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Informe Jurídico sobre el Fallo de la Corte Internacional de Justicia en la Controversia territorial y marítima (Nicaragua contra Colombia), de fecha 19 de noviembre del 2012

Trabajo de Suficiencia Profesional para optar el Título de Abogado

que presenta:

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RESUMEN

La controversia territorial y marítima entre Nicaragua y Colombia llevó a la Corte Internacional de Justicia a analizar diversos y complejos problemas jurídicos. El presente trabajo se centra sobre el trazo de la frontera marítima única que realiza la Corte en su fallo de 2012 y el procedimiento que sigue a tal fin; no obstante, analiza también la decisión del 2007 a la que llegó respecto a las excepciones preliminares a su competencia presentadas por Colombia.

La Corte concluyó en 2007 que era competente para conocer el caso en virtud del Pacto de Bogotá de 1948, pero que la materia sobre la que se podía pronunciar se encontraba restringida por el Tratado Esguerra-Bárcenas, el cual, afirmó la Corte, era válido y se encontraba en vigor hasta el momento de presentarse la controversia jurídica entre los Estados parte del caso. En sus sentencias, la Corte recurre a las normas convencionales que obligan a ambas Partes; asimismo, hace uso de normas consuetudinarias del Derecho Internacional y su propia jurisprudencia para resolver finalmente la controversia.

El presente trabajo cuestiona la elección de la etapa que realiza la Corte para analizar las implicancias del Tratado Esguerra-Bárcenas y concluye que dicho análisis pertenecía al fondo de la controversia. Asimismo, expone la incongruencia de utilizar distintas fuentes del Derecho Internacional para las partes en una misma controversia. Finalmente, critica la elección de la Corte sobre la metodología idónea para la delimitación que exigía el caso y expone cómo podría condicionar fallos futuros.

Palabras clave

Tratado Esguerra-Bárcenas, nulidad de los tratados, Archipiélago de San Andrés, Corte Internacional de Justicia, delimitación marítima.

ABSTRACT

The territorial and maritime dispute between Nicaragua and Colombia led the International Court of Justice to analyze diverse and complex legal problems. This paper focuses on the delineation of the single maritime boundary made by the Court in its 2012 judgment and the procedure followed to that end. However, it also analyzes the 2007 decision it reached regarding the preliminary objections to its jurisdiction filed by Colombia.

The Court concluded in 2007 that it had jurisdiction to hear the case under the 1948 Pact of Bogota, but that the subject matters on which it could rule were restricted by the Esguerra-Barcenas Treaty, which, the Court asserted, was valid and in force up to the time the legal dispute between the States parties to the case arose. In its judgments, the Court resorts to the conventional norms that bind both Parties but it also makes use of customary rules of international law and its own jurisprudence to finally resolve the dispute.

This paper questions the Court's choice of stage to analyze the implications of the Esguerra-Barcenas Treaty and concludes that such analysis belonged to the merits of the dispute. It also exposes the incongruity of using different sources of international law for the parties to the same dispute. Finally, it criticizes the Court's choice of the appropriate methodology for the delimitation required by the case and explains how it could condition future rulings.

Keywords

Esguerra-Bárcenas Treaty, invalidity of treaties, Archipielago of San Andres, International Court of Justice, maritime boundary delimitation.

A mi madre y a mi hermana.

Gracias a la fuerza de nuestra pirámide.

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PRINCIPALES DATOS DEL CASO

Nombre del Caso	Controversia territorial y de delimitación marítima (Nicaragua contra Colombia)
ÁREA DEL DERECHO SOBRE EL CUAL VERSA EL CONTENIDO DEL PRESENTE CASO	Derecho Internacional
IDENTIFICACIÓN DE LAS RESOLUCIONES Y SENTENCIAS MÁS IMPORTANTES	Fallo del 13 de diciembre de 2007 (Excepciones preliminares); Fallo del 19 de noviembre de 2012 (Fondo)
DEMANDANTE	República de Nicaragua
DEMANDADO	República de Colombia
INSTANCIA JURISDICCIONAL	Corte Internacional de Justicia
TERCEROS	República de Costa Rica (Denegado); República de Honduras (Denegado)
OTROS	

I. INTRODUCCIÓN

1.1. Justificación de la elección de la resolución

La elección del presente caso responde a una pluralidad de razones. En primer lugar, porque el caso se puede analizar desde diversas aristas. Si bien, el enfoque central del presente informe será el jurídico, cada uno los problemas que tuvo que analizar la Corte Internacional de Justicia (en adelante, la Corte) fueron, en el momento en que se produjeron y hasta la actualidad, de fuerte repercusión social, política y económica para cada uno de los Estados involucrados.

En segundo lugar, la materia constituye una excelente entrada para observar parte de la evolución del Derecho Internacional en el último siglo. Dado que los hechos relevantes para el caso se producen durante un amplio período de tiempo -alrededor de cien años jurídicamente relevantes para la Corte, o desde épocas coloniales, si se busca ser estricto a nivel histórico-, se nos permite vislumbrar la evolución del Derecho Internacional a lo largo de la historia reciente.

Consideramos, asimismo, que el caso resulta interesante, complejo y relevante a partes iguales. Interesante, a nuestro parecer, por dos motivos. De un lado, porque la disputa entre Nicaragua y Colombia nos presenta, ante los mismos hechos, posturas históricas y jurídicas antagónicas que nos obligan a entrar en el campo de la interpretación. De otro lado, porque es una controversia que, a pesar de haber sido "resuelta" por la Corte, continúa siendo materia de discusión por parte de los Estados involucrados: no ha pasado un año aún de un nuevo fallo del mismo órgano jurisdiccional vinculado al Archipiélago de San Andrés, Providencia y Santa Catalina, y los cayos aledaños.

El caso resulta complejo, asimismo, pues incluso antes de que la Corte pudiese pronunciarse sobre el fondo del asunto, debía examinar temas jurídicamente intrincados respecto a su competencia para conocer el caso.

Finalmente, consideramos que algunos puntos del caso son particularmente relevantes en el estudio del Derecho Internacional actual. Resaltan, a este respecto, los alcances jurídicamente permitidos de un fallo sobre excepciones preliminares; la repercusión de los criterios usados por la Corte para resolver el fondo del asunto a la luz de la fragmentación (especialmente la institucional) del Derecho Internacional; y la metodología de las tres etapas para definir fronteras que usó la Corte.

1.2. Presentación del caso

La controversia respecto a los límites territoriales entre la República de Nicaragua y la República de Colombia en el Mar Caribe occidental fue sometida finalmente a la Corte Internacional de Justicia el 6 de diciembre del 2001 a través de una demanda de parte de Nicaragua, quien solicitó a la Corte que declarase que tenía soberanía sobre las islas de Providencia, San Andrés y Santa Catalina, así como sobre los cayos de Roncador, Serrana, Serranilla y Quitasueño. Asimismo, reconocida tal soberanía, Nicaragua solicitó a la Corte que determinase el curso de la frontera marítima única entre las áreas de plataforma continental y zona económica exclusiva propias de ambos Estados.

Antes de poder pasar a resolver el fondo del asunto, la Corte tuvo que resolver dos excepciones preliminares planteadas por Colombia. En primer lugar, Colombia postuló que la Corte no podía conocer el caso sobre la base del Pacto de Bogotá, pues este proscribe someter a procedimientos pacíficos de solución de controversias (como acudir a la CIJ) aquellas cuestiones que hayan sido resueltas de conformidad con tratados en vigor. En ese sentido, sostenía que la cuestión de la soberanía sobre el Archipiélago de San Andrés había sido zanjada por el Tratado Esguerra-Bárcenas de 1928 y su Acta de Canje de Notas de 1930. De otro lado, Colombia afirmó que, dado que la competencia por el Pacto de Bogotá era imperante y excluyente en el caso, la Corte no podría pretender, subsidiariamente, analizar si tenía competencia en base a las declaraciones voluntarias que hicieron los Estados, de conformidad con el artículo 36 del Estatuto la Corte Internacional de Justicia.

La Corte emitió un fallo en diciembre de 2007 respecto a estas excepciones preliminares. De un lado, determinó que el Tratado de 1928 fue un pacto válido en el que se acordó la soberanía territorial colombiana sobre las islas que menciona expresamente el texto del Tratado: San Andrés, Providencia y Santa Catalina. El Tratado no resuelve, empero, la situación de los cayos Roncador, Quitasueño y Serrana y demás islotes que comprenden el Archipiélago de San Andrés. En consecuencia, la Corte se declara competente para resolver la cuestión de la soberanía sobre los accidentes geográficos que conforman el Archipiélago con excepción de las islas que menciona específicamente el Tratado de 1928. De otro lado, la Corte concluye que su competencia se basa en el Artículo XXXI del Pacto de Bogotá y que, en efecto, no es necesario analizar su eventual competencia bajo la cláusula facultativa del Estatuto de la Corte

Finalmente, en noviembre del 2012, la Corte resolvió el fondo del asunto mediante la delimitación de la frontera marítima entre Nicaragua y Colombia. En sus decisiones, la Corte aplicó principalmente la costumbre internacional reflejada en la Convención de las Naciones Unidas sobre el Derecho del Mar y se remitió a su propia jurisprudencia.

II. IDENTIFICACIÓN DE LOS HECHOS RELEVANTES

2.1. Antecedentes

Las islas de San Andrés, Providencia y Santa Catalina, así como las demás islas, islotes y cayos que componen el Archipiélago de San Andrés, registran un turbulento historial de ocupación. Dada su posición geográfica, el Archipiélago supuso históricamente un punto privilegiado en las rutas marítimas comerciales entre Sudamérica y las potencias europeas. A inicios del siglo XVII, asentamientos ingleses y holandeses ocupaban las islas; sin embargo, España intentó, en 1641, ocupar Providencia y Santa Catalina, lo cual daría lugar a décadas de conflicto por el control del Archipiélago, especialmente entre las

Coronas inglesa y española, con la participación ocasional de mercenarios y piratas dedicados al saqueo de las rutas comerciales que pasaban por las islas. (Rivera, 2006, p. 8)

En 1786, tras la firma del Tratado de París (1783) que puso fin a la Guerra de Independencia de Estados Unidos, España asume oficialmente la administración de las islas. Con la Real Orden de 1803 las islas pasan de la Capitanía General de Guatemala al Virreinato de Santa Fe y, tras nuevas invasiones inglesas, los territorios quedan bajo el mandato del Virreinato de La Nueva Granada. En 1822, los gobernadores de las islas proclaman su adhesión a la recientemente formada República de Colombia. (Uribe, 1981, p. 16)

La Asamblea Nacional de Nicaragua (2012, p. 5) realiza un recuento de la participación norteamericana en la historia de la controversia: en la década de 1860, los Estados Unidos de América (en adelante, Estados Unidos) declararon unilateralmente la soberanía de los cayos de Quitasueño, Roncador y Serrana a su territorio en base a una ley emitida por su Congreso el 18 de agosto de 1856, la cual les “facultaba” a incorporar islas guaneras a su territorio cuando estas no estuviesen ocupadas por ciudadanos de otro gobierno. De otro lado, es de notar también que Colombia reconoció el retorno de la Costa de los Mosquitos (“La Mosquitia”) a la actual Nicaragua, en 1894, tras haber estado bajo protectorado británico. Asimismo, resalta el hecho de que Nicaragua, entre 1912 y 1933, se encontró bajo ocupación militar estadounidense, la cual se consolidó en un régimen de protectorado de facto en 1916, con el Tratado Bryan-Chamorro.

En 1919, el presidente norteamericano Woodrow Wilson declaró que el cayo de Roncador quedaba reservado para construcción de faros por estar bajo la jurisdicción de Estados Unidos; Colombia protestó esta declaración. En la misma línea, Colombia protestó también en los años siguientes contra Nicaragua y Estados Unidos por las concesiones de exploración petrolera en algunas de las islas del Archipiélago de San Andrés celebradas entre ellos.

2.2. Hechos relevantes del caso

- 24 de marzo de 1928: se firmó el Tratado Esguerra-Bárcenas (en adelante, Tratado de 1928). Por este Tratado, Colombia reconoció la soberanía de Nicaragua sobre las islas Mangle y la Mosquitia; mientras que Nicaragua reconoció la soberanía colombiana sobre el Archipiélago de San Andrés, Santa Catalina y todas sus islas, islotes y cayos. Dada la controversia respecto a la soberanía sobre los cayos Roncador, Quitasueño y Serrana presente entre Estados Unidos y Colombia, se excluye expresamente de los límites de Tratado dichas formaciones geográficas.
- 24 de setiembre de 1929: Nicaragua declaró incondicionalmente, bajo el Artículo 36 del Estatuto de la Corte Permanente de Justicia Internacional, la jurisdicción obligatoria de la Corte.
- 5 de mayo de 1930: se produjo el Acta de Canje del Tratado de 1928. Se acordó en el Acta que el meridiano 82 de Greenwich delimitaría la frontera occidental del Archipiélago de San Andrés.
- 30 de octubre de 1937: Colombia declaró su aceptación, bajo condición de reciprocidad, de la jurisdicción de la Corte Permanente de Justicia Internacional, de conformidad con el Artículo 36 de su Estatuto.
- 4 de junio de 1969: Colombia reclamó a Nicaragua la concesión de permisos de reconocimiento y exploración petrolera en Quitasueño y zonas cercanas.
- 12 de junio de 1969: Nicaragua respondió al reclamo colombiano que tales zonas se encontraban dentro de su plataforma continental y zona económica exclusiva.
- 22 de setiembre de 1969: Colombia declaró formalmente su soberanía sobre las zonas marítimas situadas al este del meridiano 82 de Greenwich. Declaró también que los cayos de Roncador, Quitasueño y Serrana estaban fuera de negociación entre ella y Nicaragua.
- 8 de setiembre de 1972: Estados Unidos y Colombia firmaron el Tratado Vásquez-Saccio o el Tratado relativo al a situación de Quitasueño, Roncador y Serrana. En este, Estados Unidos renunció a toda pretensión de soberanía sobre dichos cayos y Colombia se reafirmó como su única titular legítima.

- 4 de octubre de 1972: la Asamblea Nacional de Nicaragua declaró formalmente su soberanía sobre los cayos de Roncador, Quitasueño y Serrana. Asimismo, protestó, mediante notas diplomáticas, el Tratado Vásquez-Saccio a Colombia y Estados Unidos.
- Julio de 1979: el Frente Sandinista de Liberación Nacional derrocó a la dictadura de Anastasio Somoza y asumió el gobierno de Nicaragua.
- 4 de febrero de 1980: Nicaragua publicó un Libro Blanco o *"White Paper"* en el que declararon la nulidad del Tratado de 1928.
- 5 de febrero de 1980: Colombia rechazó la declaración de Nicaragua y afirmó la validez del Tratado de 1928.
- 1990-2001: Ambos Estados intentaron solucionar directamente la controversia, pero fracasaron.
- 6 de diciembre de 2001: Nicaragua presentó la demanda contra Colombia ante la Corte Internacional de Justicia y le solicitó que declare la soberanía nicaragüense sobre las islas de Providencia, San Andrés y Santa Calina, así como los cayos Roncador, Serrana, Serranilla y Quitasueño. Asimismo, solicitó que la Corte definiese la frontera marítima única entre la plataforma continental y la zona económica exclusiva entre Nicaragua y Colombia.
- 8 de abril de 2003: Nicaragua presentó su Memoria ante la Corte y, además de lo planteado en su demanda, pidió que se declare la nulidad del Tratado Esguerra-Bárcenas.
- 21 de julio de 2003: Colombia presentó excepciones preliminares ante la Corte y afirmó que no tenía competencia porque la controversia había sido resuelta por el Tratado de 1928 y el Acta de 1930 de conformidad con el Pacto de Bogotá, y que no era aplicable el Artículo 36 del Estatuto de la Corte Permanente de Justicia Internacional.
- 13 de diciembre de 2007: En su fallo sobre las Excepciones Preliminares, la Corte se declaró competente en virtud del Pacto de Bogotá y delimitó los accidentes geográficos sobre los que se pronunciaría posteriormente
- 25 de febrero de 2010: Costa Rica solicitó participar como interviniente porque estaba en disputa el territorio marítimo que le correspondía.
- 10 de junio de 2010: Honduras solicitó participar como Interviniente porque tenía derechos e intereses en el territorio en disputa.

- 4 de mayo de 2011. La Corte Internacional de Justicia, en fallos separados, denegó las solicitudes de Costa Rica y Honduras.
- 11 de noviembre de 2012: la Corte dictó su sentencia sobre el fondo de la cuestión y trazó la frontera marítima única entre la plataforma continental y la zona económica exclusiva entre Nicaragua y Colombia.

III. IDENTIFICACIÓN DE LOS PRINCIPALES PROBLEMAS JURÍDICOS

3.1. Problema principal

El problema principal al que apunta a resolver la Corte Internacional de Justicia en la presente controversia es el siguiente:

¿Cuál es la línea de la frontera marítima única que delimita la plataforma continental y las zonas económicas exclusivas de la República de Nicaragua y la República de Colombia?

3.2. Problemas secundarios

Por su parte, con el fin de responder a la interrogante central del presente trabajo, hemos identificado los siguientes problemas secundarios:

3.2.1. ¿Fueron válidos el Tratado Esguerra-Bárcenas de 1928 y su Acta de Canje de 1930?

3.2.2. ¿En qué se funda la competencia de la Corte Internacional de Justicia para conocer el caso?

3.2.3. ¿Cuáles son las normas de Derecho Internacional aplicables a fin de resolver la controversia?

3.2.4. ¿Cuál es el procedimiento idóneo para delimitar la frontera marítima entre Nicaragua y Colombia?

IV. ANÁLISIS DE LOS PROBLEMAS JURÍDICOS

4.1. Problemas secundarios

A fin de comprender cabalmente el orden empleado en el presente análisis, se deben mantener presentes los extremos de la demanda de Nicaragua. Como ya se ha adelantado en la sección de los hechos relevantes del caso, Nicaragua presentó ante la Corte Internacional de Justicia (en adelante, la Corte) tres pretensiones:

a) Que declarase que Nicaragua tenía soberanía sobre las islas de Providencia, San Andrés y Santa Catalina, así como todas las islas y cayos que formen parte de estas islas; y sobre los cayos de Roncador, Serrana, Serranilla, Bajo Nuevo, Quitasueño, Alburquerque, y Cayos del Este - Sudeste. En síntesis: que la Corte declarase la soberanía nicaragüense sobre todo el Archipiélago de San Andrés.

b) Que declarase que el Tratado de 1928 y su Acta carecían de validez legal, por lo que no pueden fungir como títulos de soberanía a favor de Colombia sobre el Archipiélago de San Andrés. En esa línea, Nicaragua afirma también que el Tratado de 1928 no es un tratado de delimitación de fronteras.

c) Que, en línea con las dos pretensiones previas, la Corte determine el curso de la frontera marítima única entre las áreas de plataforma continental y zona económica exclusiva de Nicaragua y Colombia, respectivamente. Para ello, Nicaragua sostuvo que, de acuerdo con los principios equitativos y circunstancias relevantes admitidos en el Derecho Internacional, la Corte debía trazar una línea equidistante entre las costas continentales de los dos países.

Nicaragua afirmó que la Corte era competente para conocer el caso en virtud del artículo XXXI del Tratado Americano de Soluciones Pacíficas de 1948 (en adelante, “Pacto de Bogotá” o “el Pacto”), pues ambos países son Estados parte de dicho tratado y ninguno presentó reservas a él que sean relevantes en el caso. Nicaragua invocó también como base de competencia las Declaraciones de

aceptación facultativa a la jurisdicción de la Corte que se produjeron conforme al artículo 36.2 de su Estatuto.

Ante la demanda, la República de Colombia presentó dos excepciones preliminares a la competencia de la Corte. Cabe resaltar que el uso del mecanismo de las excepciones se ajustó a lo previsto por el Reglamento de la Corte, específicamente al artículo 79 de la Sección D (Procedimientos Incidentales), Subsección 1, referida a las medidas provisionales dentro de los procedimientos contenciosos.[1]

La primera de estas excepciones preliminares estuvo dirigida a demostrar que la Corte carecía de competencia a razón del carácter ya resuelto de la controversia que planteó Nicaragua. Al respecto, Colombia postuló que los asuntos planteados por Nicaragua fueron resueltos por el Tratado de 1928 y su Acta de Canje de 1930, los cuales se encontraban plenamente en vigor al momento de presentarse la supuesta controversia. Nicaragua rebatió esta excepción y argumentó que el Tratado de 1928 y el Acta de Canje eran nulos.

La segunda excepción preliminar se fundó en la prevalencia del Pacto de Bogotá sobre declaraciones posteriores en virtud de la cláusula facultativa prevista en el Estatuto de la Corte Internacional de Justicia. Colombia postuló que, dado que la controversia ya había sido resuelta en el marco del Pacto, la Corte no podría analizar subsidiariamente si tenía competencia en virtud de la mencionada cláusula.

En consecuencia, antes de revisar el pronunciamiento de la Corte sobre el fondo del asunto, es decir, el problema principal del presente informe, debemos analizar jurídicamente los argumentos que se sopesaron respecto a las excepciones preliminares presentadas por Colombia. En ese sentido, el primer problema jurídico que se nos presenta corresponde a los límites de la

[1] El numeral 1 del mencionado artículo establece que: “Cualquier excepción a la competencia de la Corte o a la admisibilidad de la solicitud, o cualquier otra excepción sobre la cual el demandado pide que la Corte se pronuncie antes de continuar el procedimiento sobre el fondo, deberá ser presentada por escrito dentro del plazo fijado para el depósito de la contramemoria. (…)”

competencia de la Corte; específicamente, se circunscribe a las consecuencias sobre estos límites que supone la validez del Tratado de 1928 y su Acta de Canje.

Posteriormente, examinaremos en qué se fundó la competencia de la Corte en el caso concreto. Luego, se analizará cuáles fueron las normas de Derecho Internacional relevantes a fin de resolver la controversia; y, como última cuestión previa, estudiaremos el procedimiento idóneo para la delimitación de la frontera marítima entre Nicaragua y Colombia.

4.1.1. ¿Fueron válidos el Tratado Esguerra-Bárcenas de 1928 y su Acta de Canje de 1930?

Dada la corta extensión del Tratado de 1928 y su Acta de Canje, consideramos conveniente reproducir parte de ellos aquí. El primer artículo del Tratado establece lo siguiente:

> "Artículo I. La República de Colombia reconoce la soberanía y pleno dominio de la República de Nicaragua sobre la costa de Mosquitos comprendida entre el cabo de Gracias a Dios y el río San Juan, y sobre las islas Mangle Grande y Mangle Chico, en el Océano Atlántico (Great Corn Island y Litle Corn Island); y **la República de Nicaragua reconoce la soberanía y pleno dominio de la República de Colombia sobre las islas de San Andrés, Providencia, Santa Catalina y todas las demás islas, islotes y cayos que hacen parte de dicho Archipiélago de San Andrés.**
>
> **No se consideran incluidos en este Tratado los cayos Roncador, Quitasueño y Serrana; el dominio de los cuales está en litigio entre Colombia y los Estados Unidos de América."** (el resaltado es nuestro)

Por su parte, el Acta de Canje, firmada en Managua el día 5 de mayo de 1930, establece en su segundo párrafo que el Archipiélago de San Andrés y Providencia, al que se refiere el Tratado de 1928, no se extiende al occidente del meridiano 82 de Greenwich.

De los precitados tratados, puede colegirse que Nicaragua y Colombia estaban de acuerdo sobre tres puntos:

1. La Costa de Mosquitos, también llamada “La Mosquitia”, se encuentra bajo la soberanía de Nicaragua.
2. Las islas, islotes y cayos que conforman el Archipiélago de San Andrés se encuentran bajo la soberanía colombiana. Es de notar, en esta línea, que no se especifica cuáles son las formaciones geográficas que componen la totalidad de dicho Archipiélago; no obstante, las partes convienen en que su extensión no supera el meridiano 82 de Greenwich.
3. Se excluye expresamente del Tratado de 1928 a los cayos de Roncador, Quitasueño y Serrana, cuya soberanía se encontraba en disputa entre Colombia y Estados Unidos.

Ahora bien, para poder dar respuesta al presente problema, consideramos que existen dos subproblemas que deben ser analizados. En un primer momento, se debe determinar si el Tratado de 1928 no incurrió en alguna causal de nulidad y, posteriormente, si soluciona la controversia planteada por Nicaragua en su totalidad.

Sobre los argumentos esgrimidos respecto a la supuesta nulidad del Tratado Esguerra-Bárcenas de 1928, nos podemos remitir al capítulo II de la Memoria de Nicaragua (2003, pp. 59-183). En ese capítulo, Nicaragua expone las razones históricas que llevaron a su consentimiento de obligarse por el Tratado de 1928 y a su ratificación en 1930. En esa línea, sostiene que la nulidad del Tratado se basa centralmente en dos puntos.

En primer lugar, argumenta Nicaragua, el Tratado de 1928 es inválido porque fue celebrado en manifiesta violación de lo establecido por la Constitución de Nicaragua de 1911, la cual se hallaba vigente en 1928. A este respecto, Nicaragua argumentó que su Constitución de 1911 estipulaba, en su artículo 2, que no se podrían celebrar tratados que se opusieran a su independencia, integridad, o que afectasen de algún modo su soberanía. En la misma línea, el artículo 3 de dicha Constitución establecía la nulidad de los actos ejecutados por

funcionarios públicos fuera del ejercicio de la ley (como la celebración de tratados).

Sobre este primer argumento planteado por Nicaragua, como bien plantea el profesor Arrighi (2007, p. 37), es pacífico en la doctrina publicista afirmar que el Derecho Internacional prevalece sobre los ordenamientos jurídicos internos de los Estados en caso de conflicto. En efecto, esto es verificable tanto a nivel interamericano como en normativa de alcance universal. Así, la Convención sobre Tratados de La Habana de 1928, ratificada tanto por Nicaragua como por Colombia, establece en sus artículos 10 y 11 que ningún Estado podrá eximirse de las obligaciones contraídas en tratados y que estos seguirán surtiendo efectos incluso "cuando llegue a modificarse la constitución interna de los Estados contratantes".

Por otro lado, respecto a normativa de carácter general, la Convención de Viena de 1969 sobre el Derecho de los Tratados recoge una serie de normas consuetudinarias que se encontraban vigentes al momento de la entrada en vigor del Tratado de 1928. Nos parece pertinente rescatar dos aquí. La primera es el *Pacta sunt servanda*. Dicha norma está recogida en la Convención en su artículo 26[2], pero también es reconocida en el Preámbulo como un principio general de Derecho Internacional. En esta misma línea, y en concordancia con la Convención de La Habana, el artículo 27 de la Convención de Viena de 1969 recoge otra norma consuetudinaria sumamente pertinente: los Estados no pueden invocar las disposiciones de su derecho interno como justificación del incumplimiento de un tratado.

En consecuencia, podemos afirmar que, incluso sí se comprobase que la manifestación de consentimiento nicaragüense en obligarse por el Tratado de 1928 y su Acta de Canje se hubiese producido en evidente vulneración de su normativa interna, esto no representa una excusa jurídicamente relevante para la exigencia del cumplimiento de las obligaciones que se plasmaron en dichos acuerdos internacionales.

[2] Artículo 26: "Todo tratado en vigor obliga a las partes y debe ser cumplido por ellas de buena fe."

En segundo lugar, Nicaragua se remitió a razones históricas. En efecto, argumentaron que las islas que rodean la Costa de los Mosquitos, como el Archipiélago de San Andrés, siempre han sido objeto de ambición por parte de extranjeros debido a la posibilidad de construir en ellas un canal interoceánico. Asimismo, afirmaron en su Libro Blanco que la firma del Tratado de 1928 se produjo como resultado de una alta presión política y económica combinada con una latente ocupación militar por parte de Estados Unidos en territorio nicaragüense. (Junta de Reconstrucción Nacional de Nicaragua, 1980, p. 3) En esa línea, sostuvieron, Nicaragua se encontraba impedida de celebrar tratados que fuesen en contra de los intereses norteamericanos; y Colombia, consciente del estado del gobierno nicaragüense, tomó ventaja de la situación para concluir el Tratado de 1928.

Esta potencial causal de nulidad podría analizarse desde dos perspectivas, pues, como en toda controversia, existen múltiples relatos de los hechos. Como bien recogió Caicedo (2003, p. 110) en su momento, Nicaragua argumentó que la aceptación de los términos del Tratado de 1928 se debió a la ocupación y coerción por parte de los Estados Unidos, materializada en las tropas militares presentes en Nicaragua durante la firma y ratificación del Tratado. Esta causal podría entenderse bajo la lógica del artículo 52 de la Convención de Viena de 1969, que prescribe la nulidad de los tratados que se hayan obtenido por la amenaza o el uso de la fuerza en violación de los principios de derecho internacional. Sin embargo, Zamora (1994) se enfoca por otro lado en la presión política sufrida por Nicaragua sobre sus líderes políticos, especialmente sobre su entonces presidente, Adolfo Díaz. Esta otra perspectiva encajaría mejor en lo recogido de la práctica internacional y plasmado en el artículo 51 de la Convención de Viena de 1969, el cual dispone la nulidad de los tratados cuyo consentimiento se haya obtenido a través de la coacción del representante estatal mediante actos o amenazas.

No obstante, nos parece pertinente apuntar aquí que las consideraciones sobre la nulidad de los tratados que hemos descrito no se pueden rastrear indubitablemente hasta 1928 en la práctica interamericana, en tanto forman parte

del desarrollo progresivo del derecho de los tratados que cobró impulso alrededor de la mitad del siglo pasado y se consolidó con la Convención de Viena de 1969. (Caicedo, 2001, p. 262)

Ahora bien, estas perspectivas no son mutuamente excluyentes; no obstante, son de difícil probanza a nivel judicial, por lo que tanto Colombia como la Corte se centraron en los actos posteriores de los Estados involucrados en la presente controversia.

En efecto, Colombia rebatió la afirmación de Nicaragua sobre la invalidez del Tratado de 1928 y se remitió a parte de lo que había afirmado en lo que sería conocido como el Libro Blanco de Colombia. En dicho Libro, el entonces ministro de Relaciones Exteriores colombiano, don Diego Uribe Vargas, rechazó bajo argumentos principalmente jurídicos lo expuesto por su homólogo nicaragüense. El ministro recurrió al artículo 10 de la Convención de La Habana de 1928, así como a la Convención de Viena de 1969 (siempre en tanto recoge costumbre internacional) para afirmar que "el desconocimiento de un tratado sobre cuestiones territoriales constituye pues una violación flagrante del Principio de Pacta Sunt Servanda (…)" (Ministerio de Relaciones Exteriores de Colombia, 1980, p. 41)

Asimismo, durante su intervención oral en los procedimientos sobre las excepciones preliminares, uno de los agentes de Colombia, el embajador Julio Londoño, señaló que el "Tratado fue discutido y aprobado por las dos cámaras de los congresos de ambos Estados partes y que el acuerdo entre ellas estableciendo el Meridiano 82°W como su frontera marítima fue integrado al Protocolo de Intercambio de Ratificaciones del Tratado, el 5 de mayo de 1930". (Ramírez, 2009, p. 38) Esto en clara alusión al tiempo razonable que tuvieron ambos Estados para considerar los términos del Tratado de 1928, así como los puntos cristalizados en el Acta de Canje de 1930. Es sabido, en esta misma línea, que los textos de ambos acuerdos fueron registrados por Nicaragua ante la Liga de las Naciones en mayo de 1932 a iniciativa propia (Colombia ya lo había hecho en 1930).

Asimismo, la Corte Internacional de Justicia, en el parágrafo 76 de su fallo de 2007, recuerda que Colombia alegó que, incluso si el Tratado de 1928 hubiese sido firmado en contravención de la Constitución de Nicaragua de 1911 o la formación de su voluntad se hubiese encontrado viciada por la ocupación estadounidense, dichos reclamos no fueron presentados ni al momento de ratificar el Tratado con el Acta de 1930 o en los subsiguientes cincuenta años.

Bajo la misma lógica, Colombia sostuvo que Nicaragua debió formular una reserva respecto al Tratado de 1928 cuando celebró el Pacto de Bogotá. En consecuencia, Nicaragua no podría pretender ahora plantear la nulidad del Tratado o de su Acta.

Estos argumentos se enmarcan en la figura de la aquiescencia; la Corte la define en su fallo del 12 de octubre de 1984 en el asunto Canadá con Estados Unidos de Norteamérica (1984, párrafo 130) como “un reconocimiento tácito manifestado mediante un comportamiento unilateral que la otra parte puede interpretar como un consentimiento.” En el presente caso, una prueba de la aquiescencia de Nicaragua respecto a la validez y vigor del Tratado de 1928 puede encontrarse en la firma del Pacto de Bogotá de 1948. En efecto, Nicaragua formuló una reserva respecto al diferendo fronterizo que sostenía con Honduras; sin embargo, no hizo lo propio con Colombia respecto a tratado o diferencia alguna (Caicedo 2003, p. 16)

Por lo descrito en los hechos del presente caso y las consideraciones previas, Nicaragua estaría incurriendo en una incongruencia; y es que no puede compatibilizarse la aquiescencia nicaragüense respecto a los acuerdos celebrados con Colombia con lo postulado en su Libro Blanco. Concordamos entonces con lo sostenido por Rivera (2006, p. 38), en tanto afirma que las pretensiones nicaragüenses estarían violando el principio de *Allegans contraria non audiendus est* (No debe ser oído aquel que alega cuestiones contradictorias).

Sobre este punto podemos recordar también que, en 1969, cuando Nicaragua responde a la declaración colombiana que afirmó al meridiano 82 como frontera

marítima con ella, no lo hizo en virtud de ninguna supuesta invalidez del Tratado de 1928, sino que únicamente cuestionó el carácter de tratado de límites que Colombia le atribuyó. En la misma línea, tres años después, Nicaragua remitió una comunicación a los Estados Unidos a fin de reservar sus derechos sobre Roncador, Quitasueño y Serrana, pero lo hizo sin cuestionar la validez del Tratado de 1928. (Corte Internacional de Justicia, 2007, p. 260) Solo en 1980, con su Libro Blanco, es que Nicaragua argumentó la nulidad de dicho acuerdo con Colombia, con lo que podemos afirmar que sostuvo como válido dicho acuerdo por más de 50 años.

En este punto, la Corte concluye lógicamente en su fallo sobre excepciones preliminares que el Tratado de 1928 era válido y no fue cuestionado hasta 1980.

4.1.2. ¿En qué se funda la competencia de la Corte Internacional de Justicia para conocer el caso?

Se ha concluido en la sección previa que el Tratado de 1928 y su Acta de Canje de 1930 fueron entendidas como válidas y en vigor por Nicaragua y Colombia, cuando menos, hasta 1980. La razón por la que es importante mantener esto presente se remonta a las bases de la competencia de la Corte Internacional de Justicia propuestas por Nicaragua.

Es menester recordar que existen diversos medios de acceder someterse a la competencia de la Corte: por ejemplo, las cláusulas jurisdiccionales en tratados, las declaraciones voluntarias de aceptación de jurisdicción o la aceptación a participar de un proceso ante una incoación. Son dos las condiciones que se deben cumplir: por un lado, que se produzca un acto de instancia a acceder a un proceso ante la Corte (una demanda) y la existencia de un título de competencia válido. (Georges, 1967, p. 49)

En el presente caso, como ya hemos mencionado líneas arriba, Nicaragua señaló que la Corte era competente para conocer el caso en virtud del artículo XXXI del Pacto de Bogotá y, asimismo, Nicaragua invocó también como base de competencia las Declaraciones de aceptación facultativa a la jurisdicción de la

Corte que se produjeron conforme al artículo 36.2 de su Estatuto tanto por ella como por Colombia.

Colombia argumentó, en su primera excepción preliminar, que, de conformidad con los Artículos VI y XXXIV del Pacto de Bogotá de 1948, las pretensiones de Nicaragua habían sido zanjadas por el Tratado Esguerra-Bárcenas de 1928 y su Acta de Canje de 1930, ambos tratados en vigor a la fecha de celebración del Pacto de Bogotá. Estos artículos del Pacto rezan:

> "Artículo VI. Tampoco podrán aplicarse dichos procedimientos [pacíficos de solución de controversias] a los asuntos ya resueltos por arreglo de las partes, o por laudo arbitral, o por sentencia de un tribunal internacional, **o que se hallen regidos por acuerdos o tratados en vigencia en la fecha de la celebración del presente Pacto**" y,
>
> "Artículo XXXIV. Si la Corte se declarase incompetente **por los motivos señalados en los artículos V, VI y VII de este Tratado, se declarará terminada la controversia**" (Énfasis añadido).

Así, lo que Colombia planteó fue que la cuestión de la soberanía sobre el Archipiélago de San Andrés, así como sobre sus formaciones geográficas, había sido resuelta por el Tratado de 1928 y su Acta. Dado que la cuestión había sido resuelta, no podría aplicarse un procedimiento pacífico conforme al artículo VI del Pacto y, conforme a su Artículo XXXIV, la Corte debía declararse incompetente para conocer la controversia y darla por terminada. Asimismo, afirmó que este punto (si el Tratado de 1928 y su Acta habían zanjado la controversia) debía ser resuelto en la etapa de excepciones preliminares.

Respecto a esta excepción, Nicaragua reafirmó que la Corte poseía competencia en razón del Artículo XXXI del Pacto de Bogotá. Este establece la competencia de la Corte Internacional de Justicia para los Estados Parte del Pacto de Bogotá en controversias jurídicas vinculadas a, entre otras, la interpretación de tratados o cualquier cuestión de Derecho Internacional. (Corte Internacional de Justicia, 2007, p. 21) Nicaragua sostuvo que el Tratado de 1928 y su Acta de Canje de 1930 no resolvieron la controversia respecto al Archipiélago de San Andrés en el sentido que estipula el Artículo VI del Pacto de Bogotá. Para ello, alegó que el

Tratado de 1928 era nulo o había sido terminado. Asimismo, incluso cuando el Tratado hubiese sido válido, sus términos no abarcaban toda la controversia que habían planteado. En contraposición a lo planteado por Colombia, Nicaragua señaló que el pronunciamiento sobre esta cuestión debía realizarse en el examen de fondo de la causa.

Respecto a estos argumentos, hemos adelantado ya que el Tratado de 1928 fue considerado como válido y en vigor por las partes hasta 1980. En consecuencia, en la presente sección, analizaremos las bases de la competencia de la Corte planteadas por Nicaragua a la luz de las excepciones preliminares postuladas por Colombia del siguiente modo: en primer lugar, analizaremos si, como postula Colombia, la controversia planteada por Nicaragua fue resuelta por el Tratado Esguerra-Bárcenas y su Acta de Canje a la luz del Pacto de Bogotá. En segundo lugar, de comprobarse que subsiste la controversia (o parte de ella), delimitaremos los aspectos sobre los que puede pronunciarse la Corte.

Debemos partir por el primer título de competencia invocado por Nicaragua, es decir, el Pacto de Bogotá. Al respecto, nos interesa establecer la fecha a partir de la cual los Estados Parte consideraron asuntos ya resueltos todas las controversias previas al Pacto que tenían con otros Estados parte. A estos efectos, debemos recordar que el Pacto de Bogotá fue suscrito el 30 de abril de 1948 durante la IX Conferencia Internacional Americana. Con esto presente, la Corte concluye lógicamente que, si el Tratado de 1928 estuvo en vigor en 1948, no resulta relevante analizar si se encontraba vigente en años posteriores, pues Nicaragua tuvo la oportunidad de formular una reserva específica con relación a él según los artículos LIV y LV del Pacto de Bogotá.[3]

[3] Art. LIV: Cualquier Estado Americano que no sea signatario de este Tratado o que haya hecho reservas al mismo, podrá adherir a éste o abandonar en todo o en parte sus reservas, mediante instrumento oficial dirigido a la Unión Panamericana, que notificará a las otras Altas Partes Contratantes en la forma que aquí se establece.

Art. LV: Si alguna de las Altas Partes Contratantes hiciere reservas respecto del presente Tratado, tales reservas se aplicarán en relación con el Estado que las hiciera a todos los Estados signatarios, a título de reciprocidad.

Sobre este punto, podemos referirnos al caso relativo al Laudo Arbitral rendido por el Rey de España el 23 de diciembre de 1906 (Honduras contra Nicaragua). En este caso, sobre el cual la Corte falla en 1960, se determina que la omisión por parte de Nicaragua de cuestionar la validez del Laudo Arbitral por más de seis años tras haberlo conocido era óbice para que Nicaragua alegara su invalidez. (Corte Internacional de Justicia, 1960, pp. 213-214)

Al respecto, en su escrito de excepciones, Colombia menciona que durante los trabajos preparatorios del Pacto el gobierno colombiano se pronunció respecto al artículo VI del Pacto y dejó en claro que "los procedimientos pacíficos de solución de conflictos a que se refiere el Pacto deben usarse únicamente para resolver controversias no resueltas a la fecha de vigencia, pero no para reabrir las ya resueltas." (Gobierno de Colombia, 2003, p. 76)

En efecto, el artículo VI se encuentra pensado como un mecanismo de prevención para impedir que los procedimientos que prescribe el Pacto de Bogotá sean utilizados para obtener un nuevo pronunciamiento sobre cuestiones ya resueltas. En concordancia con esto, Colombia también en su Escrito de excepciones, párrafo 2.31, planteó:

> "En el presente procedimiento, el declarar la disputa resuelta por el Tratado de 1928 y su Protocolo de 1930 es lo que se requiere del Pacto; y esto se encuentra dentro de la jurisdicción de la Corte. Lo que la Corte, en palabras del XXXIV del Pacto, "que se declarare incompetente" no puede hacer es revisar la controversia nuevamente, como si estuviese ya resuelta por un tratado en vigor. Es entonces claro que el objeto final y completo del Tratado Esguerra-Bárcenas y su Protocolo de 1930 fue resolver la disputa. Esto deviene no solo de la historia y del mismo texto del Tratado y el Protocolo, sino también de la aprobación de los congresos de ambos países"

Consideramos que es claro que, en efecto, la Corte Internacional de Justicia no puede fungir como una suerte de nueva instancia para cuestiones ya resueltas por otros órganos judiciales internacionales, sea que se trate de sentencias o laudos arbitrales, o para asuntos ya resueltos por acuerdos entre Estados.

En consecuencia, sigue naturalmente un paso que identifica adecuadamente la Corte al reconocer que, si el Tratado de 1928 y su Protocolo resolvieron la totalidad de la cuestión planteada por Nicaragua, correspondía que se declarase incompetente para conocer la causa. Por lo tanto, la Corte pasa a desglosar las posturas de Colombia y Nicaragua sobre los alcances del Tratado y el Acta de Canje y halla que hay puntos sobre los que los Estados no se encuentran de acuerdo. En efecto, examina la primera excepción preliminar planteada por Colombia a la luz de los diferentes elementos de la controversia, a fin de determinar si la calificación de "asuntos ya resueltos" prevista en el artículo VI del Pacto alcanza a todos los extremos de la demanda planteada por Nicaragua.

Estas cuestiones pueden dividirse en dos grupos: por un lado, están los asuntos correspondientes con el reconocimiento de soberanía. Es decir, responder cuál de los Estados parte de la presente controversia ostenta la soberanía sobre las islas de Providencia, San Andrés y Santa Catalina, así como todas las islas y cayos que formen parte de estas islas; y sobre los cayos de Roncador, Serrana, Serranilla, Bajo Nuevo, Quitasueño, Alburquerque, y Cayos del Este - Sudeste. Esto es, qué Estado es soberano sobre el Archipiélago de San Andrés.

Por otro lado, la cuestión de la delimitación de la frontera marítima solicitada por Nicaragua. Esto equivale a determinar si el Tratado Esguerra-Bárcenas ostenta el carácter de tratado de límites marítimos entre Nicaragua y Colombia.

Para el análisis del primero de estos grupos, nos valdremos del orden utilizado por la Corte durante su Fallo sobre las Excepciones Preliminares:

a) En relación con la cuestión de la soberanía sobre las islas específicamente nombradas en el Tratado Esguerra-Bárcenas (parágrafos 86-90)

Sobre este punto en particular, la Corte decidió que podía dar por zanjada la cuestión de las tres islas mencionadas por nombre en el Tratado de 1928: San Andrés, Santa Catalina y Providencia. Estableció que se desprende del texto del

artículo I del Tratado que la soberanía de dichas islas corresponde a Colombia y que la cuestión ha sido zanjada en los términos del Artículo VI del Pacto de Bogotá. En consecuencia, no podía pronunciarse sobre la soberanía de estas tres islas.

En efecto, consideramos que sobre este punto el texto del Tratado no deja lugar a dudas razonables: la Corte no puede ejercer competencia sobre este punto en los términos del artículo VI del Pacto de Bogotá.

b) En relación con la cuestión de la extensión y composición del Archipiélago de San Andrés (parágrafos 91-97)

La Corte halla aquí discrepancias entre las posturas de Colombia y Nicaragua. Nota que la primera, además de las tres islas mencionadas expresamente, afirma que el Archipiélago de San Andrés incluye los cayos de Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Albuquerque y el grupo de Cayos del Este-Sudeste, y otras formaciones geográficas adyacentes. Por su parte, Nicaragua aduce que el Tratado de 1928 y su Acta de Canje solo estipulan la extensión del Archipiélago hacia el occidente, sin establecer su composición u otros límites. Dada esta discrepancia, la Corte considera que una interpretación según los términos corrientes del Tratado de 1928 no proporciona respuesta a qué formaciones insulares, además de las tres islas sobre las que ha quedado establecida la soberanía colombiana, conforman el Archipiélago de San Andrés. En consecuencia, el asunto no ha sido resuelto en el sentido del Artículo VI del Pacto de Bogotá y la Corte puede pronunciarse al respecto.

c) En relación con la cuestión de la soberanía sobre los cayos de Roncador, Quitasueño y Serrana (parágrafos 98-104)

Tras recordar que la razón que estipula el Tratado de 1928 para excluir a estos cayos fue que se encontraban en litigio entre Colombia y Estados Unidos. Acordada esta afirmación, alegó Colombia, Nicaragua reconoció que los únicos con pretensión de soberanía sobre estos cayos al momento de firmar el Tratado de 1928 fueron, precisamente, Colombia y Estados Unidos. Asimismo, la Corte

se remite al Tratado Vásquez-Saccio de 1972 en el que Colombia afirma que quedó como legítimo soberano sobre los cayos mencionados. De otro lado, Nicaragua afirmó que no se podía desprender del texto del Tratado de 1928 que los cayos formasen parte del Archipiélago de San Andrés por razones históricas (no se entendían como parte del Archipiélago en los años veinte) y geográficas (los cayos se encuentran alejados de las islas principales). La Corte se basa, empero, directamente en los términos del Tratado de 1928: dado que el Tratado no se aplica a los cayos Roncador, Quitasueño y Serrana, posee competencia conforme al Artículo XXXI del Pacto de Bogotá.

Establecidas estas diferenciaciones, corresponde analizar el segundo grupo de cuestiones sobre las que no están de acuerdo Nicaragua y Colombia respecto a los alcances del Tratado de 1928 y su Acta de Canje. Es decir, si estos resuelven la cuestión de la delimitación de la frontera marítima entre Nicaragua y Colombia (parágrafos 105-120)

La postura de Nicaragua puede resumirse del siguiente modo: debe entenderse el meridiano 82 como una "line for purposes of attribution of tittle to islands". (Gobierno de Nicaragua, 2004, p. 65) Es decir, una línea de demarcación de una formación geográfica. Sigue lógicamente que Nicaragua rechaza que el meridiano 82 constituya ninguna forma de límite marítimo con Colombia y, por lo tanto, la cuestión de la delimitación marítima no ha sido resuelta en el sentido del artículo VI del Pacto de Bogotá, con lo que la Corte tendría competencia para pronunciarse al respecto. Somos del parecer, respecto a esta argumentación de Nicaragua, que el objetivo de este planteamiento fue que la excepción colombiana fuera entendida por la Corte como una cuestión de fondo.

La Corte comulga con lo planteado por Nicaragua respecto a la interpretación de los términos del Acta de Canje de 1930[4] y retorna al uso de la interpretación según el significado corriente de los términos empleados en el Tratado y el Acta. Concluye que estos no pueden ser entendidos con la intención de fijar una

[4] En el cual se lee: "Los infrascritos [Colombia y Nicaragua] declaran: que el Archipiélago de San Andrés y Providencia, que se menciona en la cláusula primera del tratado referido, no se extiende al occidente del meridiano 82 de Greenwich."

delimitación marítima entre las Partes y que solo representan un entendimiento sobre los límites específicos de una formación geográfica (el Archipiélago de San Andrés).

En efecto, podemos referirnos al título en que convienen las Partes para pactar el Tratado de 1928: “Tratado que pone término a la cuestión pendiente entre ambas Repúblicas sobre el Archipiélago de San Andrés Lago y Providencia, y la Mosquitia nicaragüense”. De estos términos podemos concluir que la intención de las Partes era resolver la cuestión de las islas y zonas geográficas indicadas, mas no establecer una frontera.

Bajo el razonamiento al que ya nos hemos referido, la Corte determina que la cuestión de la delimitación marítima solicitada por Colombia no se ajusta a lo previsto por el Artículo VI del Pacto de Bogotá, en tanto no puede entenderse que las partes hayan acordado una frontera marítima en el sentido planteado por Nicaragua en su demanda, por lo que se declara competente sobre esta materia bajo el Artículo XXXI del Pacto.

En síntesis, la Corte se declara competente para pronunciarse sobre determinados extremos de la controversia planteada Nicaragua. A saber: la atribución de soberanía de los cayos Roncador, Quitasueño y Serrana; y, con el objeto central de determinar el curso de la frontera marítima única entre Nicaragua y Colombia, determinar los límites y dimensiones del Archipiélago de San Andrés.

4.1.3. ¿Cuáles son las normas de Derecho Internacional aplicables a fin de resolver la controversia?

Esta es en realidad una de las escasas materias sobre las que sí existe consenso ente Nicaragua y Colombia; sin embargo, lo presentamos aquí como uno de nuestros problemas secundarios por la importancia de tener claras las normas que son aplicables para dar solución a la controversia planteada por Nicaragua.

En ese sentido, sobre este problema, es necesario tener presente que Colombia no es un Estado parte de la Convención de las Naciones Unidas sobre el Derecho del Mar (en adelante, la CONVEMAR).

Ante este hecho, aunque Nicaragua sí es un Estado parte de la CONVEMAR, la Corte establece acertadamente que es el Derecho Internacional Consuetudinario general el derecho aplicable para realizar la delimitación fronteriza que solicita Nicaragua.

Asimismo, reconoce que algunos de los artículos de la CONVEMAR reflejan la costumbre internacional en lo tocante a cuestiones como la plataforma continental (artículo 76) y la delimitación de sus dimensiones (artículo 83), así como lo relativo a la zona económica exclusiva (artículo 74). Como se recordará, estos son los términos en los que Nicaragua plantea el extremo de la controversia referido a la delimitación marítima única.

Al respecto, no podemos dejar de mencionar que en el Derecho Internacional es perfectamente plausible que una misma norma se encuentre en diferentes fuentes y que su fuerza normativa en un mismo caso pueda ser en virtud de una u otra de estas fuentes. Así, por ejemplo, si una obligación se encuentra contenida tanto en una fuente convencional como en la costumbre internacional, la obligación se hallaría incólume si desapareciese la fuente convencional, pues subsistiría en la costumbre.

Finalmente, será relevante también lo recogido en la CONVEMAR respecto al régimen legal de las islas (artículo 121), el cual tanto la Corte como las Partes reconocen como indivisible en su aplicación. En tanto sea conveniente, reproduciremos algunos de estos artículos en las secciones pertinentes.

4.1.4. ¿Cuál es el procedimiento idóneo para delimitar la frontera marítima entre Nicaragua y Colombia?

El problema del presente acápite es también uno sobre el que las partes de la controversia presentaron propuestas dispares. Recordemos que Nicaragua solicitó a la Corte la delimitación de la frontera marítima entre ella y Colombia; no obstante, reconoció desde un inicio un desafío: Colombia, aunque no era parte de la CONVEMAR, sí lo era de la Convención sobre Plataforma Continental de las Naciones Unidas de 1958. Nicaragua presentaba el caso opuesto: ella no había ratificado la Convención sobre la Plataforma Continental; no obstante, como ya hemos señalado, sí era parte de la CONVEMAR. Debe saberse también que estos instrumentos convencionales no pueden interpretarse análogamente, por lo que Nicaragua recurrió a "los principios generales de la delimitación marítima" para sustentar su solicitud a la Corte. Esto es, propuso la utilización de otra de las fuentes del Derecho Internacional que, junto con la costumbre internacional, obligaban por igual a ambas Partes.

En contraposición a lo señalado por la demandante, Colombia sostuvo que la Corte debía emplear su metodología "clásica" en casos de delimitación marítima, la misma de la que ya se había servido en casos previos[5], aunque reconoce que no es una metodología exacta en el sentido de que se ve relativizada por el contexto geográfico de cada caso.

El fallo sobre el fondo de la Corte, en sus parágrafos 190 a 199, realiza un breve recuento sobre en qué consiste la metodología de las tres etapas. En primer lugar, se realiza una delimitación provisional entre los territorios de las partes, donde se tiene en consideración también los territorios insulares. Esto es particularmente relevante en la presente controversia, pues parte de los territorios relevantes son, precisamente, islas. La delimitación provisional consiste en marcar una línea media entre las costas relevantes de las partes, es decir, una línea equidistante entre las costas de las partes que se encuentran más próximas entre sí. Esta delimitación, claro está, no es definitiva.

[5] El método en cuestión puede apreciarse también en la jurisprudencia de la Corte Internacional de Justicia. Por ejemplo, en los casos de la Plataforma Continental (Jamahiriya Árabe Libia contra Malta), cuyo fallo es del 3 de junio de 1985; o, más recientemente, en el Caso relativo a la delimitación marítima en el Mar Negro (Rumania contra Ucrania), cuyo fallo corresponde al 3 febrero de 2009.

En una segunda etapa, la Corte debe pasar a revisar si existen circunstancias lo suficientemente pertinentes como para que impliquen el ajuste o modificación de la línea equidistante planteada en la primera etapa. Este ajuste toma en consideración dichas circunstancias y mueve la línea en consecuencia. Es importante resaltar también la posibilidad del empleo de otras técnicas de delimitación que se pueden producir en esta etapa como, por ejemplo, el uso de la figura de los enclaves.

Finalmente, en una tercera etapa, se aplica un test en el que se comprueba si existe proporcionalidad en el resultado al que se ha llegado en la segunda etapa, aunque el enfoque se centra en realidad en verificar si existe una desproporcionalidad tal que pueda llevar a un resultado injusto, entendido este como una incoherencia en la relación de las longitudes de las costas pertinentes y el área marítima que finalmente le corresponderá a cada Estado.

No podemos dejar de mencionar, sin embargo, los argumentos que aportó Nicaragua desde una visión más *geográfica* de la controversia. Con ese fin podemos servirnos del mapa correspondiente al Anexo 1 para ilustrar dos puntos.

En primer lugar, el Archipiélago de San Andrés se encuentra geográficamente mucho más próximo a las costas de Nicaragua que a las de Colombia. De hecho, si se trazase una proyección de 200 millas partiendo de las costas nicaragüenses, las zonas marítimas cubiertas por aquel gráfico cubrirían el Archipiélago, lo sobrepasarían y continuarían hacia el este. Esta diferencia en la cercanía del Archipiélago fue resaltada también por Nicaragua.

Tal es la importancia que le otorgó a esta proximidad Nicaragua que planteó como posibilidad el extender los límites de su plataforma continental por encima de las 200 millas náuticas contadas desde las líneas de base de su mar territorial. La Corte determinó, en los parágrafos 126-127 de su fallo sobre el fondo que esta pretensión debía realizarse conforme al artículo 76 de la CONVEMAR. Este artículo dispone en su numeral 8 que tal pretensión deberá ser revisada por la Comisión de Límites de la Plataforma Continental, pues una delimitación de este

tipo podría, eventualmente, dificultar las comunicaciones internacionales y el uso pacífico de los mares, que es precisamente lo que pretende prevenir la CONVEMAR. Nicaragua no ha presentado mayor información a ser revisada por la Comisión.

En la misma línea, la Corte se remite a la *Controversia Territorial y Marítima entre Nicaragua y Honduras (Nicaragua contra Honduras)* del año 2007, donde aplica un criterio similar. Es de notar que el presente es un estándar que se aplicaría únicamente para Nicaragua, en tanto Colombia no es parte de la CONVEMAR, por lo que, de tener una pretensión similar, esta no se vería obstaculizada, en principio, por los requisitos de la Convención. Sobre este punto en particular regresaremos más adelante.

En segundo lugar, la demandante señaló que la metodología de las tres etapas no era la adecuada para realizar la delimitación entre las fronteras marítimas, pues identifica que las costas relevantes colombianas las componen las islas del Archipiélago de San Andrés sobre las que la Corte les ha otorgado soberanía durante su fallo sobre las excepciones preliminares; es decir, las islas de San Andrés, Providencia y Santa Catalina. Sin adelantar el ejercicio que supone la respuesta del problema principal, debemos aquí reconocer que las formaciones insulares del Archipiélago son reducidas en tamaño en comparación con las costas de Nicaragua, lo que podría llevar a una desproporción de la línea media desde la primera etapa de la metodología previamente expuesta.

La Corte se decanta finalmente por la metodología de las tres etapas que ya había utilizado recientemente, sin embargo, atiende la preocupación nicaragüense sobre la elección de las costas pertinentes. En efecto, las costas occidentales de las tres islas principales se encuentran, con cálculos conservadores, a una distancia que no es menor a sesenta y cinco millas náuticas de la costa de Nicaragua. Por lo tanto, podemos afirmar que la Corte detectó desde un inicio la potencial superposición del territorio sobre el que las Partes reclamaron soberanía.

Como vemos, la elección del método para la delimitación de la frontera solicitada por Nicaragua no estuvo exenta de polémica y, aunque el equipo legal de la demandante criticó en gran medida la idoneidad de la metodología de las tres etapas para resolver el caso, el profesor y jurista nicaragüense Mauricio Herdocia, en retrospectiva, calificó la línea de delimitación establecida por la Corte como precisa y certera, en buena medida en virtud del uso de una "metodología transparente e impecable, para un resultado exacto". (2013, p. 4)

4.2. Problema principal

Hasta el momento, el análisis de los problemas secundarios nos ha dejado el siguiente estado de la controversia:

a) El Tratado de 1928 fue válido y estuvo en vigor, cuando menos, hasta la materialización de la controversia jurídica del presente caso.
b) El Tratado de 1928 solo resuelve la cuestión de la atribución de soberanía de las islas principales del Archipiélago de San Andrés; es decir, San Andrés, Providencia y Santa Catalina, por lo que la Corte tiene competencia para pronunciarse respecto a las demás formaciones que componen el Archipiélago de San Andrés y sobre la delimitación marítima.
c) Las normas jurídicas relevantes en el caso son las de fuente convencional que obligan a las Partes y la costumbre internacional.
d) La metodología de las tres etapas es la que se usará para resolver la cuestión de la delimitación marítima.

Solo queremos destacar una última cuestión previa antes de la aplicación de la metodología de las tres etapas elegida por la Corte Internacional de Justicia para la delimitación marítima. Como ya habíamos adelantado en el acápite sobre los alcances del Tratado de 1928, quedó pendiente para la Corte establecer la composición del Archipiélago de San Andrés y a quién le corresponde la soberanía sobre sus formaciones geográficas. Una vez aclarado este punto, consideramos que se contará con todos los datos necesarios para aplicar la metodología elegida por la Corte. A dicha información se avoca la siguiente sección.

4.2.1. Soberanía sobre los accidentes geográficos del Archipiélago de San Andrés

Para establecer a cuál de las Partes, si a alguna de ellas, le corresponde la soberanía sobre las formaciones geográficas del Archipiélago de San Andrés distintas a las tres islas principales, debemos recordar necesariamente el contenido del Tratado de 1928. Tras verificar que el Tratado no fija composición alguna del Archipiélago, se debe revisar una vez más el Acta de Canje de Ratificaciones de 1930, el cual fijó el límite oeste del Archipiélago en el meridiano 82° de Greenwich, pero tampoco se refiere a su composición.

Si ni el Tratado ni el Acta arrojan luz sobre este dato de vital importancia, la Corte debió sopesar, como en efecto lo hizo, evidencias de otras fuentes para la atribución de soberanía. Nicaragua sostuvo en su oportunidad que solo algunos de los cayos próximos a las islas principales pueden considerarse parte del Archipiélago; a saber: Alburquerque y los cayos del Este-Sudeste. Por su parte, Providencia, Serrana, Serranilla, Bajo Nuevo y Quitasueño se encuentran a distancias que oscilan entre las 40 y 205 millas náuticas de las islas principales, por lo que no pueden ser consideradas una unidad geográfica en conjunto con las islas mencionadas en el Tratado de 1928.

Asimismo, Nicaragua argumentó que la exclusión del artículo I del Tratado de 1928 de Roncador, Quitasueño y Serrana debía ser interpretada en el sentido de que aquellas formaciones no pudieran ser consideradas como parte del Archipiélago. Para todos los efectos, Nicaragua sostuvo que el Archipiélago de San Andrés estaba compuesto únicamente por las islas San Andrés, Providencia y Santa Catalina.

A su turno, Colombia argumentó que desde inicios del siglo XX mantiene registros en los que se considera a los diversos cayos como parte del Archipiélago de San Andrés, además de las islas principales. Es de notar que los documentos no coinciden siempre entre sí, pero Colombia expresó que no era necesario en el contexto de todos los documentos realizar una lista detallada de

las formaciones que conforman el Archipiélago. Nos permitimos apuntar aquí que esta afirmación es cuestionable, sobre todo cuando varios de estos documentos presentados por Colombia eran mapas, en los que, en principio, deberían aparecer todas las formaciones conocidas en el momento de su elaboración.

De otro lado, Colombia rebatió la tesis nicaragüense de la interpretación de la exclusión de Roncador, Quitasueño y Serrana de los alcances del Tratado de 1928. Para la demandada, la aceptación de dicha exclusión es prueba de la aceptación de Nicaragua de que las formaciones forman parte del Archipiélago. Finalmente, Colombia apuntó que, en virtud del Acta de Canje, el meridiano 82° fue acordado por las Partes como un límite de reclamación de soberanía: Nicaragua no puede reclamar territorio al oriente del meridiano, mientras que Colombia está impedida de hacer lo propio al poniente de aquel.

Las tesis de las partes ofrecen evidencia, en general, circunstancial. La nicaragüense está basada en una interpretación actual de la intención convencional de hace muchas décadas, mientras que la colombiana prueba únicamente lo que ella entendió por los términos del Tratado de 1928 y su Acta de Canje. La Corte, reconociendo que las pruebas ofrecidas por las Partes eran insuficientes para llegar a una conclusión sustentada, revisó si podía valerse del principio de *uti possidetis iuris* para afirmar la soberanía de alguna de las Partes sobre los territorios en disputa. Recordemos que este principio se formó consuetudinariamente en el caso americano tras las sucesivas independencias de las colonias españolas y se puede traducir como "quien tuvo la posesión *de facto* puede poseer luego *de iure.*" (Ramos, 2012, pp. 148-149) Ahora bien, es de notar que esta posesión no requiere ser necesariamente efectiva para generar derecho, sino que se traduce como el derecho a poseer en base a un título válido, esto es, al reconocimiento de las tierras como antaño parte de la Corona española, de la cual Nicaragua se independizó.

En concordancia con lo señalado, en los parágrafos 58 a 65 de su fallo sobre el fondo de la controversia, la Corte realiza una recolección de los argumentos presentados por las Partes para reclamar su soberanía sobre las islas en base

a documentos coloniales. Mientras que Nicaragua se refirió a la Cédula Real del 28 de junio de 1568, en la que se establecen los límites de la Audiencia de Guatemala, los que incluyen a las islas cercanas a su costa, como, según Nicaragua, incluían al Archipiélago de San Andrés.

En contraposición, Colombia se refirió a la Real Orden de 1803, mediante la cual el Archipiélago de San Andrés pasó a formar parte de la jurisdicción del Virreinato de Nueva Granada hasta su independencia. No obstante, la Corte determinó que estas reclamaciones no eran suficientes para formar una conclusión jurídicamente sólida, pues en ninguno de los documentos se precisaba la composición del Archipiélago.

Esta decisión fue análoga a la tomada por la Corte en el caso del diferendo territorial y marítimo en el Mar Caribe (Nicaragua contra Honduras). En dicho asunto, la Corte admitió también que no era posible llegar a una conclusión con la sola aplicación del *uti possidetis.*

Existe sin embargo la herramienta de la “effectivités” en el Derecho Internacional para poder establecer la soberanía cuando esta se encuentra en disputa. Kelsen (1945, p. 121) se refiere a ella como una forma de determinar si algún Estado se ha comportado como un poseedor legítimo de un territorio mediante hechos jurídicamente válidos. Es decir, si algún Estado se ha comportado legítimamente a título de soberano.

Ahora bien, sucedió aquí una particularidad: como hemos sugerido, ni Nicaragua ni Colombia ostentaba un título jurídico en estricto que le reconociese la soberanía sobre estas otras formaciones geográficas. En efecto, hemos visto que no logra este cometido el Tratado de 1928, su Protocolo, o títulos coloniales españoles que se puedan traducir en el uso del *uti possidetis.* En consecuencia, la Corte se vio obligada a dirimir exclusivamente en base al principio de efectividad para adjudicar soberanía.

Este principio puede ser utilizado con diferentes objetivos. En primer lugar, puede confirmar un título jurídico preexistente en caso los hechos se colijan con el

derecho; esto sucede cuando se observa una administración efectiva sobre un territorio obtenido mediante la aplicación del *uti possidetis*. Una segunda posibilidad es que el resultado sea sustitutorio si es que no preexiste título alguno. Finalmente, puede ser aplicado con intenciones interpretativas o integradoras en caso exista un título que no genere resultados claros. (Del Toro, 2005, p. 589)

Dicho ello, la teoría de la aplicación del método no es compleja: en primer término, se establece una fecha crítica o de inicio del conflicto entre las Partes y, posteriormente, se toma en consideración los actos de soberanía tanto anteriores como posteriores a tal fecha.

Para estos efectos, es necesario establecer con precisión lo que es conocido como una fecha crítica, que no es más que aquel momento en el que queda clara la existencia objetiva de un desacuerdo, el cual puede ser sobre cuestiones de hecho o de derecho, pero debe versar sobre una diferencia de fondo y no solo de procedimiento (Méndez, 2019, p. 20)

La importancia de esta fecha radica en la necesidad de separar el valor probatorio del comportamiento de los Estados: si se han comportado a título de soberanos después de la fecha crítica, es posible que solo lo hayan hecho con motivo de probar su tesis en un proceso jurídico, mas no como poseedores de buena fe. Por otro lado, son sumamente reveladores los actos realizados con antelación a la fecha crítica, pues se puede presumir que los Estados actúan “naturalmente”; es decir, sin el conocimiento de una potencial controversia o la necesidad de probar nada a ningún órgano jurisdiccional u otro Estado.

En este punto, consideramos importante aclarar que cuando nos referimos a la fecha crítica en la presente sección, aludimos a la fecha en que se constata la diferencia de posturas entre Nicaragua y Colombia sobre sus límites territoriales. Esta fecha no debe ser confundida con la del cuestionamiento de la validez del Tratado Esguerra-Bárcenas y sus implicancias en el establecimiento del Pacto de Bogotá como base normativa de la competencia de la Corte.

Dicho ello, en la presente controversia, fue la tesis presentada por Nicaragua la que convenció a la Corte. En efecto, como hemos apuntado en la sección referida a los hechos relevantes del caso, fue el 12 de junio de 1969 en el que Nicaragua responde a una reclamación de Colombia en la que esta declara el meridiano 82 *como frontera* entre ellas. Esto se produjo a raíz de una concesión de exploración petrolera en Quitasueño que autorizara Nicaragua.

Establecida la fecha crítica, la Corte repasa una relativamente extensa lista de categorías que demuestran la *effectivités* colombiana sobre las islas del Archipiélago de San Andrés: desde proyectos y servicios públicos, legislación y operaciones navales hasta representación consular. La conclusión de la Corte, es, finalmente, que Colombia actuó legítimamente a título de soberano sobre las formaciones geográficas materia de controversia. Dado que estos actos de demostración de soberanía fueron públicos y no existen pruebas de protesta por parte de Nicaragua previas a la fecha crítica, la Corte afirma que Colombia es legítima soberana sobre las islas con las que se comportó como soberana; es decir, Alburquerque y Bajo Nuevo, así como los Cayos del Este-Sudeste, Quitasueño, Roncador, Serrana y Serranilla.

Ahora bien, si Colombia ha sido reconocida como soberana de estas formaciones geográficas, cabe preguntarse, naturalmente, qué derechos generan y cuál es su relevancia a fin de realizar la delimitación de la frontera marítima.

En el caso de las tres islas más importantes del Archipiélago, nos podemos remitir al artículo 121 de la CONVEMAR: tanto San Andrés como Providencia y Santa Catalina generan tanto mar territorial como zonas económicas exclusivas y plataformas continentales.

Respecto a Roncador, Serrana, y los cayos Alburquerque y Este-Sudeste, la Corte considera que cada una de estas formaciones genera, cuando menos, derecho a mar territorial. No obstante, es importante notar que su ubicación es tal que se encuentran dentro de las 200 millas náuticas que generan alguna de las islas principales del Archipiélago. En consecuencia, sería inocuo ahondar

más en los derechos que generan, pues quedan englobadas dentro de la titularidad de las plataformas continentales y zonas económicas exclusivas de San Andrés, Providencia o Santa Catalina.

Finalmente, respecto a Quitasueño, los alegatos de las Partes requirieron un apartado singular. Lo primero que hay que comprender respecto a este cayo es que una de sus formaciones encaja en la definición de isla recogida por la CONVEMAR de la costumbre internacional. Se trata de una roca cuya denominación, otorgada por geógrafos colombianos, fue "QS 32". En efecto, QS 32 es una extensión de tierra que, incluso en pleamar, se encuentra por sobre el nivel del mar. No obstante, la calidad de isla no alcanza a ninguna otra de las 53 formaciones adicionales que alrededor de Quitasueño, las cuales solo son visibles en bajamar y quedan ocultas al subir la marea.

Aquí la Corte identifica correctamente que QS 32, por ser una isla, tiene derecho a un mar territorial (12 millas náuticas). El término isla, empero, no debe ser identificado con el de la aptitud para albergar vida humana o sostener una economía propia. En efecto, el tercer numeral del artículo 121 de la CONVEMAR dicta que estas islas no podrán generar zonas económicas exclusivas ni plataformas continentales.

Asimismo, afirma la Corte que Colombia tiene derecho a que se aplique la norma contenida en el artículo 13 de la CONVEMAR, a la cual le reconoce también el recojo de una norma internacional consuetudinaria.[6] Este artículo establece, en su primer literal, que las líneas de bajamar de elevaciones que quedan ocultas en pleamar pueden ser utilizadas como línea de base para medir la anchura del mar territorial.

Así, el derecho a mar territorial (y su anchura) que genera Quitasueño se midió teniendo en consideración las decenas de elevaciones visibles en bajamar dentro de las 12 millas náuticas reconocidas a QS 32. La consecuencia jurídica

[6] Este reconocimiento no es novedoso en la jurisprudencia de la Corte Internacional de Justicia: puede consultarse el caso de la Delimitación Marítima y Cuestiones Territoriales entre Qatar y Bahrein (Qatar contra Bahrein), Sentencia sobre el fondo, 2001, p. 100.

de este tipo de reconocimiento de derechos es que la Corte podrá dilucidar mejor los límites, valga la redundancia, con los que puede realizar la delimitación.

4.2.2. La metodología de las tres etapas

Establecida la soberanía Colombia sobre las formaciones geográficas marítimas que componen el Archipiélago de San Andrés, la Corte pasa finalmente al ejercicio de la demarcación del límite marítimo entre Nicaragua y Colombia. No es nuestra intención presentar aquí un análisis riguroso de las técnicas de geografía aplicada a las que recurre la Corte; sin embargo, sí expondremos el seguimiento de la metodología de las tres etapas que describimos líneas arriba.

(i) Determinación de los puntos de base y la construcción de la línea media provisional

Según corresponde a la primera etapa de la metodología seleccionada por la Corte, se trazó una línea equidistante entre las costas de Nicaragua y las costas occidentales de las islas del Archipiélago de San Andrés, es decir, las islas colombianas.

Para ello, por Nicaragua, se fijaron los puntos de base en Arrecife Edinburgh, Cayo Muerto, Cayos Miskitos, Cayo Ned Thomas, Roca Tyra, Isla del Maíz Pequeña e Isla de Maíz Grande. Por su parte, para Colombia, se fijaron los puntos de las islas principales del Archipiélago: San Andrés, Santa Catalina y Providencia, así como en los Cayos Alburquerque.

Es de notar que Quitasueño no fue considerada para el trazo de la línea media, pues su tamaño es sumamente reducido y empujaría la línea media hacia las costas nicaragüenses de forma excesiva, por su posición al oeste. Como ya hemos expuesto líneas arriba, Quitasueño cuenta accidentes que la Corte ya ha identificado como pertinentes para determinar la anchura del mar territorial que le corresponde a dicho cayo. Esta situación, que es similar a aquella en la que se encuentra Serrana, son bastante reveladores de la solución que planteará la Corte respecto a ambos cayos: los enclaves.

(ii) Consideración de las circunstancias relevantes y ajuste de la línea provisional

La misma Corte ha mencionado antes, en el caso concerniente al Límite territorial y marítimo entre Camerún y Nigeria (Cameún contra Nigeria: Guinea ecuatorial interviniente), que las circunstancias relevantes son aquellas “that might make it necessary to adjust this equidistance line in order to achieve an equitable result”. (I.C.J. Reports, 2002, p. 244) En ese sentido, la Corte procede a listar una serie de circunstancias que considera que pueden afectar la línea provisional que ha trazado inicialmente y, posteriormente, realiza los ajustes necesarios.

La Corte identifica seis categorías de circunstancias relevantes:

a) **Disparidad en la longitud de las costas pertinentes:** la Corte considera que se encuentra ante una disparidad importante entre las costas pertinentes de Colombia y Nicaragua, pues estas se encuentran en una relación de 1 a 8,2 en longitud a favor de Nicaragua. El desplazamiento de la línea provisional dejó esta proporción en factores de 3 a 4.4 en favor de Nicaragua.
b) **Contexto geográfico general:** aquí la Corte hace hincapié sobre el hecho de que la línea provisional cercena casi tres cuartas partes de la proyección de la costa nicaragüense, por lo que realiza un ajuste adicional.
c) **Comportamiento de las partes:** esta circunstancia, afirma la Corte, no supone por sí misma un desplazamiento de la línea.
d) **Consideraciones de seguridad y mantenimiento del orden:** la Corte escucha el argumento de Colombia sobre su rol en la prevención del tráfico ilícito de drogas en el Caribe; afirma que lo tendrá en consideración.
e) **Acceso equitativo a los recursos naturales:** la Corte sostiene que ninguna de las Partes demostró que el acceso a los recursos naturales sea una circunstancia que requiera el ajuste de la línea provisional.
f) **Delimitaciones ya efectuadas en la zona:** en este punto la Corte recuerda el artículo 34 de la Convención de Viena de 1969 sobre el Derecho de los Tratados, pues recoge la norma consuetudinaria que establece que los tratados entre dos Estados no pueden afectar los derechos de terceros Estados. En ese sentido, la Corte adelantó que no se iba a pronunciar sobre

las fronteras que las Partes ya tenían establecidas en otros instrumentos convencionales con Costa Rica, Jamaica y Panamá.

Un ejemplo de la aplicación de esta norma fueron los casos de Serranilla y Bajo Nuevo. Además de la distancia que las separa de las islas principales, la Corte identificó que eran parte de una zona común entre Colombia y Jamaica, por lo que no podía afectar los derechos de ésta última. A este respecto, puede revisarse el Tratado sobre delimitación marítima entre la República de Colombia y Jamaica, el cual, en su artículo 3, establece un área de administración conjunta que incluye a estos cayos.

***(iii)* Test de desproporcionalidad**

El trazo de la frontera marítima se finiquitó tras el desplazamiento de la línea equidistante según las circunstancias mencionadas previamente. Por supuesto, dada la alta cantidad de formaciones insulares, la línea presentaba diversos "picos" o sobresalientes hacia uno u otro lado de la frontera, por lo que la Corte procedió a simplificar la línea mediante la conexión de líneas geodésicas.

La Corte recordó, sin embargo, que Quitasueño y Serrana, por su posición hacia el poniente, quedan en territorio nicaragüense, por lo que afirma que la figura de enclaves es la idónea para solucionar esta situación. Se aprecia aquí la intención de no caer en la desproporcionalidad, pues es una solución media a la alternativa propuesta por Nicaragua en su momento (parágrafo 230 del Fallo sobre el fondo). En efecto, Nicaragua buscó que cada una de las islas y cayos fueran confinados como enclaves y no se tomaran en cuenta como accidentes agrupados. Empero, incluso si se le asignase un mar territorial de 12 millas a cada uno de los potenciales enclaves, esto generaría un alto índice de desorden en dichas aguas en lo que respecta a administración, manejo de recursos y fiscalización como la que ya realiza Colombia.

En ese sentido, confirma que Quitasueño y Serrana, ahora enclaves, tienen derecho a un mar territorial no menor a las 12 millas náuticas, tal y como se desprende del artículo 121 de la CONVEMAR, el cual, recordemos, ha sido

identificado como costumbre internacional. Consideramos que es una solución adecuada, pues según las mediciones de la Corte estas formaciones no cumplen con los requisitos para ser consideradas habitables, por lo que no hay necesidad de añadirlas al cálculo de los derechos que generan una zona económica exclusiva.

Con este resultado, la Corte concluye que ha llegado a una delimitación que no supone desproporción o un resultado injusto entre las Partes de la controversia. Cabe recordar aquí que el objetivo de la Corte con este último paso no es lograr una proporcionalidad en sentido estricto, mucho menos una equidad matemática. El test de desproporcionalidad solo busca que no exista esta característica de forma marcada.

Se le reconoció a Colombia tres grupos de zonas marítimas en el área en litigio. Por un lado, el conjunto formado por las islas principales del Archipiélago y, por otro lado, los formados por los enclaves de Quitasueño y Serrana. A Nicaragua, por su parte, se le reasignaron alrededor de 75,000 kilómetros cuadrados de espacio marítimo que Colombia consideraba como suya. El resultado final puede apreciarse en gráfico del Anexo 2.

V. POSICIÓN INDIVIDUAL SOBRE LOS FALLOS

Si bien ya hemos realizado algunos comentarios a lo largo del análisis de los problemas respecto a las posturas adoptadas por las Partes y la Corte, se expondrán, en el presente capítulo, nuestras principales críticas a las decisiones y argumentación empleadas en los fallos que componen el caso.

5.1. Sobre el Tratado Esguerra-Bárcenas y su Acta de Canje

En primer lugar, consideramos que la cuestión de la validez del Tratado de 1928 y del Acta de 1930 no poseían, en estricto, un carácter preliminar. La relevancia de la interpretación de estos documentos para la resolución del fondo del asunto era tal que el fallar respecto a ellos durante la etapa de excepciones preliminares

limitó considerablemente la argumentación que podrían haber presentado las Partes sobre este punto. Es decir, las Partes se vieron privadas de la oportunidad de reunir mayor material probatorio para sustentar sus respectivas posturas sobre uno de los ejes centrales de la controversia.

En esa misma línea, dado que Nicaragua funda su pretensión precisamente en la invalidez del Tratado de 1928, la Corte no podría haber analizado la supuesta coerción por parte de Estados Unidos sin pasar a tocar el fondo de la controversia.

En efecto, concordamos con Nieto (2009, p. 33), cuando sostiene que la decisión de la Corte de clasificar la cuestión de la Costa de la Mosquitia y el Archipiélago de San Andrés como una disputa totalmente ajena a una delimitación marítima general es un pronunciamiento *ultra vires*. Este es una cuestión interpretativa que está directamente relacionada con la solicitud de Nicaragua de demarcar una frontera marítima. Lo que está realizando la Corte en este punto es prejuzgar un punto clave en la tarea de fondo de la controversia.

En efecto, la Corte concluye durante la fase de excepciones preliminares que las tres islas (San Andrés, Providencia y Santa Catalina), pertenecen a Colombia en virtud del Tratado Esguerra-Bárcenas. Esta es, a nuestro parecer, una decisión de fondo por dos razones.

De un lado, por orden procedimental. Es sabido que, al resolver las excepciones preliminares, le está permitido a la Corte tocar algunos puntos referentes a las cuestiones de fondo si es necesario. No obstante, la necesidad de tal recurso debe ser balanceada con el principio de que la integridad del fondo debe ser preservada para la fase correspondiente del proceso. Esta separación entre excepciones preliminares y fondo se funda en la búsqueda de una justa y apropiada administración de justicia, por lo que debió otorgársele mayor consideración.

De otro lado, porque el cuestionamiento de la validez del Tratado y el Acta conformaron parte central de la demanda de Nicaragua. En efecto, este es uno

de los tres puntos que hemos expuesto como parte del *corpus* principal de la solicitud nicaragüense. El hecho de que Colombia haya interpuesto una excepción preliminar al respecto no faculta automáticamente a la Corte a pronunciarse al respecto y su Reglamento prevé una alternativa en el numeral 7 de su artículo 79. En esa línea, la Corte puede, tras oír a las partes de la controversia decidir que la excepción no tiene un carácter exclusivamente preliminar.

No podemos negar aquí que la Corte, para determinar si tenía competencia conforme al Pacto de Bogotá y decidir los límites de la materia sobre la que se podía pronunciar, debía revisar la cuestión de la validez del Tratado. Esto, por supuesto, se debe a que el Artículo VI del Pacto proscribe la competencia de la Corte en los casos en que la controversia haya sido resuelta por acuerdos en vigor a la fecha de celebración del Pacto.

De este modo, observamos que decidir si la controversia había sido resuelta requería examinar el Tratado, pero el pronunciarse sobre este y las consecuencias jurídicas de su validez tuvo el efecto de prejuzgar dos terceras partes de la controversia planteada por Nicaragua; en concreto, la atribución de soberanía sobre San Andrés, Providencia y Santa Catalina, y la declaración de nulidad del Tratado de 1928.

Sabemos, además, que la atribución de soberanía que realiza la Corte sobre las islas principales juega un rol central en el ejercicio de la delimitación marítima que compone el problema central de la controversia. En esta misma línea, podemos cuestionar la postura de la Corte al determinar que el Tratado de 1928 no constituye de ninguna manera un tratado de límites marítimos, pues es también un ejercicio de interpretación ligado con el fondo del asunto.

Concordamos entonces con el juez Ranjeva (2007), cuando señala que el análisis realizado por la Corte en su fallo sobre las excepciones preliminares no refleja con precisión la estructura de la demanda presentada por Nicaragua y no toma en consideración los lazos entre sus solicitudes.

Por lo expuesto, sostenemos que el examen de la validez del Tratado de 1928 y sus consecuencias en el marco de la demanda interpuesta por Nicaragua no suponía un carácter estrictamente preliminar. Esta posibilidad no es nueva y fue recurrida por la Corte en *Barcelona Traction, Light and Power Company, Ltd. (Bélgica contra España),* precisamente en el fallo sobre las excepciones preliminares.

En dicha sentencia, la Corte halla que una de las excepciones interpuestas a su competencia se encuentra tan relacionada con el fondo, o con cuestiones de hecho o derecho ligadas al fondo, que no puede ser considerada de forma separada sin entrar a este. El artículo 79.3 del Reglamento de la Corte impide, sin embargo, que continúe el procedimiento sobre el fondo durante la fase de excepciones preliminares. Así, la Corte debió replantear los límites de aquello sobre lo que se podía pronunciar en las excepciones preliminares o determinar que las cuestiones aquí expuestas pertenecían a la etapa de fondo.

5.2. Sobre el fundamento de la competencia de la Corte

Debemos recordar que, ciertamente, lo previsto en el Pacto de Bogotá y las declaraciones facultativas realizadas según la cláusula facultativa del Estatuto de la Corte suponen bases diferentes para su competencia. Bajo lo previsto en el Pacto, la Corte tenía jurisdicción para pronunciarse respecto a cuestiones diferentes a los asuntos resueltos por el Tratado de 1928, esto es, la atribución de la soberanía de las islas específicamente mencionadas en el Tratado.

Consideramos que fue acertada la división de las cuestiones referidas a la atribución de soberanía. En efecto, la cantidad de formaciones geográficas cuya soberanía se encontraba controvertida debía ser contrastada con las normas convencionales que la Corte había declarado como válidas y aplicables. Nos referimos, por supuesto, al Tratado de 1928 y su Protocolo.

Por lo demás, es claro que la Corte no puede reabrir controversias ya resueltas por las partes, lo cual es aplicación directa de lo previsto por el Pacto de Bogotá.

Es, entonces, bastante cuestionable que la Corte le dedique posteriormente espacio en su fallo a determinar que los títulos de competencia del Pacto y la cláusula facultativa no son mutuamente excluyentes, cuando la cuestión había quedado ya sellada.

5.3. Sobre el derecho aplicable

Respecto a este punto, concordamos con las consideraciones planteadas por la Corte en tanto es conocido que la relación entre tratados (como la CONVEMAR) y la costumbre internacional es sumamente estrecha. En efecto, los tratados internacional multilaterales pueden, y efecto suelen, recoger normas que son de Derecho Internacional Consuetudinario con diferentes efectos.

Así, es reconocido que uno de los logros más importantes de la III Convención sobre el Derecho del Mar es la recopilación que realiza de la costumbre internacional sobre este régimen normativo. En efecto, esta fue una labor a través de la cual se logró unificar una gran variedad de normas por medio del diálogo de una nada despreciable cifra de Estados para el momento en que fue redactada. (Cadena, 2013, p. 66)

Así, debemos mantener presente que la Convención recogió prácticas y términos sumamente relevantes para el presente caso y que son de alcance general en el Derecho Internacional.

Dicho ello, no podemos pasar por alto el hecho de que la Corte se halla referido al artículo 76 de la CONVEMAR para desestimar la pretensión Nicaragua de una posible plataforma continental más allá de las 200 millas náuticas. Dado que en el presente caso las normas aplicables son las consuetudinarias, este estándar podría sentar un precedente preocupante para otros Estados parte de la CONVEMAR que planteen una pretensión similar, pues se encontrarían sujetos a los requisitos exigidos por la Convención, cuando sus contrapartes podrían no estarlo.

En nuestra opinión, la Corte pudo haber hallado otros argumentos para desestimar el planteamiento nicaragüense sin menoscabar el régimen de derecho consuetudinario que demandaba la decisión. Este tipo de estándares disparejos podría resultar en la pérdida de los saludables niveles de coherencia que se requiere en este tipo de controversias interestatales. En caso más graves, este tipo de decisiones podría contribuir a la proliferación de la fragmentación del Derecho Internacional, pues parte de la paz de la comunidad internacional depende de la confianza que genera la certidumbre de la aplicación uniforme de los sistemas normativos por parte de los tribunales internacionales. (Rodiles, 2009, p. 391)

5.4. Sobre la metodología elegida por la Corte

Respecto a la elección de la metodología de las tres etapas, argumentamos que la Corte debió analizar previamente el contexto geográfico de la zona marítima pertinente a fin de elegir un método que se ajustase a las características propias del territorio controvertido. Esto pues la equidad que se logre con el resultado de la delimitación debe ser un principio que guíe el procedimiento y no simplemente un factor del método elegido. En otras palabras, debe ser la justicia del resultado lo que justifique la elección del método.

En ese sentido, Cárdenas y Herrera (2013, p. 249) han criticado ya la rapidez con la que la Corte desestimó el uso del *uti possidetis iuris* y ha pasado a asignarle valor a los comportamientos de las partes, que pueden estar basados en concepciones erróneas. Así, un mayor análisis pudo haber revelado que Nicaragua sí tenía soberanía sobre alguna de las formaciones geográficas distintas a las islas principales del Archipiélago de San Andrés, pero que Colombia se había comportado como soberana sin tener conocimiento de estos datos.

Es cierto que la utilización de la metodología de las tres etapas era previsible según la línea jurisprudencial de la Corte; sin embargo, es cuestionable que el criterio de la justicia sirva para basar decisiones que mezclen decisiones de

hecho y de derecho indistintamente, como si no se tratasen de categorías relacionadas, pero diferentes.

En ese sentido, el profesor Cruz Martínez (2014, p. 121) ha señalado que “pareciera que la CIJ hubiese fijado primero el resultado y posteriormente acomodado los medios a estos fines”. Consideramos que esta es una clara alusión al hecho de que sería más coherente que la Corte primero evaluase las pruebas ofrecidas por las partes para sustentar sus planteamientos y luego asignarles un valor en base a las circunstancias pertinentes dentro de un orden coherente.

5.5. Sobre la delimitación de la frontera marítima

En general, concordamos con la delimitación final a la que ha arribado la Corte. Si bien es cierto hemos cuestionado la forma en la que se ha elegido la metodología con la que se tomó la decisión, no podemos dejar de subrayar la labor hermenéutica de la Corte para conjugar distintas técnicas de delimitación marítima dentro de una misma metodología.

Colombia se encuentra en la obligación de cumplir con lo decidido por la Corte desde el momento en que finalizó su lectura oficial. Esto se encuentra previsto en el artículo 94 del Reglamento de la Corte. Es importante establecer también que las sentencias de la CIJ no son apelables, por lo que la decisión no es reversible o modificable. Sin embargo, aún le queda a las Partes el recurso de la Interpretación.

De otro lado, es también importante mencionar que la rebeldía ante las sentencias de la Corte podría afectar seriamente la paz y seguridad internacional de la comunidad interamericana. Lo mismo sucede en el caso nicaragüense, quien tendrá que respetar la soberanía de Colombia sobre las islas del Archipiélago de San Andrés.

Las relaciones de amistad y cooperación en la región son importantes: el cumplimiento cabal de las sentencias es la mejor herramienta para prevenir controversias futuras.

VI. CONCLUSIONES Y RECOMENDACIONES

- El Tratado Esguerra-Bárcenas y su Acta de Canje se encontraban en vigor a la fecha de celebración del Pacto de Bogotá. Al no presentar Nicaragua ninguna reserva respecto al Tratado cuando ratificó el Pacto, aceptó su validez mediante aquiescencia. No obstante, el Tratado resolvió únicamente la cuestión de la soberanía sobre las islas de San Andrés, Providencia y Santa Catalina; en consecuencia, la Corte no podría pronunciarse posteriormente sobre estas formaciones geográficas. El Tratado, contrastado con la demanda, dejó la controversia dividida en un problema de atribución de soberanía sobre las demás formaciones que componían el Archipiélago de San Andrés; y un problema de delimitación de fronteras marítimas.

  La Corte resolvió la cuestión de atribución de soberanía de las islas principales del Archipiélago de San Andrés en la etapa de excepciones preliminares del proceso. Aunque es debatible si contaba en ese momento con la información suficiente para fallar en ese sentido, lo cierto es que el ejercicio correspondía, por su naturaleza, a la etapa de fondo del proceso, por ser una cuestión indesligable de la demarcación marítima solicitada por Nicaragua.

- El Pacto de Bogotá fue acertadamente identificado como la base normativa de competencia de la Corte Internacional de Justicia en la presente controversia. Su adecuada aplicación implicó la división de la materia sobre la que se pudo pronunciar la Corte. La división de la controversia no fue algo solamente permitido, sino necesario para cubrir cabalmente todos los aspectos sobre los que debía pronunciarse la Corte.

  De otro lado, puede resultar confuso, por su carácter innecesario, que la Corte se siga pronunciando sobre otros títulos de competencia cuando ha establecido ya la base concreta de la que se valdrá en un caso determinado.

- El Derecho Internacional consuetudinario es una fuente absolutamente vigente, necesaria y efectiva para resolver controversias jurídicas en la

actualidad. Las fuentes convencionales y la costumbre internacional son complementarias y pueden ser aplicadas de ese modo por órganos jurisdiccionales.

Debe mantenerse presente que la aplicación complementaria de normas que provienen de distintas fuentes requiere de un ejercicio de sistematización por parte de los aplicadores del Derecho. No pueden aplicarse dos fuentes distintas en una misma decisión si esto lleva a consecuencias incoherentes, como la exigencia de estándares distintos para las Partes de una misma controversia.

- La elección de una metodología para resolver diferendos marítimos debe estar guiada por la búsqueda de una solución justa, no al revés: la búsqueda de la justicia mediante la preselección de una metodología. El método a emplear debe adecuarse a las circunstancias pertinentes de cada caso, las cuales deben revisarse antes del ejercicio de la delimitación. En la presente controversia, el resultado al que lleva la metodología de las tres etapas es jurídicamente sólido; sin embargo, como ya se sabe en la actualidad, su implementación puede generar problemas.

- El cumplimiento del fallo sobre el fondo de la Corte Internacional de Justicia en la presente controversia es el resultado de la adecuada utilización de la metodología de las tres etapas. La labor hermenéutica realizada por la Corte deja la posibilidad abierta para casos futuros de la factibilidad de revisar una multiplicidad de posibilidades al momento de realizar una delimitación marítima. Es innegable, sin emargo, que la determinación sobre la *equidad de la decisión*, como la gran mayoría de decisiones en el Derecho, depende de la perspectiva.

  Es innegable que las decisiones de la Corte Internacional de Justicia son finales e inapelables, por lo que la frontera marítima entre Nicaragua y Colombia en el mar Caribe ha quedado oficialmente demarcada de forma definitiva. Ambos Estados deben respetar el fallo de la Corte y ajustar sus

actividades a lo decidido; de lo contrario, se arriesgan a incurrir en responsabilidad internacional.

REFERENCIAS BIBLIOGRÁFICAS

1. Doctrina

Arrighi, J. (2007). Aspectos teóricos de las relaciones entre el Derecho Internacional y los derechos internos. Publicaciones digitales del XXIV Curso de Derecho Internacional de la OEA. Actualización del Curso de 1997. http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXIV_curso_derecho_internacional_1997_Jean_Michel_Arrighi.pdf

Cadena, W. (2013). La Convención del Mar y el conflicto Nicaragua – Colombia sobre el Archipiélago de San Andrés. En *Revista Republicana, Número 15, Julio-Diciembre de 2013, pp. 61-90.* *http://ojs.urepublicana.edu.co/index.php/revistarepublicana/article/view/24*

Caicedo, J. (2003). ¿Debe Colombia presentar excepciones preliminares en el asunto sobre el Diferendo territorial y marítimo (Nicaragua C. Colombia)? En *Internacional Law – Revista colombiana de Derecho Internacional, vol. 1, Número 1.* https://revistas.javeriana.edu.co/index.php/internationallaw/article/view/14170

Cárdenas F. y Herrera, V. (2013). Una dosis de subjetividad para nada sorpresiva o innovadora: la equidad y el caso Nicaragua vs. Colombia ante la CIJ. En *International Law: Revista colombiana de Derecho Internacional, N° 22, pp. 243-251, enero-junio de 2013. https://www.redalyc.org/articulo.oa?id=82429191009*

Cruz, A. (2014). La labor hermenéutica de la Corte Internacional de Justicia en el fallo del diferendo territorial y marítimo entre Nicaragua y Colombia. En *Estudios Internacionales 178 (2014), pp. 111-131. Instituto de Estudios Internacionales, Universidad de Chile.*

Del Toro, M. (2005). El tema de las efectividades en el Caso concerniente a la soberanía sobre Pulau Ligitan y Pulau Sipadan entre Indonesia y Malasia. En *Anuario Mexicano de Derecho Internacional, número 5*. *Universidad Nacional Autónoma de México.*

Georges, A. (1967). Les exceptions préliminaires dans la procédure de la Cour Internationale de Justica. Ediciones A. Pedone.

Herdocia, M. (2013). La hora de la justicia internacional: radiografía franca de un fallo y una mirada hacia los retos del futuro (el caso Colombia-Nicaragua). En *Agenda Internacional, Año XX, N° 31, 2013, pp. 169-189.* Pontificia Universidad Católica del Perú. https://revistas.pucp.edu.pe/index.php/agendainternacional/article/view/7733

Kelsen, H. (1945). General Theory of Law and State. Harvard University Press.

Méndez, E. (2019). Las controversias internacionales en la jurisprudencia reciente de la Corte Internacional de Justicia. En F. Novak (Coord.), *Cambios y transformaciones en el Derecho Internacional en el siglo XXI. Estudios en homenaje a la Facultad de Derecho PUCP en su centenario (pp.13.37) Pontificia Universidad Católica del Perú.*

Nieto, R. (2009). La decisión de la Corte Internacional de Justicia sobre las excepciones preliminares en el caso de Nicaragua v. Colombia. En *ACDI, Bogotá, Vol. 2, pp. 7-46.* https://revistas.urosario.edu.co/index.php/acdi/article/view/1099

Ramírez, A. (2009). La decisión de la Corte Internacional de Justicia sobre las excepciones preliminares propuestas por Colombia en el caso Nicaragua contra Colombia. En *Memorias del foro internacional Fronteras del Caribe: la disputa Colombo- Nicaragüense por San Andrés, Providencia y Santa Catalina.* Universidad del Rosario https://revistas.urosario.edu.co/index.php/acdi/article/view/1099

Ramos, J. (2012). El “Uti Possidetis”. Un principio Americano y no Europeo. En *Revista Misión Jurídica, vol. 5 – número 5 / Julio – Diciembre de 2012, pp. 145-163. https://www.revistamisionjuridica.com/wp-content/uploads/2020/09/El-Uti-Possidetis-Un-principio-Americano-y-no-Europeo.pdf*

Rivera, P. (2006). Colombia y Nicaragua. Diferencias jurídicas: posiciones enfrentadas en relación con la disputa sobre el Archipiélago de San Andrés y Providencia [Tesis de pregrado, Pontificia Universidad Javeriana]

Rodiles, A. (2009) La fragmentación del Derecho Internacional ¿Riesgos u oportunidades para México? En *Anuario Mexicano de Derecho Internacional, Vol. IX (pp. 373-413). Universidad Nacional Autónoma de México.*

Uribe, D. (1981). Libro Blanco de la República de Colombia, 1980: pretendida denuncia del Tratado Esguerra-Bárcenas por Nicaragua. Bogotá: Imprenta Nacional. https://www.diegouribevargas.com/wp-content/uploads/2020/04/Libro-Blanco-de-la-Rep%C3%BAblica-de-Colombia.pdf

Zamora, A. (1994). El litigio territorial Colombia-Nicaragua. En *Envío Digital: Información sobre Nicaragua y Centroamérica, Número 154.* Universidad Centroamericana – UCA. Revista Envío - El litigio territorial Colombia-Nicaragua (envio.org.ni)

2. Jurisprudencia y documentos legales

Al-Khasawne, A. (2007). Dissenting Opinion of Vice-President Al-Khasawne. En el Fallo sobre Excepciones Preliminares, Controversia Territorial y Marítima (Nicaragua contra Colombia, Corte Internacional de Justicia. Disponible en: https://www.icj-cij.org/sites/default/files/case-related/124/124-20071213-JUD-01-01-EN.pdf

Fallo sobre el Case concerning The Barcelona Traction, Light and Power Company, Limited. (New Application: 1962) (Bélgica contra España). (24 de julio de 1964). Corte Internacional de Justicia. https://www.icj-cij.org/sites/default/files/case-related/50/050-19640724-JUD-01-00-EN.pdf

Fallo sobre el Límite territorial y marítimo entre Camerún y Nigeria (Cameún contra Nigeria: Guinea ecuatorial interviniente). Sentencia sobre el fondo. (2002, 10 de octubre). Corte Internacional de Justicia. https://www.icj-cij.org/sites/default/files/case-related/94/13803.pdf

Fallo sobre la Disputa territorial y marítima (Nicaragua contra Colombia), Excepciones Preliminares. (2007, 13 de diciembre). Corte Internacional de Justicia (Presidente de la Corte Juez P. Tomka) https://www.icj-cij.org/sites/default/files/case-related/124/124-20071213-JUD-01-00-EN.pdf

Fallo sobre la Disputa territorial y marítima (Nicaragua contra Colombia), Fallo sobre el fondo. (2012, 19 de noviembre). Corte Internacional de Justicia (Presidente de la Corte Juez P. Tomka) https://www.icj-cij.org/sites/default/files/case-related/124/124-20121119-JUD-01-00-EN.pdf

Fallo sobre el Caso relativo al Laudo Arbitral emitido por el Rey de España (Honduras contra Nicaragua), Fallo sobre el fondo. (1960, 18 de noviembre). Corte Internacional de Justicia. https://www.dipublico.org/cij/doc/36.pdf

Ministerio de Relaciones Exteriores de Colombia. (1980). Libro Blanco de la República de Colombia, 1980. Elaborado por Diego Uribe Vargas, Ministro de Relaciones Exteriores, Bogotá. Disponible en: https://www.diegouribevargas.com/wp-content/uploads/2020/04/Libro-Blanco-de-la-Rep%C3%BAblica-de-Colombia.pdf

Nicaragua. (2014). *Cronología del conflicto limítrofe entre la República de Nicaragua y la República de Colombia,* Asamblea Nacional de Nicaragua. Managua, Dirección de Relaciones Internacionales Parlamentarias. http://legislacion.asamblea.gob.ni/Internacionales.nsf/3c1dc02306ef1c66062576c60058ae43/a9b886cdb89941e506257abe00563635/$FILE/Consolidado%20Conflicto%20Limitrofe%20Nicaragua%20Colombia13112012.pdf

Ranjeva, R. (2007). Separate Opinion of Judge Ranjva. En el Fallo sobre Excepciones Preliminares, Controversia Territorial y Marítima (Nicaragua contra Colombia, Corte Internacional de Justicia. Disponible en: https://www.icj-cij.org/sites/default/files/case-related/124/124-20071213-JUD-01-01-EN.pdf

República de Colombia. (2008). *Counter-Memorial of the Republic of Colombia, Volume I*, 11 de noviembre de 2008. Repositorio de la Corte Internacional de Justicia. https://www.icj-cij.org/sites/default/files/case-related/124/16969.pdf

República de Colombia (2003). Preliminary objections of the Government of Colombia, Volume I. Repositorio de la Corte Internacional de Justicia. https://www.icj-cij.org/sites/default/files/case-related/124/13868.pdf

República de Nicaragua. (2001). *Application instituting proceedings*, 6 de diciembre de 2001. Repositorio de la Corte Internacional de Justicia. https://www.icj-cij.org/sites/default/files/case-related/124/7079.pdf

República de Nicaragua. (2003). *Memorial of the Government of Nicaragua, Volume I.* Repositorio de la Corte Internacional de Justicia. https://www.icj-cij.org/sites/default/files/case-related/124/13870.pdf

República de Nicaragua. (2004). Written statement of the Government of Nicaragua, 26 de enero de 2004. Repositorio de la Corte Internacional de Justicia. https://www.icj-cij.org/sites/default/files/case-related/124/13872.pdf

3. Normativa internacional

Convención de Viena sobre el Derecho de los Tratados, 23 de mayo de 1969. Disponible en: https://www.oas.org/xxxivga/spanish/reference_docs/convencion_viena.pdf

Estatuto de la Corte Internacional de Justicia (1945) Disponible en: https://www2.congreso.gob.pe/sicr/cendocbib/con_uibd.nsf/12A67E651A263B8A05257590006BDA99/$FILE/ESTAUtO-Corte_Haya.pdf

Reglamento de la Corte Internacional de Justicia, 14 de abril de 1978. Disponible en: https://www.icj-cij.org/sites/default/files/rules-of-court//rules-of-court-es.pdf

Tratado Americano de Soluciones Pacíficas de Controversias (Pacto de Bogotá), 30 de abril de 1948. Disponible en: https://www.oas.org/xxxvga/espanol/doc_referencia/Tratado_SolucionesPacificas.pdf

Tratado sobre cuestiones territoriales entre Colombia y Nicaragua, 24 de marzo de 1928; y su Acta de Canje, 05 de mayo de 1930. Disponibles en: https://www.sogeocol.edu.co/Ova/fronteras_evolucion/documentos/tratados/tratado_colombia_nicaragua.pdf

Tratado sobre delimitación marítima entre la República de Colombia y Jamaica, 12 de noviembre de 1993. Disponible en: https://sogeocol.edu.co/Ova/fronteras_colombia/documentos/tratados/tratado_colombia_jamaica.pdf

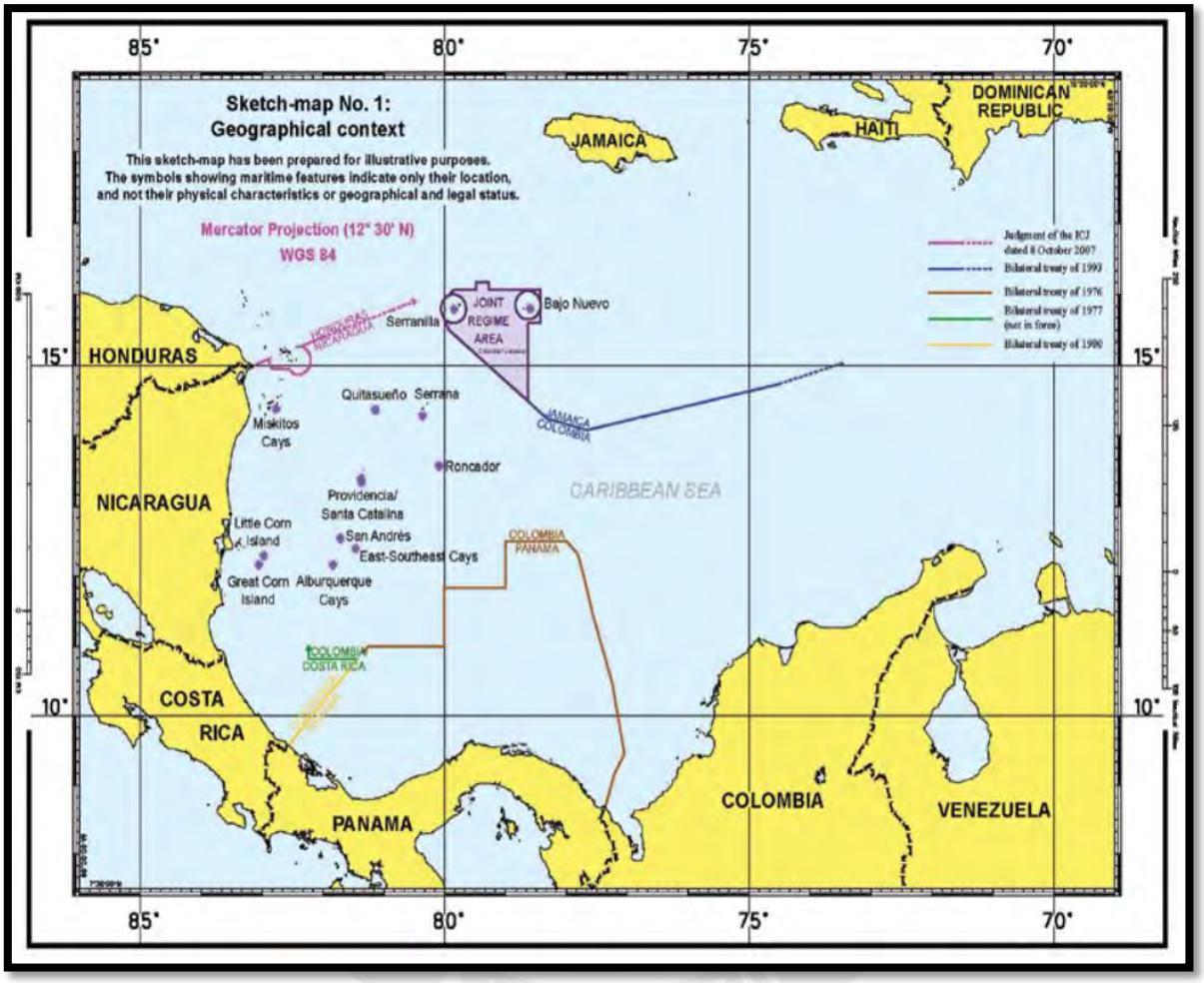
4. Normativa nacional

Constitución de Nicaragua de 1911. Disponible en: https://www.cervantesvirtual.com/obra-visor/nicaragua-9/html/02672b28-82b2-11df-acc7-002185ce6064_1.html

Junta de Reconstrucción Nacional. (1980). Libro Blanco: sobre el caso de San Andrés y Providencia. Managua, Ministerio de Relaciones Exteriores de Nicaragua, p. 3-4.

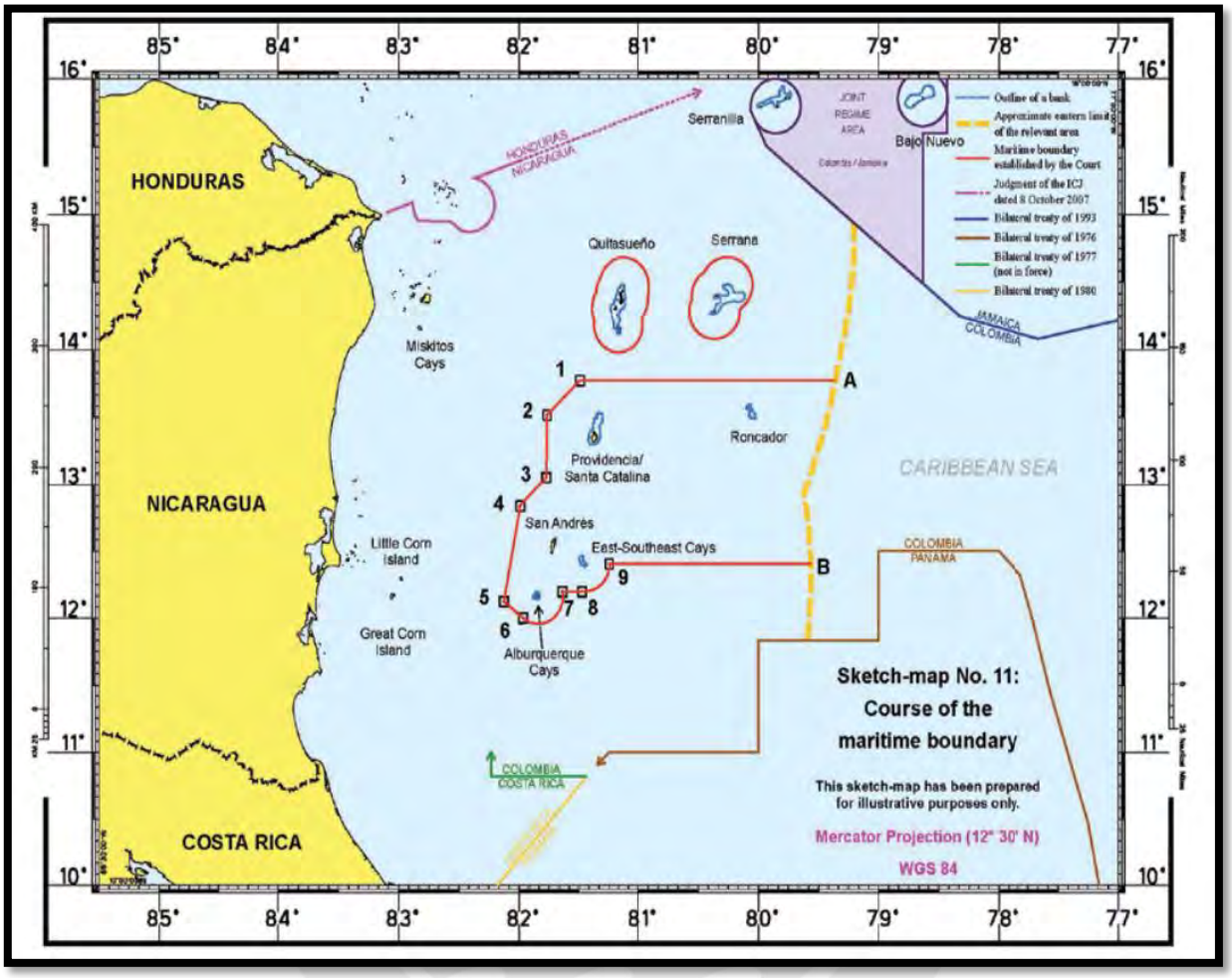
ANEXOS

- Anexo N° 1



Fuente: *Nicaragua contra Colombia, Sentencia sobre el fondo. Mapa esquemático N° 11. Curso de la frontera marítima. En Resúmenes de los fallos, opiniones consultivas y providencias de la Corte Internacional de Justicia 2008-2012, p. 366.*

- Anexo N° 2



Fuente: *Nicaragua contra Colombia, Sentencia sobre el fondo. Mapa esquemático N° 11. Curso de la frontera marítima. En Resúmenes de los fallos, opiniones consultivas y providencias de la Corte Internacional de Justicia 2008-2012, p. 376.*

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

TERRITORIAL AND MARITIME DISPUTE

(NICARAGUA *v.* COLOMBIA)

JUDGMENT OF 19 NOVEMBER 2012

2012

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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DIFFÉREND TERRITORIAL ET MARITIME

(NICARAGUA c. COLOMBIE)

ARRÊT DU 19 NOVEMBRE 2012

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TERRITORIAL AND MARITIME DISPUTE

(NICARAGUA *v.* COLOMBIA)

Geographical context — Location and characteristics of maritime features in dispute.

*

Sovereignty.

Whether maritime features in dispute are capable of appropriation — Islands — Low-tide elevations — Question of Quitasueño — Smith Report — Tidal models — QS 32 only feature above water at high tide.

1928 Treaty between Nicaragua and Colombia — 1930 Protocol — 2007 Judgment on the Preliminary Objections — Full composition of the Archipelago cannot be conclusively established on the basis of the 1928 Treaty.

Uti possidetis juris — *Maritime features not clearly attributed to the colonial provinces of Nicaragua and Colombia prior to their independence — Title by virtue of* uti possidetis juris *not established.*

Effectivités — *Critical date — No Nicaraguan* effectivités — *Different categories of* effectivités *presented by Colombia — Normal continuation of prior acts* à titre de souverain *after critical date — Continuous and consistent acts* à titre de souverain *by Colombia — No protest from Nicaragua prior to critical date — Colombia's claim of sovereignty strongly supported by facts.*

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Colombia has sovereignty over maritime features in dispute.

*

Admissibility of Nicaragua's claim for delimitation of a continental shelf extending beyond 200 nautical miles — New claim — Original claim concerned delimitation of the exclusive economic zone and of the continental shelf — New claim still concerns delimitation of the continental shelf and arises directly out of maritime delimitation dispute — No transformation of the subject-matter of the dispute — Claim is admissible.

*

Consideration of Nicaragua's claim for delimitation of an extended continental shelf — Colombia not a party to UNCLOS — Customary international law applicable — Definition of the continental shelf in Article 76, paragraph 1, of UNCLOS forms part of customary international law — No need to decide whether other provisions of Article 76 form part of customary international law — Claim for an extended continental shelf by a State party to UNCLOS must be in accordance with Article 76 — Nicaragua not relieved of its obligations under Article 76 — "Preliminary Information" submitted by Nicaragua to the Commission on the Limits of the Continental Shelf — Continental margin extending beyond 200 nautical miles not established — The Court not in a position to delimit the boundary between the extended continental shelf claimed by Nicaragua and the continental shelf of Colombia — Nicaragua's claim cannot be upheld.

*

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Entitlements generated by maritime features — San Andrés, Providencia and Santa Catalina entitled to territorial sea, exclusive economic zone and continental shelf — Serranilla and Bajo Nuevo are not relevant for delimitation — Roncador, Serrana, Alburquerque Cays and East-Southeast Cays generate territorial sea of 12 nautical miles — Colombia entitled to a territorial sea of 12 nautical miles around QS 32 — No need to determine whether maritime entitlements extend beyond 12 nautical miles.

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First stage — Construction of a provisional median line between Nicaraguan coast and western coasts of Colombian islands feasible and appropriate — Determination of base points — No base points on Quitasueño and Serrana — Course of provisional median line.

Second stage — Relevant circumstances requiring adjustment or shifting of the provisional line — Substantial disparity in lengths of relevant coasts is a relevant

circumstance — Overall geographical context — Geological and geomorphological considerations not relevant — Cut-off effect is a relevant circumstance — Conduct of the Parties not a relevant circumstance — Legitimate security concerns to be borne in mind — Issues of access to natural resources not a relevant circumstance — Delimitations already effected in the area not a relevant circumstance — Judgment is without prejudice to any claim of a third State.

Distinction between western and eastern parts of relevant area — Shifting eastwards of the provisional median line — Different weights accorded to Nicaraguan and Colombian base points — Curved shape of weighted line — Simplified weighted line — Course of the boundary eastwards from extreme northern and southern points of the simplified weighted line — Use of parallels — Quitasueño and Serrana enclaved — Maritime boundary around Quitasueño and Serrana.

Third stage — Disproportionality test — No need to achieve strict proportionality — No disproportionality such as to create an inequitable result.

*

Nicaragua's request for a declaration of Colombia's unlawful conduct — Maritime delimitation de novo *not granting to Nicaragua the entirety of the areas it claimed — Request unfounded.*

JUDGMENT

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.

In the case concerning the territorial and maritime dispute,

between

the Republic of Nicaragua,

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., former Chichele Professor of International Law, University of Oxford, associate member of the Institut de droit international,

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,

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Mr. Robin Cleverly, M.A., D.Phil, 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 Massachusetts,
Ms Carmen Martínez Capdevila, Doctor of Public International Law, Universidad Autónoma, Madrid,

as Counsel;

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, Washington D.C.,

as Assistant Counsel;

Ms Helena Patton, The United Kingdom Hydrographic Office,
Ms Fiona Bloor, The United Kingdom Hydrographic Office,

as Technical Assistants,

and

the Republic of Colombia,

represented by

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

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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,
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,

The COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 6 December 2001, the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") in respect of a dispute consisting of "a group of related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation" in the western Caribbean.

In its Application, Nicaragua seeks to found the jurisdiction of the Court on the provisions of Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof,

as the "Pact of Bogotá" (hereinafter referred to as such), as well as on the declarations made by the Parties under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed, for the period which they still have to run, to be acceptances of the compulsory jurisdiction of the present Court under Article 36, paragraph 5, of its Statute.

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Colombia; and, in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua first chose Mr. Mohammed Bedjaoui, who resigned on 2 May 2006, and then Mr. Giorgio Gaja. Following Mr. Gaja's election as a Member of the Court, Nicaragua chose Mr. Thomas Mensah. Judge Gaja then decided that it would not be appropriate for him to sit in the case. Colombia first chose Mr. Yves Fortier, who resigned on 7 September 2010, and subsequently Mr. Jean-Pierre Cot.

4. By an Order dated 26 February 2002, the Court fixed 28 April 2003 as the time-limit for the filing of the Memorial of Nicaragua and 28 June 2004 as the time-limit for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit so prescribed.

5. On 21 July 2003, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, as amended on 5 December 2000, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order dated 24 September 2003, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 26 January 2004 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections made by Colombia. Nicaragua filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

6. The Court held public hearings on the preliminary objections raised by Colombia from 4 to 8 June 2007. In its Judgment of 13 December 2007, the Court concluded that it had jurisdiction, under Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning sovereignty over the maritime features claimed by the Parties, other than the islands of San Andrés, Providencia and Santa Catalina, and upon the dispute concerning the maritime delimitation between the Parties (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 876, para. 142 (3)).

7. By an Order of 11 February 2008, the President of the Court fixed 11 November 2008 as the new time-limit for the filing of Colombia's Counter-Memorial. That pleading was duly filed within the time-limit thus prescribed.

8. By an Order of 18 December 2008, the Court directed Nicaragua to submit a Reply and Colombia to submit a Rejoinder and fixed 18 September 2009 and 18 June 2010 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits thus prescribed.

9. Referring to Article 53, paragraph 1, of the Rules of Court, the Governments of Honduras, Jamaica, Chile, Peru, Ecuador, Venezuela and Costa Rica

asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the Court decided to grant each of these requests. The Registrar duly communicated these decisions to the said Governments and to the Parties.

10. On 25 February 2010 and 10 June 2010, respectively, the Republic of Costa Rica and the Republic of Honduras each filed in the Registry of the Court an Application for permission to intervene in the case, invoking Article 62 of the Statute of the Court. In separate Judgments rendered on 4 May 2011, the Court found that those Applications could not be granted.

11. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided that, after ascertaining the views of the Parties, copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

12. Public hearings were held between 23 April and 4 May 2012, at which the Court heard the oral arguments and replies of:

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Alex Oude Elferink,
Mr. Antonio Remiro Brotóns,
Mr. Alain Pellet,
Mr. Robin Cleverly,
Mr. Vaughan Lowe,
Mr. Paul Reichler.

For Colombia: H.E. Mr. Julio Londoño Paredes,
Mr. James Crawford,
Mr. Marcelo Kohen,
Mr. Rodman R. Bundy.

13. The Parties provided judges' folders during the oral proceedings. The Court noted, with reference to Article 56, paragraph 4, of the Rules of Court, as supplemented by Practice Direction IX*bis*, that two documents included by Nicaragua in one of its judges' folders had not been annexed to the written pleadings and were not "part of a publication readily available". The Court thus decided not to allow those two documents to be produced or referred to during the hearings.

14. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Under Article 72 of the Rules of Court, each Party presented written observations on the written replies received from the other.

*

15. In its Application, the following requests were made by Nicaragua:

> "[T]he Court is asked to adjudge and declare:
>
> *First*, that the Republic of Nicaragua has sovereignty over the islands of Providencia, San Andrés and Santa Catalina and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla and Quitasueño keys (in so far as they are capable of appropriation);

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

Nicaragua also stated:

"Whilst the principal purpose of this Application is to obtain declarations concerning title and the determination of maritime boundaries, the Government of Nicaragua reserves the right to claim compensation for elements of unjust enrichment consequent upon Colombian possession of the Islands of San Andrés and Providencia as well as the keys and maritime spaces up to the 82 meridian, in the absence of lawful title. The Government of Nicaragua also reserves the right to claim compensation for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua.

The Government of Nicaragua, further, reserves the rights to supplement or to amend the present Application."

16. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

in the Memorial:

"Having regard to the legal considerations and evidence set forth in this Memorial: *May it please the Court to adjudge and declare that*:

(1) the Republic of Nicaragua has sovereignty over the islands of San Andrés, Providencia, and Santa Catalina and the appurtenant islets and cays;
(2) the Republic of Nicaragua has sovereignty over the following cays: the Cayos de Alburquerque; the Cayos del Este Sudeste; the Cay of Roncador; North Cay, Southwest Cay and any other cays on the bank of Serrana; East Cay, Beacon Cay and any other cays on the bank of Serranilla; and Low Cay and any other cays on the bank of Bajo Nuevo;
(3) if the Court were to find that there are features on the bank of Quitasueño that qualify as islands under international law, the Court is requested to find that sovereignty over such features rests with Nicaragua;
(4) the Barcenas-Esguerra Treaty signed in Managua on 24 March 1928 was not legally valid and, in particular, did not provide a legal basis for Colombian claims to San Andrés and Providencia;
(5) in case the Court were to find that the Barcenas-Esguerra Treaty had been validly concluded, then the breach of this Treaty by Colombia entitled Nicaragua to declare its termination;
(6) in case the Court were to find that the Barcenas-Esguerra Treaty had been validly concluded and were still in force, then to determine that this Treaty did not establish a delimitation of the maritime areas along the 82° meridian of longitude west;

(7) in case the Court finds that Colombia has sovereignty in respect of the islands of San Andrés and Providencia, these islands be enclaved and accorded a territorial sea entitlement of twelve miles, this being the appropriate equitable solution justified by the geographical and legal framework;

(8) the equitable solution for the cays, in case they were to be found to be Colombian, is to delimit a maritime boundary by drawing a 3 nautical mile enclave around them;

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

in the Reply:

"Having regard to the legal considerations and evidence set forth in this *Reply*:

I. *May it please the Court to adjudge and declare that:*

(1) The Republic of Nicaragua has sovereignty over all maritime features off her Caribbean coast not proven to be part of the 'San Andrés Archipelago' and in particular the following cays: the Cayos de Alburquerque; the Cayos del Este Sudeste; the Cay of Roncador; North Cay, Southwest Cay and any other cays on the bank of Serrana; East Cay, Beacon Cay and any other cays on the bank of Serranilla; and Low Cay and any other cays on the bank of Bajo Nuevo.

(2) If the Court were to find that there are features on the bank of Quitasueño that qualify as islands under international law, the Court is requested to find that sovereignty over such features rests with Nicaragua.

(3) The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary with the following co-ordinates:

Latitude north	Longitude west
1. 13° 33′ 18″ N	76° 30′ 53″ W;
2. 13° 31′ 12″ N	76° 33′ 47″ W;
3. 13° 08′ 33″ N	77° 00′ 33″ W;
4. 12° 49′ 52″ N	77° 13′ 14″ W;
5. 12° 30′ 36″ N	77° 19′ 49″ W;
6. 12° 11′ 00″ N	77° 25′ 14″ W;
7. 11° 43′ 38″ N	77° 30′ 33″ W;
8. 11° 38′ 40″ N	77° 32′ 19″ W;
9. 11° 34′ 05″ N	77° 35′ 55″ W.

(All co-ordinates are referred to WGS84.)

(4) The islands of San Andrés and Providencia (Santa Catalina) be enclaved and accorded a maritime entitlement of twelve nautical miles, this being the appropriate equitable solution justified by the geographical and legal framework.

(5) The equitable solution for any cay, that might be found to be Colombian, is to delimit a maritime boundary by drawing a 3-nautical-mile enclave around them.

II. Further, the Court is requested to *adjudge and declare that*:

— Colombia is not acting in accordance with her obligations under international law by stopping and otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82nd meridian;
— Colombia immediately cease all these activities which constitute violations of Nicaragua's rights;
— Colombia is under an obligation to make reparation for the damage and injuries caused to Nicaragua by the breaches of the obligations referred to above; and,
— The amount of this reparation shall be determined in a subsequent phase of these proceedings."

On behalf of the Government of Colombia,

in the Counter-Memorial:

"For the reasons set out in this Counter-Memorial, taking into account the Judgment on Preliminary Objections and rejecting any contrary submissions of Nicaragua, Colombia requests the Court to adjudge and declare:

(a) That Colombia has sovereignty over all the maritime features in dispute between the Parties: Alburquerque, East-Southeast, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo, and all their appurtenant features, which form part of the Archipelago of San Andrés;
(b) That the delimitation of the exclusive economic zone and the continental shelf between Nicaragua and Colombia is to be effected by a single maritime boundary, being the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the Parties is measured, as depicted on Figure 9.2 of this Counter-Memorial.

Colombia reserves the right to supplement or amend the present submissions."

in the Rejoinder:

"For the reasons set out in the Counter-Memorial and developed further in this Rejoinder, taking into account the Judgment on Preliminary Objections and rejecting any contrary submissions of Nicaragua, Colombia requests the Court to adjudge and declare:

(a) That Colombia has sovereignty over all the maritime features in dispute between the Parties: Alburquerque, East-Southeast, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo, and all their appurtenant features, which form part of the Archipelago of San Andrés;
(b) That the delimitation of the exclusive economic zone and the continental shelf between Nicaragua and Colombia is to be effected by a single maritime boundary, being the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the Parties is measured, as depicted on Fig-

ure 9.2 of the Counter-Memorial, and reproduced as Figure R-8.3 of this Rejoinder;

(c) That Nicaragua's request for a Declaration . . . is rejected.

Colombia reserves the right to supplement or amend the present submissions."

17. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

at the hearing of 1 May 2012:

"In accordance with Article 60 of the Rules of Court and having regard to the pleadings, written and oral, the Republic of Nicaragua,

I. May it please the Court to adjudge and declare that:

(1) The Republic of Nicaragua has sovereignty over all maritime features off her Caribbean coast not proven to be part of the 'San Andrés Archipelago' and in particular the following cays: the Cayos de Alburquerque; the Cayos del Este Sudeste; the Cay of Roncador; North Cay, Southwest Cay and any other cays on the bank of Serrana; East Cay, Beacon Cay and any other cays on the bank of Serranilla; and Low Cay and any other cays on the bank of Bajo Nuevo.

(2) If the Court were to find that there are features on the bank of Quitasueño that qualify as islands under international law, the Court is requested to find that sovereignty over such features rests with Nicaragua.

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

(4) The islands of San Andrés and Providencia and Santa Catalina be enclaved and accorded a maritime entitlement of 12 nautical miles, this being the appropriate equitable solution justified by the geographical and legal framework.

(5) The equitable solution for any cay, that might be found to be Colombian, is to delimit a maritime boundary by drawing a 3-nautical-mile enclave around them.

II. Further, the Court is requested to adjudge and declare that:

— Colombia is not acting in accordance with her obligations under international law by stopping and otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82nd meridian."

On behalf of the Government of Colombia,

at the hearing of 4 May 2012:

"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."

* * *

I. Geography

18. The area where the maritime features in dispute (listed in the Parties' submissions in paragraphs 16 and 17 above) are located and within which the delimitation sought is to be carried out lies in the Caribbean Sea. The Caribbean Sea is an arm of the Atlantic Ocean partially enclosed to the north and east by the islands of the West Indies, and bounded to the south and west by South and Central America.

19. Nicaragua is situated in the south-western part of the Caribbean Sea. To the north of Nicaragua lies Honduras and to the south lie Costa Rica and Panama. To the north-east, Nicaragua faces Jamaica and to the east, it faces the mainland coast of Colombia. Colombia is located to the south of the Caribbean Sea. In terms of its Caribbean front, it is bordered to the west by Panama and to the east by Venezuela. The islands of San Andrés, Providencia and Santa Catalina lie in the south-west of the Caribbean Sea, a little more than 100 nautical miles to the east of the Nicaraguan coast. (For the general geography of the area, see sketch-map No. 1, p. 639.)

20. In the western part of the Caribbean Sea there are numerous reefs, some of which reach above the water surface in the form of cays. Cays are small, low islands composed largely of sand derived from the physical breakdown of coral reefs by wave action and subsequent reworking by

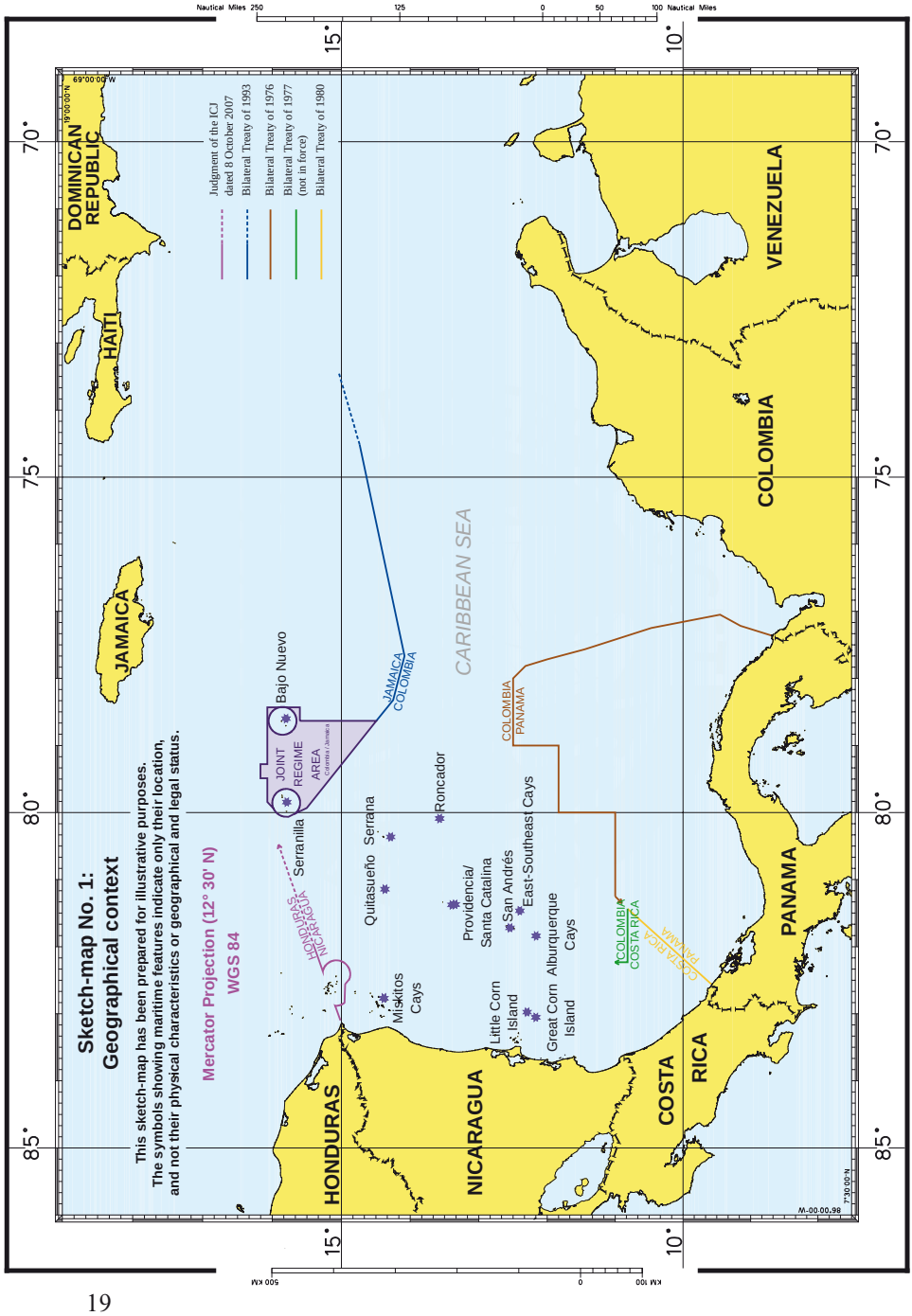
wind. Larger cays can accumulate enough sediment to allow for colonization and fixation by vegetation. Atolls and banks are also common in this area. An atoll is a coral reef enclosing a lagoon. A bank is a rocky or sandy submerged elevation of the sea floor with a summit less than 200 metres below the surface. Banks whose tops rise close enough to the sea surface (conventionally taken to be less than 10 metres below water level at low tide) are called shoals. Maritime features which qualify as islands or low-tide elevations may be located on a bank or shoal.

21. There are a number of Nicaraguan islands located off the mainland coast of Nicaragua. To the north can be found Edinburgh Reef, Muerto Cay, the Miskitos Cays and Ned Thomas Cay. The Miskitos Cays are largely given up to a nature reserve. The largest cay, Miskitos Cay, is approximately 12 square km in size. To the south are the two Corn Islands (sometimes known as the Mangle Islands), which are located approximately 26 nautical miles from the mainland coast and have an area, respectively, of 9.6 square km (Great Corn) and 3 square km (Little Corn). The Corn Islands have a population of approximately 7,400. Roughly midway between these two groups of islands can be found the small island of Roca Tyra.

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

San Andrés has an area of some 26 square km. Its central part is made up of a mountainous sector with a maximum height of 100 metres across the island from north to south, from where it splits into two branches. San Andrés has a population of over 70,000. Providencia is some 17.5 square km in area. It has varied vegetation. On the north, east and south coasts, Providencia is fringed by an extensive barrier reef. It has a permanent population of about 5,000. Santa Catalina is located north of Providencia. It is separated from Providencia by the Aury Channel, some 130 metres in width.

23. Nicaragua, in its Application, claimed sovereignty over the islands of San Andrés, Providencia and Santa Catalina. In its Judgment of 13 December 2007 (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 832), the Court held that it had no jurisdiction with regard to this claim, because the question of sovereignty over these three islands had been determined by the Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua, signed at Managua on 24 March 1928 (hereinafter the "1928 Treaty"), by which Nicaragua recognized Colombian sovereignty over these islands.


Sketch-map No. 1:
Geographical context
This sketch-map has been prepared for illustrative purposes.
The symbols showing maritime features indicate only their location,
and not their physical characteristics or geographical and legal status.
Mercator Projection (12° 30' N)
WGS 84
Judgment of the ICJ dated 8 October 2007
Bilateral Treaty of 1993
Bilateral Treaty of 1976
Bilateral Treaty of 1977 (not in force)
Bilateral Treaty of 1980
DOMINICAN REPUBLIC
HAITI
JAMAICA
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
VENEZUELA
CARIBBEAN SEA
JOINT REGIME AREA
Bajo Nuevo
Serranilla
Quitasueño
Serrana
Roncador
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Miskitos Cays
Little Corn Island
Great Corn Island
Alburquerque Cays
JAMAICA COLOMBIA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
HONDURAS NICARAGUA
Nautical Miles 250 125 0 50 100 Nautical Miles
KM 500 0 KM 100
69°00'00"W
19°00'00"N
7°30'00"N
M-00:00,98

24. Starting from the south-west of the Caribbean and moving to the north-east, there are various maritime features, sovereignty over which continues to be in dispute between the Parties.

(a) *Alburquerque Cays*[1]

Alburquerque is an atoll with a diameter of about 8 km. Two cays on Alburquerque, North Cay and South Cay, are separated by a shallow water channel, 386 metres wide. The Alburquerque Cays lie about 100 nautical miles to the east of the mainland of Nicaragua, 65 nautical miles to the east of the Corn Islands, 375 nautical miles from the mainland of Colombia, 20 nautical miles to the south of the island of San Andrés and 26 nautical miles to the south-west of the East-Southeast Cays.

(b) *East-Southeast Cays*

The East-Southeast Cays (East Cay, Bolivar Cay (also known as Middle Cay), West Cay and Arena Cay) are located on an atoll extending over some 13 km in a north-south direction. The East-Southeast Cays lie 120 nautical miles from the mainland of Nicaragua, 90 nautical miles from the Corn Islands, 360 nautical miles from the mainland of Colombia, 16 nautical miles south-east of the island of San Andrés and 26 nautical miles from Alburquerque Cays.

(c) *Roncador*

Roncador is an atoll located on a bank 15 km long and 7 km wide. It is about 190 nautical miles to the east of the mainland of Nicaragua, 320 nautical miles from the mainland of Colombia, 75 nautical miles east of the island of Providencia and 45 nautical miles from Serrana. Roncador Cay, located half a mile from the northern border of the bank, is some 550 metres long and 300 metres wide.

(d) *Serrana*

The bank of Serrana is located at 170 nautical miles from the mainland of Nicaragua and about 360 nautical miles from the mainland of Colombia; it lies approximately 45 nautical miles to the north of Roncador, 80 nautical miles from Providencia and 145 nautical miles from the Miskitos Cays. There are a number of cays on this bank. The largest one, Serrana Cay (also known as Southwest Cay), is some 1,000 metres in length and has an average width of 400 metres.

(e) *Quitasueño*

The Parties differ about the geographical characteristics of Quitasueño (a large bank approximately 57 km long and 20 km wide) which is located

[1] These cays are referred to either as "Alburquerque" or as "Albuquerque". For the purposes of the present case, the Court will use "Alburquerque".

45 nautical miles west of Serrana, 38 nautical miles from Santa Catalina, 90 nautical miles from the Miskitos Cays and 40 nautical miles from Providencia, on which are located a number of features the legal status of which is disputed.

(f) *Serranilla*

The bank of Serranilla lies 200 nautical miles from the mainland of Nicaragua, 190 nautical miles from the Miskitos Cays, 400 nautical miles from the mainland of Colombia, about 80 nautical miles to the north of the bank of Serrana, 69 nautical miles west of Bajo Nuevo, and 165 nautical miles from Providencia. The cays on Serranilla include East Cay, Middle Cay and Beacon Cay (also known as Serranilla Cay). The largest of them, Beacon Cay, is 650 metres long and some 300 metres wide.

(g) *Bajo Nuevo*

The bank of Bajo Nuevo is located 265 nautical miles from the mainland of Nicaragua, 245 nautical miles from the Miskitos Cays and about 360 nautical miles from the mainland of Colombia. It lies around 69 nautical miles east of Serranilla, 138 nautical miles from Serrana and 205 nautical miles from Providencia. There are three cays on Bajo Nuevo, the largest of which is Low Cay (300 metres long and 40 metres wide).

II. Sovereignty

1. Whether the Maritime Features in Dispute Are Capable of Appropriation

25. The Court recalls that the maritime features in dispute comprise the Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo. Before addressing the question of sovereignty, the Court must determine whether these maritime features in dispute are capable of appropriation.

26. It is well established in international law that islands, however small, are capable of appropriation (see, e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 102, para. 206). By contrast, low-tide elevations cannot be appropriated, although "a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself" (*ibid.*, p. 101, para. 204) and low-tide elevations within the territorial sea may be taken into account for the purpose of measuring the breadth of the territorial sea (see paragraph 182 below).

27. The Parties agree that Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo remain above water at high tide and thus, as islands, they are capable of appropriation. They disagree, however, as to whether any of the features on Quitasueño qualify as islands.

* *

28. According to Nicaragua, Quitasueño is a shoal, all of the features on which are permanently submerged at high tide. In support of its position, Nicaragua invokes a survey prepared in 1937 by an official of the Colombian Foreign Ministry which states that "[t]he Quitasueño Cay does not exist". Nicaragua also quotes another passage from the report, that "[t]here is no guano or eggs in Quitasueño because there is no firm land". Nicaragua also refers to the 1972 Vázquez-Saccio Treaty between Colombia and the United States whereby the United States relinquished "any and all claims of sovereignty over Quita Sueño, Roncador and Serrana". Nicaragua emphasizes that this treaty was accompanied by an exchange of diplomatic Notes wherein the United States expressed its position that Quitasueño "being permanently submerged at high tide, is not at the present time subject to the exercise of sovereignty". In addition, Nicaragua makes extensive reference to earlier surveys of Quitasueño and to various charts of that part of the Caribbean, none of which, according to Nicaragua, show the presence of any islands at Quitasueño.

29. For its part, Colombia, relying on two surveys, namely the Study on Quitasueño and Alburquerque prepared by the Colombian Navy in September 2008 and the Expert Report by Dr. Robert Smith, "Mapping the Islands of Quitasueño (Colombia) — Their Baselines, Territorial Sea, and Contiguous Zone" of February 2010 (hereinafter the "Smith Report"), argues that there are 34 individual features within Quitasueño which "qualify as islands because they are above water at high tide" and at least 20 low-tide elevations situated well within 12 nautical miles of one or more of those islands. The Smith report refers to these features as "QS 1" to "QS 54".

30. Nicaragua points out that both reports relied on by Colombia were prepared specially for the purposes of the present proceedings. Nicaragua contests the findings that there are 34 features that are "permanently above water" and objects to the method used by Dr. Smith in making these findings. Nicaragua considers that the global Grenoble Tide Model used by Dr. Smith is inappropriate for determining whether some of the features at Quitasueño are above water at Highest Astronomical Tide (HAT). According to Nicaragua, the global Grenoble Tide Model is used for research purposes for modelling ocean tides but, as stated by the United States National Aeronautics and Space Administration ("NASA") in its published collection of global tidal models, these global models "are

accurate to within 2 to 3 cm in waters deeper than 200 m. In shallow waters they are quite inaccurate, which makes them unsuitable for navigation or other practical applications."

Colombia disagrees with Nicaragua's criticism of the Grenoble Tide Model. It contends that this model should not be rejected for three reasons, namely that international law does not prescribe the use of any particular method of tidal measurement, that the measurements of the many features made by Dr. Smith were accurate and clear, and that his approach to whether those features were above water at "high tide" was conservative, because it was based upon HAT rather than "mean high tide".

31. Nicaragua claims that the "'Admiralty Total Tide' model", produced by the United Kingdom Hydrographic Office, is more appropriate to determine height in the area of Quitasueño, because it is more accurate in shallow waters. Applying that model to the features identified in the Smith Report, all the features, except for the one described in the Smith report as "QS 32", are below water at HAT. QS 32's height above HAT is about 1.2 metres according to the Smith Report, but only 0.7 metres if measured by the "'Admiralty Total Tide' model".

32. In any case, Nicaragua contends that QS 32 is "[a]n individual piece of coral debris, that is, a part of the skeleton of a dead animal, is not a naturally formed area of land" and, as such, does not fall within the definition of islands entitled to maritime zones. In response, Colombia notes that there is no case in which a feature has been denied the status of an island merely because it was composed of coral. According to Colombia, coral islands are naturally formed and generate a territorial sea as do other islands. Colombia moreover asserts that QS 32 is not coral debris, but rather represents part of a much larger coral reef firmly attached to the substrate.

33. Nicaragua also claims that size is crucial for determining whether a maritime feature qualifies as an island under international law. It notes that the top of QS 32 "seems to measure some 10 to 20 cm". Colombia, on the other hand, contends that customary international law does not prescribe a minimum size for a maritime feature to qualify as an island.

* *

34. The Court recalls that, in its Judgment in the *Pulp Mills* case, it said that

> "the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of

> the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 72-73, para. 168.)

35. The issue which the Court has to decide is whether or not there exist at Quitasueño any naturally formed areas of land which are above water at high tide. It does not consider that surveys conducted many years (in some cases many decades) before the present proceedings are relevant in resolving that issue. Nor does the Court consider that the charts on which Nicaragua relies have much probative value with regard to that issue. Those charts were prepared in order to show dangers to shipping at Quitasueño, not to distinguish between those features which were just above, and those which were just below, water at high tide.

36. The Court considers that what is relevant to the issue before it is the contemporary evidence. Of that evidence, by far the most important is the Smith Report, which is based upon actual observations of conditions at Quitasueño and scientific evaluation of those conditions. Nevertheless, the Court considers that the conclusions of that Report have to be treated with a degree of caution. As the Court has already stated, even the smallest island generates a 12-nautical-mile territorial sea (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 101-102, para. 205; see also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 751, para. 302). The Court therefore has to make sure that it has before it evidence sufficient to satisfy that a maritime feature meets the test of being above water at high tide. In the present case, the proof offered by Colombia depends upon acceptance of a tidal model which NASA describes as inaccurate in shallow waters. The waters around Quitasueño are very shallow. Moreover, all of the features at Quitasueño are minuscule and, even on the Grenoble Tide Model, are only just above water at high tide — according to the Smith Report, with the exception of QS 32 only one feature (QS 24) is more than 30 cm and only four others measured on site (QS 17, QS 35, QS 45 and QS 53) are more than 20 cm above water at high tide; a fifth, measured from the boat (QS 30), was 23.2 cm above water at high tide. The other 27 features which the Smith Report characterizes as islands are all less than 20 cm above water at high tide, with one such feature (QS 4) being described in the Smith Report as only 4 mm above water at high tide.

37. No matter which tidal model is used, it is evident that QS 32 is above water at high tide. Nicaragua's contention that QS 32 cannot be regarded as an island within the definition established in customary international law, because it is composed of coral debris, is without merit. International law defines an island by reference to whether it is "naturally formed" and whether it is above water at high tide, not by reference to its geological composition. The photographic evidence shows that QS 32 is composed of solid material, attached to the substrate, and not of loose debris. The fact that the feature is composed of coral is irrelevant. Even using Nicaragua's preferred tidal model, QS 32 is above water at high tide by some 0.7 metres. The Court recalls that in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* (*Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 197), it found that Qit'at Jaradah was an island, notwithstanding that it was only 0.4 metres above water at high tide. The fact that QS 32 is very small does not make any difference, since international law does not prescribe any minimum size which a feature must possess in order to be considered an island. Accordingly, the Court concludes that the feature referred to as QS 32 is capable of appropriation.

38. With regard to the other maritime features at Quitasueño, the Court considers that the evidence advanced by Colombia cannot be regarded as sufficient to establish that any of them constitutes an island, as defined in international law. Although the Smith Report, like the earlier report by the Colombian Navy, involved observation of Quitasueño on specified dates, an essential element of the Smith Report is its calculations of the extent to which each feature should be above water at HAT. Such calculations, based as they are upon a tidal model whose accuracy is disputed when it is applied to waters as shallow as those at and around Quitasueño, are not sufficient to prove that tiny maritime features are a few centimetres above water at high tide. The Court therefore concludes that Colombia has failed to prove that any maritime feature at Quitasueño, other than QS 32, qualifies as an island. The photographic evidence contained in the Smith Report does, however, show those features to be above water at some part of the tidal cycle and thus to constitute low-tide elevations. Moreover, having reviewed the information and analysis submitted by both Parties regarding tidal variation, the Court concludes that all of those features would be low-tide elevations under the tidal model preferred by Nicaragua. The effect which that finding may have upon the maritime entitlement generated by QS 32 is considered in paragraphs 182 to 183, below.

2. Sovereignty over the Maritime Features in Dispute

39. In addressing the question of sovereignty over the maritime features in dispute, the Parties considered the 1928 Treaty and *uti possidetis*

juris as a source of their title, as well as *effectivités* invoked by Colombia. They also discussed Colombia's allegation that Nicaragua had recognized Colombia's title, as well as positions taken by third States, and the cartographic evidence. The Court will deal with each of these arguments in turn.

A. The 1928 Treaty

40. Article I of the 1928 Treaty reads as follows:

> "The Republic of Colombia recognises the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between Cape Gracias a Dios and the San Juan River, and over Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua recognises the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago.
>
> The present Treaty does not apply to the reefs of Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America." *[Translation by the Secretariat of the League of Nations, for information.]* (*League of Nations, Treaty Series*, No. 2426, Vol. CV, pp. 340-341.)

41. The second paragraph of the 1930 Protocol of Exchange of Ratifications of the 1928 Treaty (hereinafter the "1930 Protocol") stipulated that the "San Andrés and Providencia Archipelago mentioned in the first clause of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich" *[translation by the Secretariat of the League of Nations, for information]* (*League of Nations, Treaty Series*, No. 2426, Vol. CV, pp. 341-342).

42. The Court notes that under the terms of the 1928 Treaty, Colombia has sovereignty over "San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago" (see paragraph 23). Therefore, in order to address the question of sovereignty over the maritime features in dispute, the Court needs first to ascertain what constitutes the San Andrés Archipelago.

* *

43. Nicaragua observes that, as the first paragraph of Article I of the 1928 Treaty does not provide a precise definition of that Archipelago, it is necessary to identify the geographical concept of the San Andrés Archipelago. In Nicaragua's view, the proximity test cannot justify the Colombian claim that the maritime features in dispute are covered by the term San Andrés Archipelago. Nicaragua argues that the only maritime fea-

tures that are relatively near to the island of San Andrés are the Alburquerque Cays and the East-Southeast Cays, while the closest cay to the east of Providencia is Roncador at 75 nautical miles; Serrana lies at 80 nautical miles from Providencia; Serranilla at 165 nautical miles; and Bajo Nuevo at 205 nautical miles; Quitasueño bank is at 40 nautical miles from Santa Catalina. According to Nicaragua, taking into account the distances involved, it is inconceivable to regard these maritime features claimed by Colombia as forming a geographical unit with the three islands referred to in Article I of the 1928 Treaty.

44. Nicaragua further contends that there is no historical record showing that the disputed islands and cays formed part of a geographical unit with the islands of San Andrés, Providencia and Santa Catalina. At the beginning of the nineteenth century, the first Governor of what was referred to then as the "San Andrés Islands" only mentioned five islands when explaining the composition of the group: San Andrés, Providencia, Santa Catalina, Great Corn Island and Little Corn Island. In other documents from the colonial period, which refer to the islands of San Andrés, the maritime features in dispute are never described as a group, or as part of a single archipelago. In that regard, Nicaragua cites the Royal Order of 1803, the survey of "the cays and banks located between Cartagena and Havana" carried out at the beginning of the nineteenth century on the instructions of the Spanish authorities, and the Sailing Directions *(Derrotero de las islas antillanas)* published by the Hydrographic Office of the Spanish Navy in 1820.

45. Nicaragua stresses that the definition of the San Andrés Archipelago as an administrative unit in Colombian domestic legislation is of no relevance at an international level. Nicaragua argues that, from a historical and geographical point of view, the creation of this administrative unit does not prove that it constitutes an archipelago within the meaning agreed by the parties in the 1928 Treaty.

46. Nicaragua further explains that, under the second paragraph of Article I of the 1928 Treaty, the maritime features of Roncador, Quitasueño and Serrana were explicitly excluded from the scope of that Treaty, and thus clearly not considered part of the San Andrés Archipelago.

47. With regard to the 82° W meridian in the 1930 Protocol, Nicaragua argues that this did not set a limit to Nicaraguan territory east of that meridian, but only meant that "no island lying west of the 82° W meridian forms part of the archipelago within the meaning of the Treaty". Nicaragua thus asserts that the 1930 Protocol merely sets a western limit to the San Andrés Archipelago.

48. Nicaragua concludes that the Archipelago comprises only the islands of San Andrés, Providencia and Santa Catalina and does not include the Alburquerque Cays, the East-Southeast Cays, Roncador, Serrana, the shoal of Quitasueño, or any cays on the banks of Serranilla and Bajo Nuevo.

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49. According to Colombia the islands and cays of the San Andrés Archipelago were considered as a group throughout the colonial and post-colonial era. In support of its position, Colombia contends that they were referred to as a group in the early nineteenth century survey of the cays and banks "located between Cartagena and Havana" which was carried out on the instructions of the Spanish Crown and in the Sailing Directions *(Derrotero de las islas antillanas)* published by the Hydrographic Office of the Spanish Navy in 1820. With regard to the report by the first Governor of the San Andrés Islands, Colombia argues that the five named islands are clearly the main islands of the group but that the smaller islets and cays also formed part of the Archipelago. In Colombia's opinion, the fact that references to the San Andrés islands in historical documents (in 1803 or subsequently) did not always specify each and every feature making up the Archipelago does not mean that it only consisted of the larger maritime features named.

50. Colombia contends that the concept and composition of the Archipelago remained unchanged and that this was the understanding at the time of the signature of the 1928 Treaty and the 1930 Protocol.

Further, Colombia contends that the 82nd meridian is, at the very least, a territorial allocation line, separating Colombian territory to the east from Nicaraguan territory to the west, up to the point where it reaches third States to the north and south. Colombia concludes that the 1928 Treaty and the 1930 Protocol left no territorial matters pending between the Parties. Under the terms of these instruments, according to Colombia, neither State "could claim insular territory on the 'other' side of the 82º W meridian".

51. Colombia adds that by agreeing, under the second paragraph of Article I of the 1928 Treaty, to exclude Roncador, Quitasueño and Serrana from the scope of the Treaty, since they were in dispute between Colombia and the United States, Nicaragua accepted that these features formed part of the Archipelago.

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52. The Court observes that Article I of the 1928 Treaty does not specify the composition of the San Andrés Archipelago. As to the 1930 Protocol, it only fixes the western limit of the San Andrés Archipelago at the 82nd meridian and sheds no light on the scope of the Archipelago to the east of that meridian. In its 2007 Judgment on the Preliminary Objections, the Court stated:

> "it is clear on the face of the text of the first paragraph of Article I of the 1928 Treaty that its terms do not provide the answer to the question as to which maritime features apart from the islands of San Andrés, Providencia and Santa Catalina form part of the San Andrés Archipelago over which Colombia has sovereignty" (*Ter-*

ritorial and Maritime Dispute (Nicaragua v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 863, para. 97).

53. However, Article I of the 1928 Treaty does mention "the other islands, islets and reefs forming part of the San Andrés Archipelago". This provision could be understood as including at least the maritime features closest to the islands specifically mentioned in Article I. Accordingly, the Alburquerque Cays and East-Southeast Cays, given their geographical location (lying 20 and 16 nautical miles, respectively, from San Andrés island) could be seen as forming part of the Archipelago. By contrast, in view of considerations of distance, it is less likely that Serranilla and Bajo Nuevo could form part of the Archipelago. Be that as it may, the question about the composition of the Archipelago cannot, in the view of the Court, be definitively answered solely on the basis of the geographical location of the maritime features in dispute or on the historical records relating to the composition of the San Andrés Archipelago referred to by the Parties, since this material does not sufficiently clarify the matter.

54. According to the second paragraph of Article I of the 1928 Treaty, this treaty does not apply to Roncador, Quitasueño and Serrana which were in dispute between Colombia and the United States at the time. However, the Court does not consider that the express exclusion of Roncador, Quitasueño and Serrana from the scope of the 1928 Treaty is in itself sufficient to determine whether these features were considered by Nicaragua and Colombia to be part of the San Andrés Archipelago.

55. The Court further observes that the historical material adduced by the Parties to support their respective arguments is inconclusive as to the composition of the San Andrés Archipelago. In particular, the historical records do not specifically indicate which features were considered to form part of that Archipelago.

56. In view of the above, in order to resolve the dispute before it, the Court must examine arguments and evidence submitted by the Parties in support of their respective claims to sovereignty, which are not based on the composition of the Archipelago under the 1928 Treaty.

B. Uti possidetis juris

57. The Court will now turn to the claims of sovereignty asserted by both Parties on the basis of *uti possidetis juris* at the time of independence from Spain.

* *

58. Nicaragua explains that the Captaincy-General of Guatemala (to which Nicaragua was a successor State) held jurisdiction over the disputed islands on the basis of the Royal Decree *(Cédula Real)* of 28 June 1568, confirmed in 1680 by Law VI, Title XV, Book II, of the Compilation of the Indies *(Recopilación de las Indias)* and, later, the New Compi-

lation *(Novísima Recopilación)* of 1744, which signalled the limits of the *Audiencia de Guatemala* as including "the islands adjacent to the coast".

59. Nicaragua recalls that, according to the doctrine of *uti possidetis juris*, there could have been no *terra nullius* in the Spanish colonies located in Latin America. It contends that it thus held "original and derivative rights of sovereignty over the Mosquito Coast and its appurtenant maritime features", including the islands of San Andrés, Providencia and Santa Catalina based on the *uti possidetis juris* at the moment of independence from Spain. In Nicaragua's opinion, the application of *uti possidetis juris* should be understood in terms of attachment to or dependence on the closest continental territory, that of Nicaragua. For Nicaragua, "it is incontrovertible that all the islands off the Caribbean coast of Nicaragua at independence appertained to this coast". Although, as a result of the 1928 Treaty, it ceded its sovereignty over the islands of San Andrés, Providencia and Santa Catalina, this did not affect sovereignty over the other maritime features appertaining to the Mosquito Coast. Nicaragua concludes that Roncador and Serrana, as well as the other maritime features that are not referred to *eo nomine* in the Treaty, belong to Nicaragua on the basis of *uti possidetis juris*, since, in law, the islands and cays have followed the fate of the adjacent continental coast.

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60. For its part, Colombia claims that its sovereignty over the San Andrés Archipelago has its roots in the Royal Order of 1803, when it was placed under the jurisdiction of the Viceroyalty of Santa Fé (New Granada), which effectively exercised that jurisdiction until independence. Colombia therefore argues that it holds original title over the San Andrés Archipelago based on the principle of *uti possidetis juris* supported by the administration of the Archipelago by the Viceroyalty of Santa Fé (New Granada) during colonial times.

61. Colombia asserts that the exercise of jurisdiction over the San Andrés Archipelago by the authorities of the Viceroyalty of Santa Fé (New Granada) was at no time contested by the authorities of the Captaincy-General of Guatemala. Colombia states that during the period prior to independence, Spain's activities in relation to the maritime features originated either in Cartagena, or on the island of San Andrés itself, but never had any connection with Nicaragua, which was a province on the Pacific coast under the Captaincy-General of Guatemala. Colombia concludes that such was the situation of the islands of San Andrés when, in 1810, the provinces of the Viceroyalty of Santa Fé (New Granada) began their process of independence.

62. Colombia finally states that the 1928 Treaty and the 1930 Protocol did not alter the situation vis-à-vis its sovereignty over the San Andrés Archipelago based on *uti possidetis juris*.

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63. In response to Colombia's assertions on the basis of the Royal Order of 1803, Nicaragua argues that this Order did not alter Nicaraguan jurisdiction over the islands, which remained appurtenances of the Mosquito Coast. Nicaragua claims that the Royal Order only dealt with matters of military protection and that, as it was not a Royal Decree, the Order lacked the legal requirements to effect a transfer of territorial jurisdiction. Furthermore, the Captaincy-General of Guatemala protested the Royal Order of 1803, which, according to Nicaragua, was repealed by a Royal Order of 1806. Nicaragua claims that its interpretation of the Royal Order of 1803 is confirmed by the Arbitral Award rendered by the President of the French Republic, Mr. Emile Loubet, on 11 September 1900 (hereinafter the "Loubet Award"), setting out the land boundary between Colombia (of which Panama formed part at the time) and Costa Rica (see paragraph 86 below). Nicaragua interprets that Award as clarifying that Colombia could not claim any rights over the Atlantic Coast on the basis of the Royal Order of 1803.

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64. The Court observes that, as to the claims of sovereignty asserted by both Parties on the basis of the *uti possidetis juris* at the time of independence from Spain, none of the colonial orders cited by either Party specifically mentions the maritime features in dispute. The Court has previously had the opportunity to acknowledge the following, which is equally applicable to the case at hand:

> "when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law; and it is perfectly possible that that law itself gave no clear and definite answer to the appurtenance of marginal areas, or sparsely populated areas of minimal economic significance" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 559, para. 333).

65. In light of the foregoing, the Court concludes that in the present case the principle of *uti possidetis juris* affords inadequate assistance in determining sovereignty over the maritime features in dispute between Nicaragua and Colombia because nothing clearly indicates whether these features were attributed to the colonial provinces of Nicaragua or of Colombia prior to or upon independence. The Court accordingly finds that neither Nicaragua nor Colombia has established that it had title to the disputed maritime features by virtue of *uti possidetis juris*.

C. Effectivités

66. Having concluded that no title over the maritime features in dispute can be found on the basis of the 1928 Treaty or *uti possidetis juris*, the Court will now turn to the question whether sovereignty can be established on the basis of *effectivités*.

(a) *Critical date*

67. The Court recalls that, in the context of a dispute related to sovereignty over land, such as the present one, the date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts *à titre de souverain* occurring prior to the date when the dispute crystallized, which should be taken into consideration for the purpose of establishing or ascertaining sovereignty, and those acts occurring after that date,

> "which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 697-698, para. 117).

68. As the Court explained in the *Indonesia/Malaysia* case,

> "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 135).

* *

69. Nicaragua maintains that the date on which the dispute over maritime delimitation arose was 1969. Nicaragua notes in particular that the dispute came about when Nicaragua granted oil exploration concessions in the area of Quitasueño in 1967-1968, leading to a Note of protest being sent by Colombia to Nicaragua on 4 June 1969 in which, for the first time after the ratification of the 1928 Treaty, Colombia claimed that the 82nd meridian was a maritime boundary between the Parties. Nicaragua underlines that it responded a few days later, on 12 June 1969, denying this Colombian claim that reduced by more than half Nicaragua's rights to a full exclusive economic zone and continental shelf.

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70. According to Colombia, the dispute concerning the sovereignty over the maritime features crystallized in 1971 when Colombia and the United States began negotiations to resolve the situation as regards Roncador, Quitasueño and Serrana, which were excluded from the scope of the 1928 Treaty, and Nicaragua raised claims over the San Andrés Archipelago. In the course of the hearings, Colombia limited itself to taking note of the critical date proposed by Nicaragua, and to setting out the *effectivités* carried out by Colombia before that date.

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71. The Court observes that there is no indication that there was a dispute before the 1969 exchange of Notes mentioned by Nicaragua. Indeed, the Notes can be seen as the manifestation of a difference of views between the Parties regarding sovereignty over certain maritime features in the south-western Caribbean. Moreover, Colombia does not seem to contest the critical date put forward by Nicaragua. In light of the above, the Court concludes that 12 June 1969, the date of Nicaragua's Note in response to Colombia's Note of 4 June 1969 (see paragraph 69), is the critical date for the purposes of appraising *effectivités* in the present case.

(b) *Consideration of* effectivités

72. The Court notes that it is Colombia's submission that *effectivités* confirm its prior title to the maritime features in dispute. By contrast, Nicaragua has not provided any evidence that it has acted *à titre de souverain* in relation to these features and its claim for sovereignty relies largely on the principle of *uti possidetis juris*.

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73. Colombia contends that the activities *à titre de souverain* carried out in relation to the islands coincide with Colombia's pre-existing title and are entirely consistent with the legal position that resulted from the 1928 Treaty and its accompanying 1930 Protocol. Were the Court to find that *effectivités* do not co-exist with a prior title, Colombia argues that *effectivités* would still be relevant for its claim to sovereignty.

74. With reference to the maritime features in dispute, Colombia notes that it has exercised public, peaceful and continuous sovereignty over the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque and East-Southeast for more than 180 years as integral parts of the San Andrés Archipelago. In particular, it maintains that it has enacted laws and regulations concerning fishing, economic activities, immigration, search and rescue operations, public works and environmental issues concerning the Archipelago; that it has enforced its criminal legislation over the entire Archipelago; that, from the mid-nineteenth century onwards, it

has carried out surveillance and control activities over the entire Archipelago; that it has authorized third parties to prospect for oil in the maritime areas of the San Andrés Archipelago; and that it has carried out scientific research with a view to preserving and making responsible use of the natural wealth of the San Andrés Archipelago. Colombia notes that public works have been built and maintained by the Colombian Government on the Archipelago's cays, including lighthouses, quarters and facilities for Navy detachments, facilities for the use of fishermen and installations for radio stations.

75. Colombia adds that Nicaragua cannot point to any evidence that it ever had either the intention to act as sovereign over these islands, let alone that it engaged in a single act of a sovereign nature on them. Moreover, Nicaragua never protested against Colombia's exercise of sovereignty over the islands throughout a period of more than 150 years.

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76. For its part, Nicaragua asserts that the reliance on *effectivités* is only relevant for justifying a decision that is not clear in terms of *uti possidetis juris*. Nicaragua considers that any possession of Colombia over the area only included the major islands of San Andrés, Providencia and Santa Catalina but not the cays on the banks of Roncador, Serrana, Serranilla and Bajo Nuevo, or any of the other banks adjacent to the Mosquito Coast. Nicaragua points out that in the nineteenth century, the only activity on the cays was that of groups of fishermen and tortoise hunters, who carried out their activities without regulations or under any governmental authority. Towards the middle of the nineteenth century, the United States of America, through the Guano Act of 1856, regulated and granted licences for the extraction of guano at Roncador, Serrana and Serranilla.

77. Nicaragua contests the relevance of activities undertaken by Colombia subsequent to the critical date in this case, i.e., 1969. It notes that the establishment of naval infantry detachments only began in 1975; likewise, it was only in 1977 that Colombia replaced the beacons installed by the United States on Roncador and Serrana, and placed a beacon on Serranilla. These activities, according to Nicaragua, cannot be considered as the normal continuation of earlier practices; they were carried out with a view to improving Colombia's legal position vis-à-vis Nicaragua and are not pertinent to the Court's decision.

78. Nicaragua asserts that legislation and administrative acts can only be taken into consideration as constituting a relevant display of authority "[if they] leave no doubt as to their specific reference" to the territories in dispute. It argues that the legal provisions and administrative acts relating to the San Andrés Archipelago relied upon by Colombia have been of a general nature and were not specific to the cays. Hence, it maintains

that they should not be considered as evidence of sovereignty over the maritime features.

79. Nicaragua contends that in any event it protested the activities undertaken by Colombia, but did not have the necessary means at its disposal to demand that its title over the disputed features be respected by a State with superior means on the ground and conducting a policy of "faits accomplis".

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80. The Court recalls that acts and activities considered to be performed *à titre de souverain* are in particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 713–722, paras. 176-208). It further recalls that "sovereignty over minor maritime features . . . may be established on the basis of a relatively modest display of State powers in terms of quality and quantity" (*ibid.*, p. 712, para. 174). Finally, a significant element to be taken into account is the extent to which any acts *à titre de souverain* in relation to disputed islands have been carried out by another State with a competing claim to sovereignty. As the Permanent Court of International Justice stated in its Judgment in the *Legal Status of Eastern Greenland* case:

> "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 46.)

81. The Court notes that although the majority of the acts *à titre de souverain* referred to by Colombia were exercised in the maritime area which encompasses all the disputed features, a number of them were undertaken specifically in relation to the maritime features in dispute. Colombia has indeed acted *à titre de souverain* in respect of both the maritime area surrounding the disputed features and the maritime features themselves, as will be shown in the following paragraph.

82. The Court will now consider the different categories of *effectivités* presented by Colombia.

Public administration and legislation. In 1920, the *Intendente* (Governor) of the Archipelago of San Andrés submitted to the Government a report concerning the functioning of the public administration of the Archipelago for the period from May 1919 to April 1920. The report specifically referred to Roncador, Quitasueño and Serrana as Colombian and forming an integral part of the Archipelago. In the exercise of its legal and statutory powers, the Board of Directors of the Colombian Institute for Agrarian Reform passed resolutions dated 16 December 1968 and 30 June 1969 dealing with the territorial régime, in particular, of Alburquerque, East-Southeast, Serrana, Roncador, Quitasueño, Serranilla and Bajo Nuevo.

Regulation of economic activities. In April 1871, the Congress of Colombia issued a law permitting the Executive Branch to lease the right to extract guano and collect coconuts on Alburquerque, Roncador and Quitasueño. In September 1871, the Prefect of San Andrés and San Luis de Providencia issued a decree prohibiting the extraction of guano from Alburquerque, Roncador and Quitasueño. In December 1871, the Prefect of San Andrés and San Luis de Providencia granted a contract relating to coconut groves on Alburquerque. In 1893, a permit for the exploitation of guano and lime phosphate on Serrana was issued by the Governor of the Department of Bolívar. Contracts for exploitation of guano on Serrana, Serranilla, Roncador, Quitasueño and Alburquerque were concluded or terminated by the Colombian authorities in 1893, 1896, 1915, 1916 and 1918. In 1914, and again in 1924, the Governor of the Cayman Islands issued a Government Notice informing fishing vessels that fishing in, or removing guano or phosphates from, the Archipelago of San Andrés was forbidden without a licence from the Colombian Government. The notice listed the features of the Archipelago "in which the Colombian Government claims territorial jurisdiction" as including "the islands of San Andres and Providence *[sic]*, and the Banks and Cays known as Serrana, Serranilla, Roncador, Bajo Nueva *[sic]*, Quitasueno *[sic]*, Alburquerque and Courtown [East-Southeast Cays]".

Public works. Since 1946, Colombia has been involved in the maintenance of lighthouses on Alburquerque and East-Southeast Cays (Bolívar Cay). In 1963, the Colombian Navy took measures to maintain the lighthouse on East-Southeast Cays, and in 1968 it took further measures for the inspection and upkeep of the lighthouse on East-Southeast Cays as well as those on Quitasueño, Serrana and Roncador.

Law enforcement measures. In 1892, the Colombian Ministry of Finance made arrangements to enable a ship to be sent to the Prefect of Providencia so that he could visit Roncador and Quitasueño in order to put a stop to the exploitation of guano. In 1925, a decree was issued by the *Intendente* of San Andrés and Providencia to appropriate funds to cover the expenses for the rental of a ship transporting administrative personnel to Quitasueño in order to capture two vessels under the British flag engaged in the illegal fishing of tortoiseshell. In November 1968, a United States-flagged vessel fishing in and around Quitasueño was sequestered by the Colombian authorities in order to determine whether it had complied with Colombian fishing regulations.

Naval visits and search and rescue operations. In 1937, 1949, 1967-1969, the Colombian Navy visited Serrana, Quitasueño and Roncador. In 1969, two rescue operations were carried out in the immediate vicinity of Alburquerque and Quitasueño.

Consular representation. In 1913 and 1937, the President of Colombia recognized that the jurisdiction of German consular officials extended over the islands of San Andrés, Providencia and Roncador.

83. Colombia's activities *à titre de souverain* with regard to Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla, in particular, legislation relating to territorial organization, regulation of fishing activities and related measures of enforcement, maintenance of lighthouses and buoys, and naval visits, continued after the critical date. The Court considers that these activities are a normal continuation of prior acts *à titre de souverain*. The Court may therefore take these activities into consideration for the purposes of the present case (see *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 135).

84. It has thus been established that for many decades Colombia continuously and consistently acted *à titre de souverain* in respect of the maritime features in dispute. This exercise of sovereign authority was public and there is no evidence that it met with any protest from Nicaragua prior to the critical date. Moreover, the evidence of Colombia's acts of administration with respect to the islands is in contrast to the absence of any evidence of acts *à titre de souverain* on the part of Nicaragua.

The Court concludes that the facts reviewed above provide very strong support for Colombia's claim of sovereignty over the maritime features in dispute.

D. Alleged recognition by Nicaragua

85. Colombia also contends that its sovereignty over the cays was recognized by Nicaragua itself.

86. As proof of Nicaragua's recognition of Colombia's sovereignty over the disputed maritime features, Colombia refers to Nicaragua's reaction to the Loubet Award of 11 September 1900, by which the President of France determined what was then the land boundary between Colombia and Costa Rica and is today the boundary between Costa Rica and Panama. According to this Award:

> "As regards the islands situated furthest from the mainland and located between the Mosquito Coast and the Isthmus of Panama, namely Mangle Chico, Mangle Grande, Cayos-de-Alburquerque, San Andrés, Santa Catalina, Providencia and Escudo-de-Veragua, as well as all other islands, islets and banks belonging to the former Province of Cartagena, under the denomination of Canton de San

> Andrés, it is understood that the territory of these islands, without exception, belongs to the United States of Colombia." (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 345 *[translation of French original by the Registry]*.)

Colombia recalls that in its Note of protest of 22 September 1900 against the findings in the Loubet Award, Nicaragua stated that the Award "may in no way prejudice the incontestable rights of the Republic of Nicaragua" over certain islands, banks and islets located within a specified geographical area. The Note states that those islands and other features "are currently militarily occupied, and politically administered by the authorities of [Nicaragua]". In that regard, Colombia emphasizes that none of the islands currently in dispute are situated in the geographical area described by Nicaragua in its Note. Indeed, in its Note, Nicaragua only advanced claims to the Great Corn and Little Corn Islands and to the islands, islets and cays and banks in immediate proximity to the Mosquito Coast, identifying its area of jurisdiction as only extending to "84º 30′ of the Paris meridian", which Colombia explains is equivalent to 82º 09′ longitude west of Greenwich. Moreover, none of the islands currently in dispute were "militarily occupied, and politically administered" by Nicaragua in 1900.

Colombia further argues that Nicaragua failed to protest or to claim rights over Roncador, Quitasueño and Serrana, in dispute between Colombia and the United States; and that it was only in 1972 that Nicaragua first advanced claims over some of the features comprised in the Archipelago.

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87. For its part, Nicaragua states that it has not recognized Colombian sovereignty over the disputed cays. In particular, it notes that the express exclusion of the features of Roncador, Quitasueño and Serrana in the 1928 Treaty as a result of the dispute over them between the United States of America and Colombia did not amount to a Nicaraguan renunciation of its claim of sovereignty over them. Nicaragua contends that neither the text of the 1928 Treaty nor the negotiating history supports such an assertion. Nicaragua points out that, as soon as it became aware of the negotiations concerning Roncador, Quitasueño and Serrana between Colombia and the United States leading to the 1972 Vázquez-Saccio Treaty, it reserved Nicaragua's rights over these maritime features.

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88. The Court considers that Nicaragua's reaction to the Loubet Award provides a measure of support for Colombia's case. Although that Award expressly referred to Colombian sovereignty over Alburquerque Cays and at least some of the other islands currently in dispute, Nicaragua's protest

was confined to the Corn Islands and certain features close to the Nicaraguan coast. Nicaragua, by contrast, failed to make any protest with regard to the Award's treatment of the maritime features which are the subject of the present case. That failure suggests that Nicaragua did not claim sovereignty over those maritime features at the time of the Award.

89. The Court also observes that, in the second paragraph of Article I of the 1928 Treaty, Nicaragua agreed that Roncador, Quitasueño and Serrana should be excluded from the scope of the Treaty on the ground that sovereignty over those features was in dispute between Colombia and the United States of America. The Court considers that this provision, which was not accompanied by any reservation of position on the part of Nicaragua, indicates that, at the time of the conclusion of the Treaty, Nicaragua did not advance any claim to sovereignty over those three features. However, in 1972, there was a change in Nicaragua's position on the occasion of the conclusion of the Vázquez-Saccio Treaty when it laid claim to Roncador, Quitasueño and Serrana.

90. The Court considers that although Nicaragua's conduct falls short of recognition of Colombia's sovereignty over the maritime features in dispute, it nevertheless affords some support to Colombia's claim.

E. Position taken by third States

91. The Court now turns to the evidence said by Colombia to demonstrate recognition of title by third States.

* *

92. Colombia notes that various reports, memoranda, diplomatic Notes and other correspondence emanating from the British Government confirm that "the British authorities clearly understood not only that the San Andrés Archipelago was considered as a group, from Serranilla and Bajo Nuevo until Alburquerque, but also its appurtenance to Colombia".

Colombia further contends that "[a]ll neighbouring States have recognised Colombia's sovereignty over the Archipelago, including the cays". In particular, Colombia refers to its 1976 Treaty with Panama on the Delimitation of Marine and Submarine Areas and Related Matters, to its 1977 Treaty with Costa Rica on Delimitation of Marine and Submarine Areas and Maritime Co-operation, to the 1980 Treaty on Delimitation of Marine Areas and Maritime Co-operation between Panama and Costa Rica, to its 1986 Treaty with Honduras concerning Maritime Delimitation, to its 1981 and 1984 Fishing Agreements with Jamaica, and to its 1993 Maritime Delimitation Treaty with Jamaica. Colombia refers to the 1972 Vázquez-Saccio Treaty as evidence demonstrating recognition by the United States of its claim to sovereignty over Roncador, Quitasueño and Serrana.

*

93. Nicaragua, for its part, contends that in the 1972 Vázquez-Saccio Treaty, the United States renounced any claim to sovereignty over the cays but that this renunciation was not in favour of Colombia. Nicaragua adds that when the United States ratified that Treaty, it assured Nicaragua that it did not understand the Treaty to confer rights or impose obligations or prejudice the claims of third States, particularly Nicaragua.

94. Nicaragua furthermore asserts that there can be no doubt that any recognition by third States, including those which have signed maritime delimitation treaties with Colombia, is not opposable to Nicaragua.

* *

95. The Court considers that correspondence emanating from the United Kingdom Government and the colonial administrations in what, at the relevant time, were territories dependent upon the United Kingdom, indicates that the United Kingdom regarded Alburquerque, Bajo Nuevo, Roncador, Serrana and Serranilla as appertaining to Colombia on the basis of Colombian sovereignty over San Andrés.

The Court notes that the 1972 Vásquez-Saccio Treaty mentions some of the maritime features in dispute. That Treaty contains no explicit provision to the effect that the United States of America recognized Colombian sovereignty over Quitasueño, Roncador or Serrana, although some language in the Treaty could suggest such recognition in so far as Roncador and Serrana were concerned (it was the view of the United States that Quitasueño was not capable of appropriation). However, when Nicaragua protested, the United States response was to deny that it was taking any position regarding any dispute which might have existed between Colombia and any other State regarding sovereignty over those features.

Treaties concluded by Colombia with neighbouring States are compatible with Colombia's claims to islands east of the 82nd meridian but cannot be said to amount to clear recognition of those claims by the other parties to the treaties. In any event these treaties are *res inter alios acta* with regard to Nicaragua.

Taking the evidence of third State practice as a whole, the Court considers that, although this practice cannot be regarded as recognition by third States of Colombia's sovereignty over the maritime features in dispute, it affords some measure of support to Colombia's argument.

F. Evidentiary value of maps

96. Colombia asserts that in the Colombian official maps published up to the present day, the cays in dispute have always appeared as part of the San Andrés Archipelago and therefore as Colombian. In this regard,

Colombia ascribes special value to two official maps published by its Ministry of Foreign Affairs in 1920 and in 1931, i.e., before and immediately after the conclusion of the 1928 Treaty and the signature of the 1930 Protocol. A comparison of these two maps shows that both of them include a legend indicating that the maps depict the Archipelago of San Andrés and Providencia as "belonging to the Republic of Colombia" *(Cartela del Archipiélago de San Andrés y Providencia perteneciente a la República de Colombia)*. Both maps show all the maritime features now in dispute. The difference is that the 1931 map reflects the results of the 1928-1930 agreements concluded between Nicaragua and Colombia. It therefore depicts a line following meridian 82° W, to the left of which is written "REPÚBLICA DE NICARAGUA".

97. Colombia further refers to a number of maps published in third countries, in which the San Andrés Archipelago appears in greater or lesser detail and in which neither the cays in dispute nor any other maritime features east of the 82° W meridian are indicated as belonging to or claimed by Nicaragua.

98. Colombia finally asserts that the maps published by Nicaragua prior to 1980 also show that Nicaragua never considered that the islands and cays of the San Andrés Archipelago — with the exception of the Corn Islands — belonged to it.

*

99. Nicaragua contests the evidentiary value of the maps and charts produced by Colombia. Nicaragua asserts that these maps do not contain any legend making it possible to assess their precise meaning. At most, these maps depict the 82nd meridian as the dividing line between the islands of San Andrés and Providencia and their surrounding islets on the one hand and the Corn Islands on the other.

* *

100. The Court recalls that,

> "of themselves, and by virtue solely of their existence, [maps] cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54).

Moreover, according to the Court's constant jurisprudence, maps generally have a limited scope as evidence of sovereign title.

101. None of the maps published by Nicaragua prior to 1980 (when Nicaragua proclaimed that it was denouncing the 1928 Treaty) show the maritime features in dispute as Nicaraguan. By contrast, Colombian

maps and indeed some maps published by Nicaragua show at least some of the more significant features as belonging to Colombia and none as belonging to Nicaragua.

102. The Court considers that, although the map evidence in the present case is of limited value, it nevertheless affords some measure of support to Colombia's claim.

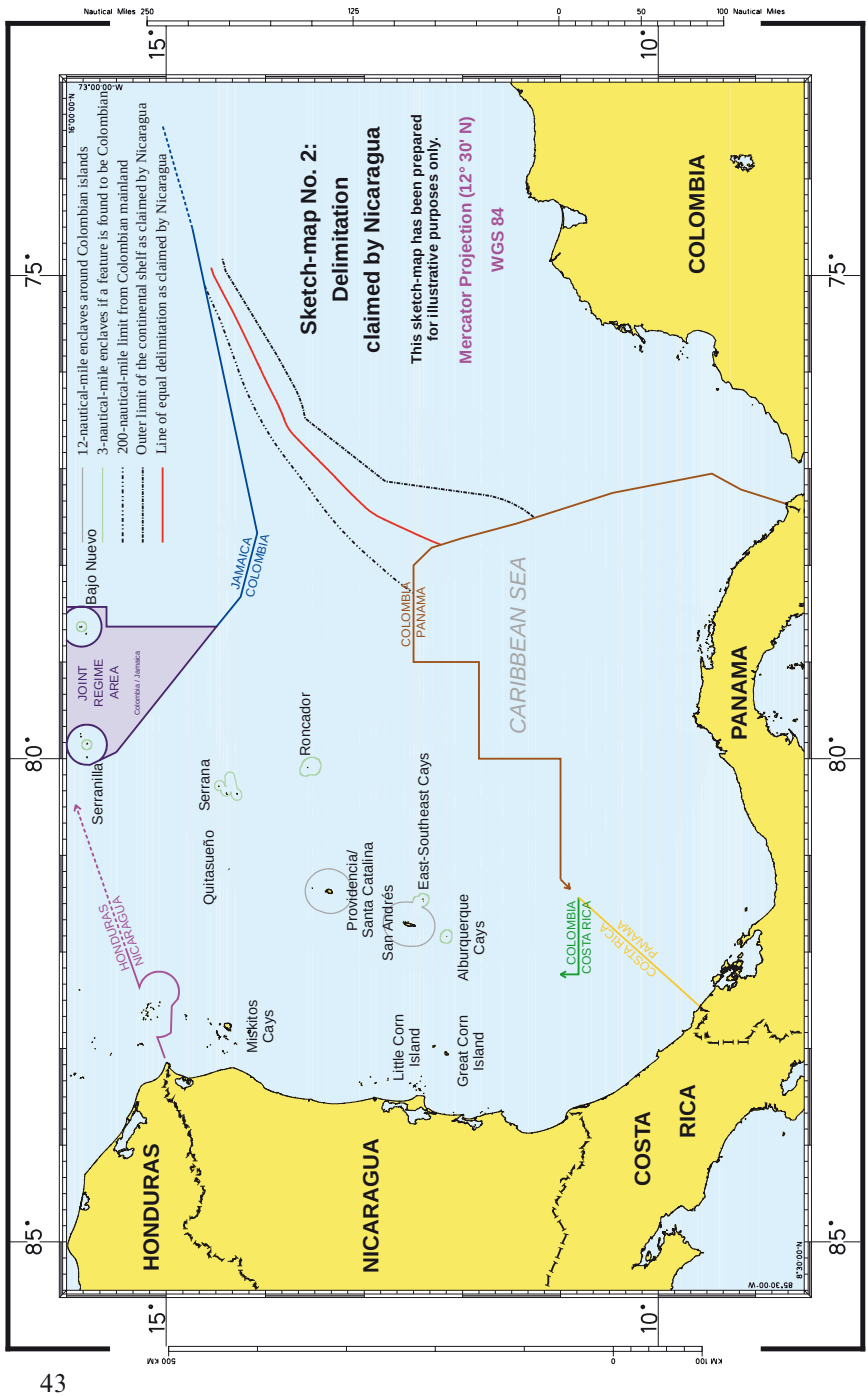
3. Conclusion as to Sovereignty over the Islands

103. Having considered the entirety of the arguments and evidence put forward by the Parties, the Court concludes that Colombia, and not Nicaragua, has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla.

III. Admissibility of Nicaragua's Claim for Delimitation of a Continental Shelf Extending beyond 200 Nautical Miles

104. The Court recalls that in its Application and Memorial, Nicaragua requested the Court to determine the "single maritime boundary" between the continental shelf areas and exclusive economic zones appertaining respectively to Nicaragua and Colombia in the form of a median line between the mainland coasts of the two States. In its Counter-Memorial, Colombia contended that the boundary line claimed by Nicaragua was situated in an area in which the latter had no entitlements in view of the fact that the two mainland coasts are more than 400 nautical miles apart.

105. In its Reply, Nicaragua contended that, under the provisions of Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS), it has an entitlement extending to the outer edge of the continental margin. Nicaragua thus requested the Court to delimit the continental shelf between Nicaragua and Colombia in view of the fact that the natural prolongations of the mainland territories of the Parties meet and overlap. Nicaragua explains this change of its claim on the ground that "[o]nce the Court had upheld '[Colombia's] first preliminary objection . . .' in its Judgment [on Preliminary Objections] of 13 December 2007, Nicaragua could only accept that decision and adjust its submissions (and its line of argument) accordingly". In the course of the hearings, Nicaragua acknowledged that, while the outer edge of the continental margin of the mainland of Colombia did not extend up to 200 nautical miles, Article 76 entitled it to a continental shelf extending to a limit of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured (see sketch-map No. 2, p. 663).


Sketch-map No. 2:
Delimitation
claimed by Nicaragua
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
12-nautical-mile enclaves around Colombian islands
3-nautical-mile enclaves if a feature is found to be Colombian
200-nautical-mile limit from Colombian mainland
Outer limit of the continental shelf as claimed by Nicaragua
Line of equal delimitation as claimed by Nicaragua
Nautical Miles 250 125 0 50 100 Nautical Miles
KM 500 0 KM 100
HONDURAS
NICARAGUA
COSTA RICA
COLOMBIA
PANAMA
CARIBBEAN SEA
JAMAICA
COLOMBIA
COLOMBIA
PANAMA
HONDURAS
NICARAGUA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
Serranilla
Roncador
Serrana
Quitasueño
Providencia/
Santa Catalina
San Andrés
East-Southeast Cays
Albuquerque
Cays
Miskitos
Cays
Little Corn
Island
Great Corn
Island
15°
10°
75°
80°
85°

106. In its final submission I (3), Nicaragua requested the Court to define "a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties". According to Nicaragua, the subject-matter of the dispute set out in its final submissions is not fundamentally different from that set out in the Application since the purpose of the Application was to request the Court to settle issues of sovereignty and, in the light of that settlement, to delimit the maritime areas between the two States "in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation".

*

107. For its part, Colombia asserts that in its Reply Nicaragua changed its original request and that the new continental shelf claim was not implicit in the Application nor in the Nicaraguan Memorial. Colombia states that the question of Nicaragua's entitlement to a continental shelf extending beyond 200 nautical miles (hereinafter referred to as "extended continental shelf"), and the delimitation of that shelf based on geological and geomorphological factors cannot be said to arise directly out of the question that was the subject-matter of the Application, namely the delimitation of a single maritime boundary based solely on geographical factors. Colombia recalls that the Court has held on a number of occasions that a new claim which changes the subject-matter of the dispute originally submitted is inadmissible. In this regard, Colombia points to a series of additional questions of fact and law that Nicaragua's new claim would, in its view, require the Court to address. In these circumstances, according to Colombia, Nicaragua's claim to an extended continental shelf, as well as its request for the Court to delimit on this basis the continental shelf boundary between the Parties, is inadmissible.

* *

108. The Court observes that, from a formal point of view, the claim made in Nicaragua's final submission I (3) (requesting the Court to effect a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties) is a new claim in relation to the claims presented in the Application and the Memorial.

109. The Court is not however convinced by Colombia's contentions that this revised claim transforms the subject-matter of the dispute brought before the Court. The fact that Nicaragua's claim to an extended continental shelf is a new claim, introduced in the Reply, does not, in itself, render the claim inadmissible. The Court has held that "the mere fact that a claim is new is not in itself decisive for the issue of admissibil-

ity" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110). Rather, "the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010 (II)*, p. 657, para. 41).

110. For this purpose it is not sufficient that there should be a link of a general nature between the two claims. In order to be admissible, a new claim must satisfy one of two alternative tests: it must either be implicit in the Application or must arise directly out of the question which is the subject-matter of the Application *(ibid.)*.

111. The Court notes that the original claim concerned the delimitation of the exclusive economic zone and of the continental shelf between the Parties. In particular, the Application defined the dispute as "a group of related legal issues subsisting between the Republic of Nicaragua and the Republic of Colombia concerning title to territory and maritime delimitation". In the Court's view, the claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute. Moreover, it arises directly out of that dispute. What has changed is the legal basis being advanced for the claim (natural prolongation rather than distance as the basis for a continental shelf claim) and the solution being sought (a continental shelf delimitation as opposed to a single maritime boundary), rather than the subject-matter of the dispute. The new submission thus still concerns the delimitation of the continental shelf, although on different legal grounds.

112. The Court concludes that the claim contained in final submission I (3) by Nicaragua is admissible. The Court further notes that in deciding on the admissibility of the new claim, the Court is not addressing the issue of the validity of the legal grounds on which it is based.

IV. Consideration of Nicaragua's Claim for Delimitation of a Continental Shelf Extending beyond 200 Nautical Miles

113. The Court now turns to the question whether it is in a position to determine "a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties" as requested by Nicaragua in its final submission I (3).

* *

114. The Parties agree that, since Colombia is not a party to UNCLOS, only customary international law may apply in respect to the maritime delimitation requested by Nicaragua. The Parties further agree that the applicable law in the present case is customary international law reflected in the case law of this Court, the International Tribunal for the Law of the Sea (ITLOS) and international arbitral courts and tribunals. The Parties further agree that the relevant provisions of UNCLOS concerning the baselines of a coastal State and its entitlement to maritime zones, the definition of the continental shelf and the provisions relating to the delimitation of the exclusive economic zone and the continental shelf reflect customary international law.

115. The Parties agree that coastal States have *ipso facto* and *ab initio* rights to the continental shelf. However, Nicaragua and Colombia disagree about the nature and content of the rules governing the entitlements of coastal States to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

116. Nicaragua states that the provisions of Article 76, paragraphs 1 to 7, relating to the definition of the continental shelf and to the determination of the outer limits of the continental shelf beyond 200 nautical miles, have the status of customary international law.

117. While Colombia accepts that paragraph 1 of Article 76 reflects customary international law, it asserts that "there is no evidence of State practice indicating that the provisions of paragraphs 4 to 9 of Article 76 [of UNCLOS] are considered to be rules of customary international law".

118. The Court notes that Colombia is not a State party to UNCLOS and that, therefore, the law applicable in the case is customary international law. The Court considers that the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law. At this stage, in view of the fact that the Court's task is limited to the examination of whether it is in a position to carry out a continental shelf delimitation as requested by Nicaragua, it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law.

* *

119. Nicaragua asserts that the existence of a continental shelf is essentially a question of fact. Nicaragua argues that the natural prolongation of its landmass seawards is constituted by the "Nicaraguan Rise", which is "a shallow area of continental crust extending from Nicaragua to Jamaica" that represents the natural prolongation of Nicaragua's territory and overlaps with Colombia's entitlement to a continental shelf of 200 nautical miles generated by its mainland coast.

120. Nicaragua notes that, in accordance with Article 76, paragraph 8, of UNCLOS, any State party which intends to delineate the outer limits of its continental shelf where it extends beyond 200 nautical miles must

submit relevant information to the Commission on the Limits of the Continental Shelf (hereinafter the "Commission"). The Commission will review the data and make recommendations. The limits established by a coastal State on the basis of these recommendations are final and binding. Nicaragua recalls that in May 2000 it ratified UNCLOS, and that in April 2010, within the ten-year deadline, it submitted "Preliminary Information" to the Secretary-General of the United Nations (in accordance with the requirements established by the Meeting of the States parties to UNCLOS) indicative of the limits of the continental shelf. Such Preliminary Information does not prejudice a full submission, and will not be considered by the Commission. According to Nicaragua, the basic technical and other preparatory work that is required in order for it to make a full submission is well advanced. Nicaragua asserts that it has established the outer limit of its continental shelf beyond 200 nautical miles on the basis of available public domain datasets and intends to acquire additional survey data in order to complete the information to be submitted to the Commission in accordance with Article 76 of UNCLOS and the Scientific and Technical Guidelines of the Commission.

121. Nicaragua also maintains that its entitlement to continental shelf beyond 200 nautical miles extends into areas within 200 nautical miles of Colombia's coasts and that, under Article 76, paragraph 1, of UNCLOS, an entitlement to continental shelf based on the distance criterion does not take precedence over an entitlement based on the criterion of natural prolongation.

*

122. According to Colombia, Nicaragua's request for continental shelf delimitation is unfounded because there are no areas of extended continental shelf within this part of the Caribbean Sea given that there are no maritime areas that lie more than 200 nautical miles from the nearest land territory of the coastal States. Colombia contends that Nicaragua's purported rights to the extended continental shelf out to the outer edge of the continental margin beyond 200 nautical miles have never been recognized or even submitted to the Commission. According to Colombia, the information provided to the Court, which is based on the "Preliminary Information" submitted by Nicaragua to the Commission, is "woefully deficient". Colombia emphasizes that the "Preliminary Information" does not fulfil the requirements for the Commission to make recommendations, and therefore Nicaragua has not established any entitlement to an extended continental shelf. That being the case, Colombia asserts that Nicaragua cannot merely assume that it possesses such rights in this case or ask the Court to proceed to a delimitation "based on rudimentary and incomplete technical information".

123. Colombia maintains that a State's entitlement based on the distance criterion always takes precedence over another State's entitlement based on natural prolongation beyond 200 nautical miles. Colombia further contends that Article 76 of UNCLOS does not enable States by means of outer continental shelf submissions, and particularly ones that have not followed the procedures of the Convention, to encroach on other States' 200-mile limits.

124. Colombia adds that the Commission will not consider any extended continental shelf submissions unless neighbouring States with potential claims in the area consent. Thus, if a neighbouring State does not give its consent, the Commission will take no action with the result that a State will not have established extended continental shelf limits that are final and binding. Colombia recalls that such limits, in any event, are without prejudice to questions of delimitation and would not be opposable to Colombia.

* *

125. The Court begins by noting that the jurisprudence which has been referred to by Nicaragua in support of its claim for continental shelf delimitation involves no case in which a court or a tribunal was requested to determine the outer limits of a continental shelf beyond 200 nautical miles.

Nicaragua relies on the judgment of 14 March 2012 rendered by ITLOS in the *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, pp. 1-151 [hereinafter *Bay of Bengal* case]. ITLOS in this judgment did not, however, determine the outer limits of the continental shelf beyond 200 nautical miles. The Tribunal extended the line of the single maritime boundary beyond the 200-nautical-mile limit until it reached the area where the rights of third States may be affected (*Judgment of 14 March 2012*, para. 462). In doing so, the Tribunal underlined that, in view of the fact that a thick layer of sedimentary rocks covers practically the entire floor of the Bay of Bengal, the Bay presents a unique situation and that this fact had been acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea (*ibid.*, paras. 444-446).

The Court emphasizes that both parties in the *Bay of Bengal* case were States parties to UNCLOS and had made full submissions to the Commission (see *ibid.*, para. 449) and that the Tribunal's ruling on the delimitation of the continental shelf in accordance with Article 83 of UNCLOS does not preclude any recommendation by the Commission as to the outer limits of the continental shelf in accordance with Article 76, paragraph 8, of the Convention. ITLOS further noted that a "clear distinction" exists under UNCLOS between the delimitation of continental shelf and the delineation of its outer limits (*ibid.*, paras. 376-394).

126. In the case concerning *Territorial and Maritime Dispute between*

Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. *Honduras)*, the Court stated that "any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder" (*I.C.J. Reports 2007 (II)*, p. 759, para. 319). The Court recalls that UNCLOS, according to its Preamble, is intended to establish "a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources". The Preamble also stresses that "the problems of ocean space are closely interrelated and need to be considered as a whole". Given the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention.

127. The Court observes that Nicaragua submitted to the Commission only "Preliminary Information" which, by its own admission, falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles which "shall be submitted by the coastal State to the Commission" in accordance with paragraph 8 of Article 76 of UNCLOS (see paragraph 120 above). Nicaragua provided the Court with the annexes to this "Preliminary Information" and in the course of the hearings it stated that the "Preliminary Information" in its entirety was available on the Commission's website and provided the necessary reference.

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

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

130. In view of the above, the Court need not address any other argu-

ments developed by the Parties, including the argument as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one party can affect a 200-nautical-mile entitlement to the continental shelf of another party.

131. The Court concludes that Nicaragua's claim contained in its final submission I (3) cannot be upheld.

V. Maritime Boundary

1. The Task Now before the Court

132. In light of the decision it has taken regarding Nicaragua's final submission I (3) (see paragraph 131 above), the Court must consider what maritime delimitation it is to effect. Leaving out of account any Nicaraguan claims to a continental shelf beyond 200 nautical miles means that there can be no question of determining a maritime boundary between the mainland coasts of the Parties, as these are significantly more than 400 nautical miles apart. There is, however, an overlap between Nicaragua's entitlement to a continental shelf and exclusive economic zone extending to 200 nautical miles from its mainland coast and adjacent islands and Colombia's entitlement to a continental shelf and exclusive economic zone derived from the islands over which the Court has held that Colombia has sovereignty (see paragraph 103 above).

133. The present case was brought before the Court by the Application of Nicaragua, not by special agreement between the Parties, and there has been no counter-claim by Colombia. It is, therefore, to the Nicaraguan Application and Nicaragua's submissions that it is necessary to turn in order to determine what the Court is called upon to decide. In its Application, Nicaragua asked the Court

> "to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary".

This request was clearly broad enough to encompass the determination of a boundary between the continental shelf and exclusive economic zone generated by the Nicaraguan mainland and adjacent islands and the various maritime entitlements appertaining to the Colombian islands.

134. In its Reply, however, Nicaragua amended its submissions. In its final submissions, as has been seen, it sought not a single maritime bound-

ary but the delimitation of a continental shelf boundary between the two mainland coasts. Nevertheless, Nicaragua's final submissions at the end of the oral phase also asked the Court to adjudge and declare that

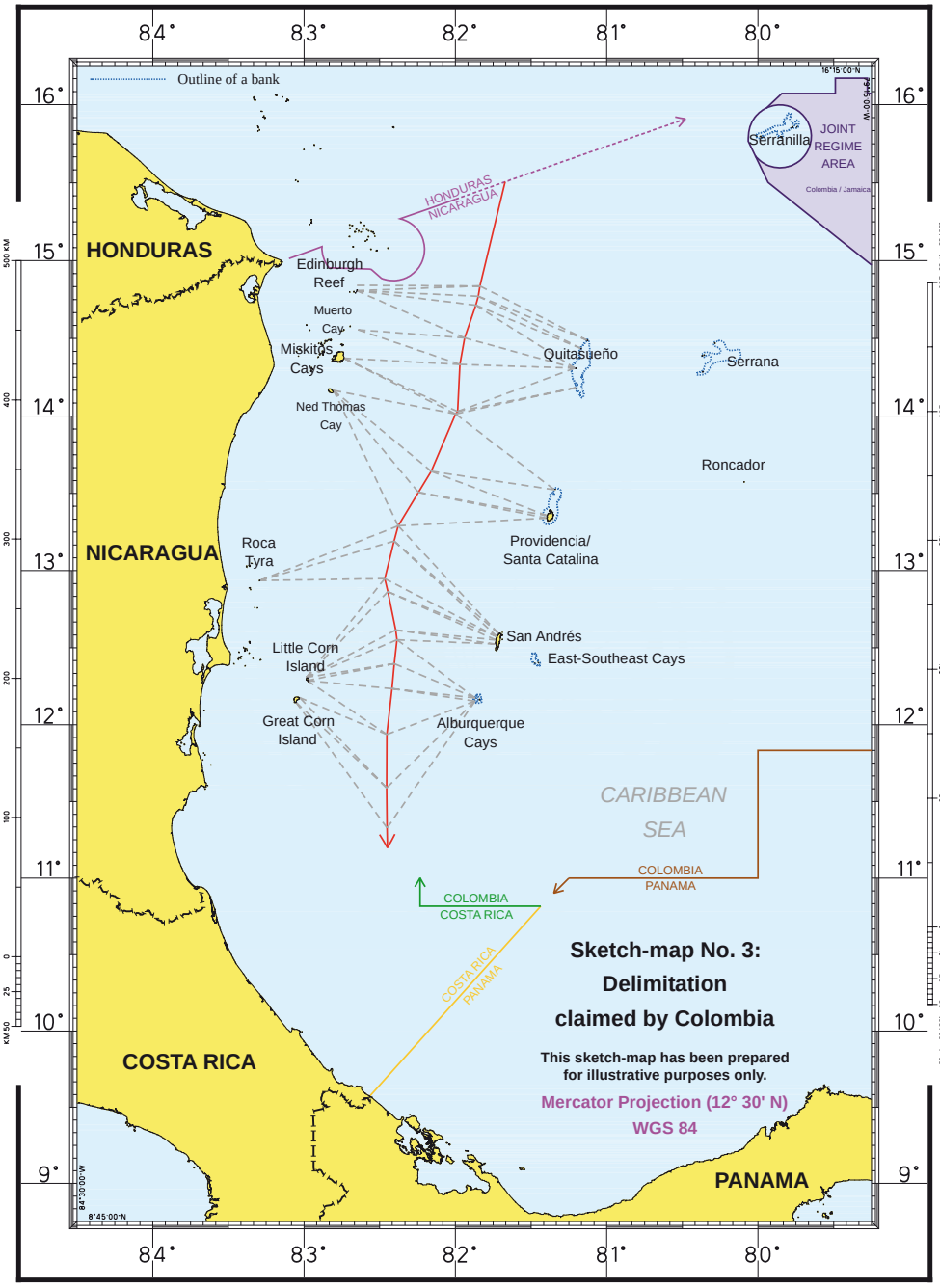
> "(4) The islands of San Andrés and Providencia and Santa Catalina be enclaved and accorded a maritime entitlement of 12 nautical miles, this being the appropriate equitable solution justified by the geographical and legal framework.
>
> (5) The equitable solution for any cay, that might be found to be Colombian, is to delimit a maritime boundary by drawing a 3-nautical-mile enclave around them."

These submissions call upon the Court to effect a delimitation between the maritime entitlements of the Colombian islands and the continental shelf and exclusive economic zone of Nicaragua. That this is what the Court is asked to do is confirmed by the statement made by the Agent of Nicaragua in opening the oral proceedings:

> "On a substantive level, Nicaragua originally requested of the Court, and continues to so request, that all maritime areas of Nicaragua and Colombia be delimited on the basis of international law; that is, in a way that guarantees to the Parties an equitable result.
>
> . . . . . .
>
> But whatever method or procedure is adopted by the Court to effect the delimitation, the aim of Nicaragua is that the decision leaves no more maritime areas pending delimitation between Nicaragua and Colombia. This was and is the main objective of Nicaragua since it filed its Application in this case." (See sketch-map No. 2, p. 663.)

135. Colombia, for its part, has requested that the delimitation of the exclusive economic zone and the continental shelf between Nicaragua and Colombia be effected by a single maritime boundary, constructed as a median line between Nicaraguan fringing islands and the islands of the San Andrés Archipelago (see sketch-map No. 3: Delimitation claimed by Colombia, p. 672).

136. As the Court held in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent" (*Judgment, I.C.J. Reports 1985*, p. 23, para. 19). Notwithstanding its decision regarding Nicaragua's final submission I (3) (paragraph 131 above), it is still called upon to effect a delimitation between the maritime entitlements of Colombia and the continental shelf and exclusive economic zone of Nicaragua within 200 nautical miles of the Nicaraguan coast.


Outline of a bank
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
HONDURAS
NICARAGUA
Edinburgh Reef
Muerto Cay
Miskitos Cays
Ned Thomas Cay
Quitasueño
Serrana
Roncador
Providencia/ Santa Catalina
Roca Tyra
San Andrés
East-Southeast Cays
Little Corn Island
Great Corn Island
Alburquerque Cays
Serranilla
JOINT REGIME AREA
Colombia / Jamaica
CARIBBEAN SEA
COLOMBIA
PANAMA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Sketch-map No. 3:
Delimitation
claimed by Colombia
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
84°
83°
82°
81°
80°
16°
15°
14°
13°
12°
11°
10°
9°
Nautical Miles
KM

2. Applicable Law

137. The Court must, therefore, determine the law applicable to this delimitation. The Court has already noted (paragraph 114 above) that, since Colombia is not party to UNCLOS, the Parties agree that the applicable law is customary international law.

138. The Parties are also agreed that several of the most important provisions of UNCLOS reflect customary international law. In particular, they agree that the provisions of Articles 74 and 83, on the delimitation of the exclusive economic zone and the continental shelf, and Article 121, on the legal régime of islands, are to be considered declaratory of customary international law.

Article 74, entitled "Delimitation of the exclusive economic zone between States with opposite or adjacent coasts", provides that:

"1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement."

Article 83, entitled "Delimitation of the continental shelf between States with opposite or adjacent coasts", is in the same terms as Article 74, save that where Article 74, paragraphs (1) and (4), refer to the exclusive economic zone, the corresponding paragraphs in Article 83 refer to the continental shelf.

Article 121, entitled "Regime of islands", provides that:

"1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

139. The Court has recognized that the principles of maritime delimitation enshrined in Articles 74 and 83 reflect customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 91, paras. 167 *et seq.*). In the same case it treated the legal definition of an island embodied in Article 121, paragraph 1, as part of customary international law (*ibid.*, p. 91, para. 167 and p. 99, para. 195). It reached the same conclusion as regards Article 121, paragraph 2 (*ibid.*, p. 97, para. 185). The Judgment in the *Qatar* v. *Bahrain* case did not specifically address paragraph 3 of Article 121. The Court observes, however, that the entitlement to maritime rights accorded to an island by the provisions of paragraph 2 is expressly limited by reference to the provisions of paragraph 3. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the long-established principle that "islands, regardless of their size,... enjoy the same status, and therefore generate the same maritime rights, as other land territory" *(ibid.)* and the more extensive maritime entitlements recognized in UNCLOS and which the Court has found to have become part of customary international law. The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law.

3. Relevant Coasts

140. It is well established that "[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77). As the Court stated in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, "the land is the legal source of the power which a State may exercise over territorial extensions to seaward" (*Judgment, I.C.J. Reports 1969*, p. 51, para. 96). Similarly, in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court observed that "the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it" (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1982*, p. 61, para. 73).

141. The Court will, therefore, begin by determining what are the relevant coasts of the Parties, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the overlapping claims by drawing a line of separation between the maritime areas

concerned. As the Court explained in the *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* case:

> "The role of relevant coasts can have two different though closely related legal aspects in relation to the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line." (*Judgment, I.C.J. Reports 2009*, p. 89, para. 78.)

142. The Court will first briefly set out the positions of the Parties regarding their respective coasts (see sketch-maps No. 4 and 5, pp. 676 and 677).

A. The Nicaraguan relevant coast

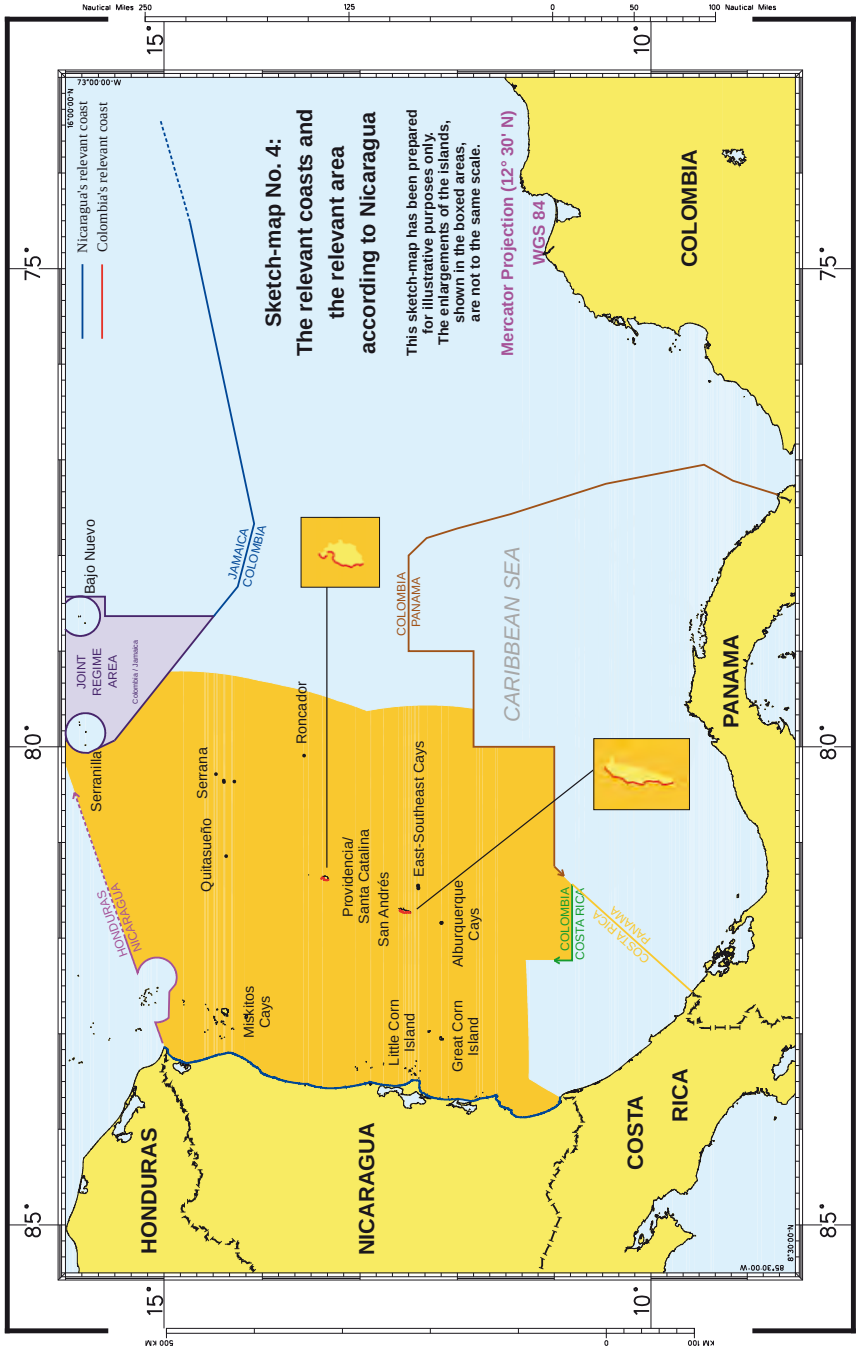
143. Nicaragua maintains that its relevant coast comprises its entire mainland coast in the Caribbean together with the islands which it considers to be "an integral part of the mainland coast of Nicaragua". In this context, it principally refers to the Corn Islands in the south and the Miskitos Cays in the north (see paragraph 21). The latter are located within 10 nautical miles of the coast. The former are located approximately 26 nautical miles from the coast but Nicaragua maintains that the presence of a number of smaller islets and cays between the Corn Islands and the mainland means that there is a continuous belt of territorial sea between the islands and the mainland.

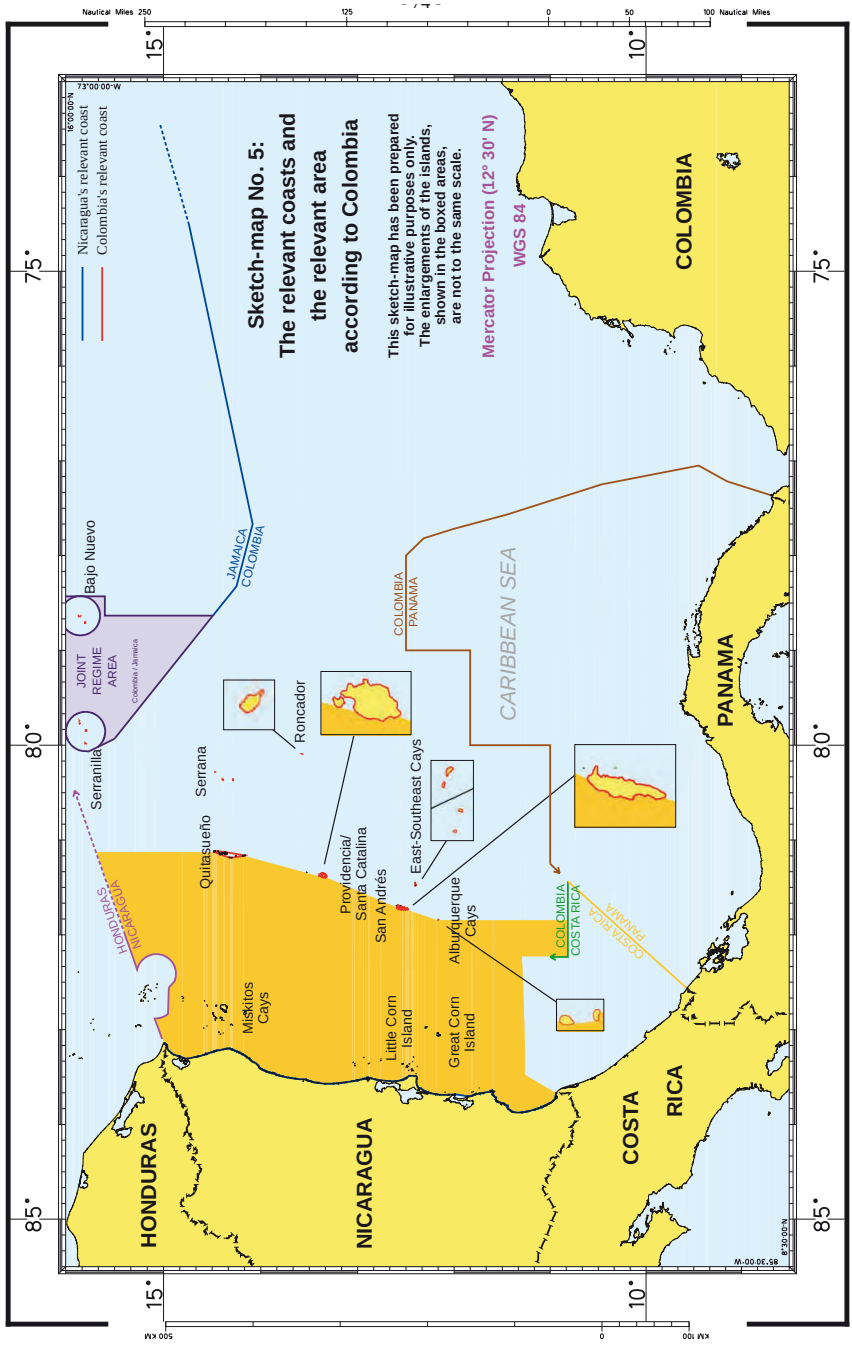
Employing, for these purposes, a straight line from the northern boundary with Honduras to the southern boundary with Costa Rica, Nicaragua estimates the length of its relevant coast as 453 km. Alternatively, Nicaragua estimates the length of the relevant coast, if one follows its natural configuration, as 701 km.

*

144. Although Colombia appeared at one point to suggest that the relevant Nicaraguan coast was confined to the east-facing coasts of the islands, since it is from these islands that the Nicaraguan entitlement to a 200-nautical-mile continental shelf and exclusive economic zone would be measured, in its pleadings as a whole, Colombia accepts that the relevant Nicaraguan coast comprises the mainland coast of Nicaragua and the Nicaraguan islands. Colombia accepts that this coast has a length of 453 km, if the straight line system is used. If, however, the Nicaraguan coast is measured in a way which takes full account of its natural configuration, Colombia maintains that the maximum length of that coast is 551 km and not the 701 km suggested by Nicaragua.

* *


Sketch-map No. 4:
The relevant coasts and the relevant area according to Nicaragua
This sketch-map has been prepared for illustrative purposes only. The enlargements of the islands, shown in the boxed areas, are not to the same scale.
Mercator Projection (12° 30' N)
WGS 84
Nicaragua's relevant coast
Colombia's relevant coast
Nautical Miles 250 125 0 50 100 Nautical Miles
KM 500 0 KM 100
HONDURAS
NICARAGUA
COSTA RICA
COLOMBIA
PANAMA
CARIBBEAN SEA
JAMAICA
COLOMBIA
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
Serranilla
Serrana
Quitasueño
Roncador
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Alburquerque Cays
Little Corn Island
Great Corn Island
Miskitos Cays
HONDURAS NICARAGUA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
15° 10° 75° 80° 85°


Sketch-map No. 5:
The relevant coasts and the relevant area according to Colombia
This sketch-map has been prepared for illustrative purposes only. The enlargements of the islands, shown in the boxed areas, are not to the same scale.
Mercator Projection (12° 30' N)
WGS 84
Nicaragua's relevant coast
Colombia's relevant coast
Nautical Miles 250 125 0 50 100 Nautical Miles
500 KM 0 KM 100
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
CARIBBEAN SEA
JAMAICA
COLOMBIA
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
Serranilla
Roncador
Serrana
Quitasueño
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Albuquerque Cays
Little Corn Island
Great Corn Island
Miskitos Cays
HONDURAS NICARAGUA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
73°00'00"W
16°00'00"N
85°30'00"W
15°
10°
75°
80°
85°

145. The Court considers that the relevant Nicaraguan coast is the whole coast which projects into the area of overlapping potential entitlements and not simply those parts of the coast from which the 200-nautical-mile entitlement will be measured. With the exception of the short stretch of coast near Punta de Perlas, which faces due south and thus does not project into the area of overlapping potential entitlements, the relevant coast is, therefore, the entire mainland coast of Nicaragua (see sketch-map No. 6, p. 681). Taking the general direction of this coast, its length is approximately 531 km. The Court also considers that Nicaragua's entitlement to a 200-nautical-mile continental shelf and exclusive economic zone has to be measured from the islands fringing the Nicaraguan coast. The east-facing coasts of the Nicaraguan islands are parallel to the mainland and do not, therefore, add to the length of the relevant coast, although they contribute to the baselines from which Nicaragua's entitlement is measured (see below, paragraph 201).

B. The Colombian relevant coast

146. There is a more marked difference between the Parties regarding what constitutes the relevant Colombian coast. Nicaragua's position is that it is the part of the mainland coast of Colombia which faces west and north-west. Nicaragua advanced that position in connection with its initial claim for a single maritime boundary following the median line between the two mainland coasts. It maintains this position in connection with its current claim for a continental shelf boundary between the outer limit of the extended continental shelf which it claims and the continental shelf entitlement generated by the Colombian mainland. Nicaragua argues, in the alternative, that, if the Court were to hold that it was not possible to address the delimitation of the continental shelf beyond 200 nautical miles, then the relevant Colombian coast would be that of the islands of San Andrés, Providencia and Santa Catalina. It maintains, however, that only the west-facing coasts of those islands should be considered as the relevant coast, since only they project towards Nicaragua, and to treat the other coasts of the islands as part of the relevant coast would constitute a form of double counting. Nevertheless, Nicaragua contends that the area of overlapping entitlements extends all the way from the Nicaraguan coast to a line 200 nautical miles from the baselines of that coast.

147. Nicaragua estimates the total length of the west-facing coasts of the islands of San Andrés, Providencia and Santa Catalina as 21 km. So far as the other maritime features are concerned, Nicaragua maintains that they should not be counted as part of the relevant coast and that, in any event, they are so small that the combined length of their west-facing coasts would be no more than 1 km.

*

148. Colombia's position is that its mainland coast is irrelevant because it is more than 400 nautical miles from Nicaragua's coast and thus cannot generate maritime entitlements which overlap with those of Nicaragua. Colombia maintains that the relevant Colombian coast is that of the Colombian islands. Its position about what part of those coasts is to be taken into account, however, is closely bound up with its view of what constitutes the relevant area (a subject which the Court considers below in paragraphs 155-166). Colombia's initial position is that the relevant area in which the Court is called upon to effect a delimitation between overlapping entitlements is located between the west-facing coasts of the islands and the Nicaraguan mainland and islands, so that only the west-facing coasts of the Colombian islands would be relevant. However, Colombia argues, in the alternative, that if the area of overlapping entitlements includes the area to the east of the islands, extending as far as the line 200 nautical miles from the Nicaraguan baselines, then the entire coasts of the Colombian islands should be counted, since islands radiate maritime entitlement in all directions.

149. Colombia estimates the overall coastline of San Andrés, Providencia and Santa Catalina at 61.2 km. It also maintains that the coasts of the cays immediately adjacent to those three islands (Hayne's Cay, Rock Cay and Johnny Cay, adjacent to San Andrés, and Basalt Cay, Palma Cay, Cangrejo Cay and Low Cay, adjacent to Providencia and Santa Catalina) are also relevant, thus adding a further 2.9 km. In addition, Colombia contends that the coastlines of Alburquerque (1.35 km), East-Southeast Cays (1.89 km), Roncador (1.35 km), Serrana (2.4 km), Serranilla (2.9 km) and Bajo Nuevo (0.4 km) are relevant, giving a total of 74.39 km. At certain stages during the hearings, Colombia also suggested that the coast of Quitasueño, calculated by a series of straight lines joining the features that Colombia claims are above water at high tide, constitutes part of Colombia's relevant coast.

* *

150. The Court recalls that, in order for a coast to be regarded as relevant for the purpose of a delimitation, it "must generate projections which overlap with projections from the coast of the other Party" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 97, para. 99) and that, in consequence, "the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 75).

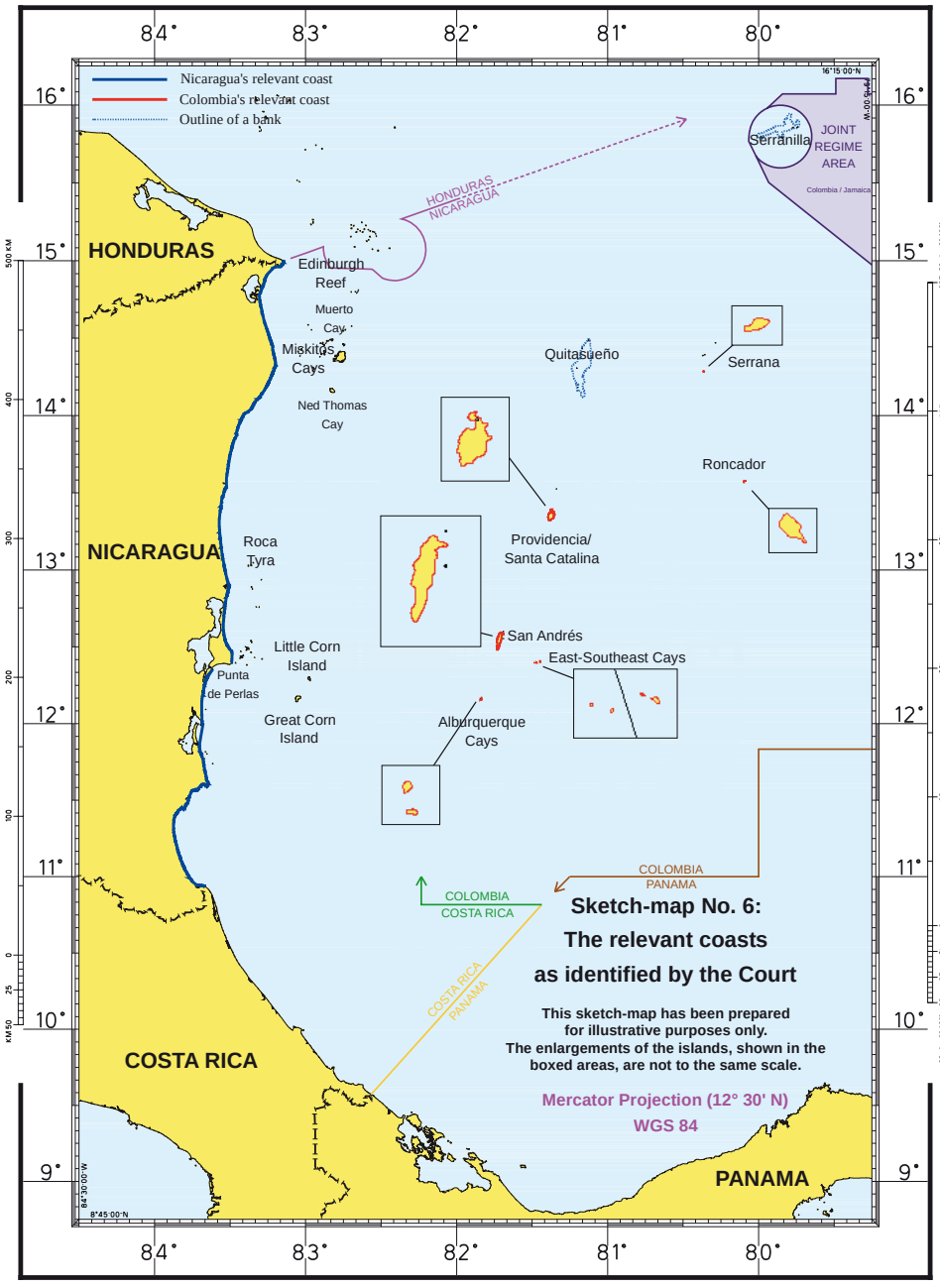
151. In view of the Court's decision regarding Nicaragua's claim to a continental shelf on the basis of natural prolongation (see paragraph 131

above), the Court is concerned in the present proceedings only with those Colombian entitlements which overlap with the continental shelf and exclusive economic zone entitlements within 200 nautical miles of the Nicaraguan coast. Since the mainland coast of Colombia does not generate any entitlement in that area, it follows that it cannot be regarded as part of the relevant coast for present purposes. The relevant Colombian coast is thus confined to the coasts of the islands under Colombian sovereignty. Since the area of overlapping potential entitlements extends well to the east of the Colombian islands, the Court considers that it is the entire coastline of these islands, not merely the west-facing coasts, which has to be taken into account. The most important islands are obviously San Andrés, Providencia and Santa Catalina. For the purposes of calculating the relevant coasts of Providencia and Santa Catalina, those two features were joined with two short straight lines, so that the parts of the coast of each island (in the north-west of Providencia, in the area of San Juan Point, and in the south-east of Santa Catalina) which are immediately facing one another are not included in the relevant coast. The Court does not consider that the smaller cays (listed in paragraph 149 above), which are immediately adjacent to those islands, add to the length of the relevant coast. Following, as with the Nicaraguan coastline, the general direction of the coast, the Court therefore estimates the total length of the relevant coast of the three islands as 58 km.

152. The Court also considers that the coasts of Alburquerque Cays, East-Southeast Cays, Roncador and Serrana must be considered part of the relevant coast. Taken together, these add a further 7 km to the relevant Colombian coast, giving a total length of approximately 65 km. The Court has not, however, taken account of Serranilla and Bajo Nuevo for these purposes. These two features lie within an area that Colombia and Jamaica left undelimited in their 1993 Maritime Delimitation Treaty (United Nations, *Treaty Series (UNTS)*, Vol. 1776, p. 27) in which there are potential third State entitlements. The Court has also disregarded, for these purposes, Quitasueño, whose features, as explained below (see paragraphs 181-183) are so small that they cannot make any difference to the length of Colombia's coast.

153. The lengths of the relevant coasts are therefore 531 km (Nicaragua) and 65 km (Colombia), a ratio of approximately 1:8.2 in favour of Nicaragua. The relevant coasts as determined by the Court are depicted on sketch-map No. 6 (p. 681).

154. The second aspect mentioned by the Court in terms of the role of relevant coasts in the context of the third stage of the delimitation process (see paragraph 141 above and paragraphs 190 *et seq.* below) will be dealt with below in paragraphs 239 to 247 in the section dealing with the disproportionality test.


Nicaragua's relevant coast
Colombia's relevant coast
Outline of a bank
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
HONDURAS NICARAGUA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
JOINT REGIME AREA
Colombia / Jamaica
Serranilla
Edinburgh Reef
Muerto Cay
Miskitos Cays
Ned Thomas Cay
Quitasueño
Serrana
Roncador
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Albuquerque Cays
Roca Tyra
Little Corn Island
Punta de Perlas
Great Corn Island
Sketch-map No. 6:
The relevant coasts
as identified by the Court
This sketch-map has been prepared for illustrative purposes only.
The enlargements of the islands, shown in the boxed areas, are not to the same scale.
Mercator Projection (12° 30' N)
WGS 84
84°
83°
82°
81°
80°
16°
15°
14°
13°
12°
11°
10°
9°
Nautical Miles
KM

4. Relevant Maritime Area

155. The Court will next consider the extent of the relevant maritime area, again in the light of its decision regarding Nicaragua's claim to a continental shelf beyond 200 nautical miles. In these circumstances, Nicaragua maintains that the relevant area is the entire area from the Nicaraguan coast, in the west, to a line 200 nautical miles from the Nicaraguan coast and islands, in the east. For Nicaragua, the southern boundary of the relevant area is formed by the demarcation lines agreed between Colombia and Panama and Colombia and Costa Rica (see paragraph 160 below) on the basis that, since Colombia has agreed with those States that it has no title to any maritime areas to the south of those lines, they do not fall within an area of overlapping entitlements. In the north, Nicaragua contends that the relevant area extends to the boundary between Nicaragua and Honduras, which was determined by the Court in its Judgment of 8 October 2007 (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 659). The sketch-maps of the relevant area submitted by Nicaragua also excluded the Colombia-Jamaica "Joint Regime Area" (see paragraph 160 below), although at one point, during the oral proceedings, counsel for Nicaragua suggested that "the Joint Regime Area is part of the area that [the Court is] asked to delimit". (See sketch-map No. 4: The relevant coasts and the relevant area according to Nicaragua, p. 676.)

*

156. Colombia maintains that the relevant area is confined to the area between the west coasts of the Colombian islands and the Nicaraguan coast (see sketch-map No. 5: The relevant coasts and the relevant area according to Colombia, p. 677) bordered in the north by the boundary between Nicaragua and Honduras and in the south by the boundary between Colombia and Costa Rica (see paragraph 160 below). Colombia considers that its sovereignty over the islands bars any claim on the part of Nicaragua to maritime spaces to the east of Colombia's islands.

* *

157. The Court recalls that, as it observed in the *Maritime Delimitation in the Black Sea* case, "the legal concept of the 'relevant area' has to be taken into account as part of the methodology of maritime delimitation" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 99, para. 110). Depending on the configuration of the relevant coasts in the general geographical context, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand.

158. In addition, the relevant area is pertinent when the Court comes to verify whether the line which it has drawn produces a result which is disproportionate. In this context, however, the Court has repeatedly emphasized that:

> "The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts." (*Maritime Delimitation in the Black Sea, I.C.J. Reports 2009*, pp. 99-100, para. 110.)

The calculation of the relevant area does not purport to be precise but is only approximate and "[t]he object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas" (*ibid.*, p. 100, para. 111; see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 18; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 45, para. 58; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 67, para. 64).

159. The relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap. It follows that, in the present case, the relevant area cannot stop, as Colombia maintains it should, at the western coasts of the Colombian islands. Nicaragua's coast, and the Nicaraguan islands adjacent thereto, project a potential maritime entitlement across the sea bed and water column for 200 nautical miles. That potential entitlement thus extends to the sea bed and water column to the east of the Colombian islands where, of course, it overlaps with the competing potential entitlement of Colombia derived from those islands. Accordingly, the relevant area extends from the Nicaraguan coast to a line in the east 200 nautical miles from the baselines from which the breadth of Nicaragua's territorial sea is measured. Since Nicaragua has not yet notified the Secretary-General of the location of those baselines under Article 16, paragraph 2, of UNCLOS, the eastern limit of the relevant area can be determined only on an approximate basis.

160. In both the north and the south, the interests of third States become involved.

In the north, there is a boundary between Nicaragua and Honduras, established by the Court in its 2007 Judgment (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 760-763). The endpoint of that boundary was not determined but "[t]he Court made a clear determination [in paragraphs 306-319 of the 2007 Judgment] that

the bisector line would extend beyond the 82nd meridian until it reached the area where the rights of a third State may be affected" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 443, para. 70). In the north, the Court must also take into account that the 1993 Agreement between Colombia and Jamaica (paragraph 152 above) established a maritime boundary between those two States but left undelimited the "Joint Regime Area" (depicted in sketch-map No. 1, p. 639).

In the south, the Colombia-Panama Agreement (*UNTS*, Vol. 1074, p. 221) was signed in 1976 and entered into force on 30 November 1977. It adopted a step-line boundary as a simplified form of equidistance in the area between the Colombian islands and the Panamanian mainland. Colombia and Costa Rica signed an Agreement in 1977, which adopts a boundary line that extends from the boundaries agreed between Colombia and Panama (described above) and between Costa Rica and Panama. The Agreement has not been ratified, although Colombia contends that Costa Rica has indicated that it considers itself to be bound by the substance of this Agreement. The boundary lines set out in all of these agreements are depicted on sketch-map No. 1 (p. 639).

161. The Court recalls the statement in its 2011 Judgment on Costa Rica's Application to intervene in the present proceedings that, in a maritime dispute, "a third State's interest will, as a matter of principle, be protected by the Court" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 372, para. 86). In that Judgment the Court also referred to its earlier Judgment in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, in which it stated that

> "the taking into account of all the coasts and coastal relationships . . . as a geographical fact for the purpose of effecting an eventual delimitation as between two riparian States . . . in no way signifies that by such an operation itself the legal interest of a third . . . State . . . may be affected" (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 124, para. 77).

In the *Maritime Delimitation in the Black Sea* case, the Court noted that, in parts of the area in which the potential entitlements of Romania and Ukraine overlapped, entitlements of third States might also come into play. It considered, however, that this fact did not preclude the inclusion of those parts in the relevant area "without prejudice to the position of any third State regarding its entitlements in this area" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 114). The Court stated that

> "where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which

> may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected. Third party entitlements would only be relevant if the delimitation between Romania and Ukraine were to affect them." (*I.C.J. Reports 2009*, p. 100, para. 114.)

162. The same considerations are applicable to the determination of the relevant area in the present case. The Court notes that, while the agreements between Colombia, on the one hand, and Costa Rica, Jamaica and Panama, on the other, concern the legal relations between the parties to each of those agreements, they are *res inter alios acta* so far as Nicaragua is concerned. Accordingly, none of those agreements can affect the rights and obligations of Nicaragua vis-à-vis Costa Rica, Jamaica or Panama; nor can they impose obligations, or confer rights, upon Costa Rica, Jamaica or Panama vis-à-vis Nicaragua. It follows that, when it effects the delimitation between Colombia and Nicaragua, the Court is not purporting to define or to affect the rights and obligations which might exist as between Nicaragua and any of these three States. The position of Honduras is somewhat different. The boundary between Honduras and Nicaragua was established by the Court's 2007 Judgment, although the endpoint of that boundary was not determined. Nicaragua can have no rights to the north of that line and Honduras can have no rights to the south. It is in the final phase of delimitation, however, not in the preliminary phase of identifying the relevant area, that the Court is required to take account of the rights of third parties. Nevertheless, if the exercise of identifying, however approximately, the relevant area is to be a useful one, then some awareness of the actual and potential claims of third parties is necessary. In the present case, there is a large measure of agreement between the Parties as to what this task must entail. Both Nicaragua and Colombia have accepted that the area of their overlapping entitlements does not extend beyond the boundaries already established between either of them and any third State.

163. The Court recalls that the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap. Accordingly, if either Party has no entitlement in a particular area, whether because of an agreement it has concluded with a third State or because that area lies beyond a judicially determined boundary between that Party and a third State, that area cannot be treated as part of the relevant area for present purposes. Since Colombia has no potential entitlements to the south and east of the boundaries which it has agreed with Costa Rica and Panama, the relevant area cannot extend beyond those boundaries. In addition, although the Colombia-Jamaica "Joint Regime Area" is an area in which Colombia and Jamaica have agreed upon shared development, rather than delimitation, the Court considers that it has to be treated as falling outside the relevant area. The Court notes that more than half of the

"Joint Regime Area" (as well as the island of Bajo Nuevo and the waters within a 12-nautical-mile radius thereof) is located more than 200 nautical miles from Nicaragua and thus could not constitute part of the relevant area in any event. It also recalls that neither Colombia, nor (at least in most of its pleadings) Nicaragua, contended that it should be included in the relevant area. Although the island of Serranilla and the waters within a 12-nautical-mile radius of the island are excluded from the "Joint Regime Area", the Court considers that they also fall outside the relevant area for the purposes of the present case, in view of potential Jamaican entitlements and the fact that neither Party contended otherwise.

164. The Court therefore concludes that the boundary of the relevant area in the north follows the maritime boundary between Nicaragua and Honduras, laid down in the Court's Judgment of 8 October 2007 (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 659), until it reaches latitude 16 degrees north. It then continues due east until it reaches the boundary of the "Joint Regime Area". From that point, it follows the boundary of that area, skirting a line 12 nautical miles from Serranilla, until it intersects with the line 200 nautical miles from Nicaragua.

165. In the south, the boundary of the relevant area begins in the east at the point where the line 200 nautical miles from Nicaragua intersects with the boundary line agreed between Colombia and Panama. It then follows the Colombia-Panama line to the west until it reaches the line agreed between Colombia and Costa Rica. It follows that line westwards and then northwards, until it intersects with a hypothetical equidistance line between the Costa Rican and Nicaraguan coasts.

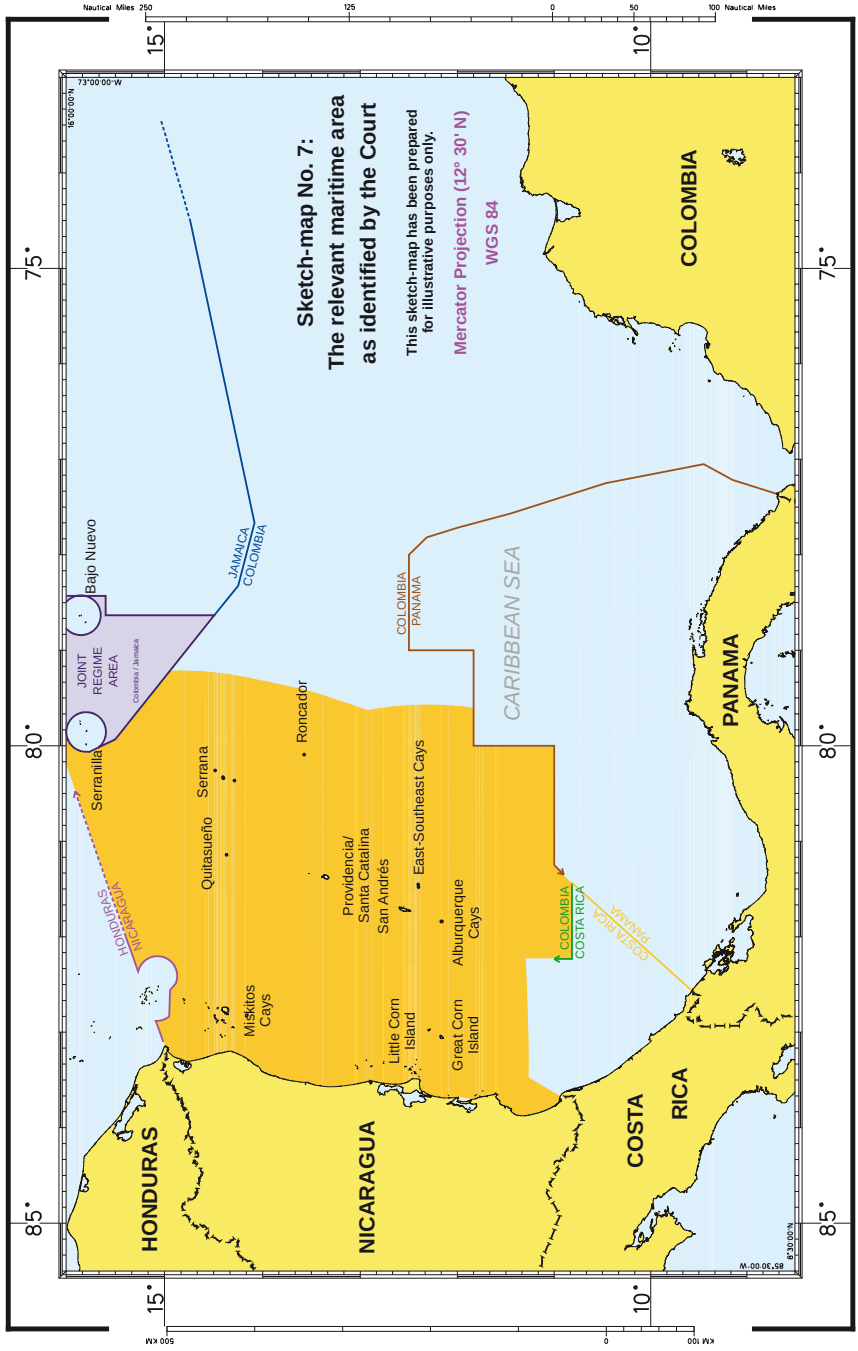
166. The relevant area thus drawn has a size of approximately 209,280 square km. It is depicted on sketch-map No. 7 (p. 687).

5. Entitlements Generated by Maritime Features

167. The Court finds it convenient at this point in its analysis to consider the entitlements generated by the various maritime features in the present case.

A. San Andrés, Providencia and Santa Catalina

168. The Parties agree that San Andrés, Providencia and Santa Catalina are entitled to a territorial sea, exclusive economic zone and continental shelf. In principle, that entitlement is capable of extending up to 200 nautical miles in each direction. As explained in the previous section, that entitlement overlaps with the entitlement to a 200-nautical-mile continental shelf and exclusive economic zone of the Nicaraguan mainland and adjacent islands. That overlap exists to the east, as well as the west, of San Andrés, Providencia and Santa Catalina. However, to the east the maritime entitlement of the three islands extends to an area which lies


Sketch-map No. 7:
The relevant maritime area as identified by the Court
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
CARIBBEAN SEA
COLOMBIA
PANAMA
HONDURAS
NICARAGUA
COSTA RICA
JAMAICA
COLOMBIA
Bajo Nuevo
JOINT REGIME AREA
Colombia / Jamaica
Serranilla
Roncador
Serrana
Quitasueño
Miskitos Cays
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Alburquerque Cays
Little Corn Island
Great Corn Island
HONDURAS
NICARAGUA
COLOMBIA
PANAMA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Nautical Miles 250 125 0 50 100 Nautical Miles
500 KM 0 KM 100
73°00'00"W
16°00'00"N
85°30'00"W
8°30'00"N
15°
10°
75°
80°
85°

beyond a line 200 nautical miles from the Nicaraguan baselines and thus falls outside the relevant area as defined by the Court.

169. Nicaragua submits that, in order to achieve an equitable solution, the boundary which the Court will draw should confine each of the three islands to an enclave of 12 nautical miles. The Court will consider that submission when it comes to determine the course of the maritime boundary (see paragraphs 184-247). At this stage, it is necessary only to note that the Parties are agreed regarding the potential entitlements of the three islands.

B. Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo

170. The Parties differ regarding the entitlements which may be generated by the other maritime features. Their differences regarding Quitasueño are such that the entitlements generated by Quitasueño will be dealt with in a separate section (paragraphs 181-183 below). Nicaragua contends that Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo all fall within the exception stated in Article 121, paragraph 3, of UNCLOS, that is to say, they are rocks with no entitlement to a continental shelf or exclusive economic zone. Nicaragua argues that these features must each be regarded separately and such entitlements as they generate cannot be enlarged by treating them as a group, particularly in view of the considerable distances between them. It also rejects what it characterizes as Colombia's attempt to suggest that these islands are larger than they are by giving the dimensions of the banks and shoals on which the different cays sit. Nicaragua maintains that it is only those individual features which are above water at high tide that generate any maritime entitlement at all and that in each case the extent of that entitlement is determined by the size of the individual island, not by its relationship to other maritime features.

171. Nicaragua points to the small size of these islands and the absence of any settled population and maintains, in addition, that none of them has any form of economic life. It argues that they cannot sustain human habitation or economic life of their own and therefore constitute rocks which fall within the exceptional rule stated in Article 121, paragraph 3, of the Convention. Accordingly, it contends that they have no entitlement to either an exclusive economic zone or a continental shelf and are confined to a territorial sea.

172. In addition, Nicaragua maintains that the achievement of an equitable solution regarding the overlapping entitlements around these islands requires that each be restricted to an enclave extending 3 nautical miles from its baselines. In support of this submission, it points to a number of instances in which it maintains that the Court and arbitration tribunals have accorded only a restricted territorial sea to small islands and maritime features.

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173. Colombia maintains that Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo are islands which have the same maritime entitlements as any other land territory, including an entitlement to a territorial sea of 12 nautical miles, an exclusive economic zone and a continental shelf. Colombia points to the presence on Alburquerque (North Cay), East-Southeast Cays, Roncador, Serrana and Serranilla of housing for detachments of Colombian armed forces and other facilities, on several of the islands of communication facilities and heliports, and on some of them of activities by local fishermen. It maintains that all of the islands are capable of sustaining human habitation or economic life of their own and would thus fall outside the exception in Article 121, paragraph 3.

174. So far as the entitlement of each island to a territorial sea is concerned, Colombia denies that there is any basis in law for Nicaragua's proposal that the territorial sea surrounding each island can be restricted to 3 nautical miles. Colombia maintains that the entitlement of an island, even one which falls within the exception stated in Article 121, paragraph 3, to a territorial sea is the same as that of any other land territory and that, in accordance with the customary international law principle now codified in Article 3 of UNCLOS, a State may establish a territorial sea of up to 12 nautical miles from its territory, something which Colombia has done. According to Colombia, where the entitlement to a territorial sea of one State overlaps with the entitlement of another State to a continental shelf and exclusive economic zone, the former must always prevail, because the sovereignty of a State over its territorial sea takes priority over the rights which a State enjoys over its continental shelf and exclusive economic zone.

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175. The Court begins by recalling that Serranilla and Bajo Nuevo fall outside the relevant area as defined in the preceding section of the Judgment and that it is accordingly not called upon in the present proceedings to determine the scope of their maritime entitlements. The Court also notes that, in the area within 200 nautical miles of Nicaragua's coasts, the 200-nautical-mile entitlements projecting from San Andrés, Providencia and Santa Catalina would in any event entirely overlap any similar entitlement found to appertain to Serranilla or Bajo Nuevo.

176. With regard to Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo, the starting-point is that

> "[i]n accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same

> status, and therefore generate the same maritime rights, as other land territory" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 97, para. 185).

It inevitably follows that a comparatively small island may give an entitlement to a considerable maritime area. Moreover, even an island which falls within the exception stated in Article 121, paragraph 3, of UNCLOS is entitled to a territorial sea.

177. That entitlement to a territorial sea is the same as that of any other land territory. Whatever the position might have been in the past, international law today sets the breadth of the territorial sea which the coastal State has the right to establish at 12 nautical miles. Article 3 of UNCLOS reflects the current state of customary international law on this point. The Court notes that Colombia has established a 12-nautical-mile territorial sea in respect of all its territories (as has Nicaragua). While the territorial sea of a State may be restricted, as envisaged in Article 15 of UNCLOS, in circumstances where it overlaps with the territorial sea of another State, there is no such overlap in the present case. Instead, the overlap is between the territorial sea entitlement of Colombia derived from each island and the entitlement of Nicaragua to a continental shelf and exclusive economic zone. The nature of those two entitlements is different. In accordance with long-established principles of customary international law, a coastal State possesses sovereignty over the sea bed and water column in its territorial sea (*ibid.*, p. 93, para. 174). By contrast, coastal States enjoy specific rights, rather than sovereignty, with respect to the continental shelf and exclusive economic zone.

178. The Court has never restricted the right of a State to establish a territorial sea of 12 nautical miles around an island on the basis of an overlap with the continental shelf and exclusive economic zone entitlements of another State. In the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Nicaragua argued that the four small islands which the Court had held belonged to Honduras (Bobel Cay, South Cay, Savanna Cay and Port Royal Cay) should be accorded a territorial sea of only 3 nautical miles in order to prevent them having an inequitable effect on the entitlement of Nicaragua to a continental shelf and exclusive economic zone, whereas Honduras maintained that it was entitled to a 12-nautical-mile territorial sea around each island, save where that territorial sea overlapped with the territorial sea of one of Nicaragua's territories. The Court found for Honduras on this point:

> "The Court notes that by virtue of Article 3 of UNCLOS Honduras has the right to establish the breadth of its territorial sea up to a limit of 12 nautical miles be that for its mainland or for islands under

> its sovereignty. In the current proceedings Honduras claims for the four islands in question a territorial sea of 12 nautical miles. The Court thus finds that, *subject to any overlap between the territorial sea around Honduran islands and the territorial sea around Nicaraguan islands* in the vicinity, Bobel Cay, Savanna Cay, Port Royal Cay and South Cay shall be accorded a territorial sea of 12 nautical miles." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 751, para. 302; emphasis added.)

Other tribunals have adopted the same approach. For example, the Court of Arbitration in the *Dubai-Sharjah Border Arbitration* (1981) (*International Law Reports (ILR)*, Vol. 91, p. 543) rejected Dubai's submission that the territorial sea around the island of Abu Musa should be limited to 3 nautical miles. The Court of Arbitration held that "every island, no matter how small, has its belt of territorial sea" and that the extent of that belt was 12 nautical miles except where it overlapped with the territorial sea entitlement of another State (p. 674). Most recently, ITLOS held, in the *Bay of Bengal* case, that

> "Bangladesh has the right to a 12-nautical-mile territorial sea around St. Martin's Island in the area where such territorial sea no longer overlaps with Myanmar's territorial sea. A conclusion to the contrary would result in giving more weight to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea." (*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, pp. 55-56, para. 169.)

179. Since the entitlement to a 12-nautical-mile territorial sea became established in international law, those judgments and awards in which small islands have been accorded a territorial sea of less than 12 nautical miles have invariably involved either an overlap between the territorial sea entitlements of States (e.g., the treatment accorded by the Court to the island of Qit'at Jaradah in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 109, para. 219) or the presence of a historic or agreed boundary (e.g., the treatment of the island of Alcatraz by the Court of Arbitration in the *Guinea-Guinea Bissau Maritime Delimitation Case* (1985), *RIAA*, Vol. XIX, p. 190 (French); *ILR*, Vol. 77, p. 635 (English)).

180. The Court cannot, therefore, accept Nicaragua's submission that an equitable solution can be achieved by drawing a 3-nautical-mile enclave around each of these islands. It concludes that Roncador, Serrana, the Alburquerque Cays and East-Southeast Cays are each entitled to a territorial sea of 12 nautical miles, irrespective of whether they fall

within the exception stated in Article 121, paragraph 3, of UNCLOS. Whether or not any of these islands falls within the scope of that exception is therefore relevant only to the extent that it is necessary to determine if they are entitled to a continental shelf and exclusive economic zone. In that context, the Court notes that the whole of the relevant area lies within 200 nautical miles of one or more of the islands of San Andrés, Providencia or Santa Catalina, each of which — the Parties agree — is entitled to a continental shelf and exclusive economic zone. The Court recalls that, faced with a similar situation in respect of Serpents' Island in the *Maritime Delimitation in the Black Sea* case, it considered it unnecessary to determine whether that island fell within paragraph 2 or paragraph 3 of Article 121 of UNCLOS (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 122-123, para. 187). In the present case, the Court similarly concludes that it is not necessary to determine the precise status of the smaller islands, since any entitlement to maritime spaces which they might generate within the relevant area (outside the territorial sea) would entirely overlap with the entitlement to a continental shelf and exclusive economic zone generated by the islands of San Andrés, Providencia and Santa Catalina.

C. Quitasueño

181. The Court has already set out (paragraphs 27-38 above) the reasons which lead it to find that one of the features at Quitasueño, namely QS 32, is above water at high tide and thus constitutes an island within the definition embodied in Article 121, paragraph 1, of UNCLOS and that the other 53 features identified at Quitasueño are low-tide elevations. The Court must now consider what entitlement to a maritime space Colombia derives from its title to QS 32.

182. For the reasons already given (paragraphs 176-180 above), Colombia is entitled to a territorial sea of 12 nautical miles around QS 32. Moreover, in measuring that territorial sea, Colombia is entitled to rely upon the rule stated in Article 13 of UNCLOS:

"Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."

The Court has held that this provision reflects customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001*, p. 100, para. 201). Colombia is therefore entitled to use those low-tide elevations within 12 nautical miles of QS 32 for the purpose of measuring the breadth of its territorial sea. Colombia's pleadings in the present case make clear that it has exercised this right and has used all the features identified in the Smith Report in measuring the breadth of the territorial sea around Quitasueño.

183. The Court observes that all but two of the low-tide elevations on Quitasueño (QS 53 and QS 54) are within 12 nautical miles of QS 32. Thus the territorial sea around Quitasueño extends from those low-tide elevations located within 12 nautical miles of QS 32, the position of which means that they contribute to the baseline from which the breadth of the territorial sea is measured. It has not been suggested by either Party that QS 32 is anything other than a rock which is incapable of sustaining human habitation or economic life of its own under Article 121, paragraph 3, of UNCLOS, so this feature generates no entitlement to a continental shelf or exclusive economic zone.

6. Method of Delimitation

184. The Court will now turn to the methodology to be employed in effecting the delimitation. On this subject, the Parties express markedly different views.

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185. Nicaragua maintains that the geographical context is such that it would not be appropriate for the Court to follow the approach which it normally employs, namely to establish a provisional equidistance/median line, then analyse whether there exist relevant circumstances requiring an adjustment or shifting of that line and, finally, test the adjusted line to see whether the result which it would produce is disproportionate. For Nicaragua, the act of constructing a provisional equidistance line between the Nicaraguan coast and the west-facing coasts of the Colombian islands would be wholly artificial. It would treat the islands as though they were an opposing mainland coast, despite the fact that the west-facing coasts of San Andrés, Providencia and Santa Catalina are less than one twentieth the length of the mainland coast of Nicaragua and the islands which would be used in the construction of the provisional equidistance/median line are situated at a considerable distance from one another. Moreover, Nicaragua maintains that a provisional equidistance/median line would completely disregard the substantial part of the relevant area which lies to the east of

the Colombian islands, thus leaving some three quarters of the relevant area on the Colombian side of the line. While Nicaragua recognizes that the establishment of a provisional equidistance/median line is only the first step in the methodology normally employed by the Court, it contends that, in the present case, adjustment or shifting of that line would be insufficient to achieve an equitable solution and that a different methodology is required. Nicaragua notes that in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, the Court stated that there may be factors which make it inappropriate to use the methodology of constructing a provisional equidistance/median line and then determining whether there are circumstances requiring its adjustment or shifting (*Judgment, I.C.J. Reports 2007 (II)*, p. 741, para. 272). Nicaragua maintains that this is such a case.

186. For Nicaragua, the appropriate methodology requires recognition at the outset that the Colombian islands are very small features and are located on what it describes as the Nicaraguan continental shelf. It maintains that small island features of this kind are frequently given a reduced effect, or even no effect at all, in maritime delimitation. In these circumstances, Nicaragua maintains that the appropriate methodology to adopt is to enclave each of the Colombian islands, while recognizing that, outside these enclaves, the continental shelf and exclusive economic zone from the Nicaraguan coast to the line 200 nautical miles from the Nicaraguan baselines would be Nicaraguan. Nicaragua contends that the enclave approach was employed in respect of the Channel Islands by the Court of Arbitration in the case of the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1977) [hereinafter the *Anglo-French Continental Shelf* case] (*RIAA*, Vol. XVIII, p. 3; *ILR*, Vol. 54, p. 6), and that it is appropriate in the present case for the same reasons. Nicaragua also refers to a number of other judgments and arbitration awards in which it maintains that comparatively small islands were given a reduced maritime space.

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187. Colombia maintains that the Court should adopt the same methodology it has used for many years in cases regarding maritime delimitation, starting with the construction of a provisional equidistance/median line and then adjusting or shifting that line if relevant circumstances so require. Colombia acknowledges that the Court has not invariably employed this method but observes that in the only recent case in which the Court departed from it, the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, the reason for doing so was that the configuration of the coastline made the construction of an equidistance line impossible (*Judgment, I.C.J. Reports 2007 (II)*, p. 743, para. 280). According to Colombia, nothing in the present case renders the construction of a provisional equidistance/median line impossible or even difficult.

188. Colombia rejects the enclave approach suggested by Nicaragua as an unwarranted departure from the approach which, it maintains, has become standard practice both for the Court and for other international tribunals, of establishing a provisional equidistance/median line and then examining whether there exist circumstances requiring adjustment or shifting of that line. It argues that the *Anglo-French Continental Shelf* case is not a relevant precedent, as the Channel Islands were located very close to the French coast, surrounded on three sides by French territory and the overall context was that of a delimitation between the opposite coasts of the United Kingdom and France. According to Colombia, the present context is entirely different, as its islands are more than 65 nautical miles from the nearest Nicaraguan territory, face the Nicaraguan coast in only one direction and the delimitation does not involve the mainland coast of Colombia.

189. In addition, Colombia contends that the enclave methodology proposed by Nicaragua would fail to take account of Colombia's entitlements, derived from the islands, to the east of the line drawn 200 nautical miles from the Nicaraguan baselines.

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190. The Court has made clear on a number of occasions that the methodology which it will normally employ when called upon to effect a delimitation between overlapping continental shelf and exclusive economic zone entitlements involves proceeding in three stages (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 46, para. 60; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, paras. 115-116).

191. In the first stage, the Court establishes a provisional delimitation line between territories (including the island territories) of the Parties. In doing so it will use methods that are geometrically objective and appropriate for the geography of the area. This task will consist of the construction of an equidistance line, where the relevant coasts are adjacent, or a median line between the two coasts, where the relevant coasts are opposite, unless in either case there are compelling reasons as a result of which the establishment of such a line is not feasible (see *Territorial and Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 745, para. 281). No legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation in each case involves constructing a line each point on which is an equal distance from the nearest points on the two relevant coasts (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, para. 116). The line is constructed using the most appropriate base points on the coasts of the Parties (*ibid.*, p. 101, paras. 116-117).

192. In the second stage, the Court considers whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result. If it concludes that such circumstances are present, it establishes a different boundary which usually entails such adjustment or shifting of the equidistance/median line as is necessary to take account of those circumstances (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 47, para. 63; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 102-103, paras. 119-121). Where the relevant circumstances so require, the Court may also employ other techniques, such as the construction of an enclave around isolated islands, in order to achieve an equitable result.

193. In the third and final stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is that the Parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts. As the Court explained in the *Maritime Delimitation in the Black Sea* case

> "Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line . . . A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.
>
> This is not to suggest that these respective areas should be proportionate to coastal lengths — as the Court has said 'the sharing out of the area is therefore the consequence of the delimitation, not vice versa' (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 67, para. 64)." (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 103, para. 122.)

194. The three-stage process is not, of course, to be applied in a mechanical fashion and the Court has recognized that it will not be appropriate in every case to begin with a provisional equidistance/median line (see, e.g., *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 741, para. 272). The Court has therefore given careful consideration to Nicaragua's argument that the geographical context of the present case is one in which the Court should not begin by constructing a provisional median line.

195. Unlike the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, this is not a case in which the construction of such a line is

not feasible. The Nicaraguan coast (including the Nicaraguan islands) and the west-facing coasts of the islands of San Andrés, Providencia and Santa Catalina, as well as the Alburquerque Cays, stand in a relationship of opposite coasts at a distance which is nowhere less than 65 nautical miles (the distance from Little Corn Island to the Alburquerque Cays). There is no difficulty in constructing a provisional line equidistant from base points on these two coasts. The question is not whether the construction of such a line is feasible but whether it is appropriate as a starting-point for the delimitation. That question arises because of the unusual circumstance that a large part of the relevant area lies to the east of the principal Colombian islands and, hence, behind the Colombian baseline from which a provisional median line would have to be measured.

196. The Court recognizes that the existence of overlapping potential entitlements to the east of the principal Colombian islands, and thus behind the base points on the Colombian side from which the provisional equidistance/median line is to be constructed, may be a relevant circumstance requiring adjustment or shifting of the provisional median line. The same is true of the considerable disparity of coastal lengths. These are factors which have to be considered in the second stage of the delimitation process; they do not justify discarding the entire methodology and substituting an approach in which the starting-point is the construction of enclaves for each island, rather than the construction of a provisional median line. The construction of a provisional median line in the method normally employed by the Court is nothing more than a first step and in no way prejudges the ultimate solution which must be designed to achieve an equitable result. As the Court said in the *Maritime Delimitation in the Black Sea* case:

> "At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data." (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, para. 118.)

197. The various considerations advanced by Nicaragua in support of a different methodology are factors which the Court will have to take into account in the second stage of the process, when it will consider whether those factors call for adjustment or shifting of the provisional median line and, if so, in what way. Following this approach does not preclude very substantial adjustment to, or shifting of, the provisional line in an appropriate case, nor does it preclude the use of enclaving in those areas where the use of such a technique is needed to achieve an equitable result. By contrast, the approach suggested by Nicaragua entails starting with a solution in which what Nicaragua perceives as the most relevant considerations have already been taken into account and in which the outcome is to a large extent pre-ordained.

198. The Court does not consider that the award of the Court of Arbitration in the *Anglo-French Continental Shelf* case calls for the Court to abandon its usual methodology. That award, which was rendered in 1977

and thus some time before the Court established the methodology which it now employs in cases of maritime delimitation, was concerned with a quite different geographical context from that in the present case, a point to which the Court will return. It began with the construction of a provisional equidistance/median line between the two mainland coasts and then enclaved the Channel Islands because they were located on the "wrong" side of that line (*Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1977), *RIAA*, Vol. XVIII, p. 88, para. 183; *ILR*, Vol. 54, p. 96). For present purposes, however, what is important is that the Court of Arbitration did not employ enclaving as an alternative methodology to the construction of a provisional equidistance/median line, but rather used it in conjunction with such a line.

199. Accordingly, the Court will proceed in the present case, in accordance with its standard method, in three stages, beginning with the construction of a provisional median line.

7. Determination of Base Points and Construction of the Provisional Median Line

200. The Court will thus begin with the construction of a provisional median line between the Nicaraguan coast and the western coasts of the relevant Colombian islands, which are opposite to the Nicaraguan coast. This task requires the Court to determine which coasts are to be taken into account and, in consequence, what base points are to be used in the construction of the line. In this connection, the Court notes that Nicaragua has not notified the Court of any base points on its coast. By contrast, Colombia has indicated on maps the location of the base points which it has used in the construction of its proposed median line (without, however, providing their co-ordinates) (see sketch-map No. 3: Delimitation claimed by Colombia, p. 673). Those base points include two base points on Alburquerque Cays, several base points on the west coast of San Andrés and Providencia, one base point on Low Cay, a small cay to the north of Santa Catalina, and several base points on Quitasueño. As the Court noted in the *Maritime Delimitation in the Black Sea* case

> "In . . . the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those Parties. The Court must, when delimiting the continental shelf and exclusive economic zones, select base points by reference to the physical geography of the relevant coasts." (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 108, para. 137.)

The Court will accordingly proceed to construct its provisional median line by reference to the base points which it considers appropriate.

201. The Court has already decided that the islands adjacent to the Nicaraguan coast are part of the relevant coast and contribute to the

baselines from which Nicaragua's entitlements to a continental shelf and exclusive economic zone are to be measured (see paragraph 145). Since the islands are located further east than the Nicaraguan mainland, they will contribute all of the base points for the construction of the provisional median line. For that purpose, the Court will use base points located on Edinburgh Reef, Muerto Cay, Miskitos Cays, Ned Thomas Cay, Roca Tyra, Little Corn Island and Great Corn Island.

202. So far as the Colombian coast is concerned, the Court considers that Quitasueño should not contribute to the construction of the provisional median line. The part of Quitasueño which is undoubtedly above water at high tide is a minuscule feature, barely 1 square m in dimension. When placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line. In the *Maritime Delimitation in the Black Sea* case, for example, the Court held that it was inappropriate to select any base point on Serpents' Island (which, at 0.17 square km was very much larger than the part of Quitasueño which is above water at high tide), because it lay alone and at a distance of some 20 nautical miles from the mainland coast of Ukraine, and its use as a part of the relevant coast "would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 110, para. 149). These considerations apply with even greater force to Quitasueño. In addition to being a tiny feature, it is 38 nautical miles from Santa Catalina and its use in the construction of the provisional median line would push that line significantly closer to Nicaragua.

Colombia did not place a base point upon Serrana. The Court's decision not to place a base point upon Quitasueño means, however, that it must consider whether one should be placed upon Serrana. Although larger than Quitasueño, Serrana is also a comparatively small feature, whose considerable distance from any of the other Colombian islands means that placing a base point upon it would have a marked effect upon the course of the provisional median line which would be out of all proportion to its size and importance. In the Court's view, no base point should be placed on Serrana.

The Court also considers that there should be no base point on Low Cay, a small uninhabited feature near Santa Catalina.

203. The base points on the Colombian side will, therefore, be located on Santa Catalina, Providencia and San Andrés islands and on Alburquerque Cays.

204. The provisional median line constructed from these two sets of base points is, therefore, controlled in the north by the Nicaraguan base points on Edinburgh Reef, Muerto Cay and Miskitos Cays and Colom-

bian base points on Santa Catalina and Providencia, in the centre by base points on the Nicaraguan islands of Ned Thomas Cay and Roca Tyra and the Colombian islands of Providencia and San Andrés, and in the south by Nicaraguan base points on Little Corn Island and Great Corn Island and Colombian base points on San Andrés and Alburquerque Cays. The line thus constructed is depicted on sketch-map No. 8 (p. 701).

8. Relevant Circumstances

205. As indicated above (see paragraph 192), once the Court has established the provisional median line, it must then consider "whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288). Those factors are usually referred to in the jurisprudence of the Court as "relevant circumstances" and, as the Court has explained,

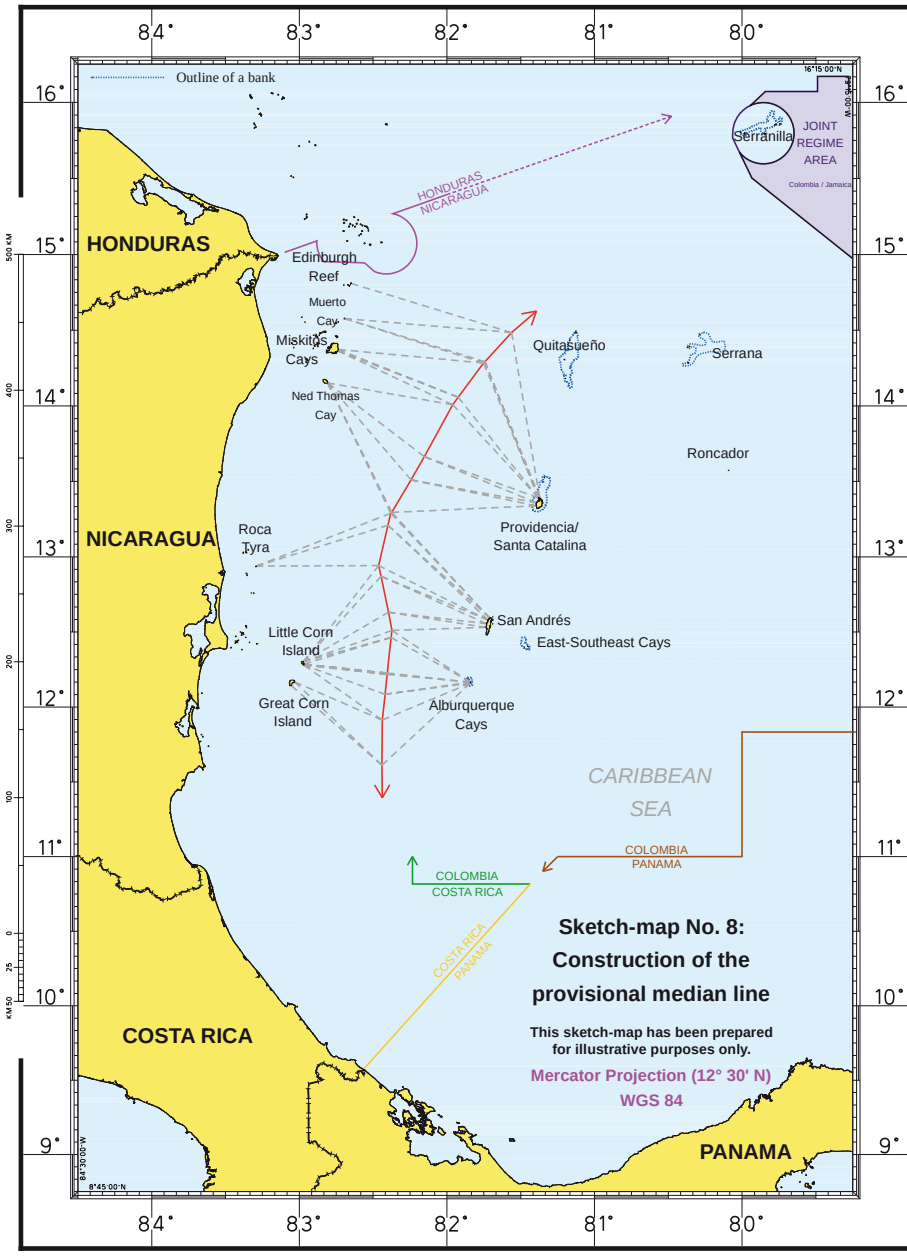
> "[t]heir function is to verify that the provisional median line, drawn by the geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 112, para. 155).

206. The Parties invoked several different considerations which they found relevant to the achievement of an equitable solution. They drew markedly different consequences from their analysis of those considerations. For Nicaragua these factors necessitate a complete break with the provisional median line and the substitution of enclaves around each of the Colombian islands. The result would be separate Colombian enclaves around San Andrés and Alburquerque, East-Southeast Cays, Providencia and Santa Catalina, Serrana and Roncador, as well as Quitasueño, if any maritime features on it were to be above water at high tide. Colombia argues that the provisional median line affords an equitable solution and therefore requires no adjustment or shifting.

207. The Court will examine in turn each of the considerations invoked by the Parties. In doing so, it will determine whether those considerations require an adjustment or shifting of the provisional median line constructed by the Court in the previous section of the Judgment in order to achieve an equitable result.

A. Disparity in the lengths of the relevant coasts

208. Nicaragua emphasizes the fact that its coast is significantly longer than that of the Colombian islands and argues that this factor must be taken into account in order to arrive at an equitable solution. Colombia


Outline of a bank
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
CARIBBEAN SEA
HONDURAS NICARAGUA
COLOMBIA COSTA RICA
COLOMBIA PANAMA
COSTA RICA PANAMA
JOINT REGIME AREA
Colombia / Jamaica
Serranilla
Edinburgh Reef
Muerto Cay
Miskitos Cays
Ned Thomas Cay
Quitasueño
Serrana
Roncador
Providencia/ Santa Catalina
Roca Tyra
San Andrés
East-Southeast Cays
Little Corn Island
Great Corn Island
Alburquerque Cays
Sketch-map No. 8:
Construction of the provisional median line
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84

responds that the achievement of an equitable solution does not entail an exact relationship between the lengths of the respective coasts and the proportion of the relevant area which the delimitation would leave to each Party. It adds that Nicaragua's approach of enclaving each island would itself fail to give due effect to the length of the Colombian relevant coast.

* *

209. The Court begins by observing that "the respective length of coasts can play no role in identifying the equidistance line which has been provisionally established" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 116, para. 163). However, "a *substantial* difference in the lengths of the parties' respective coastlines *may* be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 446, para. 301; emphasis added).

210. In this respect, two conclusions can be drawn from the jurisprudence of the Court. First, it is normally only where the disparities in the lengths of the relevant coasts are substantial that an adjustment or shifting of the provisional line is called for (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 323, para. 185; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 116, para. 164). Secondly, as the Court emphasized in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, "taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front [of the Parties]" (*Judgment, I.C.J. Reports 1993*, p. 69, para. 69).

211. In the present case, the disparity between the relevant Colombian coast and that of Nicaragua is approximately 1:8.2 (see paragraph 153). This is similar to the disparity which the Court considered required adjustment or shifting of the provisional line in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)* (*ibid.*, p. 65, para. 61) (approximately 1:9) and the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*Judgment, I.C.J. Reports 1985*, p. 53, paras. 74-75) (approximately 1:8). This is undoubtedly a substantial disparity and the Court considers that it requires an adjustment or shifting of the provisional line, especially given the overlapping maritime areas to the east of the Colombian islands.

B. Overall geographical context

212. Both Parties have addressed the Court on the subject of the effect which the overall geographical context should have on the delimitation.

Nicaragua maintains that the Colombian islands are located "on Nicaragua's continental shelf", so that the waters and sea bed around them naturally form part of Nicaragua. It contends that one of the most important principles of the international law of maritime delimitation is that, so far as possible, a State should not be cut off, or blocked, from the maritime areas into which its coastline projects, particularly by the effect of small island territories. Nicaragua argues that Colombia's approach in the present case treats the western coasts of Alburquerque Cays, San Andrés, Providencia, Santa Catalina and Serrana as a wall blocking all access for Nicaragua to the substantial area between the east coasts of those islands and the line 200 nautical miles from the Nicaraguan baselines, an area to which, according to Nicaragua, it is entitled by virtue of the natural projection of its coast.

*

213. Colombia rejects Nicaragua's reliance on natural projection and contends that the significance which it attaches to its islands does not infringe any principle precluding a "cut-off". Moreover, it maintains that Nicaragua's proposed solution of enclaving the Colombian islands itself infringes that principle, since it denies those islands their natural projection to the east up to and, indeed, beyond, the line 200 nautical miles from the Nicaraguan coast. According to Colombia, Nicaragua's proposed solution, by confining the Colombian islands to their territorial seas would, in effect, require Colombia to sacrifice the entire continental shelf and exclusive economic zone to which the islands would entitle it.

* *

214. The Court does not believe that any weight should be given to Nicaragua's contention that the Colombian islands are located on "Nicaragua's continental shelf". It has repeatedly made clear that geological and geomorphological considerations are not relevant to the delimitation of overlapping entitlements within 200 nautical miles of the coasts of States (see, e.g., *Continental Shelf (Libyan Arab Jamahirya/Malta), Judgment, I.C.J. Reports 1985*, p. 35, paras. 39-40). The reality is that the Nicaraguan mainland and fringing islands, and the Colombian islands, are located on the same continental shelf. That fact cannot, in and of itself, give one State's entitlements priority over those of the other in respect of the area where their claims overlap.

215. The Court agrees, however, that the achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 127, para. 201). The effect of the provisional

median line is to cut Nicaragua off from some three quarters of the area into which its coast projects. Moreover, that cut-off effect is produced by a few small islands which are many nautical miles apart. The Court considers that those islands should not be treated as though they were a continuous mainland coast stretching for over 100 nautical miles and cutting off Nicaraguan access to the sea bed and waters to their east. The Court therefore concludes that the cut-off effect is a relevant consideration which requires adjustment or shifting of the provisional median line in order to produce an equitable result.

216. At the same time, the Court agrees with Colombia that any adjustment or shifting of the provisional median line must not have the effect of cutting off Colombia from the entitlements generated by its islands in the area to the east of those islands. Otherwise, the effect would be to remedy one instance of cut-off by creating another. An equitable solution requires that each State enjoy reasonable entitlements in the areas into which its coasts project. In the present case, that means that the action which the Court takes in adjusting or shifting the provisional median line should avoid completely cutting off either Party from the areas into which its coasts project.

C. Conduct of the Parties

217. Both Parties addressed the Court regarding the significance of conduct in the relevant area but it was Colombia that principally relied upon this factor, so that it is appropriate to begin by reviewing Colombia's arguments. Colombia submits that it has for many decades regulated fishing activities, conducted scientific exploration and conducted naval patrols throughout the area to the east of the 82nd meridian, whereas there is no evidence of any significant Nicaraguan activity there until recent times.

*

218. Nicaragua argues that Colombia's case on this point amounts in practice to an attempt to resurrect its argument that the 1928 Treaty established a maritime boundary along the 82nd meridian, a theory which the Court rejected in its Judgment on Preliminary Objections (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 869, para. 120). According to Nicaragua, the conduct of Colombia with regard to fisheries and patrolling neither establishes a tacit agreement between the Parties to treat the 82nd meridian as a maritime boundary, nor constitutes a relevant circumstance to be taken into account in achieving an equitable solution.

* *

219. The Court has already held that the 1928 Treaty did not fix the 82nd meridian as a maritime boundary between the Parties (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (I)*, p. 869, para. 120). The Court does not understand Colombia as attempting either to reopen that question by arguing that the Parties have expressly agreed upon the 82nd meridian as a maritime boundary, or as contending that the conduct of the Parties is sufficient to establish the existence of a tacit agreement between them to treat the 82nd meridian as such a boundary. In that context, the Court would, in any event, recall that

> "[e]vidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.)

220. The Court understands Colombia to be advancing a different argument, namely that the conduct of the Parties east of the 82nd meridian constitutes a relevant circumstance in the present case, which suggests that the use of the provisional median line as a line of delimitation would be equitable. While it cannot be ruled out that conduct might need to be taken into account as a relevant circumstance in an appropriate case, the jurisprudence of the Court and of arbitral tribunals shows that conduct will not normally have such an effect (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway) Judgment, I.C.J. Reports 1993*, p. 77, para. 86; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 447, para. 304; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 125, para. 198; award of the Arbitration Tribunal in the *Arbitration between Barbados and the Republic of Trinidad and Tobago* [hereinafter the *Barbados/Trinidad and Tobago* case] *Tribunal Award of 11 April 2006* (2006), *RIAA*, Vol. XXVII, p. 222, para. 269; *ILR*, Vol. 139, p. 533; award of the Arbitration Tribunal in the *Guyana/Suriname* case (2007), *Permanent Court of Arbitration Award Series (2012)*, pp. 147-153; *ILR*, Vol. 139, pp. 673-678, paras. 378-391). The Court does not consider that the conduct of the Parties in the present case is so exceptional as to amount to a relevant circumstance which itself requires it to adjust or shift the provisional median line.

D. Security and law enforcement considerations

221. Both Parties also invoke security and law enforcement considerations in relation to the appropriate course of the maritime boundary. Colombia contends that it has taken responsibility for the exercise of jurisdiction in relation to drug trafficking and related crimes in the area east of the 82nd meridian. Nicaragua counters that most of the crime in question originates in Colombia.

222. The Court considers that much of Colombia's arguments on this issue are, in effect, arguments regarding conduct which have been dealt with in the preceding section of the Judgment. It also notes that control over the exclusive economic zone and the continental shelf is not normally associated with security considerations and does not affect rights of navigation. However, the Court has recognized that legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast of a State and the Court will bear this consideration in mind in determining what adjustment to make to the provisional median line or in what way that line should be shifted.

E. Equitable access to natural resources

223. Both Parties raise the question of equitable access to natural resources but neither offers evidence of particular circumstances that it considers must be treated as relevant. The Court notes, however, that, as the Arbitral Tribunal in the *Barbados/Trinidad and Tobago* case observed,

> "[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance" (*Tribunal Award of 11 April 2006, RIAA*, Vol. XXVII, p. 214, para. 241; *ILR*, Vol. 139, p. 523).

The Court, which quoted this observation with approval in its Judgment in the *Maritime Delimitation in the Black Sea* case (*I.C.J. Reports 2009*, p. 125, para. 198), considers that the present case does not present issues of access to natural resources so exceptional as to warrant it treating them as a relevant consideration.

F. Delimitations already effected in the area

224. Colombia refers in some detail to delimitation agreements which it has concluded with other States in the region. Those agreements are described in paragraph 160, above.

The lines prescribed by all of these agreements, together with the boundary agreed between Costa Rica and Panama in an Agreement of 1980, and the boundary between Nicaragua and Honduras established by the Court's 2007 Judgment, are depicted on sketch-map No. 1 (p. 639).

225. The Court has already explained the relevance of these agreements and the judicial determination of the Nicaragua-Honduras boundary for the identification of the relevant area (see paragraphs 160-163, above). The Court will now consider whether, and if so how, they affect the boundary now to be determined by the Court.

* *

226. There are two questions for the Court to consider. The first is whether the agreements between Colombia and Costa Rica, Jamaica and Panama amount, as Colombia argues, to a recognition by those States of Colombian entitlements in parts of the relevant area which the Court should take into account in the present case. The second is whether those agreements impose limits upon the action which the Court can take in the present case, because of the requirement that the Court respect the rights of third States.

227. With regard to the first question, the Court accepts that Panama's agreement with Colombia amounts to recognition by Panama of Colombian claims to the area to the north and west of the boundary line laid down in that agreement. Similarly the unratified treaty between Colombia and Costa Rica entails at least potential recognition by Costa Rica of Colombian claims to the area to the north and east of the boundary line which it lays down, while the Colombia-Jamaica agreement entails recognition by Jamaica of Colombian claims to the area to the south-west of the boundary of the Colombia-Jamaica "Joint Regime Area". The Court cannot, however, agree with Colombia that this recognition amounts to a relevant circumstance which the Court must take into account in effecting a maritime delimitation between Colombia and Nicaragua. It is a fundamental principle of international law that a treaty between two States cannot, by itself, affect the rights of a third State. As the Arbitral Tribunal in the *Island of Palmas* case put it, "it is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers" (*Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 842). In accordance with that principle, the treaties which Colombia has concluded with Jamaica and Panama and the treaty which it has signed with Costa Rica cannot confer upon Colombia rights against Nicaragua and, in particular, cannot entitle it, vis-à-vis Nicaragua, to a greater share of the area in which its maritime entitlements overlap with those of Nicaragua than it would otherwise receive.

228. With regard to the second question, the Court observes that, as Article 59 of the Statute of the Court makes clear, it is axiomatic that a judgment of the Court is not binding on any State other than the parties to the case. Moreover, the Court has always taken care not to draw a boundary line which extends into areas where the rights of third States may be affected. The Judgment by which the Court delimits the boundary addresses only Nicaragua's rights as against Colombia and vice versa and is, therefore, without prejudice to any claim of a third State or any claim which either Party may have against a third State.

9. Course of the Maritime Boundary

229. Having thus identified relevant circumstances which mean that a maritime boundary following the course of the provisional median line

would not produce an equitable result, the Court must now consider what changes are required to that line. The extent and nature of those changes is determined by the particular relevant circumstances which the Court has identified. The first such circumstance is the considerable disparity in the lengths of the relevant coasts, the ratio of Colombia's relevant coast to that of Nicaragua being approximately 1:8.2 (see paragraphs 208-211, above). The second relevant circumstance is the overall geographical context, in which the relevant Colombian coast consists of a series of islands, most of them very small, and located at a considerable distance from one another, rather than a continuous coastline (see paragraphs 212-216, above). Since these islands are situated within 200 nautical miles of the Nicaraguan mainland, the potential entitlements of the Parties are not confined to the area between that mainland and the western coast of the Colombian islands, but extend to the area between the east coasts of the Colombian islands and the line 200 nautical miles from the Nicaraguan baselines (see paragraphs 155-166, above, and sketch-map No. 7, p. 687). The first circumstance means that the boundary should be such that the portion of the relevant area accorded to each State takes account of the disparity between the lengths of their relevant coasts. A boundary which followed the course of the provisional median line would leave Colombia in possession of a markedly larger portion of the relevant area than that accorded to Nicaragua, notwithstanding the fact that Nicaragua has a far longer relevant coast. The second circumstance necessitates a solution in which neither Party is cut off from the entirety of any of the areas into which its coasts project.

230. In the Court's view, confining Colombia to a succession of enclaves drawn around each of its islands, as Nicaragua proposes, would disregard that second requirement. Even if each island were to be given an enclave of 12 nautical miles, and not 3 nautical miles as suggested by Nicaragua, the effect would be to cut off Colombia from the substantial areas to the east of the principal islands, where those islands generate an entitlement to a continental shelf and exclusive economic zone. In addition, the Nicaraguan proposal would produce a disorderly pattern of several distinct Colombian enclaves within a maritime space which otherwise pertained to Nicaragua with unfortunate consequences for the orderly management of maritime resources, policing and the public order of the oceans in general, all of which would be better served by a simpler and more coherent division of the relevant area.

231. Moreover, the jurisprudence on which Nicaragua relies does not support its argument that each Colombian island should be confined to an enclave. As the Court has already remarked (paragraph 198 above), the decision of the Court of Arbitration in the *Anglo-French Continental Shelf* case to enclave the Channel Islands took place in the context of a delimitation between mainland coasts. As the Court of Arbitration remarked

> "The Channel Islands . . . are situated not only on the French side of a median line drawn between the two mainlands but practically within the arms of a gulf on the French coast. Inevitably, the presence of these islands in the English Channel in that particular situation disturbs the balance of the geographical circumstances which would otherwise exist between the Parties in this region as a result of the broad equality of the coastlines of their mainlands." (*Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1977), *RIAA*, Vol. XVIII, p. 88, para. 183; *ILR*, Vol. 54, p. 96.)

By contrast, in the present case the Colombian islands face Nicaragua in only one direction and from a far greater distance than the Channel Islands face France. Whereas the distance between the nearest point in the Channel Islands and the French coast was less than 7 nautical miles, the most westerly point on the Colombian islands, Alburquerque Cays, is more than 65 nautical miles from the nearest point on the Nicaraguan islands and, most of the San Andrés Archipelago is much farther away from Nicaragua than that. Nor did the approach taken by the Court of Arbitration in the *Anglo-French Continental Shelf* case divide the Channel Islands into a series of separate enclaves. None of the other instances in which enclaving was employed involved a situation comparable with that in the present case.

232. The Court considers that it should proceed by way of shifting the provisional median line. In this context, it is necessary to draw a distinction between that part of the relevant area which lies between the Nicaraguan mainland and the western coasts of Alburquerque Cays, San Andrés, Providencia and Santa Catalina, where the relationship is one of opposite coasts, and the part which lies to the east of those islands, where the relationship is more complex.

233. In the first, western, part of the relevant area, the relevant circumstances set out above call for the provisional median line to be shifted eastwards. The disparity in coastal lengths is so marked as to justify a significant shift. The line cannot, however, be shifted so far that it cuts across the 12-nautical-mile territorial sea around any of the Colombian islands, since to do so would be contrary to the principle set out in paragraphs 176 to 180, above. The Court notes that there are various techniques which allow for relevant circumstances to be taken into consideration in order to reach an equitable solution. In the present case, the Court considers that in order to arrive at such a solution, taking due account of the relevant circumstances, the base points located on the Nicaraguan and Colombian islands, respectively, should be accorded different weights.

234. In the Court's opinion, an equitable result is achieved in this part of the relevant area by giving a weighting of one to each of the Colom-

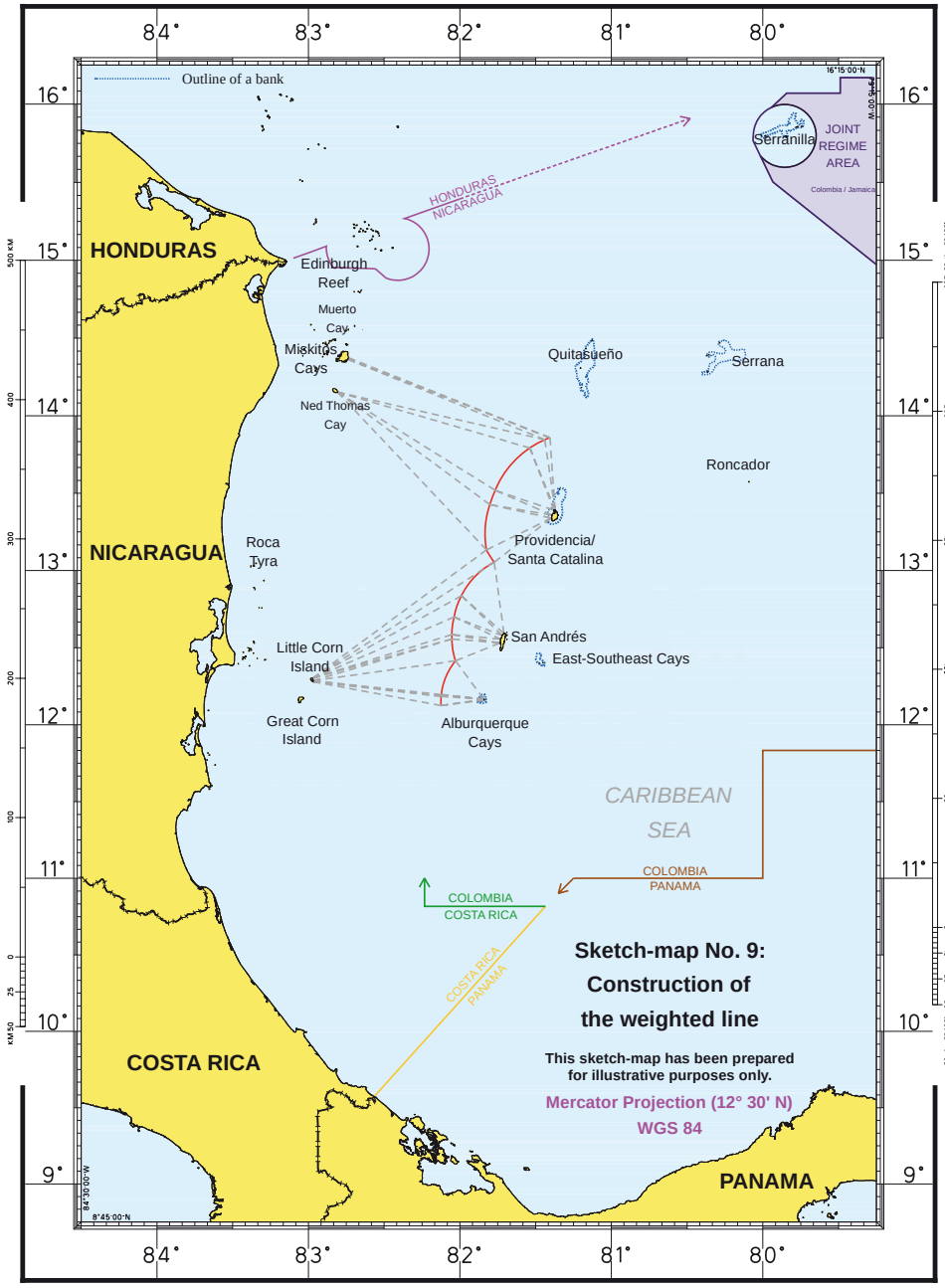
bian base points and a weighting of three to each of the Nicaraguan base points. That is done by constructing a line each point on which is three times as far from the controlling base point on the Nicaraguan islands as it is from the controlling base point on the Colombian islands. The Court notes that, while all of the Colombian base points contribute to the construction of this line, only the Nicaraguan base points on Miskitos Cays, Ned Thomas Cay and Little Corn Island control the weighted line. As a result of the fact that the line is constructed using a 3:1 ratio between Nicaraguan and Colombian base points, the effect of the other Nicaraguan base points is superseded by those base points. The line ends at the last point that can be constructed using three base points (see sketch-map No. 9: Construction of the weighted line p. 711).

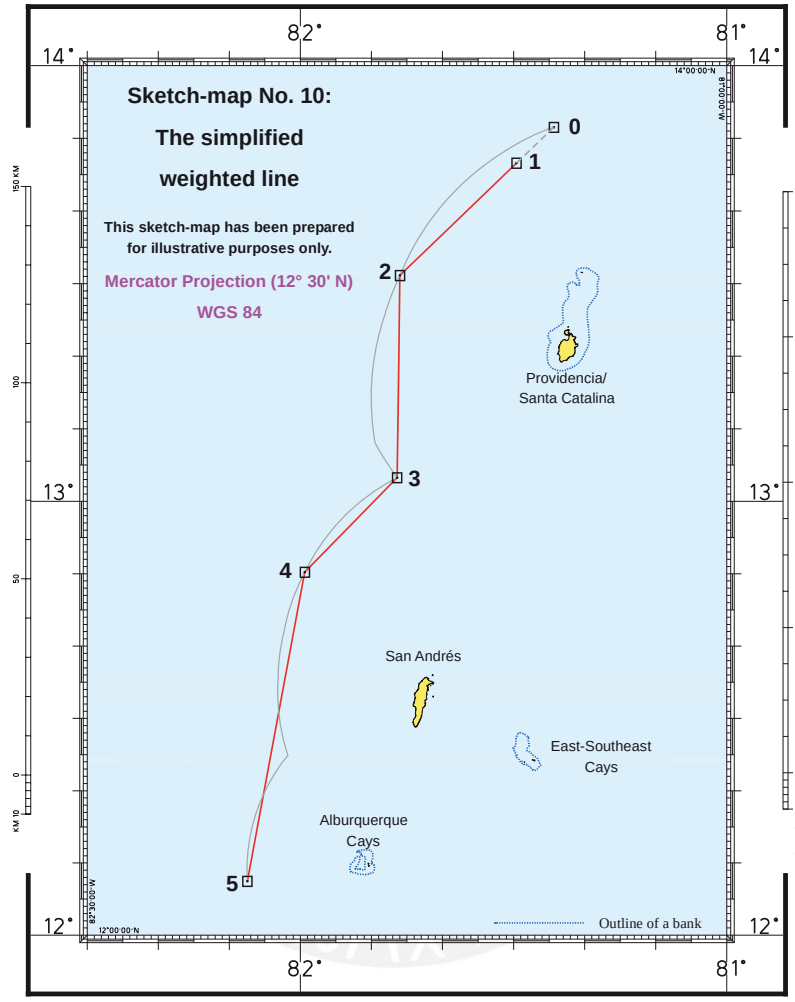
235. The method used in the construction of the weighted line (as described in the previous paragraph) results in a line which has a curved shape with a large number of turning points. Such a configuration of the line may create difficulties in its practical application. The Court therefore proceeds to a further adjustment by reducing the number of turning points and connecting them by geodetic lines. This produces a simplified weighted line which is depicted on sketch-map No. 10. The line thus constructed ("the simplified weighted line") forms the boundary between the maritime entitlements of the two States between points 1 and 5, as depicted on sketch-map No. 10 (p. 712).

236. The Court considers, however, that to extend that line into the parts of the relevant area north of point 1 or south of point 5 would not lead to an equitable result. While the simplified weighted line represents a shifting of the provisional median line which goes some way towards reflecting the disparity in coastal lengths, it would, if extended beyond points 1 and 5, still leave Colombia with a significantly larger share of the relevant area than that accorded to Nicaragua, notwithstanding the fact that Nicaragua's relevant coast is more than eight times the length of Colombia's relevant coast. It would thus give insufficient weight to the first relevant circumstance which the Court has identified. Moreover, by cutting off Nicaragua from the areas east of the principal Colombian islands into which the Nicaraguan coast projects, such a boundary would fail to take into account the second relevant circumstance, namely the overall geographical context.

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

237. As illustrated on sketch-map No. 11 (Course of the maritime boundary, p. 714), that is done as follows.


Outline of a bank
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
CARIBBEAN SEA
HONDURAS NICARAGUA
Serranilla
JOINT REGIME AREA
Colombia / Jamaica
Edinburgh Reef
Muerto Cay
Miskitos Cays
Ned Thomas Cay
Quitasueño
Serrana
Roncador
Roca Tyra
Providencia/ Santa Catalina
Little Corn Island
San Andrés
East-Southeast Cays
Great Corn Island
Alburquerque Cays
COLOMBIA COSTA RICA
COLOMBIA PANAMA
COSTA RICA PANAMA
Sketch-map No. 9:
Construction of
the weighted line
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
84°
83°
82°
81°
80°
16°
15°
14°
13°
12°
11°
10°
9°

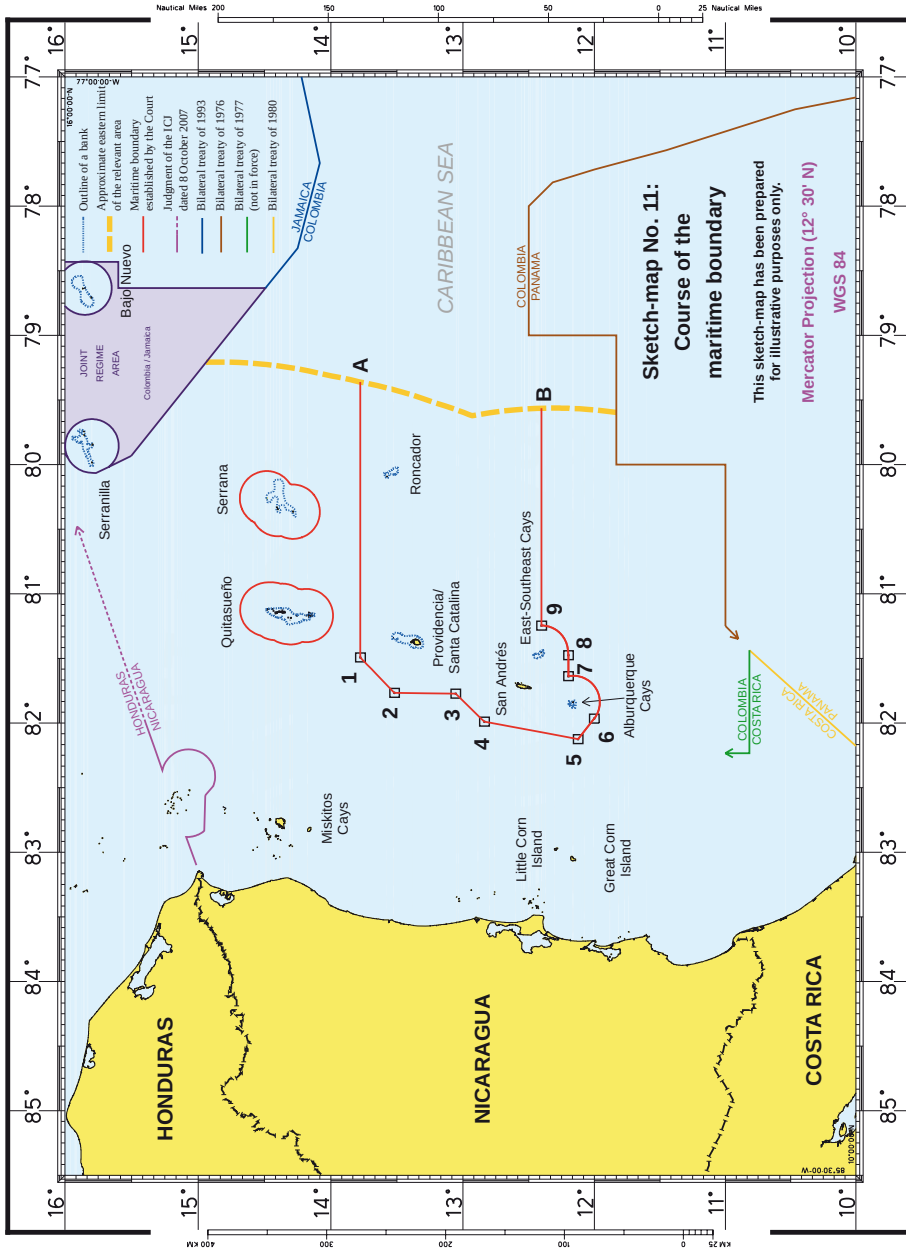

Sketch-map No. 10:
The simplified
weighted line
This sketch-map has been prepared
for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
0
1
2
3
4
5
Providencia/
Santa Catalina
San Andrés
East-Southeast
Cays
Alburquerque
Cays
Outline of a bank
82°
81°
14°
13°
12°
14°00'00"N
12°00'00"N
81°00'00"W
82°00'00"W
150 KM
100
50
0
KM 10
Nautical Miles 80
60
40
20
0
5 Nautical Miles

First, from the extreme northern point of the simplified weighted line (point 1), which is located on the parallel passing through the northernmost point on the 12-nautical-mile envelope of arcs around Roncador, the line of delimitation will follow the parallel of latitude until it reaches the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured (endpoint A). As the Court has explained (paragraph 159 above), since Nicaragua has yet to notify the baselines from which its territorial sea is measured, the precise location of endpoint A cannot be determined and the location depicted on sketch-map No. 11 is therefore approximate.

Secondly, from the extreme southern point of the adjusted line (point 5), the line of delimitation will run in a south-east direction until it intersects with the 12-nautical-mile envelope of arcs around South Cay of Alburquerque Cays (point 6). It then continues along that 12-nautical-mile envelope of arcs around South Cay of Alburquerque Cays until it reaches the point (point 7) where that envelope of arcs intersects with the parallel passing through the southernmost point on the 12-nautical-mile envelope of arcs around East-Southeast Cays. The boundary line then follows that parallel until it reaches the southernmost point of the 12-nautical-mile envelope of arcs around East-Southeast Cays (point 8) and continues along that envelope of arcs until its most eastward point (point 9). From that point the boundary line follows the parallel of latitude until it reaches the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured (endpoint B, the approximate location of which is shown on sketch-map No. 11, p. 714).

238. That leaves Quitasueño and Serrana, both of which the Court has held fall on the Nicaraguan side of the boundary line described above. In the Court's view, to take the adjusted line described in the preceding paragraphs further north, so as to encompass these islands and the surrounding waters, would allow small, isolated features, which are located at a considerable distance from the larger Colombian islands, to have a disproportionate effect upon the boundary. The Court therefore considers that the use of enclaves achieves the most equitable solution in this part of the relevant area.

Quitasueño and Serrana are each entitled to a territorial sea which, for the reasons already given by the Court (paragraphs 176-180 above), cannot be less than 12 nautical miles in breadth. Since Quitasueño is a rock incapable of sustaining human habitation or an economic life of its own and thus falls within the rule stated in Article 121, paragraph 3, of UNCLOS, it is not entitled to a continental shelf or exclusive economic zone. Accordingly, the boundary between the continental shelf and exclusive economic zone of Nicaragua and the Colombian territorial sea around Quitasueño will follow a 12-nautical-mile envelope of arcs measured from QS 32 and from the low-tide elevations located within 12 nautical miles from QS 32 (see paragraphs 181-183 above).


Sketch-map No. 11:
Course of the maritime boundary
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
CARIBBEAN SEA
HONDURAS
NICARAGUA
COSTA RICA
JAMAICA
COLOMBIA
COLOMBIA
PANAMA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
HONDURAS
NICARAGUA
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
Serranilla
Serrana
Quitasueño
Roncador
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Alburquerque Cays
Miskitos Cays
Little Corn Island
Great Corn Island
A
B
1
2
3
4
5
6
7
8
9
Outline of a bank
Approximate eastern limit of the relevant area
Maritime boundary established by the Court
Judgment of the ICJ dated 8 October 2007
Bilateral treaty of 1993
Bilateral treaty of 1976
Bilateral treaty of 1977 (not in force)
Bilateral treaty of 1980
Nautical Miles
KM
16°00'00"N
77°00'00"W
85°30'00"W

In the case of Serrana, the Court recalls that it has already concluded that it is unnecessary to decide whether or not it falls within the rule stated in Article 121, paragraph 3, of UNCLOS (paragraph 180 above). Its small size, remoteness and other characteristics mean that, in any event, the achievement of an equitable result requires that the boundary line follow the outer limit of the territorial sea around the island. The boundary will therefore follow a 12-nautical-mile envelope of arcs measured from Serrana Cay and other cays in its vicinity.

The boundary lines thus established around Quitasueño and Serrana are depicted on sketch-map No. 11.

10. The Disproportionality Test

239. The Court now turns to the third stage in its methodology, namely testing the result achieved by the boundary line described in the preceding section to ascertain whether, taking account of all the circumstances, there is a significant disproportionality which would require further adjustment.

240. In carrying out this third stage, the Court notes that it is not applying a principle of strict proportionality. Maritime delimitation is not designed to produce a correlation between the lengths of the Parties' relevant coasts and their respective shares of the relevant area. As the Court observed in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case,

> "If such a use of proportionality were right, it is difficult to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 45, para. 58.)

The Court's task is to check for a significant disproportionality. What constitutes such a disproportionality will vary according to the precise situation in each case, for the third stage of the process cannot require the Court to disregard all of the considerations which were important in the earlier stages. Moreover, the Court must recall what it said more recently in the *Maritime Delimitation in the Black Sea* case,

> "that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable and still required adjustment" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 129, para. 213).

241. ITLOS, in the *Bay of Bengal* case, spoke of checking for "significant disproportion" (*Judgment of 14 March 2012*, ITLOS, pp. 142-143,

para. 499). The Arbitration Tribunal in the *Barbados/Trinidad and Tobago* case referred to proportionality being used as "a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of *gross disproportion*" (*Tribunal Award of 11 April 2006, RIAA*, Vol. XXVII, p. 214, para. 238; *ILR*, Vol. 139, pp. 522-523; emphasis added). The Tribunal in that case went on to state that this process

> "does not require the drawing of a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines. Although mathematically certain, this would in many cases lead to an inequitable result. Delimitation rather requires the consideration of the relative lengths of coastal frontages as one element in the process of delimitation taken as a whole. The degree of adjustment called for by any given disparity in coastal lengths is a matter for the Tribunal's judgment in the light of all the circumstances of the case." (*RIAA*, Vol. XXVII, p. 235, para. 328; *ILR*, Vol. 139, p. 547.)

242. The Court thus considers that its task, at this third stage, is not to attempt to achieve even an approximate correlation between the ratio of the lengths of the Parties' relevant coasts and the ratio of their respective shares of the relevant area. It is, rather, to ensure that there is not a disproportion so gross as to "taint" the result and render it inequitable. Whether any disproportion is so great as to have that effect is not a question capable of being answered by reference to any mathematical formula but is a matter which can be answered only in the light of all the circumstances of the particular case.

243. Application of the adjusted line described in the previous section of the Judgment has the effect of dividing the relevant area between the Parties in a ratio of approximately 1:3.44 in Nicaragua's favour. The ratio of relevant coasts is approximately 1:8.2. The question, therefore, is whether, in the circumstances of the present case, this disproportion is so great as to render the result inequitable.

244. The Court recalls that its selection of that line was designed to ensure that neither State suffered from a "cut-off" effect and that this consideration required that San Andrés, Providencia and Santa Catalina should not be cut off from their entitlement to an exclusive economic zone and continental shelf to their east, including in that area which is within 200 nautical miles of their coasts but beyond 200 nautical miles from the Nicaraguan baselines. The Court also observes that a relevant consideration, in the selection of that line, was that the principal Colombian islands should not be divided into separate areas, each surrounded by a Nicaraguan exclusive economic zone and that the delimitation was one which must take into account the need of contributing to the public order of the oceans. To do so, the delimitation should be, in the words of the Tribunal in the *Barbados/Trinidad and Tobago* case, "both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome" (*Award of*

11 April 2006, RIAA, Vol. XXVII, p. 215, para. 244; *ILR*, Vol. 139, p. 524).

245. Analysis of the jurisprudence of maritime delimitation cases shows that the Court and other tribunals have displayed considerable caution in the application of the disproportionality test. Thus, the Court observes that in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the ratio of relevant coasts was approximately 1:8, a figure almost identical to that in the present case. The Court considered, at the second stage of its analysis, that this disparity required an adjustment or shifting of the provisional median line. At the third stage, it confined itself to stating that there was no significant disproportionality without examining the precise division of shares of the relevant area. That may have been because of the difficulty of determining the limits of the relevant area due to the overlapping interests of third States. Nevertheless, it is clear that the respective shares of Libya and Malta did not come anywhere near a ratio of 1:8, although Malta's share was substantially reduced from what it would have been had the boundary followed the provisional median line.

246. Similarly in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, the ratio of relevant coasts was approximately 1:9 in Denmark's favour (*Judgment, I.C.J. Reports 1993*, p. 65, para. 61). That disparity led the Court to shift the provisional median line. Again, the Court did not discuss, in its Judgment, the precise shares of the relevant area (referred to in that Judgment as the "area of overlapping potential entitlements") which the line thus established attributed to each State, but the description in the Judgment and the depiction of the boundary on the maps attached thereto show that it was approximately 1:2.7. The Court did not consider the result to be significantly disproportionate.

247. The Court concludes that, taking account of all the circumstances of the present case, the result achieved by the application of the line provisionally adopted in the previous section of the Judgment does not entail such a disproportionality as to create an inequitable result.

VI. Nicaragua's Request for a Declaration

248. In addition to its claims regarding a maritime boundary, Nicaragua's Application reserved "the right to claim compensation for elements of unjust enrichment consequent upon Colombian possession of the Islands of San Andrés and Providencia as well as the keys and maritime spaces up to the 82 meridian" and "for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua". In its final submissions, Nicaragua made no claim for compensation but it requested that the Court adjudge and declare that "Colombia is not acting in accordance with her obligations under international law by stopping and

otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82nd meridian". In this regard, Nicaragua referred to a number of incidents in which Nicaraguan fishing vessels had been arrested by Colombian warships east of the 82nd meridian.

249. Colombia states that Nicaragua's request for a declaration is unfounded. According to Colombia, Nicaragua has not demonstrated that it has suffered any damage as a result of Colombia's alleged conduct. It adds, first, that in a maritime delimitation dispute, parties do not claim reparation if the judgment finds that areas over which one party has been exercising its jurisdiction actually fall under the jurisdiction of the other. Secondly, Colombia argues that it cannot be criticized for blocking Nicaragua's access to natural resources to the east of the 82nd meridian. In particular, Colombia states that, in the normal exercise of its jurisdiction, it has intercepted to the east of the 82nd meridian fishing vessels flying the Nicaraguan flag which were not in possession of the appropriate permits. Additionally, Colombia contends that there is no evidence that any Nicaraguan vessel involved in the exploitation of natural resources in the areas east of the 82nd meridian has been threatened or intercepted by Colombia. In light of the above, Colombia submits that the Court should reject Nicaragua's request for a declaration.

* *

250. The Court observes that Nicaragua's request for this declaration is made in the context of proceedings regarding a maritime boundary which had not been settled prior to the decision of the Court. The consequence of the Court's Judgment is that the maritime boundary between Nicaragua and Colombia throughout the relevant area has now been delimited as between the Parties. In this regard, the Court observes that the Judgment does not attribute to Nicaragua the whole of the area which it claims and, on the contrary, attributes to Colombia part of the maritime spaces in respect of which Nicaragua seeks a declaration regarding access to natural resources. In this context, the Court considers that Nicaragua's claim is unfounded.

* * *

251. For these reasons,

THE COURT,

(1) Unanimously,

Finds that the Republic of Colombia has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla;

(2) By fourteen votes to one,

Finds admissible the Republic of Nicaragua's claim contained in its final submission I (3) requesting the Court to adjudge and declare that "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties";

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Sebutinde; *Judges* ad hoc Mensah, Cot;

AGAINST: *Judge* Owada;

(3) Unanimously,

Finds that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3);

(4) Unanimously,

Decides that the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia shall follow geodetic lines connecting the points with co-ordinates:

Latitude north	Longitude west
1. 13° 46′ 35.7″	81° 29′ 34.7″
2. 13° 31′ 08.0″	81° 45′ 59.4″
3. 13° 03′ 15.8″	81° 46′ 22.7″
4. 12° 50′ 12.8″	81° 59′ 22.6″
5. 12° 07′ 28.8″	82° 07′ 27.7″
6. 12° 00′ 04.5″	81° 57′ 57.8″

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

follows the parallel of latitude (co-ordinates 12° 24′ 09.3″ N) until it reaches the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured;

(5) Unanimously,

Decides that the single maritime boundary around Quitasueño and Serrana shall follow, respectively, a 12-nautical-mile envelope of arcs measured from QS 32 and from low-tide elevations located within 12 nautical miles from QS 32, and a 12-nautical-mile envelope of arcs measured from Serrana Cay and the other cays in its vicinity;

(6) Unanimously,

Rejects the Republic of Nicaragua's claim contained in its final submissions requesting the Court to declare that the Republic of Colombia is not acting in accordance with its obligations under international law by preventing the Republic of Nicaragua from having access to natural resources to the east of the 82nd meridian.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this nineteenth day of November, two thousand and twelve, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua and the Government of the Republic of Colombia, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge OWADA appends a dissenting opinion to the Judgment of the Court; Judge ABRAHAM appends a separate opinion to the Judgment of the Court; Judges KEITH and XUE append declarations to the Judgment of the Court; Judge DONOGHUE appends a separate opinion to the Judgment of the Court; Judges *ad hoc* MENSAH and COT append declarations to the Judgment of the Court.

(Initialled) P.T.

(Initialled) Ph.C.

DISSENTING OPINION OF JUDGE OWADA

1. I have voted in favour of all the conclusions of the Court relating to the merits of the dispute as contained in the operative paragraph of the Judgment (paragraph 251, subparagraph (1) and subparagraphs (3) through (6)). However, I have been unable to vote in favour of subparagraph (2) of the operative paragraph that relates to the issue of admissibility of the claim by Nicaragua contained in its final submission I (3). I wish to explain why I believe that the conclusion of the Court on this point is not in line with the criterion for judging admissibility of a claim as developed by the Court and not right as a matter of principle.

2. Nicaragua as Applicant, in its original submission contained in the Application of 6 December 2001, stated *inter alia* that:

> "Accordingly, the Court is asked to adjudge and declare:
>
> . . . . . .
>
> *Second*, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary." (Application, p. 8, para. 8.)

It maintained the same formulation in its Memorial submitted on 28 April 2003 (Memorial of Nicaragua, para. 3.39; Submissions at pp. 265-267). It, however, changed its submissions in its Reply of 18 September 2009 (submission I (3)). The final submissions of the Applicant, as read out at the conclusion of the oral proceedings held on 1 May 2012, specifies its claim as follows:

> "I. *May it please the Court to adjudge and declare that*:
>
> . . . . . .
>
> (3) The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties." (Judgment, para. 17.)

3. Colombia as Respondent lodged its objection to this, charging that "Nicaragua's maritime claims, and the basis on which those claims have been formulated, have undergone a radical change at a very late stage

of these proceedings" and that "this has fundamentally changed the subject-matter of the dispute which Nicaragua originally asked the Court to decide" (CR 2012/12, p. 44, para. 2). It elaborated its contention of inadmissibility of the new claim of the Applicant by stating that "Nicaragua has not simply reformulated its claim; it has changed the very subject-matter of the case" (*ibid.*, p. 45, para. 10). It thus suggests that this new position that the Applicant takes in the present case is contrary to Article 40 of the Statute and Article 38 of the Rules of Court (*ibid.*, p. 49, para. 32).

In its final submission read out at the conclusion of the oral proceedings on 4 May 2012, the Respondent stated as follows:

> ". . . 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." (Judgment, para. 17.)

4. In this situation the Court, before proceeding to the examination on the merits of the respective claims of the Parties, had to determine as a preliminary issue whether this newly formulated submission of the claim made by the Applicant in its final submission I (3) was admissible.

5. Both the Applicant and the Respondent cite the jurisprudence of this Court principally on the basis of two recent cases before the Court — that is, the case concerning *Certain Phosphate Lands in Nauru* and the case concerning *Ahmadou Sadio Diallo* — in order to determine whether or not this allegedly newly formulated claim of the Applicant can be considered admissible. For this purpose, both Parties developed their arguments on the basis of the criteria developed by the Court in its jurisprudence on admissibility of a new claim — that is, either the new claim has been implicit in the Application or it arises directly out of the question which is the subject-matter of the Application.

6. In my view it is doubtful whether either of these two cases is strictly pertinent to the present case. In each of these recent cases the alleged new claim advanced at a later stage of the proceedings by the Applicant was, in its essential character, a new *additional claim* which had not expressly been included in the original Application but which the Applicant claimed — and the Respondent denied — to have been covered by the original claim formulated in the original Application. It is submitted that such is not the situation in the present case. An automatic and mechanical application of these precedents thus could miss the essence of the present case.

The essence of the situation in the present case is that the Applicant attempted to *replace* the original formulation of the claim submitted to the Court in its Application by a newly formulated, ostensibly different, claim relating to the existing dispute. In this sense, the present case is unique and has no exact jurisprudential precedent of the Court.

7. If we try to find an analogous situation in the jurisprudence of the Court, the case which is more akin to the situation in the present case would

be the case concerning *Société commerciale de Belgique (Judgment, 1939, P.C.I.J., Series A/B, No. 78)*, between Belgium and Greece, which came before the Permanent Court of International Justice in 1939. In this case, the original claim of the Applicant, the Belgian Government, contained in its Application, asked the Court to declare that "the Greek Government, by refusing to carry out the arbitral awards in favour of the Belgian Company, had violated its international obligations" (*ibid.*, p. 170). In its Counter-Memorial, the Respondent disputed this allegation that it had refused to carry out the arbitral awards. It advanced the contention that it had neither refused to carry out the awards nor disregarded the acquired rights of the Belgian company, and claimed that it had committed no act which was contrary to international law. Thereupon, the Applicant decided to treat these declarations of the Greek Government as changing the character of the dispute between the two Parties, and, at the conclusion of the oral pleadings, the final submissions of the Belgian Government were given a new form. It now asked the Court to rule that "all the provisions of the awards were binding on the Greek Government without reserve" (*ibid.*, p. 171). No objection was raised by the Respondent to this abandonment by the Applicant of its original submissions which had asked the Court to declare that "the Greek Government . . . had violated its international obligations" (*ibid.*, p. 170) by refusing to pay the arbitral awards in favour of the Belgian company.

8. It was under these unusual circumstances that the Court made the following pronouncement:

> "The Court has not failed to consider the question whether the Statute and Rules of Court authorize the parties to transform the character of a case as profoundly as the Belgian Government has done in this case.
>
> It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute. The Court has not hitherto had occasion to determine the limits of this liberty, but it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute. Similarly, a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction." (*Ibid.*, p. 173.)

Under these exceptional special circumstances of the case, the Court, after thus stating the general principles governing this issue, nevertheless accepted in the end this "transformation". It declared that

> "[t]he Court, however, considers that *the special circumstances of this case* as set out above, and *more especially the absence of any objection on the part of the Agent for the Greek Government*, render it advisable that it should take a broad view and not regard the present proceedings as irregular" (*P.C.I.J., Series A/B, No. 78*, p. 173; emphasis added).

9. By comparison, it is not possible to find in the present case any such exceptional special circumstances that could justify the drastic change in the character of the claim. What is more pertinent and crucial, the Respondent in the present case raised a strong objection to this novel formulation of the claim advanced by the Applicant at that late stage of the proceedings.

10. One could only surmise the background of this change of position from what the Applicant explained before the Court:

> "Once the Court had upheld '[Colombia's] first preliminary objection . . . in so far as it concern[ed] the Court's jurisdiction as regards the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina' in its Judgment of 13 December 2007, Nicaragua could only accept that decision and adjust its submissions (and its line of argument) accordingly." (CR 2012/15, p. 38, para. 11.)

11. Whatever may be the background, what is essential for our assessment of the situation is that, contrary to the case concerning *Société Commerciale de Belgique*, the 2007 Judgment of the Court did not produce any such fundamental change in the objective legal situation surrounding the maritime delimitation of the area in question, as to require the Applicant to give up its original position and to drastically change its principal claim as well as its legal basis.

12. The present Judgment accepts that

> "from a formal point of view, the claim made in Nicaragua's final submission I (3) (requesting the Court to effect a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties) is a new claim in relation to the claims presented in the Application and the Memorial" (Judgment, para. 108).

It however rejects the contention of Colombia that this revised claim transforms the subject-matter of the dispute, arguing that "[t]he fact that Nicaragua's claim to an extended continental shelf is a new claim . . . does not, in itself, render the claim inadmissible" (*ibid.*, para. 109). It cites a dictum from its own Judgment in the case concerning *Ahmadou Sadio Diallo* that "the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings" *(ibid.)*. Relying largely upon the argument of the Applicant, the

Judgment states that "the Application defined the dispute as 'a group of related legal issues subsisting between the Republic of Nicaragua and the Republic of Colombia concerning title to territory and maritime delimitation'" (Judgment, para. 111). On the basis of this understanding, the Judgment concludes that "the [revised] claim . . . falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute" *(ibid.)*. I respectfully differ from this perception of the Court about the nature and the subject-matter of the dispute as submitted to the Court by the Applicant.

13. In its nature, this sudden change of position on the part of the Applicant cannot but be described as anything but a radical transformation of the subject-matter of the dispute itself. If the jurisprudence of the Court for admissibility of a new claim were to be applicable to the present case, it would be difficult to justify this newly formulated claim as a claim "[that] must have been implicit in the application . . . or must arise 'directly out of the question which is the subject-matter of that Application'" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67).

14. The Applicant argues that the legal situation after this newly reformulated submission replaced its original submission remains no different from the legal situation that had existed before; that the subject of the dispute has thus not been modified. It is argued that the issue of the subject of the dispute was, and still is, nothing else than "to obtain declarations concerning title and the determination of maritime boundaries [between Nicaragua and Colombia]" as paragraph 9 of the Application makes clear and "should not be confused with the means by which it is suggested to resolve it" (CR 2012/15, p. 37, para. 9). I am unable to agree with this position. The legal character of a continental shelf based on the distance criterion and that of a continental shelf based on the natural prolongation criterion are quite distinct; thus the rules applicable for determining the continental margin boundary on the basis of the principle of natural prolongation extending beyond the 200 mile limit of the continental shelf as against the continental shelf determined by the distance criterion of 200 nautical miles from the coast of the land territory (United Nations Convention on the Law of the Sea, Art. 76) are entirely distinct and different from the rules applicable for determining the extent of the continental shelf between the opposite or adjacent states (*ibid.*, Art. 83).

15. In effect, what is proposed by the Applicant by way of its newly reformulated submission I (3) is not something that can be characterized as relating only to "the *means* by which it is suggested to resolve [the dispute]" (CR 2012/15, p. 37, para. 9; emphasis added).

16. With regard to the subject-matter of the "dispute", for the resolution of which the newly reformulated claim of an extended continental shelf of Nicaragua is purportedly being advanced, replacing the original request for "a single maritime boundary" (Application, para. 8), it is to be noted that there is no express definition in the Application to indicate

what exactly in the view of the Applicant constitutes the dispute being submitted by the Applicant in the present case, except for several general references to "the dispute", such as that "[t]he dispute [submitted to the Court] consists of a group of related legal issues . . . concerning title to territory and maritime delimitation" (Application, para. 1). Nowhere in the Application is to be seen what concretely is the dispute that the Applicant is envisaging to refer to the Court.

It is only when we come to the crucial part of the Application which deals with concrete requests for the Court to adjudge and declare in the present case (*ibid.*, para. 8), that the Application specifically states that:

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

This language could not be clearer; its purport is to identify a very specific objective that the Applicant seeks to attain by the Judgment, that is, the determination of the course of a single maritime boundary constituting both the continental shelf boundary and the economic zone boundary. It cannot be read as merely indicating one possible means to be employed by the Court for achieving the general objective of demarcating maritime areas lying between the two Parties.

17. If this were a case submitted jointly by the disputing parties through a special agreement, such language as is used in this Application would undoubtedly have constituted a binding agreement of the parties setting out the framework of the task assigned to the Court, from which the Court could not derogate. While it is true that such is not the case in the present proceedings, this Application, which the other Party not only did not contest with regard to the existence and the contents of this dispute but which it positively acted upon as defining the framework and the scope of the dispute in the present proceedings, should be regarded as constituting the agreed basis of the framework of the case before the Court.

In this sense it must be said that the present situation is qualitatively different from the situation where parties are free to choose, modify or even discard the *means* through which they argue their respective cases on a defined point at issue.

18. It may be accepted that the "principal purpose of this Application" seeking the judicial settlement of the dispute may have been "to obtain declarations concerning title and the determination of maritime boundaries" (CR 2012/15, p. 35, para. 6). Nonetheless, the specific request submitted by the Applicant to the Court for achieving this general purpose was for the Court "to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone apper-

taining respectively to Nicaragua and Colombia" (Application, para. 8), and not such a generally formulated request that "whatever method or procedure is adopted by the Court to effect the delimitation . . . the decision [of the Court] leaves no more maritime areas pending delimitation between Nicaragua and Colombia" (CR 2012/8, p. 25, para. 44).

19. Having discussed so far in terms of the concrete context of the case, I wish to turn now to what in my view is an even more important point — namely, the consideration of judicial policy of this Court. The present instance of what I believe to be a transformation of the dispute already before the Court into another dispute is different in character from the normal case of procedural irregularities, to which the Court, being an international jurisdiction, can sometimes take a more flexible position. The present case in my view is not a mere matter of procedural formality with only a limited impact on the procedural fairness of the case in issue.

20. In the case concerning *Certain Phosphate Lands in Nauru*, the Court took the view that from a formal point of view the additional claim relating to certain outside assets that appeared in the Nauruan Memorial was a new claim as compared with the original claim presented in the Application. Nevertheless, it took the position that it should consider whether, although formally a new claim, this claim could be considered as included in the original claim in substance. In considering this point, the Court took careful account of the position enunciated by the Permanent Court of International Justice in an earlier case that "[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). After an extensive consideration of this point, the Court nonetheless came to the conclusion that "the Nauruan claim . . . is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 70).

21. In the present case the same consideration should apply. If the Court were to accept this radical change in the Applicant's submission, then the whole issue of maritime delimitation would acquire a totally different legal character, not only in form but also in substance. Depending upon whether the Court is deciding on the issue of maritime demarcation between the two States in relation to the sea areas covering both continental shelf and exclusive economic zone, or the issue of the delimitation of the continental shelf alone of the two States respectively based on totally different theoretical grounds, the legal character of the issue involved can be totally different. The latter issue would involve an examination of such basic questions as the following: one fundamental point to be clarified in relation to the latter issue, which does not exist in the for-

mer issue, relates to the question of geological or geomorphological features of the maritime areas involved, including the geological nature of the relevant islands, islets, cays and other maritime features in the area. Another difficult question will arise in relation to the unsettled doctrine of how to effect a maritime delimitation of overlapping areas of continental shelf entitlements between two States claimed on the strength of different legal bases by each Party — one claim based on the criterion of natural prolongation extending beyond 200 nautical miles from the baseline of the coast, the other based on the criterion of pure distance. No State practice has developed and no jurisprudence exists on this point. Yet another difficulty the Court will have to face is the question of applicability *vel non* of the relevant prescriptive conditions contained in UNCLOS, especially its Article 76, to the extent that one of the Parties, Colombia, is not a party to the Convention.

22. These are not issues which were envisaged by the Parties or by the Court when the original submission of the Applicant was made in its Application and its Memorial; nor were they argued in full at the last stage of the written proceedings or at the stage of oral proceedings by both of the Parties. The contradiction inherent in the position of the Applicant is well illustrated in the following confirmatory statement in the Memorial of the Applicant itself:

> "The Relevance of Geology and Geomorphology
>
> The position of the Government of Nicaragua is that geological and geomorphological factors have no relevance for the delimitation of a single maritime boundary within the delimitation area." (Memorial of Nicaragua, p. 215, para. 3.58.)

23. One important point for the Court to consider is that this radical change in the Applicant's position took its concrete form only in late 2007, ostensibly in connection with the 2007 Judgment of the Court on the Preliminary Objections phase of the case (13 December 2007), more than six years after the dispute had been submitted in its original form in 2001. The rationale of the prohibition of the transformation of the dispute into a new dispute is solidly founded on the consideration of fair administration of justice to be applied to both parties and the consideration of legal stability and predictability. This to my mind is an essential point of principle to be emphasized in the present setting as a matter of judicial policy of the Court.

24. In light of this situation, it should be no source of surprise to find that the Court in the present Judgment has found, while accepting that the newly reformulated claim of the Applicant is procedurally admissible, that it nonetheless could not entertain the examination of the substantive claim of the Applicant on this point. What the Court decided to do in this Judgment, after upholding the *procedural admissibility* of submission I (3) of the Application, was to engage in the analysis of the essential legal nature of this claim (Part IV), treating it separately from the more general exami-

nation of the original claim of the Applicant relating to the delimitation of the relevant maritime area between the two opposing States (Part V). Clearly the Court has concluded that the issue now raised by Nicaragua in its final submission I (3) was of such a nature that the Court at this stage of the proceedings should not address it as if it were part and parcel of the general basket of issues relating to the maritime delimitation raised in the Application of Nicaragua. It is in my view for this reason that the Court did not proceed to dispose of this Nicaraguan submission I (3) by simply rejecting it on the basis of inadequacy of evidence produced by Nicaragua. More than the issue of evidence is involved, as is revealed in the treatment of the problem involved in Part IV of the Judgment.

25. Reflecting this anomalous situation the present Judgment, while accepting that the reformulated claim of the Applicant is procedurally admissible, analyses the essential legal nature of this claim in an independent Part IV, in between Part III (which deals with the procedural issue of admissibility of the reformulated claim of the Applicant in I (3) of its final submissions) and Part V (which discusses the general issues of maritime delimitation). The Judgment treats this as a separate issue from either of the other two issues, arriving at the conclusion that this claim had to be rejected. For this reason, among others, Part IV is kept separate from Part III and Part V.

26. This approach adopted in the Judgment would seem to reflect the awareness on the part of the Court of the differences that exist in the legal nature of the two different issues involved in relation to the regions of the continental shelf, as described in paragraph 21 above. This to me is one more reason why the Court should have distanced itself from this newly reformulated claim of Nicaragua by declaring it to be inadmissible in the present proceedings.

(*Signed*) Hisashi OWADA.

SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Disagreement with the reasoning, not with the operative part — Essential first to consider the 1928 Treaty in order to determine whether it settles the question of the sovereignty of the islands still in dispute — Failure to rule on the interpretation of the 1928 Treaty — No valid justification for failing to do so — Application of the traditional equidistance method at the very least inappropriate in this instance — Impossible to construct a provisional median line which takes account of all the "relevant coasts" — Inadequacy in this case of the notions of "adjustment" or "shifting" of the provisional line.

1. I voted in favour of all the points in the operative part of the Judgment. Nevertheless, I disagree with certain aspects of the Court's reasoning. This opinion does not seek to criticize the reasoning as a whole, nor even its fundamental logic, but rather two of its individual elements. They are, first, the conclusion which the Judgment draws — or rather, in my view, does not draw — from its consideration of the 1928 Treaty at the end of Part 2, subsection A (paras. 40 to 56); and second, how the Judgment deals with the issue of the construction of a "median line" as the first stage in the delimitation process (paras. 184 to 199).

The reasons why I disagree with those two points are as follows.

* * *

I. The Consideration of the 1928 Treaty as Title to Sovereignty over the Islands in Dispute

2. In support of their opposing claims to sovereignty over the islands in dispute, the Parties put forward three main series of arguments: the first, which was essentially invoked by Colombia, was based on the bilateral 1928 Treaty and its 1930 Protocol; the second was based on the principle of *uti possidetis juris*; and the third was based on the post-colonial *effectivités*.

3. The Judgment begins by considering the issue of the 1928 Treaty. This is fully justified: not so much by the fact that Colombia relied principally on that Treaty as the source of its sovereignty and only advanced the other two series of arguments as alternatives; but above all because the conventional title, if its existence was established, would take precedence over any other consideration, and would make the examination of the other bases put forward by the Parties not only pointless but legally impossible.

4. In other words, this was not one of those situations — which do occur — in which the Court could consider the various legal bases pleaded for resolving the dispute, and choose the one which it regarded as constituting the most robust and most appropriate basis for its reasoning. It was bound to examine the issue of the Treaty first and was only entitled to move on to consider the *uti possidetis juris* and the *effectivités* if and to the extent that the Treaty did not accord sovereignty over the islands in dispute to one or other of the Parties. Indeed, if the Treaty were construed as according sovereignty to one Party, then that Party should be declared to be in possession of it at the present time, even if the examination of the *uti possidetis* and the *effectivités* were to lead to conclusions in favour of the other Party. If the 1928 Treaty did derogate from the division of sovereignty over the islands which was established by the principle of *uti possidetis juris,* then it was legitimate for it to do so; the *effectivités* subsequent to the Treaty could not, whatever their nature, take precedence over the conventional title. Only a new treaty or an agreement binding the Parties could have contradicted the 1928 Treaty on the question of sovereignty over the islands in dispute, assuming that this question was settled — in whole or in part — by that latter Treaty; but no one has alleged that such a post-1928 agreement exists.

5. It was therefore crucial to determine whether the 1928 Treaty (with its 1930 Protocol) settled the question of sovereignty over the islands currently in dispute. Moreover, it is clear that the 2007 Judgment on the Preliminary Objections raised by Colombia did not rule on that point. That Judgment merely noted that Article I of the 1928 Treaty expressly accorded sovereignty to Colombia over the three islands mentioned by name therein (San Andrés, Providencia and Santa Catalina) — which was why the Court did not have jurisdiction over that part of the dispute, since it had been settled by an agreement between the Parties — but that, on the other hand, it was not easy, prima facie, to determine the other disputed features over which sovereignty was attributed to Colombia under the Treaty, and that the Court did indeed have jurisdiction over that part of the dispute, which had to be decided on the merits in the subsequent phase of the proceedings. That was the Court's task in the present Judgment.

6. Up to this point in my reasoning I have no objections to the Judgment.

In paragraph 42, after noting that, under the terms of the 1928 Treaty, Colombia has sovereignty over "San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago", the Court is right to deduce that: "in order to address the question of sovereignty over the maritime features in dispute, [it] needs first to ascertain what constitutes the San Andrés Archipelago". In the context of this paragraph, the word "first" means that the question thus formulated needed to be resolved before the Court turned — but only if that were still to be necessary after answering the first question — to the consideration of the other arguments of the Parties, based on the *uti possidetis juris* and the *effectivités*.

7. It is clear, however, that at the end of the examination which it conducts in paragraphs 52 to 55, the Court does not do what it said it would do in paragraph 42: it does not "ascertain what constitutes the San Andrés Archipelago". In fact it does not draw any conclusion and merely notes that, since it cannot reach a definitive decision on the scope of the 1928 Treaty concerning the features in dispute, it can only settle the dispute over sovereignty on the basis of the arguments of the Parties "which are not based on the composition of the Archipelago under the 1928 Treaty" — that is to say, the arguments concerning the *uti possidetis juris* and the *effectivités* (Judgment, para. 56). It then moves on to consider those other arguments.

8. In so doing, in my opinion, the Court commits a serious legal error: it fails, without valid justification, to rule on the interpretation of the 1928 Treaty, and, more specifically, on the meaning of the words "over the other islands, islets and reefs forming part of the San Andrés Archipelago", within the meaning of Article I of the Treaty.

9. The fundamental reasons for this failure are provided in paragraph 53 of the Judgment:

> "the question about the composition of the Archipelago cannot . . . be definitively answered solely on the basis of the geographical location of the maritime features in dispute or on the historical records relating to the composition of the San Andrés Archipelago referred to by the Parties, since this material does not sufficiently clarify the matter".

In essence, the Court notes that when the 1928 Treaty refers to the "San Andrés Archipelago" it does not define its composition; that the sole fact that some islands lie close to the main island of San Andrés is insufficient to conclude that they form part of the Archipelago, whereas other, more distant, islands do not — since it would be necessary to determine a cut-off point for establishing appurtenance to the Archipelago, which the Treaty does not allow; and, finally, that the examination of the documents communicated to the Court by the Parties, which were meant to shed light on the context in which the Treaty was negotiated and concluded, does not establish with any certainty what the Parties intended the reference to the "San Andrés Archipelago" to signify at the time.

10. None of the aforementioned reasons justifies the Court's failure to interpret the Treaty: they merely emphasize that the Treaty is unclear on this point, identify the difficulties encountered when seeking to define its meaning and scope, and indicate that it is impossible to draw a definitive conclusion. None of that justifies the Court's failure to interpret the Treaty, whose meaning is disputed by the Parties. All that can be deduced from the reasons given by the Court is that the interpretation is difficult in this case. True. But the difficulty of interpreting a legal text is not — is never — a valid reason for a failure to do so by the court which is responsible for applying it. A text's obscurity is a sign that it needs to be interpreted, never an obstacle to that interpretation. The court may not be certain about the meaning of the text, it may hesitate over the solution to

adopt; that is not unusual. But it is the court's duty to decide, irrespective of its doubts — doubts which it is moreover perfectly entitled to express at the very moment when it does decide.

11. Admittedly, there are cases when, faced with a relatively obscurely worded norm, the court prefers to avoid coming down in favour of one particular questionable interpretation, and decides to set the difficulty aside and settle the dispute on the basis of other legally relevant and sufficient considerations. That is the mark of healthy judicial caution. However, it still has to be legally possible, given the particular facts of the case, to rule without establishing the meaning of the norm whose scope is in doubt. That is not always the case. For example, it is not the case in this instance, for the reasons which I have set out above: the 1928 Treaty, the *uti possidetis* and the *effectivités* are not alternative legal bases, which are on an equal footing, and between which the Court could choose in order to settle the issue of sovereignty. It was necessary first to determine the effects of the 1928 Treaty on sovereignty before the rest could — if appropriate — be examined. Deciding cannot mean merely noting that the task is difficult: the Court has not done its duty.

12. Admittedly, when it writes, in paragraph 56, that, in order to resolve the dispute, it must examine the arguments of the Parties which are not based on the Treaty, whose meaning it regards as being in doubt, the Court already knows that when it considers the *effectivités* it will find sufficient robust and relatively uncontentious evidence on which to base a conclusion in favour of awarding sovereignty to one of the Parties.

However, that does not alter the problem. For the reasons which I have already stated, the Court was not at leisure to choose between the Treaty and the *effectivités* on the basis of which of the two grounds appeared to be the more robust.

Moreover, if the Parties had pleaded solely on the basis of the Treaty, the Court would certainly not have evaded its duty of interpretation, the performance of which may be difficult but is never impossible.

13. I would add, to anticipate a possible objection, that a court's duty to interpret a treaty which has been adduced by a party, when it is not legally possible to rely on a strictly alternative basis, is not limited to cases in which the provision invoked seeks to define a rule of a general and impersonal nature, a genuine norm, that is to say, one which is abstract and permanent. The duty to interpret is equally applicable in those cases, like the present one, in which the contentious clause confers a specific title on a party, notably a title to sovereignty. In such cases there is no reason to derogate from the fundamental principle that a court is not entitled to cite the obscurity of the treaty as justification for not interpreting it. I regret that the Court disregarded that principle in this case.

14. Having said that, I think that the Court's final conclusion would have been the same if it had proceeded as it ought to have done.

15. It would first have noted that, unless the last clause of the first paragraph of Article I of the 1928 Treaty were rendered ineffective, it must

inevitably be acknowledged that at least some of the features in dispute in the present phase of the proceedings belong to Colombia on the basis of the Treaty, since they form part of the "San Andrés Archipelago". That provision in fact implies that islands other than San Andrés, Providencia and Santa Catalina form part of the "San Andrés Archipelago" under the Treaty, and those other islands can be none other than those which are presently in dispute, or certain of them at least. Nicaragua's position, that "the Archipelago comprises only the islands of San Andrés, Providencia and Santa Catalina" (para. 48 of the Judgment) is incompatible with the Treaty, since it renders it meaningless. A simple glance at the map is sufficient to conclude — once you disregard all the islands to the west of the 82° W meridian, which the 1930 Protocol declares not to belong to the Archipelago under the Treaty — that the Archipelago includes at least the Alburquerque Cays and the East-Southeast Cays, which lie closest to San Andrés. Those islands therefore definitely belong to Colombia under the Treaty, and the Court ought to have noted that fact, instead of cautiously indicating that "given their geographical location" they "could be seen as forming part of the Archipelago" (*ibid.*, para. 53), before adding that this geographical criterion was not decisive.

16. In my opinion, there is sufficient evidence to consider that in 1928 the islands of Roncador, Quitasueño and Serrana were also regarded as forming part of the San Andrés Archipelago, but it is not necessary to settle that question, since the second paragraph of Article I of the Treaty expressly precludes sovereignty over those three features from being attributed to Colombia. The fact that the reason given is that their appurtenance was in dispute between Colombia and the United States of America at the time, a dispute which subsequently disappeared when the United States renounced its claim, does not alter the indisputable fact that the 1928 Treaty does not in itself confer a title of sovereignty on Colombia over the three features in question. The Court was therefore able to leave the issue unresolved of whether Roncador, Quitasueño and Serrana formed part of the San Andrés Archipelago in the sense in which the two States understood that notion in 1928.

17. Finally, it seems to me that Bajo Nuevo and Serranilla are too far away from San Andrés to be reasonably regarded, at first sight, as forming part of the Archipelago, and that this assumption must be made, unless there is sufficiently convincing evidence to the contrary in the *travaux préparatoires* of the 1928 Treaty. However, Colombia did not provide any such evidence in support of its claim.

18. I therefore conclude that the 1928 Treaty accords Colombia sovereignty not only over San Andrés, Providencia and Santa Catalina (since these three islands are no longer at issue in the present phase of the proceedings), but also over the Alburquerque Cays and the East-Southeast Cays; however, it does not accord either of the two Parties sovereignty over the other maritime features in dispute.

19. In respect of the latter — Quitasueño, Serrana, Roncador, Serranilla and Bajo Nuevo — but of them alone, the Court had to move to the

examination of the arguments based on the *uti possidetis* and the post-colonial *effectivités*. In this regard, I support the Judgment's subsequent reasoning: a title in favour of one or other of the Parties cannot be established on the basis of the principle of *uti possidetis*; the *effectivités* are in Colombia's favour.

20. Ultimately, my serious reservations about the reasoning in the Judgment did not prevent me from voting in favour of point 1 of the operative part, since my conclusion is the same as that of my colleagues.

* * *

II. The Construction of a Provisional Median Line as the First Stage in the Method for Fixing the Maritime Boundary

21. As far as the maritime delimitation is concerned, my disagreement relates less to what the Court has done — moreover, I agree with the end result of the process, and I voted in favour of points 4 and 5 of the operative part — than to how it is presented, which appears to me to be largely fallacious. In short, my opinion is that, although the Court states that it is following the traditional method, as described in particular in its Judgment in the case between Romania and Ukraine (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61), in reality it diverges very considerably from it and actually it cannot do otherwise, since it is clear that the said method is inappropriate in the present case.

22. The method in question is recalled in paragraphs 190 to 193 of the Judgment. It consists of first constructing a provisional median line, that is to say, a line which is at equal distance from the opposite coasts of the two States which generate entitlements to overlapping maritime spaces — those overlapping entitlements being the very reason why it is necessary to effect a delimitation. Where the relevant coasts are adjacent, the provisional line is termed an equidistance line, but that does not make any substantial difference and moreover is not the case here. The second stage is to adjust or shift the provisional line thus obtained in order to take account of any particular circumstances which might require the line to be adjusted or shifted in order to achieve an equitable solution. Finally, in a third stage, the Court must check that the maritime areas awarded to the Parties by virtue of the delimitation obtained at the end of the previous stage are not markedly disproportionate to their respective relevant coasts — the coasts which generate the entitlements to the overlapping spaces.

23. The Court considers the arguments by which Nicaragua sought to convince it that the said method was inappropriate in the present case on

the grounds that the particular geographical situation was one in which the Court should not begin by constructing a provisional median line. It acknowledges that the "three-stage process is not . . . to be applied in a mechanical fashion" and "that it will not be appropriate in every case to begin with a provisional equidistance/median line" (Judgment, para. 194). However, it dismisses Nicaragua's arguments and states that, although there are undoubtedly particular circumstances which justify adjusting the provisional median line, there is no reason not to begin by constructing such a line nor to use it as a starting-point for the delimitation. Consequently, the Court affirms that it will adhere to its "standard method" (*ibid.*, para. 199), and it proceeds to do so — or rather it claims to proceed to do so — in paragraphs 200 to 204 (first stage: construction of the provisional median line), in paragraphs 205 to 238 (second stage: adjustment or shifting of the provisional line), and in paragraphs 239 to 247 (third stage: disproportionality test).

24. Nevertheless, it is obvious that the construction of a provisional median line as a starting-point for the delimitation is not only highly inappropriate in this case, but that it is even virtually impossible.

25. The reason for this is very simple. The overlapping entitlements which make the delimitation necessary in this instance do not exist because two opposite (or adjacent) coasts are generating projections which overlap in an intermediate area, as is usually the case. Here, the overlapping entitlements occur because, within the exclusive economic zone measured from the Nicaraguan coast, there are islands belonging to Colombia which generate an entitlement to an exclusive economic zone for that State in all directions. In other words, the overlapping does not only occur between the Nicaraguan coast and the Colombian islands (that is to say, in the area to the west of the Colombian islands and to the east of the Nicaraguan coast); it also occurs in the areas to the north, east and south of the Colombian islands — and even between them. This is shown very clearly on sketch-map No. 7 in the Judgment (p. 687), which depicts the "relevant maritime area", that is to say, the area of overlapping entitlements within which the Court is called upon to effect the delimitation.

26. Plainly, therefore, no "median line" can take account of the geographical reality which was submitted for the Court's consideration, not because of any "relevant particular circumstance" which would justify the adjustment of a provisional line without making it impossible to construct it in the first place, but because of the essential facts of the dispute brought before the Court, which make the very notion of a "median line" meaningless in the present case.

27. It is admittedly possible to construct a line which is equidistant from the Nicaraguan coast and the west-facing coasts of the Colombian islands, and that is what the Court does, affirming that in so doing it has completed the first stage of its "standard method". But a glance at that

line, which is shown on sketch-map No. 8 (p. 701), is sufficient to realize that it is "median" in name only: it may be equidistant from the Nicaraguan coast (more precisely from the Nicaraguan islands adjacent to that State's mainland coast), on its western side, and the western coasts of the Colombian islands, on its eastern side. However, it does not take any account — indeed the manner of its construction means that it cannot take any account — of the entire area to the east of the Colombian islands, which nonetheless also forms part of the overlapping area. This is not a "particular circumstance" which would justify a subsequent adjustment or shifting of the line. It is a fundamental defect which deprives the line of its alleged "median" character. This can be explained by a specific characteristic of the case: the Court could only construct that line by taking base points, as far as Colombia is concerned, which were located exclusively on the west-facing coasts of the islands belonging to that State. It could not adopt any base points on the east-, north- and south-facing coasts of those islands since they do not face the Nicaraguan coast. However, as I recalled above, all of the coasts of Colombia's islands, not just the west-facing parts of those coasts, generate entitlements to an exclusive economic zone which overlap with those of Nicaragua.

28. In other words, in order to be able to construct a line which has at least the semblance of a "median line" — although in my view even that is debatable — the Court deliberately had to ignore the majority of Colombia's relevant coasts. However, in order to perform its designated function in the delimitation process, a median line must take into account all the "relevant coasts" of the States present, that is to say, all the coasts which generate the projections creating the overlapping entitlements which make the delimitation necessary.

29. The Judgment itself recalls that point in paragraph 191: the median line has to be "constructed using the most appropriate base points on the coasts of the Parties". These points are admittedly chosen, but they cannot be chosen in just any way: in order for them to be "the most appropriate", they must take satisfactory account of all the "relevant coasts" and not just one part of those coasts. However, as far as the Colombian islands are concerned, the Judgment rightly points out that the relevant coasts constitute "the entire coastline of these islands, not merely the west-facing coasts" (para. 151). This suggests that a median line corresponding to the definition in the "standard method" would have to be constructed from base points on all the coasts of the Colombian islands, and not only on their west-facing parts. Clearly, however, that is not possible in this case.

30. Instead of concluding from this that the construction of a median line — albeit a provisional one — is at the very least inappropriate, if not impossible, in this case, the Court decides to construct one all the same without taking into account (simply because it cannot) the majority of the coasts of the Colombian islands. In so doing, it appears to forget in para-

graphs 200 to 204, in which it selects base points which, on the Colombian side, are located exclusively on the western sides of the islands, what it explained in paragraphs 151 and 191.

31. It is true that this enables it to construct a line (depicted on sketch-map No. 8). But that line is only "median" with respect to one part of the "relevant area" to delimit (the area shown on sketch-map No. 7); it is otherwise entirely meaningless. In my view, therefore, the line constructed cannot be regarded as a "median line", that is, as an acceptable starting-point for the delimitation, which will subsequently only be adjusted or shifted to a necessarily limited extent, in order to take account of particular circumstances.

32. Moreover, further on in its reasoning the Judgment implicitly acknowledges that fact, in two ways.

First, after adjusting the provisional line by shifting it considerably eastwards (in order, therefore, to move it closer to the Colombian islands), the Court notes that even after that adjustment the result would not be equitable if the line "extend[ed]... into the parts of the relevant area north of point 1 or south of point 5", that is to say, to the north and south of the principal Colombian islands, and that furthermore the line in question would cut off Nicaragua from the areas to the east of those islands, areas "into which the Nicaraguan coast projects" (Judgment, para. 236). That is perfectly true, but does it not constitute an acknowledgment that the provisional line is not fit for purpose, with regard to a large part of the area in which the delimitation is to be effected, that is to say, all the sectors to the north, south and east of the principal Colombian islands?

Second, and as a consequence of the foregoing, the Court is induced to construct two horizontal lines along lines of latitude passing to the north through point 1 (which is located to the north of Santa Catalina, and approximately level with Roncador) and to the south through point 9 (which is located level with East-Southeast Cays) with a view to delimiting the area to the east of the Colombian islands (*ibid.*, para. 237). However, it is difficult to regard these two horizontal lines as a mere "adjustment" or even "shifting" of the provisional line. With the exception of the starting-point of the first line, those lines are actually entirely unrelated to the provisional line. The same goes for the addition of no fewer than four maritime frontier points (points 6 to 9 on sketch-map No. 11, p. 714) in the southern part of the area to be delimited which, rather than adjusting or shifting the provisional line, are in fact supplementary to it.

33. In short, after describing as a "median line" a line which does not really merit that description, the Court terms an "adjustment" or "shift" a process which does not really merit being termed as such. Perhaps the Judgment envisaged that process (the construction of two horizontal lines and the fixing of points 6 to 9) as a separate stage after the adjustment or shifting of the line. But if so, would that not be adding another stage —

and a decisively important one in this case — to the "traditional method" (or "standard method") to which the Court nevertheless promised to adhere in paragraph 199?

34. I do not wish to say that the Court was wrong to delimit the spaces constituting the relevant area in the way that it did. On the contrary, I think that it adopted the most reasonable solution, and that each stage in its construction was intrinsically justified. However, my opinion is that it would have been clearer and more honest of the Court to acknowledge that it could not follow the so-called "standard" method in this case because the geographical framework did not at all lend itself to the application of that method. In this instance it thus found itself in the situation in which "compelling reasons . . . in the particular case" made it unfeasible to construct the provisional median line (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, para. 116) or, at the very least, in one in which the application of the equidistance method was "inappropriate" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 741, para. 272, mentioned in paragraph 194 of the present Judgment).

35. I understand that the Court wishes to give all its observers, and first and foremost States, the impression that it does not use arbitrary methods to achieve an equitable solution, but that it implements proven and consistent techniques. And it is perfectly true that there is nothing arbitrary about the Court's approach, which is characterized merely by a scrupulous search for the best solution. However, there are cases which are presented in such specific terms that it is, on the whole, preferable to acknowledge that the Court needs to depart from its usual technique, and to explain why, rather than to sacrifice clarity and intelligibility to the semblance of an illusory continuity.

(Signed) Ronny Abraham.

DECLARATION OF JUDGE KEITH

1. As my votes indicate, I agree with the conclusions the Court reaches. With one exception, I also agree in general with the reasons the Court gives in support of those conclusions. The exception concerns the law to be applied to the delimitation of the maritime boundary and the application of that law to the facts of this case (Part V of the Judgment).

2. Like the Court, I proceed on the basis that Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea are declaratory of customary international law (Judgment, paras. 138-139). Paragraph 1 of each Article reads as follows:

> "The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Since no agreement has been reached, it is for the Court to make the delimitation.

3. The two provisions are striking in their own terms: they do no more than state an aim, they state that aim in broad terms, and they state no criteria for delimitation beyond the general reference to international law. In all respects, they stand in sharp contrast to the only other provision in the Convention concerned with the delimitation of maritime areas between States — Article 15 relating to overlapping territorial seas. That provision states a rule: in the absence of agreement, a median line is to be drawn, except where historic title or other special circumstances requires a different delimitation.

4. The contrasts between those delimitation provisions are the more striking when the evolution of the treaty texts is considered. The two delimitation provisions included in the 1958 Conventions on the Territorial Sea and the Contiguous Zone and on the Continental Shelf provided, in respect of overlapping territorial seas or continental shelves, the same rule: in the absence of agreement, a median or equidistance line with a special circumstances exception (and for the territorial sea also an historical title exception), wording carried over into Article 15 of the 1982 Convention but certainly not into Articles 74 and 83. The International Law Commission, in its 1956 commentary on the draft of the continental shelf provision, which was adopted by the 1958 diplomatic conference without change, said that in that provision it had adopted the same principles as for its draft provisions on overlapping territorial seas. The case for departures from the median line, it said, "may arise fairly

often, so that the rule adopted is fairly elastic" (Annual Report of the ILC, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 300, paragraph 1 of commentary to Article 72).

5. The need for that elasticity, or indeed something more drastic, appeared as early as 1969, in the first case requiring the Court to consider the law concerning the delimitation of the continental shelf — the *North Sea Continental Shelf* cases *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3. There, too, one of the Parties had not accepted the relevant treaty, the 1958 Continental Shelf Convention, while the other two had, with the consequence that the case was to be decided under customary international law. The Court rejected the argument that the equidistance/median line rule with its qualification in the Convention was, or had become, declaratory of customary international law (see especially para. 101 (A) of the *dispositif, ibid.*, p. 53). Having recalled the history of the development of the 1958 text, it declared that it was clear that at no time was the notion of equidistance seen as an inherent necessity. Current legal thinking, it continued, was governed by two beliefs:

> "first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement, — and in pursuance of the second that it introduced the exception in favour of 'special circumstances'. Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable." (*Ibid.*, p. 36, para. 55.)

Later in the Judgment the Court stated that there was no logical basis for requiring only one method of delimitation to be used; there was no objection, it asserted, to using various methods concurrently (*ibid.*, p. 49, para. 90; see also para. 101 (B) of the *dispositif*, p. 53). Finally, "it is necessary to seek not one method of delimitation but one goal" (*ibid.*, p. 50, para. 92).

6. I do, of course, appreciate that much has happened since that Judgment was delivered, about halfway through the 70 years since the first continental shelf delimitation treaty was concluded, in 1942, between the United Kingdom and Venezuela relating to the submarine areas of the Gulf of Paria (205 *LNTS* 121). The developments include extensive uni-

lateral State practice, relating as well to the exclusive economic zone, a concept which developed rapidly in the 1970s, many bilateral delimitation agreements, international court and tribunal decisions (more than 20 to date) and the major negotiations which led to the 1982 Convention and in particular to Articles 15, 74 and 83 as well as to Part V, Exclusive Economic Zone and Part VI, Continental Shelf. Those negotiations reflected and contributed to that practice and case law. I see the course of those negotiations as significant.

7. According to the Virginia Commentary on the Convention, the protracted negotiations on delimitation revealed the existence of two virtually irreconcilable approaches:

(i) delimitation should be effected by the application of the median line or equidistance line coupled with an exception for special circumstances; and
(ii) delimitation should involve a more emphatic assertion of equitable principles (M. Nordquist, S. Nandan, S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, p. 954).

That Commentary provides a valuable account of the evolution between 1973 and 1982 of the contest between those two approaches (pp. 948-985)[1]. By the end of those negotiations the present text had emerged with wide support. It put the emphasis on the objective of the process and, so far as the resolution of disputes about delimitation was concerned, provided for negotiations on the basis of international law and the other methods of peaceful settlement set out in Part XV of the Convention. All the efforts to include in the text express requirements that the process of delimitation take into account specified matters such as equidistance as a rule or principle, relevant or special criteria or circumstances, the existence of islands in the area or equitable principles, failed. According to one of the principal negotiators of that final text, speaking at the end of the Conference,

> "[T]he main difficulty arose in connection with setting out the criteria particularly for delimitation in the economic zone or on the

[1] One other important aspect of the negotiations is that in the early stages all three issues of delimitation were included in proposals being considered by a single working group, dealing in exactly the same terms with each of them, but that from 1975 onwards territorial sea delimitation was dealt with separately in drafts based on Article 12 of the 1958 Territorial Sea Convention; see the Virginia Commentary, pp. 136-141.

> continental shelf. And, while there was broad agreement that these should be as determined by relevant international law, several efforts to express that law in a provision failed to command support across the two groups representing most of the directly interested delegations [and supporting one or the other position stated at the beginning of this paragraph]. Finally, this statement [stalemate] was broken by abandoning efforts to express the relevant law substantively and the vast majority of the interested delegations . . . endorsed the provision which now appears in the Convention.
>
> This provides that delimitation shall be effected on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice. We are satisfied that the relevant principles of international law thus referred to are as identified by the International Court of Justice in its decision on the *North Sea* cases in 1969 and as confirmed by subsequent judicial and arbitral decisions."[2]

8. I accept at once that the judicial clarification and development, over the decades, of the law and particularly of the methods to be applied have in significant measure enhanced the objectivity and predictability of the process of delimitation. That is particularly so of the "delimitation methodology" consisting of three stages as laid out most recently in the *Black Sea* case (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 101-103, paras. 115-122). A primary reason for recalling the history of the development of this area of law is to emphasize the role of legal principle. This is not simply a matter of rule or method; rather, the aim of an equitable solution must take centre stage, and the choice of method or methods must be governed by that aim. The Court did indeed recognize in the *Black Sea* case that different methods may be called for if compelling reasons exist, a matter also emphasized by the International Tribunal for the Law of the Sea in its recent Judgment (*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, pp. 72-75, paras. 227-235). I have already recalled that the Court in 1969 saw no objection to various methods being used concurrently (para. 5 above).

9. Against that background of the accepted law and its principled and practical development, I now consider the most unusual geographic facts

[2] 186th Plenary Meeting, 6 December 1982, A/CONF-62, Vol. XVII, p. 24, paras. 9-10. For a valuable account and reflection by a participant in the Conference see Philip Allott, "Power Sharing in the Law of the Sea" 77 *AJIL*, (1983), pp. 19-27.

of the present case. The ratio of the relevant coasts is about 8:1 in Nicaragua's favour (Judgment, para. 153). That proportion immediately demonstrates for me the difficulty, or really the impossibility, of beginning with a provisional median line even if it is adjusted or shifted by reference to relevant circumstances. The provisional median line in sketch-map No. 8 (p. 701), for instance, would accord nearly three-quarters of the total maritime area to Colombia or an overall disproportion in its favour of about 20:1. The adjustment or shifting required to address such a gross disproportion could not be achieved simply by a movement of the line in the western part of the shared maritime area. The Court indeed recognizes that by ending the adjusted provisional line north of Santa Catalina and south of Alburquerque Cays with the result that the line now extends only about one-half of the north-south length of the area, in addition to being adjusted by a factor of 3:1. The enclaving of Colombian islands to the north — another method of delimitation — also recognizes that the provisional median line, even when substantially adjusted, is not able by itself to achieve an equitable result (*ibid.*, para. 238; see also para. 197). More is needed to avoid a gross disproportion. The latitudinal lines to the east and the starting-point for the southern one (*ibid.*, para. 236) are similarly justified by the search for an equitable solution. They can find no possible justification in terms of any shifting of a provisional median line lying between the Colombian islands and the Nicaraguan coast. They result from the use of distinct methods to help achieve an equitable solution, particularly given the gross disproportionality which would otherwise result and the need to avoid a cut-off effect for Nicaragua.

10. While I agree essentially with the maritime boundary the Court has drawn, I consider that it can be arrived at more directly by an approach which uses a number of methods. That approach would involve those determining the boundary to focus, from the outset, on the aim of achieving an equitable result, by reference, in the particular circumstances of this case, to the relevant proportions, the need to avoid cut-off effects for each Party and the principle, often repeated in delimitation cases, that the "land dominates the sea" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96). From the north to the south, the Colombian islands extend over about one half of the length of the relevant area (see Judgment, sketch-map No. 7, p. 687). If the very small islands in the north, Quitasueño and Serrana are excluded for the moment, the latter also because of its isolation to the east, the distance from the north to the south of the remaining islands, Providencia, Santa Catalina, San Andrés and Alburquerque Cays, including their territorial seas, is a

little more than a third of the total north-south length of the relevant area. The first three of those islands are each entitled to a continental shelf and exclusive economic zone capable of extending 200 nautical miles in all directions. To the west they face the Nicaraguan coast and coastal islands about 100 nautical miles away. Bearing in mind that distance, the approximately 16:1 ratio between the facing coasts and the north-south extent of the Colombian islands just listed, along with the other matters mentioned at the beginning of this paragraph, I consider that the appropriate step in this western area would be to accord those major islands a maritime zone of 24 nautical miles from their west-facing baselines. The zones, extending at most about a quarter of the way to the Nicaraguan coast and islands, would overlap with one another and, at the south, would extend to the territorial sea of Alburquerque Cays. Given the characteristics of those cays, the relevant proportionalities and the need to avoid any cut-off effect for Nicaragua in this southern region to the areas to the east of the Colombian islands, I do not think that those cays should be accorded more than their territorial sea.

11. I return to the north and to Quitasueño and Serrana. Plainly, the former is entitled to no more than a territorial sea. I consider that that should also be the case for Serrana given its isolation, its small size, considerations of overall proportionality and the need to avoid a cut-off effect in that northern area for Nicaragua.

12. In the area to the east of the Colombian islands in which the entitlements of Colombia to maritime zones based on those islands and on its mainland further to the east overlap in significant part, I agree with the boundaries set by the Court, again for reasons of overall proportionality and avoidance of a cut-off effect for both Parties, with the aim of achieving an equitable result.

13. To repeat, the approach sketched above, employing a number of different methods to achieve an equitable result in this most unusual geographic context, would lead to essentially the same result as that reached by the Court. It would reach that result in a more direct way and would avoid the need to make major modifications in the application of the usual methodology.

(Signed) Kenneth KEITH.

DECLARATION OF JUDGE XUE

The aim of achieving an equitable result — Delimitation methodology cannot be pre-determined — Adjustment on the basis of a provisional median line is superficial and inappropriate given the geographic features and relevant circumstances of the present case — Concurrent use of different methods in the northern and southern sections is justified as long as an equitable solution can be achieved.

The interest of third States in the south — Potentially the maritime entitlements of three or even four States may overlap — The principle res inter alios acta *and Article 59 of the Statute are not sufficient to protect the interest of third States — The Court could have rested the boundary at Point 8 with an arrow pointing eastward consistent with its jurisprudence — Extent of Nicaraguan coastal projection depends on the maritime delimitation between Nicaragua and its adjacent neighbours — The consideration of the public order and stable legal relations — The boundary line in the south virtually invalidates the existing maritime agreements in the area — The Court could just point out the direction of the boundary between the Parties in this area, allowing enough space for the States concerned to first draw up their respective boundaries and then readjust their maritime relations.*

1. In regard to the maritime boundary between Nicaragua and Colombia (Part V of the Judgment), I have voted for the operative paragraph 4 on the single maritime delimitation of the continental shelf and the exclusive economic zones between the Parties because, in my view, the delimitation line on the whole has achieved the object of reaching an equitable solution to the disputes between the Parties in the case. This position is taken, however, with two reservations.

2. My first reservation relates to the three-stage methodology applied by the Court. Although in recent years, the Court, as well as other tribunals, have tried to develop a certain approach to provide for legal certainty and predictability for the process of delimitation, the guiding principle for maritime delimitation as laid down in Articles 74 and 83 of the Convention on the Law of the Sea has not been changed by this development; with the aim to achieve an equitable solution, whatever methodology that is used should be "capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 300, para. 112). In other words, in order to ensure an equitable solution, it is the geographic features and relevant circumstances that determine the selection of method(s) for the delimitation. Methodology cannot be pre-determined. As the Court pointed out in the *Continental Shelf* case,

> "[a] finding by the Court in favour of a delimitation by an equidistance line could only be based on considerations derived from an evaluation and balancing up of all relevant circumstances, since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 79, para. 110).

3. In the Judgment, the Court refers to the recent jurisprudence especially that laid out in the *Black Sea* case on the method of delimitation, according to which

> "the methodology which [the Court] will normally employ when called upon to effect a delimitation between overlapping continental shelf and exclusive economic zone entitlements involves proceeding in three stages (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 46, para. 60; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, paras. 115-116)" (Judgment, para. 190).

The first stage of that method is to construct a provisional median line between the opposite or adjacent territories of the parties, unless there are compelling reasons as a result of which the establishment of such a line is not feasible. With regard to such exceptional situations, the Court refers to the case between Nicaragua and Honduras in the Caribbean Sea (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 745, para. 281).

4. Apparently the geographic features and the relevant circumstances of the present case are considerably incomparable to those of the cases, particularly the *Black Sea* case, where the three-stage methodology is applied. Having ascertained the scope of the relevant area that extends to the east side of the Colombian islands to the 200-nautical-mile line measured from the baselines of Nicaragua's territorial sea, the Court should have seen that, even though there indeed exist opposite coasts between the Parties, it is not appropriate and feasible to delimit the entire relevant area on the basis of "a median line" located to the west of the Colombian islands. Any subsequent "adjustment or shifting", however substantial, of the provisional median line in the western part would not be able to overcome the gross disproportion in the lengths of the coasts and the ratio of the relevant area between the Parties as determined by the Court, hence unable to achieve an equitable result. Despite its recognition of the unusual circumstances in the coastal relations between the Parties, the Court nevertheless proceeds to use the "standard method" by drawing up a provisional median line.

5. The provisional median line proves superficial and inappropriate in the delimitation process. The Court constructs the provisional median line from two sets of base points chosen from the opposite islands of the

Parties (see sketch-map No. 8: Construction of the provisional median line, p. 701). Considering the disparity in the lengths of the relevant coasts and the overall geographical context, the Court decides to construct the line by giving a weighting of one to each of the Colombian base points and a weighting of three to each of the Nicaraguan base points. As a consequence, the effect of some base points on the Nicaraguan side is "superseded". This line is further adjusted to the east, identified as a simplified weighted line (Judgment, paras. 234-235). This raises the question whether this is a shifting of the provisional median line or rather a reconstruction of a new line by 3:1 ratio between the base points of the Parties.

6. I agree that the provisional median line as constructed, if applicable for the western part of the relevant area, should be adjusted and shifted eastward, given the evident disparity in the lengths of the relevant coasts. Nevertheless, such adjustment or shifting should have been made on the basis of the provisional median line, for instance, giving it half or a quarter effect. The Court's approach is arguably an adjustment to the provisional median line. The Court may have directly selected a couple of outermost base points by equal number from each side of the Parties as the controlling points and drawn up the line by 3:1 ratio. The result would be just the same. The rationale of the 3:1 ratio method is based on the delimitation principle — to achieve an equitable solution. This method stands in its own right; it does not have to be mixed up with the provisional median line.

7. In order to avoid any cut-off effect to Nicaragua and in light of the remaining significant disparity in the shares of the relevant area between the Parties, the Court decides to adopt different techniques for the delimitation of the remaining area. In the northern part, it uses the parallel of latitude passing through the northernmost point on the 12-nautical-mile envelope of arc around Roncador, while enclaving Quitasueño and Serrana. In the southern part, the boundary runs along the 12-nautical-mile arcs drawn around the South Cay of Alburquerque Cays and East-Southeast Cays till its easternmost point and then continues its course along the parallel of latitude till the 200-nautical-mile limit of Nicaragua.

8. The boundary in these two sections is apparently drawn by different methods — enclaving and latitude line. It is hard to justify them as "adjustment of" or "shifting from" the provisional median line", if the latter does not mean total departure.

9. Of course, by no means do I disapprove of the concurrent use of these methods by the Court. On the contrary, they are justified as long as an equitable solution can be so achieved. The reservation I have is whether

it is necessary for the Court to proceed with the three-stage method in the present case simply for the sake of standardization of methodology. Although one may argue that in the western part the provisional median line is plausible between the opposite coasts of the Parties, the Court could have followed its reasoning by adjusting the provisional median line rather than replacing it by the simplified weighted line based on 3:1 ratio. I see an inconsistency there.

10. Notwithstanding the approach taken, the actual use of various methods by the Court throughout the whole process of delimitation in the present case, in my view, reaffirms the established jurisprudence as pronounced by the Court and other tribunals in the maritime delimitation that

> "The method of delimitation to be used can have no other purpose than to divide maritime areas into territories appertaining to different States, while doing everything possible to apply objective factors offering the possibility of arriving at an equitable result. Such an approach excludes any recourse to a method chosen beforehand." (*Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Award of 14 February 1985,* 25 *ILM* 252 (1986), p. 294; see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 49-50; and Judgment by the International Tribunal for the Law of the Sea in the *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, p. 75, para. 235.)

11. My second reservation relating to the interest of third States is more serious in nature. It should be recognized that the Court has gone to great length in its reasoning to address the interest of third Parties in the region, both in the north and the south. In the light of the overall geographical context, I agree with the Court's reasoning and delimitation in the north, but have concern with the boundary in the south. In my view, the boundary should stop at Point 8 with an arrow pointing eastward. My consideration is three-fold.

12. In the first place, from Point 8 to further east, the boundary line will enter into the area where potentially the maritime entitlements of three or even four States may overlap, as coastal projections of Nicaragua and Colombia, as well as those of Costa Rica and Panama, all extend to that area. Regardless of being mainland coasts or islands, they all enjoy full and the same maritime entitlements under general international law. That Colombian entitlements do not go beyond the treaty boundaries with third States does not mean third States do not have interest against Nicaragua in that relevant area above the treaty boundaries. Costa Rica made that point clear in its request for permission to intervene. Even though Panama did not intervene, the same claim could also be made. It is up to the Court to take care of that concern.

13. Therefore, the coastal relationship between the Parties and the third States in the southern area requires special consideration. By restricting the coastal projections of Colombian islands against those of the Nicaraguan coast, the Court also unduly restricts the coastal projections of Colombian islands against those of the other two third States which, in my opinion, has gone beyond the jurisdiction of the Court in this case. The principle *res inter alios acta* and Article 59 of the Statute do not help in the present situation. The Court could have avoided that effect by resting the boundary at Point 8 with an arrow pointing eastward for the time being, a technique that the Court normally employs in the maritime delimitation for the protection of the interest of third States.

14. Secondly, in regard to the cut-off effect, one of the two considerations upon which the Court delimits the boundary in the north and the south, the coastal relationship between the three adjacent coastal States and Colombia in the south of the Caribbean Sea, as stated above, is a complicated one. To what extent the Nicaraguan mainland coast can project eastward against the coastal projections of Costa Rica and possibly those of Panama depends on the maritime delimitation between Nicaragua and its adjacent neighbour(s). Once that is decided, it would be more proper to determine how far the boundary between the Parties in the present case will run eastward from Point 8. This approach would better protect the interest of the third States.

15. Lastly, the consideration of the public order and stable legal relations should apply to the southern area as well. As is stated in the Judgment, the Court has to bear in mind that the delimitation has to be "both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome" (*Arbitration between Barbados and the Republic of Trinidad and Tobago, Tribunal Award of 11 April 2006, RIAA*, Vol. XXVII, p. 215, para. 244). The boundary line in the south would virtually produce the effect of invalidating the existing agreements on maritime delimitation that Colombia has concluded with Panama and Costa Rica respectively and drastically changing the maritime relations in the area. Even supposing that these agreements might have indeed infringed upon the maritime entitlements of Nicaragua in the area, it would be much better off for the maintenance of regional stability and public order if the Court just pointed out the direction of the boundary between the Parties in this area, allowing enough space for the States concerned to first draw up their respective boundaries and then readjust their maritime relations. I regret that the Court does not take that course.

(*Signed*) XUE Hanqin.

SEPARATE OPINION OF JUDGE DONOGHUE

Agrees with decision not to uphold Nicaragua's claim to continental shelf beyond 200 nautical miles of its coast — Nicaragua did not adduce sufficient evidence to support the claim — Misgivings about suggestion that the Court will not delimit continental shelf beyond 200 nautical miles before outer limits are established under Article 76 — Delimitation and delineation are distinct exercises — Nicaragua's methodology requires delineation as a step in delimitation of the boundary — Delimitation of continental shelf beyond 200 nautical miles before outer limits are established may be appropriate in some cases — Restates view that Costa Rica and Honduras met criteria for Article 62 intervention as non-parties.

1. I have voted not to uphold the Republic of Nicaragua's claim to continental shelf in the area beyond 200 nautical miles of its coast. The Judgment states that "Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast" (Judgment, para. 129). I agree with this conclusion because Nicaragua did not provide a sufficient factual basis to permit the Court to conclude that continental shelf exists beyond 200 nautical miles of Nicaragua's coast or to specify with the necessary precision the outer limits of any such shelf, which the Court would need to do in order to apply the delimitation methodology proposed by Nicaragua.

2. In this separate opinion, I first explain why I believe that Nicaragua's claim to continental shelf in the area beyond 200 nautical miles of its coast fails on the evidence. Next, I express my misgivings about the reasons given by the Court for its rejection of this Nicaraguan submission ("submission I (3)"), which suggest that the Court will not delimit continental shelf beyond 200 nautical miles of the coast of any State party to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") before the outer limits of such continental shelf have been established by that State in accordance with Article 76 of UNCLOS. Delimitation of maritime boundaries and delineation of the outer limits of the continental shelf are distinct exercises. The methodology proposed by Nicaragua blurs this distinction, because it uses the delineation of the outer limits of the continental shelf as a step in delimitation of the boundary. Nonetheless, in other circumstances, it may be appropriate to delimit an area of continental shelf beyond 200 nautical miles of a State's coast before the

outer limits of the continental shelf have been established. It is better to leave open the door to such an outcome, so that the Court and the Commission on the Limits of the Continental Shelf (the "Commission") may proceed in parallel to contribute to the public order of the oceans and the peaceful resolution of maritime boundary disputes.

I also recall in this separate opinion that I dissented from the Court's decision not to permit Costa Rica and Honduras to intervene in this case and explain why I continue to believe that those States should have been permitted to intervene as non-parties.

I. The Factual Inadequacy of Nicaragua's Evidence relating to the Outer Limits of Its Continental Shelf Claim

3. It is well established that coastal States have an entitlement to continental shelf within 200 nautical miles of the baselines from which the territorial sea is measured (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34). This entitlement, which is sometimes referred to as the "distance criterion", is reflected in Article 76, paragraph 1, of UNCLOS. Article 76, paragraph 1, also provides that a coastal State has an entitlement to continental shelf in the area beyond 200 nautical miles of its baselines on the basis of the natural prolongation of its land territory to the outer edge of the continental margin (see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 19). I agree with the Court that Article 76, paragraph 1, forms part of customary international law.

4. Unlike the existence of an entitlement to continental shelf based on the distance criterion, the existence of continental shelf beyond 200 nautical miles is a question of fact that turns on geology and geomorphology. It is therefore important to understand what facts Nicaragua asked the Court to find pursuant to submission I (3).

5. Nicaragua claims that an extensive area of continental shelf exists in the area beyond 200 nautical miles of its coast. The submission contained in its Reply asked the Court to delimit a boundary in the area beyond 200 nautical miles of Nicaragua's coast using specific co-ordinates. In submission I (3), however, Nicaragua framed its request more generally, asking the Court to declare that the appropriate form of delimitation is an equal division of the overlapping entitlements to continental shelf of both Parties.

6. In its final form, Nicaragua's submission regarding continental shelf beyond 200 nautical miles is less precise than the submission contained in

its Reply and appears to be amenable to at least two possible variations. In the first variation, the Court would effect a precise delimitation, using the methodology advanced in submission I (3). To do this, the Court would divide in half the area of the Parties' overlapping entitlements in the area beyond 200 nautical miles of Nicaragua's coast. In a second variation (suggested by Nicaragua's counsel during oral proceedings), the Court would not specify the location of a maritime boundary between the Parties in the area more than 200 nautical miles from Nicaragua's coast, but instead would instruct the Parties to divide the overlapping entitlements in that area into equal parts after Nicaragua has established the outer limits of its continental shelf in accordance with UNCLOS Article 76. I address these two variations in turn.

7. To effect the delimitation called for by the first variation of submission I (3), the Court would first have to determine the area of continental shelf beyond 200 nautical miles of Nicaragua's coast. This step would require the Court to find that continental shelf exists in the area beyond the 200-nautical-mile limit and to decide on the location of the outer limits of such continental shelf. The Court would also have to determine the co-ordinates of Colombia's entitlement (which Nicaragua would limit to the entitlement projecting 200 nautical miles from Colombia's mainland coast). After deciding on these facts, the Court would measure and determine the co-ordinates of the area of overlap and then would divide it equally between the Parties.

8. The Court has repeatedly made clear that it is the duty of a party asserting certain facts to establish the existence of those facts (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 668, para. 72; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68). Thus, to prevail with respect to the first variation of submission I (3), Nicaragua bears, at a minimum, the burden of establishing both the existence and the outer limits of any continental margin extending beyond 200 nautical miles of its coast.

9. To support its claim that continental shelf exists beyond 200 nautical miles, Nicaragua referred to the "Nicaraguan Rise", which it described as "a shallow area of continental crust extending from Nicaragua to Jamaica" that represents the natural prolongation of Nicaragua's mainland territory. As to the location of the outer limits of its continental shelf, Nicaragua provided the Court with a list of co-ordinates. According to Nicaragua, those co-ordinates were determined by using public domain datasets containing bathymetric data to locate the foot of the continental slope. Nicaragua asserts that it then located the outer limits of its continental shelf, in accordance with Article 76, paragraph 4, of UNCLOS, by drawing a line 60 nautical miles from five foot-of-slope points. To support its position, Nicaragua annexed technical information providing what it described as "[p]reliminary information indicative of the outer limits" of its continental shelf and referred the Court to the

"Preliminary Information" that it had filed with the Commission on the Limits of the Continental Shelf, set up under Annex II to the 1982 Convention. As Nicaragua explained, the purpose of filing Preliminary Information is to toll the deadline by which coastal States must make their submissions to the Commission; the Preliminary Information itself will not be considered by the Commission.

10. Given Nicaragua's responsibility to prove to the Court the existence and extent of any entitlement to continental shelf beyond 200 nautical miles of its coast, it was not incumbent on Colombia to offer a competing understanding of the geological and geomorphological facts or to propose an alternative set of geographic co-ordinates setting forth the outer limits of Nicaragua's continental shelf. And, indeed, Colombia did not do so. Instead, Colombia attacked the sufficiency of the evidence presented by Nicaragua as "woefully deficient". As Colombia's counsel stated, Nicaragua asked the Court to proceed to a delimitation "based on rudimentary and incomplete technical information" that would not satisfy the requirements of the Commission. Among other criticisms of Nicaragua's data, Colombia asserted that the foot-of-slope points used by Nicaragua did not comply with the Commission's guidelines because they were not supported by the requisite data, and therefore were unsubstantiated.

11. It is telling that, by Nicaragua's own admission, the information that it furnished to the Court, drawn from the information that it provided to the Commission in the form of Preliminary Information, does not include data and information that the Commission requires of the submissions that it reviews. In a technical annex that Nicaragua provided to the Court, Nicaragua acknowledged "issues with the data quality" that would be corrected as necessary in the final submission to the Commission. It also noted that the choice of foot-of-slope points presented in the technical document — the points from which Nicaragua derives the outer limits that it asks the Court to accept — "should be treated as indicative only".

12. Thus, this first variation of submission I (3) (like the submission in Nicaragua's Reply) would require the Court to reach factual conclusions about the outer limits of Nicaragua's continental shelf beyond 200 nautical miles of its coast on the basis of data that are "indicative" and that will be revised or more fully supported in a final submission to the Commission. Nicaragua failed to explain why the absence of certain supporting data required by the Commission, a body of technical experts, should not concern the Court. If the information falls short of what is needed to permit factual conclusions by expert scientists, surely it cannot be a sufficient basis for the Members of this Court to reach factual conclusions about the location of the outer limits of the continental shelf beyond 200 nautical miles of Nicaragua's coast.

13. It also is notable that Nicaragua proposed only to credit Colombia with a 200-nautical-mile entitlement projecting from its mainland coast. Without explanation, it excluded from consideration the continental shelf entitlements generated by the Colombian islands of San Andrés, Providencia, and Santa Catalina (which the Parties agreed generate continental shelf entitlements) in the area beyond 200 nautical miles of Nicaragua's coast.

14. Thus, to the extent that submission I (3) calls upon the Court to delimit a specific continental shelf boundary in the area beyond 200 nautical miles, I believe the Court was correct in not upholding the submission.

15. The second variation of submission I (3), suggested by Nicaragua's counsel in the oral proceedings, would call upon the Court not to effect a precise delimitation, but rather to specify that the boundary between the Parties is the median line between the outer limit of Colombia's 200-nautical-mile zone and the outer limits of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76. The Court was wise not to accept this invitation. The Court has not been presented with sufficient evidence in these proceedings to conclude that there is an area of continental shelf beyond 200 nautical miles of Nicaragua's coasts. Moreover, the suggestion by Nicaragua is, in essence, a request that the Court delimit any area of overlap solely on the basis of the first step of the Court's established three-step process — the construction of a provisional median line — without an appreciation of the size of the area to be delimited and without a factual basis to consider any circumstances calling for adjustment of the median line or disproportionality. As the Court stated in its most recent maritime delimitation case "[t]he object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 111). The Court therefore could not have upheld Nicaragua's submission I (3) without simply assuming that an equal division of the Parties' overlapping entitlements would be equitable. Such an assumption would be on shaky ground so long as the extent of any Nicaraguan entitlement to continental shelf beyond 200 nautical miles of its coast remains unsupported by sufficient evidence.

16. Under either of these two variations, the Court lacks a sufficient factual basis to embrace Nicaragua's proposed methodology. Thus, Nicaragua's submission I (3) could not be upheld.

II. Misgivings about the Court's Rationale for Deciding not to Uphold Nicaragua's Submission relating to Continental Shelf beyond 200 Nautical Miles

17. The Judgment states the Court's conclusion that Nicaragua has not established in these proceedings that it has a continental margin that extends far enough to overlap with the 200-nautical-mile entitlement extending from Colombia's mainland coast, but the Court does not lay out the factual inadequacies summarized above. I regret that it did not do so, because those inadequacies provide a clear and case-specific rationale for the Court's rejection of Nicaragua's submission I (3).

18. The Judgment alludes to legal and institutional reasons for rejecting Nicaragua's submission I (3). As discussed below, I agree with the Court that those considerations counsel against delimitation in the area beyond 200 nautical miles of Nicaragua's coast, because the delimitation methodology proposed by Nicaragua would require delineation of the outer limits as the first step in the delimitation. To the extent that the Judgment suggests a more general bar on the delimitation of entitlements to continental shelf in areas beyond 200 nautical miles of coastal baselines, however, I respectfully disagree.

19. Delimitation of a maritime boundary is an exercise that is distinct from the delineation of the outer limits of continental shelf. UNCLOS makes clear that the Commission's role in making recommendations to coastal States regarding the establishment of the outer limits of the continental shelf is "without prejudice" to the delimitation of continental shelf (Art. 76, para. 10). The International Tribunal for the Law of the Sea affirmed this distinction in *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, p. 120, para. 410), stating that:

> "[T]he fact that the outer limits of the continental shelf beyond 200 nautical miles have not been established does not imply that the Tribunal must refrain from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned."

20. The Judgment recalls the Tribunal's conclusion that scientific evidence was not in dispute in that case and emphasizes that the case before the Tribunal differed from the present case because Bangladesh and Myanmar were both UNCLOS States parties and both had made submissions to the Commission (although the Commission had made no recom-

mendations). The Tribunal also noted that the area to be delimited was far from the outer edge of the continental margin, such that delimitation by the Tribunal could not prejudice the interests of third States in the sea bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (Judgment of 14 March 2012, p. 115, para. 368).

21. Under these circumstances, the Tribunal rejected the contention that it should not delimit in the area beyond 200 nautical miles of the parties' coasts. While the Tribunal cautioned that it would have been hesitant to proceed with delimitation had there been uncertainty about the existence of continental margin in the area in question (*ibid.*, pp. 135-136, para. 443), it made clear that "the absence of established outer limits of a maritime zone does not preclude delimitation of that zone" (*ibid.*, p. 115, para. 370).

22. The distinction between delimitation of a maritime boundary and delineation of the outer limits of the continental shelf is also evident in the practice of some States (including UNCLOS States parties) that have entered into agreements delimiting continental shelf in an area more than 200 nautical miles from their coasts before the outer limits have been established (see David A. Colson, "The Delimitation of the Outer Continental Shelf between Neighboring States", 97 *American Journal of International Law* (2003), p. 91). If the geography permits, it is possible for two States to delimit overlapping entitlements to continental shelf in an area more than 200 nautical miles from their coasts without specifying the outer limits of their respective continental shelf entitlements, through techniques such as the use of a directional arrow that extends the agreed line of delimitation to the outer limits of the continental shelf, without specifying the precise location of those limits. Such a delimitation would not prejudice the interests of third States in the area beyond national jurisdiction.

23. As noted above, Nicaragua's proposed delimitation methodology blurs the usual distinction between delimitation of a maritime boundary and delineation of the outer limits of the continental shelf, because it requires delineation as an initial step in delimitation. If the Court did so before Nicaragua had established the outer limits of its continental shelf based on the Commission's recommendations (pursuant to the first variation discussed above), a variety of institutional and legal difficulties could emerge in the future. For example, the Court's conclusions regarding the location of the outer limits, in a judgment that is binding on the parties, might differ from recommendations that later emerge from the Commission. This possibility is a consequence of the particular delimitation methodology requested by Nicaragua and it militates in favour of the Court's decision not to uphold Nicaragua's submission I (3).

24. Today's Judgment does not call attention to the particular complications caused by Nicaragua's proposed methodology. Instead, the Court relies on a statement that it made in the Judgment rendered in 2007 in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*. In that case, the Court stated that the maritime boundary between the two States (both of which are States parties to UNCLOS) should not be interpreted as extending more than 200 nautical miles from the baselines because "any claim of continental shelf rights beyond 200 [nautical] miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf" (*ibid.*, p. 759, para. 319).

25. I have been puzzled by the quoted statement from the Court's 2007 Judgment. I regret that the Court reaffirms that statement today without acknowledging that delimitation is not precluded in every case in which an UNCLOS State party seeks delimitation of continental shelf beyond 200 nautical miles before having established the outer limits of such continental shelf. Each such case must be considered in light of the particular facts and circumstances. The general abstention from delimitation that the Court suggested in 2007 would go too far. The *Bangladesh/Myanmar* case illustrates that where the existence of continental shelf in the relevant area is not in dispute and the methodology and geography do not require a court or tribunal to make any factual finding regarding the outer limits of the continental shelf, the "distinct" exercises of delimitation and delineation of the outer limits of the continental shelf may proceed in parallel, regardless of whether a State has established the outer limits of its continental shelf. That is quite a different situation from the one the Court faces in the present case, in which the proposed delimitation methodology would require the Court to reach conclusions about the same question of fact that the technical experts comprising the Commission would also address after receiving a complete submission from Nicaragua.

26. I am also troubled that the Court today extends the reasoning of the 2007 *Nicaragua* v. *Honduras* Judgment to the present case, despite the fact that Colombia is not an UNCLOS State party and customary international law thus governs. The Court today appears to suggest that it will not entertain a proposed delimitation of continental shelf beyond 200 nautical miles of the coast of a State party to UNCLOS unless the procedures contemplated in UNCLOS Article 76 have been completed, even if the second State involved in the delimitation is not an UNCLOS State party. The stated rationale is that Nicaragua has obligations to other UNCLOS States parties. Nicaragua has obligations to its treaty partners, of course, but the Court offers scant explanation for its conclusion that those obligations preclude delimitation in this case.

27. The Commission's expectation that decades will elapse before it will complete the work resulting from the submissions that it has received to date makes it especially unfortunate that the Court has extended its statement from the 2007 *Nicaragua* v. *Honduras* Judgment to apply not only to a proposed delimitation between two States parties to UNCLOS, but also to a proposed delimitation as between one UNCLOS State party and one State that is not a party to UNCLOS.

28. The Court does not address the situation of two States, neither of which is a party to UNCLOS, which seek to delimit their respective entitlements to continental shelf in an area beyond 200 nautical miles of their coasts. It goes without saying that such States have no duty to make submissions to the Commission, so the Court's observations regarding Nicaragua's obligations to States parties to UNCLOS cannot be extended to them.

29. I do not mean to suggest here that the Court should be indifferent to interests other than those of the two Parties to a proposed delimitation. In the Western Caribbean, for example, the crowded geography means that a delimitation methodology that is based on the location of the outer limits of the continental shelf has potential implications for third States with 200-nautical-mile entitlements that are opposable to a claim to continental shelf beyond 200 nautical miles. The Court must take account of such interests of non-party States regardless of whether a State asserting an entitlement to continental shelf beyond 200 nautical miles of its coast is an UNCLOS State party.

30. The relationship between the Commission's role under Article 76 of UNCLOS and that of an international court or tribunal asked to delimit continental shelf beyond 200 nautical miles of a State's coast is not a tidy one. The Commission has decided that it will not consider submissions that relate to areas in which the boundary is in dispute unless it has the consent of the affected States. If the Court's 2007 pronouncement is understood to apply broadly, this Court can be expected to shy away from the delimitation of boundaries in respect of continental shelf that is beyond the 200-nautical-mile limit whenever the outer limits of the continental shelf claimed by an UNCLOS State party have not been established on the basis of Commission recommendations. This would leave some UNCLOS States parties in an unsatisfactory situation. If an area is not delimited and therefore remains the subject of a dispute, the Commission will not make recommendations about the outer limits (absent the consent of all involved States). And if the outer limits have not been established on the basis of Commission recommendations, the Court's 2007 statement suggests that it will not proceed with a delimitation. In effect, each institution holds the door open and waits for the other to walk through it. This outcome should be avoided where possible, as it constricts the ways in which this Court and the Commission can contribute to the public order of the oceans and the peaceful resolution of maritime boundary disputes.

III. A Postscript regarding the Failed Efforts by Costa Rica and Honduras to Intervene in This Case

31. I have voted for each of the dispositive paragraphs of the Judgment and concur largely with the Court's reasoning, except for the discussion of the delimitation of the continental shelf in the area beyond 200 nautical miles of Nicaragua's coast. Thus, I agree that Colombia, not Nicaragua, has sovereignty over the features in dispute and I concur both with the delimitation effected by the Court and with the rejection of Nicaragua's submission II in dispositive paragraph (6).

32. As the Court notes, pursuant to Article 59 of the Statute of the Court, its Judgment binds only the Parties. In addition, the Judgment indicates that the Court has taken account of the interests of neighbouring third States. No other third-State interests were presented to the Court.

33. The interests of the Republic of Costa Rica and the Republic of Honduras deserve additional comment, because those States filed Applications to intervene in this case on the basis of Article 62 of the Statute of the Court. The Court rejected those Applications. I disagreed with the decision to reject the Applications of Costa Rica and Honduras to intervene as non-parties and set forth my reasons in two dissenting opinions.

34. The Judgment takes account of the interests of these two States, but this does not change my view that both Costa Rica and Honduras met the criteria for intervention under Article 62.

35. I illustrate this point with one example. As I described in my dissenting opinion to the Court's Judgment rejecting the Application of Honduras *(Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II))*, the Court's Judgment on the merits of this case had the potential to affect at least one interest of a legal nature pertaining to Honduras. That interest stemmed directly from the case referred to above — the Court's 2007 Judgment in the case between Nicaragua and Honduras *(Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II))*. In that decision, the Court delimited the maritime boundary between Nicaragua and Honduras by deciding that from a final turning point, the line should continue along a particular azimuth "until it reaches the area where the rights of third States may be affected" (*ibid.*, p. 763, para. 321 (3)). As I explained in my dissent, if the maritime boundary drawn by the Court in the present case were to intersect with the Nicaragua/Honduras boundary, the point of intersection would be a *de facto* endpoint to the 2007 line defining the Nicaragua/Honduras boundary (see my dissenting opinion in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 436,

para. 49). This possibility can be seen in the map that accompanies the Court's Judgment rejecting the intervention application, which shows Colombia's proposed median line, which was before the Court when it was considering whether Honduras had an "interest of a legal nature which may be affected" by the Judgment. (Sketch-map No. 3 in today's Judgment, p. 672, again shows Colombia's proposed median line.)

36. The steps that the Court followed in arriving at the final boundary illustrate why the Court should have concluded that Honduras had demonstrated an interest of a legal nature that might have been affected by the Judgment, thus meeting the requirements of Article 62. The boundary line that was proposed by Colombia differs from the provisional median line constructed by the Court today (sketch-map No. 8, p. 701). When the sketch-map accompanying the Judgment of 4 May 2011 on intervention is compared with sketch-map No. 8 in today's Judgment, it can be seen that the provisional median line drawn by the Court in today's decision veers further to the east than does the median line proposed by Colombia and considered by the Court in the intervention proceedings. The two lines proceed on different courses because the Court did not make use of base points on either Serrana or Quitasueño to construct the provisional median line. As a result, the Court's provisional median line does not intersect with the boundary between Nicaragua and Honduras established by the 2007 Judgment.

37. The fact that one Party proposed a boundary line proceeding to a point of intersection with the Honduras/Nicaragua boundary line meant that Honduras had a concrete interest of a legal nature that may have been affected by the Court's Judgment. If the Court had placed a base point on either Serrana or Quitasueño (as Colombia proposed), the position and angle of the Court's provisional median line could have caused it to proceed in a more northerly direction and thus to intersect with the Nicaragua/Honduras boundary line (like the boundary line proposed by Colombia). Had such a provisional median line not been modified (which could not have been foreseen at the intervention phase), this would have created the *de facto* endpoint to the Nicaragua/Honduras boundary. Thus, the selection of base points had the potential to affect Honduras's interest of a legal nature, justifying its intervention as a non-party.

(*Signed*) Joan E. DONOGHUE.

DECLARATION OF JUDGE *AD HOC* MENSAH

Agrees with decision not to uphold Nicaragua's final submission I (3) — Disagrees with reliance on statement from Nicaragua *v.* Honduras *regarding continental shelf claims beyond 200 nautical miles — Does not accept argument that Nicaragua needs to establish outer limits of continental shelf pursuant to UNCLOS Article 76 for purposes of delimitation vis-à-vis non-parties to UNCLOS — Coastal States have entitlements to continental shelf beyond 200 nautical miles under customary international law — Rights over continental shelf do not depend on occupation or express proclamation — UNCLOS does not impose obligations on parties vis-à-vis non-parties — Nicaragua's evidence on its entitlement to continental shelf beyond 200 nautical miles was inadequate — Evidence not sufficient for the Commission on the Limits of the Continental Shelf also not adequate for the Court — Court lacks sufficient basis to accede to Nicaragua's delimitation request — No automatic bar for courts and tribunals to delimit the continental shelf beyond 200 nautical miles where outer limits have not been established pursuant to Article 76 — Article 59 may not be adequate to protect third States that are affected by the Judgment.*

1. I agree with the conclusion of the Court that Nicaragua's final submission I (3), which requests the Court to effect the delimitation between the respective continental shelves of Nicaragua and Colombia beyond 200 nautical miles, cannot be upheld. As I see it, the correct (and sufficient) reason for this conclusion is as indicated in paragraph 129 of the Judgment, namely, that Nicaragua has failed to "establish" that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to a continental shelf.

2. I do not believe that the reason given in paragraph 126 of the Judgment for rejecting Nicaragua's request is correct in the circumstances of this case. In particular, I do not consider that the reference to the Court's statement in the case of *Nicaragua* v. *Honduras*, to the effect that "any claim to continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder", is either appropriate or necessary (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 759, para. 319). That statement might have been valid and unobjectionable in the circumstances of the *Nicaragua* v. *Honduras* case, since both the Parties in the case were States parties to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS").

However, it is neither correct nor relevant in the present case, given that one of the Parties is not a State party to UNCLOS. In this connection, I find a trifle implausible the suggestion in the Judgment that the expression "any claim" in the *Nicaragua* v. *Honduras* Judgment was intended to mean "any claim *by a State party to UNCLOS*". In the context of that case, the qualification to the Court's statement (assuming that any such qualification had in fact been intended) would and should go further to refer to "any claim by a State party to UNCLOS as against another State party".

3. As indicated in paragraph 118, the Court has determined that, since Colombia is not a party to UNCLOS, the law applicable to the case is "customary international law". Although both Nicaragua and Colombia agree that some provisions of Article 76 reflect customary international law, they disagree on which provisions fall into this category. Specifically, Colombia denies that paragraphs 4 to 9 of Article 76 can be considered to be rules of customary international law; and the Court itself has stated that it does not need to decide as to which provisions of Article 76 of UNCLOS, other than paragraph 1, form part of customary international law. Accordingly, it is reasonable to operate on the assumption that other provisions of Article 76 of UNCLOS (and certainly paragraphs 4 to 9 to which Colombia objects) are not included in the provisions deemed to be applicable in this case.

4. In spite of this, the Judgment seeks to justify the reference to the *Nicaragua* v. *Honduras* Judgment on the ground that, although in the present case one of the Parties (Colombia) is not a State party to UNCLOS, the Court's statement in *Nicaragua* v. *Honduras* is still relevant because, in the view of the Court, the fact that Colombia is not a party to UNCLOS does not relieve Nicaragua "of its obligations under Article 76 of that Convention" (Judgment, para. 126). This would seem to suggest that Nicaragua is obliged to follow the procedure set forth under Article 76 of UNCLOS if it seeks to establish outer limits for its continental shelf beyond 200 nautical miles that are "final and binding", even as against Colombia. Although I find this argument interesting, I do not consider that it is sustainable.

5. In the first place, Nicaragua does not seek to establish final and binding outer limits for its continental shelf beyond 200 nautical miles; nor does it request the Court to establish or pronounce on such an outer limit. As the Court pertinently notes in paragraph 128, Nicaragua in the second round of oral argument stated that it was "not asking [the Court] for a definitive ruling on the precise location of the outer limit of Nicaragua's continental shelf", but was rather "asking [the Court] to say that Nicaragua's continental shelf entitlement is divided from Colombia's continental shelf entitlement by a delimitation line which has a defined course". The Court's response to this request (*ibid.*, para. 129), with which

I fully agree, is that it is not in a position to delimit a continental shelf boundary between the Parties, "even using the general formulation proposed [by Nicaragua]".

6. In my view this conclusion of the Court does not justify the reference to the statement in the *Nicaragua* v. *Honduras* case, or the argument in paragraph 126. That argument, taken to its logical conclusion, suggests that a State which is a party to UNCLOS can only assert its right to a continental shelf beyond 200 nautical miles, as against a State which is not a party to the Convention, if it follows the procedure in paragraphs 8 and 9 of Article 76 of UNCLOS. Furthermore, placing emphasis on the procedure set out in Article 76 of UNCLOS (including the role of the Commission on the Limits of the Continental Shelf (the "Commission")) appears to leave little or no room for a State which is not a party to UNCLOS to assert its right to a continental shelf beyond 200 nautical miles vis-à-vis third States, whether or not such third States are parties to UNCLOS, since it is at least arguable that this procedure is not available (certainly not as of right) to non-parties to UNCLOS.

7. Thus, while in the context of the *Nicaragua* v. *Honduras* case the statement quoted might have been correct and pertinent, I do not think it is correct or helpful in the present case. In my view, the use of the statement in this context would appear to suggest that the Court's decision in *Nicaragua* v. *Honduras* (and by implication its decision in this case) puts in doubt the possibility that a State which is not a party to UNCLOS may assert a right to a continental shelf beyond 200 nautical miles or, alternatively, that the claim of such a State to a continental shelf beyond 200 nautical miles may never be opposable vis-à-vis third States. This would in effect mean that a State which is not a party to UNCLOS may not be able to establish rights to a continental shelf beyond the limits of its exclusive economic zone. In my view, there is no legal justification for such a proposition. In this connection, it is important to note that Article 77 of UNCLOS (which clearly reflects customary international law) categorically states that the rights of the coastal State over the continental shelf do not depend on occupation or express proclamation. Accordingly, it can plausibly be argued that the entitlement of a coastal State to a continental shelf beyond 200 nautical miles arises *ipso facto* and *ab initio* under customary international law, whether or not the State is a party to UNCLOS. The procedure by which a non-UNCLOS State can assert its right may be different, but the ability to assert it should be recognized where the necessary conditions exist.

8. I emphasize that I do not wish or intend in any way to detract from or diminish the obligations which Article 76, paragraphs 8 and 9, of UNCLOS impose on States parties that seek to establish "final and binding" outer limits of their continental shelves beyond 200 nautical miles.

And I certainly do not question or underestimate the clear object and purpose of UNCLOS to establish "a legal order for the seas and oceans" or the need and desirability for universal application of the UNCLOS régime. But I do not believe or agree that the special character of UNCLOS, as set out in its Preamble, makes the rights and obligations of States parties to UNCLOS fundamentally different from the rights and obligations of State parties under other treaties. Specifically, I do not subscribe to the view that the "object and purpose of UNCLOS, as stipulated in its Preamble", in and by themselves, impose on parties to the Convention obligations vis-à-vis other States which have taken a conscious decision not to agree to be bound by that Convention. Whilst it is true that "the fact that Colombia is not a party [to UNCLOS] does not relieve Nicaragua of its obligations under Article 76 of that Convention", there is nothing in the Preamble or any provision of UNCLOS that can legitimately be interpreted to mean that the obligations under that Convention are owed also to States that are not parties thereto. In my opinion, the obligations under Article 76, paragraphs 8 and 9, are "treaty obligations" that apply only as between States that have expressed their consent to be bound by the UNCLOS treaty. Those provisions cannot be considered as imposing mandatory obligations on all States under customary international law. As such they only apply where all the States concerned are parties to UNCLOS.

9. In any event, I would have preferred the Judgment to make it clear that the evidence submitted by Nicaragua to the Court was considered to be inadequate, not because the required information has not been submitted to the Commission on the Limits of the Continental Shelf, or because the Commission has not made recommendations pursuant to Article 76, paragraph 8, of UNCLOS. Rather it is because the information presented does not provide a sufficient basis to enable the Court to proceed to the delimitation of a continental shelf beyond 200 nautical miles of the coast of Nicaragua. In my view, it is not appropriate to conclude that the evidence is inadequate merely because Nicaragua has failed to satisfy the procedural requirements for obtaining a positive recommendation from the Commission under Article 76, paragraph 8, of UNCLOS. As previously pointed out, these requirements are only applicable where the States concerned are all parties to UNCLOS.

10. If it were considered necessary or useful to explain further the nature of the evidence that would have satisfied the Court, it would have been enough to note that the information so far provided by Nicaragua is, by Nicaragua's own admission, only "preliminary" and thus would not be sufficient to satisfy the Court, just as it would not be sufficient to satisfy the Commission. In this connection, it is worth pointing out that the submission of "preliminary" data to the Commission is not for the pur-

pose of enabling the Commission to make recommendations. Rather it is to "buy time" for the coastal State concerned.

11. While a full submission to the Commission should not necessarily be required in every case to enable a court or tribunal to delimit a continental shelf beyond 200 miles, information that would satisfy the Commission should normally also be sufficient to serve as a basis for the court or tribunal to delimit a continental shelf, in cases where (as in the present case) submission to the Commission is not mandatory. In this regard, it is pertinent to recall that in the *Bangladesh/Myanmar* case, the conclusion of the International Tribunal for the Law of the Sea that both Bangladesh and Myanmar have entitlements to a continental shelf beyond 200 nautical miles from their coasts was stated to be based partly on "uncontested scientific information" that had been submitted during the proceedings, and partly on information that the two States had submitted to the Commission, even though the Commission had not pronounced itself on those submissions (*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, pp. 129-131, paras. 443-449).

12. My concern is that the present Judgment might be interpreted to suggest that a court or tribunal should, in every case, automatically rule that it is not able to decide on a dispute relating to the delimitation of the continental shelf beyond 200 nautical miles whenever one of the Parties to the dispute has not followed, or is unable to follow, the procedure set out in Article 76 of UNCLOS. Rather, I think the possibility should be left open that, in principle, a court or tribunal may be able and willing to adjudicate on a dispute relating to delimitation of the continental shelf beyond 200 nautical miles depending on the information presented to it on the geology and geomorphology of the area in which delimitation is sought. In particular, it should be made clear that, in a case of the delimitation of the continental shelf beyond 200 nautical miles involving two States, neither of which is a State party to UNCLOS, the court or tribunal is not obliged to declare itself unable to adjudicate over the dispute solely on the ground that one or the other of the States concerned has not followed the procedure mandated in Article 76 of UNCLOS. Where the States concerned are not States parties to UNCLOS, the procedure under Article 76 of UNCLOS should not apply as between them and may, in any event, not be available to them. In any case, as previously stated, I consider that paragraph 126 of the Judgment is unnecessary. It does not add anything substantive to the reasoning of the Court, but could have implications that I consider to be both wrong and unhelpful.

13. With regard to the actual delimitation effected by the Court, I share the view of Judge *ad hoc* Cot that the rights and interests of third States are affected by the Judgment. In particular, I do not think that enough weight has been given to the effect and significance of bilateral agreements concluded in the area. I, too, consider that these agreements constitute an informal multilateral framework for the management of the

Western Caribbean Sea, and are intended to have significant implications for the "public order of the oceans". As the Court rightly notes in referring to the judgment of the Arbitral Tribunal in the *Barbados/Trinidad and Tobago* case, a delimitation that contributes to such a public order should be "both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirements of achieving a stable legal outcome" (*Award of 11 April 2006, RIAA*, Vol. XXVII, p. 215, para. 244; *ILR*, Vol. 139, p. 524). I am not sure that reliance on Article 59 of the Court's Statute alone would offer adequate protection for the rights of third States, and achieve the objective of stability and practicability, in this case.

(Signed) Thomas A. MENSAH.

DECLARATION OF JUDGE *AD HOC* COT

[Translation]

Specific circumstances of the western Caribbean — Multilateral management through a network of bilateral treaties — Rights of third States affected by the Judgment — Overly complicated nature of the course of the delimitation — Status of States not parties to the 1982 Convention with respect to the delimitation of the continental shelf beyond 200 nautical miles.

1. In the main, I am in agreement with the Judgment of the Court. However, I have serious reservations about certain points.

2. On the question of the rights of third States and of the multilateral management of the western Caribbean, it is my view that the Court's strictly bilateral approach to the dispute leads to unfortunate results.

3. The dispute before the Court in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* is undoubtedly a bilateral one, in which two States are in conflict over issues of sovereignty and maritime delimitation. However, it falls within a wider and very specific geographical framework: that of the western Caribbean.

4. The western Caribbean is made up of 14 coastal States in the area. It is characterized by the density of a range of activities conducted in a relatively confined space. A density and variety of economic activities: to begin with, there is shipping, both to and from the major communications link represented by the Panama Canal. But also fishing, tourism, the collection of guano — which for a long time was an important and much sought-after resource — and the extraction of oil.

5. These activities take place in a fragile environment characterized by atolls and coral reefs, with a remarkable biological diversity. There are a great many threats to this environment: over-exploitation of fishery resources; pollution; risk of a major oil accident, as shown by the Deepwater Horizon oil platform disaster in the Gulf of Mexico in 2010.

6. To take account of these various problems, the coastal States concluded a series of bilateral agreements, not solely relating to maritime delimitation. Those agreements established an informal multilateral management régime, an application of the "public order of the oceans", to borrow the expression used by McDougal and Burke[1]. In addition to the delimitation of maritime spaces, they addressed the protection of the marine environment, the sharing of fish stocks, the exploitation of resources, scientific research, the fight against drug trafficking, etc.

[1] Myres S. McDougal and William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, New Haven, New Haven Press, 1987.

7. The Court cannot ignore these overall characteristics of the region or their legal consequences, in particular the need for joint management of this fragile area by the States concerned. Regrettably, the Court's Judgment overturns this regional framework and redraws the political geography of the western Caribbean.

8. With regard to the rights and interests of third States, I voted against Costa Rica's request to intervene, for reasons associated with the sound administration of justice. I took the view that Costa Rica had fully asserted its legal interests during the proceedings relating to the Application for permission to intervene, and that the Court had been sufficiently informed to rule with a full knowledge of the facts and with respect for Costa Rica's rights. This is not to say that I thought that Costa Rica had no rights to assert in this case. The Court must take account of the rights of third States, whether the latter have asserted them through intervention proceedings or not (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 421, para. 238).

9. Having examined the case on the merits, I believe that the rights of third States are affected by the Judgment. In view of the approach taken by the Court, Article 59 of the Statute of the Court does not afford them adequate protection in this case.

10. To be more specific, the Court decided to end the line delimiting the Parties' maritime spaces where that line reached an area delimited by an agreement concluded with a third State. The problem is that those treaty-based delimitations no longer exist, since their object disappears with the substitution of Nicaragua for Colombia as the holder of sovereignty or of sovereign rights in the spaces concerned.

11. The Judgment records — and rightly so from its perspective — the nullity *ab initio* of every single provision of the agreements made by Colombia with its neighbours, where Nicaragua takes Colombia's place as a contracting party. The Court recognizes that situation when it rejects the request for a declaration made by Nicaragua in its second submission: "The Court observes that Nicaragua's request for this declaration is made in the context of proceedings regarding a maritime boundary which had not been settled prior to the decision of the Court." (Judgment, para. 250.)

12. As a result of the disappearance of those agreements, none of the provisions contained therein, particularly those relating to the delimitation of maritime spaces, can be binding on Nicaragua in its relations with the third States. Equally, no third State is bound by those provisions in its relations with Nicaragua. In particular, those States' maritime delimitation claims cannot be subject to an agreement, which has become null and void or ceased to exist, that was agreed on the basis of different political and geographical information, and, in particular, on different baselines, with Colombia.

13. It would have been more judicious for the Court to end the delimitation line between the two Parties at the point where third States could

not advance a claim under general international law, leaving to one side the previously concluded agreements, now, however, null and void and thus of no relevance to the present dispute.

14. As to the delimitation effected between the mainland coast of Nicaragua and the San Andrés Archipelago, I find it overly complicated. The Court would have been well advised to follow its earlier jurisprudence in the matter of maritime delimitation between opposing coasts, in particular the *Libya/Malta* and *Jan Mayen* cases (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13 and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 38). It could have proceeded by selecting three base points on the respective coasts of each Party, as indicated in the Judgment handed down by the Court in the case concerning the *Maritime Delimitation in the Black Sea*[2], and used these to draw a simplified provisional median line made up of two straight lines forming an angle of approximately 130° to the west of the island of Providencia. It could then have transposed that line eastwards by approximately 25 minutes, adjusting it to take account of the considerable disproportion between the coast lengths.

15. That adjusted median line, reflecting the general direction of Nicaragua's mainland coast, would have had the merit of simplicity. It would have included only one turning point instead of the four adopted by the Court (see sketch-map No. 11 "Course of the maritime boundary", p. 714). It would have followed the Court's previous jurisprudence more closely. It would not have compelled the Court to give bizarre weightings to its chosen base points in order to plot a strange sinusoid (see sketch-map No. 9 "Construction of the weighted line", p. 711). It would not have led the Court to then transform that line into a group of straight-line segments, which will not be easy to locate at sea for the purpose of navigation or the exploitation of resources in the area.

16. The result of a simplified and transposed median line would not have been very different from that achieved by the Court. But it would have been clearer, and both simpler to explain and to justify in terms of maritime delimitation law. Because of its simplicity, a delimitation line following such a course would have been easier for the many and varied players in the Caribbean Sea to locate and thus to respect.

17. Finally, I find the Court's statements on the proceedings instituted by Nicaragua before the Commission on the Limits of the Continental

[2] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 105, para. 127:

> "In this stage of the delimitation exercise, the Court will identify the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines. The points thus selected on each coast will have an effect on the provisional equidistance line that takes due account of the geography."

Shelf somewhat muddled. The Court rightly underlines the importance of the Convention:

> "The Court recalls that UNCLOS, according to its Preamble, is intended to establish 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources'. The Preamble also stresses that 'the problems of ocean space are closely interrelated and need to be considered as a whole'." (Judgment, para. 126.)

18. I applaud this! However, it is the following sentence that I find problematic: "Given the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention." The Court observes that several of the Convention's provisions reflect rules which today are incorporated into general customary law. It notes, in particular, the Parties' agreement that Articles 74 and 83 of the Convention, and Article 121, are to be considered declaratory of customary international law (*ibid.*, para. 138). The Court confirms that Article 121, relating to the legal status of islands, forms an indivisible régime and has the status of customary international law (*ibid.*, para. 139).

19. However, I remain sceptical of the Court's finding that Nicaragua is bound, vis-à-vis Colombia, to respect its obligations under Article 76, paragraph 8, of the Convention, in order to delineate the outer limit of its continental shelf beyond 200 nautical miles. That obligation must undoubtedly be respected in relations between Nicaragua and the other States parties to the Convention. However, in my view, it is not pertinent in the present case. It is difficult to regard paragraph 8 as an expression of customary law. The provision institutes a specific procedure which is not accessible to non-member States. Article 76, paragraph 8, is thus *res inter alios acta* for Colombia.

20. The point is worth emphasizing from a regional perspective. Some important coastal States (Colombia, Venezuela, the United States of America), which have sovereignty over a good half of the mainland coast surrounding the Caribbean Sea, are not parties to the Convention. They cannot be affected by the procedures provided for therein for the determination of the outer limit of the continental shelf. In the present case, the Court should have confined itself to examining the evidence set forth during the judicial proceedings in order to reject Nicaragua's claim for a delimitation of its continental shelf beyond 200 nautical miles. On this point, I fully support the views expressed by Judge *ad hoc* Mensah.

(Signed) Jean-Pierre COT.