniform[95].

61. Mr. President, Members of the Court, you will no doubt recall Oscar Wilde's description of an English fox-hunting gentleman — "the unspeakable in full pursuit of the uneatable". Nicaragua's new outer continental shelf claim, substituting for its earlier mathematically challenged single maritime boundary claim, in either of its manifestations, could similarly be described as the inadmissible in full pursuit of the untenable.

62. In between absorbing itself, first in a claim that was, by its own admission, unsupportable, and then, later, in two different versions of a new claim which is both unsupportable and inadmissible, Nicaragua, in its written pleadings, made very little attempt to address Colombia's delimitation case. This is a case which, Colombia submits, adheres to the principles that you have repeatedly applied. It starts with a description of the relevant coasts, it defines those coasts in the relevant maritime area. It identifies base points on that coast. It sets out an

[95]RC, pp. 149-156, paras. 4.60-4.69.

equidistance or median line, and it considers the range of geographic and other circumstances which might affect the final disposition of the line. Concluding that the circumstances in the relevant area confirm the median line as the equitable line between the parties, Colombia submits that this should constitute the final delimitation with Nicaragua.

63. As against that argument, what we have is an abandonment of principle entirely. Colombia's claim is supported by the following four propositions:

(1) The San Andrés Archipelago is a significant historical, political and geographical unit. We have explained that already in some detail.

(2) We have not found a single case in the jurisprudence or in State practice where offshore islands — islands 100 miles or more offshore have been enclaved or enclosed.

(3) Nicaragua's argument that one can ignore dissimilar coasts, in terms of the equidistance principle, has no place in the law of maritime delimitation.

(4) Even if — for the sake of argument — the length of Nicaragua's mainland coast were to require some adjustment to the provisional equidistance line, any such adjustment would be modest — as it was in *Libya/Malta* and *Jan Mayen* — it would not involve the abandonment of the principle of equidistance in the way proposed by Nicaragua.

64. The claim line which Colombia submits derives from these considerations can be seen on the screen now. The result is not inequitable *inter alia* for the following reasons:

(i) First, it does not distort or disregard any possible alternative median line, such as could be drawn between proximate mainland coasts, as there is no alternative of such line here.

(ii) Second, the equitable principle at the heart of maritime delimitation accepts that, where two States generate potentially overlapping maritime entitlements, neither State is likely to obtain the full potential 200-mile EEZ entitlement; Colombia's claim proposes a fair division of potential entitlements in which both States realize some, but not all, of the potential — and I recall yesterday, how I showed you that the distribution of potential in the EEZ proposed by Nicaragua is 100 per cent to Nicaragua, 0 per cent to Colombia.

(iii) A number of third State delimitations in the same region have taken a similar approach to Colombia's claim line, which illustrates what others have considered to be an equitable solution.

(iv) Nicaragua has not taken a consistent position in respect of the treatment of its own fringing islands, sometimes ignoring them, sometimes paying attention to them; Colombia's claim line acknowledges that those islands have effect in the equidistance calculation.

(v) Nicaragua's conduct has been at best equivocal in respect of the maritime spaces to the east of the claim line; it hardly establishes that Nicaragua has any entitlement — I know the Court has been reluctant to take conduct into account in maritime delimitation cases, but there are limits.

(vi) Insofar as Nicaraguan fishing vessels have fished in the waters east of the claim line, this has been permitted under Colombian regulations when done in accordance with Colombian licences, which have been granted largely without interest; the claim line would not have any inequitable, let alone, disastrous effect on the Nicaraguan fishing industry.

(vii) Before the initial phase of the present proceedings, Nicaragua had never articulated a claim line of its own to the east of the 82nd degree west meridian; which marked the western limit of the San Andrés Archipelago for over 70 years.

(viii) The submitted claim line is the median line which accords effect to the geography of the two relevant coasts and takes account of the geographic and other relevant circumstances.

Mr. President, Members of the Court, no doubt there is more that could be said, about the adjustment of the line and we look forward to hearing what our colleagues will say about it, which will be in respect of this issue for the first time. But we have become used to their saying things for the first time in each successive round of pleadings. Mr. President, Members of the Court, thank you for your attention. I would ask you now to call on my colleague, Professor Kohen, who will conclude Colombia's first round presentation by addressing Nicaragua's claim for a declaration. Thank you, Mr. President.

The PRESIDENT: Thank you, Professor Crawford. Et je passe la parole à M. le professeur Marcelo Kohen qui sera le denier orateur au nom de la Colombie, cet après-midi. Vous avez la parole, Monsieur.

M. KOHEN :

4. LA DEMANDE NICARAGUAYENNE D'UNE DÉCLARATION EN RÉPARATION DOIT ÊTRE REJETÉE

1. Monsieur le président, Mesdames et Messieurs les juges, il m'appartient d'examiner la demande d'une déclaration formulée par le Nicaragua relative à des prétendus faits internationalement illicites commis par la Colombie. Je vais replacer cette demande dans son contexte véritable, c'est-à-dire, celui du comportement global des Parties par rapport au différend porté devant vous, afin de vous montrer que, s'il y a une Partie qui ne respecte pas ses engagements internationaux, cette Partie est le Nicaragua.

2. Je vais en effet illustrer, d'une part, que le demandeur non seulement a répudié un traité établissant un règlement territorial après un demi-siècle d'application pacifique, mais encore qu'il continue d'ignorer la souveraineté colombienne sur San Andrés, Providencia et Santa Catalina même après votre arrêt du 13 décembre 2007. Je vais ensuite démontrer, d'autre part, que la Colombie a, à tout moment, agi en conformité au droit international, limitant l'exercice de sa juridiction aux zones dans lesquelles elle l'a toujours fait, en attendant votre arrêt sur le fond.

3. En effet, la Colombie a considéré le 82e méridien comme constituant la limite des juridictions respectives. C'est bien jusqu'à ce méridien que les pêcheurs colombiens ont exercé leurs activités — même si historiquement ils allaient à l'ouest de celui-ci[96] —, et que des permis de pêche et des concessions d'exploration d'hydrocarbures ont été délivrés. Traditionnellement, les pêcheurs nicaraguayens ne s'étaient pas aventurés à l'est du 82e méridien jusqu'à ce que leur gouvernement les y avait encouragé, dans le contexte de ce différend[97]. La Colombie a toujours respecté le traité de 1928-1930 et s'est bornée à maintenir le *statu quo* existant.

A. S'il y a une Partie qui viole ses obligations internationales, il s'agit du Nicaragua

4. Monsieur le président, il est surprenant, pour dire le moins, que le Nicaragua soulève dans cette affaire des questions de responsabilité. C'est la Partie qui a déclaré, après un demi-siècle

[96] CMC, p. 371, par. 8.79.

[97] Note du ministre colombien des affaires étrangères au Secrétaire général des Nations Unies du 25 février 2008, Nations Unies, doc. A/62/733, annexe. RN, vol. II, annexe 6, p. 16.

d'application, la nullité d'un traité établissant un règlement territorial. Ce mépris de la reconnaissance de la souveraineté colombienne constitue une violation substantielle de ce traité, ainsi qu'une atteinte au principe de stabilité des traités territoriaux[98]. Il s'agit d'un cas frappant de rejet d'un traité, le premier des cas de violation substantielle mentionné à l'article 60, paragraphe 3, de la convention de Vienne sur le droit des traités[99].

5. Cette situation de rejet s'est même prolongée après la confirmation de la validité du traité par votre arrêt du 13 décembre 2007[100], malgré les affirmations de son agent lundi dernier[101]. Le Nicaragua continue d'ignorer la souveraineté colombienne sur San Andrés, Providencia et Santa Catalina. Je cite une note du président Daniel Ortega au Secrétaire général des Nations Unies datée du 11 février 2008 :

> «S'agissant de ces trois îles, dans son arrêt, la Cour se borne à indiquer qu'elle n'a pas compétence pour connaître de cette partie de la requête et qu'elle ne peut donc connaître de l'affaire. Le Nicaragua, quant à lui, fait valoir qu'il maintient sa requête concernant la souveraineté sur ces trois îles, comme il l'a fait tout au long de son histoire.»[102]

6. Dans sa réplique, le demandeur a persisté à considérer que le traité de 1928 est «dépourvu d'autorité morale et juridique»[103]. Monsieur le président, la cartographie officielle nicaraguayenne publiée postérieurement à votre arrêt sur les exceptions préliminaires considère — comme c'est le cas depuis 1980 — l'ensemble de l'archipel de San Andrés, y compris San Andrés, Providencia et Santa Catalina, comme relevant de la souveraineté nicaraguayenne. La dernière carte officielle datée de 2011, que vous avez à l'écran, le montre clairement[104]. La Colombie a dûment protesté

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[98] CMC, p. 295-297, par. 6.28-6.32. *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 37, par. 72-73 ; *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 861, par. 89.

[99] Art. 60, par. 3, litt. *a)* de la convention de Vienne sur le droit des traités. Nations Unies, *Recueil des Traités*, vol. 1155, p. 331 et suiv. Voir *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 46-47, par. 94-95.

[100] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 858-859, par. 78-81.

[101] CR 2012/8, p. 18, par. 21 (Argüello).

[102] Lettre du président du Nicaragua au Secrétaire général des Nations Unies du 11 février 2008, Nations Unies, doc. A/62/697, annexe. RN, vol. II, annexe 5, p. 12.

[103] RN, par. 9-10.

[104] «Gobierno de la República de Nicaragua, Instituto Nicaragüense de Estudios Territoriales, República de Nicaragua, Mapa de la división política administrativa (Mapa Escolar)», 2011. Disponible sur : http://www.ineter.gob.ni/.

contre la publication de cette carte. Ce comportement est inadmissible et témoigne du manque de respect de la part du Nicaragua, non seulement à l'égard des traités et de la souveraineté colombienne, mais aussi à l'encontre d'une décision de votre propre Cour.

B. Une demande de réparation changeante, comme toutes les revendications nicaraguayennes

7. Dans sa requête introductive d'instance, le Nicaragua s'est réservé «le droit de demander réparation pour tout élément d'enrichissement indu, résultant de la possession par la Colombie, en l'absence de titre légitime, des îles de San Andrés et de Providencia, ainsi que des cayes et des espaces maritimes qui s'étendent jusqu'au 82e méridien», tout comme «pour toute entrave à l'activité des bateaux de pêche battant pavillon nicaraguayen ou des bateaux détenteurs d'un permis délivré par le Nicaragua» *[traduction du Greffe]*[105]. C'est au stade de la réplique que le demandeur a formalisé cette demande, le montant de la réparation étant réservé pour une phase ultérieure de la procédure[106]. Lundi dernier, le Nicaragua est revenu sur ses pas, demandant dorénavant satisfaction et non plus une réparation pécuniaire[107]. Même dans ce domaine, Monsieur le président, les positions nicaraguayennes sont, me semble-t-il, comme le temps à La Haye : instables et imprévisibles.

8. Dans sa réplique, le Nicaragua n'a plus insisté sur sa demande de réparation au sujet des îles de San Andrés et de Providencia. C'est compréhensible à la lumière de votre arrêt du 13 décembre 2007[108]. Par contre, il est tout à fait remarquable que le Nicaragua ne réclame plus réparation au sujet des cayes, malgré le maintien formel de leur revendication. Peut-être s'agit-il d'un aveu inconscient du caractère totalement infondé de cette revendication. En ce qui concerne la demande de réparation relative aux espaces maritimes, nous verrons qu'elle aussi est infondée.

C. La demande de déclaration du Nicaragua est infondée

9. Je vais à présent examiner la demande nicaraguayenne en réparation telle que l'agent l'a décrite lundi dernier, donnant donc pour acquis que le Nicaragua a renoncé à une réparation

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[105] Requête, par. 9.

[106] RN, p. 235-238 et 240, conclusions II.

[107] CR 2012/8, p. 23, par. 40 i) (Argüello).

[108] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 860-861, par. 86-90.

pécuniaire[109]. L'agent du Nicaragua a également invoqué un prétendu emploi de la force par la Colombie depuis 1969 pour «maintenir le Nicaragua bloqué» à l'intérieur du 82e méridien[110].

10. Je m'arrête un instant sur cette accusation aussi légère qu'injurieuse, qui a déjà été fermement rejetée par l'agent de la Colombie hier[111]. L'attitude du Nicaragua lui-même témoigne du fait qu'il ne s'agit pas d'une accusation fondée. En effet, s'il était vrai que la Colombie utilise la force contre le Nicaragua depuis 1969, on peut se demander pourquoi cette prétendue violation grave d'une obligation d'une importance fondamentale n'a pas été portée à l'attention du Conseil de sécurité ou à celle des organes compétents sur le plan régional, tant de l'OEA que du traité interaméricain d'assistance mutuelle. Si l'on suit votre arrêt dans l'affaire *Nicaragua c. Etats-Unis d'Amérique*[112], que le demandeur n'ignore certainement pas, le fait que le Nicaragua n'ait pas recouru dans ces circonstances aux organes pertinents selon les chapitres VII et VIII de la Charte des Nations Unies, témoigne de la conviction de cet Etat qu'il ne se trouvait pas dans la situation de victime d'un emploi de la force.

11. Ce n'est pas la première fois, Mesdames et Messieurs les juges, que le Nicaragua lance gratuitement des accusations graves. Dans son mémoire, le Nicaragua prétendait que si le traité de 1928-1930 était valide, comme la Cour l'a déclaré, il y aurait une «violation substantielle» colombienne de celui-ci, qui lui permettrait d'invoquer l'extinction ou la dénonciation du traité[113]. Le Nicaragua a abandonné cette prétention.

12. Monsieur le président, le Nicaragua se plaint de prétendus dommages matériels causés par la Colombie du fait de l'exploitation des ressources à l'est du 82e méridien tout en affirmant qu'il ne cherche pas une réparation pécuniaire. Le fait que lundi dernier le Nicaragua ait renoncé à ce qui serait le mode de réparation approprié s'il était vrai que de tels dommages eussent été

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[109] CR 2012/8, p. 23, par. 40 i) (Argüello).

[110] *Ibid.*, p. 23, par. 40 ii) (Argüello).

[111] CR 2012/11, p. 15, par. 30 (Londoño).

[112] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 120-122, par. 233-235.

[113] MN, p. 178-181, par. 2.254-2.263 et p. 266, conclusion 5) ; CMC, p. 273-277, par. 5.62-5.70. Voir *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 934 (déclaration de M. le juge *ad hoc* Gaja).

commis[114] témoigne à nouveau de la faiblesse de la demande nicaraguayenne. La réalité est que le Nicaragua n'a subi aucun dommage du fait du comportement colombien. Jusqu'à maintenant, le demandeur a même été incapable de fournir la moindre précision au sujet des prétendus dommages subis, et *a fortiori* de prouver leur existence. Raison amplement suffisante pour rejeter la demande de déclaration nicaraguayenne[115]. Il existe aussi d'autres raisons qui conduisent au rejet de cette demande. La *première* est la nature du différend qui nous occupe. La *deuxième* tient aux comportements des Parties. La *troisième* est le fait qu'il ne découle pas de l'arrêt sur les exceptions préliminaires de 2007 que la Colombie aurait dû changer son comportement sur le terrain.

D. La nature du différend exclut la demande de déclaration nicaraguayenne

13. Monsieur le président, Mesdames et Messieurs les juges, la demande nicaraguayenne doit être examinée à la lumière de la nature du présent différend. Il demeure aujourd'hui essentiellement un différend de délimitation maritime classique. Dans ce genre de différend, la règle générale est que les parties ne demandent pas réparation au cas où la décision déclarerait que les espaces sur lesquels une partie exerçait ses compétences s'avérerait être sous la juridiction de l'autre partie.

14. La jurisprudence de votre Cour montre que même les différends territoriaux classiques sont réglés par un jugement déclaratif, et non par une décision dans le domaine de la responsabilité. Les affaires du *Temple de Préah Vihéar*, *Libye/Tchad* et *Cameroun c. Nigéria* témoignent des cas où un différend frontalier débouche sur un jugement affirmant que celui qui exerçait des compétences sur un espace donné n'était pas son souverain. Dans votre arrêt du 10 octobre 2002, la Cour a estimé que «du fait même du présent arrêt et de l'évacuation du territoire camerounais occupé par le Nigéria, le préjudice subi par le Cameroun en raison de l'occupation de son territoire aura en tout état de cause été suffisamment pris en compte» (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt,*

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[114] *Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17*, p. 27-28 et 47-48 ; *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 81, par. 152 ; *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004 (I)*, p. 59, par. 119 ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I),* p. 232-233, par. 460.

[115] *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 204-205, par. 76 ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 453, par. 323-324.

C.I.J. Recueil 2002, p. 452, par. 319)[116]. Ce qui est vrai pour les frontières terrestres l'est également pour les délimitations maritimes.

15. Par ailleurs, Mesdames et Messieurs les juges, nous ne nous trouvons pas non plus dans une situation dans laquelle la Colombie aurait évacué, que ce soit par la force ou autrement, les autorités nicaraguayennes de l'exercice des fonctions juridictionnelles dans les espaces maritimes concernés. Nous sommes encore moins confrontés à une situation d'occupation militaire ou coloniale et à l'exploitation indue de ressources naturelles résultant d'une telle occupation. Tout cela est très éloigné de notre affaire.

16. Que ce soit en 1969, lorsque le Nicaragua avança sa première revendication sur la zone entourant Quitasueño, ou en 1972, lorsqu'il revendiqua la souveraineté sur Roncador, Quitasueño et Serrana, voire même sur tout l'archipel et ses espaces maritimes en 1980, la Colombie exerçait, à toutes les époques considérées, sa souveraineté et sa juridiction ; et cette situation s'est prolongée de manière ininterrompue, aussi bien avant qu'après la requête introductive d'instance. Ainsi, la Colombie s'est bornée à maintenir la situation existante en vertu du traité de 1928-1930 et du droit international général, et à agir de bonne foi comme le ferait tout Etat défendant sa souveraineté et sa juridiction.

17. Le Nicaragua nie l'existence d'un *statu quo* relativement aux espaces maritimes[117]. Nous sommes face à une pétition de principe. *Statu quo* signifie littéralement «en l'état où la situation existe». Il est par ailleurs étrange de nier aujourd'hui l'existence d'un *statu quo*, alors que même après sa revendication totale de 1980, le Nicaragua n'a pas réagi lorsque la Colombie a établi, par exemple, des zones de pêche autour de Quitasueño, Roncador et Serrana, où l'activité des navires battant pavillon états-uniens a été autorisée, sous certaines conditions, en vertu d'un accord conclu avec les Etats-Unis d'Amérique[118]. Vous pouvez voir ces zones de pêche à l'écran[119]. Le Nicaragua n'a jamais protesté contre cet exercice concret de juridiction, malgré la publication de cet accord dans le *Recueil des traités des Nations Unies* et dans celui des

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[116] Voir aussi *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962,* p. 37.

[117] Lettre de l'agent du Nicaragua à la Cour du 20 mars 2012.

[118] Accord entre la Colombie et les Etats-Unis relatif à certains droits de pêche en application du traité relatif au statut de Quitasueño, Roncador et Serrana, 6 décembre 1983, 2015, Nations Unies, *RTNU* 3 ; 35 *UST* 3105 ; *TIAS* 10842.

[119] CMC, p. 183, fig. 4.1.

Etats-Unis[120], et le fait que plus de 700 permis aient effectivement été délivrés[121]. La Colombie a simplement exercé sa souveraineté et sa juridiction jusqu'à la limite occidentale de l'archipel, telle qu'elle fut définie par le protocole de 1930. Le Nicaragua a fait de même à l'ouest du 82e méridien. Voilà le *statu quo* en question à tous les moments pertinents.

18. La Colombie a agi de manière cohérente avec la position qu'elle a toujours soutenue, comme tout Etat qui ne veut pas que son comportement puisse être interprété comme un acquiescement à la position de l'autre[122]. Il aurait été impensable que, face à la négation absolue du traité de 1928-1930, la Colombie se contente d'observer la manière dont le Nicaragua exploiterait les ressources des zones que la Colombie revendique comme siennes.

E. Le Nicaragua a lui aussi intercepté des navires colombiens

19. Venons-en, Monsieur le président, aux comportements, qui selon le Nicaragua, lui permettraient de demander satisfaction. Il s'agirait de l'interception par la Colombie de navires de pêche battant pavillon nicaraguayen à l'est du 82e méridien[123].

20. La première remarque que l'on peut faire est que la Colombie a délivré des permis de pêche à des navires battant pavillon nicaraguayen. Lorsque des navires nicaraguayens ont exercé leurs activités sans posséder les permis correspondants, ils ont été interceptés et soumis à des amendes[124]. Par ailleurs, on voit mal de quoi le demandeur se plaint, car le Nicaragua a lui aussi, de temps en temps, intercepté des navires de pêche battant pavillon colombien sur le 82e méridien ou à l'est de celui-ci, comme vous le voyez à l'écran[125]. La Colombie a émis des protestations à leur encontre[126]. Le Nicaragua a d'ailleurs mentionné ces interceptions dans son mémoire, et votre Cour l'a aussi relevé dans votre arrêt sur les exceptions préliminaires[127].

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[120] DC, p. 181-183, par. 4.62-4.66.

[121] CMC, vol. I, p. 184, par. 4.67.

[122] *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984,* p. 65, par. 130 ; *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992,* p. 408, par. 80, p. 563, par. 341, p. 577, par. 364.

[123] RN, p. 237, par. 8, p. 240, conclusions II.

[124] CMC, p. 98, par. 3.41 ; DC, p. 288, par. 8.32.

[125] DC, p. 289, fig. R-8.2.

[126] DC, p. 287, par. 8.30.

[127] MN, vol. II, annexes 49,50, 53, 55 et 57 ; *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II),* p. 846, par. 31.

21. Monsieur le président, permettez-moi de rappeler que le Nicaragua a lui-même rejeté devant votre Cour l'argument qu'il utilise aujourd'hui contre la Colombie. Commentant avec ironie la position hondurienne relative à la saisie de navires par les deux parties, le Nicaragua affirmait : «When the coastguard is Honduran and the fishermen are Nicaraguan this is called effective control of islands and maritime areas; however, if the fishermen are Honduran and the coastguard Nicaraguan, this is considered harassment, aggression and incursion»[128]. To conclude as follows: «It cannot be considered «harassment» or «provocation» or «aggressive incursions» when the Naval Force [of Nicaragua] demands respect for the sovereignty and jurisdiction of the Republic»[129].

22. On ne saurait non plus critiquer la Colombie du fait de l'exploration et de l'exploitation de ressources naturelles à l'est du 82e méridien. Très récemment le Nicaragua a annoncé sur le site Internet de son président la mise en place d'un vaste programme d'exploration de ressources naturelles dans des zones situées à l'est du 82e méridien[130]. Dans sa note adressée à la Cour le 22 février 2012, le Nicaragua reconnaît que ces activités se déroulent dans des zones qui font l'objet du présent différend[131]. Contrairement à ce que l'agent a mentionné lundi passé, ni le site Internet du président ni la note du Nicaragua à la Cour ne se réfèrent à une vérification *in situ* des rapports scientifiques sur Quitasueño[132]. Comme mon collègue James Crawford l'a mentionné ce matin, il ne s'agit que d'un écran de fumée de dernière minute pour prétendre justifier que le Nicaragua n'a pas apporté la moindre preuve pour contrecarrer les rapports scientifiques prouvant l'existence de formations insulaires à Quitasueño. Il n'y a pas la moindre preuve non plus que ce navire ait été menacé ou intercepté où que ce soit.

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[128] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)* ; RN, p. 154, par. 7.38.

[129] *Ibid.*, p. 160, par. 7.60.

[130] «Gobierno Sandinista realiza investigaciones pesqueras en plataforma continental Caribe», *El 19*, 24 février 2012. Disponible sur le site http://www.elpueblopresidente.com/EL-19/8559.html, ainsi que sur le site http://el19digital.com/index.php?option=com_content&view=article&id=35870 :gobierno-sandinista-realiza-investigaciones-pesqueras-en-plataforma-continental-caribe&catid=23 :nacionales&Itemid=12.

[131] Note de l'agent du Nicaragua au greffier de la Cour, 20 mars 2012.

[132] CR 2012/8, p. 19-20, par. 24-27 (Argüello).

F. L'arrêt du 13 décembre 2007 n'a pas modifié l'obligation de respecter le *statu quo*

23. Je vais maintenant traiter de la situation qui a suivi votre arrêt sur les exceptions préliminaires. Le Nicaragua soutient que, par l'arrêt du 13 décembre 2007, votre Cour «a jugé que le 82e méridien n'était pas une ligne de délimitation des espaces maritimes respectifs des Parties» *[traduction du Greffe]*[133]. Ce n'est pas exactement ce que vous avez décidé. En effet, selon votre arrêt, «le traité de 1928 et le protocole de 1930 n'ont pas opéré de délimitation générale des espaces maritimes entre la Colombie et le Nicaragua»[134]. Il vous revient, Mesdames et Messieurs les juges, de décider du tracé de la délimitation maritime unique entre les deux Etats. Vous pouvez tracer cette délimitation à l'intérieur de la zone géographique pertinente, à l'endroit où vous l'estimerez appropriée, conformément au droit international. Rien ne vous empêche de vous servir du 82e méridien et ce, même si la Colombie, suite à votre arrêt de 2007, a considéré opportun de se référer à la ligne d'équidistance. Votre décision n'est donc pas encore prise et on ne peut préjuger de l'issue du différend.

24. Après votre arrêt du 13 décembre 2007, la Colombie a continué de respecter le *statu quo*, notamment en s'abstenant d'élargir l'exercice de sa juridiction à l'ouest du 82e méridien. Il est évident qu'il ne serait possible de créer ni une vaste *No Man's Area* ni une sorte de zone commune en attendant l'arrêt sur le fond, du seul fait que le Nicaragua ait procédé à une revendication, qui, rappelons-le, est totalement démesurée et infondée. En l'absence de tout accord intérimaire et dans l'attente de votre décision, le respect du *statu quo* s'impose. C'est exactement cette ligne de conduite que la Colombie a adoptée depuis le début de cette procédure et qu'elle s'attend de la part du Nicaragua.

G. Conclusion

25. En arrivant à mes conclusions, Monsieur le président, je m'interroge sur les véritables raisons de cette demande en réparation. Peut-être le demandeur a-t-il cru qu'en agissant ainsi ses revendications territoriales et maritimes seraient plus crédibles. Peut-être a-t-il cru qu'en

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[133] RN, p. 236, par. 3.

[134] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 869, par. 120.

demandant réparation ou satisfaction pour des faits illicites imaginaires commis par la Colombie, ses propres agissements pourraient alors mieux passer inaperçus.

26. Mesdames et Messieurs les juges, la demande de déclaration du Nicaragua ne correspond pas au droit applicable à ce genre de différends et au comportement que l'on peut attendre des Parties dans de telles circonstances.

27. Je me permets, Monsieur le président, un commentaire final. Dans un autre contexte juridictionnel, les revendications changeantes et clairement dépourvues de fondement juridique auraient certainement résulté en l'imposition à la Partie demanderesse du paiement des frais de la procédure[135]. La Colombie ne va pas jusqu'à vous demander cela. Elle s'oppose néanmoins avec vigueur aux prétentions démesurées et infondées du demandeur, tout comme à ses accusations gratuites.

28. Monsieur le président, Mesdames et Messieurs les juges, ainsi s'achève le premier tour de plaidoiries de la République de Colombie. Au nom de l'ensemble de la délégation, je vous remercie de l'attention que vous avez bien voulu nous accorder durant ces deux jours et je vous souhaite un bon week-end.

Le PRESIDENT : Merci, Monsieur le conseil. Avant de lever la séance, je voudrais donner la parole à M. le juge Mohamed Bennouna qui a une question aux deux Parties. Monsieur le juge Bennouna, vous avez la parole.

M. le juge BENNOUNA : Je vous remercie, Monsieur le président. Comme vous venez de le rappeler, ma question s'adresse aux deux Parties. Je vais la poser successivement dans les deux langues de travail de la Cour. Cette question est la suivante :

> «Le régime juridique du plateau continental est-il différent pour la portion de celui-ci qui se situe en deçà de la limite des 200 milles marins et pour la portion située au-delà de cette limite ?»

My question is as follows:

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[135] Voir par exemple *Generation Ukraine, Inc c. Ukraine*, affaire CIRDI n° ARB/00/9, sentence arbitrale, 16 septembre 2003, 44 *ILM* 404 (2005), par. 24.1-24.8 et 25 ; *Telenor Mobile Communications A.S. c. Hongrie*, affaire CIRDI n° ARB/04/15, sentence arbitrale, 13 septembre 2006, 21 *ICSID Rev. — FILJ* 603 (2006), par. 104-108 ; *Desert Line Projects c. Yemen*, affaire CIRDI n° ARB/05/17, sentence arbitrale, 6 février 2008, 48 *ILM* 79 (2009), par. 304.

"Is the legal régime of the continental shelf for the portion located within the 200-nautical-mile limit different from that for the portion located beyond this limit?"

Je vous remercie, Monsieur le président.

Le PRESIDENT : Merci, Monsieur le juge. Je demande aux Parties de répondre à la question oralement au cours du deuxième tour de plaidoiries. La version écrite de la question sera transmise par le greffier dans les meilleurs délais. La Cour se réunira prochainement mardi, le 1er mai, à 10 heures du matin. Cette audience est levée.

L'audience est levée à 17 h 50.

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