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International Court of Justice

THE HAGUE

Cour internationale de Justice

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YEAR 2012

Public sitting

held on Friday 4 May 2012, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le vendredi 4 mai 2012, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. Good morning. The sitting is open. The Court meets today in order to provide the opportunity to Colombia to present arguments in the second round. I give the floor to His Excellency, Agent for the Government of Colombia.

Mr. LONDOÑO PAREDES:

1. COLOMBIA'S UNQUESTIONABLE SOVEREIGNTY OVER THE SAN ANDRÉS ARCHIPELAGO

1. Thank you, Mr. President. Mr. President and distinguished Judges, during their presentation last Tuesday the Agent and counsel for Nicaragua allowed themselves to make statements that Colombia rejects, and which do not comport with the behaviour that is to be expected of representatives of a State which owes a duty of respect for the opposing Party.

2. The Government of Nicaragua built an artificial case based on ignoring and rewriting history, rejecting a fundamental treaty, refashioning geography and distorting the facts. In a last-ditch misguided attempt to buttress its position, Nicaragua, portraying itself as a defenceless country, once again ignores and misrepresents the reality of the situation in the relevant part of the Caribbean.

3. Contrary to its portrayal, it is thanks to the enormous efforts that my country has devoted to the fight against illegal traffic in drugs and arms, that peace and stability have been assured in the area of the San Andrés Archipelago. This attitude is in marked contrast with the activities engaged in by our opponent, as officially attested to in a report on the diversion of arms from Nicaragua to illegal armed groups in Colombia, by the Secretary-General of the Organization of American States in 2003[1].

4. Mr. President, Members of the Court, these misrepresentations in the pleadings by Nicaragua's counsel, make it necessary to once again, set the record straight. For 191 years, Colombia has exercised its sovereignty and jurisdiction over each and every one of the archipelago's components, including the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo

[1]OEA/Ser.G, CP/doc. 3687/03, 29 Jan. 2003. "Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defense Forces of Colombia" dated 6 Jan. 2003. Available at: http://www.oas.org/oaspage/ni-coarmas/ni-coenglish3687.htm.

Nuevo, Alburquerque and East-Southeast[2]. As shown by Colombia, the archipelago has been considered as a unit in historical, political and geographic terms[3].

5. In contrast, in its entire existence Nicaragua has never, *even for a single day* — Mr. President and Members of the Court — even for a single day, had any presence on any of the archipelago's islands and cays it now claims.

6. The territory of the San Andrés Archipelago is one of the world's largest marine biosphere reserves. Colombia's decision to declare the San Andrés Archipelago as its most important protected marine area[4], was made in light of the importance of coral reefs biodiversity for coastal protection. It is worth recalling that reefs in the Caribbean Sea are interconnected, which means that the preservation of an area depends on the preservation of another.

7. Mr. President and distinguished Judges, the Mosquito Coast and the San Andrés Archipelago were always separate and distinct geographical, historical, social and political entities. Even the Royal Order of 1803 designated O'Neille as Governor of the islands of San Andrés, but not of the Mosquito Coast. However, both the Mosquito Coast as well as the islands were allocated to the Viceroyalty of Santa Fé (New Granada), in the same Royal provision[5].

8. What was the effect of this provision? That the entire Mosquito Coast, to the west, as well as all the islands of San Andrés — as the ones located east of that Coast were known — appertained to the Viceroyalty of Santa Fé (New Granada) in 1810. There were no islands or cays in the area that were not ascribed to the Viceroyalty.

9. Therefore, neither the Coast nor any of the islands and cays east of it were part of the Captaincy-General of Guatemala, of which Nicaragua was a province, in 1810. They were part of the Viceroyalty of Santa Fé, predecessor of present-day Colombia.

10. It was only in the 1928/1930Treaty[6], that Colombia recognized Nicaragua's sovereignty over the Mosquito Coast, one of the two components that had been ascribed to the Viceroyalty in

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[2]RC, pp. 41-44, para. 2.22.

[3]CMC, Vol. I, pp. 36-74, Chap. 2, Sec. C.

[4]CMC, Vol. I, p. 18, para. 2.8; pp. 118-121, paras. 3.89--3.91.

[5]POC, Vol. II, Ann. 2.

[6]CMC, Vol. II-A, Ann. 1.

1803. In that instrument, Colombia also recognized Nicaragua's sovereignty over the Corn Islands that, although part of the San Andrés Archipelago, Nicaragua had forcefully occupied in 1890.

11. Nicaragua, for its part, recognized that all the islands located east of the Mosquito Coast, by then known as the "San Andrés Archipelago", that is, the other territorial entity that had been ascribed to the Viceroyalty in 1803, belonged to Colombia. Therefore, all the other islands off the Nicaraguan coast would continue to belong to Colombia.

12. Nicaragua realized that its general recognition of Colombia's sovereignty over the archipelago, could also imply its recognition of Colombia's sovereignty over the Miskito Cays, located in the same latitude as the Quitasueño cays. To prevent this, Nicaragua demanded that a clause be added to the treaty stating that the western limit of the archipelago[7], over which Nicaragua recognized Colombia's full dominion, was the 82nd meridian.

13. The purpose of the inclusion of the 82nd meridian could not have been, as Nicaragua has attempted to portray it, to prevent the Corn Islands to be considered as part of the archipelago, by *drawing a line along the meridian solely from Alburquerque to Providencia*, since in the treaty Colombia had already expressly recognized the Corn Islands as Nicaraguan[8].

14. However, in order to attempt to restrict the extent of the limit of the meridian to the north, Nicaragua chooses to ignore the purpose reflected not only in the process leading up to the addition of the 82nd meridian to the treaty, explained in Colombia's Counter-Memorial, but also acknowledged by Nicaragua in its Memorial and by the statements of high Nicaraguan officials[9].

15. As Colombia showed last week, Nicaragua's motivation behind its proposal of the 82nd meridian limit was to prevent that the Miskito Cays might be considered as Colombian, as clearly explained by Nicaragua's Acting Foreign Minister at the time, and 70 years later, by a distinguished former Foreign Minister, Mr. Alejandro Montiel Argüello[10]. All of this, again, Nicaragua's counsel chose to forget.

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[7] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II),* p. 867, para.115.

[8] CMC, Vol. I, pp. 247-248, paras. 5.13-5.14.

[9] CMC, Vol. I, Chap. 5, Sec. C, pp. 261-263, paras. 5.43-5.47; MN, p.176, para. 2.251; CMC, Vol. II-A, p. 731, Ann. 197: Note No. 1316, from the United States chargé d'affaires, *a.i.* at Managua, to the Secretary of State, 11 Feb. 1930.

[10] CR 2012/11, p. 14, para. 21 (Londoño).

16. Yet, the same explanation was given by the Agent of Nicaragua. Indeed, in a conference in Managua in 1999, this account was corroborated by him as follows:

> "Mr. Carlos Argüello stated that when the treaty was submitted to the Nicaraguan Senate in 1930, a Senator was concerned that if it was simply said that Colombia had sovereignty over the San Andrés Archipelago, 'by the time we realize what is happening, they will say that the Miskito cays are part of the Archipelago.'"[11]

17. As shown, in 1930 neither Nicaragua nor Colombia were thinking, *even remotely*, that any of the cays and islands that Nicaragua now claims could belong to Nicaragua.

18. Following the inclusion of the limit of the 82nd meridian in the Protocol of Exchange of Ratifications of 1930[12], all the islands, cays and banks off the Mosquito Coast located west of that meridian, between Costa Rica in the south and Honduras in the north, were Nicaraguan. And therefore, all the cays and islets located east of it, without exception, appertained to Colombia.

19. Consequently, it is surprising now to hear Nicaragua attempt to claim that the cays located east of the 82nd meridian belong to it, under the extravagant argument that Colombia's recognition of Nicaragua's sovereignty over the Mosquito Coast would have somehow appended them to that territory as a bonus of sorts.

20. Mr. President and Members of the Court, a few days ago, Nicaragua alluded to a Note containing an alleged expression of its purported rights to the cay of Serrana in 1868. However, Nicaragua did not mention this document in the Application, did not mention it in the Memorial or in its Reply and, when it attempted to add it to the judges' folders just last week, that attempt was not allowed by the Court. Nevertheless, Professor Brotóns, on Tuesday, referred again to that Note on the basis of secondary sources.

21. However, in the interest of completeness, it should be clarified that Professor Brotóns forgot to mention the general framework referred to in one of the sources he used[13]. The Note mentioned by Nicaragua was not spontaneous; it was in reply to a Note from the Secretary of State

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[11] "El Nuevo Diario" (Nicaraguan newspaper), Managua, 4 Dec. 1999, p. 10. Available at: http://archivo.elnuevodiario.com.ni/1999/diciembre/04-diciembre-1999/nacional/nacional15.html.

[12] CMC, Vol. II-A, Ann. 1, p. 4.

[13] Office of the Legal Adviser, Department of State, *Sovereignty of Islands Claimed under the Guano Act and of the North-western Hawaiian Islands, Midway and Wake*, Washington D.C., 1932, pp. 104-106.

to Nicaragua's Legation in Washington inquiring whether they believed that country had any sort of right over the cay[14].

22. The *same* Secretary of State who received the answer to this question, would later reject Nicaragua's assertions as unfounded, in a Note of 10 December 1868[15]. In the same year, Nicaragua did not ever reply to that Note. Its memory lapse concerning Serrana lasted *exactly* . . . *exactly* . . . 104 years . . . until Nicaragua first asserted a claim over it against Colombia in 1972, 104 years after.

23. Additionally, Nicaragua, without producing any scientific evidence to the contrary, has purported to discredit and delegitimize the two scientific and technical reports submitted by Colombia on Quitasueño[16]. They were conducted, as will be further explained today, with the methodology and rigor that such evidence demands when intended for submission to this Court. Nevertheless, if the Court, prior to rendering its judgment, would deem it proper to apply Article 66 of the Rules of Court, my country, Mr. President, would welcome an *in situ* visit either by the Court or by a commission appointed to that effect, in order to corroborate the veracity of Colombia's reports.

24. Quitasueño has been depicted on maps and charts since the early times of the discovery of the New World, throughout the entire colonial period in the seventeenth, eighteenth and nineteenth centuries — including that of 1885[17] — and obviously, in those of the twentieth century.

25. Nicaragua's acquiescence in relation to the sovereignty and jurisdiction exercised by Colombia over Quitasueño is evidenced, *inter alia*, in its silence — in its silence — between 1854 and 1928 — between 1854 and 1928, Mr. President — during the dispute between Colombia and the United States. Also, by its silence with regard to the exchanges between Colombia and Great Britain, and by its recognition that it was in dispute between Colombia and the United States in the

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[14]Office of the Legal Adviser, Department of State, *Sovereignty of Islands Claimed under the Guano Act and of the North-western Hawaiian Islands, Midway and Wake*, Washington D.C., 1932, pp. 104-106.

[15]*Ibid*.

[16]CR 2012/14, p. 35-41, paras. 11-22 (Oude Elferink).

[17]CMC, Vol. III, Fig. 5.1, p. 79.

1928 Treaty[18] — all that time; silence. All of this means that it *never considered* that Quitasueño could belong to it regardless of its physical status.

26. Besides, in Quitasueño Colombia has, for several decades, installed and maintained lighthouses: conducted seismic and marine scientific research; hydrographic surveys; cartographic updates, and has also authorized third States to conduct research and fishing activities in its adjacent areas. Likewise, Colombia performs security-related tasks in those areas, relating to the fight against transnational organized crime and fishing control. Also, it has concluded and implemented agreements with the United States enforcing measures for the conservation of the living resources in the area[19].

27. It is not possible for Nicaragua to now attempt to claim it, disregarding, Mr. President, disregarding 150 years of history and the peaceful jurisdiction exercised by Colombia.

28. Nicaragua's claims not only ignore Colombia's interests, entitlements and rights, but also third States, despite its protestations to the contrary. Colombia has concluded maritime delimitation treaties and agreements with several States in the region[20] that have, for decades, been a source of co-operation, stability and harmonious relations in the region.

29. Now Nicaragua is purporting to destroy them on the basis of fallacious arguments, against the principles of international law, sowing the seeds of conflict and tension in that part of the Caribbean, *without* precedents in the area.

The Court no doubt will be aware of the implications that Nicaragua's claims involve.

30. Mr. President and Members of the Court, I must therefore convey to the Court, the despair of the 80,000 inhabitants of the San Andrés Archipelago, backed by millions of their fellow nationals, in the face of Nicaragua's attempt not only to fracture the archipelago, but also to appropriate its areas, including the waters that connect its islands and cays, from which they and their ancestors have derived their sustenance and earned their living, and where Nicaragua has never been present.

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[18]CMC, Vol. I, pp. 247-248, paras. 5.13-5.14.

[19]CMC, Vol. II-A, Ann. 172; CMC, Vol. I, p. 32, para. 2.29; CMC, Vol. I, p. 96, para. 3.35; CMC, Vol. I, pp. 97, para. 3.39; CMC, Vol. II-B, Apps. 5-12; CMC, Vol. II-A, Anns. 11, 13 and 16.

[20]CMC, Vol. II–B, Anns. 2-5, 7-10, 12, 14, 15, 17 and 18.

31. They are bewildered to learn that Nicaragua is requesting the Court to enclave them. With the added affront that, once they sail beyond their immediate surroundings to conduct their traditional fishing activities in the waters and cays where they have lived for two centuries, they would encounter an unfriendly country that has never frequented those areas.

32. This does not comport with their basic rights to development, and cannot be deemed to achieve an equitable result in a case where their subsistence and essential economic activities are at stake.

33. In this regard, it is worth recalling the Tribunal's conclusion in the case of *Guinea* v. *Guinea Bissau* to the effect that, "[t]he boundaries fixed by man must not be designed to increase the difficulties of States or to complicate their economic life"[21].

34. Mr. President, Members of the Court, Colombia trusts that the Court will not endorse the attempt by a country, portraying itself as weak and law-abiding, despite the fact that neither is true, to destroy what has been an essential part of the national heritage, on the basis of contradictory arguments.

35. Mr. President, distinguished judges, 43 million Colombians are confident that the Court will not allow the appropriation of Colombia's maritime areas, in light of the fact that its rights are derived from geography which cannot be refashioned; from history, which cannot be rewritten; and from law, which cannot be violated. In sum, that it will reject Nicaragua's unfounded claims and uphold my country's position.

36. May I ask you, Mr. President, to give the floor to Professor Kohen who will continue Colombia's presentation on the issue of territorial sovereignty. Thank you, Mr. President.

The PRESIDENT: I thank Ambassador Julio Londoño Paredes for his statement. Et je donne la parole à Monsieur Marcello Kohen, conseil et avocat de la Colombie. Vous avez la parole, Monsieur.

[21] "Les frontières fixées par l'homme ne devraient pas avoir pour objet d'augmenter les difficultés des États ou de compliquer leur vie économique." 19 UN, *RIAA* 194, para. 123.

M. KOHEN :

2. L'INCAPACITÉ DU NICARAGUA D'ARTICULER UNE JUSTIFICATION POUR SA REVENDICATION ARTIFICIELLE DES CAYES

1. Monsieur le président, Mesdames et Messieurs les juges, à la fin de cette procédure, une conclusion simple s'impose : le Nicaragua a été incapable d'articuler ne serait-ce qu'un minimum de justification de sa revendication de souveraineté sur les cayes. Face à cette incapacité, le demandeur a focalisé ses efforts, d'une part, à vilipender le traité de 1928-1930 et, impuissant de présenter un vrai cas «positif» pour étayer une revendication intenable, s'est contenté, d'autre part, de présenter un cas «négatif». Autrement dit, de manière infructueuse, le Nicaragua a dépensé son énergie uniquement à faire croire que les cayes ne feraient pas partie de l'archipel. Cela n'a pourtant pas fait avancer d'un iota sa position. Car les deux hypothèses logiquement possibles mènent au même résultat : que les cayes fassent ou non partie de l'archipel, dans les deux cas, elles sont colombiennes. Si elles font partie de l'archipel de San Andrés, le traité de 1928-1930 règle définitivement la question. Si elles ne faisaient pas partie de l'archipel — idée que nous rejetons fermement — elles seraient également colombiennes en vertu de l'*uti possidetis juris* et des effectivités.

2. Dans cet exposé conclusif, je vais montrer tout d'abord que, contrairement aux affirmations du Nicaragua, le traité de 1928-1930 est un traité territorial conclu selon toutes les formes n'ayant porté aucun préjudice au Nicaragua. Ensuite, que la Partie demanderesse a été incapable d'articuler une revendication de souveraineté sur les cayes. Enfin, que le Nicaragua n'a pas pu réfuter la preuve qui montre de manière accablante que, en interprétant le traité de 1928-1930, les cayes font partie de l'archipel de San Andrés et qu'elles sont par conséquent colombiennes.

A. Un traité déclaré «nul» par le Nicaragua qui maintenant lui attribuerait tous les territoires objet du différend

3. Mesdames et Messieurs de la Cour, le Nicaragua a essayé de dresser un portrait caricatural du traité de 1928-1930, se posant en prétendue victime d'un dépouillement territorial. Après avoir entendu la Partie adverse, je dois avouer ma perplexité, car le Nicaragua prétend maintenant que,

grâce au traité de 1928-1930, toutes les cayes relèveraient de sa souveraineté. En d'autres termes, la Colombie aurait renoncé par ce traité à la côte des Mosquitos, aux îles Mangles et à toutes les cayes de l'archipel, alors qu'en même temps le Nicaragua serait victime d'un soi-disant traité «inégal» qu'on lui aurait imposé contre sa volonté !

4. Ma perplexité ne s'arrête pas là Monsieur le président. Je note que l'agent du Nicaragua a changé même l'histoire récente de ce différend. Le 1er mai, il a affirmé à deux reprises que le Nicaragua avait «dénoncé» le traité de 1928-1930 en 1980[22]. L'ambassadeur Argüello est pourtant un diplomate avisé avec une longue expérience. Pour ne pas parler de la pléthore d'éminents conseils qui constituent son équipe. Ils ne peuvent pas ignorer que «dénoncer» un traité est une chose bien différente que de le déclarer «nul».

5. La vérité, Monsieur le président, est que, s'agissant de questions territoriales, «nullité» et «Nicaragua» sont deux termes qui semblent aller de pair. Le traité de limites de 1858 avec le Costa Rica fut déclaré nul par le Nicaragua. N'étant pas satisfait de la sentence arbitrale rendue par le roi d'Espagne en 1906 au sujet de la frontière avec le Honduras, le Nicaragua l'a aussi déclarée nulle. Finalement, après un demi-siècle d'application incontestée, le Nicaragua a déclaré nul son traité territorial avec la Colombie de 1928-1930. Avec tous ses voisins donc, le Nicaragua a eu ce comportement de rejet des traités ou de sentences arbitrales définissant les étendues territoriales des parties. Et à chaque fois, le Nicaragua a essuyé des échecs. La sentence arbitrale du président Cleveland a déclaré que le traité de limites de 1858 était valide[23]. Votre Cour a déclaré que la sentence arbitrale du roi d'Espagne était valide[24]. Votre Cour encore a déclaré que le traité de 1928-1930 était valide[25].

6. On peut supposer que cette tentative de déguiser la déclaration de nullité de 1980 en prétendue «dénonciation» vise à rendre moins grave le comportement du Nicaragua. En réalité, cela ne change rien, ni la gravité de celui-ci, ni les conséquences à l'égard du régime territorial

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[22] CR 2012/14, p. 11, par. 7 et p. 14, par. 15 (Argüello).

[23] *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 230, par. 20.

[24] *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua), arrêt, C.I.J. Recueil 1960*, p. 217.

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

établi. Les traités établissant des frontières ou de règlement territorial ne sont pas, par leur nature, dénonciables et même s'ils prévoyaient explicitement la possibilité de dénonciation, la frontière ou le règlement territorial qui en découlent n'en seraient pas affectés[26].

7. Le Nicaragua a dressé un portrait de la situation qui ne s'accommode pas de la réalité. S'il y a bien un Etat expansionniste ici, c'est le Nicaragua. Il a revendiqué la côte des Mosquitos en 1838, occupé par la force les îles Mangles en 1890 et revendiqué tout l'archipel en 1913. Le conseil du Nicaragua se demandait pourquoi la Colombie aurait accepté de perdre la côte des Mosquitos si ces titres étaient fondés[27]. Comme je l'ai expliqué lors du premier tour, l'Espagne n'a jamais été capable d'exercer un contrôle effectif sur la côte des Mosquitos[28]. Après l'indépendance des républiques latino-américaines, la puissance qui a gagné le contrôle de cette côte fut le Royaume-Uni, à travers un régime de soi-disant protectorat. Pour des raisons liées à une possible construction du canal interocéanique, le Gouvernement britannique avait favorisé le Nicaragua et lui transféra le contrôle de la côte des Mosquitos. En ce qui concerne les îles Mangles, le Nicaragua les occupa par la force en 1890 pour les céder à bail aux Etats-Unis d'Amérique par le traité Bryan-Chamorro de 1914, et qui les ont effectivement administrées jusqu'en 1971. Comme on le sait, la sentence arbitrale Loubet en 1900 reconnut la côte Mosquito méridionale comme costa-ricienne — fait que la Colombie avait déjà accepté dans le traité de 1856 et 1865, et suivit la sécession du Panama en 1903. Dans ce contexte, il n'y a rien d'étonnant que la Colombie accepte l'assignation de la côte des Mosquitos et les îles Mangles au Nicaragua en échange de la reconnaissance de sa souveraineté sur l'archipel de San Andrés. En fait, par le traité de 1928-1930, les parties se sont reconnu les territoires qui étaient sous leur contrôle respectif au moment de sa conclusion. Rien ne permet donc d'invoquer une quelconque injustice ou un quelconque détriment que le Nicaragua aurait subi en vertu de celui-ci.

8. La tentative de présenter le Nicaragua comme l'Etat qui s'est vu refuser des propositions d'arbitrage ne reflète pas non plus la réalité des choses[29]. Voici la réponse catégorique du ministre

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

[27] CR 2012/8, p. 35-36, par. 15 (Remiro Brotóns).

[28] CR 2012/11, p. 32-33, par. 7 (Kohen).

[29] CR 2012/8, p. 35-36, par. 12,13 et 15 (Remiro Brotóns).

des affaires étrangères nicaraguayen à son homologue colombien, datée du 24 décembre 1913, faisant siennes les réponses de ses prédécesseurs au sujet des propositions colombiennes d'arbitrage sur la côte des Mosquitos. Ils ont, disait le ministre nicaraguayen, «rejeté totalement l'idée d'arbitrage proposée par le gouvernement de Votre Excellence [la Colombie], estimant que les droits du Nicaragua sont clairs et incontestables, et que par conséquent il n'existe pas de différend territorial entre les deux pays»[30] *[traduction du Greffe]*.

9. Voilà, Mesdames et Messieurs les juges, la toile de fond du traité de 1928-1930. Avant de faire quelques remarques relatives à son interprétation, permettez-moi quelques propos pour montrer que le Nicaragua a été incapable de présenter un cas territorial «positif» dans cette affaire.

B. Le Nicaragua n'a pas un cas «positif» pour étayer sa revendication artificielle

10. Monsieur le président, normalement, dans une affaire territoriale, les parties expliquent à quel moment elles ont revendiqué le territoire en cause pour la première fois et essayent de montrer que leur comportement a été cohérent avec cette revendication. Ce n'est pas le cas ici. La procédure s'achève et nous ne savons toujours pas ce que le Nicaragua pense sur la date à laquelle il a estimé — et agi en conséquence — que chacune des cayes relèverait de sa souveraineté. Puisque leur situation était — à en croire nos adversaires — totalement détachée de l'archipel de San Andrés — *quod non* —, on peut estimer que deux siècles constituent une période suffisamment longue pour avoir la possibilité de se manifester sur chacune de ces cayes et agir, ne serait-ce que sur le plan de la revendication. Comme il n'en est rien, le Nicaragua s'est vu forcé à inventer une sorte de présomption irréfragable : selon lui, «tout ce qui n'est pas colombien est nicaraguayen». Les fondements en seraient la présence des cayes sur le plateau continental et leur prétendue proximité aux côtes du Nicaragua. Sur le premier point, vous comprendrez, Monsieur le président, que je m'abstienne de tout commentaire sur le «cataclysme avant la lettre» qui ferait de Roncador, Serrana, Serranilla et Bajo Nuevo des territoires nicaraguayens, selon la débordante imagination du conseil mardi dernier[31]. Sur la proximité, je remarquerai que nos contradicteurs ont une vue très changeante lorsqu'ils regardent vers le large, ce qui fait que les adjectifs «lointain» et «proche»

[30] Note diplomatique en date du 24 décembre 1913 adressée au ministre colombien des affaires étrangères par le ministre nicaraguayen des affaires étrangères, CMC, vol. II-A, annexe 36, p. 172.

[31] CR 2012/14, p. 30, par. 49 (Remiro Brotóns).

changent de signification selon leurs intérêts. Peu importe, Monsieur le président, je me permets de renvoyer à nos considérations juridiques sur ces deux questions exposées la semaine dernière et qui, elles, sont restées sans réponse de la part du demandeur[32].

11. Incapables de présenter la moindre preuve montrant que le Nicaragua ait considéré les cayes comme relevant de sa souveraineté depuis l'indépendance, la Partie adverse s'est donc adonnée à présenter un cas «négatif» : les cayes ne seraient pas colombiennes. De toute évidence, les efforts se sont avérés infructueux. En effet, le Nicaragua n'a pas pu contrer l'interprétation effective du traité de 1928-1930, qui montre que les cayes tombent sous le coup de la notion d'archipel de San Andrés.

C. La distance n'empêche pas les cayes de faire partie de l'archipel de San Andrés

12. Mesdames et Messieurs de la Cour, il vous appartient d'interpréter la notion d'«archipel de San Andrés» dans le contexte du traité de 1928-1930. Les îles, îlots et cayes qui le comprennent ont historiquement été considérés comme un ensemble constituant l'archipel de San Andrés. Selon les conseils de la Partie adverse, ce serait impossible de définir l'archipel de San Andrés comme étant un archipel au «sens géographique» du mot[33]. Pour le Nicaragua, la distance entre les cayes et les îles principales constituerait un obstacle majeur à cet égard. Selon l'un des conseils, ce serait même une «aberration géographique» d'imaginer le contraire[34]. Les grandes paroles, Monsieur le président, ne peuvent pas cacher la réalité. Vous avez à l'écran l'archipel de San Andrés avec la distance existante entre ses différentes composantes. Regardez maintenant la distance de 136 kilomètres entre Mangle Chico (Little Corn Island) et San Andrés : c'est à peu près la même distance — voire plus dans la plupart des cas — que celle existante entre les autres composantes de l'archipel entre eux. Monsieur le président, comment le Nicaragua peut-il alors soutenir que les îles Mangles faisaient partie de l'archipel et que les cayes ne pourraient pas l'être en raison de la distance ?

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[32] CR 2012/8, p. 43, par. 54 (Remiro Brotóns) ; CR 2012/11, p. 39-40, par. 27 (Kohen).

[33] CR 2012/8, p. 40-41, par. 39 (Remiro Brotóns), p. 51, par. 11 (Pellet).

[34] CR 2012/8, p. 55, par. 21 (Pellet).

13. La géographie montre partout qu'il est loin d'être «aberrant» que des îles soient relativement éloignées les unes des autres mais pourtant considérées comme faisant partie d'un même archipel. Voici quelques exemples.

14. Wallis-et-Futuna. Le site Internet du ministère de l'intérieur et de l'outre-mer de la République française les décrit de la manière suivante : «Le territoire des îles Wallis et Futuna constitue un archipel de trois îles principales : Wallis, Futuna et Alofi.»[35] La distance entre Wallis et Futuna est de 222 kilomètres, plus que celle existante entre n'importe laquelle des composantes de l'archipel de San Andrés.

15. Kiribati, pour sa part, est composé de trois archipels séparés entre eux par des distances d'environ mille kilomètres, voire plus. A l'intérieur de chacun des archipels, vous trouvez des distances entre ses parties composantes bien plus supérieures que celles existantes entre les cayes de l'archipel de San Andrés, parfois atteignant presque 800 kilomètres, comme dans l'archipel des îles de la Ligne à l'est, ou les 438 kilomètres séparant Banaba du reste de l'archipel des îles Gilbert, à l'ouest.

16. L'archipel de Svalbard, où l'île aux Ours se trouve à 234 kilomètres de l'île principale de Spitzberg, distance majeure que celle existante entre les composantes de l'archipel de San Andrés entre elles.

17. Les Seychelles, dont certaines de leurs composantes se trouvent à presque 400 kilomètres, parfois trois ou quatre fois la distance existante entre les différentes composantes de l'archipel de San Andrés.

18. Ces exemples, parmi beaucoup d'autres dont je vous fais grâce ici, écartent la thèse nicaraguayenne selon laquelle la distance constituerait un obstacle pour parler des cayes comme faisant partie de l'archipel. Ce dont il est question ici, Mesdames et Messieurs de la Cour, c'est finalement de savoir à quoi se référaient les Parties lorsqu'elles parlaient de l'archipel de San Andrés dans le traité de 1928 et le protocole de 1930.

[35] http ://www.outre-mer.gouv.fr/?presentation-wallis-et-futuna.html.

D. Les négociateurs colombiens ont clairement exprimé que les cayes font partie de l'archipel de San Andrés

19. Face à la description catégorique faite en 1896 par le ministre colombien des affaires étrangères, Jorge Holguín, quant à la composition de l'archipel[36], le Nicaragua a finalement explicité sa position mardi dernier. Le demandeur semble invoquer qu'il ignorait cette prise de position. Il cite à l'appui votre arrêt sur le fond dans l'affaire *Cameroun c. Nigéria* dans un contexte qui n'a pourtant rien à voir avec la situation dans la présente espèce[37]. Il s'agit ici d'une déclaration publique faite par le ministre colombien des affaires étrangères au sujet du différend qui opposait son pays au Nicaragua, publiée dans le journal du Congrès en 1896 et dans les *Annales diplomatiques et consulaires de la Colombie* en 1914. Les représentants diplomatiques nicaraguayens à Bogotá ne pouvaient pas ignorer la publication de l'annuaire du ministère des affaires étrangères du pays où ils étaient accrédités et avec qui leur pays avait un important différend territorial. Il ne s'agissait pas d'une correspondance privée, mais bien au contraire d'une documentation publique de caractère officiel et destinée à faire autorité en matière de relations internationales[38]. Par ailleurs, cette déclaration témoigne incontestablement de la conviction absolue de la Colombie selon laquelle les cayes faisaient partie de l'archipel, d'ailleurs à une époque où le Gouvernement colombien exerçait des actes à titre de souverain sur celles-ci.

20. La note de 1927 du ministre colombien à Managua, Manuel Esguerra, négociateur et signataire du traité de 1928, décrivant toutes les cayes comme faisant partie de l'archipel, prouve aussi de manière catégorique la compréhension que la Colombie portait sur l'étendue de l'archipel de San Andrés qui fut décrit à l'article premier du traité de 1928[39]. Ce document n'a pas suscité le moindre commentaire de la Partie demanderesse.

21. La preuve que je viens de mentionner n'est qu'une petite partie de l'abondante documentation présentée par la Colombie dans ses écrits et qui montre sans l'ombre d'un doute l'unité historique de l'archipel de San Andrés[40].

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[36] CMC, p. 52, par. 2.59, et vol. II-A, annexe 89.

[37] CR 2012/14, p. 25-26, par. 28 (Remiro Brotóns).

[38] Voir *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 92, par. 261.

[39] CMC, vol. II-A, annexe 112, p. 399.

[40] CMC, vol. I, p. 190, par. 4.81-4.82, p. 36-70, par.2.32-2.85 ; CMC, vol. II-A, annexes 30, 74, 82, 85, 87, 89, 112, 173 et 180.

E. Le deuxième paragraphe de l'article premier du traité de 1928

22. Dans son exercice d'interprétation du deuxième paragraphe de l'article premier du traité de 1928, l'agent nicaraguayen a affirmé avec raison que «[l]e traité ne dit pas que ces cayes ne seront pas considérées comme faisant partie de l'archipel»[41]. C'est logique, puisque si elles n'étaient pas considérées comme faisant partie de l'archipel, il n'y avait aucune raison d'insérer cette clause : le Nicaragua reconnaissait dans ce traité la souveraineté colombienne de toutes les îles, îlots et cayes qui font partie de l'archipel de San Andrés et les cayes Roncador, Quitasueño et Serrana en font partie. Le contexte montre que le paragraphe en question vient tout de suite après la reconnaissance nicaraguayenne de la souveraineté colombienne sur les îles, îlots et cayes qui composent l'archipel de San Andrés. Le texte du deuxième paragraphe donne ensuite la raison de cette exclusion : «le *dominium* [on entend, la souveraineté] fait l'objet d'un litige entre la Colombie et les Etats-Unis d'Amérique»[42]. S'il y avait eu un différend entre la Colombie et le Nicaragua au sujet des trois cayes, ou même entre le Nicaragua et les Etats-Unis — ce qui n'était pas du tout le cas, l'application du traité aurait conduit à mettre un terme à ces différends. Les travaux préparatoires montrent pourtant qu'il n'y a jamais eu de revendication spécifique nicaraguayenne sur ces trois cayes. Durant les négociations concomitantes entre les Etats-Unis et la Colombie à propos de leur différend sur ces trois cayes, plusieurs formules ont été discutées, parmi lesquelles, la reconnaissance états-unienne de la souveraineté colombienne, l'arbitrage, le *statu quo* ou une formule favorable aux Etats-Unis mais pourtant rejetée par ces derniers. La raison invoquée par le gouvernement de Washington est révélatrice. Je cite un télégramme du ministre de la Colombie à Washington adressé à son ministre des affaires étrangères expliquant la situation : «La formule [de la cession] au Nicaragua et du transfert par ce dernier aux Etats-Unis a été accueillie avec froideur parce qu'ils estiment que le Nicaragua n'a pas possédé de droits sur les cayes.»[43] Ceci est la traduction. En fait, l'original en espagnol est bien plus catégorique : «Nicaragua nunca ha sostenido derecho sobre cayos»[44], «Le Nicaragua n'a jamais invoqué des droits sur les cayes.» «Nunca» : «Jamais» !

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[41] CR 2012/14, p. 15, par. 19 (Argüello).

[42] CMC, vol. II-A, annex 1.

[43] CMC, vol. II-A, annexe 111.

[44] CMC, vol. II-A, annexe 111. Documents originaux déposés à la Cour par la Colombie.

23. Mesdames et Messieurs les juges, le texte du deuxième paragraphe n'est pas obscur. Au contraire, il est dépourvu de toute ambiguïté. Il est simplement impossible de l'interpréter comme signifiant que non seulement la Colombie et les Etats-Unis revendiquaient la souveraineté de Roncador, Quitasueño et Serrana, mais aussi le Nicaragua.

F. Le 82e méridien constitue «la limite entre les deux archipels»

24. Monsieur le président, j'en viens maintenant à l'interprétation à donner à la limite constituée par la ligne du 82e méridien. Selon la Partie adverse, «[c]'est l'archipel de San Andrés, une fois identifié, qui détermine les limites sud et nord du méridien 82° comme ligne d'attribution de souveraineté sur les cayes en litige»[45]. C'est un curieux raisonnement, c'est le moins qu'on puisse dire. Si l'on suit le Nicaragua, le 82e méridien ne définit pas l'étendue de l'archipel de San Andrés, mais c'est l'archipel de San Andrés qui définit l'étendue pertinente du 82e méridien. Le monde à l'envers, dirait-on.

25. Nos contradicteurs persistent à affirmer que le but du 82e méridien est de séparer l'archipel de San Andrés des îles Mangles[46], lui ôtant tout effet utile. Mes collègues Alain Pellet et Antonio Remiro Brotóns ont insisté ces deux semaines sur la coupure du 82e méridien aux parallèles correspondant selon nos calculs aux 12° 23' et 12° 08'[47]. Vous avez à l'écran les lignes qu'ils ont montrées dans ces croquis. Je vais maintenant superposer cette ligne sur la véritable carte à prendre en considération, celle de 1885 du bureau hydrographique des Etats-Unis.

26. Mesdames et Messieurs de la Cour, la lecture de la résolution commune du Sénat et de la Chambre des députés du Nicaragua du 6 mars 1930, ratifiant le traité de 1928, nous aidera à mieux comprendre la situation :

> «Le traité conclu le 24 mars 1928 entre le Nicaragua et la République de Colombie, qui a été approuvé par le pouvoir exécutif le 27 du même mois de la même année, est ratifié ; ce traité met fin à la question pendante entre les deux républiques à propos de l'archipel de San Andrés et Providencia et de la Mosquitia nicaraguayenne,

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[45] CR 2012/14, p. 27, par. 34 (Remiro Brotóns).

[46] CR 2012/8 p. 40, par. 39 (Remiro Brotóns) ; p. 52, par. 15, p. 54-55, par. 20, p. 60, par. 30-31, p. 62-63, par. 38-41 (Pellet).

[47] Nicaragua, onglet no 29 du dossier des juges, 23 avril 2012, [AP1-7] ; CR 2012/8, p. 62-63, par. 38-40 (Pellet). Nicaragua, onglet no 18 du dossier des juges, 1er mai 2012, [ARB-3] ; CR 2012/14, p. 27, par. 34 (Remiro), p. 39-40, par. 14 (Pellet).

> étant entendu que l'archipel de San Andrés mentionné dans la première clause du traité ne s'étend pas à l'ouest du 82e [degré] de longitude [de] Greenwich dans la carte publiée en octobre 1885 par l'Hydrographic Office de Washington sous l'autorité du secrétaire à la marine des Etats-Unis.»[48]

27. Plusieurs commentaires s'imposent. *Primo*, le différend est décrit comme relevant de «l'archipel de San Andrés et Providencia et de la Mosquitia nicaraguayenne». Précisément, le demandeur invoque comme source de sa souveraineté sur les cayes leur prétendue appartenance à la «Mosquitia nicaraguayenne». Il est évident que si le Nicaragua considérait siennes les cayes qui figurent clairement dans la carte de 1885 à l'est du 82e méridien, il aurait fallu utiliser d'autres lignes et non celle du 82e méridien. *Secundo*, les lignes des parallèles tracées en pointillés par mes collègues de l'autre côté de la barre ne trouvent de fondement dans aucun texte. Les parallèles sont aisément identifiables sur cette carte. Si le Nicaragua voulait s'en servir, cela n'aurait pas été difficile de s'y référer. *Tertio*, le texte indique que l'archipel de San Andrés «ne s'étend pas à l'ouest du 82e [degré] de longitude [de] Greenwich dans la carte publiée en octobre 1885, etc.». Un simple regard sur la carte montre que le 82e méridien s'étend tout au long de la carte dans un espace quasi totalement maritime, ce qui correspond de façon idoine à une délimitation insulaire. Il est évident aussi que si le but était celui décrit par mon collègue Alain Pellet, autrement dit de tracer une ligne séparant les îles Mangles de la partie sud de l'archipel de San Andrés, on n'aurait pas eu besoin d'utiliser une carte avec de telles dimensions. *Quarto*, si la limite fixée était vraiment le petit segment du 82e méridien dépeint par le Nicaragua durant cette phase orale, alors la référence au 82e méridien n'aurait servi à rien, non seulement par rapport aux îles Mangles — déjà reconnues explicitement comme nicaraguayennes par le traité de 1928 —, mais aussi parce que la démarche nicaraguayenne visait à éviter que la Colombie revendique plus tard les cayes des Miskitos comme faisant partie de l'archipel.

28. Monsieur le président, cette carte fait partie de l'expression de la volonté du Nicaragua. Comme l'affirme votre jurisprudence :

> «[D]ans quelques cas, les cartes peuvent acquérir [une valeur juridique intrinsèque aux fins de l'établissement des droits territoriaux], mais cette valeur ne découle pas alors de leurs seules qualités intrinsèques : elle résulte de ce que ces cartes ont été intégrées parmi les éléments qui constituent l'expression de la volonté de l'Etat ou des Etats concernés. Ainsi en va-t-il, par exemple, lorsque des cartes sont annexées

[48] MN, vol. II, annexe 19. EPC, vol. II, annexe 10.

à un texte officiel dont elles font partie intégrante.»[49] (*Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 582, par. 54.)

29. C'est à peu près le cas ici. La résolution commune des deux chambres du Congrès nicaraguayen approuvant le traité de 1928 et se référant explicitement à la carte de 1885 prévoit que «[l]e présent décret sera reproduit dans l'instrument de ratification»[50]. L'interprétation du texte du protocole de 1930 dans son contexte, à la lumière de ses objet et but, tenant compte de l'expression de la volonté des parties au moment de la ratification, ainsi que des travaux préparatoires et de la pratique ultérieure n'offrent pas de doute : les cayes à l'est du 82e méridien font partie de l'archipel de San Andrés.

G. La cartographie corrobore l'interprétation colombienne du traité de 1928-1930

30. Restons dans la cartographie, si vous le permettez Monsieur le président. Tout ce que le Nicaragua a pu dire sur la cartographie officielle de la Colombie, montrant toutes les cayes comme relevant de «l'archipel de San Andrés appartenant à la République de Colombie», est que, comme les originaux n'ont pas été déposés auprès de votre Cour, cela rend un commentaire à leur égard «difficile»[51]. Monsieur le président, ces cartes ont été présentées par la Colombie lors de la phase des exceptions préliminaires et celle du fond[52]. Comme toute la documentation présentée en annexe, elles ont été certifiées conformes par l'agent, comme votre Règlement l'exige. Le Nicaragua a eu trois tours de pièces écrites pour soulever toute objection ou question à leur égard. Il ne l'a pas fait. Les choses sont donc claires : le Nicaragua est incapable de fournir une explication différente de celle présentée par la Colombie, ou pour être plus court : de celle qui saute aux yeux d'un simple regard des «Encart[s] de l'archipel de San Andrés» qui paraissent dans les cartes officielles de la République de Colombie.

31. L'explication que l'agent du demandeur a donné d'une carte officielle du Nicaragua de 1967 est aussi révélatrice. On trouve le territoire continental nicaraguayen, les îles Mangles, les cayes des Miskitos et à l'extrême oriental deux indications «Islas de Providencia (Colombia)» et

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[49] Voir aussi *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999*, p. 1098, par. 84 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 667, par. 88.

[50] MN, vol. II, annexe 19.

[51] CR 2012/14, p. 14, par. 14 (Argüello).

[52] Exceptions préliminaires de la Colombie (EPC), vol. III ; CMC, vol. III.

«Islas de San Andrés (Colombia)»[53]. Selon l'agent, «it must be recalled that it was only until 1980 that Nicaragua denounced the 1928 Treaty. Up to that moment, Nicaragua only claimed sovereignty over the cays presently in dispute and not the islands of San Andrés, Providencia and Santa Catalina»[54]. Si cela était vrai, au lieu de mettre que les îles de Providencia et les îles de San Andrés — je souligne les deux pluriels — sont colombiennes, il aurait mieux valu pour le Nicaragua de mettre qu'il y avait des cayes à l'est qui étaient nicaraguayennes. Il n'en était rien, tout simplement, parce qu'en 1967 le Nicaragua ne revendiquait aucune caye. Ce n'est qu'après la publication du *Livre Blanc* en 1980 que, pour la première fois dans l'histoire, le Nicaragua procède à l'«annexion» cartographique de l'archipel de San Andrés en y incluant toutes les cayes, ainsi que les trois îles principales, même aujourd'hui.

32. Mesdames et Messieurs les juges, le silence du Nicaragua face à la cartographie colombienne est remarquable. En effet, dans sa requête, le demandeur se réfère à une carte officielle de la Colombie de 1995 «que le Nicaragua a dûment protestée»[55]. Pourquoi alors le Nicaragua n'a-t-il pas protesté contre les cartes de 1920, de 1931 et toutes les cartes postérieures montrant les sept cayes comme faisant partie de l'archipel colombien de San Andrés ?

33. Votre arrêt sur les exceptions préliminaires s'est déjà penché sur ces mêmes cartes à propos de la nature juridique de la ligne du 82e méridien. Vous avez déjà constaté que le Nicaragua n'a pas protesté contre ces cartes[56]. Maintenant, au stade du fond, il vous appartient, Mesdames et Messieurs les juges, de déterminer ce que ces cartes prouvent par rapport aux sept cayes lorsqu'elles décrivent l'archipel de San Andrés.

34. Pour conclure sur ce point, Monsieur le président, le matériel cartographique présent dans cette affaire a, pour reprendre votre analyse dans l'affaire *Burkina Faso/Mali*, une valeur de preuve concordante qui conforte une conclusion — ici, celle découlant de l'interprétation du traité

[53] CMC, vol. III, fig. 2.34, p. 67.

[54] CR 2014/14, p. 14, par. 15 (Argüello).

[55] Nicaragua, requête introductive d'instance du 6 décembre 2001, par. 4.

[56] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions preliminaries, arrêt, C.I.J. Recueil 2007 (II)*, p. 867, par. 113 et p. 868, par. 118.

de 1928-1930 — ou de caractère confirmatif de cette interprétation[57], à savoir que les sept cayes font partie de l'archipel de San Andrés.

H. La relation titres-effectivités

35. Mardi dernier, le conseil du Nicaragua s'est livré à une lecture partiale aussi bien de votre jurisprudence sur la relation titres-effectivités dans le contentieux territorial en général, que sur la situation concrète dans cette affaire. Quoi qu'il en soit, nous prenons tout d'abord acte de son affirmation : «Le Nicaragua n'a jamais prétendu se battre avec la Colombie sur le terrain des effectivités.»[58]

36. Le conseil du Nicaragua s'est trompé de cible en examinant le rôle des effectivités sur des *terrae nullius* ou sur leur impossibilité de déplacer un titre[59]. Ce n'est pas du tout la situation dans cette affaire. Par contre, il est certain que les effectivités peuvent confirmer un titre territorial, comme M[e] Bundy vous a montré la semaine dernière que c'est le cas présent eu égard aux effectivités colombiennes[60]. La Partie demanderesse a oublié de mentionner une autre possibilité envisagée par votre jurisprudence. Ce sont «des cas où le titre juridique n'est pas de nature à faire apparaître de façon précise l'étendue territoriale sur laquelle il porte. Les «effectivités» peuvent alors jouer un rôle essentiel pour indiquer comment le titre est interprété dans la pratique.» (*Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986,* p. 587, par. 63.)

37. Les deux Parties s'appuient sur l'interprétation du traité de 1928-1930 pour régler le différend pendant devant vous. Au fond, la question peut être tranchée en déterminant si les cayes tombent sous le coup de la définition «côte des Mosquitos» ou sous celle des «autres îles, îlots et cayes qui font partie de l'archipel de San Andrés»[61].

38. Le traité Molina-Gual de 1825 «est encore en vigueur»[62], dit le professeur Remiro Brotóns. Je constate que le Nicaragua ne l'a pas déclaré nul. Le traité de 1928-1930 est

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[57] *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 583, par. 56.

[58] CR 2012/14, p. 21, par. 6 (Remiro Brotóns).

[59] *Ibid.*, par. 4-7 (Remiro Brotóns).

[60] CR 2012/11, p. 50-63, par. 1-45 (Bundy).

[61] CR 2012/14, p. 19, par. 32 (Argüello).

[62] *Ibid.*, p. 24, par. 22 (Remiro Brotóns).

venu régler toutes les questions territoriales pendantes entre la Colombie et le Nicaragua, et le traité Molina-Gual n'a donc qu'un intérêt historique. Il ne serait de toute manière d'aucune utilité pour les revendications nicaraguayennes. Le décret royal de 1803 a tranché la question de l'*uti possidetis juris* en faveur de la Colombie. Contrairement à ce que le Nicaragua a affirmé mardi dernier[63], la Cour avait des raisons pour se prononcer sur ce décret royal dans son arrêt en l'affaire *Nicaragua c. Honduras*[64]. La Cour devait examiner laquelle des deux anciennes provinces de la capitainerie générale de Guatemala administrait les cayes objet du différend territorial. A cette fin, votre arrêt devait déterminer la période durant laquelle cette administration aurait pu s'établir. C'était donc dans ce contexte que votre Cour a conclu que la vice-royauté de Santa Fe obtint le contrôle administratif de la côte des Mosquitos en vertu du décret royal de 1803[65].

39. Compte tenu des positions des Parties, l'interprétation du traité de 1928-1930 suffit donc pour trancher le différend. Suivons malgré tout, et par hypothèse, le Nicaragua dans son exercice de recherche d'autres possibilités. A supposer même que ce traité ne suffise pas — *quod non* —, il faudrait alors se tourner vers l'*uti possidetis*. A en croire le conseil du Nicaragua, les cayes «n'ont été attribuées à aucune des entités territoriales de la Couronne»[66]. Nous ne le pensons pas et je vous renvoie à la partie pertinente de notre exposé de la semaine dernière[67], restée par ailleurs sans contestation. Mais poursuivons tout de même le raisonnement nicaraguayen. Même si ce que le Nicaragua affirme était vrai, nous serions alors dans une situation semblable à celle de l'affaire *Nicaragua c. Honduras*, dans laquelle, bien que les cayes aient été reconnues comme appartenant à l'Espagne, l'*uti possidetis juris* tout seul ne permettait pas d'établir le rattachement des cayes à une division administrative coloniale espagnole ou à l'autre[68]. C'est dans ce cas que votre arrêt s'est tourné vers les effectivités[69]. Alors, même dans cette hypothèse, les cayes seraient colombiennes

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[63] *Ibid.*, p. 28, par. 40 (Remiro Brotóns).

[64] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 709, par. 161.

[65] DC, p. 47, par. 2.29.

[66] CR 2012/8, p. 42, par. 47 (Remiro Brotóns).

[67] CR 2012/11, p. 32-33, par. 7-8 (Kohen).

[68] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 710-711, par. 167.

[69] *Ibid.*, p. 721-722, par. 208.

du fait des effectivités déployées depuis le XIX[e] siècle jusqu'à nos jours et l'absence totale d'effectivités du côté nicaraguayen.

40. La dernière analyse du Nicaragua relative aux effectivités colombiennes sur l'archipel en général et sur les cayes en particulier regorge en inexactitudes[70]. Ce serait très fastidieux de prendre chacun des documents auxquels s'est référé le conseil de la Partie adverse et de montrer la manière détournée comme il les a interprétés. Je me contenterai d'examiner l'un des documents invoqués, laissant à votre Cour le soin de comparer les affirmations du Nicaragua avec la réalité qui ressort de cette documentation.

41. Il s'agit de la note du préfet de Providencia adressée au secrétaire du gouvernement de Carthagène du 19 septembre 1890[71], mentionnée à deux reprises par le conseil du Nicaragua. La première fois, le professeur Remiro Brotóns avance que le préfet, «appelé à informer sur les activités menées à Roncador, il déclara qu'il ne pouvait pas s'étendre là-dessus à cause d'[un] manque total d'informations»[72]. En fait, le préfet de Providencia informa que les services de la province ne possédaient des archives organisées qu'à partir de 1870 et qu'il a fait des efforts pour rassembler de la documentation. Ce qu'il indique n'est pas, malgré tout, mince ou négligeable. Par exemple, il indique que les habitants de ces îles se rendent et s'installent à Roncador, chaque année, depuis le mois de juin pour la pêche de l'écaille de tortue ; Roncador, un rocher ? Il inclut aussi des échanges de lettres datées de 1875 relatives à la lutte contre l'exploitation illicite du *guano* ou à des contrats passés avec des particuliers, ainsi que quatre témoignages sous serment de personnes de nationalités différentes et ayant déployé des activités sur Roncador et dans la région, attestant la souveraineté colombienne de la caye. La deuxième fois que le conseil cite ce document, il affirme que c'est la première mention dans un document de la Colombie que Roncador fait partie de l'archipel de San Andrés[73]. C'est faux. Pour preuve, je mentionnerai seulement à titre d'exemple la loi n[o] 25 du 24 avril 1871, dont l'article premier autorise le pouvoir exécutif à ordonner la concession des droits portant sur l'extraction du *guano* et la collecte de noix de coco sur les îles

[70] CR 2012/14, p. 22-24, par. 9-19 (Remiro Brotóns).

[71] CMC, vol. II-A, annexe 82.

[72] CR 2012/14, p. 22, par. 11 (Remiro Brotóns).

[73] *Ibid.*, p. 25, par. 25.

d'Alburquerque, Roncador et Quitasueño, «sur le territoire de San Andrés et de San Luis de Providencia» *[traduction du Greffe]*[74]. Le professeur Pellet s'insurge contre ces effectivités qu'il appelle «de papier» et fait semblant de croire que ces concessions se limitaient à Quitasueño[75], où il n'y a certainement pas de cocotiers — pour cela il fallait aller à Alburquerque — mais du *guano*, et ceci jusqu'à aujourd'hui, comme les photos prises lors des rapports scientifiques à Quitasueño l'attestent[76].

42. Mesdames et Messieurs de la Cour, des concessions octroyées par l'Etat ou la législation sont considérées par votre Cour comme des actes à titre de souverain[77]. Que la critique provienne du Nicaragua est d'autant plus étonnant, dans la mesure où il ne peut même pas présenter une seule effectivité, même celle qu'il appelle fâcheusement «de papier».

I. Remarques finales

43. Mesdames et Messieurs de la Cour, la position de la Colombie quant à l'appartenance des cayes à l'archipel de San Andrés et à sa souveraineté sur leur ensemble est bien documentée. Par exemple, la déclaration du ministre Holguín au moment où le Nicaragua commença à manifester son appétit insulaire revendiquant et occupant les îles Mangles en 1890, et ensuite quand il demanda en 1913 tout l'archipel. Par exemple, la note du ministre colombien à Managua, Manuel Esguerra, négociateur et signataire du traité de 1928. Ou ultérieurement à l'entrée en vigueur du traité, à travers la cartographie, l'exercice public et pacifique de sa souveraineté et sa reconnaissance internationale. Pour sa part, la position du Nicaragua de non-revendication des cayes et de reconnaissance de la souveraineté colombienne est elle aussi clairement établie :

— par son silence jusqu'en 1913 ;

— par le traité de 1928 ;

— par l'inclusion — à sa demande — du 82^{e} méridien dans le protocole de 1928 ;

— par l'application du traité de 1928-1930 durant des décennies ; et

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[74] CMC, vol. II-A, annexe 73.

[75] CR 2012/15, p. 40, par. 14 (Pellet).

[76] DC, vol. II, appendice 1, p. 23.

[77] *Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n^{o} 53,* p. 48 ; *Minquiers et Ecréhous (France/Royaume-Uni), arrêt, C.I.J. Recueil 1953,* p. 65 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 683-686, par. 142-149.

— par ses revendications tardives de souveraineté qui ne peuvent rien changer à une situation acceptée durant si longtemps :

  — sur Roncador, Quitasueño et Serrana en 1972,

  — sur les quatre autres cayes, mais encore comme étant «circonvoisins» des îles de San Andrés et Providencia en 1980,

  — et sur ses revendications individuelles pour ce qui est de Roncador, Quitasueño, Serrana et Serranilla dans sa requête en 2001, et

  — pour ce qui est d'Alburquerque, Est-Sud-Est et Bajo Nuevo dans son mémoire en 2003.

44. Mesdames et Messieurs les juges, en concluant mon exposé, je peux me servir du croquis présenté par le demandeur, et affirmer que, après la conclusion du traité de 1928-1930, les seules composantes de l'archipel qui méritent d'être biffées sont les îles Mangles. En ajoutant les cayes d'Alburquerque et Est-Sud-Est — oubliées dans le graphique nicaraguayen — et en donnant au 82e méridien sa vraie étendue sans amputations imaginaires, on retrouve l'archipel de San Andrés tel qu'il est, sous souveraineté colombienne, conformément au traité qui régit les relations entre les deux pays et comme il est internationalement reconnu.

45. Pour compléter le tableau, j'ajouterai le périmètre établi par le Nicaragua en sa note adressée au président Loubet montrant l'étendue véritable du domaine insulaire nicaraguayen. L'explication donnée par le demandeur mardi dernier — la première depuis que cette instance a été introduite — ne résiste pas à la moindre analyse : il s'agirait des «affirmations erronées d'un fonctionnaire» qui, dans le souci de «sauver les Mangles», aurait oublié les mangroves, selon la manière très bizarre du conseil de se référer aux cayes[78]. Sans accepter cette interprétation fantaisiste, qui transforme des notes officielles d'un ambassadeur adressées à l'Etat où il est accrédité en documents sans aucune valeur, je constate tout simplement que cette prétendue erreur n'a jamais été rectifiée. Affirmer qu'il s'agit d'une erreur plus d'un siècle après, me semble-t-il, Mesdames et Messieurs les juges, que cela ne soit quelque peu tardif pour emporter votre intime conviction.

46. Vous remerciant de votre attention, je vous prie, Monsieur le président, de donner la parole à Me Rodman Bundy. Probablement après la pause.

[78] CR 2012/14, p. 29, par. 42 (Remiro Brotóns).

Le PRESIDENT : Merci, M. le professeur. Je déclare une pause de quinze minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 15 à 11 h 35.

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

Mr. BUNDY: Thank you, Mr. President.

3. NICARAGUA'S NEW CONTINENTAL SHELF CLAIM

Introduction

1. Mr. President, Members of the Court, in this presentation, I shall address Nicaragua's new continental shelf claim. And in so doing, I shall respond to arguments that were made by Nicaragua's representatives on Tuesday.

2. The first issue I shall deal with is the inadmissibility of Nicaragua's new claim. That was not a subject that Nicaragua addressed in the first round of its oral argument, although it had been briefed by Colombia in its Rejoinder. In was only at the end of Tuesday that Professor Pellet discussed the question. I shall show that counsel's attempts to explain why Nicaragua's claim is admissible fall well short of the conditions that your Court has consistently held must be satisfied in order for a new claim introduced at a late stage of the proceedings to be admissible.

3. Following that, I shall take up the arguments advanced by Professor Lowe that Nicaragua possesses outer continental shelf entitlements beyond 200 nautical miles from its coast that should be delimited with Colombia's continental shelf. In the course of that discussion, I will also respond to the technical presentation made by Mr. Cleverly, as well as to the question posed by Judge Bennouna.

4. As a preliminary point, I would note that Nicaragua has once again changed its submissions as to what it wants the Court to do: not once in fact, but twice in the course of Tuesday afternoon. I will come back to that. What is clear is that Nicaragua's final submission with respect to what it asks the Court to decide regarding the delimitation of now what is only a continental shelf boundary is very different from what it requested in the Reply, which in turn was

radically different from what Nicaragua had submitted in its Memorial and what it said the subject-matter of the dispute was in its Application.

5. Now that is just one more example of a series of claims advanced by the other side that are literally all over the map. The claims keep changing; the legal and factual bases of those claims are wholly inconsistent with each other; the goal posts keep moving. It is like a lottery. But at the end of the day, Nicaragua still has not found the winning ticket.

Nicaragua's new claim is inadmissible

6. Let me turn first to the question of admissibility.

7. In his intervention on Tuesday, Professor Pellet insisted that Nicaragua had not modified the subject of its request, and that its new continental shelf claim, raised only in the Reply, in no way transformed the dispute into one that was different in character from that which it had requested the Court to decide in its Application[79]. In my respectful submission, those contentions simply are not tenable.

8. My colleague started by saying that Nicaragua had no quarrel with the jurisprudence that I canvassed last week. He cited in particular the *Diallo* case where the Court had clearly said that additional claims formulated in the course of the proceedings are inadmissible if they would result in transforming the subject of the dispute originally brought before the Court under the terms of the Application. As the Court stated in *Diallo*, "*A fortiori*, a claim formulated subsequent to the Memorial . . . cannot transform the subject of the dispute as delimited by the terms of the Application"[80].

9. In considering the subject of the dispute that Nicaragua brought before the Court in its Application, Professor Pellet felt that I had focused too much on paragraph 8 of that Application. He thought that paragraph was too long to read in its entirety, and he argued instead that it should be interpreted in the light of paragraph 9 of the Application, where Nicaragua said that the principal purpose of the Application was to obtain declarations concerning title and the determination of

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[79]CR 2012/15, p. 36, para. 8 (Pellet).

[80]See CR 2012/15, p. 35, para. 5 (Pellet), citing *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo)*, Judgment, I.C.J. Reports 2010, p. 18, para. 39; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108.

maritime boundaries[81]. According to Professor Pellet, the expression "to determine the course of the single maritime boundary", appearing in paragraph 8 of the Application, was not the alpha and omega of Nicaragua's request[82].

10. In my respectful submission, Professor Pellet has matters both backwards and wrong. Paragraph 8 of the Application should not be read in the light of paragraph 9; it is paragraph 9 which should be re-read — or read in the light of paragraph 8. Let me explain.

11. Because Professor Pellet thought that paragraph 8 was too long to read, he conveniently left out the fact that that paragraph contained Nicaragua's formal request to the Court. It is there that Nicaragua stated the following — you can see it on the screen:

> "Accordingly, the Court is asked to adjudge and declare [those were words that Professor Pellet did not mention — the Court is asked to adjudge and declare]:
>
> . . . . . .
>
> *Second*, in the light of the determination 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 determination of a single maritime boundary."[83]

12. Thus, when paragraph 9 referred to the purpose of the Application being the determination of maritime boundaries, those boundaries clearly referred to the determination of a single maritime boundary, which in turn was to be determined in accordance with the legal principles relevant to single maritime boundaries set out in Nicaragua's formal request, not just any maritime boundary, and certainly not solely a continental shelf boundary.

13. If there was any doubt on that point, Nicaragua's Memorial made it abundantly clear that the subject of the dispute was the determination of a single maritime boundary in accordance with the legal principles applicable to *that* régime, not the régime of the geological continental shelf.

14. In paragraph 3.3 of the Memorial, Nicaragua repeated the second part of paragraph 8 of its Application — that you just saw on the screen — not paragraph 9 — and it did so under the rubric of "The Delimitation Requested and the Applicable Law". In paragraph 3.37 of that

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[81]CR 2012/15, p. 35, para. 6 (Pellet).

[82]*Ibid.*, p. 36, para. 8 (Pellet).

[83]*Application Instituting Proceedings, Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, p. 9.

pleading, Nicaragua emphasized that what it said was the "central question of delimitation" was "to determine the course of the single maritime boundary" — the single maritime boundary between the continental shelf and exclusive economic zone appertaining to the Parties. And in its Submissions in the Memorial, Nicaragua again repeated its formal request for the Court to delimit a single maritime boundary not just maritime boundaries in general.

15. It is not surprising, therefore, that in its Judgment on the Preliminary Objections, the Court noted that Nicaragua was asserting that — and I quote from the Judgment — "the subject-matter of the dispute is the determination of a single maritime boundary" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 847, para. 35).

16. Professor Pellet now says that you have to distinguish between the *subject* of the dispute introduced by Nicaragua in its Application and the *means* by which the Court is able to settle that dispute[84].

17. I have already shown that the subject-matter of the dispute introduced in the Application was not the delimitation of maritime boundaries in a general sense; or, certainly not the delimitation of solely a continental shelf boundary — it was specifically the delimitation of a single maritime boundary. But notwithstanding this, my colleague maintains that the task of the Court in deciding that question can be accomplished by tracing one or more lines as a "means" of settling the dispute between the Parties[85]. The implication of that argument is that Nicaragua's original request to the Court to decide the course of a single maritime boundary can be transformed by the use of a line or lines into delimiting only the continental shelves of the Parties. According to Professor Pellet, that would simply constitute a means of effectuating the delimitation, not a change in the subject-matter of the dispute.

18. That argument gains no traction whatsoever, and it does not magically transform Nicaragua's new continental shelf claim into an admissible one. Yes, Nicaragua has changed the means by which it asks the Court to decide the delimitation line; but, more importantly, it has also changed the very subject-matter of the dispute.

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[84]CR 2012/15, p. 36, para. 8 and p. 37, para. 9 (Pellet).

[85]*Ibid*., p. 37, para. 9.

19. In the Application, the *subject* of the dispute was the delimitation of a single maritime boundary. The *means* for carrying out that delimitation were explained in Nicaragua's Memorial where Nicaragua argued that the Court should adopt a mainland-to-mainland single maritime boundary median line. In Nicaragua's Reply, in contrast, and its final submissions this week, the *subject* of the dispute has become the delimitation of the continental shelf — including areas situated more than 200 nautical miles from its coast — which is a very different subject-matter. The *means* that Nicaragua says the Court should adopt for delimiting the continental shelf have actually varied: they involve either applying an equal division of the Parties' geologic margins — that was Nicaragua's formal position in its Reply — or dividing in equal parts the Parties' overlapping continental shelf entitlements — that is what is now said in Nicaragua's final submissions read at the end of Tuesday.

20. Yes, the means are clearly different. But the crucial point is that the subject-matter of the delimitation that Nicaragua now asks the Court to decide is fundamentally different. It is that change of subject-matter that renders Nicaragua's new claim inadmissible under your Court's consistent line of jurisprudence. Delimiting continental shelves, particularly when they involve a claim to areas situated more than 200 nautical miles from the coast of one of the Parties, cannot possibly be deemed to entail the same subject-matter as the delimitation of a single maritime boundary.

21. Professor Pellet seemed to suggest that the reason why Nicaragua changed its position in its Reply was because of the Court's Judgment, in 2007, on the preliminary objections[86]. But he conspicuously failed to provide the slightest explanation why that Judgment could justify transforming the subject-matter of the case from the delimitation of a single maritime boundary into a claim for outer continental shelf rights and a delimitation solely of continental margins. There is no justification. Nicaragua knows this full well. In its Reply, it frankly admitted that the Court's Judgment "did not directly affect Nicaragua's request for a maritime delimitation"[87]. And that is obviously right. The Judgment did not affect the subject-matter of the maritime delimitation dispute that Nicaragua had introduced. It had no bearing; it simply said the Court had jurisdiction

[86]CR 2012/15, p. 38, para. 11 (Pellet).

[87]RN, p. 12, para. 25.

and Nicaragua admitted this in its Reply. But now Professor Pellet tries to explain to the Court that Nicaragua changed its position because of the Judgment on preliminary objections. That argument does not hold water.

22. And there is a further point. As is clear from paragraph 8 of the Application, Nicaragua also said that the delimitation of the single maritime boundary should be carried out "in accordance with equitable principles and relevant circumstances recognized by general international law as *applicable to such a delimitation of a single maritime boundary*"[88].

23. And that was, again, emphasized at several places in Nicaragua's Memorial. For example, the Memorial stated in really quite categorical terms that: "The applicable law consists of principles of general international law relating to the delimitation of a single maritime boundary, and this is the type of delimitation requested of the Court in the Application."[89]

24. On Tuesday, Professor Pellet avoided addressing the question whether a delimitation of continental shelves beyond 200 nautical miles of the coast of one of the Parties can be said to be based on the same legal principles that Nicaragua maintained were applicable to the delimitation of a single maritime boundary. But the Court made it clear in the *Diallo* case that an additional claim is not "implicit in the Application", and that it does not arise directly out of the question which is the subject-matter of the Application, if the legal bases of the new claim are different from those underlying the original claim. It was precisely because the Court recognized that what it termed "the applicable international rules" associated with the new claim in *Diallo*, that those rules were different from those on which the original claim was based, it was precisely because of that reason that the Court held that the new claim could not be considered to be implicit in the original claim, and that the new claim was inadmissible[90].

25. So, what is the position in this case? Are the legal bases of Nicaragua's new continental shelf claim different from the legal bases of its original single maritime boundary claim? In a word, the answer is: yes.

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[88]Nicaragua's Application, para. 8.

[89]MN, para. 3.49.

[90]*Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p. 19, para. 43.

26. In both its Application and in its Memorial, Nicaragua was at pains to emphasize that factors such as geography and security were key to the delimitation of a single maritime boundary, and that geological and geomorphological factors had absolutely no relevance, either for establishing title or for delimitation. Recall the quote I put from Nicaragua's Memorial on the screen last week: 80 pages on maritime delimitation; one sentence on the relevance of geology and geomorphology. What did that sentence say? Those factors were completely irrelevant. And, also, another difference, in 2007, my colleague said that the legal rules that this Court will certainly wish to apply, as it systematically does in every maritime delimitation, involve a two-step process — not Mr. Reichler's three-step process — a two-step process. First, trace the provisional equidistance line; and second, take into account consideration of any special circumstances which could be of a nature to warrant an adjustment of that line[91].

27. As I explained in my first round presentation, the legal principles that Nicaragua now says are applicable are utterly alien to the principles that it said applied to the delimitation of a single maritime boundary. The new claim depends on whether Nicaragua has established any continental shelf entitlements beyond 200 nautical miles under Article 76 of the Convention — principles that nowhere appear in Nicaragua's earlier submissions; the new claim depends on the identification of the limits of each Party's purported continental shelf entitlements — which now rely on precisely what Nicaragua previously said was wholly irrelevant, geology and geomorphology; and the new claim depends on an abandonment of the equidistance/relevant circumstances rule — which Nicaragua had earlier argued was the governing rule.

28. It follows that not only has the subject-matter of the dispute been transformed by Nicaragua in its Reply, the applicable legal principles have too.

29. I noted in my first round presentation that the Court has itself stressed that the provisions of Article 40 of the Statute and Article 38 of the Rules of Court are essential from the point of view of legal security and the good administration of justice[92]. Apart from the considerations I have just discussed, in this connection there is one final point that deserves mention.

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

[92]*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69; *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p. 18, para. 38.

30. As the Court pointed out in its Judgment in the *Diallo* case, when a new claim is only introduced at the Reply stage, the Respondent is no longer able to assert preliminary objections to it since, under Article 79 of the Rules of Court, preliminary objections must be filed within the time-limit for the delivery of the Counter-Memorial or, since the 1 February 2001 change in the Rules, within three months following the delivery of the Memorial. That is the time-limit for filing preliminary objections. And in *Diallo* the Court called this "a fundamental procedural right" — and it went on to say: "This right is infringed if the Applicant asserts a substantially new claim after the Counter-Memorial, which is to say, at a time when the Respondent can still raise objections to admissibility and jurisdiction, but not preliminary objections." (*Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p. 19, para. 44.)

31. Colombia's rights in this respect have been infringed by virtue of Nicaragua's new claim. We will never know what would have been the result if Colombia had been confronted with outer continental shelf claims in the Application or in the Memorial, and what the outcome of any preliminary objections on this point would have been, because Colombia has lost that opportunity. What we do know, however, is that, in the same year that the Court decided on the Preliminary Objections in this case — objections that Colombia was able to raise — the Court also stated in its Judgment in the *Nicaragua* v. *Honduras* case that in no case may the delimitation line extend more than 200 nautical miles from the Parties' baselines, because any claim to continental shelf rights beyond 200 nautical miles must be in accordance with Article 76 of the Convention and reviewed by the Commission on the Limits of the Continental Shelf[93].

32. Mr. President, Members of the Court, Nicaragua's new claim, its continental shelf claim, goes far beyond the limits of the claim and the subject-matter set out in the Application. It has transformed the subject-matter of the dispute and its legal basis into another dispute which is fundamentally different in character; it is a claim that was not in any way implicit in the Application; and it does not arise directly out of the question that was the subject-matter of the Application. As a consequence Nicaragua's continental shelf claim is inadmissible.

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[93] *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.

Nicaragua has not established any continental shelf entitlements beyond 200 nautical miles

33. I turn now to the arguments raised by Nicaragua concerning its alleged entitlement to a continental shelf extending well beyond 200 nautical miles from its coast, and to its new submission that surfaced at the end of Tuesday afternoon.

34. Professor Lowe began his rebuttal by positing four points of principle which he said he was confident Colombia would not question[94]. I am afraid I will disappoint my good friend, although I am sure this is not the first time — and it probably will not be the last.

35. Two of Professor Lowe's principles were indeed uncontroversial: the continental shelf appertains to the coastal State by operation of law, *ipso facto* and *ab initio*; and the goal of maritime delimitation is to achieve an equitable result. But, on those two points I would also add that *ipso facto* continental shelf rights also apply to island — just like any other mainland — and, with respect to achieving an equitable result, the Court has made it clear that that is accomplished by applying the equidistance/relevant circumstances rule. This is a matter that Professor Crawford will revert to later.

36. Where Professor Lowe and I part ways concerns the two other principles he referred to.

37. First, Professor Lowe said that it is common ground that Article 76 of the Law of the Sea Convention reflects customary international law and is applicable in this case[95]; and he referred to page 306 of Colombia's Counter-Memorial which be seemed to think confirmed the point.

38. At page 306 of the Counter-Memorial, Colombia did not say that it considered Article 76 to reflect customary international law. What Colombia said was that the provisions of the Convention dealing with baselines, and Articles 74 and 83 dealing with delimitation, do reflect customary international law. No mention was made of Article 76. To the extent that Colombia referred to a State's entitlement to maritime areas, it was not referring to outer continental shelf limits which have to be established in accordance with paragraphs 4 to 7 of Article 76. At that point in the proceedings, when Colombia submitted its Counter-Memorial, Nicaragua's outer continental shelf claim had not yet made an appearance. The entitlements that Colombia was referring to were based on the well-known 200-mile distance formula for the exclusive economic

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[94]CR 2012/15, pp. 17-18, paras. 3-7 (Lowe).

[95]*Ibid.*, p. 17, para. 5 (Lowe).

zone and the continental shelf, the 12-mile territorial sea entitlements, and the rights to a 24-mile contiguous zone. Those were the issues that were being briefed by the Parties at that stage.

39. While Colombia accepts that paragraph 1 of Article 76 reflects customary international law, Nicaragua has failed to demonstrate that paragraphs 4 to 7 of Article 76 have the same status. And, indeed, Dr. Oude Elferink in his writings has stated that the detailed provisions of Article 76 can probably not be considered to be customary international law[96].

Answer to Judge Bennouna's Question

40. Now, at this point, it is appropriate, if I may, to respond to Judge Bennouna's question. At the end of Friday's session, Judge Bennouna asked whether the legal régime of the continental shelf for the portion located within the 200-nautical-mile limit is different from that for the portion located beyond that limit. Colombia's response is the following.

41. While the legal régime of the continental shelf within and beyond the 200-mile limit has a number of elements in common, the two legal régimes are different.

42. Under Article 76, paragraph 1, of the Convention, the continental shelf of a coastal State extends to the outer edge of the continental margin, or to a distance of 200 miles from the coastal State's baselines that are used for measuring the breadth of its territorial sea. And under this paragraph, there is one continental shelf which may or may not extend beyond 200 nautical miles, depending on the circumstances.

43. Under Article 77 of the Convention the coastal State exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources.

44. These provisions apply both to the continental shelf within 200 miles and beyond 200 nautical miles. There is a difference. Under Article 82 of the Convention, the coastal State is obliged to make payments or contributions in kind through the International Seabed Authority with respect to the exploitation of the non-living resources of the continental shelf beyond 200 nm. That is not the case within 200 nm.

45. The provisions of Article 78 of the Convention, which stipulate that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of

[96]A. Oude Elferink: "The outer limits of the continental shelf beyond 200 nautical miles under the framework of Article 76 of UNCLOS"; http://www.sof.or.jp/en/topics/pdf/aba.pdf, p. 10.

the air space above these waters, and that the exercise of these rights must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in the Convention, also apply within and beyond 200 nm.

46. But once again, there is a difference. Under Article 246, paragraph 1, of the Convention, coastal States, in the exercise of their jurisdiction, have the right to regulate marine scientific research on their continental shelf, in accordance with the relevant provisions of the Convention. Under paragraph 5 *(a)* of Article 246, coastal States may, in their discretion, withhold their consent to the conduct of a marine scientific research project of another State on their continental shelf if, *inter alia*, that project is of direct significance for the exploration and exploitation of natural resources. Within 200 nm the State has the discretion to withhold its consent. However, under paragraph 6 of Article 246, coastal States may not exercise that discretion to withhold consent with respect to projects undertaken on the continental shelf beyond 200 nm from their baselines, outside of specific areas which the coastal States may designate as areas in which exploitation or detailed exploratory operations are occurring or are likely, or will occur within a reasonable period of time.

47. These provisions show that, at least as a matter of conventional law, there is a difference between the legal régime of the continental shelf within the 200-mile limit and beyond that limit.

48. Most importantly, however, there is a crucial difference relating to how a coastal State establishes the limits of its continental shelf within which it may exercise sovereign rights depending on whether the areas are within 200 nm of the baseline or beyond that limit.

49. Up to 200 nm, the limits of the continental shelf of a coastal State are based on the distance formula. Geology and geomorphology have no role to play in determining these limits. This was emphasized by your Court in the 1985 Judgment in the *Libya/Malta* case[97]. Clearly correct. Beyond 200 miles, however, the basis of a State's entitlement to the continental shelf out to the outer edge of the continental margin is different, and it depends on meeting the conditions set out in paragraphs 4 to 7 of Article 76, and satisfying the requirements in paragraph 8 of Article 76, if that State is a party to the Convention.

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[97] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34 and p. 35, para. 39.

50. It is for these reasons that Colombia says that the legal régime of the continental shelf for the portion within the 200-mile limit, while sharing a number of common elements with the régime beyond 200 miles, is different from the legal régime for the portion located beyond the 200-mile limit.

Geologic and geomorphologic deficiencies in Nicaragua's case

51. Now, let me turn to Professor Lowe's other "key principle" that Colombia does not agree with.

52. Professor Lowe noted that, while Colombia says that Nicaragua has not established any outer continental shelf entitlements or substantiated the precise limits of its margin, Colombia does not deny that as a matter of fact — as a matter of geology and geomorphology — that the continental margin extends north-east from the continental coast of Nicaragua for around 500 miles to an area where it is overlapped with Colombia's 200-mile zone[98].

53. I can assure you, Mr. President, Members of the Court, Colombia does not accept this proposition. It may be instructive to start with and to recall how Nicaragua described the Nicaraguan Rise in its case against Honduras, to place the matter in perspective. After all, the Nicaraguan Rise is the centrepiece of Nicaragua's geologic and geomorphologic claim in this case. The figure that appears on the screen shows how Nicaragua used to depict that Rise in its dispute with Honduras.

54. In its written pleadings in the *Honduras* case, Nicaragua first stated the following:

> "The Nicaraguan Rise is a wide triangular ridge that extends from the continental landmass triangle formed by Honduras and Nicaragua, via the island of Jamaica, to the island of Hispaniola (Dominican Republic and Haiti)."[99]

55. Next, Nicaragua said the following:

> "The continental shelf up to the 200 metre isobath, though not so generous in the south, widens remarkably towards the north, forming an ample submerged territory covered by a tropical sea of very little depth."[100]

56. And then Nicaragua concluded:

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[98]CR 2012/15, pp. 17-18, para. 6 (Lowe).

[99]Nicaragua's Memorial in the *Honduras* case, p. 6, para. 5.

[100]*Ibid*., p. 9, para. 12.

> "Taking as its external limits the 200 metre isobath, the continental shelf fronting Nicaragua is widest in the region of Cape Gracias a Dios whence it continues along the Nicaraguan Rise in a north easterly direction."[101]

57. Now, in the *Honduras* case, Nicaragua argued that one of the reasons why the bisector method would be equitable is because it would divide the Nicaraguan Rise roughly in half between Nicaragua and Honduras. Having achieved its purpose in that case — a case in which Nicaragua made no outer continental shelf claim, rather Nicaragua stressed that delimitation of a single maritime boundary was the general rule[102] — having gotten what it wanted, a division of the Rise in the *Honduras* case, Nicaragua is now not satisfied. It wants the continental shelf based on the Rise to consume a huge area lying further south, well within 200 nm of Colombia's islands and its mainland coast. Yes, Mr. President, Members of the Court, we do contest the proposition that Nicaragua's new version of geology and geomorphology establishes a continental margin extending far across the sea towards Colombia's mainland coast. Despite the efforts of Dr. Cleverly and Professor Lowe, that proposition has not been demonstrated.

58. In his second round presentation, Dr. Cleverly tried to show that Nicaragua's calculation of the outer edge of its continental margin was reliable — in fact, reliable according to Dr. Cleverly — up to plus or minus 100 m[103]. That is simply not the case, and Nicaragua certainly does not have the backing of the Commission on the Limits of the Continental Shelf to support its assertions.

59. Dr. Cleverly argues that Colombia cannot question the fact that Nicaragua's continental shelf, defined in accordance with Article 76, overlaps with Colombia's mainland 200-mile zone[104]. But Nicaragua has not defined the outer limits of the margin in accordance with the requirements of Article 76. It has not even made a full submission to the Commission, let alone establish the outer limit on the basis of the Commission's recommendations which only then become final and binding and opposable to third States, as the ITLOS Tribunal clearly stated in the *Bangladesh/Myanmar* case. I realize that Professor Lowe considered that this "final and binding" language was *res inter*

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[101] Nicaragua's Memorial in the *Honduras* case, p. 9, para. 13.

[102] *Ibid.*, p. 94, para. 15.

[103] CR 2012/15, p. 16, para. 25 (Cleverly).

[104] *Ibid.*, p. 10, para. 2 (Cleverly).

alios acta with respect to Colombia[105]. But if Nicaragua's outer edge of the margin is not opposable to States that are party to the Convention, how can it be opposable to States that are not parties to the Convention? That has not been explained.

60. Professor Lowe then argued that Nicaragua has in any event fulfilled its obligations under Article 76 by filing preliminary information; and it did so in time. But preliminary information, as we have said, is not even considered by the Commission and it in no way establishes a State's entitlement up to the outer edge of the margin.

61. Dr. Cleverly then argued that the reasons why some of the data contained in its preliminary information would not satisfy the Commission have nothing to do with their substance or accuracy; they only lack some of what he termed the "formal elements" the Commission requires[106]. And with the greatest respect, that assertion is badly misleading. The Commission requires detailed data in compliance with its Guidelines. It is not a matter of formalities; it is a matter of substance. None of Nicaragua's foot-of-slope points are supported by the requisite data. You either have the required data or you do not and Nicaragua does not.

62. Dr. Cleverly says that the Commission requires what he called data about data, or "metadata"[107]. That is not a term that can be found anywhere in the Commission's Guidelines and it is a misreading of the submission process. The Commission requires data that supports the claim. The required content of a submission is set out in Section 9.1.3 of the Guidelines, and detailed further in Sections 4 and 5. So-called metadata is not acceptable. Foot-of-slope point 1 is, by Nicaragua's own admission, not suitable. Foot-of-slope point 5 is based on so-called "evidence to the contrary", which is not described or substantiated and has sample profile points up to 20 km apart, which is insufficient for purposes of constructing a proper profile, let alone analysing it with a sophisticated suite of software. Those deficiencies were not mentioned by my good friend Dr. Cleverly. Nor are the other three foot-of-slope points supported by data that would be acceptable to the Commission.

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[105]CR 2012/15, p. 19, para. 13 (Lowe).

[106]*Ibid.*, p. 11, para. 4 (Cleverly).

[107]*Ibid.*, para. 5 (Cleverly).

63. The same shortcomings undermine Dr. Cleverly's bathymetric data. Once again, the Commission's Guidelines speak of a "full technical description of the bathymetric database". That has not been provided by Nicaragua. Gridded data is not admissible under the Commission's Guidelines.

64. Now, I realize that Dr. Cleverly tried to impress upon us that a good deal of information had been provided, such as the details of the ship, the date and time, the recording equipment and velocity of sound used[108]. But the one thing that is missing — the most important thing — is the data. Moreover, Nicaragua — to calculate the 2,500-metre isobath for purposes of constructing the constraint line [tab 9] — first of all relies on gridded information which would be considered inadmissible by the Commission, and it relies on simply one track-line — this was the red line that Dr. Cleverly showed you on one of these sketches, that also crosses so far to the north that it cannot be used for calculating the constraint line throughout the entire course of Nicaragua's claim to the south; but that is exactly what Nicaragua tries to do.

65. Mr. President, Members of the Court, the allegation by our colleagues that they have calculated the outer edge of the margin to an accuracy of a few hundred metres is pure fantasy.

The irrelevance of the outer margin in Nicaragua's new submission

66. But all of this now is beside the point in the light of the change of position in Nicaragua's final submissions. Let me explain this latest incarnation of Nicaragua's claims.

67. In its Reply, we know that Nicaragua abandoned its mainland-to-mainland single maritime boundary claim in favour of a claim based on an equal division of what Nicaragua said was the geologic and geomorphologic edge of Colombia's continental margin with the geological and geomorphological outer edge of what it said was Nicaragua's margin. Nicaragua's submission in the Reply — it is No. 3 — set out the specific co-ordinates — they are listed there — of what this equal division line was[109]. That was the line that Nicaragua formally asked your Court to endorse.

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[108]CR 2012/15, p. 14, para. 15 (Cleverly).

[109]RN, pp. 239-240, Submission I (3).

68. And now Nicaragua has abandoned that claim as well. With respect to Colombia's geologic margin, Dr. Cleverly did not even try to defend Nicaragua's position advanced in the Reply. Rather, he admitted, "Nicaragua has not carried out a precise analysis of Colombia's continental margin." And he added, "that is not our role"[110]. Now, that, Mr. President, is a complete *volte face*. The calculation of the edge of Colombia's margin was precisely what Nicaragua purported to do in its Reply. It was one part — one half — of the equation for the co-ordinates of what was then Nicaragua's continental shelf claim line. Now, Nicaragua's slides, that they showed earlier this week, show a 200-nautical mile entitlement from Colombia's mainland, not any line depicting a so-called geological margin of Colombia. We have one change there: Colombia's margin has disappeared. Of course, at the same time, Colombia's 200-nautical mile entitlements from its islands are also conveniently ignored. That is the first change in Nicaragua's position. Colombia's margin has now become irrelevant. It was the centrepiece of their formal claim in the Reply, now it is irrelevant. Of course, it always should have been irrelevant.

69. Second, Professor Lowe asserted, not once but three times, that Nicaragua was not asking your Court to determine and validate the outer limits of Nicaragua's purported continental shelf beyond 200 nautical miles either[111]. But, once again, that is exactly what Nicaragua was asking you to do in its Reply, where the outer edge of Nicaragua's margin was the other half of the equation for Nicaragua's division of margins claim. What is more, Professor Lowe then proceeded to completely contradict himself because, a little later in his pleading, he said that you should divide the overlapping continental shelves in two, and that the median line for doing so is measured so that it is equally distant from the *outer limit of Nicaragua's continental shelf* and Colombia's 200-mile limit[112]. So, he is still relying on the outer edge of the shelf.

70. Now, if all of this leaves some of the Members of the Court confused, I can assure you that you are not alone. Obviously, Nicaragua realizes that its outer edge of the margin claim is unsustainable, notwithstanding the brave efforts of Dr. Cleverly. So that claim is abandoned too.

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[110]CR 2012/15, p. 16, para. 22 (Cleverly).

[111]*Ibid.*, p. 21, para. 24 and p. 22, para. 27 (Lowe).

[112]*Ibid.*, p. 29, para. 70 (Lowe).

71. And how has Nicaragua accomplished this feat? By changing its submissions once again.

72. Here is Nicaragua's new submission, read at the end of Tuesday afternoon:

> "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."

73. So, no more outer edge of Nicaragua's or Colombia's continental margin; no more co-ordinates of Nicaragua's claim line that appeared in the Reply. Instead, Nicaragua is essentially telling the Members of this Court — figure it out for yourselves. And, in addition, the proposition from my colleague was, if you cannot come up with a line, wait for the Commission to do its work — notwithstanding the fact that Nicaragua has not even made a full submission to the Commission that would be considered in any event. Apart from being inadmissible because this new submission still relates to the new continental shelf claim, Nicaragua's request is inappropriate, unsustainable and would not settle the dispute.

74. Now, that being said, abandoning the outer edge of the continental margin does not solve Nicaragua's problems. Professor Lowe argued that the question of the existence of a continental shelf right should not be conflated with the question of procedural obligations consequent upon its exercise[113], and that it is not the line of the outer edge of the margin that generates entitlement to the continental margin[114].

75. The essence of the argument seems to be that Nicaragua has a continental shelf entitlement beyond 200 nm even if the outer edge of the margin has not been established. But that is not what Article 76 says.

76. Paragraph 1 of Article 76 provides that the continental shelf of the coastal State extends to the outer edge of the margin *or* to 200 miles. There is no part-way alternative. In other words, the Convention does not say the continental shelf of a coastal State beyond 200 nm extends for another 5 miles, or 10 miles or to some undetermined limit short of the edge of the margin. It

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[113]CR 2012/15, p. 19, para. 14 (Lowe).

[114]*Ibid.*, p. 18, para. 9 (Lowe).

extends to the outer edge of the margin. But a State party to the Convention has to establish that outer edge under both the substantive and procedural framework of Article 76.

77. And I would suggest that ITLOS made this point clear in its judgment in *Bangladesh/Myanmar*, if I can quote from paragraph 437 of that judgment:

> "*Entitlement* to a continental shelf beyond 200 nautical miles should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose."[115] (Emphasis added.)

Again, there is no half-way measure.

78. Professor Lowe contends that this did not stop the Tribunal in *Bangladesh/Myanmar* from delimiting areas beyond 200 nm. But the situation in *Bangladesh/Myanmar* was entirely different from what we have in our case.

79. In *Bangladesh/Myanmar*, both parties were parties to the 1982 Convention. Here, obviously, Colombia is not. Moreover, both Bangladesh and Myanmar had made full, and fully substantiated outer continental shelf submissions to the Commission. Each party claimed that there was an outer continental shelf and that the outer continental shelf appertained to it, but there was no dispute over the existence of a physical continental shelf in the Bay of Bengal extending more than 200 nm from the land territory of each of the two parties.

80. That was a critical factor for the Tribunal in deciding whether to exercise its jurisdiction to determine the boundary beyond 200 nm. At several junctures in its judgment, the Tribunal underscored the fact that "[T]he Parties do not differ on the scientific aspects of the sea-bed and subsoil of the Bay of Bengal"[116]; that both parties' submissions contained data indicating their entitlement to the continental margin beyond 200 nm[117]; that the scientific evidence was what the Tribunal termed "uncontested"[118], and that the Bay of Bengal itself presents a unique situation with respect to the existence of an extended continental shelf, as was acknowledged during the negotiations at the Third United Nations Conference on the Law of the Sea[119].

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[115] *Bangladesh/Myanmar*, p. 128, para. 437.

[116] *Ibid.*, p. 121, para. 412.

[117] *Ibid.*, p. 130, para. 445.

[118] *Ibid.*, para. 446.

[119] *Ibid.*, p. 129, para. 444.

81. In other words, both Bangladesh and Myanmar clearly had outer continental shelf entitlements. The scientific evidence for that was not in dispute. Had that not been the case — in other words, again, to quote from the Tribunal's words from its judgment — "had it [the Tribunal] concluded that there was a significant uncertainty as to the existence of a continental margin in the area in question", it "would have been hesitant to proceed with the delimitation of the area beyond 200 nautical miles"[120].

82. This case is fundamentally different.

83. Nicaragua has not made a full submission to the Commission. No other State in the region considers that an extended continental shelf exists in this part of the Caribbean given that neither Panama, nor Costa Rica, nor Jamaica, nor Honduras has made such a submission — because there are no areas in this part of the Caribbean that are situated more than 200 nm from the nearest land territory, unlike the situation in the Bay of Bengal.

84. And as I mentioned last week, in *Bangladesh/Myanmar*, the Tribunal did not need to determine the outer limits of either State's continental shelf or continental shelf entitlements because the delimitation was between States with adjacent coasts. The Tribunal had already applied the "equidistance/relevant circumstances" rule to the delimitation of the single maritime boundary up to the 200-mile limit, and it simply prolonged that delimitation line along the same azimuth using the same methodology. Consequently, the Tribunal's delimitation line in *Bangladesh/Myanmar* even beyond the 200-nautical-mile limit had nothing to do with geology and geomorphology. Once again, Nicaragua's claim — in this case, its new claim — is entirely different.

85. I also pointed out last week that State practice relating to outer continental shelf claims overwhelmingly respects the principle that such claims should not encroach on the 200-nautical-mile continental shelf and EEZ entitlements generated by another State's territory. Now that practice is not limited to 200-mile entitlements of mainland coasts. It frequently has involved the entitlements of islands — and sometimes very small islands. None of this was challenged in Nicaragua's second round.

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[120] *Bangladesh/Myanmar*, pp. 129, para. 443.

Conclusion

86. Mr. President, I come to the end.

87. I believe I have shown why Nicaragua's new continental shelf claim is inadmissible, and how it is flawed both legally and technically. Despite Nicaragua's efforts to deprive Colombia completely of an exclusive economic zone, the subject-matter of this case remains the delimitation of a single maritime boundary covering the EEZ and the continental shelf underlying that EEZ in accordance with the well-established principles and rules of international law: starting with the provisional equidistance line between the truly relevant coasts, and then taking into account the relevant circumstances that characterize the area to be delimited.

88. I thank you, Mr. President, and the Court for your attention, and I would now be grateful if the floor could be given to Professor Crawford. Thank you very much.

The PRESIDENT: Thank you very much, Mr. Bundy, and I call on Professor Crawford. You have the floor, Sir.

Mr. CRAWFORD:

4. NICARAGUA'S EEZ CLAIM (PART 1)

1. Mr. President, Members of the Court, in this rebuttal presentation I will deal with the EEZ claims of the Parties. Nicaragua's position is that although the archipelago contains at least three features which are entitled to an EEZ, the total EEZ which they generate is zero. Moreover by virtue of that zero within 200 nautical miles of Nicaragua's mainland coast, the islands of the archipelago lose some 70,000 sq km of EEZ area beyond 200 miles of that coast, EEZ areas to which only they are entitled. This is said by Professor Lowe to be equitable: the enclaving of all Colombia's islands entailed — he cordially accepted — the loss of Colombian entitlements which Nicaragua itself could not and cannot claim[121]. And this was equitable beyond 200 nautical miles because enclaving was alleged to be equitable within 200 nautical miles. Another *petitio principii* to add to the pile!

[121]CR 2012/15, pp. 24-5, paras. 41-3 (Lowe).

2. Mr. Reichler — whose job it was to defend the equity of a zero EEZ allocation to the archipelago — did not in fact address this important aspect of the matter. In a way that was a relief, because the sight of yet another Nicaraguan counsel being cheerfully complacent at the gratuitous loss of significant Colombian rights would have been altogether too much.

3. Nor did Mr. Reichler show you again the graphic on the screen, which he showed you in the first round and which confessed to the truth. Well, to part of the truth, because it attributes EEZ only to the three named islands, whereas, Serrana and Roncador are not rocks and are also entitled to the EEZ. We have amended the pink area which shows the EEZ to which only the islands of the archipelago are entitled, so as to include EEZ areas to which Serrana and Roncador are entitled. The total area in which water column rights are lost to Colombia because of the alleged equitable enclaving of these islands is 69,780 sq km.

4. It is worthwhile taking a moment to assess the equities here, since Mr. Reichler declined to do so. I am going to Roncador as an example. And, in a thought experiment, I am going to ask you to think that the only delimitation issue that arises is the delimitation issue for the EEZ as between the mainland coast and Roncador. You can see Roncador on the screen — it is clearly not a mere rock. And let us give it, as you gave equivalent Honduran cays, a 12-nautical-mile territorial sea. Roncador itself is 186.7 nautical miles from the Nicaraguan mainland, rather less from the offshore islands of Nicaragua. You can see the distances on the screen. That means that the easternmost point of the territorial sea around Roncador is 200.4 nautical miles from the Nicaraguan mainland coast using the easternmost available base point of Roncador. That means, inevitably, ineluctably, that the mainland coast is irrelevant to enclaving Roncador: there is no room for any enclave because 200 nautical miles from the mainland coast has been reached. So Nicaragua would have you give full EEZ effect to its cays in order to give zero effect to Roncador — an obviously unbalanced and inequitable solution.

5. To summarize, Nicaragua is determined at all costs to enclave all of our features, including Roncador. If Roncador gets full eastward effect, the cat is out of the bag so far as Nicaragua's zero effect aspirations are concerned. In the collegial spirit which Professor Lowe so

celebrated[122], it is thus necessary to give full effect to the Nicaraguan cays — the mainland is irrelevant — to give them a full 12-mile territorial sea, a full 200-mile EEZ — and none to the Colombian cays — a mere 3-mile territorial sea and no EEZ at all. In order to give Nicaragua a narrow strip of EEZ on the far side of Roncador, which means that Colombia loses 67,780 sq km of otherwise uncontested EEZ, it is necessary to discriminate between one cay and another. To give their cays full effect and ours none. Members of the Court may feel they have had enough of ratios but let me give you one more. Area of EEZ gained by Nicaragua if Roncador is enclaved by virtue of the Nicaraguan cays: 12.030 sq km; area of otherwise uncontested EEZ lost by Colombia if Roncador is enclaved: 69,720 sq km; in other words a ratio of 1:5.6. As the Roncador example shows, Nicaragua regards it as apparently equitable that Colombia should lose tens of thousands of square kilometres of EEZ to which no other State has any entitlement, in order to give Nicaragua a much smaller area of EEZ at the extreme limit of its range. No wonder Mr. Reichler did not talk about the equities of that point.

6. Mr. President, Members of the Court, if there was an EEZ delimitation between Nicaragua and Colombia over Roncador — if Roncador stood alone — can there be any doubt that you would *not* enclave Roncador at 12 miles? If it stood alone and not behind the three named islands, you might possibly give it half effect on the western side, but that would be the most you would do to favour Nicaragua at this distance. And as with Roncador, so with Serrana: it is inequitable to deprive these islands — not rocks — of east-facing EEZ entitlements by reason of a wholly remote Nicaraguan coast by reason of wholly remote Nicaraguan cays. Mr. Reichler may cry "cut-off, cut-off"[123] as the little boy cried "wolf" in *Aesop's Fables*[124] — I hope that is a classical enough allusion for him. But it is Mr. Reichler who should be cut off. For this case before you is precisely that EEZ delimitation between Nicaragua and Colombia over Roncador, over Serrana, and so on.

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[122] CR 2012/15, p. 26, para. 53 (Lowe).

[123] CR 2012/14, p. 51 para. 44; pp. 54-5, para. 57; p. 55, para. 58, p. 55; para. 60; p. 56, para. 68; p. 57, para. 73 (Reichler).

[124] L. Gibbs, *Aesop's Fables: A New Translation* (OUP, 2002, p. 78):

> "There was a boy tending the sheep who would continually go up the embankment and shout, 'Help, there's a wolf!' The farmers would all come running only to find out that what the boy said was not true. Then one day there really was a wolf, but when the boy shouted they didn't believe him and no-one came to his aid. The whole flock was eaten by the wolf."

Colombia's islands are not entitled to any less by way of maritime zones because there are a considerable number of them.

The issue of entitlement

7. That brings me to the issue of entitlement. Nicaragua made little or no attempt on Tuesday to rebut what I have said about the maritime zones of islands. What little there was fell to Mr. Elferink, who professed that he could not "figure out what [I] meant" when I recalled the international law definition of islands[125]. This is rather surprising, as there is not much to "figure out" about the definition. It is a plain definition and a clear-cut definition. Mr. Elferink, however, would make it a matter of many shades of gray, a definition that requires exercises in appreciation, subjective judgments, even aesthetic judgments, even the company of friends. This is what he said:

> "Now, there is of course a huge difference between a coral island and a piece of coral debris. On the screen you have two photographs. Over the weekend, I asked some people to tell me which of these two in their view was a coral island, and the choice unanimously was for the figure on the left."[126] [which is a place where one might go for a holiday]

Now, I assume these were Mr. Elferink's friends: he is evidently too nice a man to have any enemies — except, very recently, Dr. Smith. But he did not bother to tell us the names of his friends or whether they had expertise in the law of the sea. Perhaps they were members of the drafting committee of the Montego Bay Convention, come to him in The Hague to affirm belatedly what the text *really* means.

8. The reason that the bright-line rule now contained in Article 121 gained such a wide reception, from its inclusion in Article 10 of the 1958 Convention onwards, is that it affords clarity. An island is *not* a matter for appreciation, even between friends on a long and sunny Hague weekend. An island is a geographical fact. If a feature is a naturally-formed area of land, surrounded by water and above water at high tide, it is an island. If not, it is not. Mr. Elferink says he does not understand *my* theory of poor white coral trash[127]. But it is his theory, a theory with no basis in international law whatever; I gave it a label — which he could not figure out either. It

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[125]CR 2012/14, p. 40, para. 20 (Oude Elferink).

[126]*Ibid.*

[127]*Ibid.*, quoting Crawford (CR 2012/12, pp. 27-30, paras. 3-11).

does not matter in the least whether the island is a small coral feature. What matters is whether it is naturally formed, surrounded by water, above water at high tide. If it meets these criteria, that is all that is necessary. Mr. Elferink's friends have nothing to do with it.

9. What Mr. Elferink really proposes is that you create, by your judgment in this case, a new category; perhaps we can call it the island *in statu nascendi*. Lord, make me an island but not yet, says Colombia about Quitasueño — because you can be confident if it gets its hands on Quitasueño, Nicaragua will call it an island — the elevated truth will then be made available! Certainly, geographers understand that islands grow. Coral islands grow through a gradual process of accretion. Derek Bowett acknowledged this process, which he called one of "gradual accretion"[128] — he is a great one for calling a spade a spade. Beazley acknowledged it as well, when he noted that, from coral, "any associated island may gradually rise"[129]. But the observations by Bowett and Beazley, which Mr. Elferink seizes upon, were not directed towards limiting the effects of existing islands under the law of the sea. They were not directed to prove the existence of a new juridical category. Incidentally I could not detect any inconsistency between the passage of Bowett I quoted and the preceding lines which I did not quote, for want of time.

10. The question is not just one of definition; it is one of entitlement. Even Nicaragua accepts that the main Colombian islands are entitled to an EEZ — as a result of which it gives them no EEZ at all! Nicaragua's entitlement is sacrosanct, such that Mr. Reichler can cry "cut-off" at 100 nm for San Andrés, or at 180 nm for Roncador. But Colombia's entitlement is illusory; nothing at all. After which, Professor Lowe has the nerve to suggest — in response to our justified complaint that their claim has changed three or four times — that this is not a normal adversarial proceeding[130].

11. Mr. President, Members of the Court, this is as adversarial as it gets. Nicaragua claimed the lives and homes of 80,000 Colombians without a scintilla of right. These are real people who understandably view this case with the gravest concern. Now Nicaragua claims their living space,

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[128]D.W. Bowett, *The legal regime of islands in international law*, Oceana, 1979, pp. 4-5, quoted by Mr. Elferink (CR 2012/14, p. 41, para. 21).

[129]P.B. Beazley, "Reefs and the 1982 Convention on the Law of the Sea," (1991) 6 *International Journal of Estuarine and Coastal Law*, p. 285, quoted by Mr. Elferink (CR 2012/14, p. 41, para. 21).

[130]CR 2012/15, p. 26, para. 53 (Lowe).

their traditional fishing areas, their reefs and cays, the areas internationally recognized for decades as within Colombian fisheries jurisdiction. Can the Court envisage Colombian fisheries in the broad area of the archipelago if the future there belongs to Nicaragua? If this case is not adversarial, well, I hope never to be involved against Professor Lowe in proceedings that are! Let the Court not be deceived by the fact that we have conducted these proceedings in an orderly and civilized manner that there is not a great deal at stake, matters of vital national interest, the security of the western Caribbean. When I spoke on Friday about Nicaragua throwing a rock into the placid treaty-regulated waters of the western Caribbean, I spoke in deadly earnest. And I was right: you heard Professor Lowe on Tuesday trashing the treaties[131] — a matter Mr. Bundy will develop.

12. But for the moment, I am discussing maritime entitlement and I simply want to stress that there is nothing unusual about giving full effect to small islands in the law of the sea. This is Aves Island, given full effect in the agreements concluded by Venezuela with the Netherlands[132], France[133] and the United States[134]. Now you can see Bajo Nuevo and Roncador. There is perhaps not a lot of difference — I am not sure what Mr. Elferink's friends would say, between Aves Island and Bajo Nuevo, or others of our cays. My own subjective appreciation is that Aves Island is lesser than ours; but *de gustibus non disputandum.* As Mr. Bundy has shown, Alburquerque, Serrana, Roncador and others are not mere rocks within the meaning of Article 121, paragraph 3. They are islands and as such entitled to the full suite of maritime zones. This is an entitlement the Court must — I say it with all respect — recognize, even though Nicaragua declines to do so.

13. That brings me to two points — contiguous zones and Quitasueño.

(a) ***Contiguous zones in maritime delimitation***

14. Mr. Reichler suggests that it is invalid for Colombia to illustrate that the territorial sea and contiguous zones of the islands of the archipelago overlap and thus form a single area of Colombian sovereignty or sovereign authority[135]. But the illustration, for example, in

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[131]CR 2012/15, pp. 27-28, paras. 59-63 (Lowe).

[132]*Netherlands Treaty Series*, 1978 No. 61, 1979 No. 11.

[133]Maritime Boundary Agreement between the United States and Venezuela, signed 28 March 1978, entered into force 24 November 1980 (reprinted in *Limits in the Seas*, Vol 91).

[134]17 July 1980, 19 *United Nations Treaty Series* 220.

[135]CR 2012/14, pp. 55-56, paras. 61-63 (Reichler).

Figure R-8.3[136], is a succinct and accurate representation of the geographic situation, of the law of the sea as applied to that situation and of the regulatory arrangements. These powers are exercised, and exercised for a reason. The sea belts, depicted in blue shading, to which Mr. Reichler objected, are the areas, to paraphrase the Chamber in *Gulf of Maine*, "conceived as subject to the sovereignty of the coastal State . . . subject to the exercise of customs controls and similar measures, [and] intended to prevent violations of [Colombia's] territorial sovereignty"[137]. The islands of Colombia which generate the zones are proximate to one another in maritime terms. The zones form a single continuous area. This is not some sort of maritime *trompe-l'oeil*, it is a regulatory reality. It is the result one reaches by applying the straightforward rules.

(b) *Quitasueño*

15. Last Friday, I presented four points in response to Mr. Elferink's assault against Colombia's approach to surveying and charting Quitasueño. These were high tides, the use of a tidal datum, Colombia's charts, and finally, the "coral trash" theory of island deformation. Regarding the third point, I said that I was going to return to the charts in more detail this week.

16. As I said, old charts and surveys are not determinative of present-day geographic facts: your decision in *Qatar/Bahrain* is directly in point and was not challenged on Tuesday. Technology constraints years ago prevented the accurate positioning of small islands on a bank or cay classified as a hazard to navigation.

17. Mr. President, Members of the Court, let me take a few moments — while lunch awaits — to discuss the practice of hydrographic surveys and the valuable role hydrographers play in providing for the safety of mariners worldwide. Given the importance of international shipping to the commerce of virtually every country, it is important to understand that the primary purpose of nautical charts is to provide for safety in navigation, not necessarily to position each and every rock. The most recent hydrographic survey conducted by the Colombian Hydrographic Service in Quitasueño bank was done in 1999. The survey was done using a single-beam echo sounder at a

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[136]Fig. R-8.3, RC, p. 307; Map Vol. II, p. 127.

[137]*Delimitation of the Maritime Boundary in the Gulf of Main Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 302, para. 120.

1:50,000 resolution, meaning that the hydrographic lines were 500 metres apart[138]. Thus, the Colombian hydrographic vessel sailed back and forth with 500 metres separating the lines of navigation. If the ship had stopped every time a feature — of the type found in the subsequent 2008 and 2009 surveys — was seen in order to conduct a separate survey of its geographic position, the survey would have taken months. The purpose of the 1999 survey was to delimit the bank as a hazard to navigation, not to document the position of every rock.

18. Colombia's Hydrographic Service has been producing nautical charts, which have provided navigation safety in the Caribbean Sea and Pacific Ocean, for over 40 years. Colombia has been a member of the International Hydrographic Organization (IHO) since 1998. Data collected by the hydrographic services is included in the nautical charts produced by the United Kingdom Hydrographic Office for the region.

19. As to the surveys, in 2008 and 2009 the Colombian Hydrographic Service returned to Quitasueño at the request of the Colombian Government to conduct another survey, with the specific goal of verifying the existence of islands on the bank. For the 2009 survey, the Colombian Government retained Dr. Smith, as an independent expert, to confirm, or to refute, the 2008 survey. Dr. Smith is sitting in Court. It should be noted that at least one feature identified in the 2008 survey was not found in 2009 by Dr. Smith and was not included in his list of Quitasueño features. Given the nature of the hazardous bank, both surveys were made under some personal risk — and we do not suggest *une descente sur les lieux* by the entire Court. The detailed results were reported in Dr. Smith's report, which you will read for yourselves.

20. Mr. President, Members of the Court, all 54 reported features are inside the danger lines published in Nautical Chart COL 416 [1:100,000], thus verifying danger to navigation. I understand that since the nautical charts of Quitasueño were published, no navigation-related incidents have occurred in the area — or at least have been reported.

21. I will now identify five technical mistakes in Mr. Elferink's presentation. But I think, Mr. President, five is a bit too much before lunch. So perhaps we should come back to his mistakes, with some opportunity for digestion.

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[138] http://www.nauticalcharts.noaa.gov/mcd/learnnc_surveytechniques.html.

The PRESIDENT: Thank you, Professor Crawford. I think the Parties deserve also a lunch break. The sitting is adjourned. We will meet again at 3 o'clock for the continuation of Colombia's presentation. The sitting is closed.

The Court rose at 12.55 p.m.