Uncorrected
Non corrigé

CR 2012/17

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2012

Public sitting

held on Friday 4 May 2012, at 3.10 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 4 mai 2012, à 15 h 10, 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
		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
Greenwood
Mmes Xue
Donoghue
Sebutinde, juges
MM. Mensah
Cot, juges *ad hoc*

M. Couvreur, greffier

The Government of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Vaughan Lowe, Q.C., Chichele Professor of International Law, University of Oxford, Counsel and Advocate,

Mr. Alex Oude Elferink, Deputy-Director, Netherlands Institute for the Law of the Sea, Utrecht University,

Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, former Member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Paul Reichler, Attorney-at-Law, Foley Hoag LLP, Washington D.C., Member of the Bars of the United States Supreme Court and the District of Columbia,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid, member of the Institut de droit international,

as Counsel and Advocates;

Mr. Robin Cleverly, M.A., DPhil, C.Geol, F.G.S., Law of the Sea Consultant, Admiralty Consultancy Services, The United Kingdom Hydrographic Office,

Mr. John Brown, R.D., M.A., F.R.I.N., F.R.G.S., Law of the Sea Consultant, Admiralty Consultancy Services, The United Kingdom Hydrographic Office,

as Scientific and Technical Advisers;

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs,

Ms Tania Elena Pacheco Blandino, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Lawrence H. Martin, Foley Hoag LLP, Washington D.C., Member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Masschusetts,

Ms Carmen Martínez Capdevila, Doctor of Public International Law, Universidad Autónoma, Madrid,

as Counsel;

Le Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos José Argüello Gómez, ambassadeur de la République du Nicaragua auprès du Royaume des Pays-Bas,

comme agent et conseil ;

M. Vaughan Lowe, Q.C., professeur de droit international à l'Université d'Oxford, titulaire de la chaire Chichele, conseil et avocat,

M. Alex Oude Elferink, directeur adjoint de l'Institut néerlandais du droit de la mer de l'Université d'Utrecht,

M. Alain Pellet, professeur à l'Université de Paris Ouest, Nanterre-La Défense, ancien membre et ancien président de la Commission du droit international, membre associé de l'Institut de droit international,

M. Paul Reichler, avocat au cabinet Foley Hoag LLP, Washington D.C. , membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

M. Antonio Remiro Brotóns, professeur de droit international à l'Universidad Autónoma de Madrid, membre de l'Institut de droit international,

comme conseils et avocats ;

M. Robin Cleverly, M.A., D.Phil, C.Geol, F.G.S., consultant en droit de la mer, Admiralty Consultancy Services du bureau hydrographique du Royaume-Uni,

M. John Brown, R.D., M.A., F.R.I.N., F.R.G.S., consultant en droit de la mer, Admiralty Consultancy Services du bureau hydrographique du Royaume-Uni,

comme conseillers scientifiques et techniques ;

M. César Vega Masís, directeur des affaires juridiques, de la souveraineté et du territoire au ministère des affaires étrangères,

M. Walner Molina Pérez, conseiller juridique au ministère des affaires étrangères,

M. Julio César Saborio, conseiller juridique au ministère des affaires étrangères,

Mme Tania Elena Pacheco Blandino, conseiller juridique au ministère des affaires étrangères,

M. Lawrence H. Martin, cabinet Foley Hoag LLP, Washington D.C., membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du district de Columbia et du Commonwealth du Massachusetts,

Mme Carmen Martínez Capdevila, docteur en droit international public de l'Universidad Autónoma de Madrid,

comme conseils ;

Mr. Edgardo Sobenes Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,

Ms Claudia Loza Obregon, Second Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Romain Piéri, Researcher, Centre for International Law (CEDIN), University Paris Ouest, Nanterre-La Défense,

Mr. Yuri Parkhomenko, Foley Hoag LLP, United States of America,

as Assistant Counsel;

Ms Helena Patton, The United Kingdom Hydrographic Office,

Ms Fiona Bloor, The United Kingdom Hydrographic Office,

as Technical Assistants.

The Government of Colombia is represented by:

H.E. Mr. Julio Londoño Paredes, Professor of International Relations, Universidad del Rosario, Bogotá,

as Agent and Counsel;

H.E. Mr. Guillermo Fernández de Soto, member of the Permanent Court of Arbitration, former Minister for Foreign Affairs,

as Co-Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, member of the New York Bar, Eversheds LLP, Paris,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, associate member of the Institut de droit international,

as Counsel and Advocates;

H.E. Mr. Eduardo Pizarro Leongómez, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands, Permanent Representative of Colombia to the OPCW,

as Adviser;

H.E. Mr. Francisco José Lloreda Mera, Presidential High-Commissioner for Citizenry Security, former Ambassador of the Republic of Colombia to the Kingdom of the Netherlands, former Minister of State,

Mr. Eduardo Valencia-Ospina, member of the International Law Commission,

M. Edgardo Sobenes Obregon, premier secrétaire de l'ambassade du Nicaragua au Royaume des Pays-Bas,

Mme Claudia Loza Obregon, deuxième secrétaire de l'ambassade du Nicaragua au Royaume des Pays-Bas,

M. Romain Piéri, chercheur au centre de droit international (CEDIN) de l'Université de Paris Ouest, Nanterre-La Défense,

M. Yuri Parkhomenko, cabinet Foley Hoag LLP, Etats-Unis d'Amérique,

comme conseils adjoints ;

Mme Helena Patton, bureau hydrographique du Royaume-Uni,

Mme Fiona Bloor, bureau hydrographique du Royaume-Uni,

comme assistantes techniques.

Le Gouvernement de la Colombie est représenté par :

S. Exc. M. Julio Londoño Paredes, professeur de relations internationales à l'Universidad del Rosario, Bogotá,

comme agent et conseil ;

S. Exc. M. Guillermo Fernández de Soto, membre de la Cour permanente d'arbitrage, ancien ministre des affaires étrangères,

comme coagent ;

M. James Crawford, S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, avocat,

M. Rodman R. Bundy, avocat à la Cour d'appel de Paris, membre du barreau de New York, Cabinet Eversheds LLP, Paris,

M. Marcelo Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement de Genève, membre associé de l'Institut de droit international,

comme conseils et avocats ;

S. Exc. M. Eduardo Pizarro Leongómez, ambassadeur de la République de Colombie auprès du Royaume des Pays-Bas, représentant permanent de la Colombie auprès de l'OIAC,

comme conseiller ;

S. Exc. M. Francisco José Lloreda Mera, haut conseiller présidentiel pour la cohabitation et la sécurité des citoyens, ancien ambassadeur de la République de Colombie auprès du Royaume des Pays-Bas, ancien ministre d'Etat,

M. Eduardo Valencia-Ospina, membre de la Commission du droit international,

H.E. Ms Sonia Pereira Portilla, Ambassador, Ministry of Foreign Affairs,

Mr. Andelfo García González, Professor of International Law, former Deputy Minister for Foreign Affairs,

Ms Mirza Gnecco Plá, Minister-Counsellor, Ministry of Foreign Affairs,

Ms Andrea Jiménez Herrera, Counsellor, Embassy of Colombia in the Kingdom of the Netherlands,

as Legal Advisers;

CF William Pedroza, International Affairs Bureau, National Navy of Colombia,

Mr. Scott Edmonds, Cartographer, International Mapping,

Mr. Thomas Frogh, Cartographer, International Mapping,

as Technical Advisers;

Mr. Camilo Alberto Gómez Niño,

as Administrative Assistant.

S. Exc. Mme Sonia Pereira Portilla, ambassadeur, ministère des affaires étrangères,

M. Andelfo García González, professeur de droit international, ancien ministre adjoint des affaires étrangères,

Mme Mirza Gnecco Plá, ministre-conseiller au ministère des affaires étrangères,

Mme Andrea Jiménez Herrera, conseiller à l'ambassade de Colombie au Royaume des Pays-Bas,

comme conseillers juridiques ;

Le capitaine de frégate William Pedroza, bureau des affaires internationales, Marine colombienne,

M. Scott Edmonds, cartographe, International Mapping,

M. Thomas Frogh, cartographe, International Mapping,

comme conseillers techniques ;

M. Camilo Alberto Gómez Niño,

comme assistant administratif.

The PRESIDENT: Please be seated. The sitting is open. I invite Professor Crawford to continue his pleading and to make his five points. You have the floor, Sir.

Mr. CRAWFORD:

4. NICARAGUA'S EEZ CLAIM (PART 1 CONTINUED)

21. (Continued) Well the first of these points, Mr. President, Members of the Court, is that Mr. Elferink tried to convince you that the purpose of the nautical charts is to show rocks above tidal datums[1]. The real reason for hydrographic surveys, as I have said, is to create charts depicting hazards to the safety of navigation.

22. Second, he showed a high astronomical tide — HAT — of 80 cm which is completely inaccurate for a micro-tidal region such as the Caribbean Sea. I addressed this matter in my first presentation last week. In his second presentation Mr. Elferink changed his tone to say "*we were not criticizing the vertical datum used by Dr. Smith . . .*"[2] Instead, he criticized the FES model as one that is unreliable in shallow waters. He said the peer review paper quoted in my last intervention supports this point[3]. On the contrary; Torres and Tsimplis — the authors of the paper — assess the tidal model against tide gauges placed in shallow waters. "The paper concludes that there is very good agreement between observed and modelled tide, with harmonic amplitude differences below 1.5 cm."[4]

23. Third, in his slide labelled AOE2-16, depicting Providencia, Mr. Elferink argued that since the "drying reef" symbol was not used on the charts of Quitasueño, then there was no drying reef in the area[5]. What he fails to realize is the difference in the scales of the charts used for Providencia and those used for Quitasueño. Chart 218 has a resolution five times better than charts 630 and 631, and ten times better than chart 431; all three charts depicting Quitasueño

---

[1] CR 2012/14, p. 33, para. 7 (Oude Elferink).

[2] *Ibid.*, p. 39, para. 18 (Oude Elferink).

[3] *Ibid.*, p. 39, para. 19 (Oude Elferink).

[4] CR2012/12 p. 42, para. 49 (Crawford).

[5] CR 2012/14, pp. 35-6, para. 11 (Oude Elferink).

Bank. The scale of these last nautical charts and the hydrography in the area, it is inadequate to use the symbol of drying reefs recommended by Mr. Elferink.

24. Fourth, in illustration AOE2-12, Nicaragua showed the symbol of rocks which do not cover above height datum, which were not used in Colombia's nautical charts of Quitasueño. But, Nicaragua failed to explain the first of the symbols in Admiralty Chart 5011/INT 1 which appears at the top of the same slide and corresponds to a danger line.

25. The IHO recognizes that conducting hydrographic surveys in coral reef waters such as Quitasueño is challenging, as supported by the booklet "Regulations of the IHO for International (INT) Charts and Chart Specifications of the IHO", which is graphic 6. It appears on the screen. I will only ready the second of the extracts:

> **B-420.1** "A danger line, consisting of dots backed by solid blue tint, must be used to draw the navigator's attention to a danger which would not stand out clearly enough if it were represented solely by the symbol of the feature. The danger line must also be used to delimit areas containing numerous dangers, through which it is unsafe to navigate at the scale of the chart."

26. These areas correctly appear in the Quitasueño nautical charts to draw the navigator's attention to shallow danger zones. This is the correct symbol to use when hydrographic data comes from a survey with lines 500 metres apart. Again, these guidelines emphasize the purpose of a hydrographic survey — to provide a product whose purpose is the safety of navigation, not the giving of evidence.

27. Fifth, Nicaragua criticized Colombia's use of satellite imagery of Quitasueño. The image was used in Colombia's pleadings in an illustrative way to show shallow areas that highlight the extent of Quitasueño Bank. In the first round Mr. Elferink presented the same satellite image processed using the red and infrared bands. As these bands do not penetrate the water, he concluded "the satellite image does not indicate that there are any features above water on Quitasueño"[6]. On the contrary, Colombia's conclusion is that this image is inappropriate to rebut the existence of features above water. The main reason is that the image has a 30-metre spatial resolution. Spatial resolution refers to the smallest object that can be resolved on the ground and is

[6]CR 2012/9, pp. 55-6, para. 43 (Oude Elferink).

thus clearly unsuitable in this location. The proof of islands on Quitasueño has been forcefully made in the two Colombian surveys and I will not repeat that.

28. Mr. President, Members of the Court, I should emphasize again that Dr. Smith took a conservative approach in reaching his conclusions as to whether features on Quitasueño constituted islands[7]. His first conservative step was to use the highest astronomical tide (HAT) with reference to mean sea level. What this means is that over the course of 19 years of measuring tides the feature would remain above water at even the highest of tides, which is not required by the definition in the Conventions. Coastal States when determining their baselines typically use some predetermined mean level of high tide, but not the highest tide. In the case of Colombia's Hydrographic Service, all their charts use MSL datum to refer to any elevation above the sea. So Dr. Smith's approach is very conservative.

29. It may assist to compare the practice of the United States, as shown in public domain materials. Let me point out just a few items on this comprehensive graphic. First, note the term "mean" before the phrases Lower low-water line and Higher high-water line. Over the course of 19 years of measurement NOAA, the official United States charting agency — which is called NOAA, apparently, in the business — has taken the "mean" value, not the lowest, not the highest, but the mean value. These are levels at which the United States Government considers the baseline from which to determine its territorial sea (mean lower low water) and the level of high water (mean higher high water). You will notice there is no mention of low-water springs nor of the highest astronomical tide.

30. Nicaragua made much of the method by which Colombia determined the heights of the features on Quitasueño. In fact the process was relatively straightforward. The heights were measured to the centimetre. These photographs were taken at QS32. When the tidal correction model was applied to the survey data the results came out to three decimals, i.e., to centimetres. The accuracy is to the centimetre not to the millimetre. The third decimal value was not relevant to reaching the conclusions in Dr. Smith's Report.

[7]Smith Report, p. 9

31. Finally, a comment on Nicaragua's assertion that what was found in the surveys was merely "coral debris". This graphic shows some photos included in Appendix 1, Annex 6 of Dr. Smith's Report. This is not coral debris, but rather represents part of a much larger coral reef firmly attached to the substrate. One does not have to be a technical expert to deduce that Quitasueño is one of those coral islands that has formed over centuries by the gradual accretion of the skeletons of the coral polyp in temperate waters[8].

32. In an attempt to discredit the findings in Dr. Smith's Report, Mr. Elferink attempted to discredit both his independence and his expertise. First, let me address the element of his working as an "independent consultant"[9]. Is it the suggestion that Dr. Smith was expected to conduct his endeavour in a truly solo, independent manner — to row himself out to the bank, to set up the survey equipment, to take the measurements, to stay overnight in the small boat and to do the cooking? Dr. Smith's Report acknowledges the method of work, including assistance by the Colombian Navy. But he makes it clear that the conclusions in his report are his alone.

33. Turning now to the attempt to discredit Dr. Smith's reputation as an expert on the geographic and technical aspects of the law of the sea, Mr. Elferink relived a question posed to Dr. Smith during his appearance as a technical expert on behalf of Guyana in the arbitration against Suriname[10]. When asked about the concept of low-water springs Dr. Smith honestly admitted that he could not define the term. This does not mean that he is not an expert on geographic and technical matters in the law of the sea. His experience, reflected in his résumé, speaks otherwise. As I have said, the United States does not use this datum in its charting practice.

34. Finally, in Mr. Elferink's presentation, Mr. Elferink mentioned the 1983 fisheries agreement which included an illustration showing a grey box around Quitasueño[11]. He notes that Dr. Smith was an employee of the State Department at the time. In fact, at the time Dr. Smith's office was in a bureau of the department that did not have responsibility for negotiating fishery agreements. And that, you will be relieved to hear, is all I have to say about Quitasueño.

---

[8]CR 2012/14, p. 41, para. 21 (Oude Elferink), citing D.W. Bowett, *The Legal Regime of Islands in International Law*, Oceana, 1979, pp. 4-5.

[9]CR 2012/14, p. 36, para. 12 (Oude Elferink).

[10]CR 2012/14, p. 37, para. 12 (Oude Elferink).

[11]CR 2012/14, p. 35, para. 10 (Oude Elferink).

4. NICARAGUA'S EEZ CLAIM (PART 2)

Relevant coasts

1. I turn to the relevant coasts. In the first round I pointed out that if Nicaragua insisted on delimiting the whole area of overlapping EEZ claims, including the area to the east of the archipelago, then it was necessary to take into account the east-facing coasts of Colombia's islands, which generate that entitlement, indeed well beyond the area of EEZ rights to which Nicaragua's coasts are entitled. Thus it was necessary to count both the east-facing and west-facing coasts.

2. Mr. Reichler was unhappy that islands project radially[12]. He alluded to this being "less clear in the case law" than I "made it appear"[13]. The "case law" to which he refers is a separate opinion in *Libya/Malta*, joined by Judge *ad hoc* Jiménez de Aréchaga, Judge Ruda and Judge Bedjaoui. The separate opinion reads as follows, as quoted by Mr. Reichler:

> "Such a radial projection may, undoubtedly, exist in the case of islands in the open ocean not facing other States' coasts, but it does not correspond to the practice of States in enclosed or semi-enclosed seas, where more than two States may advance conflicting claims in respect of a given maritime area."[14]

The passage immediately discloses a problem in Mr. Reichler's attempt to qualify the radial effect of islands. The separate opinion was concerned with situations "where more than two States may advance conflicting claims in respect of a given maritime area." That is not the case here: there are only two States which dispute the relevant area, at least as to all of its central parts. The more serious problem is that the separate opinion was concerned with two particular third States — Italy and Greece — with which Malta's radial projections would generate overlapping — and at the time unsettled — entitlements. Nicaragua wishes to dismiss as irrelevant the extensive practice of delimitation in the western Caribbean. But this practice is highly relevant, as we have noted. Nicaragua's eagerness to dismiss the practice leads it to ignore why two judges and one judge *ad hoc* in *Libya/Malta* were concerned to qualify the radial effect of islands: in the particular circumstances of that case, two nearby third States had not reached a settlement of their entitlements with Malta. This is not the present situation. That potential problem of radial projection is not present here.

---

[12]CR 2012/14, p. 44, para. 15 (Reichler).

[13]CR 2012/14, p. 44, para. 15 (Reichler).

[14]CR 2012/14, p. 44 (Reichler), note 120, quoting *I.C.J Reports 1985*, p. 78, para. 5 (joint separate opinion of Judges Ruda and Bedjaoui and Judge *ad hoc* Jiménez de Aréchaga).

3. Moreover, the part of the projection of the islands which Nicaragua ignored last week is the part which faces *away* from Nicaragua. It was Nicaragua's erroneous exclusion of those coasts which made its coastal front comparison last week completely misleading.

4. Notwithstanding his quibbles, Mr. Reichler apparently accepted "for the sake of argument" that islands have a potential 200-nautical-mile entitlement in all directions[15]. But he accepted it for approximately five minutes, that I could tell! He complained that, within the putative relevant area, Nicaragua would get only 28 per cent of the maritime area. He calls this "the epitome of disproportionality"[16]. But "disproportional" to what? To the old coastal ratio of 21:1. That is to say, after accepting that islands have radial projections, he went on to ignore all but the west-facing coasts of the islands.

5. He accused me of "suddenly chang[ing] Colombia's position"[17]. But we have done no such thing. I merely noted that, if Nicaragua's putative relevant area was the true relevant area, then a totally different set of coastal front measurements was applicable. But, moreover, we were meeting Nicaragua's new case on Nicaragua's own terms in order to assist the Court: meeting Nicaragua's misguided view that coastal front ratios are the overriding determinant to be applied mechanistically to achieve the results sought in maritime delimitation.

6. Mr. President, Members of the Court, to summarize, on Tuesday Mr. Reichler at first seemed to accept — as indeed he ought to have accepted — that the islands of the archipelago face east and west; that the east-facing coasts generate entitlement — going potentially 100 miles further than Nicaragua's entirely east-facing coasts — and if the delimitation area surrounds the archipelago, both east and west-facing coasts must be counted. Indeed, Mr. Reichler even gave us a few more kilometres of relevant coasts than we had calculated for ourselves. But then we came to the crunch — the number crunch — and we went back to the old discredited ratio of 21:1, generating EEZ areas of 35:1 in favour of Nicaragua. The fallacies here I have already shown.

---

[15]CR 2012/14, p. 44, para. 15 (Reichler).

[16]*Ibid.*, p. 45, para. 16 (Reichler).

[17]*Ibid.*, p. 45, para. 17 (Reichler).

7. At the same time Mr. Reichler came up with a new actual coastal length for Nicaragua of — wait for it — 701 km instead of the previous 453[18]. How he got 701 he did not bother to explain. Perhaps he used Reichler's Patent Coast Enlarger, that sure remedy for distressed counsel in delimitation cases. Think of a number and add it to your coast. It works wonders! He may be offering a special price! On our count, using Nicaragua's graphics, the actual coastal length is 550 km: you can see for yourselves that it cannot possibly have increased by 250 km from the straight line previously shown. So the coastal ratio is Nicaragua, 550 km, San Andrés Archipelago, 65 km, or a ratio of 8.5:1. This is much less than the 21:1 originally proposed, let alone the 33:1 which the unexplained 701 km gives. It is also 8.5:1 in the same range as *Jan Mayen* and *Libya/Malta* — significant, yes, but not overwhelming and certainly not at a level that would produce a zero allocation of EEZ to the archipelago or anything remotely like it.

The proportionality test and its relevance to islands in the context of opposite coasts

8. Mr. President, Members of the Court, the two cases in your jurisprudence in which one or a few small islands faced a long mainland coast are *Jan Mayen*[19] and *Malta/Libya*. In neither of them did you conduct a proportionality analysis; in both you took disproportionality of coasts as a reason for the adjustment of a provisional equidistance line, but you did not use the ratio of coastal lengths as in any way a criterion for determining the length of the adjustment or its equitableness. In both cases you gave the small island coast significant effect.

9. One of the reasons why a proportionality analysis is difficult in the opposite coasts situation is that it is difficult to determine the relevant area. But it may be instructive to look at the two cases in order to assess outcomes which the Court determined to be equitable when a small offshore island faces a mainland coast.

10. The case most like ours is *Jan Mayen*. The ratio of coastal facades was 1:11. It seems reasonable to take as the relevant area the areas of overlapping potential EEZ entitlements, bounded in the south by the EEZ of Iceland and in the north by the intersection of the 200-mile lines of the two Parties. On that basis the area in dispute — the relevant area — totalled

---

[18]CR 2012/14, p. 46, para. 21 (Reichler).

[19]*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38.

161,532 sq km. The division of that area based on equidistance would have resulted in an area ratio of 1:1.27 in favour of Greenland. This may be contrasted with the adjusted area ratio of 1:3.30 in favour of Greenland.

11. The following comments may be made:

(a) First, no priority was given to the continental mainland coast as such. There was no assumption, for example, that the continental shelf was *a priori* the continental shelf of Greenland[20].

(b) Second, you specifically rejected a Danish submission that the mainland be allocated a full 200-mile zone, with Jan Mayen getting only the residue[21].

(c) Third, the adjustment was in the circumstances modest and fell well short of the ratio of coastal facades.

(d) Fourth, the relevant non-geographic factors — which Mr. Bundy has discussed — operate very much in favour of Colombia in our case. Those factors were either absent — security and administration — or favoured Denmark — the established community, the access to the capelin fishery.

12. Mr. Reichler seeks to distinguish *Jan Mayen* by reference to the fact that the area of overlapping potential claims lies between the coasts of the Parties and does not include Jan Mayen itself[22]. But you did not in fact place any weight on this circumstance. Mr. Reichler's distinction must imply that the area attributed to Jan Mayen would have been radically different — perhaps to the point of enclaving — if the island had been located within 200 nm from the Greenland coast. But there is no reason to think this, and the Judgment certainly does not say so. If *une priorité à la nicaraguenne* was to be accorded by you, as claimed by Nicaragua — its continental shelf, its maritime zone — if the same priority was to be accorded by you to the mainland coast of Greenland, it would have been reflected in the Judgment — for example, by giving Greenland all

---

[20] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993,* pp. 69-70, para. 71: "At this stage of its analysis, the Court thus considers that neither the median line nor the 200-mile line calculated from the coasts of eastern Greenland in the relevant area should be adopted as the boundary of the continental shelf or of the fishery zone. It follows that the boundary line must be situated between these two lines described above, and located in such a way that the solution obtained is justified by the special circumstances contemplated by the 1958 Convention on the Continental Shelf, and equitable on the basis of the principles and rules of customary international law."

[21] *Ibid.*, p. 69, para. 70; p. 78, para. 88.

[22] CR 2012/14, pp. 48-49, para. 34 (Reichler).

or most of the 200-mile zone. So, the Jan Mayen coast supports our position and not that of Nicaragua.

13. Then there is *Libya/Malta*. There is a greater problem here in identifying the relevant area given the funnelling effect of the Italian claims to the west and east. To judge the proportionality of the adjustment on a purely bilateral basis I have ignored the Italian carve-out — if I can call it that — and drawn lines from the relevant coast on Malta to the equivalent points on the Libyan coast, at Rajs Ajdir and Ras Zarruk. The ratio of coastal facades is 1:8 in favour of Libya. An equidistance line divides this area in a ratio of 1:2.8. You decided an adjustment was called for, in view of the disparity of coastal lengths. But the adjustment was modest, producing an area ratio of 1:3.49, not even halfway to what might be described as parity — that is, the same area distribution as coastal ratio.

14. Mr. Reichler seeks to distinguish *Libya/Malta* by reference to the fact that the entity whose zones were being determined was an independent State, not a dependent territory[23]. But it is difficult to see why that should make a difference, and the contrast between the autonomous Greenlanders and the grant-dependent metropolitan scientists surviving on Jan Mayen certainly made no impression on your Court in the latter case. Moreover, the need to make such a distinction implies that something needs explaining away from a Nicaraguan point of view, which is certainly true. If Nicaragua is right about the overwhelming effects of metropolitan coasts vis-à-vis islands at a distance, then the adjustment in favour of Libya should have been greater, possibly much greater. But the adjustment in *Jan Mayen* was of the same order of magnitude, in a case where the offshore island was a mere dependency. So Mr. Reichler's confession that something requires explaining from his point of view is right, but his avoidance device — the statehood of Malta — does not work.

The diplomatic practice

15. Mr. President, Members of the Court, as to the diplomatic practice, you have heard what we have each had to say on this practice, which I know you will examine carefully. I need only refer briefly to two cases. The first is the Australia-France treaty over New Caledonia.

[23]CR 2012/14, p. 49, para. 37 (Reichler).

Mr. Reichler referred to several small features on both sides which were given effect and balanced out, and in certain segments of this long boundary that is true[24]. But he omits to acknowledge the crucial role in the central sector of Middleton Reef, which I described the other day as little more than a low-tide elevation, much less than the components of the Archipelago of San Andrés. At high tide on Middleton Reef, only one cay on the reef is visible, at 1 m above sea level. The cay is called The Sound and it measures 100 m by 70 m[25]. The Australian authorities required considerable persuasion to revise their earlier classification of Middleton Reef as a low-tide elevation, but once established that the solitary cay was a full-fledged island and a sound basis for a base point, they took up the cause of Middleton Reef with enthusiasm and success. The area is now a Marine National Park.

16. The second case to which I should refer — because Mr. Reichler referred to it twice[26] — is the domestic Canadian decision in *Nova Scotia/Newfoundland and Labrador*[27]. Mr. President, I was a member of the panel in that case and thus have to be careful in commenting on it. It is true that the panel gave zero effect to Sable Island. As the Tribunal held, given its remote location and the very substantial disproportionate effect this small, unpopulated island would have on the delimitation, it was given no effect and the equidistance line adjusted accordingly[28]. The circumstances of that case bear no resemblance to the present one.

17. Then I should say something briefly about the three "new" cases discussed by Mr. Reichler late in his submissions on Tuesday[29]. He referred to these as examples of bilateral practice where States agreed to enclave or semi-enclave islands within the territorial sea to prevent them from having a disproportionate effect on the delimitation.

18. Now, in light of the fact that Mr. Reichler clearly considers diplomatic practice to be a "very shaky basis on which to base a maritime claim"[30], I was a little surprised that he exceeded his

---

[24]CR 2012/13, p. 62, para. 86 (Reichler).

[25]See the article by V. Prescott, "The Uncertainties of Middleton and Elizabeth Reefs" *IBRU Boundary and Security Bulletin*, Spring 1998, http://www.dur.ac.uk/resources/ibru/publications/full/bsb6-1_prescott.pdf.

[26]CR 2012/10, p. 44, para. 47 (Reichler); CR 2012/14, p. 54, para. 55 (Reichler).

[27]*Newfoundland and Labrador/NovaScotia Arbitration (Second Phase)* (2002) 128 *ILR* 425.

[28]*Ibid.*, pp. 572-573, paras. 5.9-5.15.

[29]CR 2012/14, p. 62, para. 87 (Reichler).

[30]*Ibid.*, p. 60, para. 81 (Reichler).

brief of attempting to distinguish the situations supporting Colombia and began "cherry pick[ing]"[31] of his own. And since he has accused me of "whipping through"[32] a large number of maps, perhaps the Court will permit me to whip through a few more — that is to say, the three counter-examples that Mr. Reichler mentioned and neglected to show you.

19. Before I begin this rather rapid tour — "Around the World in 80 Seconds"[33], as Mr. Reichler would have it — I will perhaps ruin the surprise by telling you that each and every example given by Mr. Reichler is irrelevant to the present situation. All of them concern situations in which the two States concerned possessed adjacent or opposite coasts which defined the delimited area, and with a minimum distance between them. Each was therefore a situation in which a proposed median line was extant and in danger of undue distortion if the relevant islands were given full effect. Neither of these factors applies here.

20. Let me start with Daiyina. The Court will clearly perceive the coast of Qatar towards the western edge of the map, with the coast of Abu Dhabi — later the UAE — curving away to the south-east and south in an "L" shape. Daiyina sits right in the crook of the Qatar-UAE elbow; to give it full effect would be to distort considerably the path of the median line and encroach on Qatar's territorial sea impermissibly.

21. Let me now take you to the Adriatic Sea, and the island of Peragruz, backed by the mainland coast of what is now Croatia. This one does not sit in an elbow; it sits between toes. As the Court can see, a grant of full effect in this instance would have caused Peragruz's maritime zone to impinge impermissibly on Italy's territorial sea. Again, this example has nothing to do with the current situation.

22. Now let us look at Pantelleria, Linosa and Lampudesa. We are again in an extremely confined space. Particularly in the case of Pantelleria, the boundaries of the two territorial seas are so close that their abutment produces friction. The coast of Sicily looms in the background. Again, one can see the similarities with the Scillies and perhaps even *St Pierre and Miquelon*[34]. But not

---

[31]CR 2012/14, p. 62, para. 87 (Reichler).

[32]*Ibid.*, p. 60, para. 81 (Reichler).

[33]*Ibid.*, p. 61 (Reichler), para. 81. Further: J. Verne, *Le tour du monde en quatre-vingts jours* (Pierre-Jules Hetzel,1873).

[34]*Delimitation of Maritime Areas between Canada and the French Republic (St Pierre and Miquelon)* (1992) 95 *ILR* 645.

this case, not *Nicaragua/Colombia*. The lad who repeatedly cried "wolf" keeps crying "enclave", and with as little foundation in our case, though he has twice the vocabulary.

23. So we return to our case, no doubt with some relief. As the Court can see, the maritime situation with respect to Nicaragua and Colombia is completely different to any of the examples provided by Mr. Reichler. In the first place, we observe the total lack of Colombia's mainland coast from the picture. We were under the impression that Nicaragua had abandoned any claim that Colombia's mainland constituted a relevant coast for the purposes of EEZ delimitation. But even if this were the case, even if it were relevant, what would the result be? Providing the islands with full effect would result in no encroachment whatever with Nicaragua's territorial sea. And Colombia's mainland coast is so far away that it cannot affect the EEZ delimitation.

Conclusions

24. Mr. President, Members of the Court, I will return later this afternoon to summarize the situation and thus will not attempt to do so now. It is sufficient to stress that the EEZ delimitation here occurs between the opposite coasts of Nicaragua and the archipelago, that enclaving is categorically excluded as a solution, notably by your jurisprudence, and — last but not least — that Quitasueño is entitled to a territorial sea and contiguous zone.

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

The PRESIDENT: Thank you, Professor Crawford. I understand now that it is the turn of Mr. Bundy to continue the pleadings on behalf of Colombia. You have the floor, Sir.

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

5. GEOGRAPHICAL FACTORS AND OTHER RELEVANT CIRCUMSTANCES

1. In this presentation — which I assure you will be briefer than my pleading this morning — I will address a number of geographic factors and other relevant circumstances that are of absolutely critical importance to Colombia and to the achievement of an equitable result in this case. In undertaking this task, I intend to focus on issues that continue to divide the Parties.

Colombia's islands possess their full maritime entitlements

2. The first issue concerns Nicaragua's assertion that, with the exception of the islands of San Andrés, Santa Catalina and Providencia, all of Colombia's other islands are mere "rocks" within the meaning of Article 121 (3) of the Convention. Professor Pellet was correct when he noted that the jurisprudence, in general, has refrained from determining the juridical status of islands[35]. But in this case, the issue has become very important precisely because of Nicaragua's attempt to deprive Colombia's islands of their legal entitlements, including not only to a territorial sea and a contiguous zone which every island possesses at a bare minimum, but also to an exclusive economic zone and a continental shelf.

3. The information that the Court has at its disposal, including photographs of the islands and the extensive pattern of conduct relating to activities that have taken place on them and within their waters, shows that these are not mere "rocks". Rockall, for example, belonging to the United Kingdom, is a rock. The Middle Rocks, which the Court will be familiar with from the *Malaysia/Singapore* case, are rocks. These islands are not. That being the case, the question whether they are capable of sustaining human habitation or economic life does not even arise. All islands, regardless of their size, possess the full suite of maritime entitlements that the law accords them just like any other land territory if they are not "rocks". Nicaragua's confident assertions on the nature of Colombia's islands not only run against the views of all the other riparian States in the region, they lack persuasion because Nicaragua has never actually set foot on any of these islands at any time. There might be a little more credence to the argument if they had actually been there!

4. The evidence on record — and there is a great deal of it — shows that all of the islands have been the subject of considerable human and economic activities from the nineteenth century to the present. That degree of attention would not have been paid to these features if they were mere "rocks".

5. I realize that Professor Pellet mocks these activities; he calls the *effectivités* that I recounted in the first round speech as "paper *effectivités*". And he laughs at the notion of harvesting coconuts on Quitasueño[36].

---

[35]CR 2012/15, p. 46, para. 27 (Pellet).

[36]CR 2012/15, p. 40, para. 14 (Pellet).

6. Apart from what my colleague, Professor Kohen, has already discussed, I would actually invite my good friend on the other side to read the documentary evidence before making such claims. The lease for coconuts that I referred to in the first round, for example, related to a specific Annex 77 that was put on the screen; it was for a permit to harvest coconuts from a coconut grove on the Alburquerque Cays, not Quitasueño. The document in question clearly shows that. The licensee paid good money for that permit — 1,001 pesos — which was a large sum in 1915. He obviously considered that the economic value of the products on the islands was worth it.

7. With respect to Roncador, Colombia's Annex 78 shows that the individual whose company was mining guano from the island had "settled on" the island, and that there was a house and workers there. Those are the words used in the contemporaneous document. People were living on the island. Similarly, a report from the archipelago's Prefect to the Government at Cartagena in 1890 referred to the fact that, for over half of the year, Roncador was "continuously inhabited by a large part of the population of these Islands, that goes there with the purpose of fishing for tortoiseshell, fishing that constitutes one of the main riches of this region"[37]. That same document explained that Roncador, Alburquerque, Serrana and Quitasueño contained "valuable guano deposits", and that Alburquerque — not Quitasueño — had coconut plantations. A further report in 1894 about the islands of the archipelago indicated that the leases issued for Roncador and Quitasueño were likely to provide the Treasury with what was termed in the document a "somewhat considerable income"[38]. And in 1913, as I mentioned last week, Germany appointed a Vice-Consul to Cartagena whose jurisdiction included Roncador. Vice-Consuls are not usually appointed for "rocks".

8. As for Serrana, the evidence shows that agents for the trading company that was engaged there in economic activities and guano production had again "settled on" the islands[39]. Those are the words that you find in the contemporaneous documentation. These activities were economically valuable. One report indicates that the licensee on Serrana had made a guarantee

[37]CMC, Vol. II-A, Ann. 82.

[38]CMC, Vol. II-A, Ann. 87.

[39]*Ibid.*, Ann. 78.

payment of 2,000 pesos at 1893 values to ensure compliance with the contract[40]. Another report sent from the British Colonial Office to the Governor of Jamaica estimated that the amount of guano shipped from Serrana over a two-year period was 1,500 tons, and that there appeared to be a large supply on the island[41]. And permits for exploiting guano on Roncador, Quitasueño, Serranilla and Alburquerque in 1915 required a 4,000 peso bond to be furnished — which was a small fortune at that time[42].

9. The economic importance of Serranilla and Bajo Nuevo also dates back to the early twentieth century, when it was clear that both Jamaican and Colombian fishermen considered the islands to be critical for their subsistence. That reality prompted British authorities to remind fishermen in 1924 that fishing around the islands of the archipelago was forbidden without licences issued by the Government of Colombia[43].

10. Serranilla's and Bajo Nuevo's economic importance continues up to today. The 1981 Fishing Agreement between Colombia and Jamaica allowed, as I said, three dozen fishermen to stay on Serranilla and two dozen on Bajo Nuevo[44]. The 1984 Fishing Agreement recorded the fact that both islands allowed habitation and could sustain the life of Jamaican fishermen living there[45]. I would suggest that Jamaica, whose nationals were actually staying on two islands, was in a far better position to know whether they could sustain human habitation or economic life than is Nicaragua, which has never set foot on the islands.

The position of third States

11. Third States such as Jamaica, Panama and Costa Rica have never considered Colombia's islands to be mere "rocks" incapable of generating continental shelf and exclusive economic zone entitlements. The delimitation agreements Colombia signed with all three States bear this out, as I went through in some detail last week. They accorded the islands equidistance treatment, and all of them recognized that Colombia possessed maritime rights, exclusive economic zone and

[40]CMC, Vol. II-A, Ann. 86.

[41]*Ibid.*, Ann. 173, pp. 632-633.

[42]*Ibid.*, Ann. 97.

[43]*Ibid.*, Anns. 185, 186 and 194.

[44]*Ibid.*, Ann. 7.

[45]CMC, Vol. II-A, Ann. 9.

continental shelf rights on its side of the boundary line. Nicaragua did not attempt to respond to this point in its rebuttal.

12. Instead, on Tuesday afternoon, Professor Lowe said the following: "as the Agent for Nicaragua said, Nicaragua is not asking the Court to disturb delimitations that have already been effected"[46]. Now that was a quite extraordinary statement given that Professor Lowe then proceeded to destroy, piece-by-piece, any boundary relationship between Colombia and Panama, Colombia and Costa Rica, and Colombia and Jamaica in the central part of the sea when he embarked on his exposition of Nicaragua's claims.

13. Under Professor Lowe's hourglass theory of Nicaragua's claims, all of the areas lying to the east of Nicaragua's so-called 200-mile entitlement from its coast, and beyond 200 nm from Colombia's mainland coast, would now be transformed, like the wave of a magician's wand, into high seas. As if that was not enough, Colombia's maritime rights over all of the other areas lying east of its islands would fall within Nicaragua's fall-back position up to 200 miles from its coast. And all of Colombia's maritime rights in those areas would be eliminated, except for 3-mile or 12-mile enclaves. There go all of the delimitation agreements with Panama, Costa Rica and Jamaica, that those countries signed with Colombia! Those countries will be astonished if they are informed that they have no maritime boundary relationship with Colombia in this area any more, particularly when it is recalled that Nicaragua has never held or exercised any rights over these areas, or co-operated with those countries in the management and conservation of the living resources situated there. If that is not considered "disturbing" delimitations that have already been effected, then I shudder to think what is.

14. Nicaragua professes to want an equitable solution. But there is nothing equitable about destroying the boundary relations that third States have with Colombia. If Nicaragua's statement that it is not asking the Court to disturb existing delimitations is sincere, Colombia's boundary agreements and boundary relationships with other States bordering the region should be fully respected.

---

[46]CR 2012/15, p. 27, para. 58 (Lowe).

15. No one — no one that is except for Nicaragua during these hearings — considers that this part of the Caribbean is either high seas or an area over which Colombia is somehow dispossessed of its EEZ and continental shelf rights. The boundary agreements with neighbouring States were all single maritime boundaries delimiting not simply the continental shelf, but also the column of water.

16. The same holds true for the international community. There is not a shred of evidence that any State considers there to be high seas in this part of the Caribbean, or that Colombia does not have continental shelf and exclusive economic zone rights over all the areas lying east of the islands of Quitasueño, Santa Catalina, Providencia, San Andrés and Alburquerque on Colombia's side of its boundary agreements with third States.

17. Last week, I pointed out that Colombia had issued vessels flying the flag of at least 12 countries, including even Nicaragua, to fish in the waters of the San Andrés Archipelago, and that there are numerous documents on the record that show this point[47]. That necessarily presupposed that Colombia possessed exclusive economic zone rights throughout the area. Colombia has exercised its jurisdiction and fulfilled its duties in these waters. Nicaragua has not even attempted, either in its first round or its second round, to rebut any of the evidence that we have put on the record to this effect. And no other State has questioned it.

The importance of the waters of the San Andrés Archipelago to Colombia

18. On Tuesday morning, it was alleged on the Nicaraguan side that the sea areas in this part of the Caribbean are "a morass of crime originating largely in Colombia, with important bases in San Andrés and Providencia"[48]. Now that rather intemperate accusation was lacking in any evidence to back it up — which I have to say is a character trait of many of Nicaragua's assertions. Nicaragua apparently thinks that if Colombia is the queen of the Caribbean, Nicaragua is its guardian angel. Neither is correct.

19. The important point for purposes of this case is that Colombia has been acting responsibly to maintain security in the region in co-operation with other States, contrary to

[47]CR 2012/13, p. 26, para. 24 (Bundy).

[48]CR 2012/14, p. 12, para. 10 (Argüello Gomez).

Nicaragua's allegations and its own lack of similar conduct. Those actions are, as are the other conduct I have referred to, fully documented.

20. Security interests are of vital interest to Colombia. That is one of the reasons why Colombia has shown that it has not only implemented and enforced its customs, fiscal, immigration and solitary laws in the contiguous zones around each of the islands, but has also exercised jurisdiction throughout its entire exclusive economic zone. I discussed last week, numerous elements of Colombia's conduct in this regard. I will not come back to them because Nicaragua remained silent, despite the fact that it stressed in its own Memorial that international tribunals have always given firm recognition to the relevance of security considerations to an assessment of the equitable character of a delimitation[49].

21. Mr. President, Members of the Court, as Colombia's Agent recalled this morning, there are 80,000 people that live in the San Andrés Archipelago, and they, and their forbearers, have always been heavily dependent on the sea — you can see that from the record. That is a consequence of the geography of the area. To deprive Colombia, and the inhabitants of the archipelago, of their long-standing rights that international law provides over the maritime spaces appertaining to those islands, would have catastrophic consequences. That cannot be equitable.

22. It is appropriate, in this connection, to recall that under Article 59 of the 1982 Convention, in cases where the Law of the Sea Convention does not attribute rights or jurisdiction to the coastal State within the EEZ, and a conflict arises with another State, that conflict should be resolved on the basis of equity, and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

23. Colombia has shown that its exercise of jurisdiction in the waters of the San Andrés Archipelago has been carried out in accordance with international law, that the interests involved are of paramount importance to it and to the people living in the archipelago, and that it has taken the interests and co-operated with the international community by entering into co-operative

[49]MN, para. 3.69.

arrangements relating to security matters as well as the conservation of the living resources of the area. No State other than Nicaragua questions that.

24. Instead of addressing these kinds of matters, Nicaragua has tried to shift the focus by repeatedly stating that its mainland coast is the dominant feature on this side of the sea. While Nicaragua has played with the length of that coast — as Professor Crawford explained — it has actually provided the Court with absolutely no information about its coastal geography. Not a single town or village on the mainland coast has been identified. No effort has been made to show that the inhabitants of the mainland coast have any economic or other dependence on sea areas situated beyond the Corn Islands in the south and the Miskitos Cays in the north. Virtually no evidence exists as to Nicaragua's exercise of jurisdiction anywhere, let alone to the east of the 82nd degree meridian. And no evidence has been produced suggesting that Nicaragua has been concerned with conservation, resource management or security issues within the waters of the archipelago.

25. On Tuesday afternoon, Professor Pellet somewhat grudgingly seemed to accept that the 82° meridian might have some relevance, although negligible he said, as a relevant circumstance for delimitation purposes. But he argued that it could only be a one-way street — blocking Colombia from claiming areas lying to the west of that line[50].

26. That line of argument ignores the facts. What all of Nicaragua's counsel have avoided discussing like the plague is that, with respect to a period of almost 40 years — that is between 1930 when the Protocol was signed providing for the 82° meridian and the late 1960s — Nicaragua has been unable to produce a single piece of evidence showing that it exercised maritime jurisdiction east of the 82° meridian, or that it even had the intention to do so, or that during this period it protested Colombia's activities. There is nothing on the other side of the Bar for this 40-year period. Nothing. That was not due to any Colombian gun boats; it was because of Nicaragua's complete disinterest in these maritime areas which it now so avaricely claims. Nicaragua's fishing grounds, to the extent they were important, at that time and as they remain today, were located a very short distance off their mainland coast, primarily around the Corn

[50]CR 2012/15, pp. 46-47, para. 28 (Pellet).

Islands, Miskitos Cays and the small islets lying in between. I pointed this out last week. It was not responded to or rebutted. Nicaragua achieved what it wanted in the 1930 Protocol — a recognition of its sovereignty over the Miskitos Cays lying west of the 82° meridian and then it did nothing east of that meridian for another 40 years.

27. In contrast, Colombia has demonstrated that, not only has it administered the archipelago and the islands as a unit for decades, for scores, for over a hundred years, but also that it has exercised its maritime jurisdiction in all the waters in between.

The relevant area

28. The only limited area where there has been a semblance of competing activities by the Parties in more recent times is in the far north-west corner of the relevant area close to the 82° meridian.

29. The map on the screen was shown to you by Professor Kohen last week. Based on the diplomatic record on file, it shows in green the location where Colombia interdicted vessels considered to be operating within its jurisdiction, and in red the naval interdictions carried out by Nicaragua. You can see that they are confined to an area lying broadly west of Quitasueño near the 82° meridian. There is no evidence anywhere of any Nicaraguan presence ever to the south, let alone the east.

30. Nicaragua has told you that it issued oil licences at the end of the 1960s. Curiously, it has not provided any details of these activities such as contracts or concession maps. From the diplomatic correspondence that is on record, though, it is possible to establish three facts relating to those permits. First, they were also located in this far north-western corner of the relevant area; second, they were very short-lived; apparently they were only preliminary permits that were not renewed or followed up on; and third, they were promptly protested by Colombia[51].

31. Now, Colombia also carried petroleum activities in this area, mainly related to seismic projects carried out by a French company in conjunction with Colombia's national oil company, and an American company, again working in co-operation with the Colombian company[52]. The

[51]CMC, para. 3.116. See also, Vol. II-A, Anns. 54-59.

[52]CMC, paras. 3.109-3.110, 3.113.

areas of those operations can be seen on the screen. This was also in our Counter-Memorial. They included Quitasueño, a zone lying to the north of Quitasueño, and areas around Serrana as well as around Serranilla. Significantly, these activities were not protested by Nicaragua.

32. These facts, I suggest, reinforce the point that the truly relevant area in this case within which the delimitation should fall, lies between Colombia's westernmost islands and Nicaragua's coasts. That is where the limits of each Party's territory are located; it is where any incidents that occurred were situated; it is the area within which the 82° meridian is located that was respected by Nicaragua for almost four decades; and it is where the maritime entitlements of the Parties converge and begin to overlap.

33. Last week I observed that there is not a single judicial or arbitral case where islands that lie as far away from the coast of another State as Colombia's islands do with respect to Nicaragua have been enclaved. Nicaragua has not been able to rebut that proposition.

34. Today I will go further. There is not a single example of State practice where islands in a similar situation have been enclaved. Professor Crawford responded to Mr. Reichler's attempt to use the Italy/Yugoslavia, Italy/Tunisia and Qatar/United Arab Emirates boundary agreements as evidence to the contrary[53]. You saw them on the screen. They all involved islands that straddled a mainland-to-mainland median line where the coasts of the mainlands were much, much closer together than 400 nm. And even then, the islands were not fully enclaved, they had partial enclaves around them.

35. The practice of this Court, as well as arbitral tribunals, has been to treat the relevant area within which the delimitation is to be effected as the area that lies between the relevant coasts of the parties. In the present case, that is the area that is depicted on the screen. Neither the relevant coasts nor the relevant area concern Colombia's mainland coast, for reasons that we fully explained last week. Moreover, the relevant circumstances that I canvassed last week, and returned to in this pleading, confirm that it simply would not be equitable to extend the area, let alone the delimitation line, any further to the east.

---

[53]CR 2012/14, p. 62, para. 87 (Reichler).

36. Mr. President, that concludes my presentation. I once again thank the Court for its attention, and would ask if Professor Crawford could be given the floor. Thank you very much.

The PRESIDENT: Thank you very much, Mr. Bundy and I call again, for the last time in the course of these proceedings, on Professor Crawford. You have the floor, Sir.

Mr. CRAWFORD:

6. CONCLUDING POINTS

1. Thank you Mr. President. I am conscious that this is the last afternoon of the old courtroom. I vividly remember my first appearance in this room in 1991, against Professor Pellet. *Plus ça change, plus c'ést la même chose*. Mr. President, Members of the Court, in these final remarks I will briefly establish three propositions, deal incidentally with two Nicaraguan graphics flashed on the screen on Tuesday, and summarize our unchanged delimitation case.

Mid-ocean islands cannot be equated to mainland coasts without refashioning geography

2. My first proposition is that mid-ocean islands cannot be equated to mainland coasts without refashioning geography. This is particularly true where, as here and as in *Jan Mayen*, there is a substantial amount of maritime space available by reason of the distance of the features concerned from the coast.

3. This proposition follows from what I have already said today about the jurisprudence, and earlier in these proceedings about the State practice. I stress that we are not concerned in this case with the Qita't al Jaradehs and Middleton Reefs of the world, tiny formations which obstruct delimitations between other coasts. But even such formations — especially offshore formations — are frequently used as components of larger settlements, as with the Australian-French Treaty over New Caledonia. The public position of the United States — conscientiously adopted and adhered to with some consistency — is that small islands count. And by small I mean very small — Aves Island in the Caribbean, Swains Island in the Pacific and dozens of others. This practice cannot be ignored.

4. But although counsel for Nicaragua, by inference, treat the Archipelago of San Andrés as a pathological formation, this is absolutely not the case. The key islands of this archipelago bear

the weight of this delimitation. Never, as Mr. Bundy has just remarked, has a substantial territorial community at a significant distance from a continental coast been enclaved, treated for EEZ delimitation purposes as zeroes, as non-existent.

5. I stress that this is a function of entitlement, not discretion. Article 10 (1) of the Geneva Convention of 1958, Article 121 (1) and (2) of the 1982 Convention, reflect deliberate, clear choices of the international community of States as a whole. Doubts have sometimes been expressed, this is true, as to Article 121 (3) — but those doubts show only the general significance in terms of delimitation which attaches to very small features. In any event, the three named islands here are not Article 121 (3) rocks — Nicaragua does not suggest otherwise — but nor are Roncador, Serrana, Serranilla or Alburquerque. They have maritime entitlements which Nicaragua seeks to denigrate by 3-mile enclaves, in an overtly discriminatory manner. You will recall what I said on that account in relation to Roncador. The inherent and at some level irreducibly *ad hoc* character of maritime delimitation should not be employed to deny these legal entitlements.

Irrelevance of geomorphology within 200 nm of any coast

6. My second proposition is that in an area within 200 nm from eligible coasts there can as a matter of law be no continental shelf beyond 200 nm of any other State.

7. You will recall last week that I showed you a graphic that demonstrated what I called the "Lowe Paradox". Here it is again.

8. As I said, the Lowe Paradox is that, according to his view of the practice of delimitation, where the distance between two States is less than 400 miles, then the *Libya/Malta*[54] dictum applies and geomorphology is irrelevant, whereas if the distance between the two States *exceeds* 400 nautical miles then geomorphology wins the day and the continental shelf keeps going and going — even if it runs well into the other State's EEZ. Put another way, the further away the coast from the edge of the continental shelf, the greater the distance ascribed to that prolongation of the shelf. Absence, makes the shelf grow longer.

[54] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13.

9. Well, on Wednesday, Professor Lowe attempted to resolve his paradox. He stated that the position taken by this Court in *Libya/Malta* was applicable only where the distance between the two States is less than 200 miles — not, as I stated, 400 miles. As Libya and Malta were 185 miles apart, he continued, and as each State was entitled to a 200 nm EEZ, it followed that geomorphology was irrelevant. To give effect to the natural prolongation would have made a nonsense of UNCLOS Article 76[55]. Thus, says Professor Lowe, as the mainland coasts of Nicaragua and Colombia are more than 200 nm apart, Nicaragua's continental shelf can keep going for as long as it likes[56]: *quod erat demonstrandum*.

10. Well, not quite. Let us see what precisely what you said in *Libya/Malta* (it's a slightly long quotation, but it is important):

> "The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, Judgment*, p. 35, para. 39.)

12. I stress — your words are unequivocal — in relation to "areas . . . situated at a distance of under 200 miles from the coasts in question"

> "title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial".

You did not say 100 miles, you said 200 miles, and this dictum applies, of course, to each coastal State separately, to each 200-nautical mile belt of the EEZ.

13. So what does this mean? It means that each State has an entitlement to a 200-mile continental shelf congruent with its entitlement to an EEZ of a similar distance and irrespective of

---

[55]CR 2012/15, pp. 23-4, paras. 36-7 (Lowe).

[56]*Ibid.*, pp. 24-5, paras. 41-4 (Lowe).

the geomorphology of the underlying sea-bed. Professor Lowe is mistaken: *Libya/Malta*'s pronouncement as to the irrelevance of geomorphology does not apply where the coasts are within 200 nm of each other: it applies within 200 nm of *any coast*, irrespective of whether the EEZ abuts the high seas or another continental shelf. Of course, where EEZs overlap, delimitation both of the EEZ and the continental shelf must occur — but if the natural prolongation of another State's continental shelf beyond 200 nm intrudes into another State's shelf entitlement as defined by the width of its EEZ then the former must give way to the latter.

13. According to Professor Lowe, UNCLOS Article 76 has a different function; it leads to a contest when the natural prolongation of one shelf meets the EEZ-generated entitlement of another. He therefore continues to state that Nicaragua is potentially entitled to a portion of Colombia's continental shelf as generated from Nicaragua's *mainland* coast! Not satisfied with having deprived Colombia's islands of their rightful maritime zones, Nicaragua wishes to lay claim to Colombia's maritime continental shelf entitlement: again, it wants not only honey, but condensed milk as well!

14. I note that not only does my proposition follow directly from what you said in *Libya/Malta*, it is also supported by a substantial volume of State practice, including abstention by almost all States in making outer continental shelf claims within 200 nm of another State's coast. Mr. Bundy took you to this practice in the first round. From Nicaragua "answer came there none". Any other conclusion would have at least two harmful side-effects. First, it will increase conflicts between States, resource conflicts which can be particularly aggravated. Secondly, it will mean that this Court will have to spend long future hours listening to the likes of me prating on plate tectonics and sea-bed morphology, those rocks of ages conscripted to the solution — or I should say, the further confusion — of maritime boundary disputes. I wish you well of the technical morass into which you would then get.

Need for a solution which is overall equitable

15. Mr. President, Members of the Court, my third proposition is that the objective of Articles 74 and 83 of the 1982 Convention — "to achieve an equitable solution" — applies severally to EEZ and continental shelf but also jointly where *both* an EEZ and continental shelf are claimed. It accordingly applies to outer continental shelf claims, including — if I am wrong as to my second proposition — claims to outer continental shelf within 200 nm of another State. The overall solution of the delimitation as a whole must be equitable.

16. The third proposition might better be called a "meta-proposition". It is a point as to the character of maritime delimitation itself — and, more particularly, about the kind of outcome that the process is intended to achieve. This Court has been asked to undertake a delimitation across multiple maritime zones, and principally in relation to the EEZ and the continental shelf of Colombia and its islands in the Caribbean Sea. The applicable law in this respect is codified within Articles 74 and 83 of the 1982 Convention. Both of these provisions require the Court to apply international law so as to achieve an "*equitable solution*"[57]. Though not a party to the Convention, Colombia has the benefit and burden of these two Articles. They apply to all delimitations, including those of continental shelf beyond 200 nm, and they apply to such delimitations without segmentation. No distinct equities arise suddenly at 200 nm from the coast: and what I have just said responds in a supplementary way to the question by Judge Bennouna.

17. Equity within international law is, of course, an amorphous concept and I will not repeat what you have said on that subject in *Libya/Malta* and in other cases. But it is not a concept that is entirely without form: it is not entirely a matter of discretion.

18. The various passages in *Tunisia/Libya* and *Libya/Malta* and so on tell us that equity is the end result of the application of legal process against a background of legal entitlement to the zone in question. Thus, although Articles 74 and 83 separate out the legal acts to be performed by the Court in the process of delimitation, they call for an equitable solution *overall and in fact*. It is not

[57]UNCLOS, Arts. 74 (1), 83 (1).

sufficient in the event of conflict to adopt what one considers the most equitable delimitation of the continental shelf if the delimitation of the EEZ suffers as a result: rather, the Court should balance these processes so as to produce the greatest net equity possible on the facts. The germ of this notion may be seen in the *North Sea Continental Shelf* cases, where 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 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 relevant weight to be accorded to different considerations naturally varies with the circumstances of the case." (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Reports 1969*, p. 50, para. 93.)

19. All this is inconsistent with the image of overweening the right projected by Nicaragua as the singular projection for 500 miles of its coasts, of its continental shelf, neglecting and nullifying all other coasts in the region.

Nicaragua's subliminal images

20. Mr. President Members of the Court, on Tuesday Mr. Reichler flashed before your eyes two graphics which did not manage to find their way into the judges' folders. It was almost subliminal. But those of you with strong visual memories will recall them, and anyway they could do with more analysis than Mr. Reichler allowed himself time for.

21. Here is the first of them: Provisional Delimitation Line Dividing the Area of Overlapping Entitlements: PR2-13. You will notice that Providencia, Santa Catalina and San Andrés appear in the *Nicaraguan* EEZ. This must be an error since they are, like all islands, entitled to a 12-mile territorial sea, as well as to their own EEZ and continental shelf. This is even less than zero. Mr. Reichler said that this approximate condition of equality of the area of overlapping entitlements was inequitable[58]. We entirely agree with his conclusion but not at all with his reasons. It is inequitable, amongst other reasons, because the delimitation line is on the wrong side of the archipelago. It is divisive of the archipelago. But Nicaragua's reason for dismissing it — the area ratio of approximately 1:1 — is not itself inequitable, given all that I have said about the effect of mid-ocean islands.

[58]CR 2012/14, p. 58, para. 73 (Reichler).

22. This is the second of Mr. Reichler's graphics, entitled "Half-Effect to San Andrés and Providencia". It shows what purports to be a half-effect line of the three named islands[59]. No explanation was given as to how precisely this half-effect line was calculated, and there are certain errors: above all, no proper effect is given to other Colombian islands which are not rocks under Article 121 (3) of the 1982 Convention. Moreover, it gets the coastal ratio wrong for the reasons I have explained.

23. But solely for the Court's information, I should indicate how in our view a half-effect line should be drawn.

24. I show first the island-to-island equidistance line, which is our claim line. You are by now familiar with it.

25. Then, exclusively for the purposes of argument we ignore Quitasueño in drawing the provisional EEZ equidistance line. This involves an adjustment as shown on the screen now.

26. Then, the islands generating the line are given half-effect, including Serranilla, Serrana in the north and Alburquerque in the south. The dog-leg in the north is due to Serranilla, but these are substantial island features which in your words "should as such be taken into consideration for the drawing of the equidistance line"[60]. In the area of Quitasueño, the line follows the western arc of the 12-mile territorial sea.

27. The result is a half-effect equidistance line now shown. One would note that it respects the unity of the archipelago. It is shown, as I have said, strictly for the information of the Court. It is in no sense put forward as a delimitation line, but simply to correct a potentially misleading impression given by Nicaragua.

Conclusions

28. Mr. President, Members of the Court, after all you have heard, I can summarize the Colombian delimitation case succinctly in seven propositions. All these are based on the premise of Colombian sovereignty over all the cays — a matter hardly contested on Tuesday.

---

[59]CR 2012/14, p. 59, para. 78 (Reichler).

[60]*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 195; cited CR 2012/12, pp. 27-28, para. 5 (Crawford).

(1) Islands, including cays and rocks, as defined in Article 121 of the 1982 Convention, are entitled to a 12-mile territorial sea. This is subject to delimitation especially as concerns overlapping territorial sea entitlements. But as a general matter this territorial sea entitlement of 12 miles trumps opposing EEZ claims — sovereignty trumps sovereign rights. My reference last week to *Bangladesh/Myanmar* in support of this proposition met with no response or rebuttal from Nicaragua.

(2) Outer continental shelf claims terminate by operation of law within 200 miles of an eligible coast of another State.

(3) Nicaragua's outer continental shelf claim in the present case is anyway inadmissible.

(4) The islands of San Andrés, Providencia and Santa Catalina, just like the other islands that form part of the archipelago generate EEZ and continental shelf entitlements in all directions including towards the east.

(5) The delimitation is in the circumstances reduced to a claim to a single maritime boundary between the opposite coasts of Nicaragua and the archipelago.

(6) As is now irrevocably the standard method, a provisional equidistance line should first be drawn.

(7) Account should be taken of all relevant circumstances: in our submission the relevant circumstances produce the result that the provisional equidistance line should be confirmed as the single maritime boundary between the territory of the Parties.

Mr. President, Members of the Court, that concludes this submission. Thank you for your attention. Mr. President, would you now call on the Colombian Agent to conclude our case.

The PRESIDENT: Thank you very much, Sir, and I give the floor to His Excellency Ambassador Julio Londoño Parades, Agent for Colombia, to present final submissions from the Government of Colombia. You have the floor, Sir.

Mr. LONDOÑO PAREDES:

3. FINAL SUBMISSIONS

1. Thank you, Mr. President, Members of the Court. Mr. President, I will now proceed to read Colombia's final submissions:

Final submissions

In accordance with Article 60 of the Rules of Court, for the reasons set out in Colombia's written and oral pleadings, taking into account the Judgment on Preliminary Objections and rejecting any contrary submissions of Nicaragua, Colombia requests the Court to adjudge and declare:

(a) That Nicaragua's new continental shelf claim is inadmissible and that, consequently, Nicaragua's Submission I (3) is rejected.

(b) That Colombia has sovereignty over all the maritime features in dispute between the Parties: Alburquerque, East-Southeast, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo, and all their appurtenant features, which form part of the Archipelago of San Andrés.

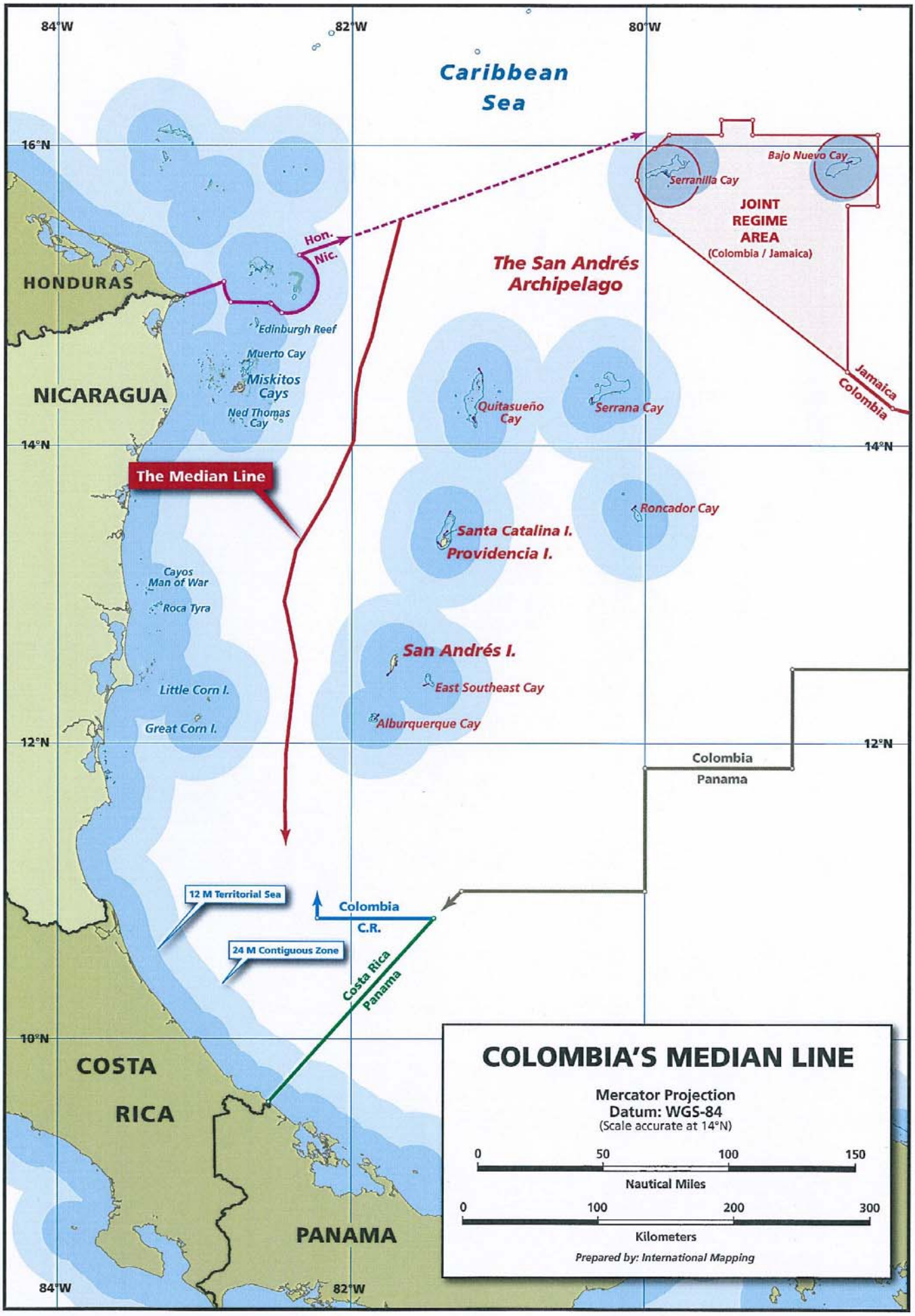
(c) That the delimitation of the exclusive economic zone and the continental shelf between Nicaragua and Colombia is to be effected by a single maritime boundary, being the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the Parties is measured, as depicted on the map attached to these submissions.

(d) That Nicaragua's written Submission II is rejected.

2. Mr. President, a signed copy of the written text of our final submissions has been communicated to the Court today.

3. On behalf of my Government and the members of our delegation, I wish to express our deepest appreciation to you, and to each of the distinguished judges for the kind attention given to our presentation. Allow me as well to convey our gratitude to the Court's Registry and to the interpreters.

Thank you, Mr. President and distinguished judges.



Colombia's Submissions Map

The PRESIDENT: Thank you very much, Excellency. The Court takes note of the final submissions which you have now read on behalf of the Republic of Colombia. Before closing, I shall give the floor to Judge Bennouna who has a question for the Parties. Monsieur Bennouna, vous avez la parole.

M. le juge BENNOUNA : Je vous remercie, Monsieur le président. Ma question s'adresse aux deux Parties. Elle est la suivante : Les règles posées à l'article 76 de la convention des Nations Unies de 1982 sur le droit de la mer, pour la détermination de la limite extérieure du plateau continental au-delà des 200 milles marins, peuvent-elles être considérées aujourd'hui comme ayant le caractère de règles de droit international coutumier ? Je vous remercie, Monsieur le président.

Le PRESIDENT : Merci, Monsieur le juge.

The written text of this question will be sent to the Parties as soon as possible. The Parties are invited to provide their written replies to the question no later than Friday 11 May 2012. In accordance with Article 72 of the Rules of Court, any comments which a Party may wish to make on any written reply by the other Party must be submitted not later than on Friday 18 May 2012.

This brings us to the end of the oral proceedings. I should like to thank the Agents, counsel and advocates for their statements.

In accordance with the practice, I shall request the Agents of the Parties to remain at the Court's disposal to provide any additional information it may require. With this proviso, I now declare closed the oral proceedings in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its Judgment. As the Court has no other business before it today, the sitting is closed.

The Court rose at 4.35 p.m.