

INTERNATIONAL COURT OF JUSTICE

TERRITORIAL AND MARITIME DISPUTE
(NICARAGUA v. COLOMBIA)

COUNTER-MEMORIAL OF THE
REPUBLIC OF COLOMBIA

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Chapter 1

INTRODUCTION AND OVERVIEW

A. The Case before the Court

1.1. This Counter-Memorial is presented pursuant to the Court's Order of 11 February 2008. It responds to the positions taken in Nicaragua's *Memorial* of 28 April 2003, to the extent these positions may have survived the Court's *Judgment on Preliminary Objections* of 13 December 2007.

1.2. Nicaragua's *Memorial* combined an artificial and unsustainable claim to sovereignty over the San Andrés Archipelago with a legally impossible claim to a single maritime boundary as between mainland coastlines which are more than 400 nautical miles apart.

1.3. The artificiality of Nicaragua's claim to the islands, islets and cays of the Archipelago can be seen from the following facts:

- Nicaragua admits that it has never administered the Archipelago.¹ The *Memorial* cites not one single act of Nicaraguan administration either over the Archipelago as a whole or over any individual island,

¹ See e.g. NM, paras. 1.89-1.91.

islet or cay to the east of the 82°W meridian at any time.

- The Nicaraguan claim is based primarily on an implausible interpretation of the *uti possidetis juris*, an interpretation already practically denied by the Court in the *Nicaragua v. Honduras* case.²
- To rely on the *uti possidetis juris* implied a claim to the Archipelago as a whole and this was the claim presented in the *Memorial*. Nicaragua failed to substantiate a claim of title to any individual island, islet or cay. What Nicaragua put forward was the far-fetched allegation that three of the Archipelago's cays – Roncador, Quitasueño and Serrana – belonged to it on the basis that they emerge from what Nicaragua considered to be its continental shelf. Nicaragua evidently has never had any claim to any feature east of the 82°W meridian which is based on actual possession.
- But the Nicaraguan claims were flatly inconsistent with the governing instrument, the Treaty of 1928 and its Protocol of 1930 (hereafter the 1928/1930 Treaty).³ It could only be sustained by asserting the invalidity of

² *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, pp. 45-46, para. 161.

³ Annex 1: Treaty concerning Territorial Questions at issue between Colombia and Nicaragua, Managua, 24 March 1928, with Protocol of Exchange of Ratifications, Managua, 5 May 1930 (Esguerra-Bárcenas).

that instrument, an argument summarily dismissed by the Court in its *Preliminary Objections* Judgment.⁴

1.4. As for Nicaragua's maritime claim, it is implausible, as can be seen from the following considerations:

- The claim presented in Part II of Nicaragua's *Memorial* entails a legal impossibility: a single maritime boundary between the mainland coasts of the parties which coasts are, relevantly, much more than 400 nautical miles apart. Indeed now that the Court has found Colombia to have sovereignty over the San Andrés Archipelago,⁵ the only maritime spaces that overlap and merge with those of the Colombian mainland are those of the Archipelago.
- Contrary to Nicaragua's thesis, therefore, the delimitation in this case is to be effected between the San Andrés Archipelago, on the one side, and Nicaraguan islands and cays, on the other.

⁴ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment of 13 December 2007*, pp. 26-27, paras. 78-81. None of the separate or dissenting opinions denied the validity of the 1928/1930 Treaty: see Vice-President Al-Khasawneh, *Dissenting Opinion*, p. 1, para. 2; Judge Ranjeva, *Opinion individuelle*, pp. 4-5, para. 14; Judge Simma, *Declaration*, p. 4; Judge Abraham, *Opinion individuelle*, p. 9, para. 33, p. 12, para. 46, p.14, paras. 59 and 62; Judge Bennouna, *Opinion dissidente*, pp. 5-6. Judge Tomka specifically affirmed its validity: *Declaration*, pp. 2-4, paras. 9-15; as did Judge Keith: *Declaration*, p. 1, para. 4.

⁵ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment of 13 December 2007*, pp. 30-31, para.97.

1.5. In short the Nicaraguan claim as presented in its *Memorial* is baseless and riven with errors and contradictions.

1.6. Colombia's position, by contrast, is straightforward.

- At the end of the colonial period the Archipelago was part of the Viceroyalty of Santa Fe (New Granada).⁶
- Since independence Colombia has always exercised sovereignty over the Archipelago, including all the islands, islets and cays.
- Nicaragua recognized Colombian sovereignty over the Archipelago, including all the islands, islets and cays to the east of the 82°W meridian, by the 1928/1930 Treaty.
- A disagreement arose between Colombia and the United States concerning three specific cays (Serrana, Quitasueño, Roncador). The United States claim was withdrawn by a Treaty of 1972 which, as confirmed by subsequent agreements and exchanges, recognized Colombia's authority over the three cays.⁷

⁶ The Spanish documents of the time referred interchangeably to that Viceroyalty as *Virreinato de la Nueva Granada* (Viceroyalty of New Granada) or *Virreinato de Santa Fe* (Viceroyalty of Santa Fe), due to the fact that Santa Fe de Bogotá was the capital of the Viceroyalty and the seat of the viceroys. Hereafter the Viceroyalty will be referred to as "Viceroyalty of Santa Fe (New Granada)".

⁷ Annex 3: Treaty between Colombia and the United States of America concerning the Status of Quitasueño, Roncador and Serrana (with Exchanges of Notes), Bogotá, 8 September 1972.

- With regard to Quitasueño, the parties had diverging views on whether it is capable of appropriation under international law. Colombia has consistently taken the position that it is, and its position is confirmed by the modern law of the sea and by the data set out in this Counter-Memorial.
- Colombia has consistently exercised maritime jurisdiction over the waters of the Archipelago up to the 82°W meridian, the limit established by the 1928/1930 Treaty. The single maritime boundary evidently lies between the Archipelago and Nicaraguan islands and cays.

B. The Framework for the Case

1.7. The Judgment of the Court of 13 December 2007 resolved a number of issues but left others open.

(1) THE QUESTION OF SOVEREIGNTY OVER THE MARITIME
FEATURES OTHER THAN THE ISLANDS OF SAN ANDRÉS,
PROVIDENCIA AND SANTA CATALINA

1.8. In its Judgment of 13 December 2007, the Court, having upheld the validity of the 1928/1930 Treaty, held that the Treaty settled “the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina” (para. 88). As to the question of the scope and composition of the rest of the San Andrés Archipelago, the Court made the following finding:

“97. The Court considers that it is clear on the face of the text of the first paragraph of Article I of the 1928 Treaty that its terms do not provide the answer to the question as to which maritime features apart from the islands of San Andrés, Providencia and Santa Catalina form part of the San Andrés Archipelago over which Colombia has sovereignty.”

1.9. From the text of the Treaty alone the Court considered that it could not determine, at the stage of Preliminary Objections, that the cays in question form part of the Archipelago. But the Court acknowledged that the whole Archipelago belongs to Colombia. All that Colombia needs to show at the merits stage is that those cays do belong to the Archipelago. Additionally, Colombia will prove that these cays have been administered by Colombia to the exclusion of third States, in particular Nicaragua. Either of these facts would be enough to sustain Colombia’s sovereignty: in fact both are true, as will be seen.

1.10. Thus there is no need to enter into the *uti possidetis juris* argument as a basis of title – although this will be briefly discussed in due course, in the interest of completeness.

(2) THE SIGNIFICANCE OF THE 82°W MERIDIAN WITH REGARD
TO THE QUESTION OF SOVEREIGNTY

1.11. In its Judgment of 13 December 2007 the Court found as follows:

“115. The Court considers that, contrary to Colombia’s claims, the terms of the Protocol, in their plain and ordinary meaning, cannot be interpreted as effecting a delimitation of the maritime boundary between Colombia and Nicaragua. That language is more consistent with the contention that the provision in the Protocol was intended to fix the western limit of the San Andrés Archipelago at the 82nd meridian.”

1.12. Thus the legal significance of the 82°W meridian, as far as the territorial element of the dispute is concerned, lies in the fact that it plays a role with regard to the scope and composition of the rest of the San Andrés Archipelago: specifically it fixes the limit of the Archipelago. That being so, it is difficult to see how any maritime feature lying east of the 82°W meridian can – as between Colombia and Nicaragua – be anything other than Colombian.

(3) THE SIGNIFICANCE OF THE 82°W MERIDIAN WITH REGARD TO MARITIME DELIMITATION

1.13. With regard to the question of maritime delimitation, the Court stated:

“120. Consequently, after examining the arguments presented by the Parties and the material submitted to it, the Court concludes that the 1928 Treaty and 1930 Protocol did not effect a general delimitation of the maritime boundary between Colombia and Nicaragua.”

1.14. Thus the Court held that the 1928 Treaty and the 1930 Protocol did not in themselves effect a general delimitation of the maritime boundary. But as will be seen, this does not entail that the 82°W meridian has no role to play in the delimitation.

C. The Structure of this Counter-Memorial

1.15. This Counter-Memorial is in three Parts.

1.16. **Part One** (consisting of Chapter 2) describes and depicts the insular territories of Colombia in the western Caribbean and demonstrates that the Archipelago constitutes a unit. These territories comprise the San Andrés Archipelago, which has been part of the territory of Colombia since independence. In its Judgment of 13 December 2007, the Court confirmed that the San Andrés Archipelago as a whole, including the three named islands of San Andrés, Providencia and Santa Catalina, is under Colombian sovereignty.

1.17. **Part Two** establishes beyond any doubt Colombia's sovereignty over all the cays which, in addition to San Andrés, Providencia and Santa Catalina, form part of the Archipelago. Chapter 3 shows that Colombia has exercised sovereignty over the cays, individually and as part of the Archipelago, since the early years of the 19th century. Chapter 4 shows that Colombia's sovereignty over all the cays east of the 82°W meridian has been

recognized by third States. Chapter 5 deals with the 1928/1930 Treaty, by which Nicaragua expressly recognized Colombian sovereignty over the Archipelago, which includes all maritime features and areas to the east of the meridian 82°W. Chapter 6 demonstrates the complete absence of any valid claim to the cays on the part of Nicaragua.

1.18. **Part Three** considers the second issue in the case, the delimitation of the maritime areas lying between the Archipelago and the islands and cays of Nicaragua. Chapter 7 establishes the framework for the delimitation. It demonstrates that the line put forward by Nicaragua in its *Memorial* is legally impossible. Chapter 8 analyses the relevant area, including the relevance of agreements with third States in the region, and the role of the 82°W meridian. Chapter 9 shows that a median line drawn between the islands and cays of the Archipelago and the islands and cays of Nicaragua is in accordance with the international law of maritime delimitation and produces an equitable result.

1.19. There follows by way of conclusion a short summary of Colombia's reasoning in these pleadings, together with Colombia's submissions, and lists of the documents and maps annexed to this Counter-Memorial.

PART ONE

**THE COLOMBIAN SAN ANDRÉS
ARCHIPELAGO**

Chapter 2

THE ARCHIPELAGO

A. Introduction

2.1. The San Andrés Archipelago is a long-standing province of Colombia inextricably linked with the Nation. The Archipelago has a population of close to 70,000 inhabitants.

2.2. The Archipelago Department is one of the 32 administrative divisions of the Republic of Colombia.¹ Its capital is the city of San Andrés on the island of San Andrés. The city is endowed with a substantial modern infrastructure, including Government facilities and public utilities; it has excellent hotels and other facilities for tourism, shops and department stores, and branches of most of the financial institutions operating in Colombia. There are centres for elementary, higher and college education, public and private hospitals and health clinics, and places of worship of different denominations. There are radio stations and four transmission stations (one on San Andrés Island and three on Providencia Island, two of which also cover Santa Catalina Island) for the television channels of the rest of Colombia. San Andrés as well

¹ Colombian Law 47 of 1993, in particular Art. 3. Available at: www.secretariassenado.gov.co/leyes/L0047_93.HTM

as Providencia have excellent airports that allow for the many flights – day and night, in the case of San Andrés – proceeding to and from the rest of Colombia and Central and North America.

2.3. The Archipelago is an important centre of commerce and tourism, its most important economic activities. The tourist flow comes from the rest of Colombia, as well as from Central American and the Caribbean. Thousands of tourists from countries such as Costa Rica, Panama, Honduras, the United States, Canada, and Nicaragua visit the Archipelago every year. Fishing accounts for 90% of the Archipelago's exports.

2.4. According to Colombia's electoral legislation, the Governors of the Archipelago Department, the members of the Departmental Assembly as well as the Mayors and councilmen of the two municipalities – San Andrés (on the island of San Andrés) and Providencia (comprising the island of Providencia and Santa Catalina) – are elected by popular vote. The Archipelago Department elects two congressmen to the House of Representatives of the National Congress and its inhabitants participate in countrywide elections (Presidential, Senate, and others). In San Andrés and in Providencia, the Judicial Branch operates in full, with the judges and courts covering the entire Archipelago. There is a Customs District, part of the National Tax and Customs Administration. Likewise, the Archipelago

has always had the presence of members of the armed forces and of the National Police.

B. The Components of the Archipelago

2.5. As noted, the San Andrés Archipelago is formed by the islands of San Andrés, Providencia and Santa Catalina; the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque, and the group of cays of the East-Southeast – Cayos del Este-Sudeste, together with associated features.² A full description of these associated features would be as follows:

- Island of San Andrés: Johnny Cay, Hayne’s Cay, Rose Cay, Cotton Cay and Rocky Cay;
- Islands of Providencia and Santa Catalina: Low Cay, Basalt Cay, Palm Cay, Cangrejo Cay, Hermanos Cay and Casa Baja Cay
- Alburquerque Cay: North Cay, South Cay and Dry Rock
- Cays of the East-Southeast: Bolivar Cay or Middle Cay, West Cay, Sand Cay and East Cay
- Roncador Cay: Dry Rocks, and another.
- Serrana Cay: North Cay, Little Cay, Narrow Cay, South Cay, East Cay, Southwest Cay, and other unnamed cays;
- Quitasueño: Eight unnamed cays.

² Up to 1928/1930 Treaty, the Archipelago included features such as the Islas Mangles (Corn Islands).

- Serranilla Cay: Beacon Cay, East Cay, Middle Cay, West Breaker and Northeast Breaker;
- Bajo Nuevo Cay: Bajo Nuevo Cay, East Reef and West Reef

The full extent of the Archipelago is shown in Figure 2.1 opposite.³

2.6. Alburquerque, the westernmost feature of the Archipelago, is located 8 nautical miles (hereinafter “nm”) to the east of the 82°W Meridian and some 106 nm to the east of Nicaragua’s mainland coast. Bajo Nuevo, the easternmost cay is located 69 nm east of Serranilla Cay, 129 nm from Jamaica’s coast, and 266 nm from Nicaragua’s mainland coast. The Archipelago as a whole has a maximum elevation above sea level of approximately 360 metres. The maximum variation between highest astronomical tide (HAT) and lowest astronomical tide (LAT)⁴ in the area is slight (only 56.19 centimetres).⁵

2.7. Of these cays only Alburquerque is located to the west of the islands of San Andrés, Providencia and Santa Catalina, over which Colombia has sovereignty, as acknowledged in the

³ See also Figure 2.1 in Volume III. Due to the scale of the figure, not all of the associated features of the main features of the Archipelago are visible.

⁴ According to Grenoble tide model FES 95.2, and Andersen’s adjusted model.

⁵ See Tidal Chart in Appendix 1.

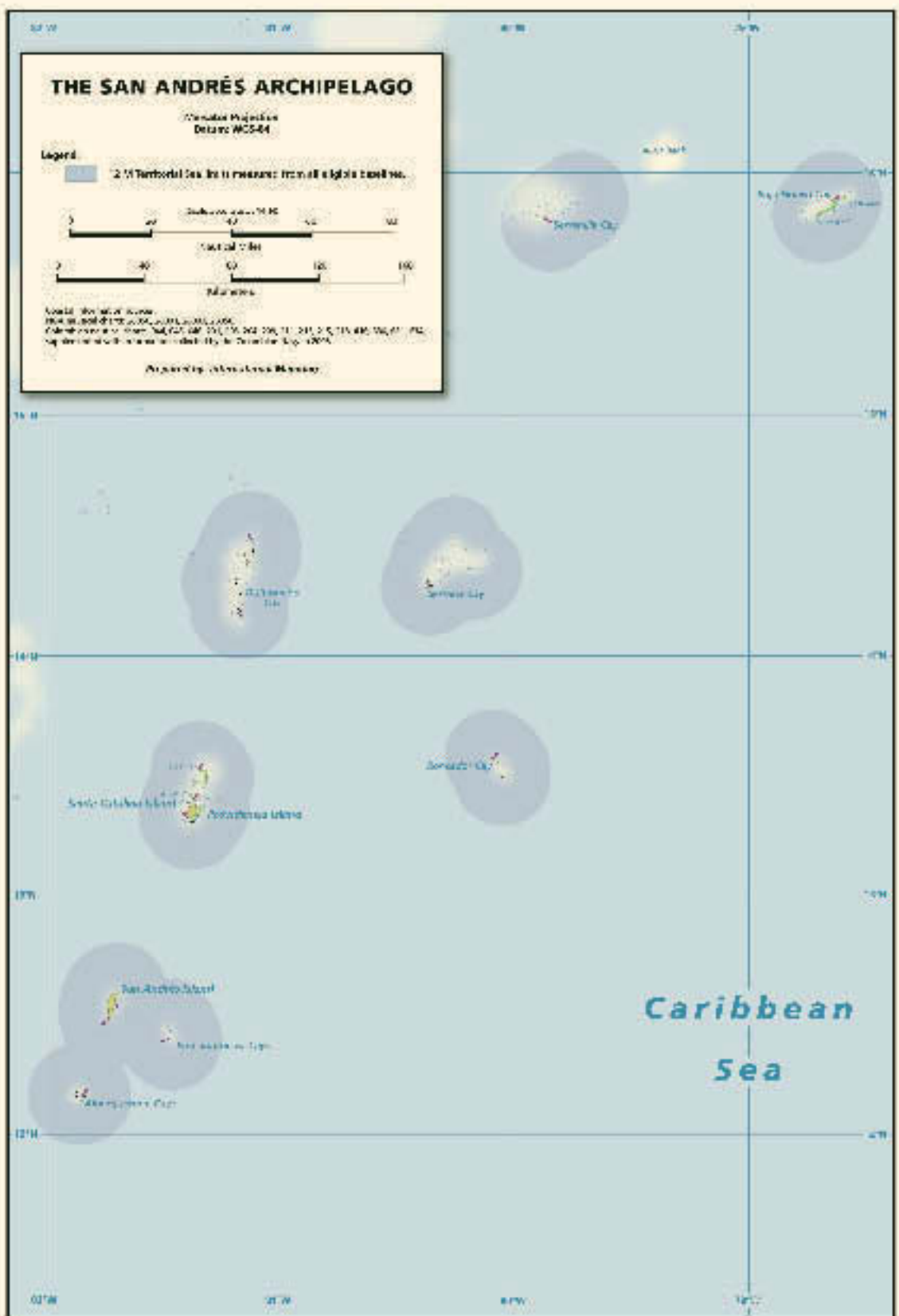


Figure 2.1

See full size Map Vol. III - page 1

Court's Judgment of 13 December 2007.⁶ East-Southeast is located south-east of those islands and Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo are located further to the east, between them and Jamaica.

2.8. The Archipelago's cays are nesting locations for booby birds (*Sula sp.*), magnificent frigatebirds (*Fregata magnificens*) and sea turtles of various species, such as green turtles (*Chelonia mydas*), hawksbill turtles (*Eretmochelys imbricata*), loggerhead or caguama turtles (*Caretta caretta*) and canal turtles (*Dermochelys coriacea*). The Archipelago's fauna, flora and, particularly, its coral reefs are protected by Colombian provisions and regulations concerning environmental and reef preservation as further detailed in Chapter 3.

2.9. A more detailed account of each of these islands and cays will now be given.⁷

(1) SAN ANDRÉS

2.10. The island of San Andrés has an area of some 26 km². Its central part is made up of a mountainous sector with a maximum height of 100 metres across the island from north to

⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, pp. 28-29, paras. 88-90 and pp. 30-31, para. 97.

⁷ Due to the scale, in Figures 2.2-2.10 corresponding to the Archipelago's main features, not all their associated features appear.



Figure 1.2

See full size map, Vol. III, page 3

south, from where it splits into two branches. The coastal plains on each side of the mountainous sector are some 10 metres above sea level and their width varies between 500 and 5000 metres. There are several lighthouses in operation in the island. See Figure 2.2, above.

(2) PROVIDENCIA

2.11. The island of Providencia is some 17.5 km² in area. It has varied and well preserved vegetation. Its inhabitants are mainly involved in agriculture (coconuts, cotton, mango, sugarcane, orange and yucca crops), cattle-raising and craft fishing. On the north, east and south coasts, there is a long barrier reef (some 18 nm in length) that surrounds the island. North of the island is Low Cay that emerges permanently above high tide.

2.12. The mountainous relief present on the island takes the form of a sierra running in a south-north direction with three main branches in an east-west direction. The central and main one features the highest point on the island (“The Peak”), some 360 metres above sea level. There are several lighthouses in operation in the island. See Figure 2.3, opposite.

(3) SANTA CATALINA

2.13. The island of Santa Catalina, some 2.5 km² in area, is located north of Providencia. It is separated from Providencia by

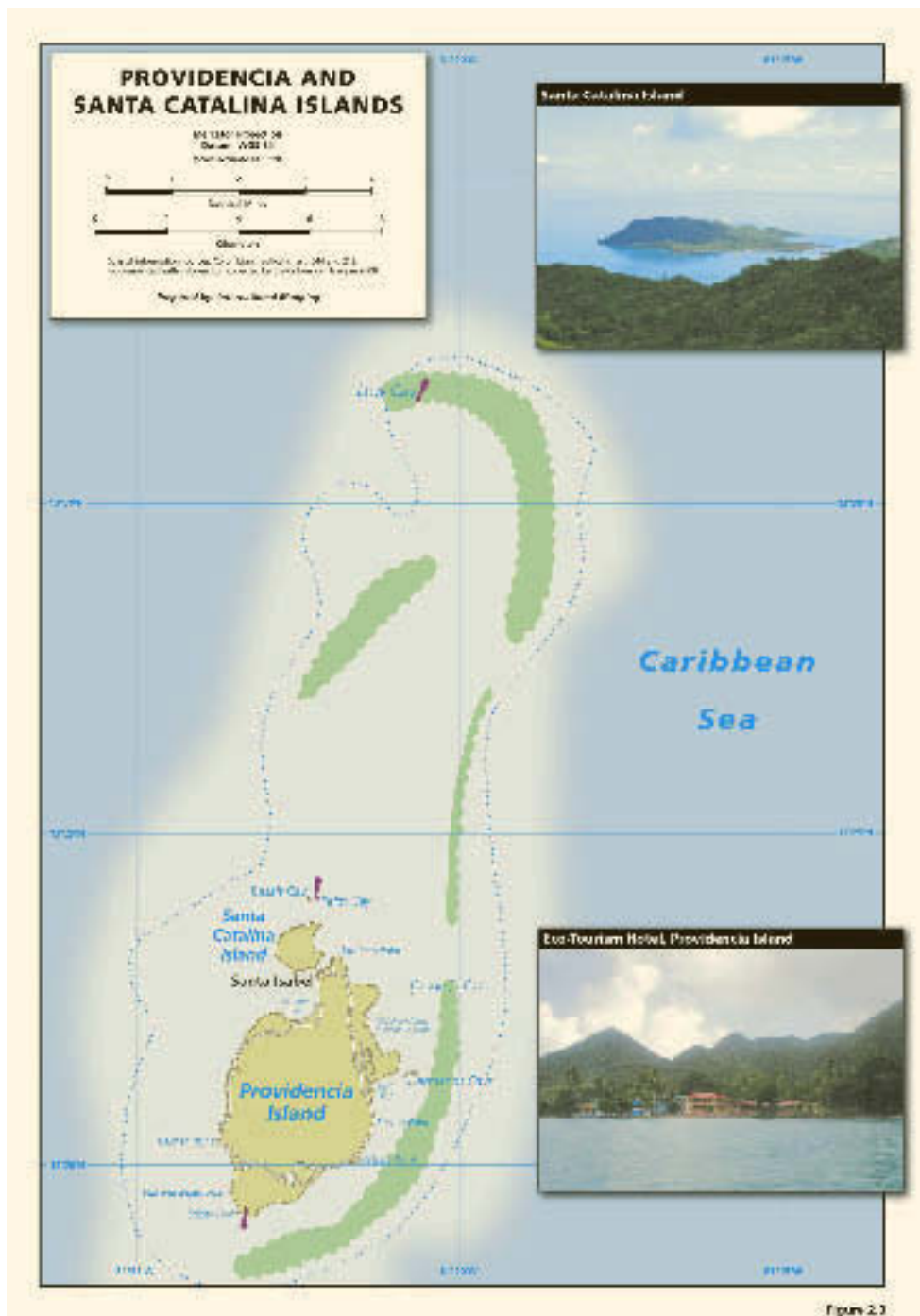


Figure 2.1

See full size map, Vol. III, page 5

the Aury Channel, some 130 metres in width. Its proximity to Providencia accounts for its dependency upon that island for purposes of its administration, communications and other activities.

2.14. The islands of San Andrés, Providencia and Santa Catalina are covered by exuberant vegetation. The weather, geology and morphology of the region facilitate the development of natural arboreal vegetation. There are two lighthouses in operation in the island. See Figure 2.3, above.

(4) ALBURQUERQUE

2.15. Alburquerque is an atoll located 20 nm south of the island of San Andrés and 25 nm SW of the East-Southeast Cays. It is oval shaped with a diameter of about 8 km, including the reef terrace. This feature has also been known, particularly in the late 19th and early 20th centuries, by the name of South-Southwest cays. See Figure 2.4, opposite.

2.16. Two of the cays on Alburquerque, North Cay and South Cay, are separated by a shallow water channel, 386 metres wide. The cays are about 6 feet above sea level, have exuberant vegetation mainly made up of coconut trees about 58 feet high, some rubber (“caucho”) trees (*Ficus sp.*) and low bushes (*Scaevola sp.*, *Tournefortia sp.*). Bordering the eastern coast there is a prairie of marine phanerogams, *Thalassia testudinum*



See full size map, Vol. III, page 7

being predominant. It has the best-preserved coral formation of the Archipelago. In the waters of these cays there is a beautiful and varied fauna: angelfish, starfish, barracudas, sharks, dolphins and numerous other species. This flora and fauna is under protection by Colombian agencies charged with the preservation of the environment.

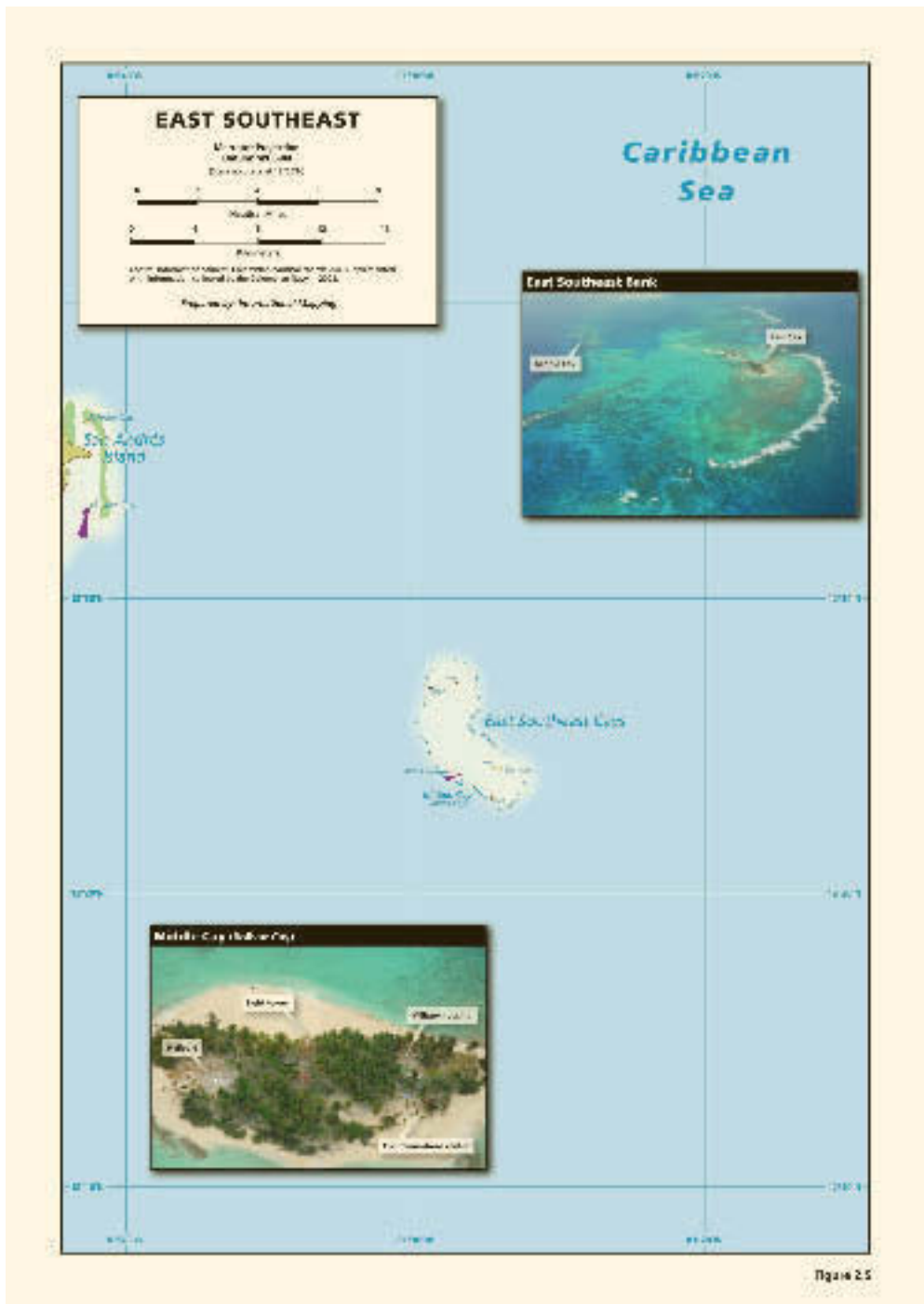
2.17. There is a Marine Infantry detachment entrusted with tasks concerning the control of fishing activities and illicit drug trafficking. Small weather and radio stations are located there as well as a lighthouse on North Cay operated by the Colombian Navy.⁸

(5) EAST-SOUTHEAST CAYS

2.18. The East-Southeast cays are located on an atoll lying 16 miles SE of the island of San Andrés and 26 miles ENE of Albuquerque; the atoll extends over some 13 km in a north-south direction. The cays are surrounded by coral reefs on the south and west, visible at a distance of 1.7 nm. On the north of the atoll is a cay of 10 metres in length, 4 metres wide and 60 cm above sea level. See Figure 2.5, opposite.

2.19. On the East Cays, there are coconut trees, low bushes and gramineous foliage. Fishermen use it as shelter during their

⁸ Albuquerque Cays / Cayos de Albuquerque Light, at 12° 10' N - 81° 50' W. Metallic tower; height 20 m.; reach 14 miles. (Source: Colombian Navy). See also *NP 69A East Coasts of Central America and Gulf of Mexico Pilot* (4th ed., United Kingdom Hydrographic Office, 2006), 70.



See full size map, Vol. III, page 9

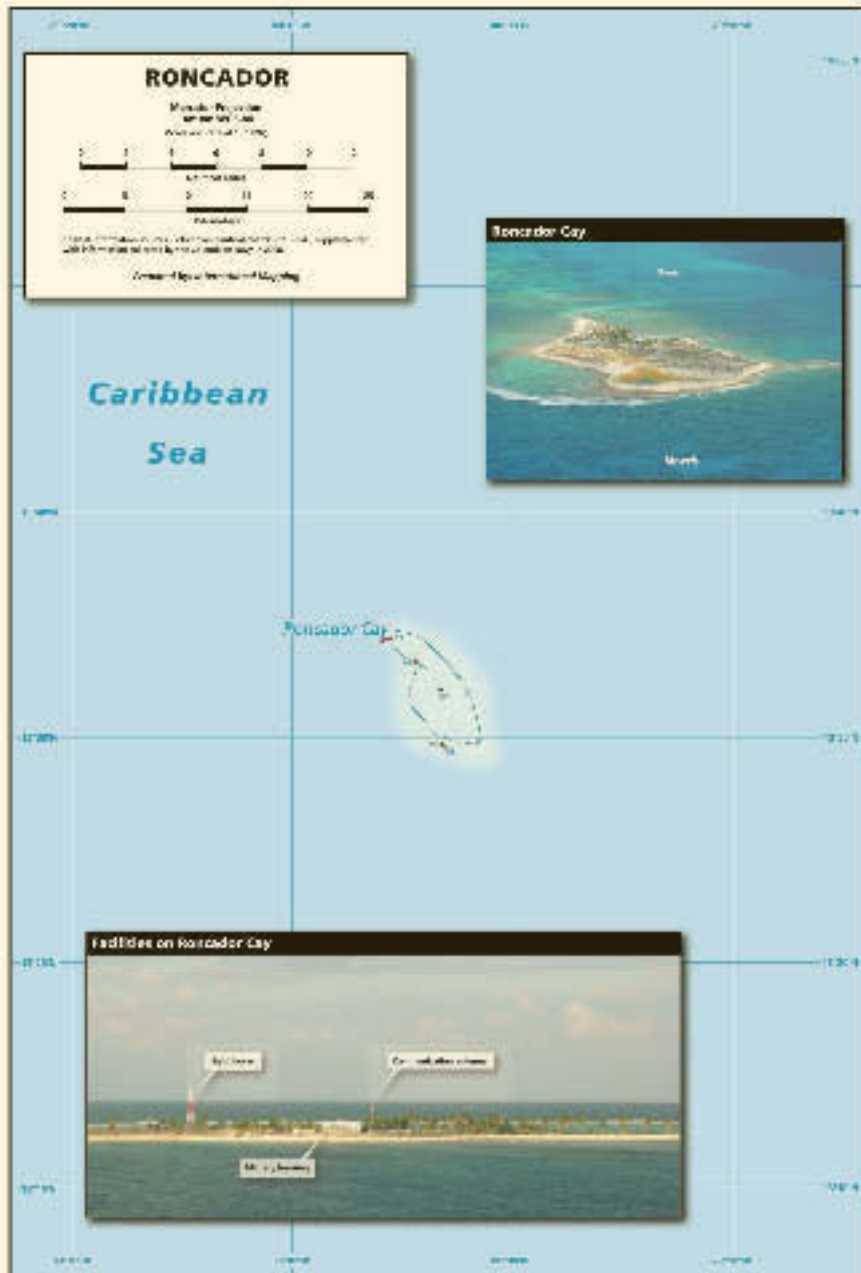
fishing trips, mainly between the months of March and August, and it is also visited by tourists.

2.20. On one of the West Cays, also known as “Cayo Bolivar”, 6 feet above sea level, there is a detachment of the Colombian Marine Infantry, in charge of controlling fishing in the area and aiding in the control of illicit drug-trafficking. There are shelters for fishermen, a signalized heliport, small weather and radio stations and a lighthouse operated by the Colombian Navy.⁹ There is also a well that provides water for the marines.

(6) RONCADOR

2.21. Roncador is a pear-shaped atoll located on a bank 15 km long and 7 km wide. It is some 77 nm east of the island of Providencia and 45 nm off Serrana. Roncador cay, located half a mile from the northern border of the bank, is some 550 metres long and 300 metres wide. It is some 4.87 metres above sea level. On the cay, there are facilities, for solar panels, communication systems and a heliport and a detachment of the Colombian Marine Infantry. With speedboats, the unit carries out tasks relating to fishing and illicit drug-trafficking control. The deepest waters in the area lying east of the cay are used by small industrial fishing vessels. The vegetation is composed of

⁹ Cayo Bolivar Light, at 12° 24' N - 81° 28' W. Metallic tower; height 30 m.; reach: 24 miles. (Source: Colombian Navy). See also *NP 69A East Coasts of Central America and Gulf of Mexico Pilot* (4th ed., United Kingdom Hydrographic Office, 2006), 70.



See full size map, Vol. III, page 11

bushes, thickets and palm trees. There is also a lighthouse operated by the Colombian Navy.¹⁰ There are two other smaller cays permanently above high tide on Roncador bank. See Figure 2.6, above.

(7) SERRANA

2.22. Serrana is the denomination for a long atoll located on a bank from which nine cays emerge permanently above high tide. It is located 45 nm NNW of Roncador and 45 miles east of Quitasueño. It is some 28 km in length and 22 km wide, featuring several groups of cays. The largest one, Southwest Cay, also known as Serrana Cay, is some 1000 metres in length and has an average width of 400 metres. It is covered by grass and stunted brushwood, 10 metres in height. There is a 6 metre-wide well for the water supply of the marine infantry corpsmen and fishermen who visit the cay. On the cay, there are facilities, solar panels and communication systems for a detachment of the Colombian Marine Infantry that carries out law enforcement activities relating to the control of fishing and illicit drug-trafficking. The cay is often visited by fishermen coming from the islands of San Andrés and Providencia who have traditionally engaged in artisanal fishing; between the months of March and August turtle fishermen also come from those islands. There is a

¹⁰ Cayos de Roncador Light, at 13°34'N - 80°05'W. Metallic tower painted red and white; height 22 m.; reach 17 miles. (Source: Colombian Navy). See also *NP 69A East Coasts of Central America and Gulf of Mexico Pilot* (4th ed., United Kingdom Hydrographic Office, 2006), 71.



Figure 2.7

See full size map, Vol. III, page 13

heliport as well as a lighthouse operated by the Colombian Navy.¹¹

2.23. Another cay, East Cay, is 3 metres above sea level, about 80 metres long and 40 metres wide, and has the same general characteristics as Serrana cay. It is also used as shelter and base of activities by Colombian fishermen.

2.24. In addition to Serrana Cay and East Cay, there are seven other cays permanently above high tide on Serrana bank. See Figure 2.7, above.

(8) QUITASUEÑO

2.25. Quitasueño is located 45 nm west of Serrana and 38 nm NNE of Santa Catalina. It is a large bank approximately 57 kilometres long and 20 kilometres wide. On the eastern border of the bank there is a coral reef barrier of some 25 nm in length, running in an N-S direction, emerging above sea level at certain places.¹² In several places, groups of rocks emerge permanently above high tide.¹³ See Figure 2.8, opposite

¹¹ “Southwest Cay Light, at 14°17’N - 80°22’W. Active; focal plane 24 m (79 ft); white flash every 10 s. 25 m (82 ft) cast iron skeletal tower, painted with red and white horizontal bands. Concrete keeper’s quarters.” In: *NP 69A East Coasts of Central America and Gulf of Mexico Pilot* (4th ed., United Kingdom Hydrographic Office, 2006), 72.

¹² *NP 69A East Coasts of Central America and Gulf of Mexico Pilot* (4th ed., United Kingdom Hydrographic Office, 2006) 72.

¹³ Annex 172: Study on Quitasueño and Albuquerque prepared by the Colombian Navy, September 2008 and see further, paras. 8.21 and 9.27.



Figure 22

See full size map, Vol. III, page 15

2.26. Quitasueño is the largest reef complex of the Archipelago. In consequence it is particularly rich in fishing, and has been given special protection by Colombian agencies charged with the preservation of coral reefs and the environment.

2.27. Apart from numerous fish species, there is active artisanal and industrial fishing – subject to Colombian regulations due to their protected and/or endangered status – of spiny lobster (*Panulirus argus*), queen conch (*Strombus gigas*), and hawksbill turtles (*Eretmochelys imbricata*).

2.28. Colombian naval authorities have often been called to investigate and aid vessels involved in shipwrecks or in distress on or in the vicinity of the bank.

2.29. There are two lighthouses on Quitasueño. One is located in the northernmost end of Quitasueño,¹⁴ the other is in the south-western sector.¹⁵ The former was initially built by the United States in 1919, in circumstances described in Chapter 4; it was transferred to Colombian ownership and control in 1972.¹⁶ The latter was built by Colombia in 2006. Both are operated and maintained by the Colombian Navy.

¹⁴ 14°28'57"N, 81°07'20"W; metallic tower; height 22 m.; reach 15 miles (Source: Colombian Navy).

¹⁵ 14°09'18"N, 81°09'48"W; metallic tower; height 18 m.; reach 15 miles (Source: Colombian Navy)

¹⁶ See below, para. 4.57.

(9) SERRANILLA

2.30. The Serranilla cays are located some 102 nm NE of Quitasueño and 69 nm west of Bajo Nuevo, on a bank of some 44 km in length and 37 km wide. There is a chain of coral reefs and several cays, among them, Cayo Oriental (East Cay), Cayo Central (Middle Cay) and Beacon Cay. The largest of them, Beacon Cay, also known as Cayo Serranilla, is 650 metres long and some 300 metres wide. Its maximum elevation above sea level is 8 metres. It has a large group of coconut trees and varied vegetation. There is a lighthouse operated by the Colombian Navy¹⁷ and a Marine Infantry detachment entrusted with tasks of controlling fishing activities and illicit drug-trafficking. There are also weather and radio stations and landing facilities for small aircraft. Major marine bird colonies of the booby species (brown boobies, *Sula leucogaster*, and red footed boobies, *Sula sula*) nest there between the months of June and August. See Figure 2.9, below.

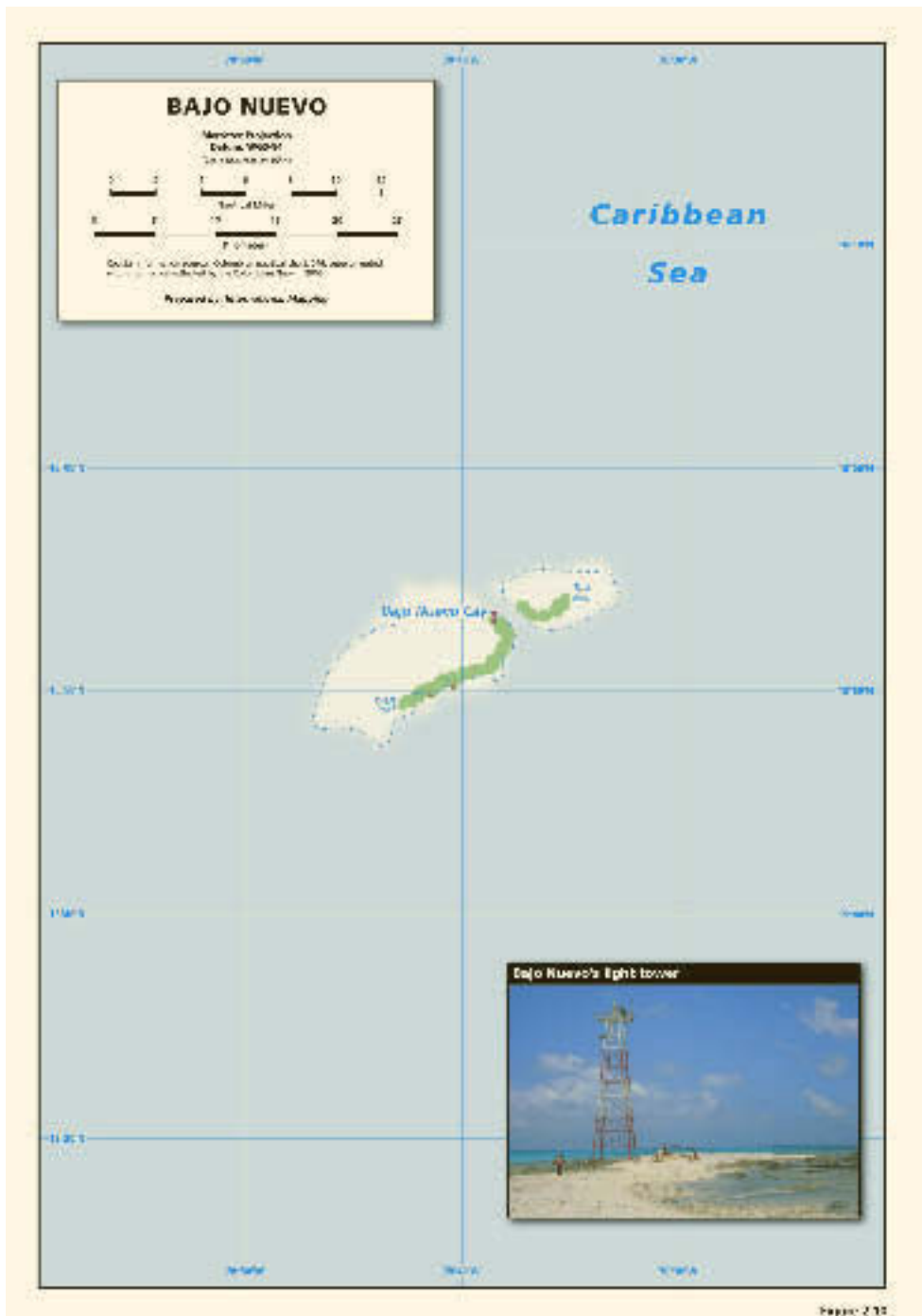
(10) BAJO NUEVO

2.31. Bajo Nuevo is located 69 nm east of Serranilla and 138 nm NNE of Serrana on a bank of the same name, of an approximate length of 33 km and width of 11 km. There are three cays the largest of which, Low Cay, is at the northern end of West Reef, about 1.55 metres above sea level, with a

¹⁷ Cayo Serranilla / Beacon Cay Light, at 15°48N - 79°51'W. Concrete and metallic tower, painted with the colors of the Colombian flag; height 30 m.; reach 24 miles (Source: Colombian Navy). See also *NP 69A East Coasts of Central America and Gulf of Mexico Pilot* (4th ed., United Kingdom Hydrographic Office, 2006), 72.



See full size map, Vol. III, page 17



See full size map, Vol. III, page 19

lighthouse operated by the Colombian Navy.¹⁸ The bank is visited by fishing vessels – subject to the national fishing regulations – from the islands of San Andrés and Providencia in March and April. See Figure 2.10, above.

C. The Archipelago as a Unit

2.32. All the maritime features Nicaragua now claims before the Court are part of the San Andrés Archipelago, over which Colombia has exercised sovereignty in an effective, peaceful and uninterrupted manner for more than 185 years.

(1) THE ISLANDS AND CAYS OF THE ARCHIPELAGO WERE
CONSIDERED AS A GROUP THROUGHOUT THE COLONIAL AND
POST-COLONIAL ERA

i. During the colonial era

2.33. Ever since the time of the Spanish colonial Empire in the Americas, the Archipelago has been known by the name of “Archipelago of San Andrés”, “Archipelago of Providencia” or “Archipelago of San Andrés and Providencia” or (since they are the most prominent of the Archipelago’s features) as the “Islands of San Andrés”.

¹⁸ Bajo Nuevo / Low Cay Light, at 15°53’09”N - 78°38’32”W. Metallic tower; height 22 m.; reach 15 miles. (Source: Colombian Navy). See also *NP 69A East Coasts of Central America and Gulf of Mexico Pilot* (4th ed., United Kingdom Hydrographic Office, 2006), 73.

2.34. The group of the “Islands of San Andrés” – including the Islands of San Andrés, Providencia, Santa Catalina and the Islas Mangles (Corn Islands) and all of the surrounding cays and islets – along with the Mosquito Coast, were ascribed by the King of Spain to the Viceroyalty of Santa Fe (New Granada) by the Royal Order of 1803.¹⁹

2.35. Nicaragua seeks to counter this fact by quoting²⁰ a report by Tomás O’Neylle – the first governor of San Andrés in the colonial era – at the beginning of the 19th century, from which Nicaragua infers that the Archipelago only consisted of the islands of San Andrés, Providencia, Santa Catalina, San Luis de Mangle Grande and Mangle Chico and some immediate cays.²¹

2.36. In his report, O’Neylle refers to the Archipelago, mentioning these islands specifically but referring generically also to “several islets and cays of the same kind”. The passage reads as follows:

“[The islands of San Andrés] are five in number, to wit: San Andrés, Providencia, Santa Catalina, San Luis de Mangle Grande, Alto or Corn Island, and Mangle Chico, surrounded by several islets and cays of the same kind.”

¹⁹ Annex 22: Royal Order of 30 November 1803. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, pp. 45-46, para. 161.

²⁰ NM, pp. 125-126, para. 2.141. NM, footnote 230, p. 126: “Reproduced in the Colombian Note of 24 June 1918 (Deposited with the Registry, Doc. N. 3).”

²¹ *Ibid.*

2.37. Clearly, the named islands are the main islands of this group. The remaining features are smaller islets and cays which, despite the fact that they are not mentioned by name, still form part of the Archipelago. The description of these islands being “surrounded” by other features cannot be taken literally, as meaning immediate proximity, but as a reference to the general area where all these features are located.

2.38. It is worth noting that the distance between the island of Providencia – mentioned expressly in the passage just quoted – and each of the cays of Roncador, Serrana or Quitasueño, is less than that between the former and the island of Mangle Grande, which is also mentioned expressly; and that the distance between the island of San Andrés and the Island of Mangle Chico – also mentioned by name – is greater than the distance between San Andrés, Alburquerque or East-Southeast. The distance between Serrana and Serranilla is also similar to that between Serrana and Providencia. The distance between Serranilla and Bajo Nuevo is similar to that between San Andrés and the Mangle Islands.

2.39. The San Andrés Archipelago is, therefore, a group of islands and cays which traditionally have been considered as a unit; the larger and more populated islands are those that have been routinely identified by name. The fact that the Archipelago’s components were not listed every single time the

“islands of San Andrés” were referred to (in 1803 or subsequently) does not imply that it only consisted of the specified islands and cays. Likewise, whenever Nicaragua refers to the so-called “Archipelago of the Miskito Cays”, it cannot be expected to mention by name every one of the “76 geographical features, varying from reefs, to cays, islets and islands” that, according to the Nicaraguan Institute of Territorial Studies, are part of that Archipelago.²²

2.40. Since the time of the Viceroyalty of Santa Fe (New Granada), the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Albuquerque and East-Southeast were considered as parts of a whole, closely interrelated with the islands of San Andrés, Providencia and Santa Catalina.

2.41. For example, at the beginning of the 19th century, Juan Francisco de Fidalgo – whose renowned exploration of the Western Caribbean was extensively quoted by the Parties in the case concerning the *Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v. Honduras)* – received instructions from Spain, via the authorities at Cartagena de Indias, the main port of the Viceroyalty of Santa Fe (New Granada), to survey the cays and banks located between Cartagena and Havana. All the

²² Information found on the website of the official *Instituto Nicaragüense de Estudios Territoriales (INETER)* (Nicaraguan Institute of Territorial Studies) at: www.ineter.gob.ni .

islands and cays that were covered by the reconnaissance are part of the San Andrés Archipelago.

2.42. Frigate Captain Manuel del Castillo y Armenta was appointed for the mission, which had the full support of the Viceroy of New Granada (Santa Fe). He sailed from Cartagena, on two ships, in the early days of December 1804, just a year after the Archipelago had been ascribed to the Viceroyalty. In his report to Fidalgo, dated from Cartagena, in February of the following year, Del Castillo stated:

“H.E. having decided... that I depart and carry out the reconnaissance of, and locate the shoals of Comboy,[²³] Nuevo, Serranilla, Serrana and Roncador I set sail from this port [Cartagena] with the brigantine Alerta...”²⁴

2.43. Del Castillo reported that he had first arrived at Serranilla, then to Serrana and later to Santa Catalina and San Andrés. He described the cays of Bajo Nuevo, Serrana, Serranilla and Roncador, and the islands of San Andrés and Santa Catalina as a group.

“On 1 January of the current year we sighted *Bajo Nuevo* on its northern part the latitude of which we observed on the same date, while being close to

²³ Del Castillo reported that he was unable to find Comboy cay or shoal, which in fact does not exist.

²⁴ Annex 23: Letter addressed to don Joaquín Francisco Fidalgo, from M. Del Castillo y Armenta, Cartagena, 9 February 1805. In: B Cuervo, *Colección de documentos inéditos sobre la Geografía y la historia de Colombia*, Sección 1ª Geografía y Viajes – Vol. I (Bogotá, Imprenta de Vapor de Zalamea Hermanos, 1891) 367.

it...on the following morning we came close to its cay or sand islet... The unsheltered state of the ships to withstand a Northwest [wind] that the season and sky seemed to threaten, made me leave the shoal, sending the brigantine to observe the latitude in the southernmost part and from there, to go to *Serrana* to carry out its reconnaissance and locate it, while I, onboard the schooner along with Navy Lieutenant Don Torcuato Piedrola of your troops, with compass 383 [*sic*] went on to that of *Serranilla* without being able to perform a further reconnaissance thereof because I had no one with practical skills on that shoal with me and its appearance was terrifying with the strong wind that was blowing. From there, I moved on to *Serrana* after having sailed four days looking for it due to its erred location and we carried out its reconnaissance and it was duly located, particularly in its northern and southern ends and eastern part... I moved on to *Roncador* and once the reconnaissance and location thereof was done, I went to the island of *Santa Catalina* where I found the brigantine dismantled of its mainmast, its log worn out at the top with a loss of its running riggings due to their having been missing as well as the top of the lower mast, topmast and its riggings. From that point, I only attempted to enable the brigantine to sail back to Cartagena having to ply to windward over a hundred leagues to that effect and, consequently, seeing as the main shoals were thus located and that there were detailed charts of the islands of *Santa Catalina* and *San Andrés*, I only tried to locate them with respect to their latitude and longitude that was verified on the second island when I sent off the schooner soon after my arrival at *Santa Catalina*.²⁵

²⁵

Annex 23. (emphasis added, pp. 368-369 in the original)

2.44. As may be seen, Del Castillo's reconnaissance was carried out over islands and cays that are part of the San Andrés Archipelago. It did not cover any other islands or cays in the vicinity, including the islets and cays close to the Jamaican and Nicaraguan coasts. It is striking that in this official document, issued immediately after the Spanish Crown had ascribed "the islands of San Andrés" to the Viceroyalty of Santa Fe (New Granada), express mention is made of most of the maritime features which are the subject of the present proceedings.

2.45. Likewise, the sailing directions published by the Hydrographic Office of the Spanish Navy in 1820,²⁶ on the basis of several sources such as the previous 1810 edition, the observation and data furnished to that office by Spanish sailors, information gathered in the pilot academies and other archives of the navy, and elements found in other sailing directions,²⁷ described the group as follows:

"Having described the coasts, the cays and reefs... to the east, at a distance of 20 leagues, we will now say something about the islands and shoals bordering vis-à-vis that coast that are beyond sounding depth.

The cays of Albuquerque or of SSW are the southernmost and westernmost of all: there are

²⁶ Annex 172: 1820 Sailing Directions of the Spanish Navy (Armada de España, *Derrotero de las islas antillanas, de las costas de tierra firme, y de las del seno mexicano, formado en la Dirección de Trabajos Hidrográficos para inteligencia y uso de las cartas que ha publicado*. 2nd ed. *Corregida y aumentada con noticias muy recientes y con un apéndice sobre las corrientes del Océano Atlántico*) Madrid, Imprenta Nacional, 1820.

²⁷ *Ibid*, "Notice" at the beginning of the book.

three of them with a good sandbank where one can cast anchor, and they are clean, and there is no need to be at guard from anything other than what is in plain sight, since although there are certain rocks around them, they are very close to them.

To the N. 18° E. of these cays, and at a distance of seven leagues is the island of San Andrés, the location of which is well known and safe enough for navigation. All the shores of this island are generally rocky, the most protruding tips to the W. are clean of soboruco, and all the W. coast is so steep that half-a-mile off it, it is almost impossible to reach bottom. The E. coast is cut off by a reef that makes it inaccessible, and that in some places protrudes for over a mile. The length of this island is seven leagues from N. to S., and two from E. to W. at its widest. On the W. part, at the anchoring place, there are two mountains protruding from the rest of the island, that is rugged in general, but it does not form streams or cliffs, its slopes being very moderate; these mountains can be seen on clear days from 10 to 12 leagues off. On the whole island there is no river or creek, nor any spring is known; which is why its inhabitants use shallow wells that provide thick and salty water. To reach this island there is no need of someone with practical skills, since staying away from the E. coast, that in no case should be passed along at a distance under three or four miles, one can head carefree to any point on the W. coast. But if one is inclined to drop anchor, the prow should be directed to the southernmost part of the island, without fear of coming up to half-a-cable's length if desired. And after seeing the so-called West inlet that is formed by the westernmost tip of the island, one heads towards it and drops anchor at 10 or less fathoms of water over sand: the ten fathoms are reached at one and a half cable's lengths from land. This anchorage place is very sheltered from

the breezes, but in the season of Northern [winds] one must be very alert to set sail at the slightest indication of a storm.

Cays of the ESE [East-Southeast]. At about E.¼ SE. from this island there are three cays called ESE., that are about six leagues off its southernmost part. These cays are surrounded by reefs and shallow sandbanks; and although there is an anchoring place on it for small vessels, it is necessary to have practical skills to approach it. These cays have loose rocks to the N. and NNE., out to seven miles from them, as can be deduced by the following occurrence told by the first pilot Don Miguel Patiño, Commander of the gunboat Concepción, that went to explore the Mosquito coast in 1804. 'Sailing around 12°35' latitude and 4°55' longitude W. of Cartagena de Indias, at half past eight in the morning, on a clear day and clear water, the helm of the gunboat with a draft of six feet and three inches Burgos [measure] jumped about a foot, without any crash or scraping being felt in any other part of the hull. The speed was six miles, but neither the sailor that was on the topmast, nor those of us who were on deck saw any spot, breaker or other sign underneath. No reconnaissance could be carried out since it was not possible to cross with the small canoe that was the only small vessel we carried. At nine, the ESE. Cays were sighted to the S. from the topmast, and at 10 the island of San Andrés was sighted amidst fog.

Islands of Santa Catalina and Providencia. The islands of Santa Catalina and Providencia, which are separated by a small channel, can be considered as a single island. They are located at N. 20° E. of San Andrés, some 18 leagues [off]...

Important notice. Of all the other shoals and islands drawn on the chart, we are only able to

provide detailed data on Bajo Nuevo, given that, although those of Serranilla, Serrana and Roncador were recognized and located, we have no additional data other than their situation; and although their positions have been rectified on the chart, we include the data on them for further information for sailors.

Roncador

Its northernmost part is located at latitude $13^{\circ}35'7''$ and longitude $4^{\circ}36'3''$ west of Cartagena de Indias. It is five miles wide in the following direction N. 28° W. and S. 28° W. There is an islet on its northern part and a cay to the south of the islet.

Serrana

Its northernmost part is at latitude $14^{\circ}18'46''$ and its southernmost part at $14^{\circ}18'72''$. Its eastern part is at longitude $4^{\circ}35'3''$ west of Cartagena de Indias and the western part is at $4^{\circ}54'54''$.

Serranilla

Its eastern part is at latitude $15^{\circ}45'20''$ and longitude $4^{\circ}21'20''$ west of Cartagena de Indias. This shoal or its breakers extend 15 miles long from E to W.

Bajo Nuevo

Bajo Nuevo is a shoal that may be some 7 miles long from N to S and 14 from E to W. On the Eastern part it is completely surrounded by a very steep reef and, on the contrary, on the western part the bottom recedes smoothly. At one and-a-half miles from its northernmost end there is a sand cay, located at latitude $15^{\circ}52'20''$ and longitude $3^{\circ}10'58''$ west of Cartagena de Indias to the WNW, at some 3 to 4 miles of which it is possible to drop anchor. Nevertheless, care must be taken to avoid entering this shoal at under 10 fathoms deep, because to the WNW of the cay, at a distance of 2

and-a-half miles a rock under only 7 feet of water has been located. And to the S¼ SE from it, at a distance of one mile, another was located under only four feet of water. Both rocks are over five fathoms of water. They are very steep and no larger than a ship.”²⁸

ii. Post-colonial era – remainder of the 19th century

2.46. During the 19th century, the administration of all the Archipelago’s components was entrusted to the Prefect of the National Territory of San Andrés and San Luis de Providencia.

2.47. An examination of documents, provisions and reports issued by the Colombian authorities during the 19th and the early 20th century with regard to the cays and islets that Nicaragua now claims shows that they were always considered to be part of the group formed by “the islands of San Andrés”, or the “Archipelago of San Andrés” or “the Archipelago of Providencia”.

2.48. Some administrative acts refer specifically to particular components of the Archipelago. For instance, when a concession for the exploitation of guano was granted to a Colombian citizen in 1915,²⁹ only Serranilla cay, over which the concession was granted, was mentioned. In the dispute with the United States, reference was made to the cays of Roncador,

²⁸ Annex 172: 1820 Sailing Directions of the Spanish Navy, pp. 393-397.

²⁹ See paras. 3.64-3.65, below.

Quitasueño and Serrana, to which the Proclamations by the United States President referred and on which the United States installed lighthouses.³⁰

2.49. On 26 September 1871 the Prefect of the National Territory of San Andrés and San Luis de Providencia, wrote to the Secretary of Finance and Development of Colombia, referring to tortoise fishing and guano extraction carried out by unauthorized persons in some of the Archipelago's cays. He said:

“For information purposes of the Government of the Union, I am honored to inform you that on the islets known as Roncador and Quitasueño, pertaining to the territory the administration of which I am in charge of and 80 miles off San Andrés island, certain citizens of the United States of America fish...”³¹

2.50. Third States shared the same conviction with regard to the extent of the Colombian Archipelago. In a note sent to the Governor of Jamaica on 29 December 1874, the British Colonial Office stated:

“... [T]he Serrana and Serranilla Cays are comprised in what [is] termed the *territory of 'St. Andrés and San Luis de Providencia'*, consisting of *St Andrews, Old Providence and neighbouring Cays of Albuquerque, Courtown bank, Roncador,*

³⁰ See para. 4.27.

³¹ Annex 74: Note N° 5 from the Prefect of the National Territory of San Andrés and San Luis de Providencia to the Secretary of Finance and Development, 26 September 1871.

Serrana and Serranilla, and that these Islands and Cays are claimed by and yield allegiance to the United States of Columbia [*sic*].”³² (emphasis added)

2.51. The enclosure to the Colonial Office’s note, a report by Captain Erskine of *HMS Eclipse*, stressed that:

“The Island of St. Andrews’

Belongs to Columbia [*sic*], and is the seat of Government of what they style ‘The Territory of San Andrés and San Luis de Providencia’ comprising St. Andrews, Old Providence and the neighbouring Cays of Albuquerque, and Courtown Bank, Roncador, Serrana and Serranilla.”³³

2.52. Jamaica took note of the information supplied by the Colonial Office and replied in the following terms:

“If it is correct statement that these cays [Serrana y Serranilla] form part of ‘what is termed ‘territory of St Andrés and San Luis de Providencia, consisting of St Andrews, Old Providence, etc.’ that would seem, having regard to the existing state of things, to negative any claim on the part of Jamaica to the Cays in question.”³⁴

2.53. In 1890, the administration of the Archipelago was entrusted to the State of Bolivar where the Prefecture of the

³² Annex 173: Note from the Commodore at the British Colonial Office to the Governor of Jamaica, 29 December 1874.

³³ Report submitted by Captain Erskine to the Commodore, 26 December 1874, enclosure to Annex 173.

³⁴ Annex 174: Note N° 20 from the Governor of Jamaica to the British Colonial Office, 9 February 1875.

Province of Providencia was created. On 19 September 1890, the Prefecture submitted Note N° 326 to the Secretary of Government of Cartagena, the capital of the Department of Bolivar. That note again reflects the appurtenance of Roncador and other islands as part of the Archipelago:

“...the acts of dominion that the Government of Colombia has exercised over the Cays of Roncador and the rest of the Islands that form the Archipelago of San Andrés.”³⁵

2.54. The Prefecture’s 1890 Note enclosed several affidavits attested at Providencia by citizens of different countries. In addition to testifying that Roncador, Quitasueño and Serrana belong to Colombia, they also considered them part of the group of San Andrés and Providencia.³⁶

2.55. There is also evidence of the extent of the Archipelago in the Reports to Congress by the highest national officials, such as Foreign Ministers. In his Reports to Congress for the years 1892 and 1894, the Colombian Foreign Minister, Marco Fidel

³⁵ Annex 82: Note N° 326 from the Prefect of the Province of Providencia to the Secretary of Government at Cartagena, 19 September 1890.

³⁶ The following is a sample: Affidavit by Mr. Alejandro Armstrong, citizen of the United States of America, dated 19 September 1890: “- Questioned - Do you know or have you heard what country do (or have) the so-called ‘Roncador’ Cays belong(ed) to?. - He replied: That he has always believed that the ‘Roncador’ Cays belong to Colombia. - Questioned - Why does the witness believe that the aforementioned Cays belong to Colombia? - He replied: That he believes so because his sailing books so state, among which he is able to quote ‘The American Coast Pilot’, work published in New York in 1864, by Messrs. Edmund and George W. Blunt, who place those Cays within the same group as ‘Albuquerque’, Vieja Providencia [Old Providence], ‘Santa Catalina’, ‘Quita sueño’, etc.; that it is all he knows in that regard.” (Enclosure to Annex 82).

Suárez, informing it of guano exploitation on the cays carried out by United States' citizens said that:

“Certain merchants from the United States have arrived at the cays of Roncador and Quitasueño, in the Colombian Archipelago of Providencia, and extracted, without the Government's permission, large quantities of the guano that lies on those islets and that is one of the assets of the Republic. Our Legation at Washington has denounced these facts that violate the territory and defraud the Nation from a source of riches the exploit of which must be attended to as soon as possible.

That the islets are of Colombia's domain cannot be doubted, since they are part of the Archipelago of Providencia...”³⁷

Similarly, in 1894, Minister Suarez wrote:

“It seems that the guano extractors obtained from the United States license to exploit the islets, by inaccurately claiming them to be *res nullius* due to their not corresponding to the territory of any State; but this statement is absolutely false, since the islets belong to Colombia by virtue of perfect titles of dominion and public and repeated acts of possession. *Roncador* and *Quitasueño* are part of the Archipelago of Providencia, belonging to the Republic, which has since its beginnings been in peaceful possession of that archipelago...”³⁸

2.56. In a Note of 17 February 1895, the Colombian Foreign Minister, when referring to a request from the Swedish-

³⁷ Annex 85: 1892 Report to Congress by the Colombian Foreign Minister. The Reports to Congress are submitted yearly by all Cabinet Ministries at the beginning of each legislature. They recount the activities carried out during the previous legislative year and are widely distributed.

³⁸ Annex 87: 1894 Report to Congress by the Colombian Foreign Minister.

Norwegian Government, espoused by the United States, to erect a lighthouse on Roncador, stated:

“Due to this, and the Cay of Roncador being comprised in the Archipelago of San Andrés and San Luis de Providencia, that is an integral part of the Colombian territory, the Minister of Finance is already dealing with the study of the matter...”³⁹

2.57. The guano extraction contracts granted by Colombia also evidence the Archipelago’s composition. For example a contract of 1896 was entitled:

“CONTRACT on guano and other fertilizers exploitation on the cays of ‘Roncador’, ‘Quitasueño’, ‘Southwest’ and others of the Archipelago of San Andrés and San Luis de Providencia”⁴⁰

2.58. Thus the Colombian Government at the time was clear in considering two of the features now claimed by Nicaragua – Roncador and Quitasueño – as “part of the Archipelago of Providencia”. The fact that the other components of the said Archipelago were not mentioned by name did not imply that they did not belong to the Archipelago; it was simply that there had been no activity on the part of United States citizens which would warrant diplomatic action with regard to them.

³⁹ Annex 30: Diplomatic Note from the Colombian Foreign Minister to the United States Minister in Bogotá, 17 January 1895.

⁴⁰ Annex 90: Contract for the exploitation of guano and other fertilizers in the Archipelago of San Andrés, 30 January 1896.

2.59. Another Foreign Minister did the same but this time with regard to every island and cay in the area. In his 1896 Report to Congress, the then Colombian Foreign Minister Jorge Holguín, referred to the forcible occupation of the Islas Mangles (Corn Islands) by Nicaragua, and included a detailed description of the Archipelago as follows:

“Colombia has upheld, upholds and will continue to uphold, until the end of time, that the islands of the Archipelago of San Andrés, formed by three groups of islands that spread from the coasts of Central America, facing Nicaragua, to the cay of Serranilla between latitude 15°52 north and longitude 80°20 west of the Greenwich meridian, the first of these groups being formed by the islands of Providencia and Santa Catalina and the cays of Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo; the islands of San Andrés and the cays of Alburquerque, Courtown Bank and others of less importance, forming the second; and the islands of San Luis de Mangle, such as Mangle Grande, Mangle Chico and the cays of Las Perlas forming the third, as well as the Mosquito Coast, are its property and belong to it by inheritance, under the *uti possidetis* of 1810.”⁴¹

2.60. The Colombian Foreign Minister’s report to Congress shows that with the sole exception of the Islas Mangles (Corn Islands), this characterization mirrors, island by island and cay

⁴¹ Annex 89: 1896 Report to Congress by the Colombian Foreign Minister. This is a revised translation.

by cays, the one included by Nicaragua in the submissions in its *Memorial*.⁴²

2.61. Also of importance here is the diplomatic correspondence exchanged between Colombia and the United States with regard to the extraction of guano from the cays of Roncador and Quitasueño, in which Colombia repeatedly stated its view that those features belonged to the San Andrés Archipelago. In a lengthy Note addressed to the Secretary of State on 18 January 1893, the Colombian Minister in Washington advanced several propositions with regard to Roncador and Quitasueño, all of which display a firm conviction that these features belonged to a unit known as the “Archipelago or group of Providencia”.⁴³ This correspondence is discussed in Chapter 4.

(2) THE ISLANDS AND CAYS OF THE ARCHIPELAGO CONSIDERED
AS A GROUP DURING THE 20TH CENTURY

i. Prior to the 1928 Treaty

2.62. During the 20th century, the established conception of the composition of the Archipelago remained unchanged.

⁴² NM, Submissions, p. 265. The same cannot be said of Nicaragua’s Application: in the list of the features claimed by that country, Bajo Nuevo, which it now claims, is not mentioned. See *Application instituting proceedings filed in the Registry of the Court on 6 December 2001*, p. 8, para. 8.

⁴³ Annex 27: Diplomatic Note from the Chargé d’Affaires of Colombia in Washington to the Secretary of State, 18 January 1893.

2.63. In an Award rendered by French President Loubet in 1900, in a dispute between Colombia and Costa Rica – which will be discussed in Section 4.3 below – the Arbitrator, when referring to the San Andrés Archipelago, leaves no doubt that it extended not only to the islands and cays specifically mentioned but also to all other islands, islets and banks that depended upon the former Province of Cartagena.

2.64. Similarly, when in 1906 the British Foreign Office again dealt with the issue of sovereignty over Serranilla, in a memorandum addressed to the British Colonial Office, it alludes to the reconnaissance carried out by Captain Erskine of *HMS Eclipse* in 1874 – quoted above – as follows:⁴⁴

“In 1874, referring to this correspondence, Commodore de Horsey forwarded a report from Captain Erskine of his Majesty’s Ship ‘Eclipse’ who had visited these islands and Cays. Captain Erskine in his report stated that the Serranilla Cays belonged to the Territory of ‘St. Andrés and San Luis de Providencia’ and that all these Islands and Cays were claimed by, and yielded allegiance to, the States of Colombia. This claim was based on the succession to Spanish rights.”⁴⁵

The Memorandum goes on to state that:

“In April 1894 His Majesty’s Minister at Bogotá reported that the Archipelago of St. Andrés was looked upon by the Colombian Government as

⁴⁴ See paras. 4.81-4.82, below.

⁴⁵ Annex 180: Note N° 34429 from the British Foreign Office to the Colonial Office, 24 October 1906, and enclosed Memorandum dated 18 October 1906.

belonging to Colombia, and that they had resisted attempts by the United States to apply the Bonding Act of 1858 (1856?) to it...”

It also recalls that:

“In the ‘Nouveau Dictionnaire de la Géographie Universelle’ it is stated that the Serranilla Cays form part of the Group of St. Andrews and Providence, and that they belong to the Republic of Colombia, and in various geographical works relating to Colombia the Island of San Andrés is given as belonging to Colombia”

It also takes note of the testimony given in Jamaica in 1906 by experienced sailors in the area, where it is recalled that Serranilla belongs to Colombia and part of the Group of San Andrés and Providencia.

2.65. On 19 July 1915, Edward Alexander, a New York lawyer, wrote as follows to the State Department informing it about deposits of guano in the San Andrés Archipelago:

“I have received a letter from one of the official representatives of the Government of Colombia, S.A., who informs me that there is a file in your office an analysis and considerable data concerning certain deposits of guano in the Archipelago of San Andrés. This Guano is located on the keys of Roncador, Quitasueño, Serranilla and South West Cay, in the Archipelago of San Andrés.”⁴⁶

⁴⁶ Annex 189: Letter from Mr. Edward A. Alexander, Counselor at Law, New York, to the Department of State, 19 July 1915.

2.66. In its reply, the State Department stated that although the Archipelago as such was not included in the “Guano Islands” list, it was possible that some of its cays and islands might have been included in the list under their own names:

“You will observe that the ‘Archipelago of San Andrés’ is not mentioned in the list of guano islands appertaining to the United States. It is possible that there are islands of the Archipelago which are so listed under separate names.”⁴⁷

ii. At the time of the 1928 Treaty and 1930 Protocol

2.67. That same conception of the Archipelago prevailed at the time of the signature and ratification of the 1928/1930 Treaty.

2.68. During the course of the negotiations of the Treaty, in a Note dated 20 November 1927, the Colombian Minister in Managua, Manuel Esguerra summarized his dealings on the matter with the Nicaraguan Foreign Ministry and expressly referred to the Archipelago’s features as follows:

“...this Archipelago is formed by the islands of San Andrés, Providencia, Santa Catalina, Great Corn Island and Little Corn Island, and the cays of Alburquerque, Cowton [Courtown], Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo and Morrison.”⁴⁸

⁴⁷ Annex 190: Note from Mr. William Phillips, Third Assistant Secretary, for the Secretary of State, to Mr. Alexander, 27 July 1915.

⁴⁸ Annex 112: Note N° 530 from the Colombian Minister in Managua to the Colombian Minister in Washington, 20 November 1927. “Cowton” refers to Courtown. Morrison is one of the Miskito Cays off the northern coast of Nicaragua.

2.69. The extent of the San Andrés Archipelago was so well known that Nicaragua and Colombia did not deem it necessary to name each and every one of the features of the Archipelago in the Treaty. The text of the 1928 Treaty embodies the traditional concept of the Archipelago when it provides that:

“..the Republic of Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina and *all* the other islands, islets and cays that form part of the said *Archipelago of San Andrés*.” (Emphasis added.)

2.70. Nicaragua alleges that – despite the establishment of the limit of the 82°W meridian in the Treaty – its recognition of Colombia’s sovereignty over the San Andrés Archipelago only applied to certain islands and cays, and not to all those that had been traditionally considered to form part of the Archipelago and over which Colombia had been exercising its jurisdiction.⁴⁹ This is untenable. Applying Nicaragua’s argument, Colombia could hold that despite the 1930 Protocol, its recognition of Nicaragua’s sovereignty under Article 1 of the 1928 Treaty only extended to the *Islas Mangles* (Corn Islands) and not to the dozens of banks, cays and islands located to the west of the 82°W meridian, all the way to the Mosquito Coast. But evidently that limit had the main purpose of preventing the San Andrés Archipelago from being considered to comprise the

⁴⁹ NM, p. 175, para. 2.249; p. 176, paras. 2.251-2.252. NWS, p. 65, para. 2.35.

Miskito Cays and dozens of other cays and banks located in the coastal region though not specifically mentioned in the Treaty. Nicaragua expressly accepts this,⁵⁰ but refuses to accept the necessary corollary with respect to islands and cays to the east of the meridian.

iii. Following the 1928 Treaty and the 1930 Protocol

2.71. During the negotiation, signature, approval and exchange of ratification instruments of the 1928 Treaty – and after its entry into force – both the Colombian and Nicaraguan Governments took the view that all of the cays east of 82°W belonged to Colombia as part of the San Andrés Archipelago and that there was no unresolved matter pending between them.

2.72. That was the position of the Nicaraguan Congress – which had proposed and approved the Treaty with the addition of the limit of the 82° W meridian. For its part, the Colombian Congress consistently acted on the basis of what was unequivocally understood to be the Archipelago’s composition.

2.73. As to the cays, the Colombian Congress, when approving the 1928 Treaty, did so on the premise that all of the cays were part of the Archipelago: it was on that basis that the United States’ claims over some of them had been rejected for

⁵⁰ NM, p. 147, para. 2.191; p. 165, para. 2.229. NWS, p. 2, para. 4.

several decades, during the complex dispute with that country (recounted in Chapter 4).

2.74. The consistency of the actions of the Colombian Congress, reflecting the historical and traditional concept of the appurtenance of these features to Colombia and to the Archipelago, was evidenced when it intervened, over the course of several decades, in guano or other exploration or exploitation contracts in the Archipelago, as shown in Chapter 3.

2.75. In 1934, the Senate of Colombia examined the question of the claims by the United States over the cays of Roncador and Quitasueño. The Senate took as established the cays' appurtenance to the Archipelago.

2.76. Indeed, one of the Senate's conclusions read as follows:

“By this detailed presentation and by the commentaries that accompany it, the Honorable Senators may have seen that two facts transcend throughout this process: First, our clear and ancient titles of sovereignty over the cays of Roncador, Quitasueño and Serrana, that are an integral part of the Archipelago of San Andrés and Providencia and, as such, an indisputable part of our territory.”⁵¹

⁵¹ Annex 118: Report of the Colombian Senate's Special Commission that studied the Memorial of Mr. Ernesto Restrepo Gaviria, in relation to the Cays of Roncador and Quitasueño, 16 November 1934.

2.77. A few years later, in its session of 10 August 1936, the Colombian Congress ordered a parliamentary commission to visit the Archipelago onboard the official steamship *Cúcuta*, in order to ascertain the living conditions of its inhabitants and to make proposals for their improvement. In the report rendered by the Commission to Congress in 1937, the Archipelago's components were again listed in the established terms, as follows:⁵²

“The Archipelago of San Andrés and Providencia is located to the north of the Sea of the Antilles, in front of the coasts of Nicaragua, and it is formed by the islands of San Andrés, Providencia and Santa Catalina; the cays and islets of Alburquerque, Bolivar, Johnny Cay and Courtoun [*sic*] Cay, close to San Andrés; Roncador and Quitasueño, close to Providencia; as well as the banks of Cerrana [*sic*], Cerranilla [*sic*] and other of lesser importance.”⁵³

(3) TEXTBOOKS AND MAPS DESCRIBING THE CAYS AS PART OF
THE ARCHIPELAGO

*i. The Archipelago in Colombian geography and history
textbooks*

2.78. Both before and after the 1928/1930 Treaty, numerous publications, on Colombian geography, economy and history, consistently reflected the established conception that the San

⁵² Colombian Congress, *San Andrés y Providencia, Informe de la Comisión Parlamentaria que visitó el Archipiélago* (Bogotá, Imprenta Nacional, 1937) 30. Peace Palace Library, *Call number* S 660 d.31.

⁵³ Colombian Congress, Peace Palace Library, *Call number* S 660 d.31

Andrés Archipelago was a group consisting of the islands of San Andrés, Providencia and Santa Catalina as well as numerous cays, including those of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque and East-Southeast. Appendix 2 contains samples of this literature.⁵⁴

ii. *The Archipelago in Colombian cartography*

2.79. In Colombian official maps published up to the present day, the cays have always appeared as part of the San Andrés Archipelago and therefore as Colombian. There was never any protest by Nicaragua. Only after it purported to disavow the 1928/1930 Treaty, as late as 1980, did it occasionally refer to a few of the hundreds of publications that have appeared since, always depicting the cays as part of the Archipelago and therefore, of Colombia. Figures 2.11 through 2.20 contain examples of Colombian maps to this effect.

2.80. Of special value are two official maps of the Republic of Colombia published by the “Oficina de Longitudes” of the Ministry of Foreign Affairs –the mapping agency of the Colombian Government at the time– in 1920 (Figure 2.11, below) and 1931 (Figure 2.12 below), i.e., before and immediately after the conclusion of the 1928/1930 Treaty.

⁵⁴ Appendix 2: Selected Colombian Geography Publications referring to the San Andrés Archipelago.

**MAP OF THE REPUBLIC OF COLOMBIA:
1920**

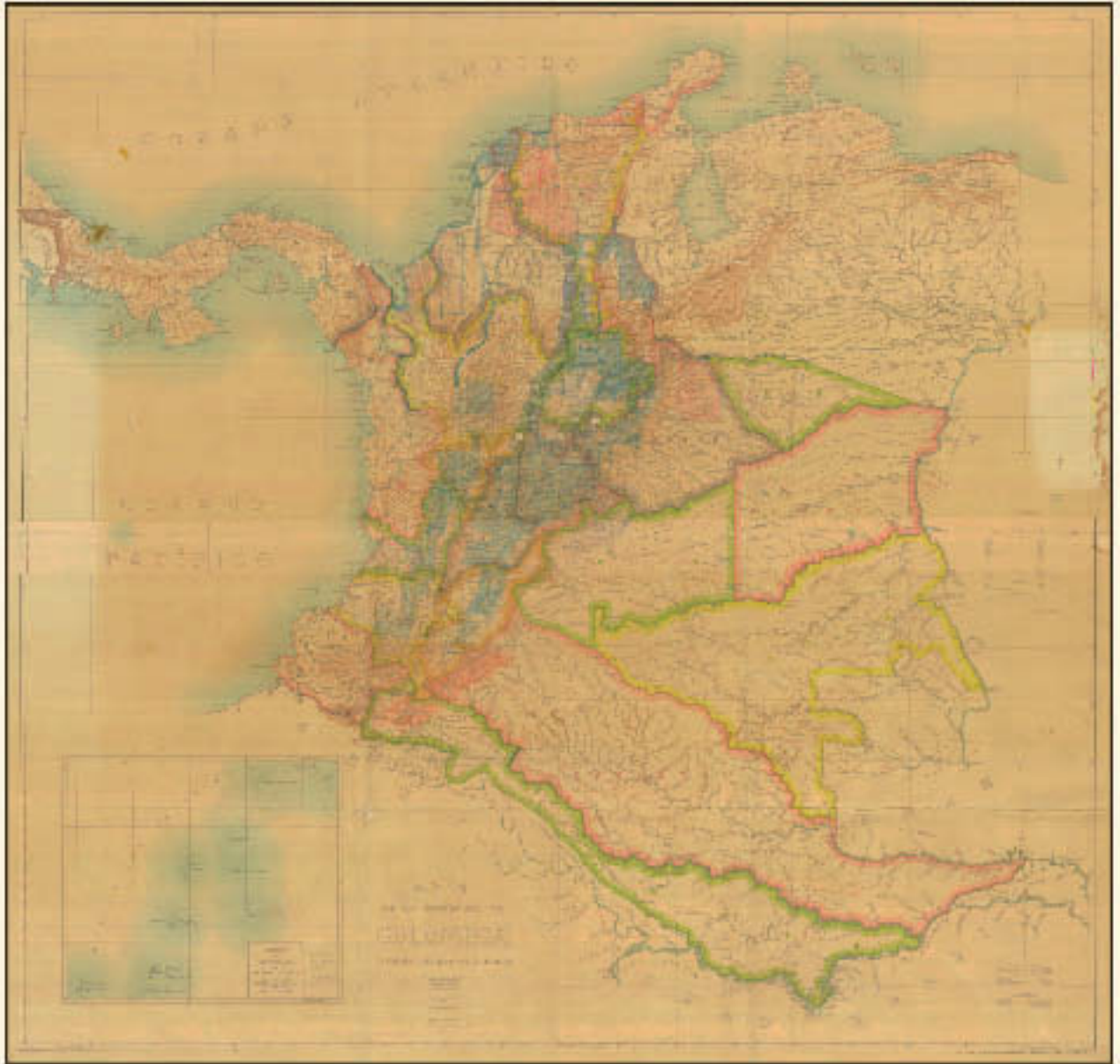
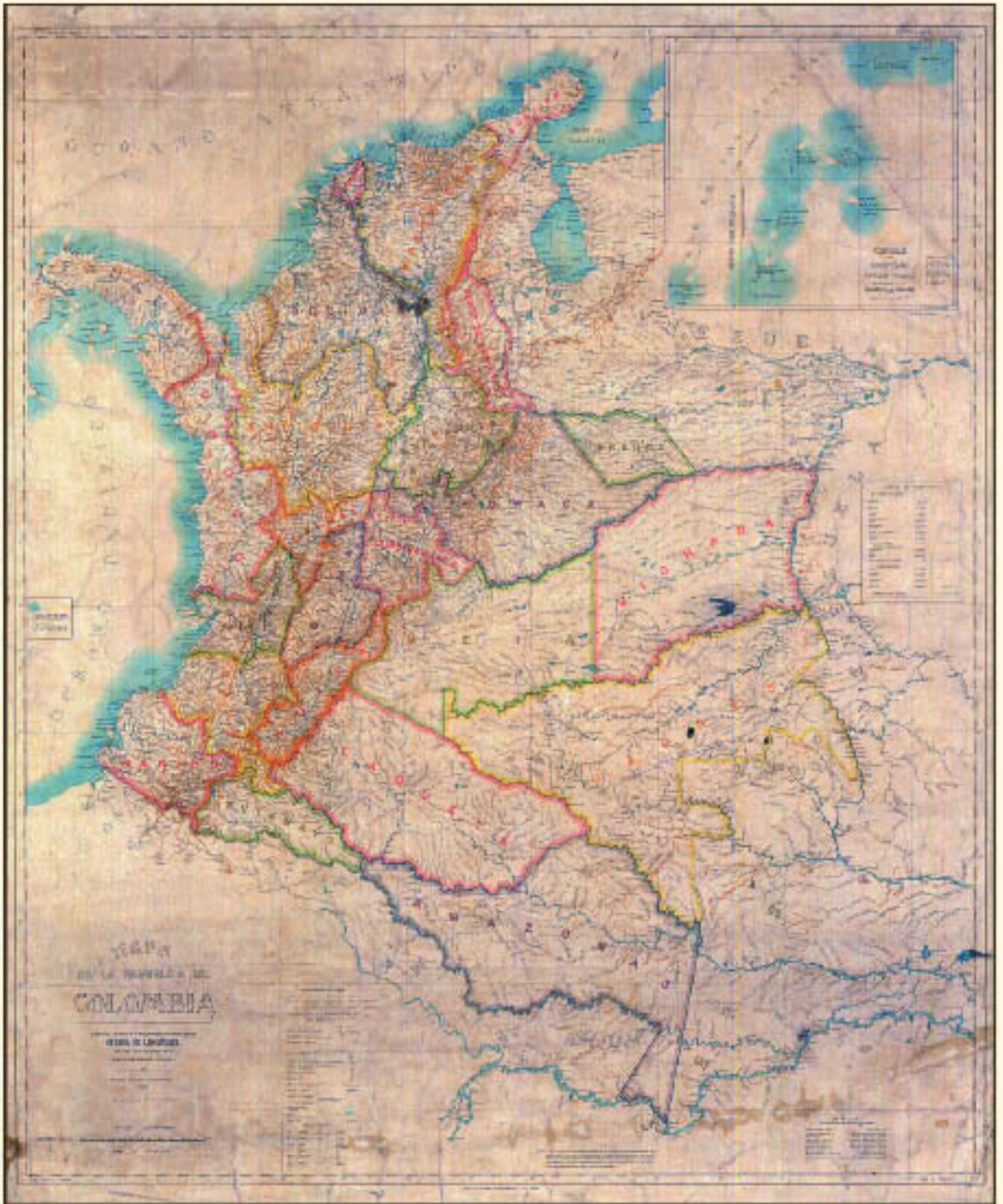


Figure 2.11

See full size Map Vol. III - page 21

**MAP OF THE REPUBLIC OF COLOMBIA:
1931**



See full size Map Vol. III - page 23

Figure 2.12

2.81. In the first of these, an inset was included devoted in its entirety to the depiction of the Archipelago, under the heading “Archipelago of San Andrés, belonging to the Republic of Colombia”. This inset includes all the features that by then were considered as making up the San Andrés Archipelago, and it mirrors the description of the archipelago as “formed by three groups of islands that spread from the coasts of Central America”, offered in 1896 by Colombian Foreign Minister Holguín.⁵⁵

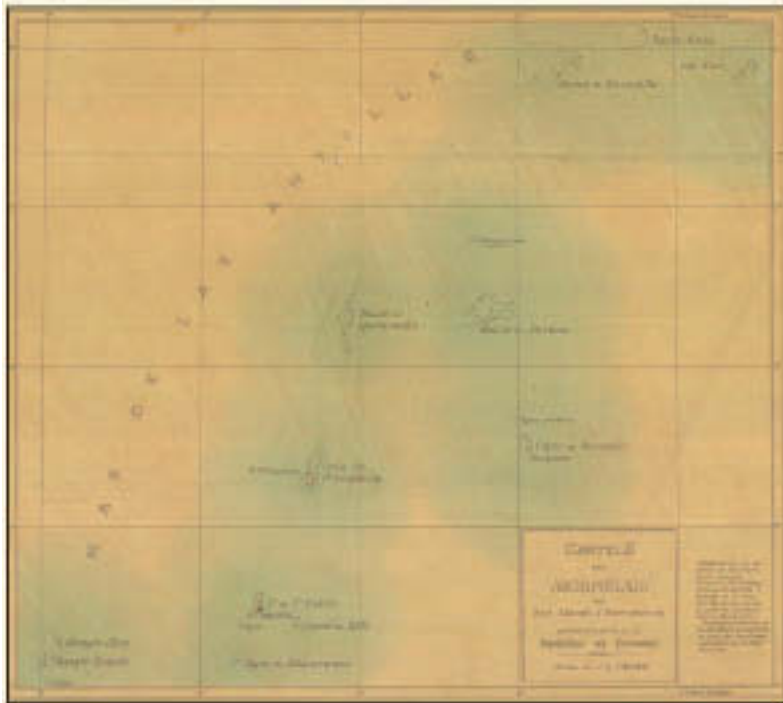
2.82. Indeed, the 1920 map shows the three groups of islands mentioned by Holguín: a group formed by the islands of Providencia and Santa Catalina and the cays of Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo; a second group formed by the islands of San Andrés and the cays of Alburquerque, Courtown Bank “and others of less importance” and the third group formed by the islands of San Luis de Mangle (Mangle Grande and Mangle Chico).

2.83. In the second map, there is also an inset bearing the same title and produced just one year after the entry into force of the 1928 Treaty with Nicaragua. However, there is a significant difference, consisting in that a line following meridian 82°W is

⁵⁵ See Annex 89.

INSET MAP OF THE REPUBLIC OF COLOMBIA: 1920

Inset of the Archdiocese of San Andrés and Providencia



INSET MAP OF THE REPUBLIC OF COLOMBIA: 1931

Inset of the Archdiocese of San Andrés and Providencia



See full size Map
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Fig. 2.14

clearly depicted and to the left of that line a legend in capital letters was included: “REPUBLICA DE NICARAGUA”.

2.84. A comparison of these two maps shows that the same template was used for producing both of them and that the cartographers working in 1931 took care to reflect the result of the arrangements between Colombia and Nicaragua of 1928 and 1930. The Islas Mangles (Corn Islands) are shown to the west of the line following the 82°W meridian, thus signaling that they belonged to the “Republic of Nicaragua”, and the whole of the Colombian Archipelago is also shown, including the features identified by name in Article 1 of the Treaty, as well as those “other islands, islets and cays that form part of the Archipelago of San Andrés”. Both insets are shown in Figure 2.13, above.

2.85. Additionally, in its Judgment of 13 December 2007, the Court concluded that “Nicaragua’s failure to protest the maps does not therefore imply an acceptance of the 82nd meridian as the maritime boundary”.⁵⁶ But the maps just described *do* show that all the features now claimed by Nicaragua *did* belong to the San Andrés Archipelago and thus to Colombia. It is submitted that, to use the words of the Court, Nicaragua’s failure to protest these maps *does* imply an acceptance of Colombia’s sovereignty over those features.

⁵⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, p. 35, para. 118.

iii. *Third States cartography and the Parties' reactions to it*

2.86. After the 1928/1930 Treaty and the Olaya-Kellogg Agreement⁵⁷ entered into force, multiple maps were published in third countries, in which the San Andrés Archipelago appears in greater or lesser detail. Colombia has reviewed over 5000 maps in the main map collections of the world: not a single one has been found showing the cays or any maritime feature east of the 82°W meridian as belonging to or claimed by Nicaragua.

2.87. With regard to the cays of Roncador, Quitasueño and Serrana, several maps edited in the United States between 1928 and 1971 – during the currency of the 1928 Olaya-Kellogg Agreement – that contain some form of indication with regard to sovereignty allude either to a condominium between Colombia and the United States of America or to claims put forward by them.⁵⁸ While certain maps assign the cays to either Colombia

⁵⁷ Annex 2: Exchange of Notes between Colombia and the United States of America, concerning the status of Quitasueño, Roncador and Serrana, 10 April 1928 (Hereafter “1928 Olaya-Kellogg Agreement”). The background and significance of this instrument will be discussed in Chapter 5, Section B (3) of the present Counter-Memorial.

⁵⁸ See e.g., National Geographic Society, “Mexico, Central America and the West Indies”, in *1939 National Geographic Maps Collection*; National Geographic Society, “Countries of the Caribbean”, in *1947 National Geographic Maps Collection*; National Geographic Society, “West Indies”, in *1954 National Geographic Maps Collection*; ESSO, *Map of Central America*, United States, 1954; National Geographic Society, “Atlantic Ocean”, in *1955 National Geographic Maps Collection*; National Geographic Society, “Countries of the Caribbean - Central America C1”, in *1960 U.S. Geological Survey*; H. Fullard, “West Indies”, in *1960 Philip Library Atlas*, p. 169; H. Fullard, “West Indies”, in *1960 Philip Record Atlas*, p. 111; National Geographic Society, “West Indies”, in *1962 National Geographic Maps Collection*; and Hammond, “Central America”, in *1971 The World Book Atlas*, p. 130. (Some of them reproduced in Vol. III, Figures 2.21-2.24).

or the United States,⁵⁹ none of them ever mentions any Nicaraguan claim.

2.88. These references were not limited to publications in the United States of America, but are also found in maps published in France,⁶⁰ Spain,⁶¹ Switzerland,⁶² Germany,⁶³ the United Kingdom of Great Britain and Northern Ireland,⁶⁴ Poland,⁶⁵ Russia,⁶⁶ Austria⁶⁷ and the Philippines.⁶⁸ None of these maps suggests that Nicaragua was ever considered a claimant to any maritime features east of the 82°W meridian.

⁵⁹ See e.g., C.S. Hammond & Co, *Hammond's Desk Study Map of West Indies and Central America* (1928); and National Geographic Society, "Mexico, Central America and the West Indies", in *1934 National Geographic Maps Collection*.

⁶⁰ *Carte de Colombie et des Guyanes*, France, M. Lape, 1828 (Vol. III, Figure 2.25).

⁶¹ Editorial Vergara, "EE.UU. y America Central", in *1932 Gran Atlas Vergara*, pp. 92-93; S. Salinas Bellver, "Antillas y América Central", in *1951 Atlas Geografía Universal*, p. 64; Editorial Seix Barral, *América Central Continental e Insular* (Barcelona, 1959); J. Aguilar, "América Ístmica", in *1959 Nuevo Atlas Mundial*, pp. 240-241; and Editorial Seix Barral, *América Central Continental e Insular* (Barcelona, 1967); Antillas, España, Editorial José Aguilar, 1968. (Two of them reproduced in Vol. III, Figures 2.26-2.27).

⁶² I. Eduard, "Nordamerika Politische Übersicht", in *1935 Der Haus Atlas*; and Inst. Orell Fü SSLI AG, "Mittelamerika und Westindien", in *1948 Schweizerischer MittelschulAtlas*, p. 109.

⁶³ National Geographic Society – Germany, *Mexico, Zentralamerika und Westindische Inseln Vorläufige Sonderausgabe IX* (1940); Bibliographisches Institut A.G. Leipzig, *Mittelamerika* (1942); and M.A.N., "May 1957", *Calendar – Caribbean Area* (Freitag, 1956).

⁶⁴ Oldham Press Limited, "West Indies", in *1950 New Atlas of the World*, p. 89; and J. Bartholomew, "The Caribbean", in *1973 The Advanced Atlas*, p. 97.

⁶⁵ Sodic Dobrosavz, "Mexico and Central America", in *1953 Geografski Atlas*, p. 28; and Panstwowe Przedsiębiorstwo, "North America", in *1974 Atala Geograficzny*, p. 85.

⁶⁶ Gugg, *Central America* (1959); Gugg, *Central America* (1972).

⁶⁷ H. Haack, "Mittelamerika und westindien", in *1968 Haack Housatlas*, p. 208. (Reproduced in Vol. III, Figure 2.29).

⁶⁸ Hammond Headline, "The West Indies", in *1975 World Atlas*, p. 12.

2.89. On the other hand, Colombia was often faced with the need to request rectifications due to the nomenclature used in certain United States-published charts or maps depicting the cays of Roncador, Quitasueño and Serrana as belonging to the United States.

2.90. In 1935, the Government of Colombia protested against the publication, by the National Geographic Society, of a map where the cays of Roncador, Quitasueño and Serrana appeared as belonging to the United States. The National Geographic Society's reply to the Colombian Legation in Washington, dated 11 June 1935, asked whether it would be agreeable to the Colombian Government, if the maps published thereafter showed signs reading "US & Colombia" under the cays of Roncador, Quitasueño and Serrana.⁶⁹

2.91. In 1941, the American Geographical Society submitted to the Department of State a request for information, concerning sovereignty over the cays of Roncador, Quitasueño and Serrana: this was required for a map it was preparing for the United States Government, under contract. The State Department informed the Society of the 1928 Exchange of Notes and stated that they were in dispute between Colombia and the United States.⁷⁰

⁶⁹ Annex 202: Note from the National Geographic Society to the Colombian Legation in Washington, 11 June 1935.

⁷⁰ Annex 204: Note from the Department of State to the American Geographical Society, 16 June 1941.

2.92. In 1943 the Colombian Foreign Ministry instructed its Legation in Washington to address the publishing house of Rand & McNally, with reference to the publication by them of a map where the cays of Serrana, Roncador and Quitasueño appeared as belonging to the United States. Recalling the 1928 Olaya-Kellogg Agreement, it instructed the Legation to take measures to ensure that the notation with regard to Roncador, Quitasueño and Serrana was modified accordingly.⁷¹

2.93. In 1950, the Colombian Representative to the Universal Postal Union addressed the Union with regard to the misnomer of the status of the cays of Roncador, Quitasueño and Serrana appearing in the leaflet of the Union circulated in Switzerland, and announced that the Governments of Colombia and the United States would issue the pertinent notification.⁷²

2.94. Throughout this period Nicaragua never carried out any similar action with a view to rectifying statements on maps assigning the cays to Colombia. If Nicaragua had indeed regarded the 1928/1930 Treaty as having preserved its alleged rights over the cays of Roncador, Quitasueño and Serrana (or over any other of the Archipelago's cays), it would not have remained silent for so many decades.

⁷¹ Annex 122: Note N° LF99/458 from the Colombian Foreign Minister to the Colombian Chargé d'Affaires in Washington, 21 October 1943.

⁷² Annex 53: Diplomatic Note from the Colombian Representative to the Universal Postal Union to the Director-General of the Universal Postal Union, Montreux, 30 May 1950.

2.95. As has been recalled, throughout the 19th and 20th centuries – until 1913, to be precise – Nicaragua evidently regarded itself as lacking any rights over the Archipelago of San Andrés. As of 1890 its claim was limited to the Islas Mangles (Corn Islands). This is confirmed not only by its silence with regard to the rest of the islands and cays of the Archipelago, but also by the reservation it communicated to the French Government following the Award rendered by President Loubet in 1900, relating solely to the aforesaid islands.⁷³

*iv. The Archipelago in Nicaraguan cartography prior to
1980*

2.96. The maps published in Nicaragua throughout this long period, even after 1913, also show that it never considered that the islands and cays of the San Andrés Archipelago – with the exception of the Islas Mangles – belonged to it. See, e.g., the Official Map of Nicaragua of 1898, published by mandate of the President of the Republic, and the Nicaraguan Ministry of Public Work’s “Map of Nicaragua” of 1978, below. The *Atlas Histórico de Nicaragua*, published in 2002 and authored by a former Foreign Minister – who happened to hold that office at the time of the filing of Nicaragua’s Application in the present proceedings – contains a series of useful historical maps of Nicaragua in this regard.⁷⁴ An official map of Nicaragua

⁷³ See paras. 4.109-4.128.

⁷⁴ F.X. Aguirre Sacasa, *Un Atlas Histórico de Nicaragua*, Managua, Colección Cultural de CentroAmérica, Serie Histórica - N° 15, 1 ed., 2002, 250 p.

OFFICIAL MAP OF NICARAGUA: 1892

Published by: Ministerio de la Gobernación de Nicaragua.
Refined by: A. S. C. B. L. Y.

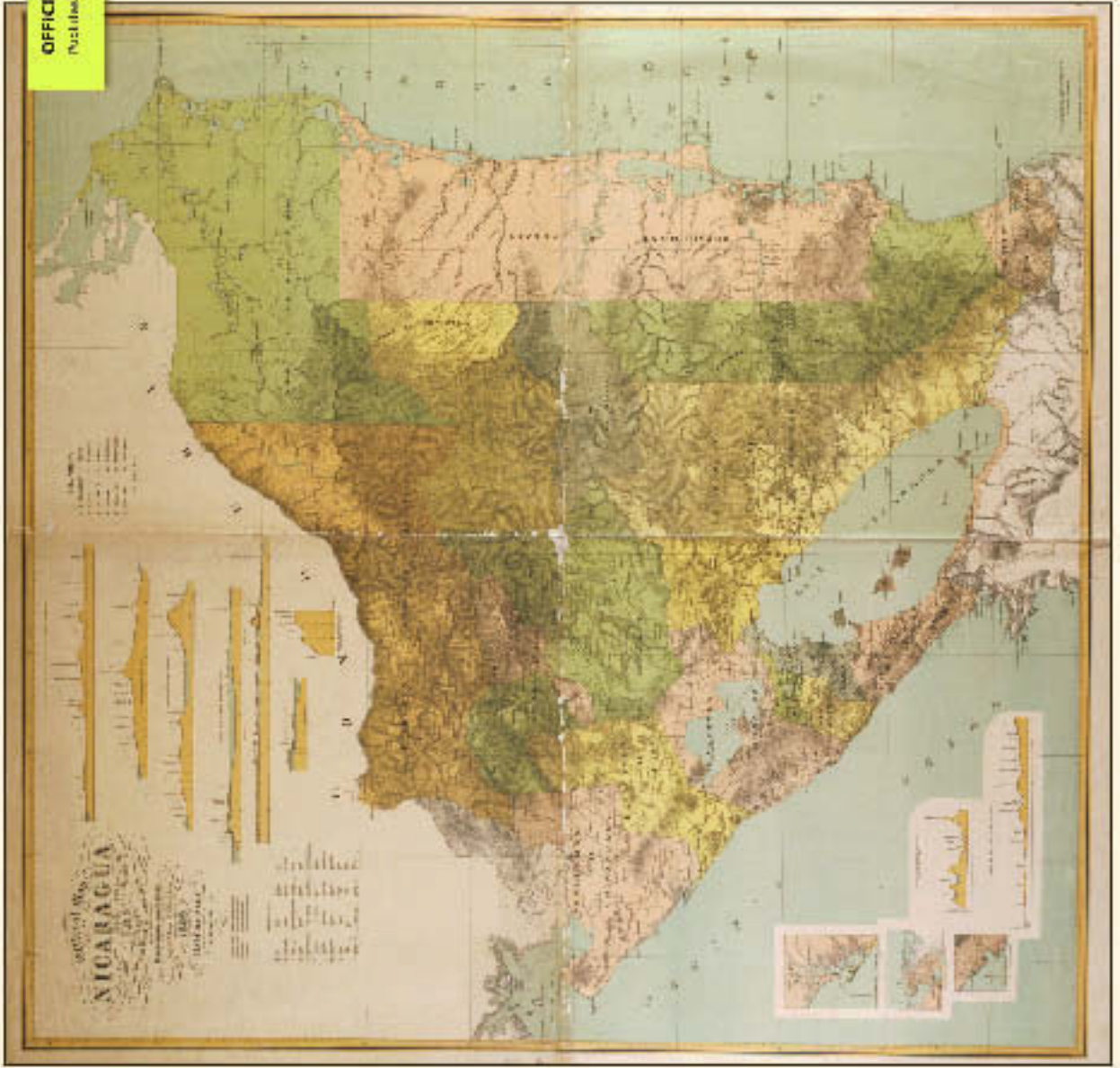


Figure 2.31

See full size Map
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published by the General Direction of Cartography in 1967 contains two arrows indicating that the island of Providencia and the island of San Andrés belong to Colombia.⁷⁵ (Figure 2.34 opposite)

2.97. To use the words of the Court in its recent Judgment in the *Malaysia/Singapore* case, these maps “give a good indication of [Nicaragua]’s official position” and “tend to confirm that [Nicaragua] considered that [the San Andrés Archipelago] fell under the sovereignty of [Colombia]”.⁷⁶ Only after the publication of the *White Book* in 1980 did Nicaragua’s cartographic practice change.

D. Conclusion

2.98. It has been shown that the islands of San Andrés, Providencia, Santa Catalina, Mangle Grande and Mangle Chico – the latter up to the year 1930 – as well as the cays of Albuquerque, East-Southeast, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo form a geographical and economic unit historically known as the San Andrés Archipelago. This conception of the Archipelago prevailed at the time of the conclusion of the 1928/1930 Treaty and has remained unchanged since then.

⁷⁵ Reproduced in Vol. III, Figure 2.34.

⁷⁶ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, p.74, paras. 271 and 272.

PART TWO

COLOMBIA'S SOVEREIGNTY OVER THE CAYS

Chapter 3

THE ROOTS OF COLOMBIA'S TITLE AND ITS EXERCISE OF SOVEREIGNTY OVER THE CAYS

A. Introduction

3.1. The principle governing the territorial division and drawing of boundaries among the Latin-American States arising after the break-up of the Spanish colonial Empire was that of *uti possidetis juris*. As the Swiss Federal Council, stated in its arbitral award of 1922 in the case concerning the boundary between Colombia and Venezuela:

“Lorsque les Colonies espagnoles de l'Amérique centrale et méridionale se proclamèrent indépendantes, dans la seconde décade du dix-neuvième siècle, elles adoptèrent un principe de droit constitutionnel et international auquel elles donnèrent le nom d'*uti possidetis juris* de 1810, à l'effet de constater que les limites des Républiques nouvellement constituées seraient les frontières des provinces espagnoles auxquelles elles se substituaient.”¹

3.2. During Spanish rule, the territory which is now Colombia formed part of the Viceroyalty of Santa Fe (New Granada). Part of what is now Nicaragua was at that time part of the Captaincy-General of Guatemala.²

¹ *Affaire des frontières colombo-vénézuéliennes* (1928), 1 UNRIAA 228

²D. Uribe Vargas, *White Book of the Republic of Colombia*, Bogotá, Foreign Affairs Ministry, 1980, 112 p. Document N° 1 deposited with the Court's Registry

3.3. Colombia was the first Latin American country to invoke the *uti possidetis juris* principle. Remarkably, a letter dated 19 June 1824 by the Colombian Foreign Minister Pedro Gual addressed to Vice-Admiral Halstead, Commander-in-Chief of the British naval forces in the Western Indies – which is mentioned as one of the first instances in which the principle was ever invoked³ – expressly referred to San Andrés, Providencia and other adjacent islands. The letter responded to a British protest concerning the prohibition of trade to British subjects coming from Jamaica with certain Colombian territories, particularly within the Mosquitia. In his letter, Minister Gual stated that long before the union between Venezuela and New Granada and the creation of a single independent State in 1819:

“...the limits of the New Granada were perfectly defined and demarcated. They reached the coasts neighboring the island of Jamaica until, and including, Cape Gracias a Dios, *with the islands of San Andrés, Vieja Providencia and other adjacent ones*. The stretch of coast comprised between Cape Gracias a Dios and the Chagres River belonged to the Captaincy-General of Guatemala for a while, but all this territory was definitively ascribed to the New Granada, on 30 November 1803.

Since that time, the Spanish authorities exercised over them, as they did over the others comprised within their respective jurisdictions, all the acts befitting the high dominion and lordship that Spain held over the cultivated and uncultured lands of the former New Granada, and which are now

³ See e.g. B. Checa Drouet, *La doctrina americana del uti possidetis de 1810* (Lima, Gil, 1936) 77.

completely in the possession of the Republic of Colombia.”⁴

3.4. Colombia included the *uti possidetis juris* principle in its Constitution (*Ley fundamental de la Unión de los Pueblos de Colombia*, 12 July 1821). Simon Bolivar also explicitly included the principle in his great project of Union and Confederation.⁵ Further, the independent Republic of New Granada led a proposal to include the principle in the Treaty of Confederation approved by the Congress of Lima in 1848.⁶ When the principle of *uti possidetis juris* was applied and analysed in international arbitrations for the first time, Colombia was one of the parties.⁷ Colombia has always attached great importance to the principle.

3.5. Colombian sovereignty over the San Andrés Archipelago has its root in the Royal Order of 1803, when it was placed under the jurisdiction of the Viceroyalty of Santa Fe (New Granada), which effectively exercised that jurisdiction until the time of independence. This is a case in which the legal

⁴ Emphasis added. Annex 24: Note from the Colombian Foreign Minister, Pedro Gual, to the Commander-in-Chief of the British naval forces in the Western Indies, Vice-Admiral Sir Lawrence Halstead, 19 June 1824.

⁵ See: P. de La Pradelle, *La frontière. Etude de Droit international* (Paris, Les éditions internationales, 1928) 77.

⁶ See references in G. Nesi, *L'uti possidetis iuris nel diritto internazionale* (Padoua, CEDAM, 1996) 56.

⁷ These were the cases of the arbitral awards rendered by the Regent Queen Maria Cristina of Spain in the case between Colombia and Venezuela (1891), by the French President Loubet in the case between Colombia and Costa Rica (1900), and by the Swiss Federal Council in the case between Colombia and Venezuela (1922). See respectively: H. La Fontaine, *Pacificrisie internationale 1794 - 1900. Histoire documentaire des arbitrages internationaux* (Bern, Stämpfli, 1902) 513; 28 UNRIAA 341 and 1 UNRIAA 223.

titles and colonial *effectivités* coincide.⁸ Both titles and *effectivités* correspond to the former colonial administrative entity from which Colombia emerged: the Viceroyalty of Santa Fe (New Granada). Using the words of the Court, it is a situation “[w]here the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*”.⁹ Before the entry into force of the 1928/1930 Treaty, Colombian *effectivités* corresponded to the application of the *uti possidetis juris* principle. Since the entry into force of the Treaty, these *effectivités* correspond to the conventional title provided in Article I, the validity of which has already been recognized by the Court.¹⁰

3.6. This chapter discusses the following matters:

- The Royal Order of 1803, placing the Archipelago under the jurisdiction of the Viceroyalty of Santa Fe (New Granada) (Section B);

⁸ The Court defined the colonial *effectivités* as being “the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period” (*Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 586, para. 63). See also *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 120, para. 47; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007*, p. 46, para. 165).

⁹ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63. See also: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 398, para. 61; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 353, para. 68, p. 354, para. 70 and p. 415, para. 223; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 678, para. 126; *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, pp. 120-121, para. 47 and p. 127, para. 77).

¹⁰ *Judgment of 13 December 2007*, pp. 26-27, paras. 79 and 81.

- The government of the Archipelago since 1803, which was vested in the Viceroyalty during colonial times and under that of Colombia thereafter (Section C);
- The specific exercise of authority *à titre de souverain* over the cays (Section D).

B. The Royal Order of 1803

3.7. At the beginning of the 19th century the consequences of the Anglo-Spanish wars were felt in the Caribbean. The difficulties faced by the Islands of San Andrés led its Governor, Tomás O’Neulle, to request Spain’s Secretary of War that the Islands be reincorporated into the Viceroyalty of Santa Fe (New Granada).¹¹ The Secretary of War submitted this request to the Junta of Fortifications and Defense. The Junta’s Report, dated 2 September 1803, recommended that the Islands of San Andrés again be made dependant upon the Viceroyalty of Santa Fe (New Granada), as they had been previously.¹²

3.8. On 25 September 1803, the King requested certain clarifications of the Junta’s Report, prior to deciding on the separation of the Mosquito Coast and the Islands of San Andrés from the Captaincy-General of Guatemala and its incorporation into the Viceroyalty of Santa Fe (New Granada). The Junta

¹¹ Annex 19: Letter addressed by the islanders of San Andrés to the King of Spain, 25 November 1802. It will be recalled that the Archipelago formed part of the Viceroyalty up to 1792 (CPO, p.29, para.1.23).

¹² Annex 20: Report from the Junta of Fortifications and Defense, 2 September 1803.

submitted a further Report dated 21 October 1803, confirming the need for the Mosquito Coast and the Islands of San Andrés to be made dependant upon the Viceroyalty of Santa Fe (New Granada).¹³

3.9. On the basis of these Reports, in November 1803 a Royal Order separated the Islands of San Andrés and the Mosquito Coast from the Captaincy-General of Guatemala and ascribed them to the Viceroyalty of Santa Fe (New Granada). The Royal Order referred to the *Islands* of San Andrés, clearly envisaging a group of islands.¹⁴ The effect of the Royal Order is illustrated in Figure 3.1 opposite.

3.10. The Court referred to the Royal Order in its Judgment in the *Nicaragua v. Honduras* case in the following manner:

“On balance, the evidence presented in this case would seem to suggest that the Captaincy-General of Guatemala probably exercised jurisdiction over the areas north and south of Cape Gracias a Dios until 1803 when the Vice-Royalty of Santa Fé gained control over the part of the Mosquito Coast

¹³ Annex 21: Report from the Junta of Fortifications and Defense, 21 October 1803.

¹⁴ Annex 22: Royal Order of November 1803. In its *Memorial*, Nicaragua produced an inaccurate translation of the Royal Order of 1803, suggesting that it only referred to the *Island* of San Andrés. But the original text clearly refers as “the *Islands* of San Andrés” (“Las Islas de San Andrés”). In the text of its *Memorial* (p. 29, para. 1.45) and in its Annexes (Vol. II, Annex 6, pp. 25-26), the same inaccurate translation appears. Indeed in the annexes it appears twice, the second time when the Royal Order mentioned the salary decided by His Majesty to be granted to (according to Nicaragua) “the Governor of the said Island”, whereas the text clearly refers to “the Governor of the said *Islands*” (“al Gobernador de las expresadas islas”) (ibid.).



running south from Cape Gracias a Dios by virtue of the Royal Decree of that year (see also *I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Vol. I pp. 19-22).”¹⁵

3.11. The Royal Order of 1803 was communicated to the Captain-General in Guatemala and the Viceroy of New Granada (Santa Fe) by notifications dated 20 and 30 November 1803 respectively.¹⁶ On the occasion of their incorporation into the Viceroyalty, the islands were also ascribed to the diocese of Cartagena, its main port. The bishop of the diocese so informed José Antonio Caballero, Justice Secretary of the Spanish Crown.¹⁷ As the King of Spain noted in his 1906 arbitral award in the *Honduras/Nicaragua* case, the spiritual territorial division ought to have corresponded to the secular territorial division.¹⁸

3.12. The Viceroy notified Governor O’Neulle of the royal decision in the following year. San Andrés Island was briefly occupied – for a period of two months – by British forces but

¹⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, pp. 45-46, para. 161.

¹⁶ NM, p. 29, para. 1.45.

¹⁷ E. Restrepo, *De Gonzalo Ximénez de Quesada a Don Pablo Morillo, Documentos inéditos sobre la Historia de la Nueva Granada* (Paris, Imprinta Le Moil & Pascaly 88, Tours de Vincennes, 1928) 62-63.

¹⁸ “Whereas Regulation 7 of Title II and Book II of the Code of the Indies, in fixing the manner as to how the division of the discovered territories was to be made, ordained that it should be carried out in such a manner that the secular division should conform to the ecclesiastical” (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Vol. I, p. 21).

was re-occupied by O’Neulle in 1807, acting on instructions issued by the Viceroyalty. O’Neulle held office until 1810.¹⁹

3.13. At no time was the exercise of jurisdiction over the San Andrés Archipelago by the authorities of the Viceroyalty of Santa Fe (New Granada) contested by the authorities of the Captaincy-General of Guatemala. Such was the situation of the Islands of San Andrés when, in 1810, the provinces of the Viceroyalty of Santa Fe (New Granada) began their process of independence. None of the Spanish documents cited by Nicaragua modified this situation.²⁰

3.14. Nicaragua now seeks to reopen the situation of the San Andrés Archipelago before independence. It contends that the Royal Order of 1803 could not have transferred territory from one jurisdiction to another, that this transfer was not executed, and that the Royal Order of 1803 was superseded by other colonial decisions that purportedly re-allocated the Archipelago to the Captaincy-General of Guatemala.²¹ Colombia rebutted these unfounded contentions at length in the negotiations leading to the conclusion of the 1928/1930 Treaty. There are no grounds for litigating the issue *de novo* now. The 1928/1930 Treaty recognized Nicaraguan sovereignty over the Mosquito Coast and Islas Mangles (Corn Islands), recognized Colombian sovereignty

¹⁹ *Informe del Ministro de Relaciones Exteriores de Colombia al Congreso de 1930* (Bogotá, Imprenta Nacional, 1930) 164-166.

²⁰ NM, vol. II, Annexes 7 to 10.

²¹ NM, pp. 29-43, paras. 1.45-1.79.

over the San Andrés Archipelago, and acknowledged the existence of a dispute between Colombia and the United States of America (not Nicaragua) concerning sovereignty over three cays, Quitasueño, Roncador and Serrana. That Treaty thereafter determined the territorial situation, resolving the previous disagreement between the parties.

C. The Government of the Archipelago after 1803

3.15. In 1811, the schooner *La Clara* set sail under orders from the authorities of Cartagena (New Granada) carrying aboard Luis Garcia, Grenadier Captain of the Fixed Regiment of Cartagena, to replace Tomás O’Neylle as Governor.²²

3.16. In 1812, the Viceroy of New Granada (Santa Fe) designated Manuel González Sarmiento as the new Governor of San Andrés. He governed the Archipelago with the support of a junta or council.²³

3.17. Between 1818 and 1821, Luis Aury, a French-born sailor (1788-1821) who joined the forces battling for Colombia’s independence, took *de facto* control of the government of the Islands of San Andrés. He offered to place his squadron and forces at the disposal of Simón Bolívar to aid in the

²² J.J. Parsons, *San Andrés y Providencia: una geografía histórica de las islas colombianas del Caribe* (Bogotá, El Ancora Editores, 3ª ed., 1985) 56.

²³ *Ibid*, p. 56.

consolidation of the independence of Great Colombia. Bolívar rejected this offer.²⁴

3.18. In accordance with the Colombian Constitution of 1821, by a Law dated 8 October 1821, the territory of Colombia was divided into seven major administrative divisions called “Departamentos”. Among them was Magdalena, which included “Cartagena with its adjacent islands”.²⁵

3.19. By a provision dated 16 March 1822, the Province of Cartagena was divided into six Cantons. The Sixth Canton was “[i]ntegrated by the five islands named San Andrés, Santa Catalina, Vieja Providencia and Los Mangles with a municipality of two thousand one hundred and thirty souls...”²⁶ On 23 June 1822, in a meeting with all the inhabitants of Providencia, their allegiance to the 1821 Constitution of Cúcuta (Colombia) was proclaimed.²⁷ The same ceremony took place in San Andrés and later in the Islas Mangles (Corn Islands), which also belonged to the Sixth Canton of the Province of Cartagena.²⁸

²⁴ J.J. Parsons, *San Andrés and Providencia. English-Speaking Islands in the Western Caribbean* (Berkeley: University of California Press, 1956) 20; Spanish Version: *San Andrés y Providencia: una geografía histórica de las islas colombianas del Caribe* (Bogotá, El Ancora Editores, 3ª ed., 1985) 60-62.

²⁵ Annex 70: Colombian Law of 8 October 1821 on the organization and political regime of the departments, provinces and cantons in which the Republic is divided.

²⁶ Annex 71: Division of the Province of Cartagena in Six Cantons. Provision of 16 March 1822 issued by General Mariano Montilla, Governor.

²⁷ J. J. Parsons, *San Andrés y Providencia: una geografía histórica de las islas colombianas del Caribe* (Bogotá, El Ancora Editores, 3ª ed., 1985) 62.

²⁸ *Ibid.*, p. 63.

3.20. Authority over the islands then passed briefly to two officers under Aury's command, Colonel Juan Bautista Faiquere and Captain Severo Courtois (after whom Courtown Cay is named).²⁹ Although Faiquere nominally assumed authority over the islands, it was Courtois who actually administered them.³⁰ The latter had to travel to Cartagena and Bogotá on several occasions to defend himself before the Colombian authorities against certain accusations made against him by his rivals.³¹

3.21. That same political division lasted throughout the 19th century, albeit under different names such as "Territory of San Andrés", "District of San Andrés", "Canton of San Andrés", etc. Depending on the denomination of the political division at any given time, the Colombian administrators of the Archipelago received corresponding names such as Prefect, *Intendente* or Governor.³²

3.22. By Law 52, dated 26 October 1912, the San Andrés Archipelago was established as an Intendancy, which is one of the largest political divisions of the Republic.³³ It continued as

²⁹ F. Diaz Galindo, *Monografía del Archipiélago de San Andrés* (Bogotá, Ediciones Medio Pliego, 1978) 65.

³⁰ J. Duarte French, *Los tres Luises del Caribe* (Bogotá, El Ancora Editores, 1^a ed., 1988) 360-362.

³¹ *Ibid*, 376-396. Nicaragua contends that the Federal Republic of Central America "contested the occupation by Colombia of San Andrés immediately" (NM, Introduction, p. 3, para. 7), but it does not provide any evidence at all.

³² See Appendix 3: List of Governors, Prefects and *Intendentes* of the Archipelago since 1803 to date.

³³ Annex 91: Colombian Law 52 of 1912 on the creation and organization of the National Intendancy of San Andrés and Providencia.

such until 1991 when, under the new Constitution, the category of Intendancies was dropped. As with other former Intendancies, the Archipelago became one of the 32 Colombian Departments (i.e., provinces).³⁴

3.23. Appendix 3 contains a list of the governors, prefects and *intendentes* of the Archipelago since 1803 until the present time.³⁵

D. The Exercise of Sovereignty over the Cays

3.24. Colombia has exercised public, peaceful and continuous sovereignty over the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque and East-Southeast for more than 180 years as integral parts of the San Andrés Archipelago.

3.25. Following independence from Spain, the inhabitants of San Andrés continued to carry out fishing activities on and around the cays. Colombia granted guano exploitation rights on the cays, protested to other States against their infringement, and adopted measures to enable the Prefect of the Province to exercise surveillance over the cays with a view to preventing their unlawful exploitation.³⁶ It responded to requests by other

³⁴ Colombian Political Constitution of 1991, Articles 309-310. Available at: http://confinder.richmond.edu/admin/docs/colombia_const2.pdf

³⁵ Appendix 3: List of Governors, Prefects and *Intendentes* of the Archipelago since 1803 to date.

³⁶ Annexes 83 and 84: Note N° 5382 from the Colombian acting Foreign

States to adopt measures concerning the safety of navigation in and around the cays. It is unnecessary for the purposes of this Counter-Memorial to deal comprehensively with this material, since Nicaragua's *Memorial* cites not one single instance of administration whatsoever on its part. The following acts *à titre de souverain* by Colombia are merely illustrative.

(1) LEGISLATIVE AND ADMINISTRATIVE CONTROL

3.26. Colombian legislation has regulated the territorial organization and administration of the San Andrés Archipelago as Colombia's own political and territorial structure evolved throughout the 19th and early 20th century. Regardless of the Archipelago's denomination at any specific time, its territorial extent remained unchanged, with the exception of the Islas Mangles (Corn Islands), ceded to Nicaragua in the 1928/1930 Treaty.

3.27. Colombian legislation concerning electoral and judicial districts, intendancy or departmental and municipal assemblies and councils, applies in the Archipelago as in every other territorial division in Colombia.³⁷

Minister to the Governor of the Province of Bolívar, 13 January 1892; and Note N° 343 from the Colombian acting Minister of Finance to the Foreign Minister, 1 February 1892.

³⁷ Annex 92: Presidential Decree N° 1066 on Electoral Districts for the Election of Deputies to the Departmental Assemblies, 4 December 1912.

3.28. Laws and regulations concerning fishing, public works, environmental issues and certain specific regulations or statutes relevant to the nature of the Archipelago as a border territorial area have also been enacted.³⁸ For illustrative purposes, Appendix 4 contains a list of some such provisions.³⁹

i. Regulation of fisheries

3.29. As stated above, the Colombian Government has consistently regulated fishing activities in the maritime areas appertaining to the San Andrés Archipelago. In some instances, the provisions were issued with regard for the specific characteristics of the Archipelago's waters; in others, they were similar or identical to those adopted for other maritime areas under Colombian jurisdiction. Foreign governments were officially informed of these provisions in order to ensure compliance on the part of their nationals.

3.30. Pursuant to the provisions issued by the Colombian Congress by Law 52 of 1912, regarding the organization of the National Budget in the Intendancy of San Andrés and Providencia, the Executive branch of the Colombian Government, on 12 December 1912, issued Decree N° 1090. In this Decree, the Intendancy of San Andrés was authorized to

³⁸ e.g., Colombian Law 1 of 1972, Statute of the Archipelago of San Andrés and Providencia; and Law 47 of 1993, Art. 5, available at: www.secretariasenado.gov.co/leyes/L0047_93.HTM

³⁹ Appendix 4: List of Colombian legal provisions concerning the San Andrés Archipelago.

open public tenders in order to grant leases for gathering pearl, coral and tortoiseshell, as well as for the extraction of guano, marine sponges and algae on the coasts and cays of the Archipelago.⁴⁰

3.31. Between 1924 and 1926, the Colombian Government established rules for pearl fishing, dividing the Colombian coasts into four sectors. “The Archipelago of San Andrés and Providencia” was specifically included as the “Third Sector”, on the basis that pearl exploitation was particularly significant in the areas surrounding the cays of Roncador, Quitasueño and Serrana. The Official Journal published the terms of the tender.⁴¹

3.32. During the early 20th century diplomatic exchanges took place between the Colombian and the British Government on account of illegal fishing activities carried out by Cayman Islanders (under the jurisdiction of the Governor of Jamaica, then a British colony) in certain areas of the Archipelago, as more fully set out in Chapter 4. As a result of these exchanges, the 1925 Report to Congress of the Colombian Foreign Minister recalled that the Governor of Jamaica was instructed by the British Government to notify fishing vessels under his authority,

⁴⁰ Annex 93: Presidential Decree N° 1090, 12 December 1912.

⁴¹ Annex 105: Terms of tender for pearl fishing in Colombian Seas, including the Archipelago of San Andrés, 21 April 1924. Annex 106: Presidential Decree N° 625 on pearl fishing in Colombian Seas, including the Archipelago of San Andrés, 22 April 1925. Annex 109: Presidential Decree N° 755 on the reorganization of pearl fishing in Colombian Seas, including the Archipelago of San Andrés, 7 May 1926.

“that the fishing of turtles, pearls, corals, sponges or other marine products in the waters of the Republic of Colombia in the Archipelago of San Andrés, or the extraction of guano or phosphates from the islands or cays of that Archipelago, is prohibited, as illegal, except under license granted by the Colombian Government. The Archipelago of San Andrés comprises the islands of San Andrés and Providencia, and the banks and cays named Serrana, Serranilla, Roncador, Bajo Nuevo, Quitasueño, Alburquerque and Courtown.”⁴²

3.33. Even with the scant resources available at the time, the Colombian Government exercised its sovereignty over the cays. The Intendancy of San Andrés at times resorted to renting vessels from private individuals in order to enforce Colombian law and to put an end to illegal fishing activities carried out by British vessels, particularly around Quitasueño. A Decree issued by the Intendancy in 1925 ordering certain budget transfers in order to cover the expenses caused by the capture of two such vessels is found in Annex 109.⁴³

3.34. Following the conclusion of the 1928 Olaya-Kellogg Agreement with the United States and the 1928/1930 Treaty with Nicaragua, Colombia continued to exercise its sovereignty and jurisdiction not only over the cays of Alburquerque, East-

⁴² Annex 107: 1925 Report to Congress by the Colombian Foreign Minister, Ch. VI.

⁴³ Annex 108: Colombian Decree N° 121, issued by the Intendancy of San Andrés, 31 December 1925.

Southeast, Serranilla and Bajo Nuevo, but also over the cays of Roncador, Quitasueño and Serrana.⁴⁴

3.35. The United States limited its activities on the cays to the infrequent maintenance of the lighthouses on Roncador, Quitasueño and Serrana. The Colombian maritime authorities – periodically involved in the inspection of the lighthouses and buoys in the Archipelago – on several occasions reported operational problems of those lighthouses.⁴⁵

3.36. Colombian fishermen from San Andrés and Providencia continued to carry out fishing and turtle crawling activities on the cays. Colombian Navy ships and various official commissions frequently traveled to the cays. At times – particularly around Serranilla and Bajo Nuevo – they intercepted British subjects from Jamaica or the Cayman Islands collecting bird eggs or turtle eggs.⁴⁶

3.37. In April 1949 the Nicaraguan Embassy in Bogotá requested the Colombian Government’s authorization “to carry out exploratory fishing activities in waters adjacent to the Islands of San Andrés and Providencia”.⁴⁷ After consulting with the

⁴⁴ See pars. 4.62 and 8.80.

⁴⁵ Annexes 208 and 127: Note DIR.GE/Lg, from the Swedish company AGA to the General Command of the Colombian Navy, 4 December 1954; and Note N° 060CG-EMG-SJ/832 from the Colombian Minister of War to the Foreign Minister, 4 March 1955.

⁴⁶ See Chapter 4, Section C.

⁴⁷ Annex 51: Diplomatic Note N° 6 from the Nicaraguan Embassy in Bogotá

relevant authorities, the Colombian Foreign Ministry declined the request on the basis that a Colombian company was planning similar explorations in those areas.⁴⁸

3.38. In August 1972, Louis Ellicot, a United States' citizen who managed the company "EpcO Fishing Industry Limited", requested through the Colombian Consulate in Kingston, Jamaica, authorization to carry out fishing activities in the maritime areas appurtenant to "the cays of Serrana and Roncador".⁴⁹ The authorization was granted by the Colombian Government.

3.39. On 22 September 1980 the Honduran company Empacadora de Castilla S.A. de C.V., based in Tegucigalpa, requested the Colombian Foreign Ministry's authorization to carry out fishing activities in the "Maritime Zones appertaining to the Colombian Archipelago of San Andrés and Providencia, particularly in the Zone of the Cays of Roncador, Quitasueño, Serrana and Serranilla".⁵⁰

3.40. The Colombian Maritime Authority DIMAR (Maritime and Port General Directorship), a division of the Colombian

to the Colombian Foreign Ministry, 29 April 1949.

⁴⁸ Annex 52: Diplomatic Note N° CN-1768 from the Colombian Foreign Ministry to the Nicaraguan Embassy in Bogotá, 28 June 1949.

⁴⁹ Annex 137: Note N° 71/33, from the Colombian Consulate in Kingston, Jamaica, to the Colombian Foreign Minister, 4 August 1972.

⁵⁰ Annex 216: Letter from the fishing company Empacadora de Castilla S.A. de C.V. to the Colombian Foreign Ministry, 22 September 1980.

Navy, has controlled and exercised surveillance over all the maritime activities carried out in the area of the San Andrés Archipelago.⁵¹ Every vessel intending to fish in areas of the Archipelago must have a fishing license granted by the Colombian fishing authority and an operation permit issued by DIMAR. Without this permit – issued for a term of one year – no foreign vessels may fish in those areas.⁵²

3.41. Nicaraguan vessels have been granted such permits. For instance, on 12 January 1977 the Nicaraguan motor-vessel “Miss Genelle” obtained a six-month permit to carry out fishing activities in waters adjacent to the islands of San Andrés and Providencia. The same permits were issued for Nicaraguan motor-vessels *Don Fabio* in 1997, and *Miss Tina* in 2000 and 2001. Between 2001 and 2002, Nicaraguan motor-vessels *Explorer II*, *Capitán Carlson* and *Capitana* were issued permits to carry out fishing activities in the area.⁵³ Several vessels have been fined for non-compliance with rules issued by the Colombian maritime authority.⁵⁴

⁵¹ See, e.g., Annex 157: Resolution N° 46 of the Colombian Maritime and Port General Directorship, 3 February 1993.

⁵² For example, Art. 60 of Decree N° 3182 of 1952; Art. 1 and 34 of Decree N° 0376 of 13 Dec. 1957; Art. 5 of Decree 2324 of 1984; and Decree N° 2256 of 1991 (Fishing Statute). All published in the Diario Oficial of Colombia.

⁵³ See text of Colombian Resolutions granting fishing permits to Nicaraguan vessels: Annex 139: Resolution N° 16 of 1977; Annex 140: Resolution N° 169 of 1977; Annex 163: Resolution N° 806 of 1997; Annex 166: Resolution N° 26 of 2000; Annex 167: Resolution N° 440 of 2001; Annex 168: Resolution N° 474 of 2001. Annex 169: Operation Permit of 24 April 2002.

⁵⁴ See e.g., Appendix 5: Licensing of foreign fishing vessels in the San Andrés Archipelago.

3.42. Appendixes 5 and 6 contain lists of permits granted to United States' vessels under the 1972 Vázquez-Saccio Treaty in the areas covered by that Treaty,⁵⁵ and to United States' and other foreign vessels – including Nicaraguan – in areas of the San Andrés Archipelago.⁵⁶ Sample resolutions issued by the Colombian Maritime Authority, in both cases, can also be found in the Annexes volume of this Counter-Memorial.⁵⁷

ii. Regulation of other economic exploitation, including guano contracts

3.43. The Colombian Government has granted contracts for the exploitation of other resources in the Archipelago. Most notably, during the mid- to late 19th century and the beginning of the 20th century, public tenders and contracts concerning guano exploitation were issued and concluded by the Colombian Government. The development of those contracts is illustrative not only of the efforts undertaken by the Colombian Government to counter illegal exploitation activities on the cays, but also the involvement of all branches of the Government.

3.44. For example, when United States' citizens were discovered trying to extract guano from Roncador Cay on 15

⁵⁵ Appendix 6: Operation and permanence of U.S.A. fishing vessels in the cays of Roncador, Quitasueño and Serrana, pursuant to the 1972 Vázquez-Saccio Treaty between Colombia and the United States of America.

⁵⁶ Appendix 5.

⁵⁷ Annex 147: Resolution N° 1162 of 1986; Annex 148: Resolution N° 1039 of 1987; Annex 153: Resolution N° 1368 of 1990; Annex 156: Resolution N° 42 of 1993.

November 1854, even prior to the enactment of the so-called Guano Act of 1856,⁵⁸ the Governor of the Province of Cartagena – of which the Canton of San Andrés was a dependency – issued a Decree whereby the extraction of guano from the islands constituting the Canton was banned.⁵⁹

3.45. The Decree was published in the Official Journal of the Governorship of Cartagena on 19 November 1854. It was notified to all consuls resident in Cartagena, including Mr. Ramón León Sánchez, United States’ Consul, by Note N° 52 dated 22 November of the same year.⁶⁰ The Decree read as follows:

“Art. 1.º Any extraction of guano from the recently discovered deposit in the District of Providencia, or from any other that may be discovered in the future in the group of islands that form the Archipelago of San Andrés, is hereby prohibited.

Art. 2.º Those infringing this prohibition shall be considered and prosecuted as defrauders of the Republic’s finances.

Be it made known to all the Consuls residing in this location; to the Political Chief of San Andrés for its strictest compliance, and to the Chargé d’Affaires of the Republic to the United States’ Government for matters of his competence.”⁶¹

⁵⁸ See further, paras. 4.3-4.4.

⁵⁹ See paras. 4.5-4.21, below.

⁶⁰ Annex 25: Note N° 52 from the Governor of the Province of Cartagena to the United States Consul in that city, 22 November 1854.

⁶¹ Annex 72: Decree of the Governor of Cartagena, Colombia, banning the extraction of guano in the Archipelago of San Andrés, 15 November 1854.

3.46. It is clear that the cay of Roncador, the attempted exploitation of which gave rise to this Decree, was considered as part of the group of islands forming the Canton of San Andrés.⁶²

3.47. The Colombian Congress, by Law 25 of 24 April 1871, authorized the executive branch to order the Prefect of the Territory of San Andrés and San Luis de Providencia to grant by contract, for a 5-year term, the right to extract guano and collect coconuts on the cays of Roncador, Quitasueño and Alburquerque.

“LAW 25 (of 24 April), regarding the exploitation of guano and coconut groves belonging to the Government of the Union in the territory of San Andrés and San Luis de Providencia.

(...)

Art. 1.º The Executive Branch shall order to lease in public tender and for a term of five years, the right to extract guano and collect coconuts on the islets of Alborkeator [Alburquerque], Roncador and Quitasueño, in the Territory of San Andrés and San Luis de Providencia.

Art. 2º The lease shall be made before the Prefect of the Territory, having previously issued a public invitation in the Territory itself, at Colon, New York, Baltimore, Philadelphia and Jamaica, at least 90 days in advance, and the contract that is concluded shall be submitted to the approval of the Executive Branch.”⁶³

⁶² See Annex 27: Diplomatic Note from the Chargé d’Affaires of Colombia in Washington to the Secretary of State, 18 January 1893.

⁶³ See Annex 73.

3.48. The same law provided that the income derived from the exploitation of the cays would be used to finance elementary education and payment of other public employees resident in the territory of the Archipelago, as well as the acquisition and maintenance of a lighthouse on the cays:

“Art. 3.º To the acquisition and maintenance of a lighthouse at the location on those islets that, provided for in a prior report of the Prefect, the Executive Branch designates.”⁶⁴

3.49. The 1871 Annual Report sent by the Prefect of San Andrés to the central Government, published in the Report to Congress of the Secretary of the Interior and Foreign Affairs, refers to the Decree issued by the Prefect prohibiting guano extraction on Alburquerque, Roncador and Quitasueño,⁶⁵ and to his instructions to the Corregidor at Providencia to prevent further attempts to illegally extract guano from the cays:

“...the Nation has the islets known by the names of ‘Alborkeator’ [*sic*] [Alburquerque], ‘Roncador’ and ‘Quitasueños’ [*sic*] that have deposits of regular-quality guano. From these two last islets, certain vessels coming from the United States of America have extracted a considerable amount of the aforementioned product in the current year, as the Corregidor of the Corregimiento de Providencia informed this office; wherefore I issued a decree on 26 September of this year, prohibiting guano extraction from the referred-to islets and gave strict

⁶⁴ Annex 73: Colombian Law 25 of 24 April 1871

⁶⁵ Annex 75: Colombian Decree issued by the Prefect of the National Territory of San Andrés and San Luis de Providencia, 26 September 1871.

orders to the same Corregidor to prevent the continuation of the perpetration of such abuse in detriment of the Nation's interests.”⁶⁶

3.50. On 25 December 1871, the Prefect of San Andrés informed the Secretary of Finance and Development of a five-year lease contract granted to Mr. John C. Sterkenberg, following public auction, over the coconut groves located on Alburquerque, also referred to as South-Southwest.⁶⁷ The contract was approved in February 1872 by the Secretary of Finance and Development, acting on behalf of the President.⁶⁸

3.51. In 1874 the Government concluded a contract with Lázaro María Pérez and J. Sescan for the extraction of “minerals and fertilizers [guano] found on the public terrains of the national Territory of San Andrés and Providencia.”⁶⁹

3.52. With the authorization of the Colombian Government, J. Sescan subsequently ceded his rights in the exploitation contract to Flament & Co., of Paris.⁷⁰

⁶⁶ Annex 76: Report by the Prefect of the National Territory of San Andrés and San Luis de Providencia to the Government of the Union, 25 November 1871.

⁶⁷ Annex 77: Note N° 35 from the Prefect of the National Territory of San Andrés and San Luis de Providencia to the Secretary of Finance and Development of the Union, 25 December 1871.

⁶⁸ *Ibid.*

⁶⁹ Annex 79: Contract for the exploitation of minerals and fertilizers in the Archipelago of San Andrés, 25 April 1874.

⁷⁰ Annex 80: Definitive administrative termination of contract for the exploitation of minerals and fertilizers in the Archipelago of San Andrés, 9 October 1877.

3.53. In late 1874 Flament & Co. informed Lázaro María Pérez that United States' citizens had been extracting guano illegally from the cays, although the Prefect of the Territory had been able to prevent the loading of at least one such fraudulent shipment. Mr. Pérez notified the Government:

“My concessionaries in the contract for the exploration of coal mines and fertilizer deposits in the Territory of San Andrés and Providencia, wrote to me from Paris, dated 31 October last, that they had learned through two different channels that several shipments of guano had been fraudulently extracted from those islands, and that a large ship of the U.S. of America had recently arrived at Providencia to load a shipment of the same fertilizer, operation that was prevented by the Prefect of the Territory. In light of this state of affairs, and foreseeing new attempts of fraud, they indicate it as convenient for me to resort to the Government of the Union, in order for it to impart the strongest instructions to the Prefect of that Territory that, supporting and strengthening his sound provisions, may safeguard and affirm the rights that we have acquired by the concluded contract. And it is with this purpose that I denounce what has been occurring thus far, begging Mr. Secretary to accede to address a note to the Prefect of the Territory in the terms he sees fit.”⁷¹

3.54. The Secretary of Finance and Development ordered the Prefect of the Territory of San Andrés and Providencia to

⁷¹ Note N° 1455 from the Secretary of Finance and Development to the Prefect of San Andrés and Providencia, 6 February 1875. Transcribed in Annex 82.

prevent the illegal extraction of guano from the Islands of San Andrés and Providencia:

“I transcribe the above, so that you will proceed to issue the necessary provisions to prevent guano being illegally extracted from the Islands of San Andrés and Providencia in the future.”⁷²

3.55. The Islands of San Andrés, Providencia and Santa Catalina have no guano deposits;⁷³ thus the reference to the “Islands of San Andrés” refers generically to the cays where the facts took place, which were evidently considered as part of the group.⁷⁴

3.56. On 13 April 1875, the Secretary of Finance of the central Government reiterated the instructions to the Prefect to exercise control over the extraction of guano:

“The Government having concluded with Messrs. Lázaro Ma. Perez and I [*sic*] Sescan the contract published in the Official Journal N° 3152, on the exploitation of minerals and fertilizers in the public terrains of that Territory, there is greater need, if possible, of surveillance to prevent guano from being extracted or exported by persons other than those that have acquired that right. To that effect, I have been charged by the Citizen President with

⁷² Annex 82: Note No. 326 from the Prefect of the Province of Providencia to the Secretary of Government at Cartagena, 19 September 1890.

⁷³ Annex 125: Report by the Geological Commission sent to the Archipelago by the Colombian Mines and Oil Ministry, October 1947.

⁷⁴ Thus, in 1894 when the Colombian Foreign Minister referred to the illegal guano extraction carried out by United States citizens, he stated it had taken place on the cays of “Roncador and Quitasueño, in the Archipelago of Providencia”. Paras. 2.46-2.61.

conveying to you the existing urgency for You to take as many provisions as are within the scope of your authority and that your known zeal concerning national interests advice you, in order to prevent the contraband of guano... (signed) Nicolás Esguerra.”⁷⁵

3.57. By resolution dated 11 October 1877, the Government decided to terminate the contract with Pérez and Flament & Co. for the extraction of guano and collection of coconuts on the cays, on account of their failure to commence exploitation within the prescribed term, and imposed the corresponding fines.⁷⁶

3.58. Flament & Co. and Pérez requested the Colombian Government to renew the contract. On 11 January 1882 the Government granted them a new contract on the exploitation of “minerals and fertilizers [guano] found on the vacant terrains of the national Territory of San Andrés and Providencia”.⁷⁷ Thereafter, the enterprise continued on the cays under the surveillance of the authorities in San Andrés.

3.59. On 12 August 1893 the Governorship of the Department of Bolivar, of which the San Andrés Archipelago was then a dependency (at the time known as the Province of Providencia),

⁷⁵ Note N° 1524 from the Secretary of Finance and Development to the Prefect of San Andrés and Providencia, 13 April 1875. Transcribed in Annex 82.

⁷⁶ Annex 80: Definitive administrative termination of contract on exploitation of minerals and fertilizers in the Archipelago of San Andrés, 9 October, 1877

⁷⁷ Annex 81: Contract for the exploitation of minerals and fertilizers in the Archipelago of San Andrés, 11 January 1882.

opened a public tender for the exploitation of guano and lime phosphate “from the islands of Serrana located in the Province of Providencia, in the Archipelago of San Andrés”.

3.60. The terms of the tender were published in the *Official Journal* of Colombia, and provided for the ships to “make a stop in San Andrés, and request a special written permit from the Prefect of the Province of Providencia, to carry out the extraction”. It specified the pre-requisites to be complied with in order to obtain such permit:

“3.º In order for the Prefect to be able to issue such permit it is indispensable: 1º That the ship be surveyed by one or two experts sworn in by him; and 2.º That N.N. (or his representative) deposit in the Municipal Administration of National Finance of San Andrés, fifty cents (\$ 0-50 American gold) for each registered ton of two thousand two hundred and forty pounds (2,240 lb).”⁷⁸

The tender was published ten times, in different issues of the *Official Journal*, between September and November 1893.⁷⁹

3.61. The 1894 Report by the Colombian Foreign Minister to the Congress recalls the exploitation leases granted by the

⁷⁸ Annex 86: 1893 Terms of tender regarding guano and phosphates exploitation contracts in Serrana.

⁷⁹ Diario Oficial, Bogotá: N° 9.275, 29 September 1893, p. 1087; N° 9.281, 6 October 1893, p. 1111; N° 9.286, 12 October 1893, p. 1130; N° 9.286, 16 October 1893, p. 1142; N° 9.292, 19 October 1893, p. 1154; N° 9.295, 23 October 1893, p. 1166; N° 9.301, 30 October 1893; N° 9.307, 6 November 1893; N° 9.310, 9 November 1893, p. 1226; N° 9.321, 22 November 1893, p. 1270. See explanatory note in Annex 86.

Colombian Government and the actions carried out to defend Colombia's rights over the cays of Roncador and Quitasueño:

“In your latest sessions you were informed of the actions taken by the Government of the Republic towards the Government of the United States against the abuses of certain traffickers that, without Colombia's permission, extract large quantities of the guano from the islets of Roncador and Quitasueño, in the Archipelago of Providencia, to sell it in foreign markets. The guano deposits of these cays were at some other time leased by our Government to certain contractors; and if they were to be again offered in a public tender, after studying their probable output, they might provide the Treasury with a somewhat considerable income.

...Roncador and Quitasueño are part of the Archipelago of Providencia, belonging to the Republic, which has since its beginnings been in peaceful possession of that archipelago, that was in turn under Spain's domain; and on the other hand, the inhabitants of the neighboring islands make use of the cays at certain times during the year, traveling to them with the purpose of fishing for tortoises and profiting that part of the territory to the extent possible.”⁸⁰

3.62. On 5 February 1896 a contract was concluded between the Colombian Ministry of Finance and Colombian citizens Rafael Torres Mariño and José Rivas Groot for the exploitation of guano and other fertilizers on Roncador, Quitasueño, Southwest (Albuquerque) and other adjacent islands that form

⁸⁰ Annex 87: 1894 Report to Congress by the Colombian Foreign Minister.

part of the San Andrés Archipelago. The contract was published in the Official Journal of Colombia on 1 May 1896, as follows:

“CONTRACT on guano and other fertilizers exploitation on the cays of ‘Roncador’, ‘Quitasueño’, ‘Southwest’ and others of the Archipelago of San Andrés and San Luis de Providencia

(...)

The undersigned, to wit: Carlos Uribe, Minister of Finance, on behalf of the national Government, on the one hand, and Rafael Torres Mariño and Jose Rivas Groot, in their own name, on the other, have entered into the following contract:

Article one. Rafael Torres Mariño and Jose Rivas Groot, who shall be referred to as the Concessionaries, undertake to exploit jointly with the Nation, the existing deposits of guano and fertilizers on the islands called “Roncador”, “Quitasueño”, “Southwest” and other adjacent ones that form part of the Archipelago of San Andrés and San Luis de Providencia...”⁸¹

3.63. In mid-1914 the Colombian Government entered into a contract with a Colombian citizen, Manuel Uscátegui, for the exploitation of guano on the cays of Roncador, Quitasueño, Serranilla and Southwest Cay (Alburquerque), lasting until 1926. The detailed developments that occurred in the Council of Ministers and Congress of Colombia concerning the contract with Mr. Uscátegui were published in the *Official Journal* between 1914 and 1926.

⁸¹ Annex 90: Contract for the exploitation of guano and other fertilizers in the Archipelago of San Andrés, 30 January, 1896

3.64. In February 1915 a Report was submitted to the Council of Ministers on the negotiations with Mr. Uscátegui “on the exploitation of the guano on the islets of the Archipelago of San Andrés and Providencia, called Roncador, Quitasueño, Serranilla and South West Cay.”⁸²

3.65. In April 1915 the *Official Journal* published the text of the Contract signed with Mr. Uscátegui in December 1914, “on the exploitation of guano on the cays of Roncador, Quitasueño, Serranilla and South West Cay, in the Archipelago of San Andrés and Providencia”.⁸³

3.66. The *Official Journal* also published all the Government’s acts in connection with the contract. These included the opinion of the Council of Ministers, the approval of the executive branch (President and Minister of Finance), the Resolution approved in March 1915 by the Contentious Administrative Court of the Council of State requiring that two amendments be made to the contract, the notification by the Minister of Finance to Mr. Uscátegui and the latter’s acceptance of the required modifications to the contract.⁸⁴

⁸² Annex 96: Report to the Council of Ministers on legal aspects of guano exploitation contract in the Archipelago of San Andrés, 1 February 1915.

⁸³ Annex 97: Contract for the exploitation of guano in the Archipelago of San Andrés and related official documents, 19 March 1915.

⁸⁴ See Annex 97.

3.67. In June 1916, the *Official Journal* published the Resolution adopted by the Ministry of Finance, postponing the start-date of the term provided for in clause 3 of the contract with Mr. Uscátegui, “concessionary to exploit the cays of Roncador, Quitasueño, South West Cay and Serranilla, located in the Archipelago of San Andrés and San Luis de Providencia”, due to the difficulties posed by World War I in Europe to the contractor in gathering the capital investments required for the guano exploitation enterprise.⁸⁵

3.68. In 1918, as published in the Official Journal, Mr. Uscátegui was granted authorization by the Ministry of Public Works, ratified by the President, to establish facilities for coal deposits in order to supply the land and maritime transports required for the guano exploitation “on the Cays of Roncador, Serranilla, Quitasueño and South West Cay, of the Archipelago of San Andrés and Providencia”.⁸⁶

3.69. In December 1926 the Ministry of Industries, in a Note to the Colombian Congress, declared the termination of the contract “regarding guano exploitation on the Cays of Roncador, Serranilla, Quitasueño and South West Cay, in the Archipelago of San Andrés and Providencia”. It rejected the contractor’s

⁸⁵ Annex 99: Resolution of the Ministry of Finance concerning a contract for guano exploitation in the Archipelago of San Andrés, May 1916.

⁸⁶ Annex 100: Resolution of the Ministry of Public Works concerning a contract for guano exploitation in the Archipelago of San Andrés, 11 December 1918.

claim that the start-date of the 2-year term of the exploitation had not elapsed because Colombia had not formally declared the re-establishment of peace in Europe after World War I. The Resolution terminating the contract was published in the *Official Journal*, along with reports from the Foreign Affairs Advisory Commission and several Ministries, and memorials filed by the contractor.⁸⁷

3.70. In the course of the contract's legal existence, all of the branches of the Colombian Government intervened at one point or another, including several Ministries, the Council of Ministers, and the President of the Republic, the National Congress, and the Council of State, one of the two high courts in existence at that time in Colombia. The matter was also studied by the Foreign Affairs Advisory Commission.

3.71. The Colombian Government routinely continued to authorize other types of economic exploitation in areas of the San Andrés Archipelago. Nicaragua never protested any of the provisions or contracts concerning the exploitation of natural resources of the Archipelago's cays.

iii. Regulation of immigration

3.72. Regulations for permanent migrants to the Archipelago are strict, given the rapid population growth experienced

⁸⁷ Annex 110: Resolution of the Ministry of Industries terminating a contract for for guano exploitation in the Archipelago of San Andrés, 16 December 1926.

following its declaration – issued on San Andrés Island – as a free port in 1953.⁸⁸ However, since the Archipelago is a popular domestic and international tourist destination, special provisions regulate the flow of visitors, in addition to the specific controls and regulations applicable to the activities they may carry out in the Archipelago, such as fishing, diving, etc.⁸⁹

3.73. Pursuant to the Fishing Agreements concluded between Colombia and Jamaica in the 1980s, specific provisions were issued and enforced by the Colombian Government regulating the temporary migration of Jamaican fishermen to the cays of Serranilla and Bajo Nuevo for fishing purposes under those Agreements. The measures included the issuance, by the Colombian Consulate in Kingston, of photo-identification cards to the Jamaican fishermen and crew of vessels authorized under the agreements, for which purpose the Jamaican authorities would send the corresponding lists and photographs. The

⁸⁸ Annex 126: Presidential Decree N° 2966-BIS, issued in San Andrés, Island of San Andrés, 13 November 1953. See also: Colombian Decree N° 2762 of 1991, available at:

http://www.dnp.gov.co/archivos/documentos/DDTS_Ordenamiento_Desarrollo_Territorial/3graizDecreto%202762%20de%201997.pdf ; Colombian Decree N° 2171 of 2001, Diario Oficial, Bogotá, 19 October 2001, No. 44.587, available at: http://www.presidencia.gov.co/prensa_new/decretoslinea/2001/octubre/12/dec2171122001.doc.

⁸⁹ Presidential Resolution N° 344 of 1972, available at:

<http://web.minambiente.gov.co/normatividad/applet//Normas/RESOLUCIONES/R003441972/R003441972.html>; Colombian Decree N° 2762 of 1991, Arts. 14-17, available at:

http://www.dnp.gov.co/archivos/documentos/DDTS_Ordenamiento_Desarrollo_Territorial/3graizDecreto%202762%20de%201997.pdf ; Colombian Law 47 of 1993, Art. 4(j), www.secretariassenado.gov.co/leyes/L0047_93.HTM ; Colombian Law 915 of 2004, Diario Oficial, Bogotá, 27 October 2004, N° 45.714, available at: <http://www.secretariassenado.gov.co/leyes/L0915004.HTM>.

Colombian Naval authorities on the cays were entitled to inspect such identification cards at any time, and frequently did so.⁹⁰

iv. Port captaincies

3.74. Colombia port captaincies – under the Maritime and Port General Directorship of the Colombian Navy – exercise maritime authority in their respective jurisdictions. For this purpose they must carry out official on-board visits when vessels arrive in port, grant authorizations or clearances for docking and sailing, inspect the seaworthiness of vessels and their crews’ training, etc.

3.75. The Port Captaincy of San Andrés was first established in 1911. It became a first category port by Decree N° 133, dated 11 January 1986. Its jurisdiction initially comprised the Island of San Andrés, the cays of Alburquerque and East-Southeast. The Captaincy of Providencia was created in 1974. Its jurisdiction comprised the island of Providencia, the cays of Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo.⁹¹ In 1994, the jurisdictional limits were replaced by references to lines identified with coordinates of latitude and longitude, covering the entire Archipelago.⁹²

⁹⁰ See paras. 4.169-4.181.

⁹¹ Annex 138: Colombian Navy Resolution N° 282, 10 July 1975.

⁹² Annex 159: Colombian Navy Resolution N° 825, 27 December 1994.

v. *Search and rescue operations*

3.76. The Colombian Navy has carried out search and rescue operations⁹³ and the Port Captaincy of San Andrés has conducted investigations on naval incidents on the cays and their neighboring areas.⁹⁴

3.77. For example on 15 August 1969, the Colombian Navy ships *ARC Gorgona* and *ARC Pedro de Heredia* joined by units of the Navy's Tactical Support Air Squadron, undertook a search and rescue mission of the vessel *Rose Mary*, located in distress by *ARC Gorgona* 10 miles SW of Alburquerque.⁹⁵

3.78. In the same year, the motor-vessel *Wave Crest* was aided by the *ARC Pedro de Heredia* and the Colombian Air Force craft *Catalina* FAC-623, following its being towed to Quitasueño by the fishing ship *La Chiquita*.⁹⁶

3.79. On 30 October 1971 the motor-vessel *Nicodemus* of Liberian flag ran aground on Serrana, at 14°27'25"N, 80°18'12"W, while sailing from Houston to Punta Arenas (Costa Rica). The incident was dealt with by the Colombian Navy ship

⁹³ See Appendix 7: Exercise of sovereignty and jurisdiction in the San Andrés Archipelago through naval activities.

⁹⁴ See Appendix 8: Colombian interdiction of illegal fishing in the area of the San Andrés Archipelago.

⁹⁵ See references to Colombian Navy Operation Orders 106/CFNA/69 and 107/CFNA/69, and to aerial support in search and rescue mission in Annex 135: Periodic Report N° 8 by the Command of the Atlantic Naval Force, Cartagena, 31 August 1969.

⁹⁶ Annex 135.

ARC *20 de Julio*. The investigation into the incident was conducted by the Port Captaincy of San Andrés.⁹⁷

3.80. On 22 July 1983 the motor-vessel *Mareostrum* was aided in the vicinity of Albuquerque by the Colombian Navy ship ARC *Pedro de Heredia*.⁹⁸

3.81. On 4 June 1986 the sailboat *It is a Paradise* was shipwrecked and assisted by the Colombian Navy ship ARC *Caldas* on Quitasueño. Two survivors were rescued.⁹⁹

3.82. On 3 October 1988, after going adrift, the motor-vessels *Lianette* and *Capitán Wilson* were assisted by the Colombian Navy ship ARC *Independiente*.¹⁰⁰

3.83. On 7 October 1989 the motor-vessel *Nordfels* of Singapore ran aground on Roncador, at 13°26'N, 80°02'W. It was assisted by the Colombian Navy ship ARC *Pedro de Heredia*.¹⁰¹

⁹⁷ Annex 136: File N° 001/71 of the Port Captaincy of San Andrés, Office of Investigation, 30 October 1971.

⁹⁸ Annex 145: Historical log, ARC *Pedro de Heredia*, July 1983. “ARC” is the Spanish acronym for “Armada de Colombia”, i.e. the Colombian Navy.

⁹⁹ Annex 146: Historical log, ARC *Caldas*, June 1986.

¹⁰⁰ Annex 149: Historical log, ARC *Independiente*, October 1988.

¹⁰¹ Annex 154: Decision of the Colombian Maritime and Port General Directorship of 27 September 1990.

3.84. On 5 August 1990 the Nicaraguan motor-vessel *Kunda* was assisted by the Colombian Navy ship *Pedro de Heredia* after it ran aground west of Albuquerque.¹⁰²

3.85. On 9 April 1992 the motor-vessel *Raziman* reported an emergency at 11°16'N, 75°05'W: it was assisted by the Colombian Navy ship *Almirante Padilla*.¹⁰³

3.86. On 28 July 1993, the motor-vessel *Reina Beatriz* was assisted by the Colombian Navy ship *ARC Caldas*, at 12°26'9"N, 81°31'5"W. The motor-vessel *Navey* towed it to San Andrés.¹⁰⁴

vi. *Foreign consuls*

3.87. In some instances, States requested the Colombian Government's agreement to post consular officials in Colombian cities, whose jurisdiction would include not only San Andrés and Providencia but also Roncador. Such was the case of the German Empire in 1913 when its Vice-Consul was recognized as accredited in Cartagena, with jurisdiction over the islands of San Andrés, Providencia and Roncador, by Decree N° 1496, dated 23 May 1913:

“Single Article- Mr. W. Heideman is hereby recognized in his capacity as Vice-Consul of the German Empire at Cartagena, with jurisdiction

¹⁰² Annex 152: Historical log, *ARC Pedro de Heredia*, August 1990.

¹⁰³ Annex 155: Historical log, *ARC Almirante Padilla*, April 1992.

¹⁰⁴ Annex 158: Historical log, *ARC Caldas*, Julio 1993.

over the Department [Province] of Bolívar, the islands of San Andrés and Providencia and Roncador.”¹⁰⁵

3.88. After 1913, the German Government continued to accredit its consular agents with jurisdiction extending to Roncador. Thus in 1937, it requested the Colombian Government’s agreement to appoint a Consul whose jurisdiction would include San Andrés, Providencia and Roncador. The Colombian President approved the request as follows:

“Single Article. Having seen the corresponding Consular Letters Patent, Mr. Felix Tripeloury is hereby recognized as German Consul at Barranquilla, with jurisdiction on... the islands of San Andrés, Providencia *and Roncador*...”¹⁰⁶

vii. *Environmental matters*

3.89. By Resolution N° 206 of 1968,¹⁰⁷ the Board of Directors of the Colombian Institute for Agrarian Reform (INCORA)¹⁰⁸ provided that the territory of the San Andrés Archipelago would no longer be included in what was termed the “territorial reserve of the State”, and certain sectors thereof were declared to be special reserves. The operative part stated:

“Article Two: To exclude from the Territorial Reserve of the State the islands of San Andrés, Providencia and Santa Catalina, the cays [of] Sucre (Johnny), Acuario (Rose), Rocoso [Rocky],

¹⁰⁵ Annex 94: Presidential Decree N° 1496, 23 May 1913.

¹⁰⁶ Annex 119: Executive Resolution N° 90, 1 June 1937. Emphasis added.

¹⁰⁷ See Annex 133

¹⁰⁸ In Spanish: Instituto Colombiano de la Reforma Agraria.

Algodón [Cotton], Alburquerque, E-SE [East-Southeast], Córdoba, Santander, Casabaja, Hermanos [Brothers], Del Valle, Cangrejo [Crab] and Serrana; the banks [of] Roncador, Serranilla, Quitasueño, Bajo Nuevo and Alicia, and the other islets, cays and banks that are part of the Archipelago of San Andrés and Providencia and constitute the national Intendancy by the same name.

Article Three: To declare as special reserve zones, with the purpose of preserving the flora, fauna, lake levels, the creeks and natural scenic beauties, the following sectors of the Archipelago of San Andrés and Providencia.

(...)

Cays and Banks

Preservation Zones

(...)

b) The Cay of Serrana and the banks of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo and Alicia

Article Four: To declare as special reserve zones for tourism purposes the following sectors of the Archipelago of San Andrés and Providencia:

Cays and banks

All of the cays and banks that form part of the Archipelago of San Andrés and Providencia, excluding Cangrejo and Serrana Cays as well as the banks of Roncador, Quitasueño, Serranilla, Bajo Nuevo and Alicia, comprised within the intangible preservation zones dealt with in the previous article...¹⁰⁹

¹⁰⁹ Annex 133: Resolution N° 206 from the Colombian Institute for Agrarian Reform (INCORA), 16 December 1968.

3.90. The 1968 Resolution was modified by INCORA's Resolution N° 092 of 30 June 1969, without altering the previously established regime for the cays. The cays were once again expressly mentioned in the operative part of the resolution as follows:

“Article One:

(...)

Continuing in the same reserve regime are the Cays [of] Sucre (Johnny), Acuario (Rose), Rocoso [Rocky], Algodón [Cotton], Alburquerque, E-SE [East-Southeast], Córdoba, Santander, Hermanos [Brothers], Del Valle, Cangrejo [Crab] and Serrana; the banks of Roncador, Serranilla, Quitasueño, Bajo Nuevo, Alicia, and the other islets, cays and banks that are part of the Archipelago of San Andrés and Providencia.”¹¹⁰

3.91. By Article 37 of Law 99 of 1993, the Autonomous Corporation for the Sustainable Development of the Archipelago (Coralina) was created with a jurisdiction comprising the “territory of the Archipelago Department of San Andrés, Providencia and Santa Catalina, the territorial sea and the EEZ generated by the land sections of the Archipelago”. It was mandated to promote the preservation, protection and sustainable use of the renewable natural resources and the environment of the Archipelago, and the integration of the native communities

¹¹⁰ Annex 134: Resolution N° 92 from the Colombian Institute for Agrarian Reform (INCORA), 30 June 1969.

inhabiting the islands and their ancestral methods of using nature's resources to this process.¹¹¹

(2) LAW ENFORCEMENT

3.92. Colombia has enforced its criminal and civil legislation over the entire Archipelago.

3.93. For example, in June 1891 a United States' citizen, Edward Bailey, owner of the Colombian Guano and Phosphate Co., incorporated in Washington, went to Roncador and extracted guano, part of which he shipped to the United States. He left the rest on the cay, under the guard of 12 workmen, promising to return three weeks later. When he did not return, 7 of the 12 workmen embarked on a canoe and were rescued by a vessel named *Bucefalous*. The 5 remaining workmen disappeared. Colombian fishermen from Providencia later found two corpses on the cay. Once the authorities in San Andrés were alerted, the Prefect immediately went to Roncador and initiated an investigation. He removed the small boat found at Roncador to San Andrés. The incident was officially communicated to the United States Government, since the responsible party appeared to be a United States' citizen.¹¹²

¹¹¹ The full text of Law 99 of 1993 is available at: <http://www.epacartagena.gov.co/ley99de1993.html>

¹¹² An account of the facts and the statements rendered in the course of the investigation were transmitted to the central Government that, in turn, communicated them to the Colombian Legation in Washington, in order to have it submit a formal protest to the Department of State. In Annex 27: Diplomatic Note N° 5 from the Chargé d'Affaires of Colombia in Washington to the Secretary of

3.94. An example of the enforcement of civil legislation by Colombia over the Archipelago is provided by the following. On 4 May 1892 the Legation of the United States in Bogotá informed the Department of State about a claim made by an American citizen, William M. Patterson, against the Government of Colombia concerning the alleged plundering of a United States' vessel *Bell* by Colombian citizens in the Archipelago. The Legation's report stated that the Island of Providencia was under the jurisdiction of the Province of Bolívar and specifically recognized that Colombia had jurisdiction over Serrana Cay. Three Notes exchanged between the United States' Legation in Bogotá and the Colombian Foreign Ministry on the matter, were enclosed with the report.¹¹³ A subsequent note from the Legation to the State Department, N° 267 dated 14 April 1897, referred to the subject again.¹¹⁴

(3) NAVAL PATROLS AND OPERATIONS

3.95. From the mid 19th century onwards, the Colombian authorities have carried out surveillance and control activities over the entire Archipelago, including the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Albuquerque and East-Southeast.

State, 18 January 1893.

¹¹³ Annex 175: Note N° 340, and enclosures, from the United States Minister in Bogotá to the Department of State, 4 May 1892.

¹¹⁴ Annex 178: Note N° 267 from the Department of State to the United States Minister in Bogotá, 14 April 1897.

3.96. In this regard, when the Colombian Navy started developing in the 1930s, it began to maintain a regular presence in the Archipelago, where Army garrisons and police units had traditionally been posted for local surveillance purposes.

3.97. For instance, in 1935, the Colombian destroyers ARC *Caldas* and ARC *Antioquia*, newly acquired flagships of Colombia's Navy, were instructed to carry out an inspection visit to the Serrana cays. The Government of the United States was aware of this visit, as shown in a report from the United States' Consul in Kingston, where the ships began their voyage.¹¹⁵

3.98. Also, in 1937, on the Colombian Navy vessel ARC *Junín*, a commission constituted of officials and officers designated by the Colombian Foreign Ministry and Ministry of War performed a thorough study and reconnaissance of the cays of Roncador, Quitasueño and Serrana with the purpose of determining their characteristics, economic potential, as well as the possibility of establishing military garrisons for national defense purposes and control of the area. The detailed report submitted by the Foreign Ministry official who led the expedition is found in Annex 121.¹¹⁶

¹¹⁵ Annex 203: Despatch N° 145 from the United States Consul in Kingston to the Department of State, 11 September 1935.

¹¹⁶ Annex 120: Report by an official of the Colombian Ministry of Foreign Affairs regarding the cays of Roncador, Quitasueño and Serrana in the Archipelago of San Andrés, 31 August 1937.

3.99. From Cartagena, the main Colombian port in the Caribbean where the Caribbean Naval Force Command is located, and from the Naval Garrison established on the island of San Andrés in 1940,¹¹⁷ the Navy has regularly carried out missions with the purpose of surveillance, protection of the marine environment, fishing control, defense against armed actions such as the pirating of vessels, the fight against and interdiction of smuggling operations, arms and drugs trafficking and other related criminal activities. Appendix 7 contains a list of the mission or operation orders (*Ordenes de Operaciones*) under which the Colombian Navy ships perform their duties in the area,¹¹⁸ and several samples thereof are annexed.¹¹⁹

3.100. The ships of the Colombian Navy have regularly visited each and every one of the Archipelago's cays with the purpose of rotating and supplying the Marine infantry detachments that were established thereon in the late 1970s.¹²⁰ The Marine detachments and the visiting corpsmen perform maintenance duties on the lighthouses on the cays, and aid in performing scientific research, carrying out hydrographic surveys, mapping surveys, etc.

¹¹⁷ Annex 121: Presidential Decree N° 487 establishing the Naval Garrison on San Andrés, 8 March 1940.

¹¹⁸ See Appendix 7: Exercise of sovereignty and jurisdiction in the San Andrés Archipelago through naval activities.

¹¹⁹ Annex 132: Periodic Report N° 11 by the Command of the Atlantic Naval Force, Cartagena, 30 November 1968; Annex 130: Periodic Report N° 8 by the Command of the Atlantic Naval Force, Cartagena, 31 August 1968; Annex 165: Operation Order N° 2 of 2000 from the Specific Command of the Colombian Navy for San Andrés and Providencia (CESYP).

¹²⁰ Appendix 7.

3.101. In the course of their fishing control missions, ships of the Colombian Navy have encountered vessels engaged in fishing activities in areas of the San Andrés Archipelago in violation of the rules in force or of the terms of the permits granted to them. A few examples are set out below. Appendix 8 contains a list of such incidents in the area involving Nicaraguan and other vessels.¹²¹

3.102. In March 1965 the Assistant Legal Advisor of the State Department, Marjorie M. Whiteman, addressed a note to Mr. W.H. Crippen, a United States' citizen interested in carrying out fishing activities on the cays of Serrana, Quitasueño and Serranilla. In her note, the Assistant Legal Advisor stated that:

“...[I]nasmuch as they are claimed by both the United States and Colombia, this Government can, of course, give no assurance that your activities near these banks may not be interfered with by authorities of Colombia. If however, you will provide the Department with more definite information as to the nature and scope of your interests in the waters near these banks and the estimated time you would be active therein, we will be pleased to inform the Government of Colombia.”¹²²

3.103. In April 1965, Ms. Whiteman again addressed Mr. Crippen, requesting him to provide more details concerning the

¹²¹ Appendix 8: Colombian interdiction of illegal fishing in the area of the San Andrés Archipelago.

¹²² Annex 209: Note from the Assistant Legal Adviser of the Department of State to Mr. W.R. Crippen, Jr., 2 March 1965.

latter's foreseen operation in the cays of Serrana, Quitasueño and Serranilla, "[i]n order to supply the Colombian Government with all the information it might find useful".¹²³

3.104. In October 1965, Mr. Carl F. Salans, who succeeded Ms. Whiteman as Assistant Legal Advisor at the State Department, replied to Mr. Crippen's inquiry on the status of his request as follows:

"The Secretary General [of the Colombian Foreign Ministry] apparently stated that if any administrative difficulties arose, you should get in touch directly with the Colombian Navy and attempt to reach an understanding with appropriate Navy officials. Of course, it is the Colombian Navy which has patrol and related duties in the areas of concern to you.

In order to avoid possible difficulties, it may, therefore, be advisable for you to get in touch with Colombian Navy officials before undertaking your proposed lobstering operations."¹²⁴

3.105. In May 1967 a ship belonging to the Colombian Navy intercepted a vessel coming from Jamaica, contracted by Mr. Crippen's fishing company from the United States of America, while it was engaged in fishing activities near the cay of Serrana.¹²⁵ The ship's leaser claimed to have a permit granted by

¹²³ Annex 210: Note from the Assistant Legal Adviser of the Department of State to Mr. W.R. Crippen, Jr., 13 April 1965.

¹²⁴ Annex 211: Note from the Assistant Legal Adviser of the Department of State to Mr. W.R. Crippen, Jr., 12 October 1965.

¹²⁵ Annex 212: Cable from the United States Embassy in Bogotá to the Department of State, 10 May 1967.

the Commander of the Colombian Navy, Vice-Admiral Orlando Lemaitre. However, as evidenced in a cable from the Department of State to its Embassy in Bogotá, the authorization signed by the Vice-Admiral was subject to the ship refraining from fishing within 12 miles from the cays.

“1. W.R. Crippen, Sea Foods, Inc., has terminated fishing operation of Jamaican contractor in waters off Serranilla, Serrana and Quita Sueño pending his decision whether apply for new license and employ US vessels.

2. Crippen’s license to fish (copy pouched separately) granted in letter from Vice Admiral Orlando Lemaitre Torres of Colombian Navy date July 8, 1966, Colombian file No. 05372 / COMDEARC – DMMC - 525. License ‘recommends’ Seafood’s vessels not fish within 12 miles of the Islands.

3. Crippen now asks if Department could obtain permission for Jamaican contractor, Mrs. Marie Sampson, to return to island waters in order retrieve canoes and traps left there after hurried departure. Evacuation operation will require a number of roundtrips and may last as long as 30 days. Crippen states no fishing would take place during retrieval although they may wish keep fish presently in traps.

4. Request you contact Colombian Navy office and attempt obtain permission for retrieval equipment.”¹²⁶

3.106. In 1968 the United States’ vessel *Geminis* was captured by a Colombian Navy ship while carrying out fishing activities

¹²⁶ Annex 213: Cable from the Department of State to the United States Embassy in Bogotá, 16 May 1967.

around Quitasueño and was escorted to San Andrés. The Colombian Defense Minister informed the Foreign Minister of the incident, by Note dated 18 November 1968:

“At 07:00 hrs., the Commander of the Naval Station of San Andrés – Port Captain – found the vessel ‘Geminis’ of US flag, fishing in Colombian waters in Quitasueño Bank, at the geographical position of 14°04’N and 81°20’W, under the command of Captain Clarence E. Fisher who exhibited a departure sailing clearance from Pascagoula-Mississippi, dated 23 September of the current year.¹²⁷

The vessel was subsequently released without a fine.

3.107. In March 1973 a Colombian Navy ship intercepted the fishing vessels *Tampico*, *Swan Island* and *Yucatan* flying the United States flag, while they were carrying out fishing activities in the territorial sea of Serrana Cay. Following their interception and the examination of their documents, the vessels were allowed to continue their journey. The United States’ Embassy in Bogotá reported the incident to the Department of State as follows:

“The Ministry version of the incident follows: A Colombian patrol boat sighted three fishing vessels near Serrana bank and headed for them. They pulled anchors and fled, inasmuch as none was flying colors, the Colombian vessel signaled them to stop, when they did not do so shots were fired across their bows. As the Colombians approached,

¹²⁷ Annex 131: Note N° 03308/MIDSG-A-559 from the Colombian Defense Minister to the Colombian Foreign Minister, 18 November 1968.

the vessels hoisted U.S. flags, the Colombian captain nevertheless sent a boarding party aboard to take pictures and advise the fishermen to fly their colors while fishing in Colombian waters.

(...)

By stating that inasmuch as Colombia, too, wishes to avoid incidents of this nature, American fishing vessels should fly their colors and allow themselves to be identified....”¹²⁸

3.108. The Colombian Navy has also been in charge of enforcing compliance with the terms of the fishing agreements between Colombia and Jamaica, operating within the framework of the maritime interdiction agreements for drug-trafficking control in the Caribbean with the United States.¹²⁹

(4) SEISMIC / OIL-RELATED RESEARCH

i. By Colombia

3.109. On 4 October 1977 the Colombian Maritime Authority authorized the Compagnie Générale de Géophysique to carry out oil prospection activities in the maritime areas of the San Andrés Archipelago with the French ship *Dauphin de Cherbourg*.¹³⁰

¹²⁸ Annex 214: Note E.O.11652N/A from the United States Embassy in Bogotá to the Department of State, 25 May 1973.

¹²⁹ United States-Colombia Agreement to Suppress Illicit Trafficking by Sea, 20 February 1997. TIAS 12835.

¹³⁰ Annex 141: Resolution N° 580 of the Colombian Maritime and Port General Directorate, 4 October 1977, granting a permit to the Compagnie Générale de Géophysique to carry out oil prospection Works in Colombian jurisdictional waters, in areas of the Archipelago of San Andrés, with the French ship *Dauphin de Cherbourg*.

3.110. These oil prospection activities were conducted on the basis of an association contract between the Compagnie Générale de Géophysique and the official Colombian Oil Company, ECOPETROL, over 31,000 square kilometres of the Archipelago's waters, in the area of the Cays of Quitasueño, Roncador and Serrana between the meridians 80° 00' and 81° 40' and the parallels 14° 00' and 14° 40'.¹³¹

3.111. In the same year ECOPETROL carried out a seismic study in the area of the Cay of Serranilla, between the meridians 79° 35' and 80° 30' and parallels 16° 20' and 14° 40'.¹³²

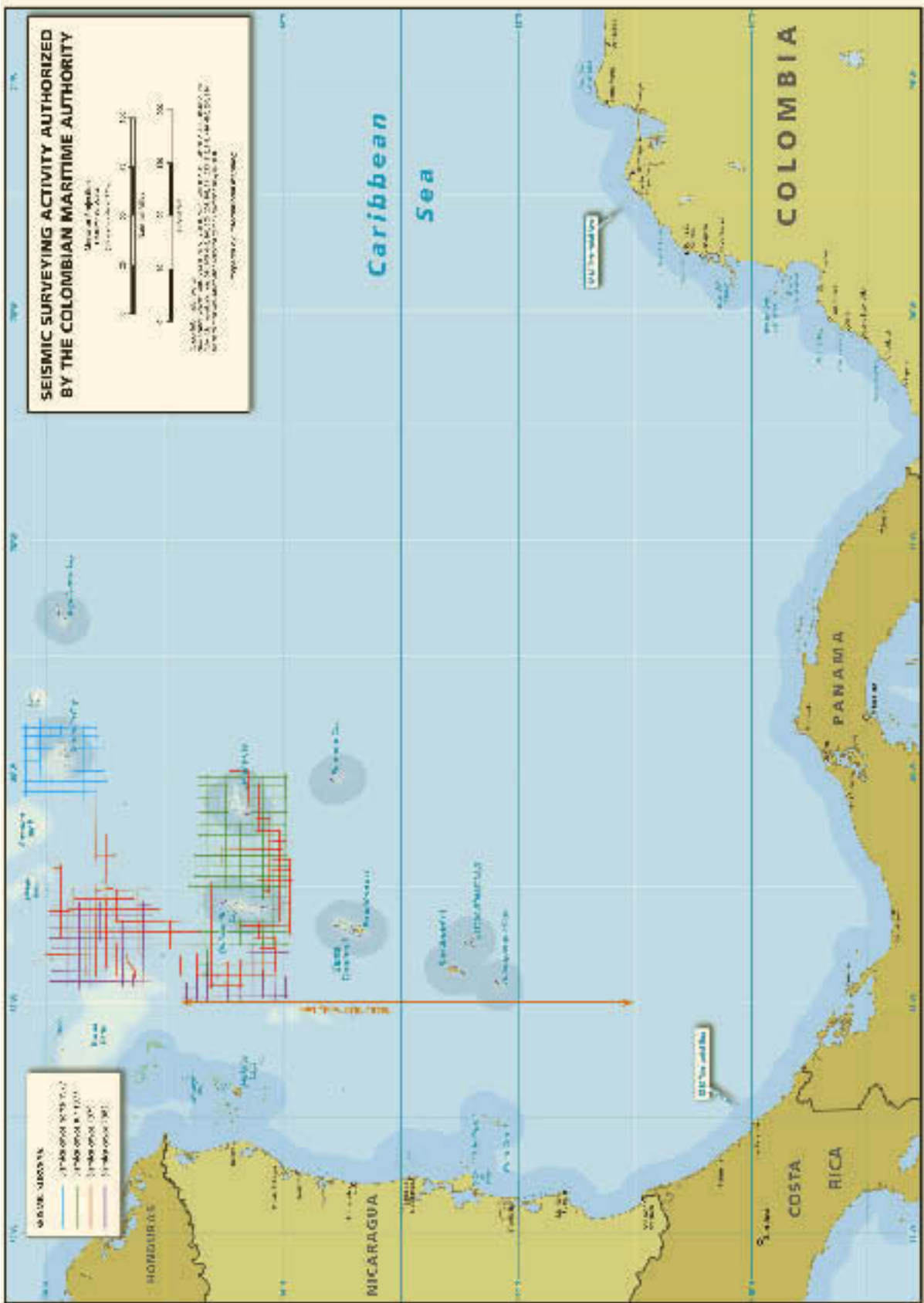
3.112. In 1979, ECOPETROL carried out a detailed seismic survey between the meridians 82° 00' and 79° 30' and the parallels 16° 00' and 13° 50'.¹³³

3.113. On 3 December 1982 the Colombian Maritime Authority authorized the United States'-based Geosource Exploration Company to carry out seismic exploration activities in Colombian waters in three sectors, including the cays, with the

¹³¹ ECOPETROL, Operation report for Marine Geophysical Survey, Using reflection Seismic Method. 23 October to 5 December 1977.

¹³² Ibid.

¹³³ "Los cayos area of Caribbean Sea", Report on the digital processing of the 1979 seismic survey by Denver Processing Center, Inc., W.C. Carmichael Marine Processing.



See full size Map, Vol. III - page 71

United States' ship *Geomar II*. Under the Resolution granting the authorization, the company undertakes to report to the Commander of the Special Command of San Andrés and Providencia, about the installation of stations on Providencia and Roncador.¹³⁴ Sector "a) Cays" was entirely located within the San Andrés Archipelago in the areas adjacent to Quitasueño, between the meridians 82°00' and 81°00' and the parallels 14°00' and 16°00'. The oil prospection activities were conducted on the basis of an association contract with ECOPETROL.¹³⁵

3.114. Figure 3.2 above shows the location of these concessions.

3.115. In contrast to the three instances when Nicaragua attempted to authorize oil exploration activities to the east of the 82°W meridian, which were all firmly rejected by Colombia, none of the seismic studies or oil prospection activities carried out by the Colombian Petroleum Company since 1977, or by foreign companies authorized by virtue of a contract with the Colombian Government, elicited any protest or reservation by Nicaragua.

¹³⁴ Annex 144: Resolution N° 788 of the Colombian Maritime and Port General Directorship, 3 December 1982, authorizing Geosource Exploration Company to carry out seismic exploration operations in Colombian waters.

¹³⁵ Geosource Inc./ECOPETROL, Final report, "Los Cayos Prospect Area Offshore Colombia", Los Cayos Program, December 1982 to February 1983.

ii. By Nicaragua

3.116. The Nicaraguan Government granted a “reconnaissance permit” in 1967, over an area termed “Quitasueño Block” which extended to the east of the 82°W meridian.¹³⁶ It did not involve a claim to Quitasueño or any other cay itself. Certain oil exploration and exploitation concessions were also granted by Nicaragua in 1975 and 1977, in areas to the east of the 82°W meridian. Most of the concessions granted for oil exploration or exploitation in the area by the Nicaraguan Government only reached the continental shelf’s 200-metre isobath limit. The Colombian Government strongly protested each of these concessions on the ground that they extended to the east of the 82°W meridian.¹³⁷

(5) MAPPING SURVEYS

3.117. For a long time, as was the case for most countries in the hemisphere, the Colombian Government used maps and charts

¹³⁶ NM, pp. 153-154, para. 2.204. It may be noted that Nicaragua has not actually produced the “permit” in question. See Nicaraguan Diplomatic Note of 12 June 1969, NM, Annex 28.

¹³⁷ Annex 54: Diplomatic Note N° 092 from the Colombian Ambassador in Managua to the Nicaraguan Foreign Minister, 4 June 1969. Annex 55: Diplomatic Note N° DM-170 from the Colombian Foreign Minister to the Nicaraguan Ambassador in Bogotá, 18 April 1975. Annex 56: Colombian Diplomatic Note N° F-229 from the Colombian Foreign Minister to the Nicaraguan Ambassador in Bogotá, 21 August 1975. Annex 57: Diplomatic Note N° DM-156 from the Colombian Foreign Minister to the Nicaraguan Ambassador in Bogotá, 28 March 1977. Annex 58: Diplomatic Note N° DM 457 from the Colombian Foreign Minister to the Nicaraguan Ambassador in Bogotá, 24 October 1977. Annex 59: Diplomatic Note N° DM-00482 from the Colombian Foreign Minister to the Chargé d’Affaires of Nicaragua in Bogotá, 15 November 1977.

prepared by foreign authorities or institutions with a long-standing cartographic tradition. Following the exchange of ratification instruments of the 1928 Treaty with Nicaragua in 1930, the Colombian Government ordered surveys to be undertaken for the preparation of its own maps and charts of the San Andrés Archipelago.

3.118. By Law 47 of 1931, the Government was authorized by the Colombian Congress to send a commission to the San Andrés Archipelago in order to prepare geographical and geological charts of the islands and cays of the Archipelago:

“Article 1. The Executive Branch is authorized to proceed, at the earliest possible time, to send to the Archipelago of San Andrés and Providencia a Scientific Commission, in order for it to prepare separate geographical and geological charts of the islands and cays that form that Archipelago and belong to Colombia.”¹³⁸

3.119. One of these charts became the inset on the Official Map of Colombia of 1931, published by the relevant division of the Foreign Affairs Ministry, showing all the islands, cays and banks of the San Andrés Archipelago, as well as the 82°W Greenwich meridian that was incorporated as its limit. This map clearly shows that all the cays now claimed by Nicaragua were part of the Archipelago and belonged to Colombia.¹³⁹

¹³⁸ Annex 117: Law of 47 of 11 April 1931.

¹³⁹ See Figures 2.12 and 2.13, Vol. III

3.120. Subsequently, the National Geographic Institute Agustín Codazzi published several dozens of maps of Colombia and of the San Andrés Archipelago, based on surveys performed by that entity, aerial photographs and field works in the Archipelago.¹⁴⁰

3.121. Additionally, over the last forty years, the Colombian Navy has been carrying out bathymetric studies in the Archipelago – including all of the cays – with a view to producing and updating its own nautical charts that are available to sailors.

3.122. In 1969 the Colombian Navy ship *ARC Quindío* undertook a survey of the Island of San Andrés and its neighboring areas. Later, between 1984 and 1986, it carried out a survey covering most of the Archipelago that was the basis for preparing Chart 004 – the San Andrés Archipelago.¹⁴¹ The survey also assisted in the characterization of the submarine geomorphology, by identifying, describing and naming each of the submarine features found in the area.

3.123. A list of the survey campaigns undertaken by the Colombian Navy is found at Appendix 10.¹⁴²

¹⁴⁰ Appendix 9: List of maps published by the Geographic Institute of Colombia (*Instituto Geográfico “Agustín Codazzi”*).

¹⁴¹ This was one of the basis for producing Map N°3 of Colombia’s *Preliminary Objections* (“The Archipelago of San Andrés”), and Figure 2.1 in Vol III.

¹⁴² Appendix 10: List of survey cruises carried out by the Colombian Navy in the area of the San Andrés Archipelago.

3.124. As a result of these surveys, and other research and related work undertaken by the Colombian Navy, the Navy has produced and published numerous charts of the area of the San Andrés Archipelago, a list of which is found at Appendix 11.¹⁴³

3.125. Up to 1980 none of the maps constituting the official Colombian cartography met with any opposition by Nicaragua.¹⁴⁴

(6) SCIENTIFIC RESEARCH

3.126. Colombia has sought to increase scientific knowledge of the San Andrés Archipelago with a view to preserving and making sound use of its natural wealth and improving the livelihood of its inhabitants. With the evolution of the country's specialized institutions and the growing availability of resources, these activities have become more technically elaborate and widespread over time.

3.127. For instance, on 26 July 1929, pursuant to orders given by the Colombian Ministry of Industries, a commission formed by two agronomists, an engineer, a photographer and a practitioner, aided by the *Intendente* of the Archipelago, left from San Andrés en route to the cays, with the purpose of studying the guano deposits. The *Intendente* telegraphed the

¹⁴³ Appendix 11: List of charts of the area of the San Andrés Archipelago by the Colombian Navy.

¹⁴⁴ See paras. 278-2.85, above.

Ministers of Government and Industries informing them of the commission's departure as follows:

“I inform you [that] on [the] 16[th of the] current [month] the commission of agronomists Mocco, Toro left for the Roncador, Quitasueño, Serrana Cays [to] study guano deposits STOP Undersigned decided [to] send along engineer Dastan, photographer Philips and intern Robert Hecker [at the] Intendancy's expense [with the] purpose [of] drawing charts [and] bring back [from] visits[,] all of which I deem important even internationally given situation [with the] Nicaragua treaty STOP Commission sent [by] Ministry [of] Industries has been furnished full support here. – Your servant”¹⁴⁵

3.128. In October 1947, a geological commission was sent by the Mines and Oil Ministry and the Industrial Promotion Institute of Colombia to study “the possibilities of the phosphate deposits in the Archipelago of San Andrés and Providencia”. The commissioners, Alberto Sarmiento Alarcón and José Sandoval, submitted a detailed study on the matter, comprising the islands of San Andrés, Providencia, Santa Catalina and Serrana Cay. In their report, found at Annex 125, they concluded that the surveyed locations did not hold significant guano deposits and were unsuitable for economic exploitation.¹⁴⁶

3.129. For its part, the Colombian Navy has carried out and continues to embark on research activities on oceanographic

¹⁴⁵ Annex 115: Telegram from the *Intendente* of San Andrés to the Ministers of Government and Industries of Colombia, 26 July 1929.

¹⁴⁶ See Annex 125.

ships. These activities relate to geological aspects and marine biology in the areas of the San Andrés Archipelago. It has also actively participated in collective efforts, such as the CICAR initiative (Cooperative Investigations of the Caribbean and Adjacent Regions), under the auspices of UNESCO's Intergovernmental Oceanographic Commission. Some of the research activities undertaken by the Navy are listed in Appendix 12.¹⁴⁷

3.130. As mentioned above, the Agustín Codazzi Geographic Institute of Colombia has also conducted several topographic and aerial photographic surveys in the Archipelago, including its cays for the elaboration of cartography.¹⁴⁸

3.131. In 1982, the French Government requested the authorization of the competent Colombian authorities for the French Petroleum Institute to carry out a marine geophysical survey in a zone at “a distance of 26 miles from the Island of Bajo Nuevo located under Colombian sovereignty”, on the ship *Resolution*.¹⁴⁹ The Colombian Government, after consulting with different competent agencies, agreed to this request,

¹⁴⁷ Appendix 12: List of scientific research activities carried out by the Colombian Navy in the area of the San Andrés Archipelago.

¹⁴⁸ See para. 3.120.

¹⁴⁹ Annex 61: Diplomatic Note N° 23 from the French Embassy in Bogotá to the Colombian Foreign Ministry, 26 January 1982.

provided that the French Government agreed to comply with the relevant legal requirements.¹⁵⁰

(7) PUBLIC WORKS

3.132. In addition to all the infrastructure works built by the Colombian Government on the main islands of the San Andrés Archipelago, works have also been built and maintained by the Colombian Government on the Archipelago's cays. These include lighthouses, quarters and facilities for Navy detachments, solar panels, water collection wells, facilities for the use of the Navy infantry corps and fishermen who visit the cays, and the installation of radio stations or antennae.

3.133. On 20 November 1894, the diplomatic representative of the Kingdom of Sweden-Norway in Bogotá addressed a request to the Colombian Foreign Ministry for the Colombian Government to install a lighthouse on Roncador Cay, belonging to the San Andrés Archipelago.¹⁵¹ Moreover, the diplomatic representative of Sweden and Norway in Washington requested the Department of State to act in support of the request addressed to the Colombian Government.¹⁵² The request was studied by the Colombian Government,¹⁵³ and exchanges with the United

¹⁵⁰ Annex 62: Diplomatic Note N° SG. 00222 from the Colombian Foreign Ministry to the French Embassy in Bogotá, 16 February 1982.

¹⁵¹ Annex 30: Diplomatic Note from the Colombian Foreign Minister to the United States Minister in Bogotá, 17 January 1895.

¹⁵² Annex 176: Note N° 76 from the Department of State to the United States Minister in Bogotá, 26 November 1894.

¹⁵³ *Ibid.*

States and Sweden and Norway were included in the 1896 Report to Congress by the then Colombian Foreign Minister, Jorge Holguín.¹⁵⁴

3.134. On 1 March 1919, the United States' Minister in Bogotá addressed a request to the Colombian Foreign Minister in order to obtain the Government's authorization for the installation of two lighthouses, "one on the eastern or southern coast of the island of old Providencia and another on the island of Courtown Cays."¹⁵⁵

3.135. On 15 May 1919, the Colombian Foreign Minister replied that the Colombian Government was not legally allowed to grant permits to foreign governments for building works on the national territory or to occupy any part thereof. The Colombian Note further asked the United States' Minister to inform his Government that since 1915, Colombia had been taking the necessary steps to build lighthouses in several locations "and particularly, in the Archipelago of San Andrés" and had thus contracted the necessary materials with American Gas Accumulator, a United States' company that had been unable to deliver them due to the state of war and particularly, to the United States' law on export restrictions as a result thereof.

¹⁵⁴ Annex 29: Diplomatic Note from the United States Minister in Bogotá to the Colombian Foreign Minister, 2 January 1895.

¹⁵⁵ Annex 40: Diplomatic Note N°1 from the United States Minister in Bogotá to the Colombian Foreign Minister, 1st March 1919.

The Note went on to explain the actions taken by the Colombian Minister in Washington in that regard.¹⁵⁶

3.136. In his address to Congress in July 1920, the President of Colombia, Marco Fidel Suárez, mentioned the installation of a wireless telegraph in the Archipelago. After recalling that the Archipelago was formed by “the islands of San Andrés, Providencia, Santa Catalina, Islas Mangles [Corn Islands], and numerous other cays more or less removed from the islands”, the President insisted on the imperative need “to facilitate communication with the Archipelago by means of a ship that shall make it speedy and safe”, proposing that “a vessel making a weekly crossing between the Archipelago and Cartagena or Puerto Colombia, would satisfy such need”.¹⁵⁷

3.137. As for maritime signaling, since the 1940s, Colombia has been building, operating and maintaining lighthouses and buoys in the San Andrés Archipelago. A few examples of the Colombian Government’s actions in this regard are given below.¹⁵⁸

3.138. In 1944, Enrique Ancízar, representative of the United States-based “American Gas Accumulator Company”, addressed

¹⁵⁶ Annex 41: Diplomatic Note from the Colombian Foreign Minister to the United States Minister in Bogotá, 15 May 1919.

¹⁵⁷ Annex 104: Address to Congress by the President of the Republic of Colombia, July 1920.

¹⁵⁸ See Appendix 7 and Annexes 123-124, 128, 132, 143, 160-161, 164, 170, 205 and 208.

a note to the Navy General Division of the Colombian Ministry of War concerning the refitting of the system of lighthouses and buoys, including those on the cays of Alburquerque, Quitasueño, Serrana, despite the fact that the latter two were maintained – albeit intermittently – by the United States.¹⁵⁹

3.139. In January 1946, the Navy General Division addressed a note to the Colombian Minister of War requesting an allocation of funds for the maintenance of lighthouses and buoys in Colombian coastal zones, expressly including Quitasueño and Alburquerque.¹⁶⁰ In May 1946, a Memorandum addressed by the Lighthouses and Buoys Sub-division to the Navy General Division of the Colombian Ministry of War, reported the results of the inspection conducted in the Atlantic and requested funds for repairing the lighthouse on Bolivar Cay (East-Southeast Cays).¹⁶¹

3.140. In December 1954, with a view to improving the light potency and the autonomy of the lighthouses on Quitasueño, Serrana and Roncador, the Swedish company AGA submitted a

¹⁵⁹ Annex 205: Note from Mr. Enrique Ancízar, legal representative of the American Gas Accumulator Company, to the Navy General Division of the Colombian Ministry of War, 15 October 1944.

¹⁶⁰ Annex 123: Note N° 938/DIN from the General Marine Division to the Colombian Minister of War, 21 January 1946.

¹⁶¹ Annex 124: Colombian Navy internal Memorandum on status of lighthouses, including two in the Archipelago of San Andrés, 3 May 1946.

budget, at the request of the General Command of the Colombian Navy.¹⁶²

3.141. In March 1955, the Colombian Minister of War requested the Foreign Affairs' Minister to begin discussions with the United States to terminate the 1928 Olaya-Kellogg Agreement and transfer the lighthouses on Roncador, Quitasueño and Serrana to Colombia, or at least to have the United States commit itself to tend to their adequate maintenance.¹⁶³

3.142. In October 1959, the Lighthouses and Buoy division of the Navy summarized the actions undertaken in order to modernize the lighthouse system, including those of the Archipelago.¹⁶⁴

3.143. In October 1964, the Merchant Marine Directorship of the Colombian Navy produced a report on the working state of the lighthouse on Bolívar Cay (East-Southeast Cays) at the same time as the Colombian Navy ship ARC *Almirante Padilla* ran aground in that area.¹⁶⁵

¹⁶² Annex 208: Note Dir.GE/Lg from the Swedish company AGA to the General Command of the Colombian Navy, 4 December 1954.

¹⁶³ See Annex 208.

¹⁶⁴ Annex 128: Note N° 142 from the Chief of the Lighthouses and Buoy Division of the Colombian Navy to the Coasts and Merchant Marine Director, 22 October 1959.

¹⁶⁵ Annex 129: Note N° 11700R from the Merchant Marine Director of the Colombian Navy to the General Command, 1 October 1964.

3.144. In November 1968, the periodic report of the Atlantic Naval Force Command recounted the operation carried out by the Colombian Navy ship ARC *Gorgona*, transporting personnel and materials to the lighthouses and buoys for the works to be carried out on Bolívar Cay (East-Southeast Cays), as well as the inspection of aids to navigation in the area of San Andrés, Providencia, Serrana, Quitasueño and Roncador, pursuant to Operation Order No. 149-CFNA/68.¹⁶⁶

3.145. In 1971, a sea buoy was installed near Bajo Nuevo Cay.

3.146. In 1977, the Colombian Navy built a new lighthouse on Roncador to replace the old one that had ceased to be maintained by the United States Government some years prior to the termination of the 1928 Olaya-Kellogg Agreement, following the conclusion of the 1972 Vázquez-Saccio Treaty yet prior to this latter treaty's entry into force.

3.147. Also in 1977, a new lighthouse on Serrana was built by the Colombian Navy, replacing the old one that like the old Roncador lighthouse had also ceased to be maintained by the United States Government long before the termination of 1928 Olaya-Kellogg Agreement, following the conclusion of the 1972 Vázquez-Saccio Treaty yet prior to this latter treaty's entry into force.

¹⁶⁶ See Annex 132.

3.148. Finally, in 1977 the metallic tower and shed of the lighthouse on Serranilla were built by the Colombian Navy.¹⁶⁷

3.149. In January 1980, the lighthouse on Alburquerque was completed. In December 1980, the Maritime and Port General Directorship of the Colombian Navy produced a study to implement marine signals fueled by solar power, including those in the San Andrés Archipelago.¹⁶⁸

3.150. In December 1996, the Colombian President attended the opening ceremony of the cement structure and metallic tower on the new lighthouse on Serranilla.¹⁶⁹ In September 1998 the lighthouse on Bajo Nuevo was repaired due to damage caused by hurricane “Mitch”.¹⁷⁰ In March 1999 the lighthouse on Bajo Nuevo again had to be repaired after a tropical storm caused damage. On 26 July 2006 new light-keepers’ quarters on Roncador were built.¹⁷¹ On 20 October 2006 the lighthouse in the southern part of Quitasueño was built.

¹⁶⁷ Annex 161: Colombian Navy’s Notice to Sailors on new lighthouse at Serranilla, to replace that built by Colombia in 1977, 1997.

¹⁶⁸ Annex 143: Colombian Maritime and Port General Directorship, Study of Maritime Signaling System fueled by solar energy, including lighthouses in the Archipelago of San Andrés, 3 December 1980.

¹⁶⁹ Annex 160: Note N° NR. 003 from the Chief of Maritime Signals on the Atlantic to the Chief of the Navigational Aids Division, Colombian Maritime and Port General Directorship, 2 January 1997.

¹⁷⁰ Annex 164: Note N° NR. 437 from the Chief of Maritime Signals on the Atlantic to the Secretary-General of the Colombian Maritime and Port General Directorship, 10 December 1998.

¹⁷¹ Annex 170: Resolution N° 128 of CORALINA, the environmental authority in the Archipelago of San Andrés, 27 February 2006.

3.151. The installation of lighthouses by the Colombian authorities was carried out in accordance with the relevant international norms. They have never met with any Nicaraguan protest.

E. Conclusions

3.152. The present chapter has recalled the original title of Colombia based on the principle of *uti possidetis juris* as well as the administration of the San Andrés Archipelago by the Viceroyalty of Santa Fe (New Granada) during colonial times; a situation in which legal title coincides with colonial *effectivités*.

3.153. The evidence adduced by way of example in this chapter shows the public, continuous and peaceful display of Colombian authority *à titre de souverain* over the entire Archipelago since independence and until the present.

3.154. The treaties concluded with the United States and with Nicaragua in 1928 did not alter this situation. After the entry into force of the Olaya-Kellogg Agreement in April 1928 and that of the Esguerra-Bárcenas Treaty in 1930, Colombia continued to exercise its sovereignty over all of the Archipelago's cays, including those which were the subject of a dispute between Colombia and the United States (Roncador, Quitasueño and Serrana).

3.155. Thereafter, and until the conclusion of the 1972 Vázquez-Saccio Treaty, the United States limited itself to the maintenance of the lighthouses on those three cays – as stipulated in the 1928 Agreement – whereas Colombia continued to carry out various fishing activities, scientific research, etc. No State, including Nicaragua, objected to these acts.

3.156. These wide-ranging displays of Colombia's long-standing, continued and peaceful sovereignty over the entire San Andrés Archipelago were not contested by the international community and, particularly, by Nicaragua, which belatedly and sporadically began to do so only in 1972. In fact, as will be shown in Chapter 4, Colombian sovereignty over the different components of the San Andrés Archipelago was explicitly recognized by third States and by Nicaragua itself.

Chapter 4

RECOGNITION BY OTHER STATES OF COLOMBIA'S SOVEREIGNTY OVER THE CAYS

A. Introduction and Overview

4.1. As demonstrated in Chapter 3, the cays were included in the Viceroyalty of Santa Fe (New Granada) and were administered by Colombia as part of the Archipelago from the early 19th century pursuant to the Royal Order of 1803. Colombia's sovereignty was recognised by third States, and indeed by Nicaragua itself, through its conduct, even prior to the 1928 Treaty and its Protocol of 1930.¹

4.2. This chapter describes the practice of recognition as follows:

- Section B describes the dispute with the United States over three of the cays, its resolution in Colombia's favour in 1972, and the subsequent practice of the parties concerning fisheries and conservation measures by Colombia in the waters around the three cays;
- Section C describes the position of Great Britain, which was an important power in the region both because of its

¹ For a full treatment of the Treaty of 1928 and the 1930 Protocol see Chapter 5.

own Caribbean islands and (until 1860) its protectorate over the Mosquito Coast;

- Section D describes the position of other neighbouring States, specifically Panama, Costa Rica, Honduras, and Jamaica, as manifested in maritime delimitation agreements;
- Section E demonstrates Nicaragua's own tacit recognition of the position, in particular through its response to the Loubet Award of 1900.

Relevant conclusions are summarised in Section F.

B. The Dispute with the United States over Roncador, Quitasueño and Serrana

4.3. During the 19th century, United States farmers faced serious difficulties because of a shortage of fertilizers. Guano, to be found on oceanic islands and cays, especially in the Caribbean Sea, was an ideal solution.² The United States' Congress accordingly enacted the so-called Guano Act on 18 August 1856, which provided that:

² Guano is formed by the excrement of marine birds, and is found on rocky coasts or on islets and cays scattered in the sea, especially those located in the Caribbean Sea. It is rich in phosphates and has been used for a long time as a top quality, low-priced fertilizer. In the mid-19th century, the price of guano from the Caribbean in the United States market was 33% lower than that which had to be brought from the remote regions of the Pacific.

“Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.”³

Numerous United States’ adventurers and entrepreneurs set out in search of guano deposits, including those located in the San Andrés Archipelago, even if the latter was clearly within the lawful jurisdiction of Colombia.

4.4. The Colombian Government consistently opposed the attempts of United States’ citizens to exploit some of the Archipelago’s cays.

(1) EARLY STAGES OF THE DISPUTE WITH THE UNITED STATES
OVER RONCADOR, QUITASUEÑO AND SERRANA

4.5. In 1853, the United States ship *St. Lawrence*, under the command of Captain S.R. Kimball, arrived at San Andrés, having extracted guano from Roncador Cay. The Prefect of the Canton of San Andrés, the highest authority in the Archipelago, banned the ship from leaving port, based on the fact that the guano extracted from Roncador belonged to the Republic of Colombia. However, the ship evaded the order and left port.

³ United States Code, Title 48, ch 8, §1411.

The facts were reported to the Governor of the Province of Cartagena.⁴

4.6. Thereafter, in the course of their administration of the Archipelago, the Prefects learned of or found United States citizens occasionally engaged in illegal guano extraction activities, mainly in Roncador and Serrana cays.⁵ Thus, in 1871, for example, the Prefect issued a Decree prohibiting guano extraction on some of the Archipelago's cays.⁶

4.7. In 1890 J.W. Jennet, a United States citizen, was found by the Colombian authorities engaged in guano extraction on Roncador. He claimed that he was acting under an authorization, granted by the United States Government, which also extended to Quitasueño.

4.8. The Colombian Chargé d'Affaires in Washington addressed a Note to the Department of State on 8 December 1890, enquiring as to the truth of Mr. Jennet's assertion. The

⁴ Annex 27: Diplomatic Note from the Chargé d'Affaires of Colombia in Washington to the Secretary of State, 18 January 1893.

⁵ See e.g., Annex 78: Note N°17 from the Prefect of the National Territory of San Andrés and Providencia to the Colombian Secretary of the Interior and Foreign Affairs, 25 November 1872; and 1885 incident, reference to which is found in Annex 82: Note N° 326 from the Prefect of the Province of Providencia to the Secretary of Government of Cartagena, 19 September 1890.

⁶ Annex 75: Colombian Decree issued by the Prefect of the National Territory of San Andrés and San Luis de Providencia, 26 September 1871.

Note made it clear that these cays “are part of the Archipelago of Providencia”.⁷

4.9. On 19 January 1891 the State Department confirmed that Jennet had been granted such an authorization under the 1856 Guano Act.⁸

4.10. In 1892, the Foreign Minister reported on this fact to the Colombian Congress and reiterated that the cays belonged to Colombia and that the inhabitants of the islands of San Andrés and Providencia travelled to them seasonally for the exploitation of tortoiseshell. The Report referred to the protest submitted to the Department of State in 1890, and reported on contracts concluded by Colombia for the exploitation of guano on some of those cays:

“II – Defense of the cays of ‘Roncador’ and ‘Quitasueño’:

Certain merchants from the United States have arrived at the cays of Roncador and Quitasueño, in the Colombian Archipelago of Providencia, and extracted, without the Government’s permission, large quantities of the guano that lies on those islets and that is one of the assets of the Republic. Our Legation at Washington has denounced these facts that violate the territory and defraud the Nation from a source of riches the exploit of which must be attended to as soon as possible.”⁹

⁷ Annex 26: Diplomatic Note from the Colombian Minister in Washington to the Department of State, 8 December 1890.

⁸ Reference found in Annex 27.

⁹ Annex 85: 1892 Report to Congress by the Colombian Foreign Minister.

4.11. The reply given by the State Department in 1891, and new incidents occurring with United States' citizens attempting to extract guano, gave rise to a lengthy Note, dated 18 January 1893, from the Colombian Minister in Washington to the United States' Secretary of State, rejecting those attempts and providing a detailed explanation of Colombia's rights.

4.12. The 1893 Note read in part as follows:

“...As well in the desire to proceed methodically in my analysis of the rights of Colombia as for the purpose of clearly establishing the origin of those rights, it will be necessary for me to go back to a very remote epoch, and to prove that from the original discovery [of] the islands of the Providence group, of which the keys in question form a part, have been considered as belonging, first to the Crown of Spain, and subsequently to the Republic of Colombia, in virtue of the succession of the latter to all the rights and choses in action in the section of South America known in the colonial times under the name of the Vice Royalty of New Granada...

The possession and domain which the Crown of Spain thereafter continued to exercise over the Archipelago in question were not again subsequently disturbed by any foreign power, and were maintained until the victorious insurrection of the Colonies against the Mother-country took place... and the present Republic of Colombia –which was the Vice Royalty of New Granada in the colonial times – under authority of the so often mentioned Royal Order of November 30th, 1803, continued in the exercise of dominion and jurisdiction over the Providence Archipelago, of which, I repeat, the keys of Roncador and Quitasueño form an integral part; which Archipelago subsequently was erected into

the canton of San Andrés, and formed a part of the province of Cartagena.

(...)

The extended statement of facts which I have thus made concurs in clearly setting forth the following points:

First, that the islands and keys which form the Archipelago or group of Providence have been known from a remote epoch; second, that the dominion and possession of that group have been exercised from time immemorial by the Crown of Spain, in the first place, and subsequently by the Republic of Colombia...”¹⁰

The Note was never answered.

4.13. The 1894 Report to Congress by the Colombian Foreign Minister contains an account of the actions to defend Colombia’s rights over the cays of Roncador and Quitasueño, including the protests submitted due to the unauthorized exploitation of guano by United States’ citizens, as follows:

“It seems that the guano extractors obtained from the United States license to exploit the islets, by inaccurately claiming them to be *res nullius* due to their not corresponding to the territory of any State; but this statement is absolutely false, since the islets belong to Colombia by virtue of perfect titles of dominion and public and repeated acts of possession. Roncador and Quitasueño are part of the Archipelago of Providencia, belonging to the

¹⁰ See Annex 27.

Republic, which has since its beginnings been in peaceful possession of that archipelago...”¹¹

4.14. On 27 October 1894 the diplomatic representative of Sweden and Norway in Washington requested the Department of State to act in support of the request addressed by the Swedish Minister in Bogotá to the Colombian Government, concerning the installation of a lighthouse on Roncador Cay, “the said Key being understood to belong to the Republic of Colombia”.¹²

4.15. The Department of State, having consulted the views of the Secretary of the Navy, instructed its Legation in Bogotá to carry out the action requested by the Swedish-Norwegian Government.¹³ The State Department’s request was communicated by the Legation of the United States in Bogotá to the Colombian Foreign Ministry, by Note dated 2 January 1895, the text of which read as follows:

“The Government of the United States has been officially informed, that the Minister at Bogotá, of his Majesty the King of Sweden and Norway, has been instructed to call the attention of the Government of the Republic of Colombia to the advisability of erecting a light house on Roncador Key in the Caribbean Sea.

¹¹ Annex 87: 1894 Report to Congress by the Colombian Foreign Minister.

¹² Annex 28: Diplomatic Note from the representative of the Kingdom of Sweden and Norway in Washington to the Secretary of State of the United States, 27 October 1894.

¹³ Annex 176: Note N° 76 from the Department of State to the United States Minister in Bogotá, 26 November 1894.

The Swedish Government[’s] understanding [is] that the dangerous rock in question is a Colombian dependency. In view of the recent loss of the United States man of war *Kearsarge*, on the above mentioned reef, and as the Navy Department reports that the erection of a light house on Roncador would be of great assistance to navigation... I have been instructed to inform Your Excellency that the Government of the United States most cordially commends the suggestion of the Swedish and Norwegian Government and would be gratified to learn that the establishment of this greatly needed light has been determined upon.”¹⁴

4.16. On 17 January 1895 the Colombian Foreign Minister addressed a Note to the United States’ Minister in Bogotá, stating that the Colombian Government had been considering the Swedish request, supported by the United States, and would continue to examine it in order to come to a decision, taking into account that “the Cay of Roncador being comprised in the Archipelago of San Andrés and San Luis de Providencia, that is an integral part of the Colombian territory”.¹⁵

4.17. On the same date, the Colombian Foreign Minister transmitted to the Colombian Minister in Washington a copy of the Note sent by the United State’s Minister in Bogotá, since the Legation had been dealing with the State Department on the matter of the guano exploitation by United States citizens in

¹⁴ Annex 29: Diplomatic Note from the United States Minister in Bogotá to the Colombian Foreign Minister, 2 January 1895. See also Annex 176.

¹⁵ Annex 30: Diplomatic Note from the Colombian Foreign Minister to the United States Minister in Bogotá, 17 January 1895.

Roncador and Quitasueño, and the aforementioned note of 1893 had still not been replied to:

“... I have deemed it fit to transmit to You, the attached copy of that note, since the step that is thereby taken can be considered as the implicit recognition of Colombia’s domain over the Cays of Roncador and Quitasueño, a matter which You have been so adeptly and interestedly treating with that Government, whose reply to the latest presentation on the matter by You is still pending.”¹⁶

4.18. The Colombian Government’s interpretation of the United States Note coincided with that of the United States Legation itself, as evidenced by its transmittal of the Colombian reply to the Department of State on 19 January 1895:

“...In the letter from the State Department, to this legation, asking the Republic of Colombia to establish a light house on Roncador Reef, the Department claims that the Island is a part of the Territory of Colombia. You will observe in the letter which I enclose, the Foreign Office refers to the fact that the Island is an integral part of Colombian Territory. I am not familiar with the controversy regarding the license granted to merchants to remove guano from said Island, but simply call your attention to the fact that in the letter to this legation, in regard to a light house, it is admitted that the Island is in the territory of Colombia.”¹⁷

¹⁶ Annex 88: Note N° 5154 from the Colombian Foreign Minister to the Colombian Legation in Washington, 17 January 1895.

¹⁷ Annex 177: Note N° 91 from the United States Minister in Bogotá to the Department of State, 19 January 1895.

4.19. The view that the United States, by acting in support of the Swedish-Norwegian request, had acknowledged Colombia's sovereignty over Roncador was shared by officials in the Department of State in 1947, as will be seen.¹⁸

4.20. The 1896 Report to the Colombian Congress by the Foreign Minister, Jorge Holguín, reported the action of the United States in support of the request made by the Kingdom of Sweden and Norway and the Colombian reply.¹⁹ It explained the Government's construction of the attitude of the United States, as follows:

“In previous reports of this Ministry you have been informed of the actions of our Legation in Washington due to the guano extraction carried out on the Cays of Roncador and Quitasueño by certain traffickers by a license surreptitiously obtained by them from the US Government, that was to grant it pursuant to one of their laws and in the belief that those islets were *res nullius*.

The discussion on this issue with the Department of State can now be well regarded as ended, because although the lengthy presentation by Colombia's Chargé d'Affaires showing our exclusive property over those islands has not been replied to, an incident has taken place thereafter that is the indirect but formal recognition of the Republic's sovereignty on those same territories.”²⁰

¹⁸ See below, paragraphs 4.48-4.50.

¹⁹ Annexes 29 and 88.

²⁰ Annex 89: 1896 Report to Congress by the Colombian Foreign Minister.

The Report contained an emphatic statement of Colombia's sovereignty over the Archipelago, which it described in detail.²¹

4.21. In the 1914 Foreign Minister's Report to Congress there are multiple references to the situation of the Colombian cays and the dispute with the United States. Among many other references is the text of a note addressed by the Colombian Foreign Minister to his colleague in charge of Public Works, pointing out Colombia's rights over the cays of Roncador, Quitasueño and Serrana and the diplomatic actions taken vis-à-vis the United States and Great Britain at the time.²²

(2) 1919 – INSTALLATION BY THE UNITED STATES OF
LIGHTHOUSES ON THE CAYS OF RONCADOR, QUITASUEÑO AND
SERRANA

4.22. In August 1919 the Governor of San Andrés found that the United States had installed lighthouses on the cays of Roncador, Quitasueño and Serrana. The information was reported to the Ministry of Government in Bogotá. A few days later, the Governor banned United States' employees from visiting Roncador Cay and stated that a \$1,000 fine would be applicable in case of non-compliance.²³

²¹ Annex 89. The passage is quoted in full at paragraph 2.59.

²² Annex 95: Note from the Colombian Foreign Minister to the Minister of Public Works, 2 April 1914.

²³ Annex 102: Note N° 1287 from the Governor of San Andrés to the Minister of Government, 21 September 1919 and enclosure.

4.23. Simultaneously, the Mayor of Providencia issued a decree conferring police powers on the masters of Colombian vessels in the area. In addition, he granted them fishing permits and authorized them to settle on the cays and to prevent any attempted action thereon without prior authorization from the Colombian Government.²⁴

4.24. On 13 September 1919, the Colombian Foreign Minister summoned the United States Minister in Bogotá to the Ministry and delivered a note of protest due to the installation of lighthouses on the cays.²⁵

4.25. The United States Minister in Bogotá transmitted the Colombian protest to the Department of State and, regretting the incident, reported his interview with the Colombian Foreign Minister as follows:

“I have the honour to transmit herewith copy and translation of a note from the Colombian Minister for Foreign Affairs, dated the 13th instant, relative to an official report received by the Ministry of Government to the effect that light towers have been installed on the cays known as Roncador, Quita Sueño and Serranilla [*sic*] and which belong to the Republic of Colombia.

[Here follows summary of the enclosed note]

In my conversation with the Foreign Minister on the subject he called my attention to the press notices in

²⁴ Annex 103: Annual Report from the *Intendente* of San Andrés to the Minister of Government, May 1919-April 1920.

²⁵ CPO, Vol. II, Annex 14, p. 89.

regard to it. I said that I was in entire ignorance of any such action having been taken and felt very confident that the work had not been undertaken at the instigation of the Government of the United States unless some misunderstanding may have existed as to the ownership of the rocks in question.

The opposition press is using this report as one of its points of attack against President Suarez as well as against the policy of the United States towards Colombia.

It is very regrettable that the incident has arisen at this juncture and I very much hope to receive from the Department such information as will have the effect of allaying all cause for criticism here in regard to it.”²⁶

4.26. The Colombian Minister in Washington informed the Colombian Foreign Ministry that as a result of his enquiries with the Department of State on the issue of the installation of lighthouses on the cays, he was told that the Department had no news of the fact but that they would address a memorandum to the Secretary of the Navy, in order to determine what had happened.²⁷ In fact, in February 1913 the Department of the Navy of the United States had submitted to the Department of State a request from the United States Commander-in-Chief of the Atlantic Fleet, stating that he did not know which State owned Roncador, Quitasueño and Serrana, and requesting

²⁶ Annex 191: Telegram from the United States Minister in Bogotá to the Department of State, 17 September 1919. The reference to Serranilla is a slip: the United States had no claim to Serranilla and had erected no lighthouse on it.

²⁷ Annex 101: Note N° 312-2973 from the Colombian Minister in Washington to the Colombian Foreign Minister, 13 September 1919.

information in that regard for purposes of establishing navigational aids there.²⁸

4.27. In fact (as the Colombian Government was subsequently informed) the lighthouses had been built pursuant to Proclamations issued by the President of the United States on 25 February 1919 with regard to Serrana and Quitasueño, and on 5 June 1919 with respect to Roncador.²⁹

4.28. On 4 October 1919, the United States Minister in Bogotá again voiced his concern over the matter to the Department of State, noting that the installation of the lighthouses had caused violent protests against the United States in Colombia.³⁰

4.29. Finally, a Note from the Secretary of State to the United States Minister in Bogotá, dated 16 October 1919, stated that the lighthouses were built and in operation in June 1919, on the Cays of Roncador, Serrana and Quitasueño, in the belief that they

²⁸ Annex 181: Note from the Department of the Navy to the Department of State, 27 February 1913. This request for information as to the ownership of the cays was reiterated by the Department of the Navy to the Department of State in 1914 and 1915, clarifying that the information was needed before adopting measures concerning the establishment of navigational aids in the Caribbean Sea, as seen in Annexes 183 and 188, Notes from the Department of the Navy to the Department of State, 9 April 1914 and 3 February 1915, respectively.

²⁹ See Proclamation N°1512, Reservation for Lighthouse Purposes of Cays on Serrana and Quita Sueño Banks, by the President of the United States of America, 25 February 1919: in *Papers relating to the Foreign Relations of the United States, 1919-I* (Washington, United States Government Printing Office, 1934) 796; Proclamation N°1522-A, 5 June 1919 of the reservation for Lighthouse Purposes of Roncador Cay, by the President of the United States of America, *ibid* at p. 797.

³⁰ Annex 192: Telegram from the United States Minister in Bogotá to the Department of State, 4 October 1919.

appertained to the United States under the Guano Act.³¹ Nevertheless, the Secretary of State instructed his Minister in Bogotá to assure the Colombian Government that the United States Government would be pleased to hear any arguments Colombia cared to make with respect to these cays.

4.30. The installation of lighthouses on the cays by the United States in 1919 gave rise to an open and public debate in Colombia. Neither the actions by the United States nor the public and official statements by Colombia's highest authorities on the matter elicited any reaction by Nicaragua vis-à-vis either Colombia or the United States.

4.31. In spite of these incidents Colombia maintained its exercise of sovereignty and jurisdiction over the cays and adjacent waters.

(3) THE 1928 OLAYA-KELLOGG AGREEMENT CONCERNING
THE CAYS OF RONCADOR, QUITASUEÑO AND SERRANA

4.32. In 1927, with the approaching conclusion of the Treaty between Colombia and Nicaragua, the United States Government voiced its concern due to its implications for the three cays in dispute between Colombia and the United States. Under the text as it stood, Nicaragua's recognition of Colombia's sovereignty

³¹ Annex 193: Telegram from the Secretary of State to the United States Minister in Bogotá, 16 October 1919.

over the San Andrés Archipelago would encompass the three cays.

4.33. In August 1927, the Colombian Minister in Washington, Enrique Olaya Herrera, began holding talks with the United States Assistant Secretary of State regarding the situation of the cays of Roncador, Quitasueño and Serrana. The Colombian Minister reiterated Colombia's rights over the cays. For his part, the United States representative alluded to the Guano Act of 1856 and the Proclamations of 1919 for the installation of lighthouses on the three cays.

4.34. The Colombian Minister proposed an agreement between the United States and Colombia to submit the question of sovereignty over Roncador, Serrana and Quitasueño to arbitration, thus facilitating the signature of the Colombia-Nicaragua Treaty.³² However, the proposal was rejected several times by the United States.

4.35. In the course of these discussions, it was clear that the United States regarded Nicaragua as having no rights over the cays. The Colombian Minister in Washington informed Bogotá of his discussions with the Department of State in the following cable:

³² Annex 48: Proposal submitted by the Colombian Minister in Washington to the Department of State, 2 August 1927.

“No. 81 (...) I refer to your [N°] 28. Yesterday and today I have conferred at the Department of State. Arbitration formula does not carry through since they insist considering scant value [of the] cays makes direct settlement preferable. Formula [of] cession to Nicaragua and transfer by the latter to the United States received coldly because they say Nicaragua has not held rights over the cays...”³³

4.36. It is to be noted that in its *Memorial* Nicaragua refers to Cable 28 from the Colombian Foreign Ministry – the communication giving rise to the message just quoted – but carefully omits to quote the United States’ reply.³⁴ The reason for deliberately failing to mention this is no doubt the significant passage where the Colombian Minister reports that the Department of State reacted coldly to the cession formula “because they say Nicaragua has not held rights over the cays”.

4.37. Finally, Colombia and the United States decided to conclude an agreement by way of an exchange of notes maintaining the *status quo* over the three cays. Colombia would not object to the maintenance of the lighthouses installed by the United States, while the United States would in turn refrain from objecting to the fishing activities traditionally carried out by Colombian nationals in the waters adjacent to the cays.

³³ Annex 111: Cable N° 81 from the Colombian Minister in Washington to the Foreign Minister, in reply to the latter’s cable N° 28 of 31 August 1927, 8 September 1927.

³⁴ Cable N° 28 is partially quoted in NM, Vol. I, p. 131, para. 2.155; Vol. II, Annex 75.

4.38. The United States also requested that in the Treaty between Colombia and Nicaragua a proviso be included to the effect that the cays of Roncador, Quitasueño and Serrana were not considered to be included in that instrument, since their sovereignty was in dispute between Colombia and the United States.³⁵

4.39. On 10 April 1928 an agreement by exchange of notes took place between the Colombian Minister in Washington, Enrique Olaya Herrera and the Secretary of State of the United States, Frank Kellogg.

4.40. The preamble to both Notes stated that a dispute with regard to the three cays existed between the two countries. No mention was made of any purported Nicaraguan right over the cays or the adjacent maritime areas.³⁶

³⁵ In the first version of the draft treaty delivered by the Colombian Minister in Managua to the Nicaraguan Government in 1925, the clause referring to the Cays of Roncador, Quitasueño and Serrana was not included (see Annex 45; see also CPO, Vol. II, Annex 5). It was only in 1927, in light of the impending Treaty, that the Department of State asked Colombia to include a proviso regarding the disputed status of the cays as between Colombia and the United States. That proposal was initiated by the United States, not by Nicaragua.

³⁶ Annex 2: 1928 Olaya-Kellogg Agreement. Excerpts of the Colombian note read as follows: "...Whereas both Governments have claimed rights of sovereignty over these cays; And whereas the interest of the United States lies primarily in the maintenance of aids to navigation on those cays; And whereas Colombia shares the desire that such aids shall be maintained without interruption and furthermore is especially interested that her nationals shall uninterruptedly possess the opportunity of fishing in the waters adjacent to those cays." Excerpts of the United States note read as follows: "...Whereas both Governments have claimed rights of sovereignty over these Islands; And whereas the interest of the United States lies primarily in the maintenance of aids to navigation on those cays; And whereas Colombia shares the desire that such aids shall be maintained without interruption and furthermore is especially interested that her nationals shall uninterruptedly possess the opportunity

4.41. The operative part of the Exchange of Notes read as follows:

“They resolve to preserve the *status quo* in respect to the matter, and, consequently, the Government of Colombia will refrain from objecting to the maintenance by the United States of the services which it has established or may establish on said cays to aid navigation, and the Government of the United States will refrain from objecting to the utilization, by Colombian nationals, of the waters appurtenant to the cays for purposes of fishing.”³⁷

4.42. The 1928 Olaya-Kellogg Agreement was concluded less than a month after the signature of the Colombia-Nicaragua Treaty of 1928. The content of this Agreement was officially communicated by Colombia to the Foreign Minister of Nicaragua over a year before the 1928 Treaty was considered and approved by the Nicaraguan Congress.³⁸ As will be demonstrated in Chapter 5, no objection was formulated by the Government or the Nicaraguan Congress.³⁹

4.43. In Colombia, the President of the Republic informed Congress of the conclusion of the 1928 Olaya-Kellogg Agreement. Likewise, the Colombian Foreign Minister in his Annual Report to Congress in 1928 transcribed the entire text of the Agreement and added:

of fishing in the waters adjacent to those Islands.”

³⁷ See Annex 2

³⁸ Annex 49: Diplomatic Note from the Colombian Minister in Managua to the Nicaraguan Foreign Minister, 3 January 1929.

³⁹ See below, paras. 5.31-5.38.

“...the aforesaid agreement culminates the definition of our situation in the Archipelago, since it ‘perpetually’ enshrines the right of our nationals to continue to exploit the waters adjacent to [the cays]...”⁴⁰

4.44. The same Annual Report, when listing the issues that the Foreign Affairs Advisory Commission had studied during that year, mentions the matter of the Agreement with the United States, under the premise that the cays were part of the Archipelago. The rubric reads: “International Legal Situation of the *cays of the Archipelago of San Andrés and Providencia*...”⁴¹

4.45. Nicaragua never protested against Colombia’s exercise of sovereignty and jurisdiction over the cays, or against the activities carried out thereon by the United States pursuant to the 1928 Olaya-Kellogg Agreement, or against the contemporary public statements by Colombia with regard to the situation.

4.46. For over half a century, in all the treaty collections published by the Colombian Government and by the United States, the 1928 Olaya-Kellogg Agreement was featured as one of the main instruments pertaining to territorial matters. Nicaragua never made any objections or references to these publications.⁴²

⁴⁰ Annex 114: 1928 Report to Congress by the Colombian Foreign Minister.

⁴¹ *Ibid* (Emphasis added).

⁴² See e.g.: E Guzman Esponda, *Tratados y Convenios de Colombia, 1919-1938* (Bogotá, Imprenta Nacional, 1939) 386-387; N. García Samudio, *Tratados y*

4.47. From the conduct of Nicaragua since 1871,⁴³ with regard to the protracted controversy between Colombia and the United States of America over the cays of Roncador, Quitasueño and Serrana, the following facts emerge:

- (1) The Nicaraguan Government never claimed any right over the three cays.
- (2) Nicaragua did not object to Colombia's continued public and peaceful exercise of its jurisdiction over the three cays any more than to the actions of the United States with regard to them.
- (3) Nicaragua never protested against the activities carried out by Colombia and the United States in the area of the three cays pursuant to the 1928 Olaya-Kellogg Agreement.

Convenios de Colombia, 1938-1948 (Bogotá, Imprenta Nacional, 1950) 755; *Historia de la Cancillería de San Carlos*, Vol. I (Bogotá, Imprenta del Estado Mayor General, 1942) 503; Ministerio de Relaciones Exteriores, *Tratados y Acuerdos Territoriales de Colombia* (Bogotá, Imprenta Nacional, 1978) 25-26; *Papers Relating to the Foreign Relations of the United States, 1928-II* (Washington, United States Government Printing Office, 1943) 637-638; *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and other Powers 1923-1937, Vol. 4* (Washington, United States Government Printing Office, 1938) 4023-4024; C.I. Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949, Vol. 6* (Washington, United States Government Printing Office, 1971), 904-905.

⁴³ Although the Guano Act was enacted in 1856, the United States Civil War effectively precluded its actual implementation, which began in earnest only in 1871.

(4) SUBSEQUENT STATE DEPARTMENT ACKNOWLEDGEMENT
OF THE STRENGTH OF COLOMBIA'S CASE CONCERNING THE
THREE CAYS

4.48. In 1947, the State Department considered the possibility of recognizing Colombia's sovereignty over the three cays, since it was felt that Colombia's claims were much stronger than those of the United States, and since the United States had already recognized Colombia's sovereignty in 1894. A State Department officer wrote a file note as follows:

"...Under date of June 20, 1945, I prepared a brief study for Miss Borjes of BC, concerned with the ownership of the banks and keys named. Finding references as I worked, which suggested to me that the United States might not have the good title it claimed, I dug into the archives. The documents so found convinced me that that is the fact. I propose to you therefore, as my contribution toward the implementing of our good neighbor policy, that the United States voluntarily relinquish its claim to these islands in favor of Colombia. Briefly, the facts are (partly by memory here) as follows:

(...)

2.- These islands are claimed by both Colombia and the United States. After forty years of intermittent dispute, in 1928 the two governments agreed upon a joint use of the islands, without settling claims of ownership.

3.- The Colombian title seems to me to be beyond question. If Colombia has the information which should be in its possession, to judge from what is in our own archives I have no doubt it could establish its claim before any reasonable, impartial arbitrator or court. The Colombian Government presented a lengthy statement on January 18, 1893, which seems

to me as a historian to be a sound basis for its title.
... The United States virtually admitted that claim in 1895 [*sic*], by supporting a recommendation from Sweden to Colombia, concerning the Islands.

In 1919 the United States made a claim by presidential proclamation. In 1920, the Colombian note of 1893 was seen in the Department by, among others, Dr. Rowe and Mr. Hackworth. They and others felt that it established the Colombian case, but they felt hesitant about going against the presidential order.

(...)

My thought is that in the present state of our Colombian relations, we could probably arrange by friendly discussions to quitclaim any rights which we may have had, without reopening past discussions, in return for a Colombian grant of a site for any lighthouses that we feel to be essential. Such action would have no possible ill effects for the United States now, and would be a valuable gesture. It would help to answer the charges being made in interested quarters that our policy is imperialistic. A failure to take it, on the other hand, could eventually lead to the revival of a bitter dispute.

I noted that Bain Davis of NWC, on July 10, 1945 made a comment to this general effect to Miss Borjes.”⁴⁴

4.49. It was decided to wait until Colombia raised the question anew, so as not to elicit suspicions as to the United States’ motives for bringing up the matter. The File Memorandum dated 1 December 1947, by Mr. Woodward, Deputy Director of the

⁴⁴ Annex 206: Office Memorandum of the Department of State from Mr. Hussey – Division of American Republics to Mr. Wright – American Republic Affairs, 9 September 1947.

Office of American Republic Affairs of the Department of State,
read as follows:

“The reasons for which Mr. Daniels believes that it might be unwise for the United States Government to bring up this subject are:

- (1) That this action would be so surprising that the Colombian Government and other observers would be suspicious of our motives, and
- (2) That we might, by bringing the subject up, prompt a considerable amount of publicity concerning the controversial background which would result in our receiving further recriminations for having made the concession so belatedly rather than appreciation for having done so at all.

This memorandum will, therefore, serve as a recommendation in the file that, when the Colombian Government brings up again the question of sovereignty over this Banks and Keys, our Government should promptly concede Colombian sovereignty over these small points of land once we have obtained clear permission from the Colombian Government to continue to operate the two lighthouses.

Robert F. Woodward

cc: DRA – Mr. Dozer
NWC – Mr. Mills
Mr. Gerberich - Agree [handwritten]”⁴⁵

4.50. As shown, the United States was fully aware of the weakness of its claim to the three cays and was convinced of the

⁴⁵ Annex 207: Office Memorandum of the Department of State from Mr. Woodward, American Republic Affairs Deputy Director, to The Files, 1 December 1947.

strength of Colombia's title to them. It is telling that Nicaragua is never mentioned with regard to the cays.

(5) WITHDRAWAL OF THE UNITED STATES' CLAIM TO THE THREE CAYS AND SUBSEQUENT DEVELOPMENTS

4.51. In the early 1970s, negotiations between Colombia and the United States were held in order to put an end to the dispute between the two States over Roncador, Quitasueño and Serrana.

i. The 1972 Treaty between Colombia and the United States concerning the status of Quitasueño, Roncador and Serrana

4.52. On 8 September 1972 Colombia and the United States concluded a Treaty concerning the status of Quitasueño, Roncador and Serrana, and three accompanying Exchanges of Notes on related issues. This replaced the Olaya-Kellogg Agreement, in force since 1928.⁴⁶

4.53. Putting an end to the dispute it had had with Colombia since the 19th century, the United States "renounce[d] any and all claims to sovereignty over Quitasueño, Roncador and Serrana" (Article 1). Articles 2, 3 and 4 of the Treaty established a fishing regime. Pursuant to Article 6, by separate Exchange of Notes of the same date as the Treaty, Colombia undertook the maintenance and control of the lighthouses and aids to navigation established on the cays.

⁴⁶ Annex 3: Treaty between Colombia and the United States of America concerning the Status of Quitasueño, Roncador and Serrana (with Exchanges of Notes), Bogotá, 8 September 1972. 1307 UNTS 379; 33 UST 1405, TIAS 10120.

4.54. With regard to Quitasueño, despite the fact that the United States had granted guano-extraction concessions over it to several of its citizens as long ago as 1869, on the basis of the alleged extraction of hundreds of tons of guano and the building of facilities thereon, and that it had contended the question of sovereignty vis-à-vis Colombia for a century, the United States' position in 1972 was to the effect that "Quitasueño, being permanently submerged at high tide, is at the present time not subject to the exercise of sovereignty." However, the United States reiterated that "under the terms of its exchange of notes with the Government of the Republic of Colombia of April 10, 1928, it was recognized at that time that sovereignty over Quitasueño was claimed by both the United States and Colombia."⁴⁷

4.55. The United States also noted the position of Colombia to the effect that "the physical status of Quitasueño is not incompatible with the exercise of sovereignty"; that the 1928 Treaty between Colombia and Nicaragua and its 1930 Protocol recognized Colombia's sovereignty over the islands, islets and cays that make up the San Andrés Archipelago, "with the exception of the cays of Roncador, Quitasueño and Serrana, the sovereignty of which was in dispute between the United States and the Republic of Colombia"; and that "[t]herefore, with the

⁴⁷ Diplomatic Note N° 694 of 8 September 1972, from the Embassy of the United States of America to the Colombian Foreign Ministry. See Annex 3. Also in: 1307 UNTS 383-384; TIAS 10120, pp. 11 and ff.

renunciation of sovereignty by the United States over Quitasueño, Roncador and Serrana, the Republic of Colombia is the only legitimate title holder on those banks or cays...”

4.56. The exchange of the instruments of ratification, following the approval of the Treaty by the Congress of Colombia and by the United States Senate, took place on 17 September 1981.

4.57. As Nicaragua acknowledges in its *Memorial*, it sought to block the conclusion of the 1972 Treaty and subsequently to prevent its ratification, based on the argument that the cays were part of its continental shelf.⁴⁸ Once it was clear that the 1972 Treaty could not be blocked, Nicaragua sought to have the United States “relinquish its supposed rights over Roncador, Serrana and Quitasueño before the Government and People of Nicaragua, or relinquish them unilaterally before the world...”⁴⁹ The United States refused to do either of those things. What it did was to explain – notably in an Aide-Mémoire of 16 July 1981 which Nicaragua paraphrases⁵⁰ but does not annex – that the 1972 Treaty was without prejudice to the legal position as between Colombia and Nicaragua. That proposition was obvious: a bilateral treaty between States A and B cannot affect

⁴⁸ NM, p. 135, para. 2.164.

⁴⁹ Diplomatic Note N° 027 from the Ministry of Foreign Affairs of Nicaragua to the Embassy of the United States of America to Nicaragua, 4 February 1981: NM, Vol. II, Annex 41.

⁵⁰ NM, p. 141, para. 2.176.

the legal rights (if any) of State C. But this was a merely formal proviso. By the 1972 Treaty the United States expressly accepted the continuing authority of Colombia with respect to Roncador and Serrana (Article 3), and in one of the accompanying Exchanges of Notes it granted “in perpetuity to the Republic of Colombia ownership of the lighthouse located on Quita Sueño and the navigational beacons on Roncador and Serrana”. In fact, these lighthouses had been operated by the Colombian Navy since the signature of the Treaty in 1972, long before its ratification, as recounted in Chapter 3.⁵¹

4.58. The Aide-Mémoire of 16 July 1981 confirms this interpretation.⁵² It was addressed not to Colombia but to Nicaragua and was an attempt by the State Department to appease the Nicaraguan Government by explaining that whatever right Nicaragua considered it might have over the three cays would not be affected by the 1972 Treaty, which the United States was nonetheless determined to ratify. The following points may be made about the Aide-Mémoire:

- (1) It was written, as the Court will be aware, against a background of tensions in bilateral relations between the United States and Nicaragua, which it sought (unsuccessfully) to allay.

⁵¹ See paras. 3.137-3.151.

⁵² Annex 60: Aide-Mémoire from the United States Embassy in Managua to the Government of Reconstruction of Nicaragua recording the history of negotiations on Quitasueño, 16 July 1981.

- (2) It asserts the validity of the initial United States claim to sovereignty over the three cays, but denies that Quitasueño is capable of appropriation. The contradiction between these two propositions is sought to be resolved by the following statement:

“Quita Sueño bank is *now* totally submerged at high tide and, in the view of the Government of the United States, must be regarded as part of the high seas and thus beyond the U.S. legal position.”⁵³

It is fair to say that for so long as the United States wished to claim Quitasueño for itself, it regarded it as an island: at the point at which it decided to relinquish its claim, Quitasueño had somehow sunk into the sea! In fact there is no evidence that the actual geomorphology of the cay has changed at any relevant time.⁵⁴ In fact Quitasueño consists of a number of rocks above high tide and a larger number of low-tide elevations with a fringing reef.⁵⁵ As such it is an island under international law in accordance with the criteria set out in Article 121 of the United Nations Convention on the Law of the Sea.

⁵³ Annex 60, p. 1 of the original document. (Emphasis added)

⁵⁴ The letter from Foreign Minister Chamberlain of 7 July 1926 on Quitasueño (Annex 47) concedes the existence of at least one rock above high tide: apparently the UK was applying a test for an island under international law which is different from that now recognized. In 1926 the United States claimed Quitasueño in sovereignty, as Chamberlain noted. For discussion of the Chamberlain letter see paras. 4.99-4.101.

⁵⁵ See above, paras. 2.26-2.30, and Annex 171: Study on Quitasueño and Albuquerque prepared by the Colombian Navy, September 2008. On the use of Quitasueño as a basepoint see below, para. 9.27.

- (3) It would have been inconsistent with the purpose of the Aide-Mémoire for the United States to express views about the validity of Nicaragua's claim to the three cays. Nonetheless it did not manage to refrain from doing so. It noted that "Nicaragua's claims to these banks or cays, under international law, must have its own independent basis" (but gives no clue as to what that independent basis could be).⁵⁶ It noted that "The United States was unaware of any *recent* Nicaraguan claim to the cays before 1969... The Government of Nicaragua did not communicate this claim directly to the United States Government until June of 1971."⁵⁷ Above all it acknowledged Colombia's long-standing administration of the area, in the following passage:

"It is common practice for the United States Government and other states to deal with authorities in de facto control of an area, notwithstanding formal legal positions regarding such presence. It is on the basis of Colombia's *incontestable* de facto presence and enforcement activities in the area, *over a long period of time*, that the United States Government concluded that it was prudent to provide for continuing U.S. fisheries access in the Treaty and efficacious to turn over the navigational aids to a party *clearly* in a practical position to maintain them."⁵⁸

⁵⁶ Annex 60, p. 2 of the original document.

⁵⁷ *Ibid*, p. 3 of the original document (emphasis added).

⁵⁸ Annex 60, p. 6 of the original document (emphasis added).

- (4) In short, the Nicaraguan claim was necessarily “new”. It was indeterminate. For the Nicaraguan claim to succeed, it had to prevail over “Colombia’s incontestable de facto presence and enforcement activities in the area, over a long period of time”. The Court will not need reminding that in such circumstances a new claim to territory, unsupported by a treaty, cannot prevail.

4.59. To summarise, in the 1972 Treaty, although the United States and Colombia expressed diverging views over the status of Quitasueño, there was no disagreement as to which government had actual authority over the three cays and surrounding waters. The subsequent history shows a clear and continuous acceptance by the United States of Colombia’s authority in the area, including the waters around Quitasueño. That history will now be described.

ii. Developments following the 1972 Treaty

4.60. The 1972 Treaty is in force. Numerous actions and measures have been adopted since it entered into force in 1981.

4.61. Periodic meetings have been held between the relevant scientific authorities of both countries.⁵⁹ These meetings have

⁵⁹ Annex 12: Agreed Minutes of the consultations on the 1972 Vázquez-Saccio Treaty, 5-6 October 1989. Annex 15: Agreed Minutes of the III meeting between the Government of the Republic of Colombia and the Government of the United States of America in compliance with the 1972 Vázquez-Saccio Treaty, 17-

produced agreements or recommendations on scientific research, limitations on fishing craft and equipment, bans or closed seasons for certain species and/or areas, fishing procedures, communication systems, information exchanges on catches, etc. The following are illustrative.

iii. The 1983 Agreement on regulation of fishing rights of nationals and vessels of the United States under the 1972 Treaty

4.62. By Exchange of Notes dated 6 December 1983, the Parties agreed that the United States would annually submit to Colombia a list of fishing vessels which intended to carry out fishing activities in the cays of Roncador, Quitasueño and Serrana, and Colombia would provide gratis to the Government of the United States certificates to be transmitted to the listed vessels, in order for them to begin carrying out their activities.⁶⁰

4.63. Despite the publication of the Exchange of Notes by both the United States and the United Nations,⁶¹ Nicaragua never advanced any protest or objections with regard to it.

18 May 1994.

⁶⁰ Annex 8: Agreement between Colombia and the United States of America on certain fishing rights in implementation of the Treaty between Colombia and the United States of America of 8 September 1972, concerning the status of Quitasueño, Roncador and Serrana: Diplomatic Note N° 711 from the Embassy of the United States of America to the Colombian Foreign Ministry, 24 October 1983; and Diplomatic Note N° DM 01763 from the Colombian Foreign Ministry to the Embassy of the United States of America, 6 December 1983. 2015 UNTS 3; 35 UST 3105, TIAS 10842.

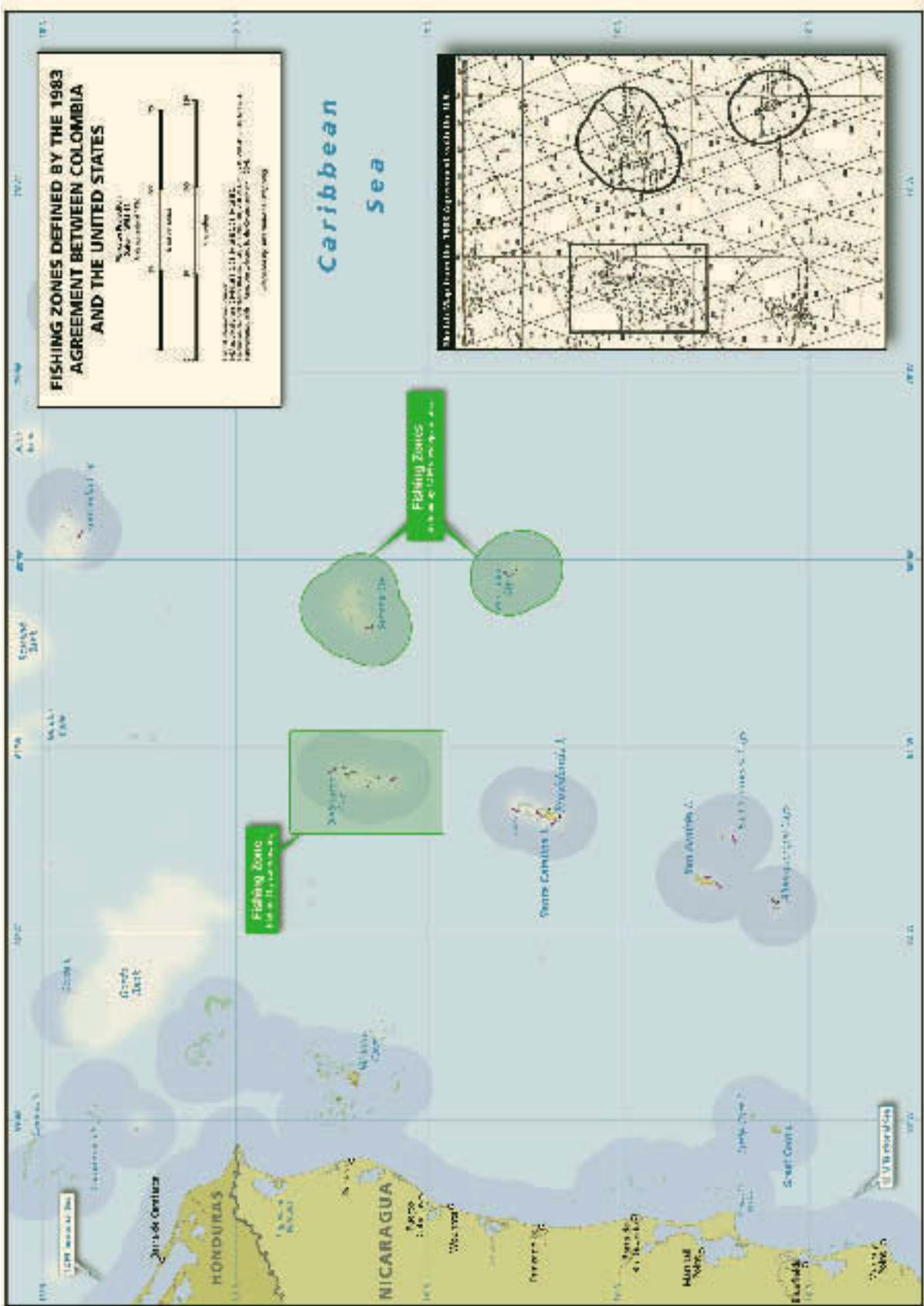
⁶¹ 2015 UNTS 3; 25 UST 3105, TIAS 10842.

4.64. The Exchange of Notes required United States vessels to report to the designated Colombian authorities of their arrival and departure of the area, as well as to provide a statement of the quantity and species of the catch. The Colombian authorities could board United States vessels fishing in the described areas to inspect their documents and verify the compliance with the agreed regulations, establishing procedures to be followed in case the United States vessels were found not carrying the documentation required.

4.65. It was agreed that the fishing activities could be carried out within 12 nautical miles of Roncador and Serrana “from the baselines from which the breadth of the territorial sea is measured” and in the adjacent waters to Quitasueño in an area enclosed in a rectangle (13°55’N, 14°43’N; 80°55’W, 81°28’W). A sketch map of the “described areas” was attached: see opposite, Figure 4.1. Subsequently, the United States Embassy in Bogotá requested a copy of “the Map of Limits of the Vasquez-Saccio Treaty Waters of 1972” i.e. the sketch-map attached to the Exchange of Notes.⁶² The Colombian Foreign Ministry complied with this request.⁶³

⁶² Annex 65: Diplomatic Note N° 340 from the United States Embassy in Bogotá to the Colombian Foreign Ministry, 25 April 1994.

⁶³ Annex 66: Diplomatic Note N° ST./757 from the Colombian Foreign Ministry to the United States Embassy in Bogotá furnishing a copy of the map attached to the 1983 Agreement, 1994.



See full size Map, Vol. III - page 73

4.66. Since then, over seven hundred fishing licenses have been issued to United States vessels by the Maritime and Port General Directorship of the Colombian Navy, following the reports submitted by the Embassy of the United States to the Colombian Foreign Ministry. On occasions, the licenses have been issued with stipulations concerning bans or prohibitions on the fishing of certain species.

4.67. A table of vessels that have been granted such licenses is submitted as Appendix 6. Samples of the standard text of the resolutions issued by the Colombian maritime and port authority authorizing the issuance of the corresponding licenses to United States and third-State vessels to fish in the area are found e.g. at Annexes 147-148, 153 and 156.

4.68. Nicaragua never protested any of the actions carried out pursuant to the 1983 Agreement.

iv. The 1987 Colombia-United States Joint Statement regarding a temporary ban on conch fishing in the waters adjacent to Quitasueño

4.69. Between 21 and 23 January 1987, consultations were held in Bogotá between the representatives of the United States and Colombia to exchange views on conservation measures with respect to conch (*Strombus gigas*) resources in the waters adjacent to Quitasueño, covering the area described in the 1983 Agreement.

4.70. A Joint Statement was issued as a result of that meeting, whereby the Parties agreed to establish a temporary ban on the taking of conch in the area.⁶⁴ The United States representative undertook to inform United States vessels of the ban and stated that the Government of the United States “would not object to the enforcement of this conservation measure by the Government of Colombia, provided that such enforcement is non-discriminatory and applied to nationals and vessels of the Republic of Colombia and other States which fish in the area”.

v. *The 1989 Colombia-United States Joint Statement regarding fisheries conservation measures in the waters adjacent to Quitasueño*

4.71. On 5-6 October 1989, consultations between Colombia and the United States were held in Washington to discuss the adoption of several conservation measures in the waters adjacent to Quitasueño, covering the area described in the 1983 Agreement. At the closing of the consultations the Parties issued a Joint Statement whereby they agreed to continue the ban on fishing for conch and to establish a ban for capturing spiny lobsters (*Panulirus argus*, Latreille, and *P. laevicuda*, Latreille) specimens under 14 centimetres, or egg-bearing females of those species.⁶⁵ They also agreed to prohibit the operation of factory vessels and the use of autonomous or semi-autonomous diving

⁶⁴ Annex 11: 1987 Joint Statement of the Government of the United States and the Government of the Republic of Colombia regarding a temporary ban on conch fishing in the Treaty waters adjacent to Quitasueño, 23 January 1987.

⁶⁵ Annex 13: Joint Statement of the Government of the Republic of Colombia and the Government of the United States of America regarding fisheries conservation measures in the Treaty waters adjacent to Quitasueño, 6 October 1989.

equipment for the extraction of resources, or of nylon-based or synthetic monofilament fykes (i.e. bag-nets). They reiterated the importance of compliance with the provisions established in the 1983 Agreement “regarding reports that United States fishing vessels shall make to Colombian authorities on entry into and departure from the area.” The United States also reiterated that it “would not object to the enforcement of these conservation measures by the Government of Colombia, provided such enforcement is non-discriminatory and applied to nationals and vessels of the Republic of Colombia and the other States that may fish in the area.”

4.72. With regard to Quitasueño, the Parties reiterated the decision adopted in the 1983 Agreement, to the effect that when a United States vessel was found to have violated the agreed conservation measures the Colombian authorities would require the vessel to leave the area and notify the United States of such action.

vi. 1994 Colombia-United States consultations on the 1972 Treaty

4.73. On 17-18 May 1994 in Cartagena, Colombia and the United States held consultations pursuant to the 1972 Treaty.⁶⁶ Among other things, the Delegations exchanged information on the state of the fisheries, number of vessels, figures on catches and fishing crafts used, etc. Colombia explained its most recent

⁶⁶ See Annex 15.

fishing regulations, including Law 13 of 1990 and Decree No. 2256 of 1991; environmental legislation (Law 99 of 1993) and provisions pertaining specifically to the Archipelago (Law 47 of 1993).

4.74. The Parties reaffirmed the conservation measures agreed to in 1989 and agreed on a new conservation measure in the waters adjacent to Roncador and Serrana, effective as of 1 January 1995, concerning crawling cages for fish and lobsters, requiring these –in case they were not made of wood – to have escape panels made from bio-degradable materials. The measure is also applicable to the waters adjacent to Quitasueño, concerning fykes for fish or spiny lobsters, pursuant to the Joint Statement annexed to the Minutes of the meeting.⁶⁷

4.75. An *ad hoc* Scientific Work Team was established to discuss the data on fishing activities reported by the Delegations and to formulate recommendations on procedures or meetings for further exchanges of technical and scientific information, and the evaluation of fishing resources.

vii. 1996 Colombia-United States meetings on enforcement of conservation measures

4.76. In meetings between representatives of the two Governments in 1996, Colombia and the United States reiterated

⁶⁷ Annex 16: Joint Statement of the Government of the Republic of Colombia and the Government of the United States of America regarding fisheries conservation measures in the Treaty waters adjacent to Quitasueño, 18 May 1994.

their agreement concerning the latter's authorization for the boarding of United States vessels by coastguards of the Colombian Navy in order to verify their compliance with the conservation measures adopted by the Colombian Government in the area and agreed to by the United States Government in accordance with the terms of the 1972 Treaty. Vessels found to be pursuing activities in violation of such measures would be required to cease operations and depart. United States authorities would be furnished with the relevant information for purposes of the investigation and prosecution of such violations when applicable.⁶⁸

4.77. The conservation measures agreed with the United States were implemented by the relevant Colombian authorities. The Colombian Government has been laying down and enforcing conservation measures which are applicable to United States vessels, third-State vessels and Colombian vessels in those areas.⁶⁹

⁶⁸ Annex 68: Diplomatic Note N° ST 29040 from the Colombian Foreign Ministry to the United States Embassy in Bogotá, 6 August 1996.

⁶⁹ Annex 150: Resolution N° 1565 of INDERENA, 29 December 1989. Annex 151: Resolution N° 140 of INDERENA, 27 June 1990. Annex 162: Resolution N° 287 of the National Institute of Fisheries and Aquiculture - INPA, 7 May 1997. See also, reference to Executive Resolution N° 0052, establishing regulatory measures for fishing activities in the Archipelago of San Andrés and Providencia, and particularly in its Cays of Roncador, Serrana and Quitasueño, 5 April 1989, in Appendix 4.

C. The Position of Great Britain

4.78. Great Britain always had an important presence in the Caribbean area, in the vicinity of the San Andrés Archipelago. This was because it had what amounted to a protectorate over the Mosquito Coast until 1860, but also because numerous ships and fishermen from two of its most important colonies, Jamaica and the Cayman Islands, frequented that part of the Caribbean. As a result, the British authorities were thoroughly familiar with the region.

4.79. From the outset the British authorities clearly understood not only that the San Andrés Archipelago was considered as a group, from Serranilla and Bajo Nuevo until Alburquerque, but also its appurtenance to Colombia.

(1) 1874 – THE BRITISH GOVERNMENT NOTIFIES THE GOVERNORSHIP OF JAMAICA THAT THE CAYS OF SERRANA, SERRANILLA, ALBURQUERQUE, COURTTOWN AND RONCADOR BELONG TO THE COLOMBIAN “TERRITORY OF SAN ANDRÉS”

4.80. In 1872 the Governor of Jamaica asked the Colonial Office for information with regard to sovereignty over the cays of Serrana and Serranilla.

4.81. For that purpose, the British authorities instructed Captain Erskine of HMS *Eclipse* to visit the cays. His report, dated 26 December 1874, referred to the presence of Colombian authorities on those territories and stated:

“‘The Island of St. Andrews’

Belongs to Columbia [*sic*], and is the seat of Government of what they style ‘The Territory of San Andres and San Luis de Providencia’ comprising St. Andrews, Old Providence and the neighbouring Cays of Albuquerque, and Courtown Bank, Roncador, Serrana and Serranilla. An Official called the Prefect resides there, having under him other officers called Corregidores [*sic*]. St. Andrews being divided into halves, viz San Andres and San Luis, over each of which a Corregidor presides, and another Corregidor at Providence. Serrana and Serranilla being uninhabited.”⁷⁰

4.82. Further, on 29 December 1874, the Colonial Office replied to the Governor, attaching Captain Erskine’s report and stating that the cays

“are comprised in what [is] termed the territory of ‘St. Andres and San Luis de Providencia’, consisting of St. Andrews, Old Providence and the neighbouring Cays of Albuquerque, Courtown bank, Roncador, Serrana and Serranilla, and that these Islands and Cays are claimed by and yield allegiance to the United States of Columbia [*sic*]”.

It explained that they had been transferred to the Viceroyalty of Santa Fe (New Granada) by the Royal Order of 1803.⁷¹

⁷⁰ Report submitted by Captain Erskine to the Commodore, 26 December 1874. Enclosure to Annex 173: Note from the Commodore at the British Colonial Office to the Governor of Jamaica, 29 December 1874.

⁷¹ Report submitted by Captain Erskine to the Commodore, 26 December 1874. Enclosure to Annex 173. Between 1861 and 1886 the official name of Colombia was “United States of Colombia”.

(2) 1906-1914 – THE BRITISH GOVERNMENT REPEATEDLY
CONSIDERS THE CAYS TO BE PART OF THE COLOMBIAN SAN
ANDRÉS ARCHIPELAGO

4.83. Jamaican fishermen had expressed an interest in carrying out fishing activities in Serranilla. For that reason, in 1906, the authorities in Jamaica submitted a request to the Colonial Office which, in turn, transmitted it to the Foreign Office. In its reply of 24 October 1906, the Foreign Office stated that both Colombia and the United States of America had at different periods claimed Serranilla cays and warned that any attempt to regard them as British possessions by the authorities in Jamaica could cause problems.⁷²

4.84. The pertinent excerpt of the Memorandum enclosed with the Foreign Office's reply reads as follows:

“In the ‘Nouveau Dictionnaire de la Géographie Universelle’ it is stated that the Serranilla Cays form part of the Group of St. Andrews and Providence, and that they belong to the Republic of Colombia, and in various geographical works relating to Colombia the Island of San Andres is given as belonging to Colombia.

In 1872 a Kingston firm applied for permission to rent the Cays of Serrana and Serranilla, but the Government of Jamaica could not obtain any information as to the sovereignty over these islands, and the firm concerned having made no further application, the matter was allowed to drop.

⁷² Annex 180: Note N° 34429 from the British Foreign Office to the Colonial Office, 24 October 1906, and enclosed Memorandum dated 18 October 1906.

In 1874, referring to this correspondence, Commodore de Horsey forwarded a report from Captain Erskine of his Majesty's Ship 'Eclipse' who had visited these islands and Cays. Captain Erskine in his report stated that the Serranilla Cays belonged to the Territory of 'St. Andres and San Luis de Providencia' and that all these Islands and Cays were claimed by, and yielded allegiance to, the States of Colombia. This claim was based on the succession to Spanish rights.

(...)

In April 1894 His Majesty's Minister at Bogotá reported that the Archipelago of St. Andres was looked upon by the Colombian Government as belonging to Colombia, and that they had resisted attempts by the United States to apply the Bonding Act of 1858 [*sic*] to it. (Mr. Jenner, April 18th 1894).

There do not appear to be any further references to the Serranilla Cays in the correspondence. We might, therefore, if the Colombian and United States claims were well grounded, become involved in difficulties if Jamaica were to attempt to annex the Serranilla Islands."⁷³

The reference to the Bonding Act of 1858 was an error: it should have been the Guano Act of 1856.

4.85. The information was transmitted to the Jamaican authorities and no further action was taken. This correspondence is clear evidence that the United Kingdom refrained from claiming the cays as British out of deference, *inter alia*, to Colombia's claims.

⁷³ Annex 180, enclosure. The reference to the "Bonding Act of 1858" was clearly a mistake for the Guano Act 1856.

4.86. Nevertheless, fishermen from the Cayman Islands were often found by the authorities of San Andrés carrying out illegal turtle and shark-fishing activities, as well as extracting guano and tortoises from the cays of Roncador, Serrana and Serranilla.

4.87. On 19 February 1913, the Colombian Legation in London requested the British Government, through the Foreign Office, to take measures to prevent further irregularities.⁷⁴

4.88. Shortly thereafter, on 2 April 1913, the Governor of the San Andrés Archipelago notified the Captain of the *W.E. Hurlston*, flying the British flag, that he could not carry out fishing activities on the Roncador, Serrana and Serranilla cays because they belonged to Colombia; that the transport of foreigners to the cays in order to extract guano and other products thereon was prohibited, and that violations would be subject to penalties under the law. He requested the Captain to communicate the contents of his letter to the authorities and inhabitants of the Cayman Islands. The Governor's note was published in *The Searchlight*, the local newspaper, on 21 April 1913.⁷⁵

4.89. Fishermen from the Cayman Islands continued to venture around the cays of Roncador, Serrana, Serranilla and –

⁷⁴ Annex 35: Diplomatic Note from the Colombian Minister in London to the British Foreign Office, 19 February 1913.

⁷⁵ Annex 182: Note from the Governor of the Archipelago of San Andrés to the Captain of the *W.E. Hurlston*, 2 April 1913.

particularly – Quitasueño, giving rise to renewed actions of the authorities in San Andrés, who reported the situation to the central Government. The Colombian Legation in London was instructed to address the Foreign Office again, which it did on 25 March 1914.⁷⁶

4.90. Following the protest submitted by the Colombian Legation in London, the Secretary of State for the Colonies transmitted to the Governor of Jamaica copies of the correspondence with the Foreign Office. The Governor, in turn, transmitted these documents in April 1914 to the Commissioner of the Cayman Islands, who replied that the Colombian Government indeed “exercised a claim” over Bajo Nuevo, Serranilla, Serrana, Roncador and Quitasueño:

“I have the honour to acknowledge receipt of your confidential letter N^o. 6141/S.S.Conf.21/4/14 enclosing a copy of a Confidential Despatch from the Secretary of State for the Colonies together with copies of correspondence with the Foreign Office on the subject of complaints by Cayman Islands Fishermen and the alleged irregularities by Cayman Island fishing vessels operating off the Island of San Andres.

2. It appears that there are five Cays or Reefs, called Boxanova [Bajo Nuevo], Seranilla, Sárrannah [Serrana], Roncadore [Roncador], and Quitaseno [Quitasueño] which are uninhabited and over which the Colombian Government exercise a claim.

⁷⁶ Annex 37: Diplomatic Note from the Colombian Minister in London to the British Foreign Office, 25 March 1914.

3. These Cays are situated some distance away from the Colombian shores and used to be frequented by fishermen from the Lesser Cayman Islands in search of hawksbill turtle.

4. I am led to understand that fishing operations are now, and have been for some long time past entirely confined to Nicaraguan waters, and that there have been no reports since the late Dr. Hirst's confidential letter N° 5 of the 17th November 1911 of any friction or misunderstanding of any nature whatsoever between the Colombian Government and the Cayman Islands fishermen.

5. I am not aware of the enforcement of any fresh regulations since last year nor indeed of the existence of any regulations.

A.C. ROBINSON
COMMISSIONER⁷⁷

4.91. In 1914 the Colombian Foreign Ministry gave the British Minister in Bogotá, at the latter's request, copies of the Colombian fishing regulations in the waters of the Archipelago.⁷⁸ On 10 July 1914 the Foreign Office informed the Undersecretary of State for the Colonies that it had submitted copies of the Colombian regulations with regard to licences to fish in the waters of the Archipelago of San Andrés to the Colonial Office, requesting that they be notified to the Governor of Jamaica.⁷⁹ On 23 July 1914, the Secretary of State for the Colonies

⁷⁷ Annex 184: Note N° 109/271 from the Commissioner of the Cayman Islands to the Colonial Secretary at Jamaica, 13 June 1914.

⁷⁸ Annex 38: Diplomatic Note from the British Legation in Bogotá to the Colombian Foreign Ministry, 11 May 1914. Annex 39: Diplomatic Note from the Colombian Foreign Ministry to the British Legation in Bogotá, 1 June 1914.

⁷⁹ Annex 185: Note N° 30613/14 from the British Foreign Office to the Undersecretary of State for the Colonies, 10 July 1914.

instructed the Governor of Jamaica to ensure compliance with those regulations, to transmit them to the Commissioner of the Cayman Islands for the notice of all concerned and to report on the measures taken.⁸⁰

4.92. On 14 November 1914, the Governor of Jamaica acknowledged receipt of these instructions and submitted the report of the Commissioner of the Cayman Islands showing that he had proceeded to act on them.⁸¹

4.93. On 26 October 1914, the Commissioner for the Cayman Islands had published a Government Notice notifying masters and crews of fishing vessels of the Dependency that fishing in the territorial waters of the Republic of Colombia in the San Andrés Archipelago or the removal of guano or phosphate deposits from the islands or cays thereof was forbidden except under license from the Colombian Government.⁸²

(3) 1924 – THE BRITISH GOVERNMENT NOTIFIES BRITISH
SUBJECTS OF THE NEED TO COMPLY WITH COLOMBIAN FISHING
REGULATIONS AROUND ALL THE CAYS

4.94. In 1924, faced with new unauthorized fishing activities by British subjects from Jamaica and the Cayman Islands in the

⁸⁰ Annex 186: Note from the Secretary of State for the Colonies to the Governor of Jamaica, 23 July 1914.

⁸¹ Annex 187: Note from the Governor of Jamaica to the Secretary of State for the Colonies, of 14 November 1914.

⁸² As evidenced in Annex 194: Notice N° 21 issued by the British Commissioner of the Cayman Islands, 22 May 1924, reiterating the contents of the Notice issued on 26 October 1914.

Archipelago's cays, the Colombian Government again addressed the Foreign Office to request that instructions be given to put an end to them.⁸³

4.95. On 17 July 1924, the Foreign Office addressed a Note to the Colombian Legation in London, recalling the actions taken by the British Government in order to ensure compliance with Colombian regulations concerning the Archipelago's fisheries:

“With reference to my note N° A 403/403/11 of February 4th last, I have the honour to inform you that the Secretary of State for the Colonies did not fail to communicate with the Governor of Jamaica on the subject of the alleged irregularities of Cayman Islands fishing vessels in the Archipelago of San Andres. A report has now been received from the officer administering the Government of Jamaica that appropriate instructions were given to the Commissioner of the Cayman islands dependency, and the latter has reported that he immediately issued a Government Notice (Copy of which I beg leave to enclose herewith) and that he instructed the collectors of customs personally to warn all masters of fishing vessels leaving the dependency in connection with the matter.”⁸⁴

4.96. On 22 May 1924, the Commissioner of the Cayman Islands had issued a Notice, reiterating the contents of the Notice issued by his predecessor in 1914. The 1924 Notice read as follows:

⁸³ Annex 43: Diplomatic Note from the Colombian Legation in London to the British Foreign Office, 12 January 1924.

⁸⁴ Annex 44: Diplomatic Note from the British Foreign Office to the Colombian Legation in London, 17 July 1924.

“CAYMAN ISLANDS
GOVERNMENT NOTICE

Commissioner’s Office

Nº.21 Georgetown

22nd May, 1924

Referring to Government Notice of the 16th October 1914, masters and crews of fishing vessels of the Dependency are again notified that fishing for turtle, pearls, coral, sponges or other marine products in the territorial waters of the Republic of Colombia in the Archipelago of San Andres or the removal of guano or phosphate deposits from the islands or cays thereof, is forbidden as being illegal except under license from the Colombian Government.

The Archipelago of San Andres in which the Colombian Government claims territorial jurisdiction includes the islands of San Andres and Providence, and the Banks and Cays known as Serrana, Serranilla, Roncador, Bajo Nuevo, Quitasueno, Albuquerque and Courtown.

H.H. HUTCHINGS,
COMMISSIONER”⁸⁵

(4) 1925 – JUDGMENT AGAINST BRITISH FISHERMEN
ILLEGALLY FISHING TORTOISE AROUND QUITASUEÑO

4.97. Despite the actions of the Colombian Government and the repeated instructions of the British Government, fishermen from Grand Cayman and Jamaica were often found carrying out unauthorized fishing activities in the area, particularly in the vicinity of Quitasueño. In 1925, the Colombian authorities in San Andrés captured two British ships, the *Edison Bros.* and the

⁸⁵ See Annex 194.

Testeco, and their crew while carrying out such activities around Quitasueño and took them to San Andrés for trial.

4.98. They were tried by the Judge in San Andrés and sentenced on 16 December 1925. On appeal, their prison terms were overturned but the fines confirmed by the Superior Court of Cartagena (the San Andrés Judge being part of the Judicial District of Cartagena).⁸⁶

4.99. A later incident involving another British vessel led to an exchange of correspondence which bears on the status both of Quitasueño and of the Archipelago in general. A Colombian Note of 27 May 1926⁸⁷ led the British Government to form a view of Quitasueño as a low-tide elevation. The Foreign Secretary, Austen Chamberlain, replied, in part, as follows:

“3. His Majesty’s Government are, of course, aware of the Colombian claim to sovereignty over the archipelago of San Andres and recall the previous requests of the Colombian Government to restrain the inhabitants of the Cayman Islands from fishing in Colombian territorial waters. Their attention has, however, recently been drawn to certain aspects of the question which conflict

⁸⁶ Revocation of Sentence against the 31 fishermen by the Cartagena Superior Court, 7 June 1926. Enclosure N° 1 to Bogota Despatch N° 100 of 21 Jun. 1926, British Vice-Consulate, Cartagena, Colombia. At: The National Archives (Great Britain), Registry Number A3859/21/11 from Mr. Sullivan, Bogota, N° 100, dated 21 June 1926.

⁸⁷ Referred to in Foreign Secretary Chamberlain’s letter of 7 July 1926, Annex 47.

fundamentally with the Colombian claim to sovereignty over Quitasueño.”⁸⁸

4.100. The issue of the status of Quitasueño will be discussed in Chapter 9, where it is shown that under modern international law and having regard to the facts, Quitasueño is an island. For present purposes the point is that the British Foreign Secretary’s letter cast no doubt on Colombia’s sovereignty over the Archipelago as a whole: his concern was specifically with the status of Quitasueño.

4.101. It is significant that, immediately after the Chamberlain letter, in August 1926, the British Foreign Office instructed its Embassy in Washington to examine the State Department’s files on the matter. As a result, an internal document discusses the Embassy’s findings concluding that, in any event, Colombia’s title to Quitasueño was anterior to the claim of the United States:

“It is clear therefore that United States claim dates from the filing of the affidavits referred to in this despatch, i.e. 1869. But the Colombian claim dates from the days of the Spanish occupation and is therefore the older.”⁸⁹

4.102. Moreover, despite the Chamberlain letter, there was no formal British objection when Colombia signed the 1928 Treaty with Nicaragua, stipulating that Quitasueño, Roncador and

⁸⁸ Annex 47.

⁸⁹ Annex 195: British Foreign Office’s internal document of 29 November 1926. Emphasis in the original.

Serrana were in dispute between Colombia and the United States, or when Colombia concluded the 1928 Agreement with the United States, whereby a special regime for Quitasueño, Roncador and Serrana was established.

(5) THE DISPUTE BETWEEN GREAT BRITAIN AND NICARAGUA
OVER TURTLE FISHERIES SHOWS NICARAGUA HAD NO RIGHT OR
CLAIM OVER THE CAYS OF THE SAN ANDRÉS ARCHIPELAGO

4.103. As recalled in the written pleadings in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, since the mid-19th century Nicaragua was in dispute with Great Britain over the turtle-fishing activities carried out by British fishermen from the Cayman Islands around some of the Miskito and Morrison cays, over which Nicaragua considered it had sovereignty.⁹⁰ The dispute lasted until 1916, when an Agreement was signed between the parties, in force until 1960.⁹¹

4.104. In that case, Nicaragua claimed that the differences with Great Britain arose due to a decree it issued in 1864 whereby it declared that the islands adjacent to the Mosquito Coast belonged to it.⁹²

⁹⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Counter-memorial of the Republic of Honduras (HCM), Vol. I, paras. 3.9-3.12; Reply of the Government of Nicaragua (NR), Vol. I, paras. 4.46-4.53.

⁹¹ *Ibid*, NR, Vol. II, Annex 12, pp. 51-54.

⁹² *Ibid*, NR, Vol. I, para. 4.46.

4.105. As shown in the written pleadings of the Parties, in 1905 a Joint Commission was set up between Nicaragua and Great Britain, entrusted with the task of determining which cays were under Nicaraguan jurisdiction. Nicaragua only claimed those belonging to the Miskitos and Morrison groups, located some 45 miles west of the 82°W meridian and 27 miles off the Mosquito Coast.⁹³ At the time, Nicaragua never considered that any of the islands, cays or banks of the San Andrés Archipelago appertained to it under any title.

4.106. In its Reply, Nicaragua pointed out that in 1904 Deogracias Gross was granted a concession by the Government of Nicaragua for the exploitation of coconut trees on the islands and cays that Nicaragua considered as belonging to it.⁹⁴ None of the islands and cays of the San Andrés Archipelago are mentioned in that concession either.

4.107. The Treaty between Nicaragua and Great Britain of 1916, in which the fishing activities of the British subjects from the Cayman Islands were at last regulated in the “waters and Cays in the jurisdiction of Nicaragua with the purpose of fishing or crawling turtles”, only alludes to the Mosquito Cays.⁹⁵ The

⁹³ *Ibid*, HCM, Vol. I, para. 3.12; NR, Vol. I, para. 4.49.

⁹⁴ *Territorial and Maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* NR, Vol. I, para. 4.48.

⁹⁵ Treaty between Great Britain and Nicaragua for the regulation of the Turtle-fishing Industry in the Territorial Waters of Nicaragua as regards Fishing Vessels belonging to the Cayman Islanders, signed at Guatemala City, 6 May 1916, 221 CTS 316.

1916 Treaty made no mention of any of the cays of the San Andrés Archipelago.

4.108. During the lengthy period of its dispute with Great Britain over the Mosquito Coast and appurtenant cays, Nicaragua never laid claim over any of the islands, cays and banks it now claims, despite the fact that around Quitasueño, for instance, the activities carried out by fishermen from the Cayman Islands gave rise to Colombian actions and protests addressed to Great Britain.⁹⁶

**D. The Absence of any Nicaraguan Claim to the Cays:
Nicaragua's Response to the Loubet Award**

4.109. Throughout the 19th century, Nicaragua made no claim to any part of the Archipelago and exercised no jurisdiction there. In its response to the 1900 Award of the French President Emile Loubet, Nicaragua made it clear that its claims extended exclusively to inshore island and cays, well to the west of the 82° meridian.

4.110. The Loubet Award,⁹⁷ which dealt with a territorial dispute between Colombia and Costa Rica, was mentioned by Nicaragua several times in its *Memorial*.⁹⁸ The terms of the

⁹⁶ See above, paragraphs 4.89-4.97.

⁹⁷ *Award Relating to the Boundary Dispute between Colombia and Costa Rica*, 11 September 1900, 28 UNRIAA 341.

⁹⁸ NM, Introduction, p. 3, para. 8; pp. 43-44, para. 1.81; pp. 52-54, paras.

Award and Nicaragua's attitude with regard to it evidence its lack of rights over the islands, cays and banks located to the east of the 82° W meridian and to the north of the 15th parallel.

(1) THE LOUBET AWARD

4.111. Prior to the secession of Panama, Colombia and Costa Rica, by means of the Holguín-Esquivel Treaty of 4 November 1896, agreed to submit the question of the determination of the land boundary between both States to arbitration by the President of France.⁹⁹

4.112. Costa Rica made no claim to the San Andrés Archipelago and made only marginal references to it, when dealing with the Royal Order of 1803, in its arguments during the arbitral proceedings.¹⁰⁰

4.113. The Arbitral Award rendered by the President of France on 11 September 1900 set out the land boundary between

1.106-1.110; p. 55, para. 1.112; p. 56, para. 1.115; p. 154, para. 2.204.

⁹⁹ Boundary Arbitration Convention between Colombia and Costa Rica, signed at Bogotá, 4 November 1896: 183 CTS 434.

¹⁰⁰ M.M. de Peralta, *Historia de la Jurisdicción Territorial de la República de Costa Rica (1502-1880)* (Madrid, Hijos de D. Manuel Ginés Hernández Impresores de la Legación de Costa Rica en Madrid, 1891), 215. M.M. de Peralta, *Exposé des droits territoriaux de la République de Costa-Rica soumis à S.E.M le Président de la République Française, Arbitre de la Question des Limites Entre Costa-Rica et Colombia* (Paris, Imprimerie générale Lahure, 1898), 229, 255. *Costa Rica-Panamá Arbitration, Opinion Concerning the Question of Boundaries Between The Republics of Costa Rica and Panama – Examined with respect to the Spanish law given at the request of the Government of Costa Rica by their excellencies Don Segismundo Moret y Prendergast... and Don Vicente Santamaría de Paredes...* (Washington, Gibson Bros., Inc., 1913), 127-151.

Colombia and Costa Rica and, on the basis of the Royal Order of 1803, reiterated Colombia's full and entire sovereignty over the San Andrés Archipelago with all the islands, cays, islets and banks that form part of it:

“As to the Islands farthest from the Continent and comprised between the Mosquito Coast and the Isthmus of Panama, particularly *Mangle Chico* [Little Corn], *Mangle Grande* [Great Corn], the Cays of Albuquerque, San Andrés, Santa Catalina, Providencia, Escudo de Veragua, as well as any other Islands, Islets and banks that formerly depended upon the former Province of Cartagena, under the name Canton of San Andrés, it is understood that the territory of these islands, *without any exception*, belongs to the United States of Colombia.”¹⁰¹ (Emphasis added)

(2) NICARAGUA'S ATTITUDE TO THE AWARD

4.114. On 22 September of the same year, 1900, Nicaragua addressed a Note to the French Foreign Minister reserving its position with regard to the *Islas Mangle* (Corn Islands) mentioned in the Award:

“I have the honour to make known to Your Excellency that the islands, banks, cays and islets, located in the sea of the Antilles, are under the

¹⁰¹ *Award Relating to the Boundary Dispute between Colombia and Costa Rica*, 11 September 1900, 28 UNRIAA 345. The original text reads:

“Quant aux îles les plus éloignées du continent et comprises entre la côte de Mosquitos et l'Isthme de Panama, nommément: *Mangle-Chico*, *Mangle-Grande*, *Cayos-de-Albuquerque*, *San Andrés*, *Santa-Catalina*, *Providencia*, *Escudo-de-Veragua*, ainsi que toutes autres îles, îlots et bancs relevant de l'ancienne Province de Cartagena, sous la dénomination de canton de *San-Andrès*, il est entendu que le territoire de ces îles, sans en excepter aucune, appartient aux États-Unis de Colombie.”

dominion and property of the Republic of Nicaragua, between the 11th and 15th parallels of latitude North, to the East of the Atlantic Coast of the Republic of Nicaragua and until 84°30' of the Paris meridian, to which they incontestably belong geographically and jurisdictionally, and that are currently militarily occupied, and politically administered by the authorities of the Republic.

The Republic of Nicaragua came into peaceful possession of such islands through the Treaty of Managua of 28 January 1860 with Great Britain.

I was therefore deeply astonished to read, in the arbitral award rendered on the 11th of this month by His Excellency the President of the French Republic, in his capacity as arbitrator in the territorial border dispute between the Republics of Costa Rica and Colombia, that: *the Mangle Chico [Little Corn] and Mangle Grande [Great Corn] islands, as well as all the other islands, islets and banks comprised between the Mosquito Coast and the Isthmus of Panama, without exception, belong to the United States of Colombia.*¹⁰²

My government has always rejected Colombia's claims, as I beg Your Excellency to see in the attached copies of the replies given by the Foreign Ministers of Nicaragua to those of Colombia, on 16 September 1880 and 14 March 1896.

The Government of Nicaragua has not intervened in the Arbitration and I believe it to be my duty to respectfully recall to Your Excellency that Article III of the Additional Convention of Paris, concluded between Costa Rica and Colombia on 20 January 1886, provides that the arbitral award: shall be circumscribed to the territory in dispute and may in

¹⁰² By letter of 18 September 1900 the French Foreign Minister Delcassé clarified to the Costa Rican Minister in Paris, that the expression "United States of Colombia" used in the third paragraph of the *Dispositif* of the Award, was to be understood as applicable to the Republic of Colombia or the Colombian State. See note 71.

no way affect the rights that a third party that has not intervened in the arbitration may claim as to the property of the territory comprised between the stated limits. (Between Cape Gracias a Dios and the Escudo de Veragua island)

The Republic of Costa Rica not having stated any claims whatsoever over those islands, that fall entirely outside its jurisdiction, the arbitral award had no reason to deal with them, and hence the aforementioned award may in no way prejudice the incontestable rights of the Republic of Nicaragua.

While I await instructions from my Government, instructions that shall not fail to arrive soon, I allow myself to make these respectful considerations to Your Excellency. Because I have the highest confidence in the great wisdom and spirit of equity of His Excellency, the President of the Republic, and because I dare to expect that they will suffice for him to see fit to suppress, from the Arbitral Award, the second clause of its dispositive that impairs the rights of a friendly nation that did not take part in the arbitration, and that runs counter to a contractual provision between Costa Rica and Colombia, and a recognized principle of international law proclaimed in 1865, with the avowal of prominent French jurists, by the Institute of International Law.

(Signed) Crisanto Medina”¹⁰³ (Emphasis in original)

4.115. Nicaragua’s reservation was clear both in what it covered and in what it omitted. It allows for the following conclusions.

¹⁰³ Annex 32: Diplomatic Note from the Nicaraguan Minister in Paris, Mr. Crisanto Medina, to the French Foreign Minister, Mr. Delcassé, 22 September 1900.

i. The omission of the islands and cays of the Archipelago

4.116. The omission in Nicaragua's Note of essential elements in the text of the Award leaves no doubt that its claims were exclusively limited to the islands of Mangle Grande (Great Corn) and Mangle Chico (Little Corn) and to the islands, islets, cays and banks in immediate proximity to the Mosquito Coast.

4.117. As noted already, the Award expressly lists certain islands, islets and banks, sovereignty over which it recognizes as Colombian:

“As to the Islands farthest from the Continent and comprised between the Mosquito Coast and the Isthmus of Panama, particularly Mangle Chico [Little Corn], Mangle Grande [Great Corn], the Cays of Albuquerque, San Andrés, Santa Catalina, Providencia, Escudo de Veragua, as well as any other Islands, Islets and banks that formerly depended upon the former Province of Cartagena, under the name Canton of San Andrés, it is understood that the territory of these islands, without any exception, belongs to the United States of Colombia.”

4.118. However, Nicaragua in its original Note not only mentions, but actually emphasizes by underlining them, the islands, islets and banks to which its reservation referred:

“I was therefore deeply astonished to read, in the arbitral award rendered on the 11th of this month by His Excellency the President of the French Republic, in his capacity as arbitrator in the territorial border

dispute between the Republics of Costa Rica and Colombia, that: *the Mangle Chico [Little Corn] and Mangle Grande [Great Corn] islands, as well as all the other islands, islets and banks comprised between the Mosquito Coast and the Isthmus of Panama, without exception, belong to the United States of Colombia.*”

See Figure 4.2 below: Islands claimed by Nicaragua in its 1900 Note with regard to the Loubet Award.

4.119. The Note obviously omits mentioning “the Islands farthest from the Continent” while only preserving the phrase “comprised between the Mosquito Coast and the Isthmus of Panama”. It therefore refers to the islands, islets and banks located in immediate proximity to the Mosquito Coast and not to those furthest from the continent, as are all those appertaining to the San Andrés Archipelago. It likewise omits to mention “the Cays of Albuquerque, San Andrés, Santa Catalina, Providencia, Escudo de Veragua, as well as any other Islands, Islets and banks that formerly depended upon the former Province of Cartagena, under the name Canton of San Andrés...”

4.120. It is not plausible that Nicaragua, had it considered it had any right over the islands, cays and banks of the Archipelago expressly listed in the Award other than the Islas Mangles (Corn Islands), would have omitted mentioning them in its Note.

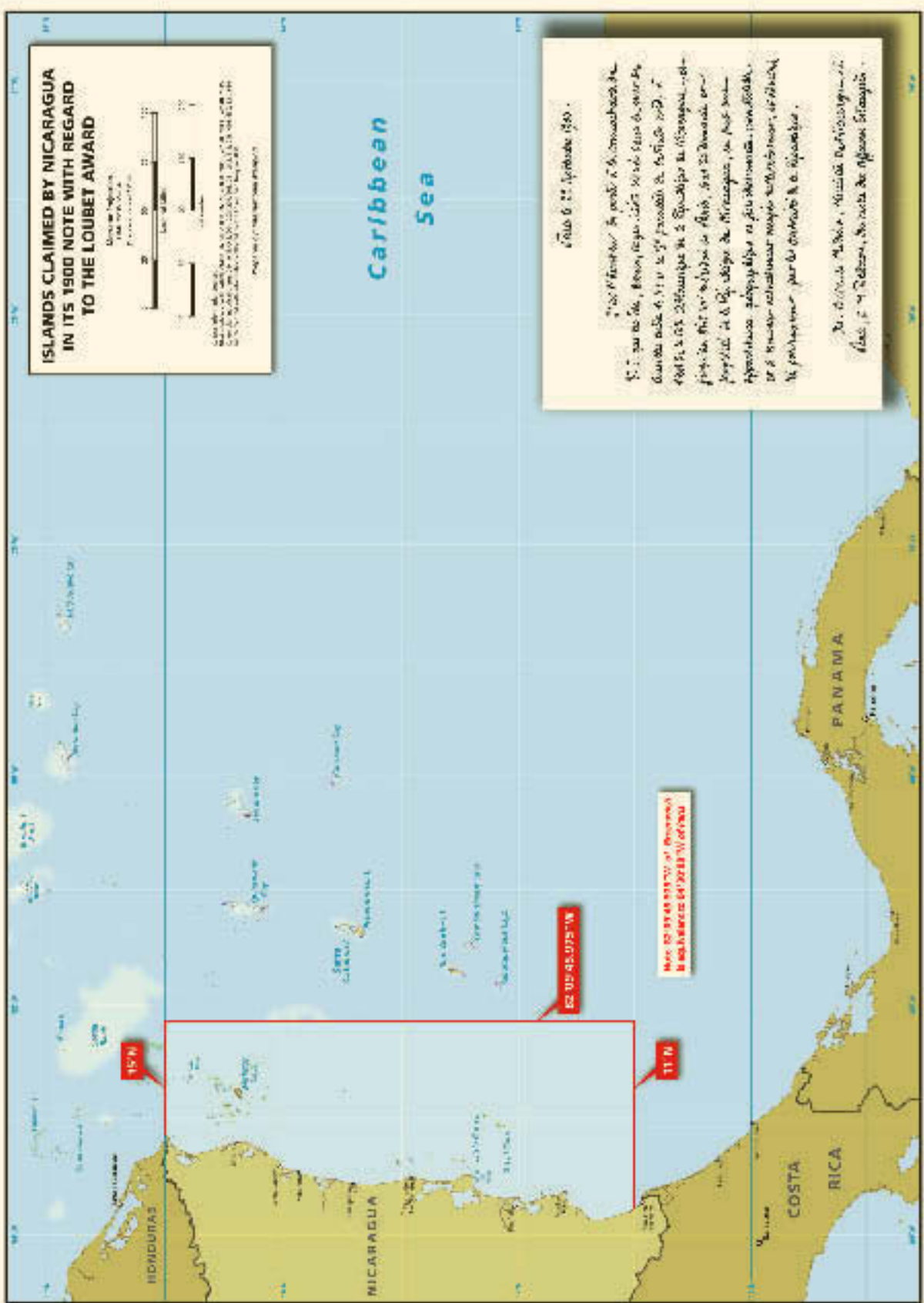
- ii. *Nicaragua's reservation expressly excluded all the cays and banks of the Archipelago, located to the east of the 82° W meridian*

4.121. The first paragraph of the Nicaraguan Note described the area in which, according to Nicaragua, the islands, banks, cays and islets over which it claimed jurisdiction were located. It stated:

“...the islands, banks, cays and islets, located in the sea of the Antilles, are under the dominion and property of the Republic of Nicaragua, between the 11th and 15th parallels of latitude North, to the East of the Atlantic Coast of the Republic of Nicaragua and until 84°30' of the Paris meridian, to which they incontestably belong geographically and jurisdictionally...”

Thus the islands, banks and islets to which Nicaragua laid claim were located in the area comprised within the following limits: from north to south, between the 15th and 11th parallels; and from west to east, between the Mosquito Coast and the 84°30' Paris meridian.

4.122. In accordance with the certification issued by the Chief of the Service de Géodésie et de Nivellement of the Institut Géographique National of France, the 84°30' of longitude west of Paris mentioned as the limit of Nicaragua's jurisdiction in the Caribbean Sea (Sea of the Antilles), is equivalent to the 82°09'45".975 of longitude west of Greenwich, that is, extremely close to the 82° W meridian that 30 years later Nicaragua would insist on stating as the limit in the Protocol of



See full size Map, Vol III - page 75

Exchange of Ratifications to the Treaty between Colombia and Nicaragua.¹⁰⁴ These limits, and the maritime features mentioned in the Loubet Award, are shown on Figure 4.2.

4.123. The islands of San Andrés, Providencia and Santa Catalina and the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, East-Southeast and Albuquerque are all located to the east of the $82^{\circ}09'45''.975$ of longitude west of Greenwich or of the $84^{\circ}30'$ longitude west of Paris. Furthermore, the cays of Serranilla and Bajo Nuevo – which Nicaragua is now claiming, more than 100 years after the Award – are located to the north of the 15th parallel.¹⁰⁵

iii. Nicaragua's Note added that its reservation exclusively referred to islands, banks, cays and islets militarily occupied and politically administered by it at the time

4.124. In order to further specify the islands, banks, cays and islets to which its reservation referred, the Nicaraguan Note claimed that as a result of a treaty signed in 1860 with Great Britain, it had come into possession of the islands and cays over which it purported to reserve its rights, and stated that these were, at the time, militarily occupied and politically administered by its authorities:

“...the islands, banks, cays and islets ... are under the dominion and property of the Republic of Nicaragua ... to which they incontestably belong

¹⁰⁴ Annex 218: Certification N° SGN/031075, issued by Service de géodésie et de nivellement of the Institut géographique national of France, 12 November 2003.

¹⁰⁵ See Figure 4.2, Vol. III.

geographically and jurisdictionally, and that are currently militarily occupied, and politically administered by the authorities of the Republic.”

By the time Nicaragua made representations to the Arbitrator, in September 1900, the only off-shore islands that could be said to be “militarily occupied, and politically administered” by the Nicaraguan authorities were the Islas Mangles (Corn Islands), which they had taken by force in 1890. None of the other components of the San Andres Archipelago was ever militarily occupied or politically administered by Nicaragua, neither before nor after the delivery of the Loubet Award. The Archipelago was, by that time, an administrative sub-division of the Departamento of Bolivar of the Republic of Colombia.

iv. The Islands over which Nicaragua allegedly “came into peaceful possession” through the 1860 Treaty could only be located in the immediate proximity to the coast and in any event to the west of the 83 W Greenwich meridian

4.125. In its Note Nicaragua also states:

“The Republic of Nicaragua came into peaceful possession of such islands through the Treaty of Managua of 28 January 1860 with Great Britain.”

4.126. It is important to recall that the Archipelago in its entirety was administered by Colombia at all times. The 1860 Treaty between Nicaragua and Great Britain did not refer to any of the components of the Archipelago, and in fact did not

mention any island at all.¹⁰⁶ The islands over which Nicaragua affirms that it came into peaceful possession through the 1860 Treaty with Great Britain could only be those small islands, islets and banks located in immediate proximity to the Mosquito Coast. The parties to the 1860 treaty simply assumed that no area to the east of the 83°W meridian was part of the Nicaraguan territory.

4.127. As this account demonstrates, Nicaragua did not, whether in 1860 or at any other time, “come into possession” of the islands, cays or banks of the San Andrés Archipelago. Indeed, its *Memorial* does not pretend otherwise. As to the islands, cays or banks claimed in the *Memorial*, Colombia had never faced claims by Nicaragua itself, or by the Miskito Indians, or by Great Britain.

- v. *The Nicaraguan Note expressly refers to the antecedent events on which it bases its reservation: these concern the Mosquito Coast and not any of the islands or cays of the Archipelago of San Andrés*

4.128. As attachments to its Note to the French Foreign Minister, Nicaragua submitted two Notes, dated 16 September 1880 and 14 March 1896, referred to in the main text of the Note:

“My government has always rejected Colombia’s claims, as I beg Your Excellency to see in the

¹⁰⁶ *Treaty between Great Britain and Nicaragua relative to the Mosquito Indians and the Rights and Claims of the British Subjects*, signed at Managua, 28 January 1860, 121 CTS 317.

attached copies of the replies given by the Foreign Ministers of Nicaragua to those of Colombia, on 16 September 1880 and 14 March 1896.”

These Notes do not refer, even indirectly, to the islands and cays of the San Andrés Archipelago. They refer exclusively to the Mosquito Coast. The Note of 16 September 1880 is a reply to a Colombian Note of 18 July 1880 whereby Colombia proposed negotiations or an arbitration to settle the dispute over the Mosquito Coast. In the second Nicaraguan Note – that of 14 March 1896 – the Nicaraguan Government again rejected a proposal of arbitration of the dispute over the Mosquito Coast formulated by Colombia on 8 February 1896, stating that at the time there was “no pending question” between Nicaragua and Colombia.

(3) THE ARBITRATOR’S REPLY TO NICARAGUA

4.129. Upon receiving the Nicaraguan Note concerning the Loubet Award, the French Foreign Minister, Thèophile Delcassé, addressed a handwritten memo to the President of the French Republic on 13 October 1900, recalling the position stated by the Nicaraguan Minister in Paris with regard to the Mangle Chico and Mangle Grande (Little and Great Corn) islands, mentioned in the Award:

“By a Note sent to the Foreign Ministry on 22nd September last, the representative of the Republic of Nicaragua at Paris has stated the rights that his government would be in capacity to uphold over the

Mangle Chico and Mangle Grande [Little and Great Corn] islands mentioned in the arbitral award rendered on 11 September of the same year between Colombia and Costa Rica.

Mr. Crisanto Medina has on this occasion, invoked the treaty concluded by both States on 20 January 1886, with a view to their respective delimitation and to the terms thereof according to which the arbitration in question may not affect the rights that a third party might claim as to the property of the territory in dispute.”¹⁰⁷

4.130. In a Note of 22 October 1900 to the Nicaraguan Minister in Paris, Foreign Minister Delcassé stated that what was expressed “in particular, over the Mangle Chico and Mangle Grande [Little and Great Corn] islands mentioned in the Arbitral Award”, did not affect the rights that a third party might claim in that regard.¹⁰⁸ The French reply did not allude to the other islands, cays and banks of the San Andrés Archipelago.¹⁰⁹

4.131. In a Note dated 26 October 1900 to the Colombian Minister in Paris, Julio Betancourt, French Foreign Minister Delcassé enclosed a copy of his note to the Nicaraguan Minister, taking into account that the latter had pointed out the rights that his government considered to have specifically over the Mangle Chico and Mangle Grande [Little and Great Corn] islands. In his

¹⁰⁷ Annex 179: Memorandum from the French Foreign Minister, Mr. Delcassé, to the French President, Mr. Loubet, 13 October 1900.

¹⁰⁸ Annex 33: Diplomatic Note from the French Foreign Minister, Mr. Delcassé, to the Nicaraguan Minister in Paris, Mr. Crisanto Medina, 22 October 1900 (Draft copy held in French official archives).

¹⁰⁹ *Ibid.*

Note to the Colombian Minister, M. Delcassé again did not mention the other islands, cays and banks of the San Andrés Archipelago: as has been shown Nicaragua had not mentioned these.

“...[T]he Representative of the Republic of Nicaragua in Paris has stated the rights that his government would be in capacity to uphold over the Mangle Chico and Mangle Grande [Little and Great Corn] islands mentioned in the Arbitral Award rendered on 11 September of the same year between Colombia and Costa Rica.”¹¹⁰

4.132. The Colombian Minister made no comment with regard to this Note, nor to the one sent by the French Foreign Minister to the Nicaraguan representative in Paris. As stated above, since 1890 there had been a dispute between Colombia and Nicaragua over the *Islas Mangles* (Corn Islands), following Nicaragua’s occupation of them by force in that year.

(4) CONCLUSIONS

4.133. The following conclusions can be drawn from this important episode:

- (1) The Loubet Award, while delimiting the land boundary between Colombia and Costa Rica, expressly reiterated Colombia’s full and entire sovereignty over the San Andrés Archipelago with

¹¹⁰ Annex 34: Diplomatic Note from the French Foreign Minister, Mr. Delcassé, to the Colombian Minister in Paris, Mr. Julio Betancur, 26 October 1900.

all the islands, cays, islets and banks that form part of it, including the Islas Mangles (Corn Islands).

- (2) Following the Award, Nicaragua addressed an official Note to the arbitrator reserving its position with regard to the Islas Mangles (Corn Islands).
- (3) Nicaragua's Note specifically set out the limits of its territorial claims in the area as follows: "...the islands, banks, cays and islets, located in the sea of the Antilles ... between the 11th and 15th parallels of latitude North, to the East of the Atlantic Coast of the Republic of Nicaragua and until 84°30' of the Paris meridian" – that is, 82°09'45".975 W of Greenwich.¹¹¹
- (4) Nicaragua never referred to any of the other islands and cays of the San Andrés Archipelago expressly mentioned in the Award. By delimiting its claims, it acknowledged that it lacked any rights over the rest of the Archipelago's features, all of which are located to the east of the 84°30' longitude west of Paris and some of which are located to the north of the 15th parallel.
- (5) That twofold acknowledgement by Nicaragua of Colombia's sovereignty over the islands, islets, cays and banks of the Archipelago, on the occasion

¹¹¹ See Annex 218.

of the issuance of the Loubet Award, is decisive in itself. It is also important background to the agreements reached between Nicaragua and Colombia in 1928 and 1930, analysed in the next Chapter.

(5) THE WHITE AWARD OF 1914 BETWEEN PANAMA AND COSTA RICA CONFIRMED THE LOUBET AWARD WITH REGARD TO THE ARCHIPELAGO'S ISLANDS AND CAYS

4.134. In 1910, seven years after its separation from Colombia, the new Republic of Panama agreed with Costa Rica to submit the interpretation of certain aspects of the Loubet Award to arbitration by the Chief Justice of the United States.

4.135. The Parties were in agreement that the Award was clear concerning the limit in the Pacific region. However, they did not agree as regards the Atlantic sector.

4.136. The arbitrator thus defined the starting point of the border in the Atlantic sector by a new line. Although Colombia was not a party to the proceedings, the White Award confirmed what the Loubet Award had established with regard to the "islands farthest from the continent", the phrase President Loubet had used to refer to the San Andrés Archipelago.

4.137. The relevant "reservation" in the White Award read as follows:

“3. That this decree is subject to the following reservations, in addition to the one above stated:

(...)

(b) And, moreover, that nothing in this decree shall be considered as affecting the previous decree awarding *the islands off the coast* since neither party has suggested in this hearing that any question concerning said islands was here open for consideration in any respect whatever.”¹¹²
(Emphasis added)

4.138. Nicaragua made no objection or reservation with regard to the White Award.

4.139. For its part, the Foreign Affairs Advisory Commission of Colombia, in an analysis of the White Award, considered that it had confirmed what the Loubet Award had established with regard to the Archipelago.¹¹³

E. The Position of Other States

4.140. All neighbouring States have recognised Colombia’s sovereignty over the Archipelago, including the cays.

¹¹² *Boundary Case between Costa-Rica and Panama, Award of 12 September 1914*, 11 UNRIAA 547.

¹¹³ Annex 98: Report by Mr. Antonio José Uribe to the Colombian Foreign Affairs Advisory Commission, 5 November 1915, at p. 6: “As it may be seen, as to the insular territory, that is what has mainly caused the various reports that I have had the honor to submit to the Foreign Affairs Commission, the Chief Justice’s Award respects or does not purport to undermine the award by H.E. the President of the French Republic, that awarded and recognized the Archipelago of San Andrés and Providencia of which the Mangle Islands are part, as appertaining to Colombia’s exclusive sovereignty.”

(1) PANAMA – 1976 TREATY ON THE DELIMITATION OF MARINE AND SUBMARINE AREAS AND RELATED MATTERS

4.141. On 20 November 1976, Colombia and Panama signed the Treaty on the Delimitation of Marine and Submarine Areas and Related Matters.¹¹⁴

4.142. In the Caribbean sector, the Parties delimited the maritime areas appertaining to the adjacent mainland coasts of both States, as well as those generated by the islands and cays of the San Andrés Archipelago and the Panamanian mainland territory. The delimitation can be seen on Figure 4.3, below – Maritime Delimitations Agreements in the Area.

4.143. The adjacent mainland coasts were delimited by an equidistance line. For the delimitation of the areas generated by the islands and cays of the San Andrés Archipelago and the Panamanian mainland territory, a median line was averaged, through the use of parallels and meridians, in order to facilitate the identification of the line.

4.144. As stated in the analysis of the Treaty carried out by the Geographer of the Department of State of the United States,

“[t]he geometry of the boundary from points H-M, however, lends no credence to the possibility that the Colombian offshore cays received a consistently less

¹¹⁴ Annex 4: 1976 Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Colombia and the Republic of Panama. 1074 UNTS 221.

consideration or ‘weight’ than the Panamanian mainland.”¹¹⁵

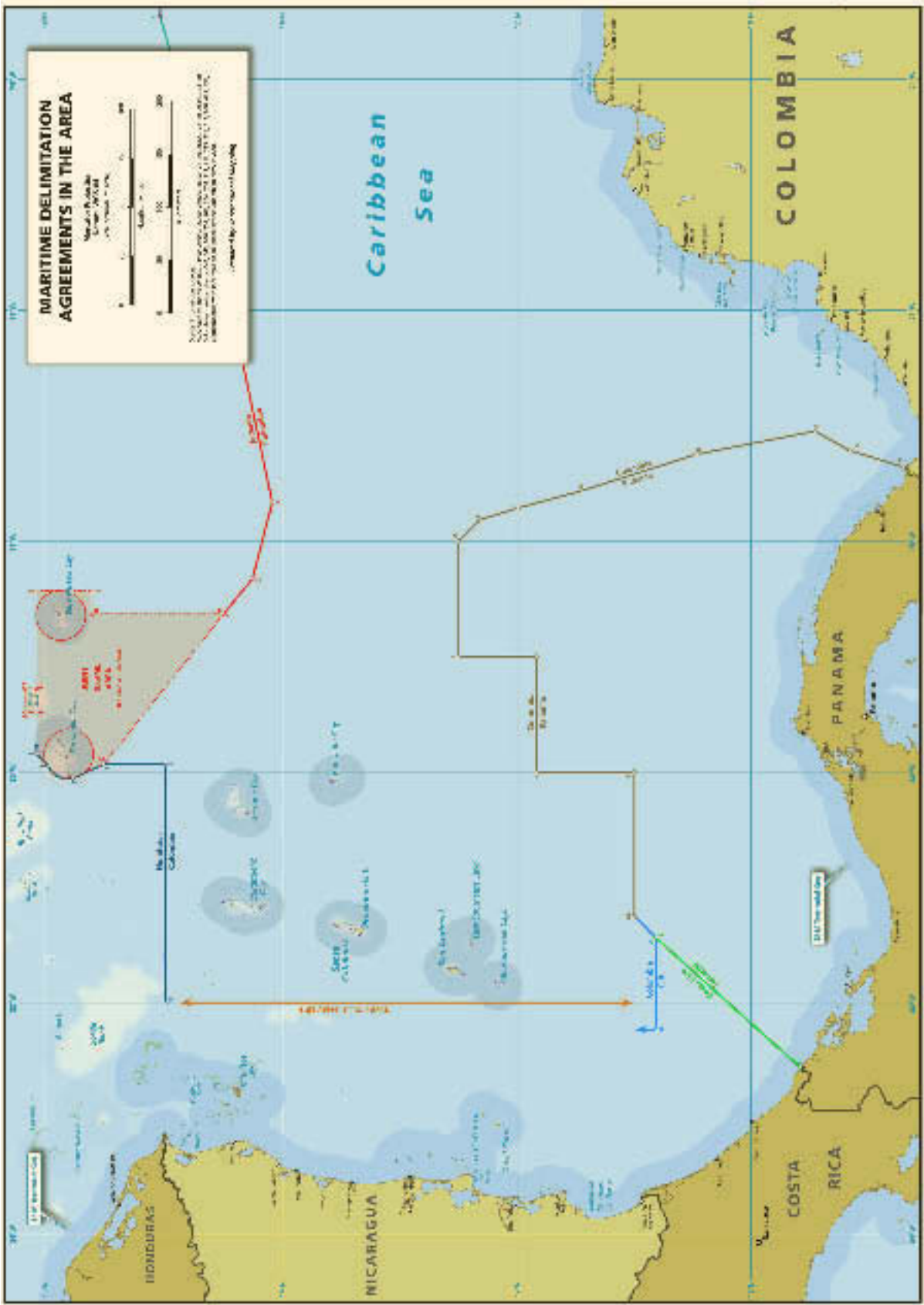
4.145. In the last section, in the westernmost sector, the delimitation consists of a straight line drawn from a point located at 11°00’00”N, 81°15’00”W, at azimuth 225° (45°SW), that would reach the point where it now intersects with the maritime boundary between Panama and Costa Rica.

4.146. Article II of the Colombia-Panama Treaty provides as follows:

“To recognize and respect the procedures through which each State at present exercises or may in future exercise sovereignty, jurisdiction, surveillance, control or rights in the marine and submarine areas adjacent to its coasts delimited by virtue of this Treaty, in accordance with the conditions established or to be established by each country and with the regulations of its own domestic law.”

4.147. The Treaty was approved by the Congresses of both countries. The exchange of ratifications took place on 30 November 1977 and the Treaty was registered jointly by Colombia and Panama with the Secretary-General of the United Nations on 3 February 1978.

¹¹⁵ *Limits in the Seas N° 79, Maritime Boundaries: Colombia-Panama*. U.S. Department of State, Bureau of Intelligence and Research, Issued by the Geographer, 3 November 1978, p. 6.



See full size Map, Vol. III - page 77

4.148. Nicaragua has never protested the 1976 Delimitation Treaty.

(2) COSTA RICA

i. 1977 Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation

4.149. On 17 March 1977, Colombia and Costa Rica signed the Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation.¹¹⁶ The negotiations had been carried out more or less simultaneously with those for the Treaty between Colombia and Panama.

4.150. In the case of the Costa Rica Treaty as well, the median line drawn between the San Andrés Archipelago – specifically from the cays of Alburquerque – and the Costa Rican mainland territory was taken as a general reference. It was also simplified with two straight lines: a parallel and a meridian. The delimitation can be seen on Figure 4.3. – Maritime Delimitations Agreements in the Area.

4.151. The first section of the delimitation of the maritime areas generated by the San Andrés Archipelago and the Costa Rican territory, started on the line used for the last sector of the delimitation between Colombia and Panama: “a straight line,

¹¹⁶ Annex 5: 1977 Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica.

drawn with an azimuth of 225° (45° southwest) from a point located on latitude 11°00'00" North and longitude 81°15'00" West, with parallel 10°49'00" North."

4.152. Article 1 of the 1977 Treaty, describing the course of the boundary, reads as follows:

"To designate as the boundary between their respective marine and submarine areas, that are established or may be established in the future, the following lines:

A.- Starting on the intersection of a straight line, drawn with an azimuth of 225° (45° southwest) from a point located on latitude 11°00'00" North and longitude 81°15'00" West, with parallel 10°49'00" North.

Along the cited parallel towards the West, until its intersection with meridian 82°14'00" West.

B.- From the intersection of parallel 10°49'00" North and the meridian 82°14'00" West, the boundary continues along the cited meridian towards North up to where the delimitation shall be done with a third State."

4.153. The segment of the parallel fixed in the delimitation extends beyond the 82°W meridian, as far as the meridian 82°14'00". This is due not to Colombia's not having regarded the 82°W meridian as its limit with Nicaragua – as Nicaragua has suggested¹¹⁷ – but to the effect that, as between Colombia and

¹¹⁷ NM, p. 157, para. 2.210.

Costa Rica, the adjustments to the median line agreed to by the parties bring about.

4.154. Article 2 of the 1977 Treaty contained an identical provision to that in the Colombia-Panama 1976 Treaty, with regard to the regime that “each country has established or may establish in the future” over the marine and submarine areas delimited by the Treaty.

4.155. The Treaty between Colombia and Costa Rica was approved by the Congress of Colombia. While it has not yet been approved by the Legislative Assembly of Costa Rica, the Treaty has been applied by both States since its signature. Not a single incident has occurred since between vessels of Colombia or Costa Rica, despite the activities carried out by Colombian fishermen sailing from the southern cays of the San Andrés Archipelago and the important fishing activities of Costa Rican ships – whose fishing fleet is among the most prominent in the hemisphere.

ii. The attitude of Costa Rica with respect to the 1977 Treaty with Colombia

4.156. The highest Costa Rican authorities have on several occasions stated that despite the fact that the Treaty has not yet been approved by their Legislative Assembly, they have applied it and will continue to apply it in good faith.

4.157. On 14 May 1996, the Foreign Minister of Costa Rica, Fernando Naranjo, in reply to a Colombian Diplomatic Note with regard to certain statements made by him concerning the situation between Colombia and Nicaragua, wrote:

“[I] inform Your Excellency that in the Government of Costa Rica’s view, in full harmony with international norms as embodied in the Vienna Convention on the Law of Treaties, the Treaty on Maritime Delimitation between Colombia and Costa Rica has been complied with, is being complied with and will continue to be complied with, as a show of good faith of the Parties. The terms of that Treaty are clear, unequivocal and the absence of incidents or difficulties between both countries in this matter evidences the beneficial character of that legal instrument.”¹¹⁸

4.158. By a Note dated 23 March 1997, the Costa Rican Foreign Vice-minister Rodrigo Carreras informed the Colombian Ambassador in Costa Rica of the official position of his country in light of a press report stating the alleged decision of the Costa Rican Government not to ratify the delimitation treaties signed with Colombia. The note read as follows:

“I was surprised to read this article that completely distorts the position of the Government of Costa Rica with respect to the Treaties on Maritime Limits between the Republic of Costa Rica and the Republic of Colombia, signed in 1977 and in 1984, and that erroneously states that Costa Rica has decided not to ratify these instruments.

¹¹⁸ Annex 67: Diplomatic Note N° DM. 172-96 from the Costa Rican Foreign Minister to the Colombian Foreign Minister, 14 May 1996.

In this regard, my Government reiterates what has been already stated in previous notes with respect to our interest in having those treaties ratified by our Legislative Assembly, both of them being in its agenda. The Government of Costa Rica, in accordance with the Law of Treaties, shall continue to comply with what was agreed without acting against it.”¹¹⁹

4.159. In a conference held on 27 August 1998 at the Costa Rican Foreign Ministry, in the presence of the diplomatic corps, the Costa Rican signatory of the 1977 Treaty and former Foreign Minister, Mr. Gonzalo J. Facio, stated:

“...[T]here is no reason whatsoever why the Legislative Assembly should not approve the ‘Fernández-Facio’ Treaty that duly delimited the maritime boundaries in the Atlantic Ocean between the Republics of Colombia and Costa Rica, on the premise that the San Andrés Archipelago belonged to Colombia.

...Colombia will continue to exercise the sovereignty it has always exercised over the San Andrés Archipelago, for over a century prior to the recognition of that legal fact by the Government of Nicaragua by the ‘Bárcenas-Esguerra’ Treaty.

Consequently, the Government of Nicaragua cannot reproach us with anything since, on signing the Fernández-Facio Treaty of 1977, we acted in accordance with the existing legal situation that has the San Andrés Archipelago as an integral part of the Colombian territory.”¹²⁰

¹¹⁹ Annex 69: Diplomatic Note N° DVM 103 from the Costa Rican Foreign Vice-Minister to the Colombian Ambassador in Costa Rica, 23 March 1997.

¹²⁰ Annex 217: Statement given by Mr. Gonzalo J. Facio, Costa Rican signatory of the 1977 Treaty and former Foreign Minister, at the Costa Rican

iii. *1980 Treaty on Delimitation of Marine Areas and Maritime Cooperation between Panama and Costa Rica*

4.160. On 2 February 1980, Panama and Costa Rica signed a Delimitation Treaty, the last segment of which intersects with the last segment of the boundary between Colombia and Panama. Indeed, Article I of the Panama-Costa Rica Treaty provided as follows for the Caribbean sector:

“The median line every point of which is equidistant from the nearest baselines from which the breadth of the territorial sea of each State is measured in accordance with public international law; from the termination of the land boundary between both countries, at a point located on the mouth of the Sixaola River, latitude 09°34’16” North, longitude 82°34’00” West, along a straight line to a point located at latitude 10°49’00” North, longitude 81°26’08.2” West, where the boundaries of Costa Rica, Colombia and Panama intersect.”¹²¹

The last sentence of article 1 of this latter treaty, in particular, recognizes the fact that there is a maritime limit in existence between Costa Rica and Colombia and that it intersects with the limit that each of those States has with Panama at coordinates 10°49’00” North longitude and 81°26’08.2 West.” The delimitation can be seen on Figure 4.3. – Maritime Delimitations Agreements in the Area.

Foreign Ministry, 27 August 1998.

¹²¹ Treaty concerning Delimitation of Marine Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama, reproduced in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (Dordrecht, Martinus Nijhoff Publishers, 1993), Vol I, 547.

4.161. As pointed out in Chapter 8,¹²² the 1976 Treaty between Panama and Colombia was closely linked to the 1977 Costa Rica-Colombia Treaty, and the latter was in turn closely linked to the 1980 Panama-Costa Rica Treaty.

iv. *Statement on the Occasion of the Ratification of the 1984 Colombia-Costa Rica Treaty on Maritime Delimitation in the Pacific Ocean*

4.162. The exchange of ratifications of the Treaty on Maritime Delimitation between Colombia and Costa Rica of 6 April 1984 concerning the maritime delimitation in the Pacific Ocean took place on 20 February 2001, as agreed by the Parties.¹²³ In the Protocol of Exchange of Ratifications of that Treaty, the decision of both States to continue applying the 1977 Treaty on the delimitation in the Caribbean is expressed as follows:

“...That the compliance of the ‘Treaty on the Delimitation of Marine and Submarine Areas and Maritime Cooperation’ signed on March 17, 1977, will continue in the current condition until the exchange of the respective instruments of ratification of that treaty is carried out.”¹²⁴

¹²² See paras. 8.42-8.45.

¹²³ Annex 17: Exchange of Notes between the Republic of Colombia and the Republic of Costa Rica of 29 May 2000: Colombian Note N° DM-M 14081, Costa Rican Note N° 396-UAT-PE. See 2139 UNTS 409-410.

¹²⁴ Annex 18: Protocol of Exchange of Ratifications of the 1984 Treaty on the Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica of 6 April 1984, additional to that signed in the city of San José on 17 March 1977, 20 February 2001.

(3) HONDURAS – 1986 TREATY CONCERNING MARITIME
DELIMITATION

4.163. As it was demonstrated above, from the time of its independence Colombia has always exercised sovereignty and jurisdiction over Serranilla Cay and its appurtenant maritime areas, as part of the San Andrés Archipelago. In 1975, unexpectedly, Honduras laid claim over Serranilla, openly disregarding Colombian titles. On the other hand, by that time Colombia's position was that its maritime jurisdiction *vis-à-vis* Honduras extended further north and further west of Serranilla, up to and including Rosalinda Bank and adjacent areas, a position that was not shared by Honduras. The two countries began negotiations in order to solve this dispute and to establish their definitive maritime boundary.

4.164. On 2 August 1986, Colombia and Honduras signed the Treaty concerning Maritime Delimitation.¹²⁵ By that Treaty, both countries established their maritime boundary by geodesic lines starting at the 82° W meridian, along parallel 14°59'08"N up to meridian 79°56'00"W where the boundary continues to the north until reaching the 12-mile territorial sea generated by Serranilla cays. It continues along the border of a 12-mile arc of circle (corresponding to the western section of the territorial sea of Serranilla cays) until it reaches the tangent parallel on the external border of the arc of circle (at Lat. 16°04'15"N and Long.

¹²⁵ Annex 10: 1986 Treaty concerning Maritime Delimitation between the Republic of Colombia and the Republic of Honduras. 2093 UNTS 295.

79°50'32"W). From there, it continues east along parallel 16°04'15"N up to where the limits should be established with a third State.

4.165. The 1986 Treaty was approved by the respective Congresses and entered into force on 20 December 1999, following the exchange of ratifications. The parties jointly registered the treaty with the United Nations and it is in force.¹²⁶

4.166. By virtue of this Treaty, Honduras recognized Colombia's sovereignty and jurisdiction over the Serranilla cays.

4.167. This Treaty is closely linked to the 1993 Colombia-Jamaica Delimitation Treaty in the northern sector of the delimitation.

(4) JAMAICA

4.168. Since the second half of the 19th century when Jamaica was a British colony there had been exchanges between Colombia and Great Britain on the activities of Jamaican and Cayman Islands fishermen in the area of the Serranilla and Bajo Nuevo cays. The British Government accepted that Serranilla Cays belonged to the Viceroyalty of Santa Fe (New Granada) by virtue of the Royal Order of 1803; equivalent positions were taken as to the other cays: the disagreement of 1926-7 concerned

¹²⁶ Registered on 21 December 1999, N° 36360.

the status of Quitasueño,¹²⁷ and cast no doubt on Colombia's sovereignty over the Archipelago, including Quitasueño if it was capable of being held in sovereignty.

i. The 1981 Fishing Agreement

4.169. Jamaica became independent in 1962. On 30 July 1981, Colombia and Jamaica concluded a Fishing Agreement whereby Colombia allowed vessels under the Jamaican flag "to carry out specific fishing activities in certain maritime areas of the Republic of Colombia", specifically within the 12-mile area around Bajo Nuevo and Serranilla Cays.¹²⁸ The duration of the Agreement, pursuant to Article 14, was 2 years, renewable by mutual agreement. The Agreement was approved by the Colombian Congress by Law 24 of 1982 and published in the Official Journal.¹²⁹

4.170. In conformity with Article 14, the parties renewed the Agreement on 6 August 1982 for a term of two years. Upon the expiration of this period, it was replaced by a new agreement, signed on 30 August 1984.

4.171. In execution of the 1981 Agreement, the Colombian Government set out the documents to be furnished and other

¹²⁷ See paras. 4.99-4.102, above.

¹²⁸ Annex 7: 1981 Fishing Agreement between the Republic of Colombia and Jamaica (with annex).

¹²⁹ Diario Oficial N° 35.949, Bogotá, 19 February 1982, p. 456. See also 1295 UNTS 99.

requirements to be met by Jamaican vessels carrying fishing in the territorial sea of the two cays. These provisions were notified to the Jamaican Government and its vessels complied with them.

4.172. Thus, for instance, pursuant to Article 8 of the 1981 Agreement, on 3 March 1984, the Jamaican Director of Fisheries submitted to the Colombian Consul General in Kingston, two photographs of each of the fishermen and members of the crew of vessel Captain B “who [were] requesting licences to be based on and to fish within the Serranilla Cay Zone.”¹³⁰

4.173. As a further example, on 30 March 1984 the Jamaican Director of Fisheries submitted to the Colombian Consul General in Kingston a list of the owners of fishing vessels who had applied for permits “to operate in Colombian waters under the terms of the Colombia/Jamaica fishery agreement.”¹³¹

4.174. There are many other examples of information furnished by the Jamaican to the Colombian authorities pursuant to the Agreement.¹³²

4.175. Nicaragua never protested the 1981 Agreement or its execution.

¹³⁰ Note of 3 March 1984. In Annex 63: Notes from the Jamaican Director of Fisheries to the Colombian Consul General in Kingston, pursuant to the 1981 Fishing Agreement.

¹³¹ *Ibid*, Note of 30 March 1984.

¹³² See Annex 63.

ii. The 1984 Fishing Agreement

4.176. A new Agreement was concluded between the parties on 30 August 1984, for a term of two years. The Agreement was submitted to the Colombian Congress and was approved by Law 34 of 1986, published in the Official Journal.¹³³

4.177. The 1984 Agreement contained almost identical provisions as the earlier one, except for an increase in fishing quotas, decrease in number of carrier vessels and rules as to their stationing.

4.178. Throughout the Agreement's existence, both Parties resolved minor difficulties and periodically exchanged statistics on the resources in the area through the Colombian Embassy and Consulate in Kingston. These Colombian posts in Kingston channelled all requests from the Jamaican authorities concerning vessels, crews, permits and other details set out in the Agreement to the Colombian Foreign Ministry.

4.179. For instance, following the new Agreement of 30 August 1984, on 27 November 1984 the Jamaican Director of Fisheries submitted to the Colombian Consul General in Kingston,

“...the general Statistical Information to be provided under Article VI of the Fishing Agreement between

¹³³ Annex 9: 1984 Fishing Agreement between Colombia and Jamaica. Diario Oficial, Bogotá, 6 February 1986, Year CXXII, N° 37.336, p. 8.

Jamaica and the Republic of Colombia for the three (3) months period ending the 31st October, 1984.”¹³⁴

4.180. More examples of communication between the Jamaican and Colombian authorities are annexed.¹³⁵

4.181. Nicaragua never protested the 1984 Agreement or its execution.

iii. The 1993 Maritime Delimitation Treaty between Colombia and Jamaica

4.182. On 12 November 1993, Colombia and Jamaica signed a treaty on maritime delimitation and the establishment of a Joint Regime Area in an area comprised between the San Andrés Archipelago and the territory of Jamaica.¹³⁶ The exchange of ratification instruments took place in Bogotá on 14 March 1994. The delimitation can be seen on Figure 4.3. – Maritime Delimitations Agreements in the Area.

4.183. The delimitation is constituted by a slightly modified median line, drawn from an equidistant point between the island of Providencia and Jamaica and the westernmost point of the maritime boundary between Colombia and Haiti. The

¹³⁴ Annex 64: Notes from the Jamaican Director of Fisheries to the Colombian Consul General in Kingston, pursuant to the 1984 Fishing Agreement.

¹³⁵ *Ibid.*

¹³⁶ Annex 14: 1993 Treaty on Maritime Delimitation between the Republic of Colombia and Jamaica. 1776 UNTS 27.

delimitation divided the maritime areas generated by the San Andrés Archipelago and the Colombian mainland coast on one hand, and Jamaica on the other.¹³⁷

4.184. The Joint Regime Area is delimited to the south by a line drawn from the terminal point of the median line until the intersection of the delimitation established in the 1986 Colombia-Honduras Treaty. Thereafter, the delimitation of the Joint Regime Area continued along a series of parallels and meridians that integrally cover Bajo Alicia until reaching the starting point.¹³⁸ The Joint Regime Area excludes the 12-mile zone drawn around the Colombian Cays of Serranilla and Bajo Nuevo.¹³⁹

4.185. Within the Joint Regime Area, the 1993 Treaty provided for a regime of joint administration, control, exploration and exploitation of living and non-living resources. Each Party may also carry out activities of marine scientific research, protection and preservation of the marine environment, and conservation of living resources.¹⁴⁰ The Parties may not authorize third-State vessels, unless provided for in a lease, joint venture or technical assistance program agreed to by the Joint Commission entrusted with elaborating the modalities for the implementation of

¹³⁷ Article 1 of the 1993 Colombia-Jamaica Treaty.
¹³⁸ Article 3.1.a) of the 1993 Colombia-Jamaica Treaty.
¹³⁹ Article 3.1.b) and c) of the 1993 Colombia-Jamaica Treaty.
¹⁴⁰ Article 3.2 of the 1993 Colombia-Jamaica Treaty.

measures and the carrying out of activities provided for in the Treaty.¹⁴¹

4.186. Article 3.5 of the Treaty establishes a simple procedure for settling disputes over the breach of the Treaty's provisions or the measures adopted for their implementation by the nationals or vessels of either Party in the Joint Regime Area.

4.187. Pursuant to the Treaty, Colombia and Jamaica have carried out and continue to carry out activities for evaluating the fishing potential and that of hydrocarbon exploration and exploitation in the area.

4.188. Nicaragua has never protested the 1993 Delimitation Treaty.

F. Conclusion

4.189. As this Chapter demonstrates, there has been a comprehensive pattern of recognition of Colombian sovereignty over the cays – a pattern which extends temporally throughout the 19th and 20th centuries until the present day and geographically to all the cays. It is a pattern in which the United States and Great Britain were involved, as well as other States neighbouring the Archipelago – Panama, Costa Rica, Honduras,

¹⁴¹ Articles 3.4 and 4 of the 1993 Colombia-Jamaica Treaty.

Jamaica. It is a pattern in which Nicaragua itself has joined, even before the 1928/1930 Treaty – notably in its unequivocal response to the Loubet Award. Any disagreements were related to specific cays – Roncador, Quitasueño and Serrana (the United States), Serranilla (Honduras) – and were resolved in favour of Colombia in every case.¹⁴² It is significant that prior to 1972, when the Vázquez-Saccio Treaty was concluded between Colombia and the United States, there was never any Nicaraguan claim to any specific cays, along the lines of the claims – subsequently withdrawn – of the United States and Honduras. That is a vital element underlying the 1928/1930 Treaty, which resolved the only claim made by Nicaragua, a claim to the Archipelago as a whole.

¹⁴² The only matter unresolved concerned the status of Quitasueño as an island or low tide elevation; even so the United States expressly recognized Colombia's jurisdiction in the waters around Quitasueño.

Chapter 5

THE 1928 TREATY AND 1930 PROTOCOL

A. Nicaragua's Claim of 1913 and the Ensuing Negotiations

(1) EMERGENCE OF THE DISPUTE OVER THE SAN ANDRÉS ARCHIPELAGO IN 1913

5.1. On 8 February 1913, Nicaragua signed a treaty with the United States (known as the Chamorro-Weitzel Treaty) granting the United States the right to build an inter-oceanic canal through Nicaraguan territory.¹ In the same treaty, Nicaragua granted to the United States a 99-year lease of the Islas Mangles (Corn Islands), which belonged to Colombia but which had been occupied by Nicaragua in 1890. The Chamorro-Weitzel Treaty was not approved by the United States Senate. In the following year, the two countries signed a new agreement, the Chamorro-Bryan Treaty, containing much the same terms. Colombia protested to Nicaragua on 9 August 1913² and to the United States on 6 February 1916.³

¹ C.L. Wiktor (ed), *Unperfected Treaties of the United States of America, 1776-1976, Vol. IV* (New York, Oceana Publications, 1979), 237.

² CPO, Vol. II, Annex 4: Diplomatic Note of 9 August 1913, addressed to Nicaragua's Foreign Affairs Minister by Colombia's Foreign Affairs Minister.

³ El Salvador and Costa Rica also protested against this Treaty. Separate cases were brought by those States against Nicaragua before the Central American Court of Justice: see *Costa Rica v. Nicaragua*, Judgment of 30 September 1916, (1917) 11 *AJIL* 181; *El Salvador v. Nicaragua*, Judgment of 9 March 1917, (1917) 11 *AJIL* 674. Nicaragua's refusal to comply with the decisions of the Court precipitated its collapse.

5.2. It was only on 24 December 1913 that Nicaragua, for the first time, asserted claims over the Archipelago of San Andrés.⁴ This compounded the existing dispute over the Islas Mangles (Corn Islands) and the Mosquito Coast.

(2) NEGOTIATIONS BETWEEN THE PARTIES

5.3. There followed an extended diplomatic exchange between the two countries.

5.4. In April 1922, the Nicaraguan Government expressed to Manuel Esguerra, the Colombian Ambassador to the Central American States, its willingness to settle the dispute by direct negotiations. The Government of Colombia, through Esguerra, suggested a possible formula: Colombia would renounce its rights over the Mosquito Coast and the Islas Mangles (Corn Islands) in exchange for Nicaragua's renouncing any claim whatsoever over the Archipelago of San Andrés including all of its islands, islets and cays:

“With the purpose of stating the genuine meaning and true scope of that proposal, I deem it convenient to lay down in this note the terms in which it was formulated, to wit:

The Republic of Colombia would renounce the rights of dominion and sovereignty it has held and

⁴ Annex 36: Diplomatic Note from the Nicaraguan Foreign Minister to the Colombian Foreign Minister, 24 December 1913.

holds over the Mosquito Coast, comprised between the San Juan River and Cape Gracias a Dios, and over the Islas Mangles, and the Republic of Nicaragua would in turn renounce the rights it believes it holds over the Islands of San Andrés, Providencia, Santa Catalina and the other Islands, Islets and Cays of the Archipelago.

This proposal entails the utmost renunciations and concessions that Colombia would make, in its wish to see its differences with the cultured and appreciated Nicaraguan Nation ended, and compelled by the spirit of hemispheric brotherhood...”⁵

5.5. In March 1925, the endorsement of the Foreign Affairs Advisory Commission of Colombia having been obtained, Esguerra presented a draft treaty to Nicaragua, thus formalizing the earlier proposal.⁶

5.6. According to the draft treaty, Nicaragua would renounce “in a definitive and absolute manner” the rights it asserted over “the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays of the Archipelago of San Andrés and Providencia”. In turn, Colombia would do the same with regard to its rights over the Mosquito Coast, laying between the Cape Gracias a Dios and the San Juan River, as well as to “the islands called Great Corn Island and Little Corn Island, or

⁵ Annex 42: Diplomatic Note N° 72 from the Colombian Minister in Managua to the Nicaraguan Foreign Minister, 10 December 1923.

⁶ Annex 45: Diplomatic Note N° 232 with enclosure (draft treaty), from the Colombian Minister in Managua to the Nicaraguan Foreign Minister, 18 March 1925.

Mangle Islands”.⁷ The terms of this proposal are substantially the same as those which were to be incorporated into the 1928 Treaty signed between the parties.

5.7. The Nicaraguan Minister replied to Esguerra’s Note,⁸ noting that “... had the political events which have precipitated within these last few days allowed it, it is very likely that this important matter would have been solved under equitable and cordial terms”. But the civil war that broke out in Nicaragua at the time led to a suspension of negotiations, and to Esguerra’s departure.

5.8. In mid-1927 the Nicaraguan Government expressed its willingness to resume the negotiations in order to settle the controversy. In the course of the negotiations, in a Note dated 20 November 1927, the Colombian Minister summarized his dealings on the matter with the Nicaraguan Foreign Ministry, expressly referring to the Archipelago’s features as follows:

“...this Archipelago is formed by the islands of San Andrés, Providencia, Santa Catalina, Great Corn Island and Little Corn Island, and the cays of Alburquerque, Cowton [Courtown], Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo and Morrison.”⁹

⁷ Annex 45, enclosure.

⁸ Annex 46: Diplomatic Note N° 157 from the Nicaraguan Foreign Minister to the Colombian Minister in Managua, 28 March 1925.

⁹ Annex 112: Note N° 530 from the Colombian Minister in Managua to the Colombian Minister in Washington, 20 November 1927.

This was Colombia's understanding when signing and approving the 1928 Treaty. There is no evidence that the Nicaraguan understanding was any different.

5.9. In its written pleadings on the Preliminary Objections, Nicaragua referred to the work of the 1930 Hague Codification Conference,¹⁰ arguing that the features it now claims do not constitute a single archipelago in legal terms. But the Codification Conference at The Hague had not even been convened when the parties concluded the 1928 Treaty and settled the question of sovereignty over the Archipelago of San Andrés; the work of the Conference had not even started when the Parties reached agreement on the 82°W meridian.

5.10. Moreover Nicaragua implies that the 1930 Conference made a decision (adverse to Colombia's case) on the definition of "archipelago". This is not true. In fact, due to the failure to reach agreement on the breadth of the territorial sea, Basis N° 13, dealing with groups of islands,¹¹ was never decided on, nor even discussed by the Second Committee.¹² True, the United States representative suggested that "we have decided, tentatively, at least, that it takes three islands to make a group without ever approaching the question whether a group is always

¹⁰ NWS, p. 25, para. 1.31.

¹¹ League of Nations, *Acts of the Conference for the Codification of International Law, Vol. III, Minutes of the Second Committee: Territorial Waters*, 180. (Hereafter, *Acts of the Conference*)

¹² The passage cited by Nicaragua comes from the Observations of the Sub-Committee: *ibid*, 219.

or only sometimes an archipelago”.¹³ But the Report adopted by the Committee noted: “The Questions which [the Sub-Committee] had to examine are so closely connected with the breadth of the territorial sea that the absence of an agreement on that matter prevented the Committee from taking even a provisional decision on the articles drawn up by that Sub-Committee”.¹⁴ On the issue of groups of islands “the idea of drafting a definite text on the subject had to be abandoned” by the Sub-Committee:¹⁵ there was nothing even for the Committee to decline to consider.

5.11. At relevant times the concept of “archipelago” was consistent with the definition in the different editions of the Dictionary published by Spain’s Royal Academy of the Spanish Language (*Real Academia Española de la Lengua*). The most authoritative source for all queries regarding the language, the Dictionary stated that an “archipelago” was a “*Part of the sea sprinkled with islands*”. The 13th edition¹⁶ in 1899, the 14th edition¹⁷ in 1914, the 15th edition¹⁸ in 1925 and the 16th edition

¹³ 14th Meeting of the Committee, 7 April 1930 in *Acts of the Conference*, 147. There is no record of any discussion about groups of islands in the Committee minutes.

¹⁴ *Acts of the Conference*, 209, 211.

¹⁵ *Acts of the Conference*, Appendix 2, Report of the Second Sub-Committee, *ibid*, 219.

¹⁶ *Diccionario de la Lengua Castellana por la Real Academia Española*. Décimatercia Edición (Madrid, Imprenta de los Sres. Hernando y Compañía, 1899) 86.

¹⁷ *Ibid*, Decimocuarta Edición (Madrid, Imprenta de los Sucesores de Hernando, 1914) 89.

¹⁸ *Ibid*, Décima Quinta Edición (Madrid, Talleres Calpe, 1925) 105.

in 1936 edition¹⁹ of the Dictionary, contain the same non-technical definition.

B. The 1928 Treaty (Esguerra-Bárceñas)

5.12. The Treaty was signed in Managua on 24 March 1928;²⁰ the Protocol of Exchange of Ratifications was signed on 5 May 1930. The 1928/1930 Treaty settled the controversy by Nicaragua's recognition of Colombia's sovereignty over the San Andrés Archipelago, Colombia's relinquishment of its title to the Islas Mangles (Corn Islands) and the Mosquito coast, and the establishment of the 82°W Meridian as the limit between the two countries. That is precisely the dispute that Nicaragua has sought to reopen before this Court.

5.13. The substantive provisions of the 1928 Treaty, in the authentic Spanish text, are as follows:

“Artículo I

La República de Colombia reconoce la soberanía y pleno dominio de la República de Nicaragua sobre la Costa de Mosquitos comprendida entre el cabo de Gracias a Dios y el río San Juan, y sobre las islas Mangle Grande y Mangle Chico en el Océano Atlántico (Great Corn Island y Little Corn Island); y

¹⁹ *Diccionario de la Lengua Castellana por la Real Academia Española*, Décima Sexta Edición. (Madrid, Talleres Espasa-Calpe, 1936) 110. The 1936 edition contained a third figurative definition, irrelevant for the present purposes, as follows: “Archipiélago. *m.* Parte del mar poblada de islas.|| 2. Por antonomasia, parte del mar Mediterráneo poblada de islas y comprendida entre Asia y Grecia.|| 3. fig. Piélago, 4.ª acep.” (Emphasis added).

²⁰ Annex 1: 1928/1930 Treaty, original in Spanish and English translation provided by Colombia.

la República de Nicaragua reconoce la soberanía y pleno dominio de la República de Colombia sobre las Islas de San Andrés, Providencia, Santa Catalina y todas las demás islas, islotes y cayos que hacen parte de dicho archipiélago de San Andrés.

No se consideran incluidos en este Tratado los cayos Roncador, Quitasueño y Serrana, el dominio de los cuales está en litigio entre Colombia y los Estados Unidos de América.

Artículo II

El presente Tratado será sometido para su validez a los Congresos de ambos Estados, y una vez aprobado por estos, el canje de las ratificaciones se verificará en Managua o Bogotá, dentro del menor término posible.”

- 5.14. The English text is as follows:

“Article I

The Republic of Colombia recognizes the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between the Cape Gracias a Dios and the San Juan River, and over the Mangle Grande and Mangle Chico islands, in the Atlantic Ocean (Great Corn Island and Little Corn Island); and the Republic of Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés.

The Roncador, Quitasueño and Serrana cays are not considered to be included in this Treaty, sovereignty over which is in dispute between Colombia and the United States of America.

Article II

The present Treaty, in order to be valid, shall be submitted to the Congresses of both States, and once approved by them, the exchange of ratifications shall take place at Managua or Bogotá, in the shortest possible term.”

(1) TRANSLATIONS OF THE 1928 TREATY

5.15. The original text of the 1928 Treaty is in Spanish and was thus registered, together with its 1930 Protocol of Exchange of Ratifications, with the League of Nations by Colombia in 1930 and by Nicaragua in 1932.

5.16. The Secretariat of the League prepared, “for information”, translations of the Treaty into English and French, without consulting the Parties. In its *Judgment on Preliminary Objections* of 13 December 2007, the Court used the League of Nations translation, clarifying (with respect, correctly) that it would use the term “cays” instead of “reefs” or “*récifs*” to refer to the text of the first paragraph of Article I, the equivalent term in the authentic Spanish version being “*cayos*”, not “*arrecifes*”.²¹

5.17. Nevertheless, as the Court itself pointed out, “there are certain differences between the original Spanish text of the 1928 Treaty and the French and English translations prepared by the

²¹ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p.11, para. 18.

Secretariat of the League of Nations”.²² One of these differences concerns an aspect of the text to which the Court gave substantial weight in its Judgment of 13 December 2007²³ and must be referred to in more detail.

5.18. The original text of the second paragraph of Article I of the 1928 Treaty reads as follows:

“*No se consideran incluidos en este Tratado los cayos Roncador, Quitasueño y Serrana, el dominio de los cuales está en litigio entre Colombia y los Estados Unidos de América.*” (Emphasis added)

The League’s translation was as follows:

“The present Treaty *does not apply* to the reefs of Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America.”

« Le présent traité *ne s’applique pas* aux récifs de Roncador, Quitasueño et Serrana, dont la possession fait actuellement l’objet d’un litige entre la Colombie et les Etats-Unis d’Amérique. »

(Emphasis added)

5.19. But the translation submitted by Colombia is more accurate:

“The Roncador, Quitasueño and Serrana cays *are not considered to be included* in this Treaty, sovereignty over which is in dispute between

²² *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 11, para. 18.

²³ *Ibid*, p.32, para.104.

Colombia and the United States of America.”
(Emphasis added)

5.20. As shown in Chapter 4, the United States took an interest in the drafting of the second paragraph of Article I of the Treaty, in order to make sure that it took account of the dispute between the United States and Colombia over Roncador, Quitasueño and Serrana. The wording in the translation prepared at the time of the Treaty’s conclusion by the United States Legation in Managua for the Department of State is virtually the same as the one submitted by Colombia. The United States translation read as follows:

“The Keys Roncador, Quitasueño and Serrana, the dominion over which is in dispute between Colombia and the United States of America, *are not considered to be included* in this treaty.”²⁴
(Emphasis added)

5.21. Thus Colombia and the United States, the two countries in dispute, understood it to mean – not that the Treaty did not apply – but that the cays were not considered to be included in the Treaty by reason of the dispute between the two States. The phrase “are not considered to be” is in effect a deeming clause: its subject is the three cays. It implies that, but for the dispute, the three cays would have been considered as included in the Treaty; in other words, that they were included in the phrase “all

²⁴ *Papers Relating to the Foreign Relations of the United States 1928-1* (Washington, Government Printing Office, 1943) 703.

the other islands, islets and cays that form part of the said Archipelago of San Andrés”.

5.22. In this Counter-Memorial, the more accurate translation provided by Colombia will be used.²⁵

(2) THE TEXT OF ARTICLE I OF THE 1928 TREATY

5.23. In the first paragraph of Article I of the 1928 Treaty, Nicaragua recognizes Colombia’s sovereignty over all the islands, islets and cays of the Archipelago, in the following terms:

“...Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés.”

²⁵ Colombia proposes the following translation of Article I into French:
“Article premier:

La République de Colombie reconnaît la souveraineté et le plein *dominium* de la République du Nicaragua sur la côte de Mosquitos, comprise entre le cap de Gracias a Dios et le fleuve San Juan, et sur les îles Mangle Grande et Mangle Chico dans l’océan Atlantique (Great Corn Island et Little Corn Island) ; et la République du Nicaragua reconnaît la souveraineté et le plein *dominium* de la République de Colombie sur les îles de San Andrés, Providencia, Santa Catalina et sur toutes les autres îles, îlots et cayes qui font partie de l’archipel de San Andrés. Ne sont pas considérés comme inclus dans le présent Traité les cayes Roncador, Quitasueño et Serrana dont le *dominium* fait l’objet d’un litige entre la Colombie et les Etats-Unis d’Amérique.”

5.24. As shown in Chapter 2, the cays of Roncador, Quitasueño, Serrana, as well as Serranilla, Bajo Nuevo, Alburquerque and East-Southeast, have always been considered part of the Archipelago of San Andrés and have been administered as such. The Parties did not deem it necessary to mention the Archipelago's components one by one in the 1928 Treaty, but rather resorted to the formula that was traditionally used to define it, as reflected in the text of the first paragraph of the Treaty.

5.25. The second paragraph of Article I of the 1928 Treaty states that three of the cays were not considered to be included the Treaty since they were in dispute between Colombia and the United States:

“The Roncador, Quitasueño and Serrana cays are not considered to be included in this Treaty, sovereignty over which is in dispute between Colombia and the United States of America.”

5.26. Evidently, the matter of sovereignty over those cays – over which a dispute existed between Colombia and the United States – could not be settled in the context of an arrangement between Colombia and Nicaragua. In this context it must be stressed that before 1928 Nicaragua had never made any specific claim to the three cays: its belated claim of 1913 (which the Treaty settled) was to the Archipelago as a whole.

5.27. Nicaragua argues that the second paragraph of Article I means that the three cays do not form part of the San Andrés Archipelago.²⁶ On the contrary, the provision is only explicable on the basis that they *are* part of the Archipelago. Given that the Nicaraguan claim to the Archipelago as a whole was what the Parties were resolving in favour of Colombia, there was no reason to include a provision regarding the three cays if they were not part of the Archipelago.

5.28. The second paragraph of Article I of the 1928/1930 Treaty implies that Nicaragua accepted that the cays of Roncador, Quitasueño and Serrana form part of the San Andrés Archipelago and that it lacked any rights whatsoever over them.

5.29. The scope of the dispute pending between Colombia and Nicaragua was established by the Parties themselves in the 1930 Protocol, when they stipulated that the Treaty had been concluded “to put an end to the question pending between both Republics, concerning the San Andrés and Providencia Archipelago and the Nicaraguan Mosquitia”. The significance of this was noted by the Court in its Judgment of 13 December 2007.²⁷ It was the purpose of the second paragraph of Article I of the 1928/1930 Treaty to reserve an existing dispute between the United States and Colombia over three of the Archipelago’s

²⁶ NWS, Introduction, p.3, para. 6; p. 26, para. 1.35, pp. 28-32, paras.1.41-1.45.

²⁷ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, p.35, para. 117.

cays – not to create a new dispute between Nicaragua and Colombia.

5.30. If Nicaragua had thought that it held any specific rights over the three cays, it would have sought to refer to that claim: the second paragraph of Article I would then have referred to a trilateral dispute, not a bilateral one. But there was no such mention because there was no such claim. And indeed, for nearly four decades after the Treaty's entry into force, Nicaragua never purported to claim any rights over the three cays.

(3) THE GOVERNMENT AND CONGRESS OF NICARAGUA WERE
OFFICIALLY NOTIFIED OF THE OLAYA-KELLOGG AGREEMENT
PRIOR TO THE APPROVAL OF THE 1928 TREATY

5.31. Less than one month after the signature of the 1928 Treaty, Colombia and the United States exchanged notes establishing a special regime for Roncador, Quitasueño and Serrana. The terms of the Olaya-Kellogg Agreement of 10 April 1928, which entered into force on the date of its signature, had been communicated by Colombia to the Nicaraguan Foreign Minister and Congress over a year before the 1928 Treaty was considered and approved by the Nicaraguan Congress. The Colombian Note of 3 January 1929 read as follows:

“I believe it to be pertinent to inform Your Excellency that the Cays of Roncador, Quitasueño and Serrana having been excluded from the Treaty of 24 March due to their being in dispute between Colombia and the United States, the Government of

the latter, recognizing Colombia as owner and sovereign of the Archipelago, of which those cays are part, concluded with the Government of Colombia, last April, an agreement that put an end to the dispute, according to which the status quo on the matter is preserved, and consequently, the Government of Colombia will refrain from objecting to the maintenance by the Government of the United States of the services which it has established or may establish on said cays, to aid navigation, and the Government of the United States will refrain from objecting to the utilization by Colombian nationals of the waters appurtenant to the cays for purposes of fishing.”²⁸

5.32. As appears from the Colombian Note:

- The reason for the exclusion of the three cays from the Treaty of 24 March 1928 was that they were in dispute between Colombia and the United States, not because they were not part of the Archipelago or because some (as yet unasserted) Nicaraguan right might exist over them.
- The cays of Roncador, Quitasueño and Serrana were part of the Archipelago of San Andrés.
- The arrangements made in the 1928 Olaya-Kellogg Agreement were exclusive to the parties: the United States would continue to maintain the navigational

²⁸ Annex 49: Diplomatic Note from the Colombian Minister in Managua to the Nicaraguan Foreign Minister, 3 January 1929. Transcribed in the Record of session XXIV of the Chamber of the Senate of the Nicaraguan Congress, 21 January 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., N° 35, 11 February 1930, p. 273.

aids it had established; Colombian (not Nicaraguan) nationals would continue to use the waters around the three cays for fishing.

5.33. It should be pointed out that, the Colombian Note expressly mentioned the fact that they were part of the Archipelago of San Andrés:

“...the Cays of Roncador, Quitasueño and Serrana having been excluded from the Treaty of 24 March due to their being in dispute between Colombia and the United States, the Government of the latter, recognizing Colombia as owner and sovereign of the Archipelago, of which those cays are part, concluded with the Government of Colombia, last April, an agreement...”

As shown below, neither the Nicaraguan Government nor Congress advanced the slightest objection or comment in that regard.

5.34. The Colombian Note requested the Nicaraguan Foreign Minister to transmit the information about the 1928 Olaya-Kellogg Agreement to the Nicaraguan Congress where the Esguerra-Bárcenas Treaty had been under consideration since 19 December 1928.

5.35. The Nicaraguan Foreign Minister duly transmitted the note to the Chamber of the Senate of the Nicaraguan Congress, in the following terms:

“The approval of the Treaty of Limits between Nicaragua and Colombia of 24 December [*sic*] 1928 being pending, I am pleased to transcribe to You, the note dated 3 January 1929, sent to this office by H.E. Mr. Minister of Colombia:...”²⁹

The text of the Colombian note followed.

5.36. During the plenary session of the Nicaraguan Senate held on 21 January 1930, the note of the Nicaraguan Foreign Minister conveying the Colombian note was read out. The Senate decided to transmit it, without any comment, to the Foreign Affairs Commission that was “studying the Treaty of limits between Nicaragua and Colombia”.³⁰ The 1928 Treaty was subsequently approved by both chambers of the Nicaraguan Congress, and ratified by Nicaragua, again without any further comment on this point.

5.37. In the years between 1928 and 1972, Nicaragua did not advance any protest or objection in connection with the Olaya-Kellogg Agreement or its uninterrupted application by Colombia and the United States. In its *Memorial* Nicaragua recognizes that the 1928 Olaya-Kellogg Agreement “confirmed the *status quo*... [w]ithout settling the claims by both parties”, meaning Colombia and the United States.³¹ That dispute over the three cays was evidently one between Colombia and the United

²⁹ See Annex 49.

³⁰ *Ibid.*

³¹ NM, p. 128, para. 2.149.

States, in no way involving Nicaragua. It was only in 1971, when Colombia and the United States began to discuss a way to terminate the regime established in the 1928 Olaya-Kellogg Agreement, that Nicaragua advanced a claim over these cays. With the conclusion of the 1972 Vázquez-Saccio Treaty, Colombia and the United States put an end to that regime and definitively settled a dispute to which Nicaragua was entirely alien.

5.38. To summarize, it is inconceivable that, had Nicaragua considered it had any right to the features over which a special regime had been agreed between Colombia and the United States, it would have refrained from voicing any opposition to that effect, either when it took action in order to approve the 1928 Treaty, or when it ratified it. This is all the more so, since that regime, apart from having been timely notified to the Government and Congress of Nicaragua, had been in full force and complied with by both countries for well over two years.

(4) THE COLOMBIAN CONGRESS APPROVES THE 1928 TREATY

5.39. In Colombia, in accordance with the Constitution, the President ordered the Esguerra-Bárcenas Treaty to be submitted to Congress for its approval. In its transmittal to Congress, the Minister of Foreign Affairs noted that “the settlement in question comes to dispel any motive of divergence between the

two countries”.³² The Government also pointed out that the Treaty confirmed Colombia’s sovereignty over the Archipelago and thus prevented any future claim by Nicaragua and any future controversy.³³

5.40. In his annual address at the start of the ordinary sessions of 1928, the President of the Republic informed Congress of the conclusion of both the Esguerra-Bárcenas Treaty and the Olaya-Kellogg Agreement. He stated that:

“With these two arrangements, Colombia’s situation in the Archipelago of San Andrés is thus defined, and its sovereignty and ownership of the islands [are] explicitly and perpetually recognized.”³⁴

5.41. For his part, the Colombian Minister of Foreign Affairs, in his 1928 Report to Congress, transcribed the text of the Olaya-Kellogg Agreement with the United States, stating that with that instrument the definition of Colombia’s situation was finalized:

“...the aforesaid agreement culminates the definition of our situation in the Archipelago, since it

³² *Anales del Senado, Sesiones Ordinarias de 1928* [Annals of the Senate, Ordinary Sessions of 1928], N° 114, Bogotá, 20 September 1928, p. 713.

³³ “This arrangement forever consolidates the Republic’s situation in the Archipelago of San Andrés and Providencia, erasing any pretension to the contrary, and perpetually recognizing the sovereignty and right of full domain for our country over that important section of the Republic.” *Anales del Senado, Sesiones Ordinarias de 1928* [Annals of the Senate, Ordinary Sessions of 1928], N° 114, Bogotá, 20 September 1928, p. 713.

³⁴ Annex 113: Annual Address by the President of the Republic of Colombia at the Start of the 1928 Ordinary Sessions of Congress. *Diario Oficial*, Bogotá, 4 September 1928, N° 20.885.

‘perpetually’ enshrines the right of our nationals to continue to exploit the waters adjacent to [the cays]...’³⁵

5.42. Both the Colombian Government and Congress consistently acted on the basis that the cays of Roncador, Quitasueño and Serrana were part of the Archipelago of San Andrés and that Nicaragua lacked any right over them.

C. The 1930 Protocol

(1) THE 82°W MERIDIAN LIMIT

5.43. In the 1928 Treaty Colombia recognized Nicaragua’s sovereignty over the Mosquito Coast and the Islas Mangles (Corn Islands); the latter had previously been considered as part of the Archipelago of San Andrés. However, there were many small islets, cays and banks, not expressly mentioned in the Treaty, located to the east of the Mosquito Coast and to the north-east of the Islas Mangles (Corn Islands). Among them was the numerous group of cays and banks called the Miskito Cays.

5.44. After a thorough study carried out by the Commission on Foreign Affairs of the Nicaraguan Senate and the Foreign Minister and his advisors, fears were expressed that Colombia could still claim those features as part of the San Andrés

³⁵ Annex 114: 1928 Report to Congress by the Colombian Foreign Minister.

Archipelago. Thus Nicaraguan officials concluded that an express limit to the Archipelago should be stipulated in the Treaty.³⁶

5.45. During the debates in the Nicaraguan Congress, reference was repeatedly made to the need to establish a “geographical limit”, a “limit between the archipelagos”, a “dividing line of the waters in dispute”, a “boundary in the dispute”.³⁷

5.46. In its *Memorial*,³⁸ Nicaragua affirms its interest in 1928 in protecting the Miskito cays – adjacent to the Nicaraguan coast and not mentioned expressly in the Treaty – from a future claim by Colombia, by fixing the limit of the 82°W meridian. The reason for the meridian’s inclusion, at Nicaragua’s request, was explained in 1930 by the acting Minister for Foreign Affairs of Nicaragua to the United States’ diplomatic representative at Managua, as follows:

“The Acting Minister for Foreign Affairs told me that there were a large number of small and unimportant islands and cays within a short distance of the east coast of Nicaragua and the proposed interpretation or clarification of the treaty was to insure that the ownership of those islands would not

³⁶ Annex 199: Record of the XLIX session of the Chamber of the Senate of the Nicaraguan Congress, 5 March 1930.

³⁷ *Ibid.*

³⁸ NM, p.176, para. 2.251.

at a later date become the subject of another controversy between Nicaragua and Colombia.”³⁹

5.47. It is significant that, to the east, the Miskito Cays face not the islands of San Andrés or Providencia but rather Quitasueño and Serrana, which are located at approximately the same latitude. If the Nicaraguan authorities at the time could conceive that the Miskito cays were part of the San Andrés Archipelago, regardless of their distance from the main islands, the same must apply *a fortiori* to Quitasueño, Roncador and Serrana. Nicaragua’s demand to include the 82°W meridian as a limit in the Treaty implied that it lacked any rights, not only over the cays of Roncador, Quitasueño and Serrana, but also over Serranilla, Bajo Nuevo, Albuquerque and East-Southeast, all located between 9 and 199 miles to the east of that meridian and also (except for Albuquerque) to the east of San Andrés, Providencia and Santa Catalina.

(2) NEGOTIATIONS WITH COLOMBIA ON THE 82°W MERIDIAN
LIMIT

5.48. Consequently the Nicaraguan Foreign Minister and the members of the Senate’s Study Commission asked, through the Colombian Minister at Managua, whether a change to the Treaty text would be acceptable.⁴⁰ Significantly, when the Colombian

³⁹ Annex 197: Note N° 1316 from the United States Chargé d’Affaires *a.i.* at Managua, to the Secretary of State of the United States, 11 February 1930.

⁴⁰ CPO, pp. 43-47, paras. 1.61, 1.63. See also Annex 199, Vol. II-A of this Counter-Memorial.

envoy requested instructions from Bogotá, he took care in pointing out his own understanding of the effects that the eventual reference to the 82°W meridian would have on the import of the bilateral arrangement under discussion:

“...[R]eport Senate’s Commission... ends by requesting the approval of the treaty with the clarification that the western limit of the Archipelago shall be the 82 Greenwich meridian. According to sketch given to me by Longitudes’ Office Bogotá *all the islands and cays forming the Archipelago* are located to the east of that meridian, that is, within the *extension* over which Nicaragua recognizes Colombia sovereignty...”⁴¹ (emphasis added)

5.49. The Colombian Government stated that although it was willing to accept the limit of the 82°W meridian, its inclusion in the text of the Treaty – already approved by the Colombian Congress – would require a new legislative approval process.⁴² It proposed instead that the limit be adopted by an exchange of notes, and that this fact be recorded in the Protocol of Exchange of Ratifications of the 1928 Treaty. The Nicaraguan Foreign Minister and the Chairman of the Senate’s Study Commission wished to include the clause itself in the Protocol of Exchange of Ratifications: a reference to the establishment of the limit would

⁴¹ Cable from the Colombian Minister in Managua to the Colombian Foreign Ministry, 8 February 1930, in Annex 116: Memorandum from the Colombian Foreign Ministry to the Colombian Minister in Managua, in reply to the latter’s cable of 8 February, 1930. 11 February 1930.

⁴² CPO, para. 1.63. See Annex 199.

also be included in the approval decree issued by the Nicaraguan Congress.

5.50. The Colombian Foreign Ministry accepted the formula, but proposed that the limit of the 82°W meridian should be included in the Protocol and that the decree should make reference to a specific map.⁴³ The Parties agreed on the chart published in 1885 by the Hydrographic Office in Washington, which clearly depicted the 82°W meridian.⁴⁴ That chart, with minor modifications in later editions, is still in use.

(3) APPROVAL OF THE TREATY BY THE NICARAGUAN
CONGRESS

i. The Treaty's approval by the Nicaraguan Senate

5.51. The Study Commission of the Nicaraguan Senate delivered its report to the plenary in the session of 4 March 1930 recommending that the Treaty be ratified, with the following addition as agreed with the Colombian Government:

“...understanding that the Archipelago of San Andrés mentioned in the first clause of the Treaty does not extend west of Greenwich meridian 82 of the chart published in October 1885 by the Hydrographic Office of Washington under the authority of the

⁴³ See Annex 116

⁴⁴ Vol.III, Figure 5.1. Chart of the East Coast of Central America, 1885, published in the United States by the Hydrographic Department under the authority of the Secretary of the Navy of the United States of North America.

Secretary of the Navy of the United States of North America.”⁴⁵

5.52. During the debate, the Chairman of the Commission reported that the Colombian Minister had conveyed his Government’s acceptance of the addition concerning the proposed delimitation:

“... His Excellency the Minister of Colombia [in Managua], Mr. Esguerra having declared to me in my capacity as Senator of the Republic, that his Government was willing to accept the agreed delimitation, he had asked for the Minister of [Foreign] Affairs to be called in order to learn whether our Ministry of Foreign Affairs is officially aware of that decision of the Colombian Government regarding the clarification or demarcation of the dividing line of the waters in dispute; as he understands that such demarcation is indispensable for the question to be at once terminated for ever...”⁴⁶

5.53. Subsequently, the Foreign Minister informed the Senate of the negotiations with the Colombian Minister at Managua and reported how the agreement on the 82°W meridian had been reached:

“The Minister replied: ... that during an interview at the Ministry of Foreign Affairs with the Honorable Senate Commission on Foreign Affairs, it was agreed between the Commission and the advisors of

⁴⁵ Annex 198: Record of the XLVIII session of the Chamber of the Senate of the Nicaraguan Congress, 4 March 1930.

⁴⁶ See Annex 199.

the Government to accept the 82° West Greenwich meridian and of the Hydrographic Commission of the Ministry of the Navy of the United States of 1885, *as the boundary* in this dispute with Colombia...”⁴⁷

He added that in the course of those negotiations, he had been told by the Colombian Minister that his Government saw no need to resubmit the Treaty to Congress by reason of the clarification of the dividing line:

“...his government had authorized him to declare that such Treaty would not be submitted for the approval of the Colombian Congress, by reason of the clarification which marked the *dividing line*, that he could therefore, even though there was nothing in writing, assure the Honorable Chamber, on behalf of the Government, that the Treaty would be approved without the need for it to be submitted again for the approval of the [Colombian] Congress.”⁴⁸

5.54. The Foreign Minister went on to explain the purpose of the addition, reiterating the purpose the “limit” of the 82°W meridian would fulfill:

“The Minister added that the clarification did not revise the Treaty, as its only purpose was to establish a boundary between the archipelagos which had been the reason for the dispute...”⁴⁹

He added:

⁴⁷ See Annex 199.
⁴⁸ *Ibid.*
⁴⁹ *Ibid.*

“...that this clarification was a need for the future of both nations, as it came to establish the geographical boundary between the archipelagos in dispute, without which the question would not be completely defined.”⁵⁰

ii. The Treaty’s approval in the Nicaraguan Chamber of Deputies

5.55. After a lengthy debate, the Chamber of Deputies approved the Treaty on 3 April 1930, by 25 votes to 13.⁵¹ The resulting Congressional decree stated:

“Single [Article]—The Treaty concluded between Nicaragua and the Republic of Colombia on 24 March 1928, that was approved by the Executive Branch on the 27th of the same month and year, is hereby ratified; the Treaty puts an end to the question pending between both Republics regarding the Archipelago of San Andrés and the Nicaraguan Mosquitia; understanding that the Archipelago of San Andrés mentioned in the first clause of the Treaty, does not extend to the west of Greenwich Meridian 82, of the chart published in October 1885 by the Hydrographic Office of Washington, under the authority of the Secretary of the Navy of the United States.

This decree shall be included in the Instrument of Ratification.”⁵²

5.56. It is evident that both States regarded the 82°W meridian as the limit to their respective jurisdictions. As shown

⁵⁰ See Annex 199.
⁵¹ CPO, Annex 9, at p. 66.
⁵² CPO, Annex 10, at p. 71.

in Chapter 2,⁵³ in 1920 the Colombian Government published an official map depicting the islands, cays and banks of the Archipelago of San Andrés, including the Mangle Islands (at the time still regarded by Colombia as part of the Archipelago). In 1931, shortly after the entry into force of the 1928/1930 Treaty, a new edition of the official map of 1920 was published, this time with the depiction of the 82°W meridian limit that had just been agreed to by both states. In the 1931 map,⁵⁴ the *Islas Mangles* (Corn Islands) – recognized as Nicaraguan by Colombia in the Treaty – are depicted within Nicaragua’s jurisdiction to the west of the 82°W limit. Until 1969, Nicaragua never claimed any territory or maritime areas to the east of that meridian, and it was only in 1972 that it first attempted to assert its purported rights over three of the Archipelago’s cays.

5.57. During the debates in the Nicaraguan Congress, not a single question arose with regard to the clause dealing with the cays. No deputy suggested that Nicaragua would retain any claim to any feature to the east of the 82°W meridian. Nor were any observations or objections voiced with regard to the 1928 Olaya-Kellogg Agreement between Colombia and the United States: as already demonstrated, the Nicaraguan Congress had been officially informed of that Agreement.

⁵³ See paras. 2.80-2.84. See Figure 2.11, Vol. III.

⁵⁴ See Figure 2.12, Vol. III.

5.58. The Nicaraguan Foreign Minister, when reporting to Congress on the exchange of the instruments of ratification of the 1928 Treaty, said:

“On 5 May of the current year [1930]... [we] proceeded to exchange the ratifications of the Treaty of limits concluded with Colombia ... in order to put an end to the question pending between both republics...”⁵⁵

5.59. Thus the 1928 Treaty and the limit established in the 1930 Protocol left no territorial matters pending. Further they were intended to prevent any future differences with regard to the islets, cays and banks located in the area. Consistently with the 1928/1930 Treaty, neither State could claim insular territory on the “other” side of the 82°W meridian: Nicaragua could not do so to the east any more than Colombia could do so to the west. And the practice of the parties conformed with that understanding. For the next four decades the parties treated the 82°W meridian as the limit of their respective jurisdictions, as will be shown in Chapter 9.

D. The Legal Effect of the 1928/1930 Treaty

5.60. In the light of this account it is possible to analyse the legal effect of the 1928/1930 Treaty.

⁵⁵ Annex 201: 1930 Report to Congress by the Nicaraguan Foreign Minister, concerning the 1928/1930 Treaty.

- (1) Prior to the Treaty Colombia, on grounds of *uti possidetis juris*, claimed the Mosquito Coast and its off-shore islands, including the Corn Islands, which were regarded as part of the San Andrés Archipelago.
- (2) A complex dispute had broken out at different times with Nicaragua: as to the Mosquito Coast in the mid-19th century; as to the Corn Islands, in 1890; as to the whole of the San Andrés Archipelago only in 1913, when Nicaragua first claimed it.
- (3) The object and purpose of the 1928 Treaty was to resolve this dispute in its entirety. It did so by allocating to Nicaragua the Mosquito Coast and the Corn Islands, and to Colombia the islands of the San Andrés Archipelago, including “*all* the other islands, islets and cays that form part of the said Archipelago of San Andrés” (emphasis added).
- (4) But these descriptions were not considered sufficient security by the Nicaraguan Congress. Nicaragua sought a more precise formula for what had been agreed, to prevent the possibility that Colombia could later regard the cays and islets close to the Mosquito Coast as part of the San Andrés Archipelago. This was achieved in 1930 at the time of the exchange of ratifications. By it the parties declared that the Archipelago of San Andrés “does not extend west of the 82 Greenwich meridian”.

- (5) The territorial scope of the dispute resolved by the 1928/1930 Treaty was extensive. It covered the mainland coast and the immediate off-shore islands of Mosquitia, as well as islands far off-shore; it covered islands as far south as Mangle Grande (Great Corn) Island, in the same latitude as Albuquerque Cay, and as far north as Edinburgh Reef, some way north of Quitasueño.
- (6) At the time the Nicaraguan Congress insisted on the 1930 formula, it had been officially informed of the 1928 Olaya-Kellogg Agreement which was already in force. Yet no reference was made at any stage – by any Nicaraguan official or Congressman – to any actual or potential claim by Nicaragua to any islands, islets or cays to the east of the 82°W meridian. In particular no claim was made or reserved to the three cays the use of which was regulated (to the exclusion of Nicaragua) by the 1928 Olaya-Kellogg Agreement.
- (7) It must be stressed again that Nicaragua’s claim prior to 1928 – as also its primary claim before the Court in the present proceedings – was to the whole Archipelago, not to any individual island, islet or cay to the east of 82°W, considered in isolation.

5.61. It follows that – considered in the light of its object and purpose and having regard to the history of the matter – the

1928/1930 Treaty signified not only Nicaragua's abandonment vis-à-vis Colombia of any claim to the Archipelago as such, but the non-existence of any Nicaraguan claim to any island, islet or cay to the east of the 82°W meridian.

E. The 1928/1930 Treaty is in force

5.62. Nicaragua raises one further issue concerning the 1928/1930 Treaty. In addition to invoking the invalidity of the Treaty, Nicaragua contends that it had been terminated on the ground that Colombia's interpretation of the 1930 Protocol "constituted a violation of the Treaty".⁵⁶ Alternatively it seeks a declaration that it is entitled to terminate the Treaty on that ground.⁵⁷

5.63. In its Judgment of 13 December 2007, the Court rejected the Nicaraguan plea of invalidity. For the purposes of the decision on jurisdiction, the Court only needed to determine whether the Treaty was in force at the time of the conclusion of the Pact of Bogotá, that is, in 1948.⁵⁸ The Court felt no need to deal with Nicaragua's allegations concerning an alleged termination of the Treaty due to its material breach by Colombia.⁵⁹ It recalled that until 1980, when Nicaragua

⁵⁶ NM, Introduction, p.9, para. 20.

⁵⁷ NM, p. 266, para. (5).

⁵⁸ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, p. 27, para. 81.

⁵⁹ *Ibid*, p. 27, para. 82.

advanced for the first time its claim of the “nullity and lack of validity” of the Treaty, Nicaragua had treated it “as valid and never contended that it was not bound by the Treaty”.⁶⁰ As the Court noted:

“On the contrary, Nicaragua has, in significant ways, acted as if the 1928 Treaty was valid. Thus, in 1969, when Nicaragua responded to Colombia’s claim that the 82° W meridian, referred to in the 1930 Protocol, constituted, the maritime boundary between the two States, Nicaragua did not invoke the invalidity of the Treaty but argued instead that the 1928 Treaty and the 1930 Protocol did not effect a maritime delimitation. Similarly, in 1971 when Nicaragua made representations to the United States reserving its rights over Roncador, Quitasueño and Serrana, it did not call into question the validity of the 1928 Treaty.”⁶¹

It is true that this passage concerned the issue of invalidity. But it is relevant also to termination. The alleged Colombian “breach” occurred in 1969. For more than a decade subsequently, Nicaragua acted as if the Treaty was valid. At no stage, whether in 1980 or at any other time, did it purport to terminate the Treaty, as distinct from asserting its invalidity *ab initio*.

5.64. The 1928/1930 Treaty is in force. For the sake of completeness, two points may be summarily made.

⁶⁰ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, p. 26, para. 79.

⁶¹ *Ibid.*, pp. 26-27.

(1) COLOMBIA NEVER BREACHED THE TREATY

5.65. In April 2003, for the first time ever, Nicaragua raised the curious argument that Colombia's compliance with the 82°W meridian limit as mentioned in the 1930 Protocol constituted a material breach because it involved "completely shifting" the meaning of the Treaty.⁶² There are several answers to this.

5.66. First, Colombia's position cannot seriously be said not to have been in good faith.⁶³ 1969 was not the first time that Colombia took the 82°W meridian as the limit of the respective maritime jurisdictions of the parties.⁶⁴ This had been its position since the Treaty entered into force; it was also the position taken by Nicaragua until 1969, when for the first time it made a maritime claim to an area east to 82°W. For a State to take in good faith a position on the interpretation of a treaty is not to breach the treaty.

5.67. Secondly, in accordance with Nicaragua's view of the 1930 Protocol, either party was entitled to make claims to maritime jurisdiction irrespective of the 82°W limit. If Colombia had previously refrained from doing so, it was

⁶² NM, pp. 178-181, paras. 2.257-2.263.

⁶³ In the words of Judge *ad hoc* Gaja, "...the adoption by Colombia of a wide interpretation of the scope of the 1928 Treaty as including maritime delimitation, even if incorrect, cannot conceivably constitute a material breach" (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment of 13 December 2007*, Judge *ad hoc* Gaja, *Declaration*, p. 1).

⁶⁴ As asserted by Nicaragua: NM, p. 178, para. 2.255.

because of its sincerely held view of that limit, and did not involve any imposition. This cannot possibly be said to have been a breach of the 1928/1930 Treaty.

5.68. In its pleadings, the Applicant suggested that Colombia “imposed this interpretation through the use of force”.⁶⁵ There is no basis whatever for this accusation. Colombia has acted regularly in its maritime area, notably by combating drug traffic and by taking action to preserve marine living resources. This has taken the form of maritime enforcement measures in accordance with international law.

(2) NICARAGUA NEVER TOOK STEPS TO TERMINATE THE
TREATY

5.69. In any event, Nicaragua only invoked the possibility of the termination of the Treaty in its *Memorial* filed on 28 April 2003, i.e. more than 30 years after the alleged Colombian “material breach”. Article 45 of the Vienna Convention on the Law of Treaties, which can be considered to reflect customary international law, is plainly applicable in the present context – as the Court implied in paragraph 79 of its Judgment of 13 December 2007, quoted above.

5.70. Additionally, in its Judgment of 13 December 2007 on the *Preliminary Objections* submitted by Colombia, the Court

⁶⁵ NWS, Introduction, p. 9, para. 17; pp. 19, para. 1.22 and p. 40, para. 1.65. CR 2007/19, 8 June 2007, p. 12, para. 18 (Argüello).

recalled the well-established rule concerning the permanence of regimes established by territorial treaties, as follows:

“Even if the Court were to find that the 1928 Treaty has been terminated, as claimed by Nicaragua, this would not affect the sovereignty of Colombia over the islands of San Andrés, Providencia and Santa Catalina. The Court recalls that it is a principle of international law that a territorial régime established by treaty “achieves a permanence which the treaty itself does not necessarily enjoy” and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed (*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 37, paras. 72-73).”⁶⁶

This is true not only of San Andrés, Providencia and Santa Catalina; it is true for the Archipelago “over which Colombia has sovereignty” – as the Court also held⁶⁷ – as a whole. It also applies with equal force to the clause concerning the 82°W meridian in the 1930 Protocol.

F. Conclusions

5.71. The following conclusions can be drawn:

- (1) In the 1928 Treaty, Nicaragua recognized the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina “and all the other islands, islets and cays that

⁶⁶ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, p. 29, para. 89.

⁶⁷ *Ibid.*, pp. 30-31, para. 97.

form part of the said Archipelago of San Andrés”. With regard to the Archipelago’s cays of Roncador, Quitasueño and Serrana, Nicaragua recognized that they were in dispute between Colombia and the United States. For its part, Colombia recognized Nicaragua’s sovereignty over the Islas Mangles (Corn Islands) and the Mosquito Coast.

- (2) The Protocol of Exchange of Ratifications, an integral part of the 1928 Treaty, constitutes an agreement whereby Nicaragua recognized that the Archipelago of San Andrés extends until the 82°W meridian, established as a limit.
- (3) By the 1930 Protocol, Nicaragua wished to avoid the possibility that, in the future, the islets, cays or areas located west of the 82°W meridian could be considered as belonging to Colombia, i.e. as “form[ing] part of the said Archipelago of San Andrés”. It is impossible to explain how, if Nicaragua was so careful as to the western limit where Colombia had never claimed any island or cays –other than the Islas Mangles (Corn Islands), specifically mentioned in the Treaty and recognized as Nicaraguan – it chose not to be as careful and mindful of the east, where all the cays it now claims are located.

- (4) The 1928/1930 Treaty precluded Nicaragua from claiming islands, cays or areas to the east of the limit along the 82°W.
- (5) The 1928/1930 Treaty has not been breached by Colombia; and it remains in force.

Chapter 6

THE LACK OF ANY BASIS FOR NICARAGUA'S CLAIM TO THE CAYS

A. Introduction

6.1. Nicaragua's territorial claim is a fabricated one – inconstant, inconsistent with Nicaragua's own conduct over time, contradicted by the documentary record (especially the treaty record) – overall, lacking in substance.

6.2. Nicaragua advances its territorial claim on two grounds: first, on the basis of a rule no longer relevant to this dispute, *uti possidetis juris*; second, on the basis of a non-existent title to territorial sovereignty, namely the presence of islands on a continental shelf supposed *a priori* to belong to the claimant State. In order to invoke these alleged roots of title, Nicaragua is obliged to reject the relevant treaty determining which State has sovereignty over the islands and cays of the San Andrés Archipelago: the 1928/1930 Treaty.

6.3. Not only is Nicaragua unable to advance any kind of title to support its claim; it fails to provide the slightest example of any *effectivités* with regard to any of the cays or to the Archipelago as a whole, either during colonial times or following

independence. This contrasts with the situation of Colombia, as demonstrated in Chapter 3 above.

6.4. This chapter will rebut Nicaragua's claim to territorial sovereignty in so far as it may have survived the Court's Judgement of 13 December 2007. It will be demonstrated that:

- (1) Nicaragua's claim over the Archipelago's cays has changed many times, even after the institution of these proceedings (**Section B**);
- (2) Since the 1928/1930 Treaty is in force, there is no need to reopen the discussion of the *uti possidetis juris*. Consequently Nicaragua's thesis on proximity is irrelevant; it is also wrong in fact and law (**Section C**);
- (3) The 1928/1930 Treaty did not leave unresolved any territorial dispute between the parties: it consequently determined sovereignty over all the cays (**Section D**);
- (4) The purported "Nicaraguan" continental shelf does not determine sovereignty over any of the cays (**Section E**).

B. The Unstable Character of the Nicaraguan Claim

6.5. Nicaragua's claims to the Archipelago or its components have changed many times.

6.6. When Nicaragua for the first time asserted a general claim over the islands of the San Andrés Archipelago in 1913,¹ it did not differentiate among its individual components. It was this claim which was settled in 1930.

6.7. When Nicaragua eventually claimed sovereignty over Quitasueño, Roncador and Serrana in 1972, it did so on the basis that they were located on “its continental shelf”.² As demonstrated already, this claim is incompatible with Nicaragua’s conduct since the signing of the 1928-1930 Treaty, when it acknowledged the existence of a dispute over those three cays between Colombia and the United States but made no claim of its own. Nor did Nicaragua react to the conclusion of the 1928 Olaya-Kellogg Agreement (despite being duly informed of that Agreement by Colombia before ratification of the 1928/1930 Treaty³), or to the Colombian-United States arrangements following the conclusion of the Olaya-Kellogg Agreement, or to the continued display of sovereignty by Colombia over those cays.

¹ Annex 36: Diplomatic Note from the Nicaraguan Foreign Minister to the Colombian Foreign Minister, 24 December 1913.

² Formal Declaration of Sovereignty over “the Banks of Quitasueño, Roncador and Serrana, enclaved in our Continental Shelf and Patrimonial Sea”, Approved by the National Constituent Assembly of Nicaragua, 4 October 1972 (NM, vol. II, Annex 81); Diplomatic Note N. 053 from the Nicaraguan Foreign Minister to the Colombian Foreign Minister, 7 October 1972 (NM, vol. II, Annex 34); Diplomatic Note N. 054 from the Nicaraguan Foreign Minister to the Secretary of State of the United States of America, 7 October 1972 (NM, vol. II, Annex 35).

³ See paras. 5.31-5.38.

6.8. When Nicaragua renewed its claim over the whole Archipelago in 1980, it alleged for the first time the invalidity of the 1928/1930 Treaty. At this stage, it indicated, again for the first time, that it considered Quitasueño, Roncador and Serrana not to form part of the Archipelago.⁴ No mention was made in the Nicaraguan “White Paper” of the other cays that Nicaragua now contends do not form part of the Archipelago.

6.9. When Nicaragua filed its Application in 2001, it added Serranilla as a supposedly separate cay for the first time.⁵ In so doing, it distinguished between two groups of islands and cays: (1) the main islands and “all appurtenant islands and cays” and (2) the cays of Roncador, Serrana, Serranilla and Quitasueño. In relation to the former, Nicaragua acknowledged that the same State having sovereignty over San Andrés, Providencia and Santa Catalina also has sovereignty over *all appurtenant islands and cays*.⁶ There was no mention of Alburquerque, East-South East and Bajo Nuevo as separate cays at all.

6.10. When Nicaragua filed its *Memorial* on 28 April 2003, it separately claimed sovereignty over Alburquerque, East-South

⁴ NM, Vol. II, Annex 73: Ministerio del Exterior. *White Paper (Libro Blanco sobre el caso de San Andrés y Providencia)*, 4 de Febrero 1980.

⁵ *Application instituting proceedings filed in the Registry of the Court on 6 December 2001*, p. 2, para. 2.

⁶ NM, p.126, para. 2.143; NWS, p. 26, para. 1.35 and pp.30-31, para.1.44. See also, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, p. 30, para. 94.

East and Bajo Nuevo for the first time.⁷ In its Written Statement concerning the preliminary exceptions, Nicaragua provided the following explanation:

“The issue of sovereignty over the cays that are not considered part of the San Andrés Archipelago flared up when the negotiations of Colombia and the United States of America over the claim of sovereignty over the cays began in June 1971.”⁸

But – leaving aside this inaccurate rendering of the 1972 Vázquez-Saccio Agreement⁹ – the fact is that during this period (1971-1972) Nicaragua only claimed Quitasueño, Roncador and Serrana. It had made no claim to Serranilla, Bajo Nuevo, Albuquerque and East-South East cays.

6.11. Nicaragua’s changing claim on the Archipelago shows the inconsistent, even contradictory character of such a claim. Indeed it seems not to have been aware, at relevant times, even of the existence of features over which – it now says – it has held sovereignty for nearly 200 years.

C. The *Uti Possidetis Juris* Issue is Foreclosed by the 1928/1930 Treaty

6.12. Nicaragua claims sovereignty over the cays on the basis of an erroneous interpretation of *uti possidetis juris*. In Chapter 3 Colombia explained the situation of the Archipelago before

⁷ NM, Submissions (2), p. 265.

⁸ NWS, Introduction, para. 7.

⁹ See above, paras. 4.52-4.59.

independence as part of the territory of the Viceroyalty of Santa Fe (New Granada).¹⁰ Consequently, according to the *uti possidetis juris*, the Archipelago belonged to Colombia following independence. Nicaragua alleges that the *uti possidetis juris* contains a supposed *renvoi* to the notion of proximity.¹¹ Since, according to Nicaragua, these features are closer to the Nicaraguan than the Colombian mainland, they should be under Nicaragua's sovereignty.¹²

6.13. The only foundation advanced by Nicaragua for what it calls this “presumption” of proximity¹³ is a quotation from Juan de Solórzano, who wrote in the 17th century.¹⁴ This obscure reference is irrelevant to the case before the Court; it is quoted out of context, and it does not support Nicaragua's position.¹⁵

¹⁰ See paras. 3.7-3.14.

¹¹ NM, pp. 142-146, paras. 2.179-2.188.

¹² NM, pp. 145-146, paras. 2.187-2.188.

¹³ NM, p. 142 and ff., sub-section 5.

¹⁴ NM, p.142, para.2.179, footnote 265.

¹⁵ Nicaragua's quotation from Solórzano's text is so selective that the sentence is given an entirely different meaning. Solórzano was comparing two different approaches to the acquisition of territory: first, that “the islands on the seas belong to those that find and occupy them”; second, that authority and jurisdiction over “those places” belong to the one who possesses “ownership over that sea”. Only the second approach is mentioned by Nicaragua. Solórzano then added that “apparently” (“*al parecer*”) the one having ownership over the mainland also has ownership over the sea which is in its vicinity: Nicaragua omitted this passage. Both in the highly selective Nicaraguan version and when read in its proper context, the quotation does not in any way support the Nicaraguan claim. At most, it could explain the Spanish acquisition of sovereignty over islands in the vicinity of coasts under Spanish sovereignty at the time Solórzano wrote; in no way can it explain the administrative situation of the Archipelago within the Spanish Empire at the end of colonial rule in the 19th century. See Juan de Solórzano Pereira, *De Indiarum iure, Liber II: De acquisitione Indiarum (Cap. 1-15)* (Madrid, Ed. and transl. by J.M. García Añoveros et al., 1999) 186-188.

6.14. As for the present case Nicaragua explains its purported *renvoi* to the notion of proximity in the following terms:

“There is no explicit mention of Roncador, Serrana or much less the bank of Quitasueño in the acts of the Spanish Crown. Being at best cays, the application of *uti possidetis iuris* should be understood, as is the case of Serranilla and Bajo Nuevo, in terms of attachment or dependence on the closest continental territory, that of Nicaragua.”¹⁶

This is inaccurate. Nicaragua was not a Caribbean State at the time of its independence. In 1803 the Viceroyalty of Santa Fe (New Granada), gained control over the part of the Mosquito Coast running south from Cape Gracias a Dios by virtue of the Royal Order of that year, as acknowledged by the Court in *Nicaragua v. Honduras*.¹⁷

6.15. The Court has already, in the *Nicaragua v. Honduras* case, had the opportunity to reject the Nicaraguan “proximity” argument. There Nicaragua asserted that, since it was not possible to determine whether the islands in dispute belonged to the province of Honduras or that of Nicaragua during the colonial era, “in view of the geographical proximity of the islands to the Nicaragua coastline, it holds original title over

¹⁶ NM, p. 142, para. 2.179.

¹⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, pp.45-46, para. 161.

them under the principle of adjacency”.¹⁸ In its Judgment of 8 October 2007, the Court noted that “proximity as such is not necessarily determinative of legal title.”¹⁹ Rather what is essential in determining sovereignty over islands in Latin America on the basis of *uti possidetis juris* is the existence of a territorial attribution between the former colonies.²⁰ “Thus in order to apply the principle of *uti possidetis juris* to the islands in dispute it must be shown that the Spanish Crown had allocated them to one or the other of its colonial provinces.”²¹ The Court recalled that the 1803 Royal Order placed the Mosquito Coast within the territory of the Viceroyalty of Santa Fe (New Granada).²² The same Royal Order placed the *Islands* of San Andrés under the jurisdiction of the same Viceroyalty.

6.16. But the essential point is that (regardless of the correct interpretation of *uti possidetis juris*) there is a treaty that settles the issue, the 1928/1930 Treaty. It is well known that the application of the *uti possidetis juris* rule in Latin America was accompanied by numerous territorial disputes. In some cases,

¹⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, p.25, para. 75.

¹⁹ *Ibid*, pp.45-46, para. 161.

²⁰ See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, pp. 558-559, para. 333; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, pp. 44-46, paras. 157-161.

²¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, pp. 44-45, para. 158.

²² *Ibid*, pp.45-46, para. 161.

the boundary areas were totally unexplored and unknown;²³ in others, different interpretations as to the scope of the Spanish administrative decisions were possible.²⁴ Often States put an end to these disputes through agreements.²⁵ Whatever view might have been taken of *uti possidetis juris* became completely irrelevant in such cases. Since States are free to modify their existing boundaries or to adjust their claims through agreement,²⁶ it is the boundary or territorial determination made by treaty that establishes which territory belongs to one party or the other, precluding any further dispute as to what the situation may have been at the time of independence. Thus in the *Beagle Channel* case, the Court of Arbitration considered that it was:

“not part of its task to pronounce on what would have been the rights of the Parties on the basis of the *uti possidetis juris* of 1810 because, in the first place, these rights – whatever they may have been – are supposed to have been overtaken and

²³ *Affaire des frontières colombo-vénézuéliennes* (1928), 1 UNRIAA 228

²⁴ *The Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case decided by a Chamber of this Court in 1992 is but an example (see *I.C.J. Reports 1992*, p. 351).

²⁵ An example is the Treaty of Limits of 23 July 1881 between Argentina and Chile: 159 CTS 45. Many disputes arose between these South American States after the conclusion of that Treaty, but they concerned in all cases the interpretation and application of the Treaty or an arbitral award rendered on the basis of the interpretation and application of the Treaty (see *The Cordillera of the Andes Boundary Case* (Argentina, Chile), 20 November 1902, 9 UNRIAA 29-49; *Argentine-Chile Frontier Case*, 9 December 1966, 16 UNRIAA 109-182; *Dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, 21 UNRIAA 53-264; *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, 21 October 1994, 22 UNRIAA 3-149).

²⁶ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 37, para.73.

transcended by the regime deriving from the 1881 Treaty.”²⁷

6.17. Nicaragua comes to the Court as though there were no binding treaty concluded in solemn form in which Nicaragua recognized Colombian sovereignty over the San Andrés Archipelago and the existence of a dispute between Colombia and the United States over Roncador, Quitasueño and Serrana, and in which Colombia recognized Nicaraguan sovereignty over the Mosquito Coast and the Islas Mangles (Corn Islands), and both parties agreed that the 82°W meridian separated their respective jurisdictions.

6.18. In the diplomatic exchanges prior to 1928, Colombia clearly set out its case that in conformity with the *uti possidetis juris* the whole of the San Andrés Archipelago belonged to the Viceroyalty of Santa Fe (New Granada) at the time of independence and consequently became Colombian territory. Further, Colombia was (incontestably) the only Party to these proceedings to have demonstrated any colonial or post-colonial *effectivités*. The 1928-1930 Treaty put an end to this dispute, both with regard to the Colombian position vis-à-vis the Mosquito Coast and the Islas Mangles (Corn Islands) on the one hand, and with regard to the Nicaraguan position concerning *all* the other islands, islets and cays of the San Andrés Archipelago,

²⁷ *Dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, para. 11, 21 UNRIAA 82.

on the other hand. To reopen that dispute nearly 80 years later cannot be permissible.²⁸

D. The 1928/1930 Treaty Did Not Leave Open any Territorial Dispute between the Parties

6.19. In its *Memorial* Nicaragua claims that at least some of the cays are under its sovereignty because they do not form part of the Archipelago and are therefore not covered by the first paragraph of Article 1 of the 1928/1930 Treaty. So far it has not specified precisely which cays fall into this alleged category, or on what basis the Court should now distinguish between cays all of which (as demonstrated in Chapter 3) have been administered by Colombia to the exclusion of Nicaragua since the independence of both States. But in any event there is a short and simple answer to Nicaragua's argument, which is that the 1928/1930 Treaty resolved the sovereignty dispute with respect to all islands and cays, both to the east and the west of the 82°W meridian.

6.20. In the 1890s, when the very first dispute broke out between the parties as to offshore islands (on the occasion of the forcible occupation by Nicaragua of the Islas Mangles (Corn Islands), Colombia's Foreign Minister Holguín clearly defined

²⁸ M. Esguerra, *La Costa Mosquitia y el Archipiélago de San Andrés y Providencia*, San José, Costa Rica, Imprenta María V. de Lines, 1925, 84 p., Document N° 2 deposited with the Court's Registry

the San Andrés Archipelago.²⁹ Nicaragua did not react. The same year of Minister Holguín's statement, Colombia proposed to Nicaragua to refer the question of the Mosquito Coast to arbitration. Nicaragua considered at that time that there was "no dispute whatsoever between Nicaragua and Colombia" and declined the Colombian offer.³⁰ Even if this exchange concerned the Mosquito Coast, the Nicaraguan Foreign Minister could not, and would not, have remained silent over any other claim to the offshore islands mentioned by Foreign Minister Holguin.

6.21. It is true that Nicaragua extended the existing dispute over the Mosquito Coast and the Islas Mangles (Corn Islands) to the rest of the San Andrés Archipelago in 1913. But the 1928/1930 Treaty definitively resolved this claim. That Treaty constitutes the relevant applicable law to the present case.

6.22. The preamble of the Treaty left no room for doubt. As the Court recalled:

"[i]n the Preamble of the Treaty, Colombia and Nicaragua express their desire to put 'an end to the territorial dispute pending between them.'"³¹

²⁹ Annex 89: 1896 Report to Congress by the Colombian Foreign Minister. See also para. 2.59.

³⁰ Annex 31: Diplomatic Note from the Nicaraguan Foreign Minister to the Colombian Foreign Minister, 14 March 1896.

³¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, p.23, para. 65.

The 1930 Protocol of Exchange of Ratifications similarly specified that the Treaty was concluded “to put an end to the question pending between both Republics concerning the San Andrés and Providencia Archipelago and the Nicaraguan Mosquitia.”³²

6.23. This conclusion is supported not only by the text of the Treaty but also by the process of its negotiation (in particular the addition of the 82°W meridian as a limit in the 1930 Protocol), and by the subsequent statements of both Governments to that effect.³³

6.24. The settlement reached in 1928-1930 was ratified first by Colombia and then by Nicaragua. In both countries ratification followed debates in the national Congresses. These leave no doubt as to the intention of both Parties, particularly of Nicaragua, to bring all disputes to an end.³⁴

6.25. On 22 September 1928, by an editorial included in the official journal of Nicaragua under the title “*Official Opinion on the end of the Dispute with Colombia*”, the Government “deliver[ed] the Treaty to the Nicaraguan public”, publishing the text “so that it may calmly study and discuss it and prepare the

³² Annex 1: Treaty Concerning Territorial Cuestions at issue between Colombia and Nicaragua, Managua, 24 March 1928, with Protocol of Exchange of Ratifications, Managua 5 May 1930 (Esguerra-Bárcenas)

³³ See paras. 5-39-5.52, 5.54-5.55 and 5.58.

³⁴ See paras. 5.51-5.54.

general views that the Sovereign Congress shall find”.³⁵ The Nicaraguan Government’s explanation of the Treaty read in part as follows:

“It was necessary, therefore, to set aside impediments, cleanse our titles, fix our rights, so that when the time comes no foreign protests can again push towards the future that which can be the fruit of this generation. ... Our Government being so motivated, the cooperation that was prudently afforded to us by Washington’s State Department was an important part in facilitating a *definitive* and friendly understanding.”³⁶ (Emphasis added)

At no time was it envisaged that any residual Nicaraguan rights over the cays might have been left pending.

6.26. In granting full powers to the Foreign Minister to exchange the ratification instruments, the Nicaraguan President stated:

“...I indeed hereby confer, full powers to effect the Exchange of ratifications of the treaty concluded between Colombia and Nicaragua, on 24 March 1928, to put an end to the question pending between both Republics concerning the Archipelago of San Andrés and Providencia and the Nicaraguan Mosquitia...”³⁷

³⁵ Annex 196: *Official opinion of the Nicaraguan Government on the end of the dispute with Colombia*, “La Gaceta”, Diario Oficial, Managua, N° 216, 22 September 1928.

³⁶ *Ibid.*

³⁷ Annex 200: Full powers granted by the President of Nicaragua to the Nicaraguan Foreign Minister on 9 April 1930. In C. Moyano, *El Archipiélago de San Andrés y Providencia, Estudio Histórico – Jurídico a la luz de derecho internacional* (Bogotá, Ed. Temis Librería, 1983) 152.

6.27. On 7 May 1930, the Nicaraguan Foreign Minister wrote to the Colombian Minister in Managua, on his departure at the end of his tour of duty, in the following terms:

“My Government is deeply satisfied, Mr. Minister, with the *peaceful and equitable solution of our old territorial dispute with Colombia* – largely due to Your Excellency’s discreet and able actions...”³⁸
(Emphasis added)

6.28. Nicaragua’s claim contradicts the well-known principle of stability and finality of boundaries, equally applicable to treaties determining sovereignty over islands. A failure to apply the 1928/30 Treaty would undermine the stability of territorial arrangements, on which the Court has repeatedly insisted. As the Court stated in a well-known passage of its judgment in the *Temple* case:

“In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality.”³⁹

6.29. Long before, in the *Mosul* advisory opinion, the Permanent Court also interpreted a boundary treaty in the sense of achieving completeness and finality:

³⁸ Annex 50: Diplomatic Note from the Nicaraguan Foreign Minister to the Colombian Minister in Managua, 7 May 1930.

³⁹ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962*, p. 34. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 23-24, paras. 46-48.

“Not only are the terms used (‘lay down’, *fixer*, *déterminer*), only to be explained by an intention to establish a situation which would be definitive, but, furthermore, the very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary line throughout its length.

It often happens that, at the time of signature of a treaty establishing new frontiers, certain portions of these frontiers are not yet determined and that the treaty provides certain measures for their determination... It is, however, natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier.”⁴⁰

6.30. In the present case, not only was the desire of both countries to put an end to their territorial dispute expressly acknowledged in the 1928/1930 Treaty but the parties expressly added another clause, to the effect that Roncador, Quitasueño and Serrana were not considered to be included in the Treaty because their sovereignty was in dispute between Colombia and the United States.⁴¹

6.31. Why, if there were other cays to the east of the 82°W which Nicaragua was entitled to claim, did no Nicaraguan

⁴⁰ Article 3, paragraph 2, of the Treaty of Lausanne (*Frontier between Turkey and Iraq*), Advisory Opinion of 21 November 1925, p. 20, P.C.I.J., Series B, N°12, p. 20.

⁴¹ See *supra*, paras. 5.25-5.30.

authority say so? Why, if there were other cays which Nicaragua was entitled to claim, did the Nicaraguan Congress not seek assurances, or at least reserve Nicaraguan rights in that regard? According to Nicaragua: “[t]he reason that the Nicaraguan Congress had for adding this understanding was that it was afraid that if this issue was not clarified, Colombia might contend in the future that the Archipelago comprehended all islands and cays off the Nicaraguan Atlantic Coast”.⁴² It is apparent that the Nicaraguan Congress did not have in mind any of those cays that Nicaragua claims now.

6.32. Nicaragua repeatedly refers to the fact that Colombia considered the 1928 Treaty to have forever settled all differences⁴³ – it even quotes a statement by Colombia’s Foreign Affairs Minister in 1928.⁴⁴ Nicaragua’s Foreign Minister used exactly the same terms to describe the settlement.⁴⁵ Neither State considered that sovereignty over any of the cays to the east of the 82ndW meridian was left pending.⁴⁶

E. It is not the Continental Shelf that Determines Territorial Sovereignty over the Cays

6.33. The key argument by which Nicaragua claimed Quitasueño, Roncador and Serrana in 1972 and the rest of the

⁴² NWS, Introduction, p. 2, para. 4.

⁴³ NM, pp. 153-154, para. 2.204. NWS, p. 28, para. 1.39; p. 30, para. 1.45; p. 35, para. 1.53; p. 36, para. 1.56; p. 53, paras. 27-28.

⁴⁴ NWS, p. 68, para. 2.43.

⁴⁵ CPO, Vol. II, Annex 8, p. 57, at pp. 58-59.

⁴⁶ *Ibid*, Annex 9, p. 61, at pp. 63-66. Annex 50.

Archipelago in 1980 is that these features are located on the “Nicaraguan” continental shelf and consequently belong to Nicaragua. In the “White Paper” of 4 February 1980, the Nicaraguan Government asserted:

“The Bárcenas Meneses-Esguerra Treaty, in addition to being injurious to Nicaragua, involved the occupation of a great part of our insular territory, such as the islands of San Andrés and Providencia and the surrounding cays and banks, without including Roncador, Quitasueño and Serrana. The injustice is even more evident in as much as all of these islands, islets, cays and banks are an integral and indivisible part of the Continental Shelf of Nicaragua, submerged territory, which is the natural prolongation of the principal territory and by the same, it is unquestionable sovereign territory of Nicaragua”⁴⁷

6.34. In the “Background of the Declaration of Nullity of the Bárcenas Meneses-Esguerra Treaty” (which Nicaragua did not bother to annex), Nicaragua said:

“From within this ‘NICARAGUAN RISE’ emerge a series of islands, islets, cays and banks, the same way mountains, peaks, mountain ranges and volcanoes rise from the continental mass of a State...

Hence, in geographical terms, there is no doubt that all those territories are an integral part of Nicaragua’s Continental Shelf, which is the submarine extension of its main or continental territory, or as it has been already defined, the

⁴⁷ NM, Vol. II, Annex 73: Ministerio del Exterior. *White Paper (Libro Blanco sobre el caso de San Andrés y Providencia)*, 4 de Febrero 1980.

formations we refer to ‘are one with the Central American continental mass, undoubtedly attached – geographically and geomorphologically – to Nicaragua’s Atlantic or Caribbean Coast’.⁴⁸

6.35. This position had been previously advanced by Nicaragua, although only limited to Quitasueño, Roncador and Serrana, in 1972.⁴⁹

6.36. Not only is the assertion that the islands and cays are located on the “Nicaraguan continental shelf” untrue, but the argument contradicts the principle that “the land dominates the sea”, the essential criterion to determine the relationship between territory and maritime spaces in international law. This principle was recalled by the Court in *Nicaragua v. Honduras* as follows:

“On a number of occasions, the Court has emphasized that ‘the land dominates the sea’ (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 51, para. 96; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p. 36, para. 86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 97, para. 185). Accordingly, it is

‘the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In

⁴⁸ Annex 215: Background of the declaration of nullity and invalidity of the Barcenas Meneses-Esguerra Treaty, 4 February 1980.

⁴⁹ See above, para. 4.57.

accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.’ (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I. C.J. Reports 2001*, p. 97, para. 185.).⁵⁰

6.37. Nicaragua’s claim based on the presence of the islands in “its” purported continental shelf is devoid of any legal value. Likewise, its argument denying the Colombian islands forming the San Andrés Archipelago their legal entitlements to a continental shelf and an exclusive economic zone is without legal merit.⁵¹

F. Conclusions

6.38. The present chapter has demonstrated that:

- (1) Nicaragua’s claims have constantly changed. Its claims to Quitasueño, Roncador and Serrana (in 1972), as well as to Serranilla (in 2001), are “paper claims” made more than 50 years after the 1928-1930 Treaty and after 150 years of Colombian exercise of sovereign authority over the cays. Bajo Nuevo was

⁵⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007*, pp.34-35, para. 113.

⁵¹ See para. 7.37.

only included among its territorial claims in 2003. The exact scope of its continuing claims is still unclear.

- (2) Proximity is not a root of title either in itself or in relation to the *uti possidetis juris*.
- (3) The 1928/1930 Treaty is the relevant title for determining sovereignty over the territories. As such, it superseded the *uti possidetis juris*.
- (4) The 1928/1930 Treaty put an end to *all* territorial disputes between the parties. There is no possibility that it left open any further scope for territorial disputes between the parties.
- (5) Nicaragua's assumption that cays situated on its purported continental shelf belong to it is contrary to existing law, case-law and common sense. It is "the land [that] dominates the sea" and not the other way around. It is the islands that generate a continental shelf, and not the continental shelf that generates sovereignty over the islands.

PART THREE

THE MARITIME DELIMITATION

INTRODUCTION TO PART THREE

THE MARITIME DELIMITATION

1. In this Part, Colombia will turn to the issue of maritime delimitation in the light of the Court's decision in its *Judgment on the Preliminary Objections* that it has jurisdiction on the basis of Article XXXI of the Pact of Bogotá to adjudicate upon the dispute concerning the maritime delimitation between the Parties.¹

2. In its Application and *Memorial*, Nicaragua has requested the Court to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining to the two Parties. In particular, Nicaragua claims a single maritime boundary based upon the median line dividing the area where the projections of the mainland coasts of the two States are said by Nicaragua to converge and overlap in accordance with the provisions of the 1982 Law of the Sea Convention and, "in so far as relevant", the principles of general international law.²

3. As a preliminary matter, it is appropriate to address briefly the question of the applicable law. Nicaragua is a party to

¹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, p.43, para. 142 (3)(b).

² NM, p. 198, para. 3.28.

the 1982 Convention which it ratified on 3 May 2000. Colombia signed the Convention in 1982, but has not ratified it and is therefore not a party to it. On the other hand, Colombia is a party to the 1958 Geneva Continental Shelf Convention and Nicaragua is not. Moreover, in 1978 Colombia established a twelve-mile territorial sea, a two-hundred mile exclusive economic zone and sovereign rights over its continental shelf measured from its baselines.³

4. In these circumstances, the applicable law in the present case with respect to maritime delimitation is customary international law as mainly developed by the jurisprudence of the Court and by international arbitral tribunals. While the provisions of the 1982 Convention are not applicable as a source of conventional law per se, the relevant provisions of the Convention dealing with a coastal State's baselines and its entitlement to maritime areas, as well as the provisions of Articles 74 and 83 dealing with the delimitation of the exclusive economic zone and continental shelf respectively, reflect well-established principles of customary international law.

5. In the balance of this Part III, Colombia will deal with the following issues.

6. In Chapter 7, Colombia will address the framework of the

³ Annex 142: Colombian Law No. 10 on Maritime Spaces, 4 August 1978.

delimitation and, in particular, Nicaragua's position that the delimitation to be effected by the Court is essentially a median line between the mainland coasts of the Parties. As Colombia will show, Nicaragua's approach to delimitation is based on a faulty premise due to the fact that the mainland coasts of the Parties lie well over 400 nautical miles from each other, and that Nicaragua's claim line thus falls within an area over which Nicaragua has no legal entitlement to continental shelf or exclusive economic zone rights, let alone a valid claim to a median line boundary.

7. In Chapter 8, Colombia will then examine the proper relevant area for the delimitation to be effected in the case, which is the area lying between the San Andrés Archipelago, on the one hand, and Nicaragua's islands and cays, on the other. This is the area within which the maritime entitlements of the Parties meet and overlap. East of the San Andrés Archipelago both the Archipelago and Colombia's mainland coast generate continental shelf and EEZ rights. In this area, only Colombia has maritime rights. In contrast, Nicaragua has no legal entitlement east of the San Andrés Archipelago, and this area, as a result, falls outside of the area to be delimited.

8. Chapter 8 will also examine the geographic characteristics of the area and a number of other relevant factors bearing on the determination of a boundary. These include the various pre-existing delimitations entered into by Colombia with third States

and the relevance of the 82°W meridian of longitude referred to in the 1928/1930 Treaty as well as in the Court's *Judgment on the Preliminary Objections*.

9. With respect to the presence of third States, it is apparent that, even ignoring the delimitation agreements which such States have concluded with Colombia, there are third State rights existing in areas which Nicaragua claims as part of the relevant area. These areas fall within 200 nautical miles of the territory of both Colombia and third States, but more than 200 miles from the nearest Nicaraguan territory. They therefore do not comprise part of the "relevant area" for purposes of this case. As for the 82°W meridian, even though the Court has stated that the 1928/1930 Treaty did not effected a general delimitation of the maritime spaces between Colombia and Nicaragua, the facts show that, in practice, the Parties consistently treated this meridian as the limit of their jurisdictions for a considerable period of time.

10. In Chapter 9, Colombia will then address the principles and rules of international law relevant to maritime delimitation and their application to the facts of the case. In the light of these considerations, Colombia will identify the relevant basepoints on the Parties' coasts for purposes of constructing the equidistance line and will demonstrate why such a line achieves an equitable result in the light of the relevant circumstances of the case.

CHAPTER 7

THE FRAMEWORK FOR THE DELIMITATION AND THE FLAWED NATURE OF NICARAGUA'S APPROACH TO DELIMITATION

A. Introduction

7.1. This Chapter will address the overall framework for the maritime delimitation, including the flawed character of Nicaragua's delimitation claim line as well as the legally untenable basis underlying Nicaragua's approach to delimitation as a whole.

7.2. In Chapter III of the Nicaraguan *Memorial*, Nicaragua takes the position that the delimitation falls to be effected by means of a single maritime boundary between the mainland coasts of the Parties.¹ According to Nicaragua, and as illustrated on Figure I to the Nicaraguan *Memorial*, the "Delimitation Area" comprises the entire area between the mainland coasts of Nicaragua and Colombia. Basing itself on the notion of an "equal division" of this area, Nicaragua advances a mainland-to-mainland median line as its claim line.

7.3. Under Nicaragua's thesis, as sustained in its *Memorial*, this line is unaffected by the presence of the various islands and

¹ NM, p.238, para. 3.96.

cays lying in the middle of the sea regardless of which Party possesses sovereignty over them. Nicaragua asserts that if sovereignty over the disputed islands lies with Nicaragua, the principle of equal division still applies, “and the sovereignty of Nicaragua would not have any effect on the delimitation between the mainlands of Nicaragua and Colombia”.² If sovereignty over the islands lies with Colombia, then Nicaragua argues that the islands of San Andrés and Providencia should be enclaved by being “accorded a territorial sea entitlement of twelve nautical miles”.³ As for the other islands at issue in the case, Nicaragua’s position is even more extreme: in the event they are found to be Colombian – as Colombia has shown to be the case in Part Two of this Counter-Memorial – Nicaragua requests the Court “to delimit a maritime boundary by drawing a 3 nautical mile enclave around each individual cay”.⁴ In either case, Nicaragua submits that the mainland-to-mainland median line remains intact and that it achieves an equitable delimitation.

7.4. The fundamental defect in Nicaragua’s methodology is readily apparent. Reduced to its essentials, Nicaragua advances a mainland-to-mainland median line taking the form of a single maritime boundary *in an area where Nicaragua itself has no legal entitlement*, let alone a valid claim to an equidistance boundary. This is because Nicaragua’s claimed median line lies

² NM, p. 238, para. 3.96.

³ Ibid, p. 239, para. 3.98.

⁴ Ibid, p.255, para. 3.130.

more than 200 nautical miles from both Nicaragua's and Colombia's mainland coasts, as the next section will show, and in an area east of the San Andrés Archipelago, where only Colombia possesses maritime rights.

7.5. It goes without saying that Nicaragua cannot claim a maritime boundary vis-à-vis Colombia which lies in an area over which Nicaragua has no legal entitlement either to an exclusive economic zone or a continental shelf and where the legal entitlements of the Parties therefore do not meet or overlap.

7.6. It follows from this fact alone – and quite apart from other considerations – that the maritime boundary to be delimited by the Court is not, and cannot be, a mainland-to-mainland median line, as argued by Nicaragua, but rather that the delimitation must lie between the islands and cays comprising the San Andrés Archipelago belonging to Colombia, on the one hand, and the islands and cays of Nicaragua, on the other. Nicaragua's entire approach to delimitation is devoid of a legal foundation, and its plea for a mainland-to-mainland median line boundary has no role to play.

7.7. Equally misguided is Nicaragua's attempt to deny any relevance to the San Andrés Archipelago for purposes of constructing an equitable delimitation line. Contrary to Nicaragua's thesis, the present case is not one in which certain

islands belonging to one State are located on “the wrong side of an equidistance line” – that is to say, within maritime spaces appertaining to the other State. Rather, the Colombian mainland coast has no role to play because of its geographical location beyond the area of concern, and the actual delimitation is consequently one that falls to be effected between the Colombian islands, which generate maritime entitlements in their own right, and Nicaragua’s own islands.

B. Nicaragua’s “Median Line” Lies More Than 200 Nautical Miles from the Mainland Coasts of the Parties

(1) NICARAGUA CLAIMS A BOUNDARY WHERE IT HAS NO LEGAL ENTITLEMENT

7.8. To appreciate the invalid basis of Nicaragua’s claim, reference may be made to Figure I to Nicaragua’s *Memorial*.

7.9. This figure is labeled “The Delimitation Area”. It depicts a shaded area extending from the respective mainland coasts of Nicaragua and Colombia. Also included on the figure is Nicaragua’s “median line” boundary based on Nicaragua’s position that “the Court is requested to construct an equidistance line between the mainland coasts of Nicaragua and Colombia, respectively, in order to divide the delimitation area in accordance with equitable principles.”⁵

⁵ NM, pp. 212-213, para. 3.50

7.10. It is striking that nowhere does Nicaragua actually indicate what basepoints on the mainland coasts of the Parties it used for the construction of this line or how far the line is from the mainland coasts of the Parties.⁶

7.11. Notwithstanding the ill-founded nature of its claim, in paragraph 9 of its Submissions, Nicaragua formally requests the Court to adjudge and declare that:

“the appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a single maritime boundary in the form of a median line between these mainland coasts.”⁷

7.12. The “geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia”, referred to in Nicaragua’s Submissions, lends no support to Nicaragua’s methodology. Geographically, this is because the two mainland coasts lie more than 400 nautical miles apart in the area covered by Nicaragua’s claim. Legally, because of the distances involved, neither mainland coast generates maritime rights to an exclusive economic zone or continental shelf which meet or overlap with the entitlements generated by the other mainland coast, whether under the 1982 Law of the Sea Convention to which Nicaragua is a party, or under the 1958 Geneva

⁶ NM, p. 239, para. 3.99.

⁷ *Ibid.*, pp. 266-267, para. (9).

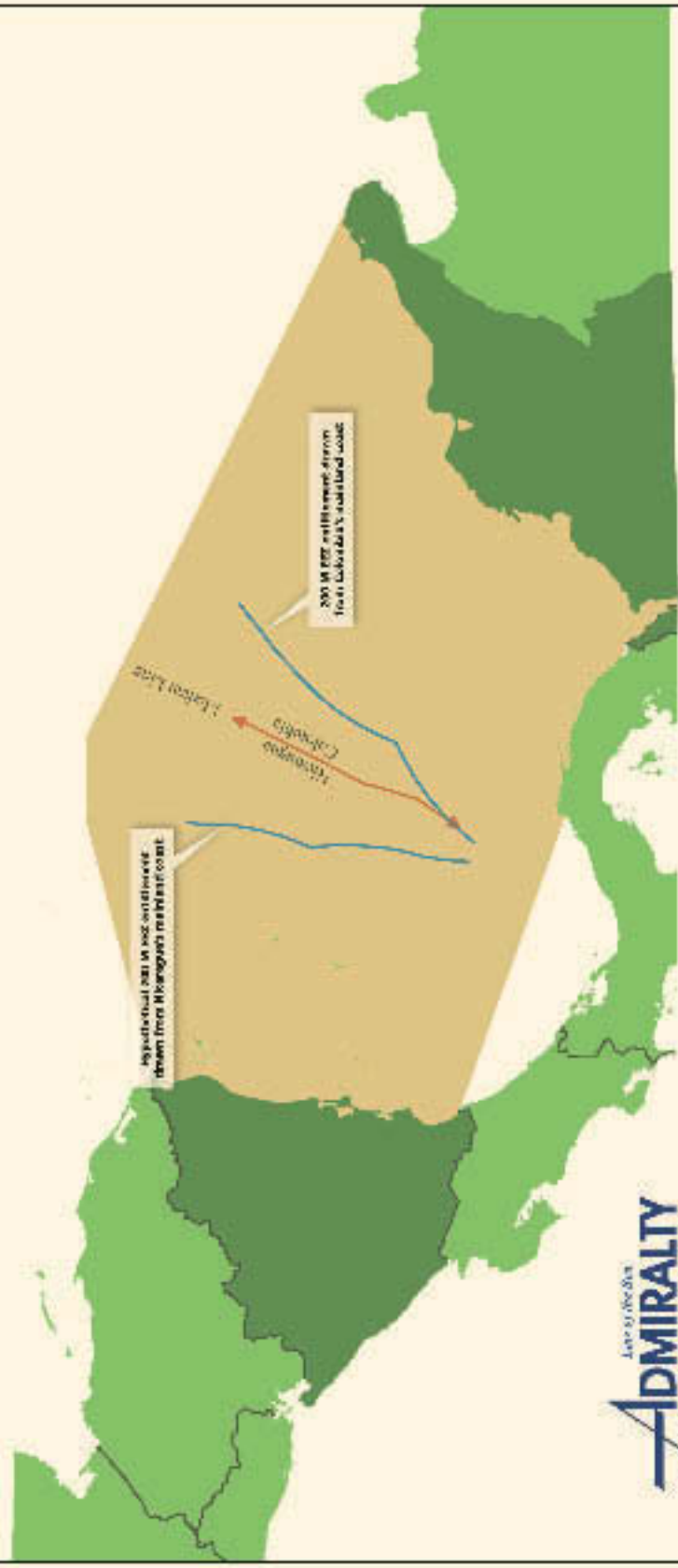
Continental Shelf Convention to which Colombia is a party, or under customary international law, or indeed under the domestic legislation of the Parties.⁸ Thus, the geographic situation does not give rise on the legal plane to an issue of delimitation as between the mainland coasts of the Parties.

7.13. To illustrate the position, Colombia has superimposed on Figure I to Nicaragua's *Memorial* 200 nautical-mile belts, corresponding to hypothetical exclusive economic zone and continental shelf entitlements drawn from the mainland coasts of the Parties. The result of this exercise appears on Figure 7.1 opposite. In short, there is no issue of delimitation between the mainland coasts of the Parties to this case. Where there are no overlapping legal entitlements, there is nothing for the Court to delimit.

7.14. In contrast, Colombia's San Andrés Archipelago does generate continental shelf and exclusive economic zone entitlements extending in all directions. In the light of these entitlements generated by the San Andrés Archipelago, what Nicaragua is essentially seeking by its claim line is continental shelf and exclusive economic zone rights within 200 nautical miles of Colombia's own coasts constituted by its islands. This can be seen on Figure 7.2 below, which shows how the area

⁸ NM, pp. 197-203, paras. 3.25-3.34 where this legislation is referred to.

**NICARAGUA'S MARITIME CLAIM DIVIDES AN
AREA WHERE IT HAS NO MARITIME ENTITLEMENT**

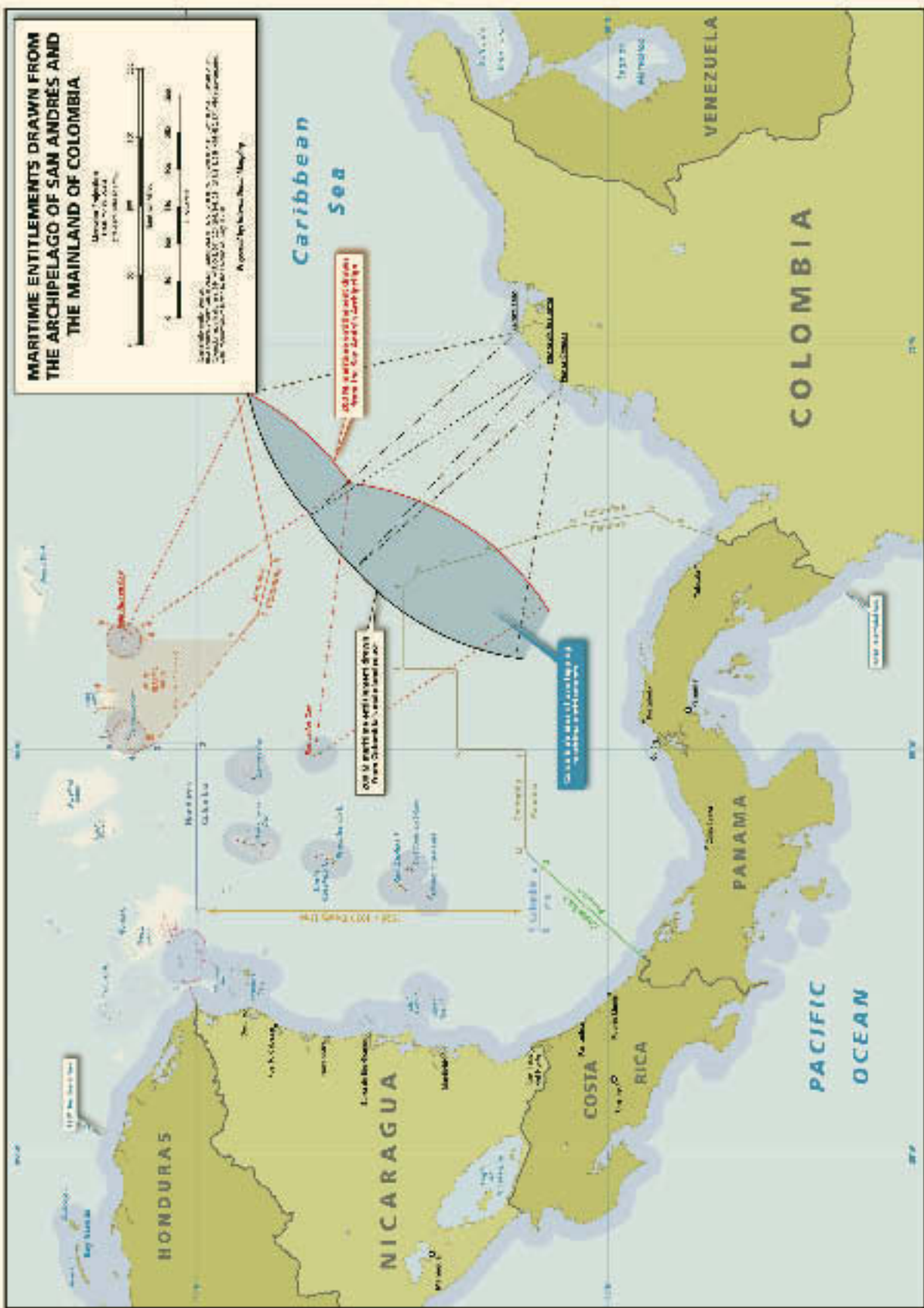


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east of the San Andrés Archipelago is an area falling under the exclusive sovereign rights of Colombia due to the overlapping maritime entitlements generated by Colombia's islands and by its mainland coast. This area has nothing to do with Nicaragua and is wrongly identified by Nicaragua as forming part of the delimitation area, which it is not. See Figure 7.2 opposite.

7.15. Figure 7.1 also shows the location of Nicaragua's claimed "median line" in relation to the maritime entitlements generated by the mainland coasts of the Parties. That line, which does not appear to be a true mainland-to-mainland median line in any event, falls in the middle of the "gap" – in other words, more than 200 nautical miles from both Nicaragua's and Colombia's mainland coasts. The end result is that Nicaragua is seeking from the Court a maritime delimitation in an area where Nicaragua has no maritime rights under established principles of international law, but where Colombia does have such rights. By the same token, Nicaragua's assertion that "Nicaragua claims a single maritime boundary based upon the median line dividing the areas where the coastal projections of Nicaragua and Colombia converge and overlap" is unsupported in law.⁹ As Colombia has demonstrated, the coastal projections emanating from the Parties' mainland coasts do not converge or overlap in this area.

⁹ NM, p. 198, para. 3.28.



See full size Map, Vol. III - page 83

7.16. It follows that Nicaragua's whole approach to maritime delimitation is as misguided as it is unprecedented. As will be seen, Nicaragua advances a "delimitation area" which covers large areas within which only Colombia and third States possess maritime rights, and an outlandish claim line where Nicaragua has no legal entitlement at all. These fundamental defects vitiate the entire premise on which Nicaragua's case on delimitation depends.

(2) THE COURT HAS CONSISTENTLY REFRAINED FROM
DELIMITING MARITIME BOUNDARIES LYING MORE THAN 200
NAUTICAL MILES FROM THE COASTS OF THE PARTIES

7.17. The Court's jurisprudence makes it clear that the Court has consistently refrained from delimiting maritime boundaries that extend further than 200 nautical miles from the baselines of the parties from which the breadth of the territorial sea is measured. This is the natural consequence of the fact that, whether under the Law of the Sea Convention or under customary international law, a State cannot claim exclusive economic zone rights extending beyond 200 nautical miles from its baselines or continental shelf rights beyond 200 miles except under special circumstances which are not present here. The only exception is under Article 76 of the 1982 Convention where, under certain circumstances, a State may claim an outer continental shelf beyond 200 nautical miles. However, such a claim must be submitted to, and reviewed by, the Commission on the Limits of the Continental Shelf. Suffice it to say that

Nicaragua has not demonstrated, nor received any approval for, a continental shelf entitlement extending beyond 200 nautical miles from its baselines under Article 76. Indeed, in this part of the Caribbean Sea, there are no maritime areas that lie more than 200 nautical miles from the nearest territory of a State.¹⁰

7.18. The most recent expression of the principle that the Court will not delimit areas lying more than 200 nautical miles from the relevant baselines of the Parties is found in the Court's Judgment in the *Nicaragua-Honduras* case. That case is particularly apposite on this point since it concerned a delimitation in the same general area of the Caribbean Sea. While the Court did not indicate the precise endpoint of the maritime boundary between Nicaragua and Honduras so as not to prejudice the rights of third States (including Colombia) in the area, it did articulate the following important proviso:

“It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the

¹⁰ The Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs notes, in one of its publications, that about 30 States have been identified as possibly having extended continental shelves beyond 200 nautical miles. Nicaragua is not listed as one of those States. *The Law of the Sea Definition of the Continental Shelf*, U.N. publication sales N° E.93.v.ISBN 92-1-133454-3, para. 30.

Limits of the Continental Shelf established thereunder.”¹¹

7.19. Given the Court’s clear pronouncement that the delimitation line in Nicaragua-Honduras could not extend more than 200 nautical miles from the relevant baselines of the Parties, it must also be the case here that the delimitation line cannot be situated at a distance greater than 200 nautical miles from the baselines of either Party. Yet that is precisely the shortcoming of Nicaragua’s claim line: the entire course of that line falls in an area which is more than 200 nautical miles from Nicaragua’s baselines falling along the low-water mark of its mainland coast, which is the coast that Nicaragua relies on for its methodology.¹²

7.20. In short, there is no basis for the Court to effectuate a delimitation in areas where the legal entitlements of the Parties to maritime areas lying off their coasts do not converge or overlap. Since Nicaragua’s claimed delimitation line falls in an area where Nicaragua cannot demonstrate any legal entitlement,

¹¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, p. 90, para. 319.

¹² The Chamber of the Court in the *Gulf of Maine* case adopted a similar approach with respect to delimiting a single maritime boundary between the United States and Canada. After noting that the decisive criterion should be the recognition of the fact that the delimitation must initially be drawn to divide equally the area in which the maritime projections of the two parties’ coasts overlap, the Chamber determined that the end point (*terminus ad quem*) of the seaward, or perpendicular, segment of the delimitation coincided with the last point where the perpendicular reached the 200-mile zones claimed by the two States. *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 339, para. 228. And see also, the similar treatment by the Court of Arbitration in the *Canada-France Arbitration*, 21 RIAA 292-293, paras. 79 and 82 (English translation).

it is a line which is without legal foundation and, as such, unsustainable *per se*.

C. Nicaragua’s “Delimitation Area” Is Similarly Flawed and Provides No Support for the Application of Its “Equal Division” Claim

7.21. While the Nicaraguan *Memorial* correctly observes that the “judicial authorities always insist that the choice of the pertinent method of delimitation ‘is essentially dependent on geography’”,¹³ Nicaragua then misuses the geography by wrongly identifying the relevant coasts of the Parties and the “Delimitation Area” within which the delimitation is to take place.

7.22. Nicaragua describes the coasts that define the delimitation area in the following manner:

“(a) the mainland coast of Nicaragua from the terminus of the land boundary with Honduras (in the north) to the terminus of the land boundary with Costa Rica (in the south).

(b) The mainland coast of Colombia opposite the coast of Nicaragua, and fronting on the same maritime areas.”¹⁴

7.23. The “Area of Delimitation” thus posited by Nicaragua is the entire offshore area lying between the mainland coasts of the

¹³ NM, p. 191, para. 3.14.

¹⁴ *Ibid*, p.191, para. 3.15.

Parties. This is the area that is depicted on Nicaragua's Figure I and referred to at paragraph 3.21 of the Nicaraguan *Memorial*.

7.24. It is with respect to this area that Nicaragua advances its two main propositions: first, “[i]n the geographical circumstances the applicable criterion is the principle of equal division,”¹⁵ and second, in accordance with the 1982 Convention and general international law, “Nicaragua draws a single maritime boundary based upon the median line dividing the areas where the coastal projections of Nicaragua and Colombia converge and overlap.”¹⁶

7.25. With respect to the area within which the delimitation is to be carried out by the Court – sometimes referred to as the “relevant area” or, in Nicaragua's case, the “delimitation area” – it is axiomatic that that area is defined by reference to the relevant coasts of the Parties. For a coast of a party to be a “relevant coast”, however, it must be capable of generating maritime rights that overlap with the rights generated by the coast of the other party. As the Court observed in the *Tunisia-Libya* case – a case which Nicaragua curiously asserts “is the most similar in geographical terms”¹⁷ to the present case:

“Nonetheless, for the purpose of shelf delimitation between the Parties, it is not the whole of the coast

¹⁵ NM, p. 205, para. 3.38.

¹⁶ *Ibid*, p. 198, para. 3.28.

¹⁷ *Ibid*, p. 235, para. 3.89.

of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court.”¹⁸

7.26. As Colombia has explained, its mainland coast is not a “relevant coast” for purposes of delimitation with Nicaragua because the projection of that coast out to a distance of 200 nautical miles does not overlap with any area falling within 200 nautical miles of Nicaragua’s coast. To transpose the Court’s words in *Tunisia-Libya*, the extension of Nicaragua’s mainland coast cannot overlap with the extension of the mainland coast of Colombia which thus should be excluded from further consideration.

7.27. Nicaragua’s delimitation proposal affects areas that in no way could appertain to it, due to their being located over 200 nautical miles off its mainland coast and within 200 miles from both the Colombian mainland and the San Andrés Archipelago.

7.28. It is also striking that Nicaragua’s “Delimitation Area” includes large areas that are relevant to third States but not Nicaragua. This can clearly be seen on Nicaragua’s Figure I where, in the south, the “Delimitation Area” stretches right up to

¹⁸ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 61, para. 75.

and, in fact, abuts roughly half of the entire Caribbean coast of Panama. In the north, Nicaragua's area also trespasses on to areas established and delimited by agreement between Colombia and Jamaica. This is yet a further indication of the ill-founded nature of Nicaragua's "Delimitation Area".

7.29. As more fully discussed in the next Chapter, the proper area subject to delimitation in this case is the area lying between the San Andrés Archipelago, on the one hand, and the Miskito Cays, the features in the vicinity of Roca Tyra, and the Islas Mangles (Corn Islands), on the other. The extension or projection of these coasts *does* meet and overlap. Therefore, Nicaragua's definition of the "Delimitation Area" is fundamentally misguided and without support in law.

7.30. Given that Nicaragua's reliance on the principle of equal division is applied to an area and to coasts that are not relevant in this case, the entire foundation of Nicaragua's mainland-to-mainland median line – which is claimed by Nicaragua to effect an equal division of the relevant maritime areas – is misplaced.

7.31. The Nicaraguan *Memorial* seeks support for its methodology by quoting lengthy passages from the Chamber's judgment in the *Gulf of Maine* case. But the very passages cited by Nicaragua to support the "equal division" approach – in fact,

quoted twice in the same chapter of the Nicaraguan *Memorial* – disprove the Nicaraguan thesis.¹⁹

7.32. In the key passage in question – paragraph 195 of the Judgment in *Gulf of Maine* – the Chamber first noted that it was bound to turn to an application of criteria derived from geography, mainly the geography of the coasts, in approaching the delimitation of the single maritime boundary between the United States and Canada. The Chamber then continued:

“Within this framework, it is inevitable that the Chamber’s basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas *where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap.*”²⁰

7.33. Nicaragua’s approach to “equal division” fails to appreciate the significance of the italicized words from the Chamber’s Judgment. The premise underlying the Chamber’s reasoning was that the “equal division” criterion only applied in situations where the projections, or legal entitlements, of the Parties’ coasts converged and overlapped. It is abundantly clear that the area in *Gulf of Maine* to which the Chamber applied this

¹⁹ See NM, pp. 187-188, para. 3.6 and pp. 205-206, para. 3.38.

²⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 327, para. 195. (Emphasis added).

approach was an area lying within 200 nautical miles of *both* parties' coasts and thus an area where the projections from those coasts converged and overlapped. The Chamber specifically refrained from extending the delimitation, or the "equal division" criterion, into any areas that lay more than 200 nautical miles from the coast of one of the parties.²¹

7.34. It is obvious that the "equal division" criterion cannot apply to areas where there is no convergence or overlap, as is the case between the mainland coasts of Colombia and Nicaragua. The proof of that proposition lies in the fact, previously demonstrated by Colombia, that application of Nicaragua's "equal division" theory results in a median line boundary claim which lies more than 200 nautical miles from Nicaragua's coast and thus in an area where Nicaragua has no legal entitlement to continental shelf or exclusive economic zone rights. On the other hand, the area where the maritime entitlements of the Parties do converge and overlap is the area between the San Andrés Archipelago and Nicaragua's islands.

**D. Nicaragua's Attempt To Enclave Colombia's Islands
Has No Legal Support**

7.35. Starting from the faulty assertion that the delimitation should be effected on the basis of a mainland-to-mainland equidistance line, Nicaragua then compounds its error by arguing

²¹ See *supra*, footnote to para. 7.19 (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 339, para. 228).

that Colombia's islands should be enclaved within what Nicaragua sustains is its continental shelf and exclusive economic zone. As this Section will show, this line of argument finds no support in the factual or legal elements characterizing the case.

7.36. Nicaragua's basic argument is that, because Colombia's islands are closer to Nicaragua's mainland coast than to the mainland coast of Colombia, these islands should be enclaved within Nicaragua's maritime area which is claimed to extend out to a mainland-to-mainland median line. As Nicaragua asserts in its *Memorial*:

“The relevant data show that both San Andrés and Providencia fall within the continental shelf of Nicaragua and within its exclusive economic zone.”²²

7.37. Quite apart from the fact that Nicaragua does not identify the so-called “relevant data” that supports its assertion that Colombia's islands fall within Nicaragua's continental shelf and EEZ, the proposition advanced by Nicaragua is fundamentally unsound. The reason why this is so is apparent when it is recalled that the mainland coast of Colombia has no role to play in the present delimitation. Consequently, the delimitation does

²² NM, p. 237, para. 3.95. As for the other islands and cays belonging to Colombia, Nicaragua makes essentially the same argument when it states that these cays “do not have to be accorded any weight in establishing the maritime boundary between Nicaragua and Colombia” except for an insignificant 3-mile enclave. *Ibid.*, p. 254, para. 3.127 and p. 255, para. 3.130.

not fall to be established between the Parties' mainland coasts, but rather is to be effected between the San Andrés Archipelago, on the one hand, and Nicaragua's islands, on the other. Because the islands comprising the San Andrés Archipelago generate their own territorial sea, continental shelf and EEZ rights, it is in this area that the legal entitlements of the Parties to maritime areas generated by the projection of their coasts meet and overlap. As a result, it is quite wrong for Nicaragua to maintain that, because Nicaragua's continental shelf and exclusive economic zone extends beyond Colombia's islands, "the relationship between the mainland coasts of Nicaragua and the islands cannot be characterized as merely opposite".²³ That situation of oppositeness is precisely the relationship between the San Andrés Archipelago and the Nicaraguan islands. These two sets of coastal fronts directly face each other.

7.38. Similarly, Nicaragua's section heading at page 239 of its *Memorial* that "The San Andrés Group Does Not Form Part of the Coastal Front of Colombia" is also mistaken. Once again, Nicaragua assumes that the delimitation is between the mainland coasts of the Parties and that, because of their distance from the Colombian mainland, Colombia's islands do not constitute part of its "coastal front."

²³ NM, p. 190, para. 3.11.

7.39. In the first place, even if Colombia's mainland coast was relevant to the delimitation, which it is not, the Colombian islands still possess coasts and thus constitute, both individually and collectively, coastal fronts. More importantly, however, under international law a State's entitlement to maritime areas – whether continental shelf or exclusive economic zone – is based on the projection of its coast out to a distance of 200 nautical miles from the State's baselines. This entitlement exists as a matter of law. It is only where the legal entitlements generated by one State's coasts meet and overlap with the legal entitlements of a neighboring State that such area of overlap falls to be delimited.

7.40. In the present case, it is mere question-begging for Nicaragua to assert that the San Andrés Archipelago is situated within Nicaragua's continental shelf and exclusive economic zone and that the islands should therefore be enclaved. Nicaragua ignores the fact that Colombia's islands also generate continental shelf and exclusive economic zone rights on their own, just as, for example, the coasts of the island of Jan Mayen generated such rights independent of the mainland coast of Norway in the *Greenland – Jan Mayen* case and the island of Bioko generated maritime entitlements independent of the mainland coast of Equatorial Guinea as was recognized by the Court in the *Cameroon-Nigeria* case. This principle is reflected in Article 121(2) of the 1982 Convention which provides:

“Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.”

7.41. The need for delimitation in this case arises precisely because the maritime entitlements of both States generated by their respective coasts meet and overlap in the area lying between the islands comprising the San Andrés Archipelago and Nicaragua’s offshore islands. It is in this area that the quite separate rules of delimitation come into play in order to determine an equitable boundary – an aspect of the case that will be discussed in Chapter 9.

7.42. In support of its enclave theory, Nicaragua relies on the treatment of the Channel Islands in the *Anglo-French Arbitration* and on a few selected examples of State practice. As will be seen, however, the geographic circumstances of the examples put forward by Nicaragua bear no resemblance to the geographic situation in this case.

7.43. If one starts with the main case that Nicaragua relies on – the *Anglo-French Arbitration* – it is evident that Nicaragua’s contention that “there is a certain analogy with the situation

relating to the Channel Islands in the *Anglo-French Continental Shelf case*²⁴, is fundamentally misconceived.

7.44. The Channel Islands are located just off the French coast of Normandy. As the Court of Arbitration noted in its decision, the closest of the islands (the Ecrehos) were situated just 6.6 miles distant from Cap de Carteret on the Normandy coast.²⁵ In contrast, San Andrés Island is located some 105 miles from the mainland coast of Nicaragua, Providencia is roughly 125 miles from Nicaragua, and other islands belonging to Colombia such as the Seranilla Cays and Bajo Nuevo Cays are more than 200 miles from the Nicaragua mainland coast. The proximity of the Channel Islands to the mainland of France was one of the main reasons why the Court of Arbitration treated them as a special circumstance – a situation which does not exist in the present case.

7.45. Moreover, the Channel Islands were situated in a rectangular gulf surrounded on three sides by French territory. In contrast, the entire San Andrés Archipelago is located at a considerable distance from the Nicaragua coast, and the islands comprising the Archipelago are not surrounded on three sides by Nicaragua territory but only “face” Nicaragua in one direction,

²⁴ NM, p. 240, para. 3.102.

²⁵ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, 30 June 1977, 18 UNRIAA 19, para. 6.

another difference which distinguishes this situation from the *Anglo-French Arbitration*.

7.46. Lastly, in the *Anglo-French Arbitration* the delimitation in the English Channel was essentially one between mainland coasts lying in relatively close proximity to each other. As the Court of Arbitration observed, the width of the Channel varied between 18 nautical miles at its narrowest point to about 100 nautical miles at its western entrances.²⁶ In these circumstances, and but for the presence of the Channel Islands, a mainland-to-mainland median line achieved an equitable result. It was because the Channel Islands were situated “on the wrong side” of the mid-channel median line just off the French mainland coast that they were enclaved.

7.47. The present case is entirely different. The mainland coasts of the Parties are more than 400 nautical miles apart and there is consequently no mainland-to-mainland median line that is relevant or as to which Colombia’s islands fall “on the wrong side”. As the Court of Arbitration itself noted with respect to the Channel Islands:

“The case is quite different from that of small islands on the right side of or close to the median line, and it is also quite different from the case

²⁶ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, 30 June 1977, 18 UNRIAA 18, para. 3.

where numerous islands stretch out one after another long distances from the mainland.”²⁷

7.48. It follows that Nicaragua seriously misstates the position when it asserts that “[t]he San Andrés group is not only ‘on the wrong side’ of the median line but wholly detached geographically from Colombia”.²⁸ First, Colombia’s islands are not “on the wrong side” of any median line – rather, the delimitation falls to be established between those islands and Nicaragua’s own islands. Second, the geographical relationship between the islands comprising the San Andrés Archipelago and the Colombian mainland is irrelevant since Colombia’s mainland coast has no role to play other than to show that Colombia is the sole Party to possess sovereign rights east of the San Andrés Archipelago.

7.49. With respect to State practice, Nicaragua is forced to admit that, “Examples of full enclaves are rare.”²⁹ The only example Nicaragua can point to is the 1978 Australia-Papua-New Guinea Agreement which Nicaragua itself characterizes as “very complex and reflects highly specialized geographical and cultural desiderata”.³⁰ It involved islands belonging to Australia lying just two miles off the coast of Papua New Guinea and an

²⁷ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, 30 June 1977, 18 UNRIAA 94, para. 199. (Emphasis added).

entirely different political context. As such, it is scarcely a relevant precedent for this case.

7.50. Nicaragua then resorts to a fall-back position in which it refers to an example of State practice where semi-enclaves were agreed on a bilateral basis.³¹ The Agreement in question is the 1971 Italy-Tunisia continental shelf delimitation in which certain Italian islands were accorded a semi-enclave along what was otherwise a median line boundary between the Tunisian mainland and Sicily.

7.51. Once again, the geographic context in which the Italy-Tunisia delimitation was agreed was entirely different from the present case. The Italian islands in question either straddled, or lay “on the wrong side” of, what was otherwise a mainland-to-mainland equidistance line between two coasts lying substantially less than 200 nautical miles from each other. Moreover, Nicaragua omits to mention that, in the northern sector of the delimitation, the Galite Islands belonging to Tunisia were accorded full equidistance treatment against the much longer, opposite coast of Sardinia.

7.52. Nicaragua then refers to the *Dubai-Sharjah* arbitration in which the island of Abu Musa (sovereignty over which was

²⁸ NM, p. 243, para. 3.105.

²⁹ *Ibid.*, p. 243, para. 3.106.

³⁰ *Ibid.*

³¹ NM, p. 245, para. 3.109.

contested between Iran and Sharjah) was accorded a 12-mile belt of territorial sea. However, the geographic situation in which that delimitation was decided was also entirely dissimilar from the situation existing between Colombia's archipelago and Nicaragua.

7.53. The *Dubai-Sharjah* delimitation was primarily one between States with adjacent coasts sharing a common land boundary. The lateral boundary decided by the arbitral tribunal was an equidistance line running roughly perpendicular to the parties' coastal fronts. The island of Abu Musa lay just 35 miles off the coast of Sharjah. Given the constricted area within which the delimitation was being carried out, and the fact (referred to by the Tribunal) that there was comparable regional practice in the Persian Gulf according mid-Gulf islands 12-mile territorial sea belts, the Tribunal adopted a similar approach and established semi-enclave around a portion of Abu Musa which only caused a minor deflection to the adjacent coasts equidistance line.

7.54. In the present case, the Court is not confronted with a delimitation between adjacent coasts. Nor is there a single small island situated in the middle of a confined maritime area which would inequitably distort the course of an equidistance line. Rather, Colombia possesses a lengthy archipelago comprising many islands and cays, the nearest island of which is over

100 miles from Nicaragua, and Nicaragua also possesses offshore islands which figure in the delimitation. As such, the situation is very different from that presented in the *Dubai-Sharjah* arbitration.

7.55. Lastly, the Nicaraguan *Memorial* refers to the Los Monjes.³²

7.56. It must be pointed out that no definitive delimitation boundary has been agreed between Colombia and Venezuela, and that the Los Monjes are located about 19 miles off the Colombian coast, i.e. less than twice the breadth of the territorial sea. It follows that the Los Monjes example cited by Nicaragua in no way supports Nicaragua's position in this case.

7.57. Based on the foregoing, none of the very limited examples of arbitral decisions or State practice cited by Nicaragua where islands were enclaved or semi-enclaved are even remotely comparable or relevant to the present case where the geographical context is very different.

E. Conclusions

7.58. This chapter has shown that Nicaragua's delimitation methodology based on a mainland-to-mainland median line is unsupported. In sum:

³² NM, p. 259, para. 3.135.

- (1) Nicaragua wrongly identifies the relevant coasts of the Parties as including the Colombian mainland coast, which has no role to play in the present delimitation because the mainland coasts of the Parties lie well over 400 nautical miles from each other;
- (2) As a result of its choice of the wrong coasts, Nicaragua posits a delimitation area which is inappropriate since it includes a large maritime area where the legal entitlements of the Parties do not meet or overlap, where only Colombia possess maritime rights, and which even trespasses on the legal entitlements of third States situated much closer to the area;
- (3) Nicaragua then misapplies the “equal division” criterion to this wrongly identified delimitation area;
- (4) The end result is a Nicaraguan claim line – the mainland-to-mainland median line – which does not effect a delimitation between the relevant coasts of the Parties and which falls in an area where Nicaragua has no continental shelf or exclusive economic zone entitlement.
- (5) Nicaragua’s assertion that Colombia’s islands lie within Nicaragua’s continental shelf and exclusive economic zone is mere question-begging which

ignores the legal entitlements generated by Colombia's islands themselves.

- (6) San Andrés Island is located some 105 miles from the mainland coast of Nicaragua, Providencia is at a distance of roughly 125 miles from that coast, and other islands belonging to Colombia such as the Seranilla Cays and Bajo Nuevo Cays are as far as 270 miles from Nicaragua's coast.
- (7) In the geographic circumstances of the case, there is no basis for Nicaragua's enclave position or for arguing that the islands of the San Andrés Archipelago lie "on the wrong side" of a mainland-to-mainland median line.

CHAPTER 8

THE DELIMITATION AREA

A. Introduction

8.1. Having shown in the previous Chapter why the delimitation area advanced by Nicaragua is wrongly identified, this Chapter will turn to the actual area within which the delimitation is to be effected and the geographic and related facts characterizing that area which constitute relevant circumstances to be taken into account in arriving at an equitable delimitation.

8.2. Section B deals with the relevant area and the coastal geography of the area. Section C addresses existing delimitations involving third States in the region and their relevance for the present case. In Section D, Colombia will then discuss the significance of the 82°W meridian for purposes of delimitation in the light of the Court's findings in its *Judgment on the Preliminary Objections* and the Parties' conduct with respect to that meridian.

B. The Relevant Area

(1) THE LEGAL BASIS FOR IDENTIFYING THE RELEVANT AREA

8.3. The relevant area – or the area within which the

delimitation is to be carried out – is primarily a function of geography, particularly the relevant coasts of the Parties to the delimitation. In some cases – and this case is one – the presence of third States in the general region can also assist to identify the relevant area. The Court has always been sensitive to the actual or potential rights of third States in maritime delimitation cases and has taken care not to prejudice such rights. Given the existence of a number of existing bilateral delimitations in this part of the Caribbean Sea, the Court is in a position to appreciate the interests of third States that fall to be taken into account.

8.4. It is well settled that the geographic correlation between a coast and the maritime areas lying off that coast is the basis of the coastal State’s legal title under international law. The relevant coasts of the parties to a delimitation dispute are those coasts whose projections seaward generate entitlements to maritime areas that meet and overlap. As the Court stated in the *Tunisia-Libya* case:

“The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position.”¹

¹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 61, para. 74; cited with approval in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 40, para. 47.

8.5. It was in the light of this basic starting point that the Court noted, in the passage from its Judgment in *Tunisia/Libya* quoted at paragraph 7.25 above, that those coasts of a party the extension of which cannot overlap with the extension of the coast of the other party should not be considered to be “relevant coasts” for delimitation purposes and should be excluded from further consideration. In contrast, the “relevant coasts” are those coasts which do give rise to overlapping legal entitlements.

8.6. Applying these criteria to the geographic context of the present case, it is evident that the coasts of the Parties that generate overlapping entitlements to continental shelf and exclusive economic zone rights – and the baselines representing these coasts – must be less than 400 nautical miles from each other in order to be relevant. It is for this reason, as explained in the previous Chapter, that the mainland coast of Colombia is not a relevant coast and has no role to play in the identification of the relevant area. Rather, the relevant coasts of the Parties comprise the coasts of the Parties which face each other in the area between the San Andrés Archipelago, on the one hand, and the Nicaraguan islands, on the other.

8.7. On the Colombian side, the relevant features comprise the islands and cays of the San Andrés Archipelago. From south to north the relevant features are as follows:

- The Albuquerque Cays (North Cay and South Cay), which are the southernmost and westernmost islands of the Archipelago lying on an atoll only 8 nautical miles to the east of the 82°W meridian and more than 100 nautical miles from Nicaragua's mainland coast opposite Nicaragua's Corn Islands;
- The East-Southeast Cays; located on an atoll to the northeast of the Albuquerque Cays and a short distance from San Andrés Island;
- San Andrés Island, including the cays adjacent to the main island;
- The islands of Providencia and Santa Catalina, together with a series of cays located to the north and east of Santa Catalina;
- Roncador Cay, situated on an atoll to the east of Providencia and Santa Catalina;
- Serrana, also situated on an atoll and featuring several groups of cays located north of Roncador;
- Quitasueño, which includes at least eight features that are above water at high tide situated on a long bank extending in a broad north-south direction;
- Serranilla Cays, located some 107 miles northeast of Quitasueño on a broad bank comprising a chain of coral reefs and including a series of separate cays;

- Bajo Nuevo, located some 70 miles east of Serranilla and consisting of two east-west oriented banks with at least three cays that are above water at high tide.

8.8. The San Andrés Archipelago generates maritime entitlements on a 360° basis throughout this part of the Caribbean Sea. To the east, these entitlements extend until they overlap with the 200 nautical mile entitlements generated by Colombia's mainland coast. To the north and south, the maritime spaces appertaining to the Archipelago extend until they overlap with the entitlements of third States – Jamaica and Honduras in the north, and Panama and Costa Rica in the south. As explained below and as depicted on Figure 4.3, Colombia has signed delimitation agreements with each of these four States.

8.9. It is only to the west of the San Andrés Archipelago that the maritime entitlements of the Archipelago meet and overlap with the entitlements generated by Nicaragua's offshore islands and cays.

8.10. On the Nicaragua side, there are two main groups of islands and cays which face the San Andrés Archipelago. The southern group of islands consist of the Islas Mangles (Corn Islands), principally Little Corn Island and Great Corn Island. As Figure 8.1 below shows, these islands lie roughly opposite

Albuquerque, East Southeast Cays and San Andrés Island. The northern group of Nicaragua's islands consist of the Miskito Cays and Edinburgh Reef, which lie opposite Quitasueño and, to the southeast, the Islands of Providencia and Santa Catalina. In between these two groups are a number of other Nicaraguan islands including Roca Tyra.

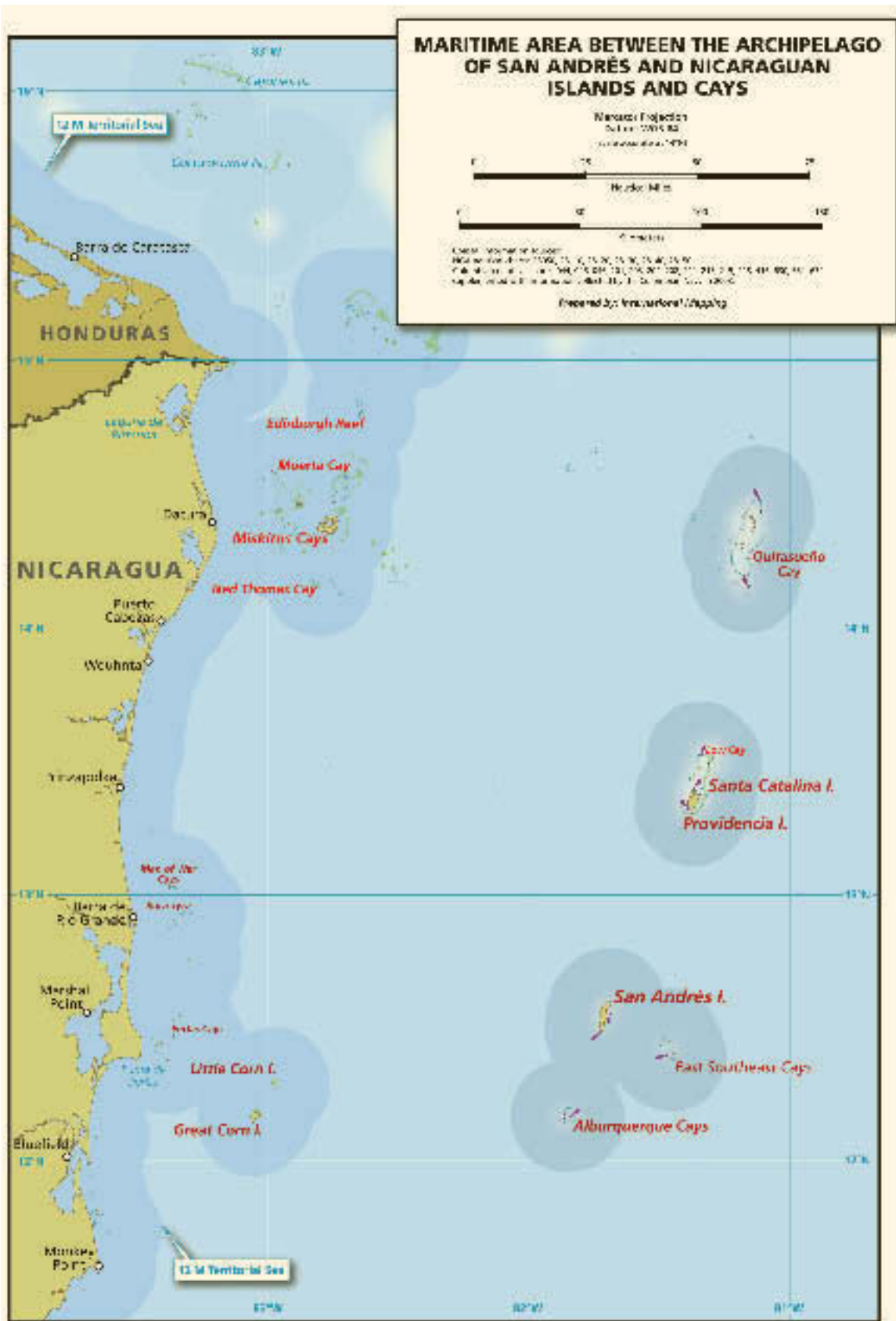
8.11. Based on the geographic relationship between the relevant coasts of the Parties and the maritime areas lying off those coasts, broadly speaking the relevant area comprises the area lying between the Colombian San Andrés Archipelago on the east, and the Nicaraguan islands and cays on the west. As explained in Section 8 (C) below, the northern and southern limits of the relevant area are restricted by the presence of third States in the region.

(2) THE COASTAL GEOGRAPHY WITHIN THE RELEVANT AREA

i. On the Colombian side

8.12. In Chapter 2, Colombia set out the geographical characteristics of each of the islands and cays belonging to it that lie within the relevant area.

8.13. Starting in the south, the Albuquerque Cays are situated on an oval shaped atoll having a diameter of some 8 kilometres. There are two cays (North Cay and South Cay) which are above



See full size Map, Vol. III - page 85

Figure R.1

water at high tide as shown on Figure 2.4.² Colombia built and maintains a lighthouse in North Cay where there are also housing and communication facilities, including an antenna, for detachments of the Colombian Marines. The Albuquerque Cays also attract tourist and recreational visits which are regulated by Colombian governmental officials.

8.14. The East Southeast Cays also lie on an atoll which stretches in a north-south direction for approximately 13 kilometres. As shown on Figure 2.5, there are six cays that are above water at high tide. The main cay (Middle Cay or Bolivar Cay) has a number of buildings on it including a light tower, heliport, communications centre and housing facilities, all operated by the Colombian Marine forces.

8.15. San Andrés Island has an area of some 26 km². It supports a significant population and is the administrative capital of the department.³ See Figure 2.2.

8.16. The islands of Providencia and Santa Catalina, with a total area of some 20 km², are also inhabited. To the north of Santa Catalina, and lying within 12 nautical miles of its coast on a bank extending from the main islands, lies Low Cay where there is a lighthouse built and maintained by Colombia. Between

² See also Annex 171: Study on Quitasueño and Albuquerque prepared by the Colombian Navy, September 2008.

³ See para. 2.11.

Low Cay and Santa Catalina are two other cays – Palm Cay and Basalt Cay, the former of which also has a lighthouse situated on it. The distance from Low Cay in the north to the southern tip of Providencia Island is some 16 miles. See Figure 2.3.

8.17. Roncador also includes a series of three smaller features. They lie on a pear-shaped atoll 15 km long and 7 km wide which stretches in a northwest/southeast direction (see Figure 2.6). There is a lighthouse built and maintained by Colombia on the northernmost cay, as well as housing facilities for elements of Colombia's armed forces, a communications antenna, and a helicopter-landing pad.

8.18. Serrana is also situated on an extended triangular atoll which, from east to west, measures some 28 kilometres in length. There are nine individual features which are above water at high tide. Another lighthouse built and operated by Colombia is situated on Serrana Cay. The geographic characteristics of Serrana are depicted on Figure 2.7.

8.19. Quitasueño is located about halfway between Serrana and the Miskito Cays. The bank itself extends in a north-south direction for over 31 miles. Towards both the northern and southern extremities of Quitasueño, Colombia operates two lighthouses, the locations and photographs of which are indicated and shown on Figure 2.8. As discussed in Chapter 3, Colombia

has also regulated fishing and other activities on and around Quitasueño on a regular basis over a long period of time.

8.20. Some views have been expressed about the status of Quitasueño. For over a decade the United Kingdom held that it was susceptible of the exercise of sovereignty until 1926 when it expressed the view that it was a submerged reef with the exception of a small and solitary rock which “is normally visible above the surface of the sea”.⁴ The United States’ attitude oscillated, from considering Quitasueño, for a century, as an island on which guano concessions were granted, to the view that Quitasueño was not “an island under international law” because it was not permanently above high tide.⁵

8.21. Colombia has carried out a detailed survey of Quitasueño which demonstrates that there are at least eight features that are above water at high tide, together with a larger number of low-tide elevations. The features above high tide are located in the middle of the bank and constitute islands within the meaning of Article 121 of the Law of the Sea Convention. The location of these features is indicated on Figure 2.8. Attached as Annex 171 is a Study prepared by the Colombian Navy, demonstrating these characteristics.⁶

⁴ See paras. 4.89-4.102, above.

⁵ See Section 4 (B) above.

⁶ See Annex 171.

8.22. Under modern international law, the test for an island (as distinct from a low-tide elevation) is as stated in Article 121(1) of the United Nations Convention on the Law of the Sea:

“An island is a naturally formed area of land, surrounded by water, which is above water at high tide.”

The same rule is stated in Article 10 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. There is no minimum size for an island, provided it meets the criteria stated on Article 121(1) of being “naturally formed” and “above water at high tide”. Whether a given feature meets these criteria is a question of fact.⁷

8.23. It follows that Quitasueño is comprised of islands under international law. The location of the basepoints on Quitasueño for purposes of establishing the maritime delimitation will be considered in Chapter 9.⁸

8.24. Serranilla is also situated on an extended bank where an atoll is located which has an east-west orientation stretching for over 44 kilometres. Figure 2.9 depicts Serranilla where there are at least four individual features that emerge at high tide. The largest of these is Serranilla Cay on which Colombia built and maintains a lighthouse, as well as a helicopter landing area and

⁷ See the discussion about Qit’at Jaradah in the *Qatar/Bahrain* case (*Merits*), ICJ Reports 2001 p. 40, 98-99, paras. 192-195.

⁸ See below, para. 9.27.

other facilities staffed by the Colombian Marines.

8.25. Lastly, there is Bajo Nuevo which is located to the east of Serranilla. Colombia built and maintains a lighthouse on the Cay. It comprises the easternmost series of features in the San Andrés Archipelago. See Figure 2.10.

8.26. Because of their location east of the relevant coasts of Colombia's other islands, both Serranilla and Bajo Nuevo are not directly relevant to the present delimitation. Nevertheless, both features still have a role to play. They figure in a joint regime agreement concluded between Colombia and Jamaica.

8.27. From the foregoing, it will be appreciated that the islands of San Andrés, Providencia and Santa Catalina are islands hosting a significant level of population and economic activity. The remaining islands belonging to Colombia are, for the most part, situated on sizable banks or atolls and are many in number. Together, they form a continuous archipelago stretching from Alburquerque in the southwest to Bajo Nuevo in the northeast.

8.28. As will be described more fully in Chapter 9, because of the existence of fringing reefs and low tide elevations in the vicinity of many of the islands and cays of the San Andrés Archipelago, the basepoints from which their maritime entitlements are measured are also relatively extensive.

ii. *On the Nicaraguan side*

8.29. It is striking that the Nicaraguan *Memorial* contains almost no salient information regarding Nicaragua's own coastal geography. The Islas Mangles (Corn Islands), the islands around Roca Tyra and the easternmost cay of the Miskito Cays go virtually unmentioned by Nicaragua and no details are given as to their physical characteristics.

8.30. The Islas Mangles (Corn Islands) are located approximately 30 nautical miles off the mainland coast just above the 12°N parallel. Little Corn Island lies about 8-10 miles north of Great Corn Island.

8.31. To the north these features there is a series of islands including Roca Tyra. They are located to the west of San Andrés Island and Providencia, as can be seen on Figure 8.1.

8.32. The Miskito Cays are more numerous. Together with Edinburgh Reef, they stretch north of the 14°N parallel and lie off the Nicaraguan mainland coast opposite Quitasueño and, further to the east, Serrana. Again, Colombia is not aware that these Cays support any significant levels of population or economic activity. As will be seen in Chapter 9, because of their location the easternmost cays in this group provide basepoints for purposes of constructing the equidistance line in the northern part of the delimitation area.

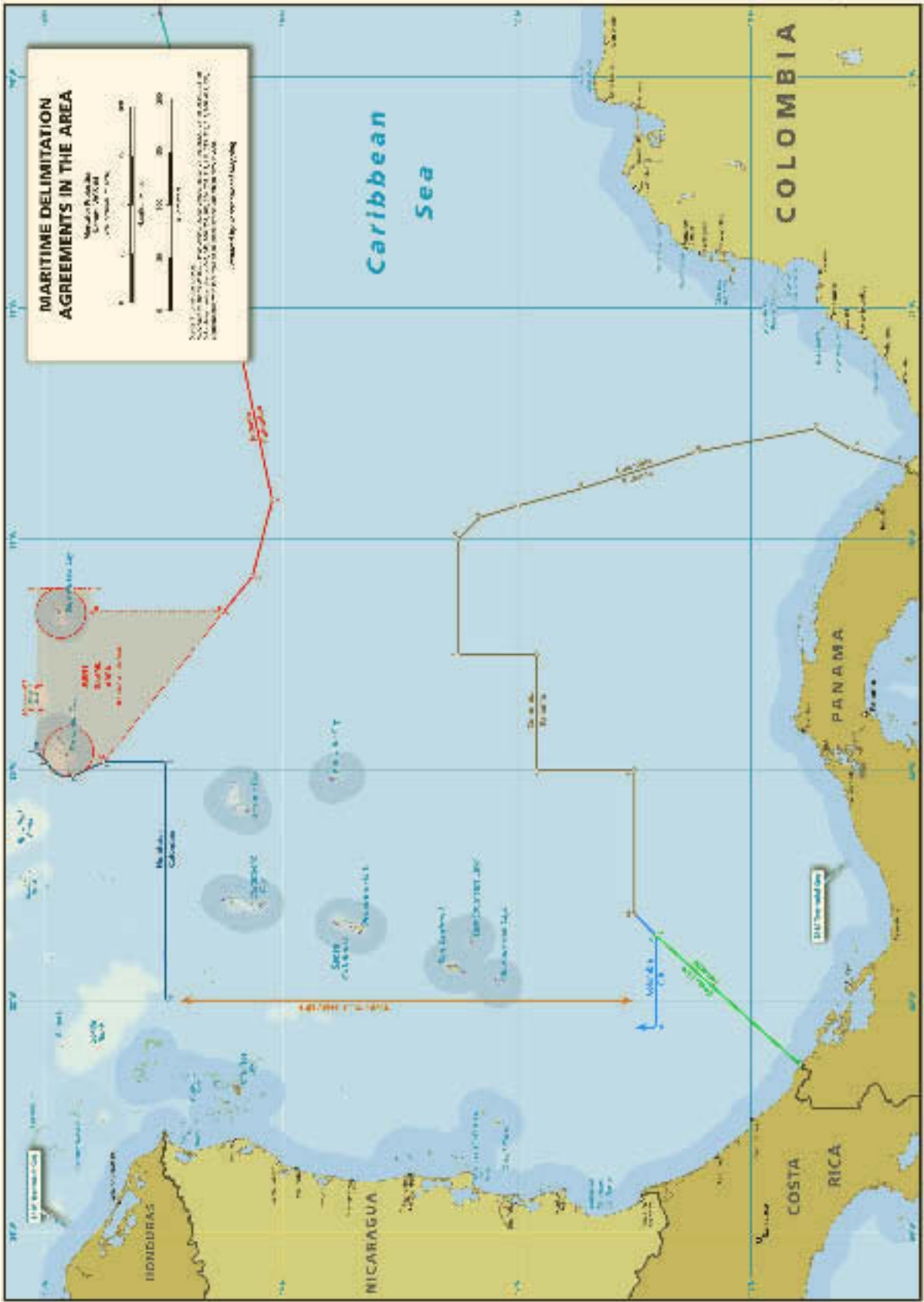
C. Existing Delimitations with Third States

8.33. As noted above, the identification of the relevant area also depends on the presence of third States, and on existing third State delimitations, in the general region. Colombia has previously pointed out that it has concluded maritime boundary treaties with Panama (1976), Costa Rica (1977) the Dominican Republic (1978), Haiti (1978), Honduras (1986) and Jamaica (1993).⁹ All of these agreements are in force with the exception of the Agreement with Costa Rica which the latter signed but has not ratified. Costa Rica and Panama also concluded a maritime boundary Agreement in 1980 extending into the Caribbean Sea from their common land boundary. This Agreement is in force and also has significance for the present delimitation.

8.34. In Chapter 4, Colombia discussed these agreements in connection with the issue of sovereignty. There, Colombia demonstrated that the agreements in question were concluded on the basis that Colombia possesses sovereignty over the entire San Andrés Archipelago – from Alburquerque in the south to Serranilla and Bajo Nuevo in the north.

8.35. Colombia will not rehearse this issue again. Rather, the purpose of this section is to show that the relevant agreements, which were broadly based on equidistance principles, accorded

⁹ See, Chapter 4, Section (E) of this Counter-Memorial.



See full size Map, Vol. III - page 77

to the islands comprising the San Andrés Archipelago a full, or substantially full, effect for maritime delimitation purposes.

8.36. For ease of reference, the boundaries agreed in these treaties are depicted on Figure 4.3 which is reproduced above,¹⁰ together with the 82° W meridian referred to in the 1928/1930 Treaty. Of particular significance for the present case are Colombia's agreements with Panama, Costa Rica, Jamaica and Honduras, as well as the delimitation Agreement between Panama and Costa Rica. These will be discussed in turn.

8.37. The Colombia-Panama boundary agreement was signed on 20 November 1976 and entered into force on 30 November 1977.¹¹ It was the first delimitation agreement in the region. In its substantive provisions, the Treaty delimits the maritime boundary in the Caribbean Sea. As Article I (A)(1) provides, that boundary was agreed in general on the basis of, “[T]he median line whose points are all equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.”¹²

8.38. As can be seen on Figure 4.3, the actual delimitation line between Colombia and Panama assumes a step-line

¹⁰ See Figure 4.3, Vol. III.

¹¹ Annex 4: 1976 Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Colombia and the Republic of Panama. 1074 UNTS 221.

¹² *Ibid.*

configuration in the area between the Colombian islands of Alburquerque, East Southeast Cays, San Andrés, Providencia and Roncador on the one hand, and the mainland coast of Panama on the other. The Agreement notes that this has been done in order to simplify the boundary without departing from the equidistance principle. Parts of the stepped line lie somewhat closer to the Panama mainland than to Colombia's islands, while other parts lie marginally closer to the islands. This situation is explained in Article 1(A) of the Agreement in the following way:

“In accordance with the principle of equidistance hereby agreed upon, except for a few minor deviations which have been agreed upon in order to simplify the drawing of the line, the median line in the Caribbean Sea shall be constituted by straight lines joining the following points:”
[Thereafter the co-ordinates of the relevant points are listed.]¹³

8.39. The Agreement as thus formulated attributes full effect, on a simplified basis, to each of Colombia's islands and cays vis-à-vis Panama's mainland coast. It is clear that the parties did not proceed on the basis that there were any Nicaraguan maritime rights in the area being delimited or any question of Nicaraguan sovereignty over Alburquerque, East Southeast Cays or Roncador.

8.40. Significantly, Nicaragua never protested this Agreement.

¹³ See Annex 4.

Nicaragua evidently did not consider that its interests were prejudiced in any way or that it possessed maritime rights lying to the south and east of Albuquerque, East Southeast Cays, San Andrés Island, Providencia or Roncador. It was only 19 years later, in August 1995, that Nicaragua belatedly sent a generic letter of reservation regarding Colombia's delimitation agreements with third States without specifically mentioning the Agreement with Panama.¹⁴

8.41. The Colombia-Costa Rica Agreement, signed in 1977, was the next delimitation agreement in the area. While Costa Rica has not ratified this agreement, Costa Rica has sent a number of diplomatic notes and made official statements indicating that it considers itself to be bound by the substance of this agreement.¹⁵ As for the course of the boundary, the median line is not referred to in the text of the agreement itself. However, it can be seen from the course of the boundary line depicted on Figure 4.3 that Albuquerque and the East Southeast Cays, received at least, if not more than, full equidistance treatment. On the east, the boundary is linked up with the Colombia-Panama and Costa Rica-Panama boundaries; on the north (north of Point B), the end point of the line was left undefined pending future delimitations with third States.

¹⁴ See Annex 9 to Vol. II of Nicaragua's Reply in the *Nicaragua-Honduras* case.

¹⁵ See paras. 4.156-4.160.

8.42. Costa Rica and Panama concluded a delimitation Agreement in 1980 which both Parties ratified and which entered into force in 1982 – in other words, after the Colombia-Panama and Colombia-Costa Rica agreements had been signed.¹⁶ The Costa Rica-Panama Agreement dealt with delimitation in the Caribbean Sea and the Pacific Ocean, although it is only the former which is pertinent to the present case. As far as Colombia is aware, Nicaragua never protested this Agreement.

8.43. Article 1(1) of the Agreement dealing with the boundary in the Caribbean Sea states that the boundary between the marine areas of the parties is, “the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea is measured in accordance with public international law.” The course of the boundary is also depicted on Figure 4.3. It extends from the terminal point on the land boundary between the two countries up to a point defined by specific co-ordinates where the boundaries of Costa Rica, Colombia and Panama intersect.

8.44. By making specific reference in Article 1(2) of the Agreement to the tri-point between Colombia, Costa Rica and Panama, the agreement implicitly recognizes those agreements which, as has been seen, were concluded on the basis that the

¹⁶ A copy of this Agreement may be found in Annex 5: 1977 Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica.

Albuquerque Cays and East Southeast Cays fell under Colombian sovereignty and were entitled to full effect.

8.45. Turning to the northern limits of the area of concern, a further delimitation agreement of relevance to the case is the Colombia-Jamaica Agreement concluded in 1993.¹⁷ It dealt with two separate issues. The first concerned the delimitation of the maritime boundary between the two States in an eastern sector. The course of this boundary was defined as a series of geodesic lines connecting Points 1 to 4 as illustrated on Figure 4.3. As can be seen on the Map, this boundary falls well to the east of the 80°W meridian and is not relevant to the delimitation between Colombia and Nicaragua other than to show the extent of third State interests to the north.

8.46. Second, the 1993 Agreement also provided for a Joint Regime Area. Once again, the agreement, which lies east of the 80°W meridian, was concluded on the basis that there was no question of any Nicaraguan sovereignty over the Serranilla Cays or over Bajo Nuevo.

8.47. The last agreement with a third State relevant to the present dispute is the Colombia-Honduras maritime delimitation Agreement, which was signed in 1986 and entered into force in

¹⁷ Annex 14: 1993 Treaty on Maritime Delimitation between the Republic of Colombia and Jamaica. 1776 UNTS 27.

1999.¹⁸ Nicaragua has protested this Agreement.

8.48. The 1986 Agreement adopted a two-sector approach to delimitation between Colombia and Honduras. On the west, the boundary followed the latitude of 14°59'08" from Point 1 (the intersection with the 82°W meridian) to Point 2. The second sector proceeds north from Point 2 along the 79°56' meridian, with a slight bulge around Serranilla which was recognized as belonging to Colombia in settlement of a territorial dispute that previously existed with Honduras.¹⁹ The eastern end-point of the boundary north of Serranilla was made contingent on delimitation with a third State and was thus left undefined. Subsequently, when Colombia and Jamaica agreed their Joint Regime Area in 1993, the limit of that area linked up with the extension of the Colombia-Honduras Agreement to the north of Serranilla.

8.49. The Colombia-Honduras Agreement was clearly predicated on the basis that Quitasueño, Serrana and Serranilla appertained to the Colombian San Andrés Archipelago. Significantly, it was "signed in San Andrés, Archipelago of San Andrés, Republic of Colombia"²⁰ in the presence of the Presidents of both countries.

¹⁸ Annex 10: 1986 Treaty concerning Maritime Delimitation between the Republic of Colombia and the Republic of Honduras. 2093 UNTS 295.

¹⁹ See, paras. 4.163-4.166 above.

²⁰ *Ibid.*

8.50. In its Judgment in the *Nicaragua-Honduras* case, the Court had occasion to comment on this Agreement. With respect to the potential end-point of the delimitation line established by the Court, the Court took care not to prejudice the rights of third States by stating that: “The Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined.”²¹ Accordingly, the final point on the Nicaragua-Honduras maritime boundary was left unspecified. Nonetheless, the Court did go on to observe that -

“any delimitation between Honduras and Nicaragua extending east beyond the 82nd meridian and north of the 15th parallel (as the bisector adopted by the Court would do) would not actually prejudice Colombia’s rights because Colombia’s rights under this Treaty [the 1986 Colombia-Honduras Treaty] do not extend north of the 15th parallel.”²²

8.51. In so far as this dicta bears on Colombia’s maritime rights vis-à-vis Honduras, it is correct with respect to the first, or western, sector of the Colombia-Honduras delimitation. However, the second, or eastern, sector of the Agreement clearly recognized that Colombia possessed maritime rights vis-à-vis Honduras to the north of the 15° parallel in the vicinity of

²¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, pp. 87-89, para. 312.

²² *Ibid*, pp. 89-90, para. 316.

Serranilla and Bajo Nuevo where the boundary agreement first proceeds due north, turns slightly to the west and then to the east, north of Serranilla.

8.52. With respect to Honduras, Colombia is bound by the maritime delimitation established by the 1986 Treaty. However, bearing in mind the provisions of Article 59 of the Court's Statute, and the Court's earlier statement that it would refrain from indicating the end-point of the Nicaragua-Honduras boundary so as avoid prejudicing the rights of third States, the effect of the Colombia-Honduras Agreement is different when it comes to considering the delimitation between Colombia and Nicaragua.

8.53. The question of delimitation between Colombia and Nicaragua is the subject-matter of the present proceedings - a matter which the Colombia-Honduras Agreement did not deal with.

8.54. In the light of the Court's Judgment, it follows that Colombia is in no way precluded from asserting maritime rights vis-à-vis Nicaragua north of the 14°59'08" parallel or east of the 79°56'W meridian. Delimitation between the Parties to this case in this area, as in other areas, falls to be established in accordance with the applicable principles and rules of international law.

8.55. In sum, the maritime delimitation practice of third States in this part of the Caribbean Sea is relevant to the present case in several different ways:

- First, the agreements in question indicate the areas where third States have maritime rights. Given the Court's past practice in delimitation cases of taking into account the interests of neighbouring States when delimiting a maritime boundary between the two States that are before it, the location of these agreed boundaries assists in identifying the limits of the relevant area and of the maritime boundary which the Court is called upon to establish.
- Second, as discussed in Chapter 4, the agreements that Colombia has concluded with Panama, Jamaica and Honduras – and the signed agreement with Costa Rica – all show that the States concerned considered that Colombia, not Nicaragua, possesses sovereignty over all the islands comprising the San Andrés Archipelago. Viewed collectively, these agreements proceed on the basis that the San Andrés Archipelago – from Alburquerque in the south, to Serranilla and Bajo Nuevo in the north – all belong to Colombia, in addition to the main islands of San Andrés, Providencia and Santa Catalina.
- Third, with the exception of the portion of the Colombia-Honduras agreement dealing with the

boundary to the west of the Serranilla Cays, and the Colombia-Jamaica Agreement which established a Joint Regime Area, the agreements in question accord to Colombia's islands a substantially full equidistance effect. None of them in any way suggest that the parties to the agreements considered that islands such as the Albuquerque Cays, the East Southeast Cays, the islands of San Andrés, Providencia and Santa Catalina, or Roncador, Quitasueño and Serrana should be enclaved in order to achieve an equitable result, as Nicaragua has proposed in this case.

8.56. What is striking is that there is a considerable body of State practice in the form of bilateral delimitation agreements along the limits of the area to be delimited in the present case involving all of the other riparian States in the immediate region. This practice constitutes strong evidence of general repute amongst the States in the area as to the disposition of sovereignty over the islands that are at issue in this case, and the effect that has been given to such islands for delimitation purposes.²³ None of these agreements suggests that the States concerned considered that Nicaragua possessed maritime rights that

²³ In the *Eritrea-Yemen* Arbitration, the Arbitral Tribunal attached importance to the existence of "general opinion or repute" for purposes of determining sovereignty over a number of the disputed islands. In *the Matter of an Arbitration Pursuant to an Agreement to Arbitrate, Eritrea/Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, para. 381.

extended up to or beyond Colombia's islands or that the islands and cays of the San Andrés Archipelago could be enclaved. Invariably, Colombia's islands were accorded a full, or substantially full, effect. Nor did third States consider that the area to be delimited between Colombia and Nicaragua extended right up to their own shores, or involved the mainland coast of Colombia, although the easternmost portions of Colombia's agreements with Jamaica and Panama, which lie well outside the area of concern in this case, did naturally take into account Colombia's mainland coast.

D. The Role of the 82°W Meridian

8.57. Having examined the relevance of third State delimitations in the region, it is appropriate to turn to the role that the 82°W meridian plays for purposes of maritime delimitation.

(1) THE COURT'S JUDGMENT ON THE PRELIMINARY OBJECTIONS AND THE OBJECT AND PURPOSE OF THE 82°W MERIDIAN

8.58. In addressing this issue, Colombia is mindful of the fact that the Court has stated that the 1928/1930 Treaty "did not effect a general delimitation of the maritime boundary between Colombia and Nicaragua" and that, consequently, the Court has jurisdiction to delimit the maritime boundary between the

Parties.²⁴ Nonetheless, and for the reasons explained below, Colombia considers that the 82°W meridian constitutes an important factor to be taken into account in assessing where an equitable delimitation lies.

8.59. The Court will recall that, in relevant part, Article I of the 1928 Treaty provided as follows:

“the Republic of Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés.”

8.60. This provision must be read in conjunction with the relevant part of the 1930 Protocol in which the Parties, after referring back to the 1928 Treaty, declared:

“that the Archipelago of San Andrés and Providencia, which is mentioned in the first clause of the referred to Treaty, does not extend west of the 82 Greenwich meridian.”

8.61. The reference in Article I of the 1928 Treaty to Nicaragua’s recognition of Colombia’s “full and entire sovereignty” over the San Andrés Archipelago is significant.

²⁴ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, p. 36, para. 120.

8.62. It is true that the Court concluded in its *Judgment on the Preliminary Objections* that the plain and ordinary meaning of this language cannot be interpreted as effecting a delimitation of the maritime boundary between the Parties and that the language is more consistent with the contention that the Protocol was intended to fix the western limit of the San Andrés Archipelago.²⁵ At the same time, it is difficult to see how Nicaragua’s recognition of Colombia’s “full and entire” sovereignty over an Archipelago that lies east of the 82°W meridian is compatible with Nicaragua’s current attempt to argue that it possesses sovereign rights (continental shelf and EEZ) that not only extend east of the 82°W meridian, but also swallow up and surround all of Colombia’s islands comprising the Archipelago. As will be recalled, under Nicaragua’s mainland-to-mainland delimitation scenario, Nicaragua’s claim line lies over 150 nautical miles east of San Andrés Island.

8.63. As shown in Chapter 5, Nicaragua proposed the 82°W meridian as “the limit in the dispute with Colombia”. The pre-ratification discussions of the 1928/1930 Treaty regarding the 82°W meridian are significant: the terms used included a “border”, a “dividing line of the waters in dispute”, a “delimitation”, a “demarcation of the dividing line”²⁶ – in other words, a limit.

²⁵ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 34, para. 115.

²⁶ *Ibid.*, p. 36, para. 120.

8.64. Moreover, in its pleadings Nicaragua considers that the reference to the 82°W meridian limit in the 1930 Protocol is “an integral part of the Treaty and binds both Parties”.²⁷

8.65. Nicaragua also considers that the meridian is the “limit of the San Andrés Archipelago”²⁸ or the “limit between the archipelagos that had been the reason for the dispute”.²⁹

8.66. Indeed, when commenting on the terms used by its Foreign Minister and Congressmen during the approval of the Treaty in 1930, Nicaragua stated that the reference to the meridian was included to fix the “limit to the archipelago”:

“The fact that others used the word delimitation or border is perfectly understandable: they were putting a limit to the archipelago”.³⁰

Later on, Nicaragua stated that it had the purpose of establishing “a limit ‘between the archipelagoes’”.³¹

8.67. Nicaragua’s statement in its *Memorial* to the effect that an eventual maritime limit along the 82°W meridian would only extend for a distance of about 75 miles,³² was contested by

²⁷ NM, p. 153, para. 2.201.

²⁸ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, p. 33, para. 111, paraphrasing Nicaragua.

²⁹ *Ibid*, p. 34, para. 111, quoting Nicaragua.

³⁰ NWS, p. 37, para. 1.58.

³¹ *Ibid* p. 38, para. 1.60.

³² NM, p. 176-177, para. 2.253.

Colombia in its *Preliminary Objections*.³³ Colombia considered that the maritime limit rather extended northwards and southwards until it intersected with the relevant third-State delimitations.

8.68. For its part, in its Judgment of 13 December 2007, the Court stated that, although the 1928/1930 Treaty did not effect a general maritime delimitation,³⁴

“[t]hat language is more consistent with the contention that the provision in the Protocol was intended to fix the western limit of the San Andrés Archipelago at the 82nd meridian.”³⁵ (Emphasis added)

8.69. When referring to the various Colombian maps depicting the 82°W meridian limit, the Court also indicated that that dividing line could be construed either as identifying a general maritime delimitation, or only as a limit between the archipelagos:

“An examination of these maps indicates that the dividing lines on them are drawn in such a way along the 82nd meridian between the San Andrés Archipelago and Nicaragua that they could be read *either as identifying a general maritime delimitation between the two States or as only a*

³³ CPO, p. 102-103, paras. 2.60-2.61.

³⁴ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, p. 35, para.116.

³⁵ *Ibid*, p. 34, para.115.

limit between the archipelagos.”³⁶ (Emphasis added)

8.70. Naturally, the only archipelago opposite the San Andrés Archipelago that a “limit between the Archipelagos” could refer to would be that formed by the Miskito Cays and certain other cays, islets and banks of Nicaragua.³⁷

8.71. As pointed out, the Court stated that the inclusion of the 82°W meridian in the 1930 Protocol, and on the official maps of Colombia since then, does not imply that “a delimitation of the maritime boundary”³⁸ had been effected. It held that “that language is more consistent with the contention that the provision in the Protocol was intended to fix the western limit of the San Andrés Archipelago”³⁹ or “a limit between the archipelagos”.⁴⁰

8.72. Both interpretations lead to similar results.

8.73. In case the 82°W meridian is considered as a limit between the archipelagos, it inevitably constitutes a “limit” that must be taken into account in a delimitation of the maritime

³⁶ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 35, para.118.

³⁷ In 1930 Nicaragua considered that the Miskito Cays and others located off the Mosquito Coast could be later claimed by Colombia as part of the San Andrés Archipelago.

³⁸ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment of 13 December 2007*, p. 34, para. 115.

³⁹ *Ibid*, p. 34, para. 115.

⁴⁰ *Ibid*, p. 35, para. 118.

spaces that those archipelagos generate.

8.74. If the aforesaid meridian is considered to have the character of being the western limit of the San Andrés Archipelago, that would imply that all the islands, cays and banks, and the waters that connect them, located to the east of that meridian, belong to Colombia, whereas those located to the west of that meridian appertain to Nicaragua.

8.75. As a logical consequence, Colombia would have no rights over any of the banks, cays and islands, or over the waters that connect them, located to the west of that meridian and Nicaragua would have no right over those located to the east of it.

8.76. The 82°W meridian limit is therefore, an element of essential importance for establishing a maritime delimitation between the San Andrés Archipelago and Nicaragua in accordance with the application of equitable principles. This is all the more so, since in 1930, due to the demand advanced by Nicaragua and accepted by Colombia, it was solemnly established in a bilateral instrument signed by them and registered with the League of Nations.

(2) THE CONDUCT OF THE PARTIES WITH REGARD TO THE
82°W MERIDIAN

8.77. The relevance of the 82°W meridian is not limited to Nicaragua's recognition of Colombia's sovereignty over the San Andrés Archipelago and its composition, and to Colombia's recognition of Nicaragua's sovereignty over the islands, islets and cays located to the west of that meridian. Nicaragua, for nearly 40 years, and Colombia until the present time, fully respected the 82°W meridian in practice as the limit of the exercise of their respective jurisdictions.

i. Fishing activities

8.78. In the relevant area, fishing activities have been carried out by Nicaragua in the zones adjacent to the Islas Mangles (Corn Islands) and the Miskito Cays, as well as in areas near the other islands and cays located to the west of the 82°W meridian. Only in the late 1970s did isolated episodes of Nicaraguan vessels fishing to the east of the meridian first occur.

8.79. On the Colombian side, despite the immediate proximity of several of the islands and cays to the meridian,⁴¹ the activities of the fishermen of the islands of San Andrés and Providencia as of 1930, were carried out up to the 82°W meridian. Nicaragua did not protest the fishing activities of Colombian vessels to the

⁴¹ The cays of Alburquerque are at a distance of 9.5 miles, Providencia at 36 miles, and San Andrés at 16 miles east of the meridian.

east of the 82°W meridian, and neither did Colombia protest those activities carried out by Nicaraguan fishing vessels to the west of that meridian.

8.80. Throughout the period between 1928 and 1981, during which the Olaya-Kellogg Agreement was in force between Colombia and the United States, Nicaragua also did not protest the fishing activities carried out by United States' vessels in the areas adjacent to the cays of Roncador, Quitasueño and Serrana, that were authorized pursuant to that instrument.

ii. Research activities

8.81. Likewise, surveys for drawing nautical charts and research activities concerning natural resources, marine geology, marine environment, etc., conducted by Colombia covered an area up to the 82°W meridian.⁴² None of those activities, performed as part of the normal exercise of Colombian jurisdiction to the east of the meridian, has been objected to by Nicaragua. The same can be said for Colombia with respect to the activities carried out by Nicaragua to the west of the aforesaid meridian.

iii. Control and surveillance in the area

8.82. The control functions carried out by ships of the Colombian Navy of fishing activities, illicit drug trafficking and other prohibited activities have been limited up to the 82°W

⁴² See paras. 3.117-3.125, 3.126-3.131.

meridian ever since 1930. For its part, the Nicaraguan coastguard remained to the west of the 82°W meridian. Only in the late 1970s did certain isolated incidents arise following Nicaragua's claim over maritime areas to the east of the meridian. These were protested by Colombia, and Colombia's Navy stationed in Cartagena and San Andrés has routinely patrolled the Archipelago's maritime areas.

iv. Seismic studies and oil concessions

8.83. It was only between 1967 and 1977 that Nicaragua purported to grant oil exploration concessions in areas partly located to the east of the 82°W meridian. Under the conviction that the meridian was the jurisdictional limit between both countries, Colombia protested to Nicaragua.⁴³

8.84. For its part, Nicaragua never protested the studies or seismological activities carried out by the Colombian Government to the east of the 82°W meridian.⁴⁴

v. The rights over the areas divided by the 82°W meridian

8.85. Colombia does not suggest that, as of 1930, the notion of coastal State's sovereign rights over the continental shelf and exclusive economic zone existed. Obviously, at the time, this development lay well in the future. By the same token, it is

⁴³ See para. 3.116.

⁴⁴ See paras. 3.109-3.115.

impossible to read the 1928/1930 Treaty as contemplating that Nicaragua would, at some point in the future, be entitled to exercise sovereignty, or sovereign rights, east of the 82°W meridian, including over such sensitive matters such as fishing and mineral resources, or that Nicaragua could be held to possess such rights extending right up to, and beyond, all of Colombia's islands.

8.86. As the Court has pointed out in the past, the conduct of the parties can constitute a relevant circumstance that must be taken into account.

8.87. For example, in the *Tunisia-Libya* case, the Court indicated that it would take into account as a relevant circumstance in the delimitation process conduct of the parties which evidenced what the parties themselves considered to be equitable in terms of maritime zones. As the Court stated,

“it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such – if only as an interim solution affecting part only of the area to be delimited.”⁴⁵

8.88. *Tunisia-Libya* involved the mutual recognition of a *de facto* maritime line by the parties to the case over a relatively modest period of eight years. Nonetheless, this mutual conduct,

⁴⁵ *Continental Shelf (Tunisia/Libya Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 84, para. 118.

while not rising to the level of a “tacit agreement”, was a key circumstance influencing where the first sector of the delimitation lay. In the present case, the evidence points to a total lack of any Nicaraguan presence or claim east of the 82°W meridian for some 40 years after the 1928/1930 Treaty was concluded. That conduct, or lack of conduct, is highly significant in assessing where an equitable maritime boundary now lies, particularly when considered in the light of Colombia’s own conduct which has been geared to the exercise of jurisdiction east of the 82°W meridian.

8.89. In short, both Parties have acted in accordance with the limits established in the 1928/1930 Treaty. Notwithstanding this, Nicaragua now claims huge maritime areas to the east of the 82°W meridian in contradiction to its previous conduct. However, as Judge Alfaro of the International Court of Justice stated:

“...the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right.”⁴⁶

8.90. It is also significant that the fixing of the 82°W meridian as

⁴⁶ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, Separate Opinion of Judge Alfaro, I.C.J. Reports 1962, p. 40.*

a limit was considered, at the time the 1930 Protocol was agreed, to be “indispensable for the question to be at once terminated forever”.⁴⁷ Moreover, the Nicaraguan Government was prepared to discontinue the process of the Treaty’s approval in Congress unless the limit was incorporated. The meridian’s adoption entailed careful negotiations and consultations between both Governments and was subject to debate in the Nicaraguan Congress. Its inclusion required a special mention in the full powers granted for the exchange of the ratification instruments. In effect, it was expressly incorporated in the Protocol of Exchange, registered along with the Treaty by both States – separately at that – with the League of Nations, and was respected for several decades as the limit between both States. It follows that the 82°W meridian cannot be regarded as lacking any effect for the maritime delimitation.

8.91. It was Nicaragua who, in 1930, demanded and obtained the establishment of a limit along the 82°W meridian. It would be contrary to a delimitation carried out in accordance with equitable principles for Nicaragua now to be permitted to acquire rights that it had never claimed to the east, or on “the wrong side”, of the 82°W meridian limit that Nicaragua itself demanded.

⁴⁷ Annex 199: Record of the XLIX Session of the Chamber of the Senate of the Nicaraguan Congress, 5 March 1930.

8.92. This is particularly the case given that, as the Nicaraguan Foreign Minister and Congressmen repeatedly pointed out during the approval of the Esguerra-Bárcenas Treaty in 1930, the 82°W meridian was viewed as the “dividing line of the waters in dispute”,⁴⁸ the “demarcation... indispensable for the question to be at once terminated forever”,⁴⁹ the “limit in this dispute”, the “dividing line”,⁵⁰ the “boundary between the archipelagos”⁵¹ and the “geographical boundary between the archipelagos”.⁵²

8.93. In the light of these factors, the 82°W meridian has an important role to play in determining where an equitable delimitation lies even if it does not represent a general maritime boundary *per se*.

E. Conclusions

8.94. Given the geographical characteristics of the area in dispute, and the other factors discussed in this Chapter, the situation regarding the area in which the delimitation falls to be effected may be summarized as follows:

- (1) The relevant area is the area where the maritime entitlements of the Parties generated by their opposite coasts meet and overlap.

⁴⁸ See Annex 199.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

- (2) This area comprises the maritime spaces lying between the Colombian islands, islets and cays comprising the San Andrés Archipelago, on the one hand, and Nicaragua's islands and cays, on the other.
- (3) Colombia's mainland coast is not a relevant coast due to its location well over 400 nautical miles from the nearest Nicaraguan territory.
- (4) Existing delimitations involving third States in the region are relevant factors to be taken into account for four main reasons:
 - They indicate the areas where third States have maritime rights, and thus assist in defining and limiting the area to be delimited in this case;
 - They show that all the other riparian States in the region consider that Colombia possesses sovereignty over the islands, islets and cays comprising the San Andrés Archipelago;
 - For the most part, they accord Colombia's islands and cays full effect, or substantially full effect, for delimitation purposes; and
 - None of them are based on the notion that there are any Nicaraguan maritime rights extending up to, or beyond, the San Andrés Archipelago.
- (5) Given the conduct of the Parties in entering into the 1930 Protocol, and in respecting the 82°W meridian in

practice for a long period of time afterwards, that meridian is a relevant factor to be taken into account in assessing where an equitable delimitation lies.

CHAPTER 9

THE DELIMITATION LINE AND ITS EQUITABLENESS UNDER INTERNATIONAL LAW

A. Introduction

9.1. In this Chapter, Colombia will address the principles and rules of international law relevant to the delimitation and their application to the facts of the case in order to achieve an equitable result.

9.2. Colombia considers that the delimitation in the relevant area – that is, between the islands and cays of the San Andrés Archipelago and those corresponding to the group of the Miskito Cays, the Islas Mangles (Corn Islands) and the Nicaraguan islands lying in between - should be effected by a median line drawn from the relevant basepoints on the Parties' baselines, taking into account that such a line reflects well-established principles and rules of international law.

9.3. Colombia has previously explained that the applicable law in the present case is customary international law.¹ In Section B, Colombia will review the relevant principles and rules, as primarily developed in the Court's jurisprudence, which

¹ See the Introduction to Part III, para. 4 above.

currently find their expression in the “equitable principles/relevant circumstances” rule.

9.4. In Section C, Colombia will identify the basepoints on the Parties’ respective baselines which govern the plotting of the equidistance, or median, line and will set out the course of that line.

9.5. In Section D, Colombia will then address the question whether there are any relevant circumstances justifying the shifting of the median line and will show that such circumstances do not exist. In Section E, Colombia will show that a median line boundary achieves an equitable result in the circumstances of the case.

B. The Applicable Principles and Rules of International Law

9.6. The previous Chapter has shown that the delimitation in this case lies between coasts of the Parties that are situated in an opposite relationship with each other – namely, between the Colombian Archipelago and Nicaragua’s islands and cays which face the Archipelago. While the law of maritime delimitation has undergone a certain evolution over recent years, one principle that has remained a constant is that, in situations involving delimitation between opposite coasts, an equidistance

or median line boundary will normally produce an equal division of the parties' overlapping entitlements and an equitable result.

9.7. This principle was alluded to by the Court in its very first decision involving maritime delimitation – the 1969 *North Sea Cases* - where the Court stated that: “Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line.”²

9.8. Subsequently, in the *Libya-Malta* case, the Court posited the median line as the starting point for maritime delimitations involving opposite coasts. As the Court stated, this approach “is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result”.³

9.9. The same process was adopted by the Court in *Qatar-Bahrain*, where the Court referred back to its decision in *Libya-Malta*. In other words, the Court proceeded on the basis that it would first draw an equidistance line, and then consider whether

² *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 36, para. 57. In this connection, the Court went on to observe that, “Whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.” *Ibid.*, p. 38, para. 58.

³ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 47, para. 62.

there were any circumstances calling for an adjustment of that line.⁴

9.10. In *Qatar-Bahrain*, the Court expanded on its previous reasoning for proceeding in this manner. As the Court explained:

“The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely related.”⁵

9.11. The close relationship identified by the Court between the “equitable principles/relevant circumstances” rule for the delimitation of the continental shelf and exclusive economic zone, and the “equidistance/special circumstances” rule applicable to territorial sea delimitation, is important. The latter rule is reflected in Article 15 of the Law of the Sea Convention, which mirrors the earlier provisions of Article 12 of the 1958 Geneva Convention of the Territorial Sea and the Contiguous Zone, and which reflects a well-established principle of customary international law.

⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 111, para. 230.

⁵ *Ibid.*, p. 111, para. 231.

9.12. It is clear from the wording of Article 15 of the 1982 Convention that there is a presumption in favour of an equidistance or median line boundary for territorial sea delimitation in the absence of a showing of historic title or other special circumstances justifying a departure from equidistance. Given the close relationship between the “equidistance/special circumstances” rule and the “equitable principles/relevant circumstances”, the same priority accorded to the equidistance line for territorial sea delimitation applies to the delimitation of maritime areas lying beyond the territorial sea. The similarity in the two rules was referred to by the Court in its Judgment in the *Cameroon-Nigeria* case where it stated:

“The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’.”⁶

9.13. In the light of these precedents, Colombia believes that the basic rule of maritime delimitation is now well settled. It

⁶ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 441, para. 288.*

involves first plotting an equidistance line, and then considering whether there has been a showing of any special or relevant circumstances which might justify an adjustment of that line. If not, the equidistance or median line will be the final delimitation.

C. Identifying the Median Line

(1) THE CRITERIA FOR PLOTTING THE EQUIDISTANCE LINE

9.14. The drawing of the equidistance line obviously depends on the identification of the relevant basepoints on the baselines of the Parties which control the course of the line. The legal criteria for choosing these basepoints are clear from both the provisions of Article 15 of the 1982 Convention and the case precedents. The relevant part of Article 15 of the 1982 Convention is the first sentence which provides as follows:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.”

9.15. This provision makes it clear that the basepoints to be used for constructing the equidistance or median line are the nearest basepoints situated on the baselines of the Parties from which the breadth of their respective territorial seas is measured.

Significantly, the criteria set out in Article 15 for drawing the equidistance line have been endorsed by the Court in its Judgments in the *Qatar-Bahrain* and *Cameroon-Nigeria* cases. The relevant passage in *Qatar-Bahrain*, which was cited with approval in *Cameroon-Nigeria*, reads as follows:

“The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. It can only be drawn when the baselines are known.”⁷

9.16. Recent arbitral practice has followed the same approach. Thus, in the *Guyana-Suriname* arbitration, the Tribunal quoted the passage cited above from the Court’s Judgment in *Qatar-Bahrain* for purposes of identifying the applicable legal criteria for establishing the equidistance line.⁸

9.17. As noted by the Court in its Judgment in *Qatar-Bahrain*, in order to identify with precision the relevant basepoints for constructing the equidistance line, it is necessary to be informed of the parties’ baselines. In the present case, neither Party has enacted a system of straight baselines that is relevant for

⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 94, para. 177. And see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 442, para. 290.

⁸ *In the matter of an Arbitration between Guyana and Suriname, Award dated 17 September 2007*, p.113, para. 352.

delimitation between Colombia's Archipelago and Nicaragua's islands and cays.⁹

9.18. For the most part, the baselines in question are therefore the "normal" baselines constituted by the low-water line along the coast. With respect to the baselines of islands, however, it is important to bear in mind that international law, as reflected in Articles 6 and 13 of the 1982 Convention, permits the use of fringing reefs and low-tide elevations situated within the breadth of the territorial sea of the mainland or an island as part of the baseline for measuring the breadth of the territorial sea. These details will be examined in the next section.

(2) THE RELEVANT BASEPOINTS

9.19. The location of the relevant basepoints on the baselines of the Parties for purposes of plotting the equidistance line depends on reliable information regarding the geographic characteristics of the Parties' islands and cays situated within the relevant area. There are a number of hydrographic charts of the area produced by Colombia and third States, such as the United States and Great Britain, covering this region. Because of the shallow nature of some of the maritime areas around the islands and cays and the fact that the charts in question have been prepared on

⁹ In its *Memorial* Nicaragua criticizes the system of straight baselines that Colombia established pursuant to Decree N° 1936 of 13 June 1984 (NM, pp. 203-204, para. 3.35). However, these baselines only apply to Colombia's mainland coast and, consequently, have no bearing for the present delimitation.

different scales, and are outdated in some respects, Colombia has commissioned a survey of the relevant features. This study was undertaken by personnel of Colombia's Navy. (Annex 171)

9.20. For ease of reference, Colombia will first describe the relevant basepoints on its side, starting in the south and proceeding northwards, and taking into account the geographic description of the various islands and cays set out in Chapters 2 and 8. Thereafter, Colombia will identify Nicaragua's basepoints based on information available to Colombia. As Colombia has noted, one of the many shortcomings of the Nicaraguan *Memorial* is that Nicaragua has failed to provide any meaningful information concerning the details of its own geography. Consequently, the identification of the basepoints on Nicaragua's side of the median line has been based on available maps and charts of these areas.

9.21. The basepoints so identified are depicted on Figure 9.1 accompanying the next section along with the control lines generated by these points for plotting the course of the equidistance line.¹⁰

9.22. In assembling this information, Colombia has proceeded in accordance with the relevant provisions of the Law of the Sea dealing with the location of a State's baselines including in

¹⁰ See Figure 9.1, Vol. III.

situations where there are fringing reefs around islands situated on an atoll and where there are low-tide elevations which are located wholly or partly within the 12 nautical mile territorial sea of the mainland or of an island.

9.23. The former situation is governed by Article 6 of the Law of the Sea Convention which provides that, where islands are situated on atolls having fringing reefs, the baseline of the island is the seaward low-water line of the reef. The latter situation is addressed in Article 13 of the Convention which provides that, where a low-tide elevation is located wholly or partly at a distance not exceeding the breadth of the territorial sea of the mainland or an island, the low-water line on the elevation may be used as the baseline. Both of these provisions reflect accepted principles of customary international law.

i. Colombian Basepoints

9.24. As previously pointed out, the Alburquerque Cays are the southernmost islands forming part of the San Andrés Archipelago and the nearest Colombian territory to Nicaragua's islands and cays. Because of its location, Alburquerque provides basepoints from which the breadth of Colombia's territorial sea as well as the other maritime areas are measured and thus relevant basepoints for purposes of calculating the equidistance line. A detailed graphic depicting the basepoints may be found in Figure 9.1.

9.25. San Andrés Island itself provides four separate basepoints for equidistance purposes along its west-facing coast, which lies opposite the Nicaraguan Islas Mangles (Corn Islands). These can also be seen in greater detail on the Figure 9.1.

9.26. Approximately 45 nautical miles north of San Andrés Island lies the southern tip of the Island of Providencia. The west coast of Providencia Island provides another set of basepoints for the central portion of the equidistance line. To the north of Providencia and Santa Catalina, about eight nautical miles away, lies Low Cay which provides a relevant basepoint as well. These basepoints are depicted on Figure 9.1.

9.27. Quitasueño is located about 40-45 nautical miles north of Low Cay. As discussed in the previous chapter, Quitasueño is an extended bank some 50 kilometres in length with several sets of features situated along the bank that are above water at high tide. This has been confirmed by the technical survey team that conducted the on-site study of Quitasueño. Each of these features generates basepoints for purposes of measuring the outer limits of Colombia's territorial sea, as do low-tide elevations situated within twelve nautical miles of these features. The relevant basepoints for equidistance purposes are depicted on the large-scale Figure 9.1.

ii. Nicaraguan Basepoints

9.28. On the Nicaraguan side, the entire equidistance line is controlled by basepoints situated on various offshore islands and cays appertaining to Nicaragua.

9.29. In the south, a series of basepoints are located on Great Corn Island and Little Corn Island, respectively. As can be seen on Figure 8.1,¹¹ these basepoints control the entire southern sector of the equidistance line up to a point where the interests of a third State (Costa Rica) potentially come into play.

9.30. North of Little Corn Island, there is a Nicaraguan island – Roca Tyra – which generates basepoints for this part of the equidistance line. This feature lies opposite the Colombian islands of San Andrés, Providencia and Santa Catalina.

9.31. North of the 14th parallel, the relevant basepoints on the Nicaraguan side are initially provided by the Miskito Cays and then, north of those cays, by Edinburgh Reef and the other features situated in its vicinity.

(3) THE COURSE OF THE MEDIAN LINE

9.32. Having identified the basepoints which govern the construction of the median line, it is a straightforward exercise to

¹¹ See Vol. III, Figure 8.1.



See full size Map, Vol. III - page 89

Figure 9.7

plot that line. The description given below is illustrated on Figure 9.2 above.

9.33. In the south, the median line lies between the Albuquerque Cays and San Andrés Island, on the Colombian side, and the Islas Mangles (both Great Corn and Little Corn) on the Nicaraguan side.

9.34. There is a question how far the median line should be prolonged to the south given the potential interests of third States in the region. To avoid any possible prejudice to such rights, as may exist, Colombia has placed an arrow at the end of the line to the south of Albuquerque and Great Corn Island.

9.35. Further north, the line lies between the main Colombian islands of San Andrés, Providencia and Santa Catalina (including Low Cay) and Little Corn Island and Roca Tyra on the Nicaraguan side. The portion of the median line described above can be seen to extend in roughly a south-to-north direction up to a point where, on the Nicaraguan side, basepoints on the Miskito Cays come into play.

9.36. At that point, the orientation of the median line changes slightly and adopts a south-southwest to north-northeast direction. The line then passes midway between the cays lying off Santa Catalina, on the one hand, and the Miskito Cays, on the

other. The Miskito Cays lie opposite to Quitasueño which then takes over control of the course of the line on the Colombian side. Figure 9.2 depicts the median line between the two sets of islands in this area.

9.37. The last sector of the equidistance line falls between Quitasueño and Edinburgh Reef on the Nicaraguan side. The line proceeds in roughly a south-north direction until areas where potential rights and interests of third States become a factor.

D. Relevant Circumstances

9.38. Having established the course of the median line, the question arises whether there are any special or relevant circumstances justifying an adjustment of that line. As this Section will show, the median line boundary is equitable in this case. In addition to the overall geographic context which confirms the equitable nature of the median line, other factors, such as the delimitation methods employed by third States in the same general area of concern, comparable examples of State practice, and the significance of the 82°W meridian based on the past conduct of the Parties, support the appropriateness of the proposed median line delimitation.

(1) GEOGRAPHIC FACTORS

i. Coastal geography

9.39. With respect to the geography of the relevant area, the Court has consistently held that the determination of an equitable boundary does not involve any refashioning of geography. The coastal geography of the area to be delimited, as well as the political geography in terms of the territorial sovereignty of the Parties over relevant land territory, are facts which form the predicate for the delimitation process. As the Court put it in the *Cameroon-Nigeria* case:

“The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation.”¹²

9.40. The Nicaraguan *Memorial* tries to minimize the individual size and significance of the islands and cays that comprise the San Andrés Archipelago while arguing that these islands lie closer to Nicaragua’s mainland coast than to the mainland coast of Colombia.¹³ Such a piecemeal approach to the relevant geography is seriously misleading and does not begin to reflect the overall geographic situation existing in this corner of the Caribbean Sea.

¹² *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 444-445, para. 295.

¹³ See, for example, pp. 237-239, paras. 3.94-3.100 and pp. 248-252, paras. 3.115-3.123 of the Nicaraguan *Memorial*.

9.41. As discussed in Chapter 2, the San Andrés Archipelago is an important political and geographic unit, and has been constantly treated as such by Colombia.¹⁴ The Archipelago is, and has been, an important centre of commerce, fishing and tourism, and Colombia has a long-standing history of regulating all aspects of economic, social, administrative and judicial life within the Archipelago as well as policing in the waters around the islands and cays comprising the Archipelago.¹⁵

9.42. In geographic terms, the Archipelago stretches over a considerable distance from northeast to southwest.

9.43. In addition, as pointed out earlier in this Chapter, an equidistance line drawn between the nearest points on the Parties' respective baselines is not actually controlled by any basepoints on Nicaragua's mainland coast. The position of the Islas Mangles (Corn Islands), Roca Tyra, the Miskito Cays, and Edinburgh Reef shadowing Nicaragua's coast is such that, for median line purposes, the Nicaraguan mainland coast does not have a role to play.

9.44. These factors illustrate the fundamental differences that exist between the relevant geography characterizing this case and the geographic situation that the Court faced in cases such as

¹⁴ See Colombia's *Preliminary Objections*, pp. 25-27, paras. 1.7-1.16. See also, paras. 2.2-2.4, and Section C (paras. 2.32-2.77) in Chapter 2.

¹⁵ Section D, Chapter 3, paras. 3.24-3.151.

Libya-Malta and *Greenland-Jan Mayen*. Those cases involved a single small island, or compact group of islands (as opposed to a long archipelago), opposite a relatively long mainland coast, with no islands lying off the mainland coast which would dictate the course of an equidistance line as is the situation here with respect to Nicaragua's islands and cays.

9.45. In the present case, viewed together, the islands and cays comprising the San Andrés Archipelago extend along a considerable distance from northeast to southwest. All of them lie a substantial distance – more than 100 nautical miles – from Nicaragua's mainland coast, with Roncador and Serrana situated some 190 and 170 nautical miles from that coast respectively, and the Serranilla Cays and Bajo Nuevo located more than 200 nautical miles away.

9.46. Unlike the geographic situation in the *Anglo-French Arbitration* involving the Channel Islands, which lay just off the French coast and which were surrounded on three sides by French territory, Colombia's islands and cays comprising the San Andrés Archipelago lie much further from Nicaragua and face Nicaragua in only one direction. Moreover, Nicaragua also possesses a series of islands lying off its coast that are opposite to the San Andrés Archipelago. A median line boundary between Colombia's islands and cays and the islands and cays of Nicaragua therefore results in no undue encroachment or “cut-

off’ effect on the maritime areas appertaining to either Party. Nor do Colombia’s islands and cays fall on the “wrong side” of any median line, as has been explained in Chapter 7.

ii. State practice

9.47. In terms of comparable examples of State practice, and apart from the practice of third States in the immediate region discussed in Chapter 8, the geographic situation characterizing the relevant area is not dissimilar to that existing between India and the Maldives. Those two States concluded a maritime boundary agreement in 1976 which gave full equidistance effect to the Maldives Islands in two ways: first, equidistance was used in the sector of the delimitation between the Maldives and the Indian mainland; second, equidistance was also used to delimit the sector between the Maldives and the small Indian island of Minicoy to the north.

9.48. The present case also presents a certain resemblance to the delimitation concluded in 1982 between Australia and France (with respect to New Caledonia). According to the Charney and Alexander study: “The boundary line runs between a series of small islands or reefs on both sides.”¹⁶ In the southern reaches of the delimitation, two very small features belonging to Australia – Middleton Reef and Norfolk Island – were accorded a full

¹⁶ *International Maritime Boundaries*, Vol. 1 (J. Charney and L. Alexander eds.; Martinus Nijhoff, 1993) 907.

equidistance effect. This is not unlike the median line boundary in this case between Colombia's islands and cays, on one side, and the islands and cays belonging to Nicaragua, on the other.

9.49. Another significant example of State practice supporting the same basic approach is the delimitation between Thailand and India (with respect to the Nicobar Archipelago) signed in 1978. Once again, the boundary is based on the equidistance method that gives full effect both to the Nicobar Archipelago and to the small Thai islands lying off the mainland coast of Thailand.

9.50. Reference may also be made to the Isla de Aves, which is a coral cay belonging to Venezuela in the Caribbean Sea located some 560 km north of the Venezuelan mainland. With an area of 420 square metres, a maximum length of 570 metres and width ranging between 27 and 150 metres, it is much smaller than any of the cays of the San Andrés Archipelago.

9.51. By a Treaty of 28 March 1978, Venezuela and the United States accorded full effect to the aforesaid island for purposes of the delimitation of the continental shelf and exclusive economic zone with Puerto Rico and the United States' Virgin Islands.

9.52. Moreover, in the Treaty of 31 March 1978 between the Kingdom of The Netherlands and Venezuela, large areas of

exclusive economic zone and continental shelf were accorded to Isla de Aves in the delimitation with Aruba, Bonaire, Curacao and Saint Eustachius.

9.53. Lastly, in the Treaty of 17 July 1983 between France and Venezuela on the maritime delimitation with the French territories of Martinique and Guadeloupe, with areas of 1,026 and 1,179 square km respectively and an approximate population of 1 million, the small Isla de Aves – that has no population other than a military detachment – was accorded full effect in generating exclusive economic zone and continental shelf rights.

9.54. In all the aforementioned treaties, the delimitations were effected on the basis of an equidistance line.

9.55. It will be appreciated, therefore, that a median line boundary between Colombia's islands and cays and the Nicaraguan islands and cays respects the geography of the area. It is also consistent with the regional practice of third States as well as State practice in a wider context. In such circumstances, there is no justification for shifting the median line boundary based on geographic factors.

iii. Geomorphology and bathymetry

9.56. In the light of Nicaragua's arguments, it is also appropriate to observe that a median line boundary respects the

geomorphological characteristics of the relevant area.

9.57. In the *Nicaragua-Honduras* case, Nicaragua emphasized that the islands at issue lay within its continental shelf by reference to the location of the 200 metre isobath.¹⁷ Nicaragua drew attention to the fact that the natural prolongation of the mainland extended in a northeast direction from Nicaragua's coast towards Jamaica.¹⁸ In the present case, as previously noted, Nicaragua contends that the San Andrés Archipelago lies within its continental shelf based on the "relevant data" which Nicaragua does not otherwise elaborate.

9.58. An analysis of the bathymetry of the area, however, reveals that this is incorrect on geomorphologic grounds. Figure 9.3 opposite,¹⁹ is a bathymetric map of the region. It clearly shows that the bathymetric contours do indeed stretch from the northern part of Nicaragua's coast north-eastwards towards Jamaica. Vis-à-vis Colombia, however, there is a deep trench roughly along a southwest-northeast direction that lies between Nicaragua's islands and cays, on the one hand, and the islands and cays comprising the San Andrés Archipelago, on the other.

¹⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Memorial of Nicaragua, p. 9, para. 12.

¹⁸ Ibid. p. 18, para. 43.

¹⁹ Figure 9.3, Vol. III.

COLOMBIA NAUTICAL CHART 1601

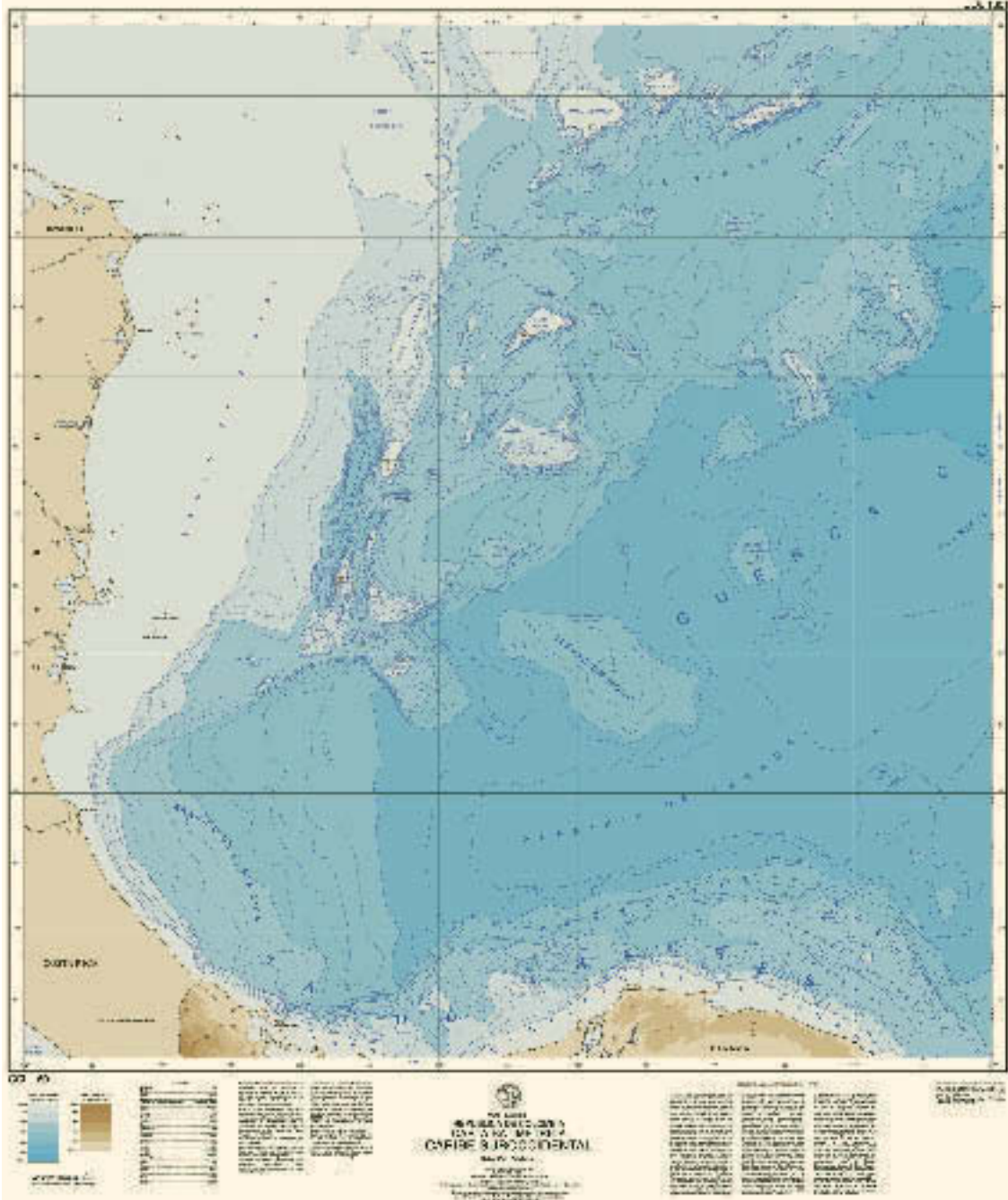


Figure 9.3

See full size Map, Vol. III - page 91

9.59. Moreover, as explained in Chapter 8, the individual components of the San Andrés Archipelago generate legal entitlements to territorial sea, continental shelf and exclusive economic zone on their own. It follows that it is both factually and legally incorrect for Nicaragua to assert that Colombia's islands are situated on Nicaragua's continental shelf.

(2) THE CONDUCT OF THE PARTIES AND THE 82°W MERIDIAN

9.60. In Chapter 8, Colombia explained the relevance of the 82°W meridian in the case based on the conduct of the Parties even if that line did not constitute a general maritime delimitation at the time it was referred to in the 1930 Protocol. Even if the 82°W meridian is not a line of maritime delimitation *per se*, the circumstances in which it was agreed, and the Parties' mutual respect of it in practice over a considerable period of time, represent key factors to be considered in relation to a equidistance based boundary arrived at independently on the basis of contemporary international law.

9.61. Figure 9.2 shows the relationship between the 82°W meridian and the equidistance line set out above. While the two lines do not coincide – a fact that is not surprising – they do lie in the same general area between the San Andrés Archipelago and the Nicaraguan islands. Both lines follow the same general north-south orientation.

9.62. In the south, the equidistance line falls somewhat west of the 82°W meridian due to the fact that the meridian passes very close to Albuquerque and San Andrés Island, which are the two westernmost components of the Archipelago. Indeed, the meridian falls within Albuquerque's 12-mile territorial sea.

9.63. In the north, an equidistance boundary crosses over to the east of the 82°W meridian due to the location of the features that control the course of the line in relation to the 82°W meridian. This causes the median line to be deflected in a slightly more north-easterly direction.

9.64. The result reflects a certain balance in the situation that is broadly consistent with the past conduct of the Parties relating to their maritime presence and activities in the area of concern. While the 82°W meridian may not represent a delimited boundary in and of itself, an equidistance based delimitation does not depart disproportionately from the line and thus gives it due effect as a relevant circumstance to be taken into account in arriving at an equitable result.

(3) THIRD STATES

9.65. As discussed in Chapter 8,²⁰ the delimitation practice of the other riparian States bordering this part of the Caribbean Sea attests to the fact that the islands comprising the San Andrés

²⁰ See, paras. 8.33-8.56, above.

Archipelago have, for the most part, been accorded a full equidistance effect for delimitation purposes in agreements concluded with Colombia.

9.66. For example, the Colombia-Panama Agreement accorded Alburquerque, East Southeast Cays and Roncador a full equidistance effect on a simplified basis.

9.67. The Colombia-Costa Rica Agreement also gave full effect to Alburquerque. And the Costa Rica-Panama Agreement implicitly recognized both of the preceding agreements by linking up its course with a tri-point between the other two agreements.

9.68. The Colombia-Jamaica Agreement gave Providencia Island a full equidistance effect for the part of the boundary that was actually delimited. A Joint Regime Area was agreed as a result of the continental shelf and EEZ entitlements of both States, generated, on one hand, by Serranilla and Bajo Nuevo, and by Jamaica, on the other.

9.69. The Colombia-Honduras Agreement was concluded on the basis that Quitasueño appertained to Colombia. Likewise, Honduras recognizes Colombia's sovereignty over Serranilla as well as the continental shelf and EEZ to the south and east of this Cay.

9.70. An equidistance based delimitation between the San Andrés Archipelago and Nicaragua is thus fully consistent with the general delimitation framework evidenced by the practice of third States in the region.

(4) ACCESS TO RESOURCES

9.71. While maritime delimitation is based principally on the geography of the relevant area, in the past the Court has had occasion to consider whether access to natural resources, particularly fishing resources, can constitute a relevant circumstance justifying an adjustment of the median line.

9.72. In the *Gulf of Maine* case, for example, access to fishing banks was of considerable importance to the parties to the proceedings. In addressing this issue, the Chamber indicated that there was no reason why the delimitation should provide a party in certain places with a compensation, in terms of access to fishery zones, equivalent to what it may lose elsewhere.²¹ The Chamber thus took the view that the respective scale of activities relating to fishing (or navigation, defense and petroleum exploration, for that matter) “cannot be taken into account as a

²¹ *Delimitation of the Maritime Delimitation in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 342, para. 236.

relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line.”²²

9.73. Nonetheless, the Chamber did suggest that, in certain exceptional circumstances, access to resources might be a relevant factor. As the Chamber explained:

“What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned.”²³

9.74. The *Greenland-Jan Mayen* case is the only case decided by the Court where, in one zone of the delimitation, the Court established the delimitation taking into account the need of the parties to have equitable access to a particular species of fish.²⁴ However, this aspect of the case was distinguished by its specific facts – namely, the presence of the capelin stock which seasonally migrated into a part of the area to be delimited. An adjustment to the median line was required to assure the parties equitable access to this particular stock.

²² *Delimitation of the Maritime Delimitation in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 342, para. 237.

²³ *Ibid*, p. 342, para. 237.

²⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 72, para. 76.

9.75. In the present case, similar factors are not at work. There is no evidence that a median line boundary between the Colombian Archipelago and the relevant basepoints on Nicaragua’s islands and cays would have any “catastrophic repercussions” for the livelihood of the local population of the two countries. Nor is there any particular stock of fish whose migration habits necessitate them being taken into account to ensure that the Parties have equitable access to such resource.

9.76. If anything, the most important potential fishing grounds in the area are located a short distance off the Caribbean coast of Nicaragua, including around the Corn Islands, the Miskito Cays and the string of cays facing that coast. Among the resources found there, there are some that are highly valued in foreign markets, as is the case of the spiny lobster (*Panurilus argus*). Nicaragua has a privileged position in the export of spiny lobster, despite the over-exploitation of this resource. Indeed, 87.5% of Central-American exports of spiny lobster to the United States come from Nicaragua and Honduras.²⁵ A median line boundary would not affect these areas and would result in no adverse effects to Nicaragua regarding its access to such resources. In

²⁵ *Cadena de comercialización de la langosta espinosa* [Spiny lobster commercialization chain], Summary of the research study “Descripción de la cadena de comercialización de la langosta espinosa en Centoramérica”, entrusted to USAID-funded project PROARCA/APM (Programa Ambiental Regional para Centroamérica [Regional Environmental Program for Central America]), conducted by World Wildlife Fund (WWF) Central America, The Nature Conservancy and Rainforest Alliance. Available at: http://assets.panda.org/downloads/wwfca_langosta_espinosa_carpeta.pdf

contrast, east of the median line, the fishing potential of the area is limited.²⁶

9.77. In sum, there are no economic or resource considerations that would call for an adjustment to be made to the median line delimitation in order to arrive at an equitable result. Indeed, one distinct advantage of an equidistance-based delimitation is that each Party would have access to the resource potential lying between their relevant coasts out to the same distance from those coasts.

9.78. In any event, it is important to point out that since mid-nineteen century the population of San Andrés and Providencia have relied for their subsistence on the fisheries, turtle hunting, guano exploitation and other food resources in Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo.

(5) SECURITY CONSIDERATIONS

9.79. The Nicaraguan *Memorial* contains a section entitled “Security Considerations” which begins by asserting that, “International Tribunals have given firm recognition to the relevance of security considerations to the assessment of the equitable character of a delimitation.”²⁷ Thereafter, however, Nicaragua does not actually demonstrate, let alone adduce any

²⁶ Colombia has nevertheless consistently engaged in enforcing preservation measures in the area, as shown in Chapters 3 and 4.

²⁷ NM, p. 224, para. 3.69 and see pp. 224-226 generally.

facts relating to, what security interests of the Parties may be implicated by the delimitation of their respective maritime zones in this case.

9.80. In the present case, there are no security considerations that would be adversely affected by a median line delimitation between the Colombian Archipelago and Nicaragua. In contrast, any limitation to the jurisdiction exercised by Colombia would have serious security repercussions for Colombia, which is responsible for the protection of the 70,000 inhabitants living in the Archipelago. Colombia has also been the sole Party to police the waters around the Archipelago, to interdict illegal fishing as well as contraband in the area and to carry out surveying operations.

9.81. Colombia has been leading the struggle against illicit drugs, in particular in the maritime areas of the San Andrés Archipelago. In that regard, cooperation agreements have been concluded with other states, including the United States of America. For many years Colombia has suffered the scourge of drug trafficking that nourishes the terrorist groups that have caused violence and destruction in the country. In the international community there is no doubt today on the close links existing between drug trafficking and terrorist groups. It is evident, therefore, that the preponderance of security interests in

the area is Colombian. A median line delimitation respects these facts.

E. The Equitableness of the Delimitation

9.82. It is well established that the overall aim of maritime delimitation is to achieve an equitable result in the light of the relevant circumstances characterizing the area to be delimited. In this case, Colombia has shown that the equidistance line respects the geographic facts and produces a line which is consistent with the Parties' conduct in the region, the interests and rights of neighbouring countries and State practice in broadly comparable situations.

9.83. The present delimitation concerns Colombia and Nicaragua whose relevant coasts, those of their islands and cays, lie opposite to each other. As previously noted, the Court has held that there is much less difficulty in applying the equidistance method in such situations.

9.84. On the Colombian side, the San Andrés Archipelago is not an isolated feature situated in close proximity to Nicaragua, but rather comprises a large number of islands stretching over a long distance. These features form a distinct geographic and political unit lying at a considerable distance from Nicaragua.

9.85. Nicaragua possesses its own numerous islands and cays which directly face the San Andrés Archipelago. Amongst them the Islas Mangles (Corn Islands) in the south, the islands around Roca Tyra in the middle, and the Miskito Cays and Edinburgh Reef in the north. The geography of the area is such that these islands and cays control the course of the equidistance line on the Nicaraguan side. In other words, the equidistance line is an island-to-island median line which gives equal weight to all of the relevant features.

9.86. It is axiomatic that the geographic characteristics of the area to be delimited are a given and not subject to being refashioned. In this case, there is no need to do so. Given that there is a substantial maritime area lying between the San Andrés Archipelago and the Nicaraguan islands and cays because of the distances between the two sets of the relevant coastal fronts, there is no risk of the equidistance line producing a “cut off” effect or unduly encroaching on the maritime areas appertaining to either Party. The fact that the islands and cays comprising the San Andrés Archipelago also generate maritime entitlements east of the Archipelago is simply a product of nature and of no relevance in the light of the fact that these areas have no relationship to Nicaragua.

9.87. In some cases, the equitableness of a particular delimitation line may be tested against the criterion of

proportionality. The Nicaraguan *Memorial* cites lengthy passages from the Court's jurisprudence and from the *Anglo-French Arbitration* on the element of proportionality, and then asserts that a mainland-to-mainland median line does not produce a disproportionate result.²⁸ However, there are several basic flaws to this superficial approach to the issue.

9.88. First, as shown in Chapter 7, this case does not involve delimitation between the mainland coasts of the Parties, rendering the Nicaraguan discussion on the issue largely irrelevant. Equally important is the fact that proportionality, in terms of a correlation between the lengths of the relevant coasts of parties to a delimitation dispute and the maritime areas appertaining to those coasts, has actually been employed very rarely and with considerable caution. This is mainly due to the fact that it is only in situations where the relevant area can be defined with reasonable precision because of the confined nature of that area – such as in the *Tunisia-Libya* case involving delimitation between adjacent coasts – that the test can be meaningfully employed.

9.89. Here, the delimitation is between opposite coasts in a relatively open area of sea and where there are at least four other States with rights in the same general area and where both Colombia and Nicaragua possess islands which figure in the

²⁸ NM, pp. 226-236, paras. 3.73-3.90 and pp. 241-243, 3.104-3.105.

delimitation. This makes it almost impossible to establish any useful mathematical correlation between coasts and maritime areas attaching to those coasts.

9.90. Any application of the proportionality test in this case would hinge on a general appreciation whether an equidistance based boundary produces a result which is manifestly disproportionate. In this connection, Nicaragua's coast is shadowed by its own islands situated more than 12 nautical miles offshore which control the course of the median line. On the Colombian side, many of the islands comprising the San Andrés Archipelago are situated on extended banks or atolls with fringing reefs which generate a significant series of baselines and basepoints.

9.91. Given these geographic facts, and when considered in the light of the conduct of the Parties and the importance of the 82°W meridian, the median line depicted on Figure 9.2 cannot be said to produce a disproportionate result calling for any adjustment. Such a line respects the legal methodology for delimitation articulated by the Court in its recent jurisprudence and accords to each Party appropriate and substantial maritime areas generated by its relevant coasts and baselines. In short, the median line produces an equitable result that takes due account of the geographic and other facts characterizing the area to be delimited.

F. Conclusions

9.92. In the light of the application of the law of maritime delimitation to the facts of the case, the basis on which an equitable delimitation can be achieved may be summarized as follows:

- (1) The applicable principles and rules relating to maritime delimitation are reflected in the “equidistance/special circumstances” rule.
- (2) The median or equidistance line lies between the relevant basepoints on islands and cays forming part of the San Andrés Archipelago appertaining to Colombia, on the one side, and the basepoints on Nicaragua's islands and cays, on the other.
- (3) A median line delimitation respects the geographical characteristics of the relevant area. Its use in this case is consistent with the conduct of the Parties regarding the 82°W meridian agreed in the 1928/1930 Treaty and with the delimitation practice of third States in the region.
- (4) A median line delimitation also provides to each Party equal access to the resources of the area and suitable protection for its legitimate security interests.

PART FOUR
CONCLUSIONS

Chapter 10

SUMMARY

10.1. The San Andrés Archipelago today is formed by the islands of San Andrés, Providencia and Santa Catalina; the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque and the East-Southeast Cays, and all their appurtenant features.¹

10.2. The islands and cays of the Archipelago were considered as a unit during the colonial and post-colonial periods. The islands of San Andrés, Providencia, Santa Catalina, Mangle Grande (Great Corn) and Mangle Chico (Little Corn); the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque, East-Southeast and other adjacent islets, cays and shoals were traditionally considered as an archipelago and were geographically, politically, economically and historically interrelated.²

10.3. Pursuant to the Royal Order of 1803 the San Andrés Archipelago was an integral part of the Viceroyalty of Santa Fe (New Granada). Colombia, the successor State, exercised sovereignty over all the islands, islets and cays of the Archipelago. This situation was recognized by third States.

¹ See above, paras. 2.5-2.30.

² See above, paras. 2.32-2.77.

Even Nicaragua did so through its conduct regarding the Loubet Award.³

10.4. In the 1928/1930 Treaty, Nicaragua expressly recognized “the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés”. In the same Treaty Colombia recognized the sovereignty of Nicaragua over the Mosquito Coast and the Mangle Grande (Great Corn) and Mangle Chico (Little Corn) islands.

10.5. The 1928/1930 Treaty, which is in force, settled the entire dispute between the Parties.⁴

10.6. The 82°W meridian limit was included in the 1930 Protocol at Nicaragua’s insistence, and with a view to protecting itself against potential claims by Colombia to some islets and cays off the Nicaraguan coast and to the west of the meridian, including the Miskito cays. The 82°W meridian was considered as a limit between Colombia and Nicaragua.⁵

10.7. The second paragraph of Article I of the 1928/1930 implies that Nicaragua accepted that the cays of Roncador, Quitasueño and Serrana form part of the San Andrés Archipelago

³ See above, paras. 4.114-4.132.

⁴ See above, Chapter 6, Section D (paras. 6.19-6.32).

⁵ See above, paras. 5.48-5.49.

and that it lacked any right whatsoever over them. Colombia and the United States agreed on a regime for the three cays by the Olaya-Kellogg Agreement of 10 April 1928, the terms of which were officially communicated by Colombia to Nicaragua well before the ratification of the 1928/1930 Treaty, without any objection by the latter.⁶

10.8. Following the conclusion of the 1928/1930 Treaty, Nicaragua made no claim of any kind to any insular features or maritime areas to the east of the 82°W meridian. Only between 1969 and 2003, Nicaragua purported to disown first of all, the agreed 1930 limit, and later to progressively claim the different cays of the Archipelago.⁷ The general claim to the Archipelago has already been rejected by the Court and as to specific features these claims are entirely lacking in legal or historical support.⁸

10.9. The 1972 Treaty between the United States and Colombia concerning the status of Roncador, Quitasueño and Serrana replaced the 1928 Olaya-Kellogg Agreement. Although the United States and Colombia put on record diverging views over the status of Quitasueño, there was no disagreement as to which government had actual authority over these three cays and the surrounding waters. The subsequent practice shows a clear and

⁶ See above, paras. 5.31-5.38.

⁷ See above, paras. 5.56, 5.66-5.67, 6.5-6.11.

⁸ See above, paras. 6.12-6.18, and Section E (paras. 6.33-6.37).

continuous acceptance by the United States of Colombia's jurisdiction in the area, including the waters around Quitasueño.⁹

10.10. As shown, Quitasueño, over which Colombia has been exercising sovereignty, is capable of appropriation under international law.¹⁰

10.11. Nicaragua's assumption that cays situated on its purported continental shelf belong to it is contrary to existing law, case-law and common sense. It is "the land [that] dominates the sea" and not the other way around. It is the islands that generate a continental shelf, and not the continental shelf that generates sovereignty over the islands.

10.12. Ever since the consolidation of its independence from the Spanish crown and the foundation of the Republic, Colombia *à titre de souverain* has for almost two centuries exercised publicly, peacefully and uninterruptedly its sovereignty over the Archipelago of San Andrés, including all the islands, islets and cays. In striking contrast, Nicaragua exercised no sovereignty at all over the Archipelago of San Andrés. Nicaragua is unable to show the exercise of any element of administration in either the 19th or 20th centuries.

10.13. As to the maritime boundary, Nicaragua wrongly identifies the relevant coasts of the Parties as including the

⁹ See above, paras. 4.60-4.77.

¹⁰ See above, paras. 8.19-8.23.

Colombian and Nicaraguan mainland coast, which have no role to play in the present delimitation. It proposes a mainland-to-mainland median line which does not effect a delimitation between the relevant coasts of the Parties and which falls in an area where Nicaragua has no continental shelf or exclusive economic zone entitlement.¹¹ The mainland coasts of the parties lay well over 400 nautical miles from each other.

10.14. The relevant area for the delimitation is the area lying between the Colombian islands and cays comprising the San Andrés Archipelago, on the one hand, and Nicaragua's islands and cays, on the other.¹²

10.15. Quitasueño is entitled to its own maritime zones; hence it provides basepoints for the purpose of maritime delimitation.¹³

10.16. Existing delimitations involving third States in the region are relevant factors to be taken into account. In addition to defining the area to be delimited in this case, these delimitations are inconsistent with the notion that there are any Nicaraguan maritime rights extending up to or beyond the San Andrés Archipelago. The 82°W meridian, though not constituting a general maritime boundary between the Parties, is also a relevant

¹¹ See above, Chapter 7, Section B (paras. 7.8-7.20).

¹² See above, Chapter 8, Section B (paras. 8.3-8.32).

¹³ See above, para. 9.27.

factor to be taken into account in arriving at an equitable delimitation.¹⁴

10.17. Given the geographic facts, and taking into account the conduct of the Parties and the relevance of the 82°W meridian, a median line (in fact drawn from Nicaragua's offshore islands and cays as well as the islands and cays of the Archipelago: see Figure 9.2) produces an equitable result. Such a line respects the legal methodology for delimitation articulated by the Court in its jurisprudence and accords to each Party the maritime areas generated by its relevant coasts and baselines.¹⁵

¹⁴ See above, Chapter 8, Section D (paras. 8.57-8.93); Chapter 9, paras. 9.60-9.64.

¹⁵ See above, Chapter 9, Section E (paras. 9.82-9.91).

SUBMISSIONS

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

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

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

JULIO LONDOÑO PAREDES
Agent of Colombia

The Hague, 11 November 2008

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