INTERNATIONAL COURT OF JUSTICE

QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST

(NICARAGUA *v.* COLOMBIA)

COUNTER-MEMORIAL OF THE REPUBLIC OF COLOMBIA

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Chapter 1

INTRODUCTION

1.1 Colombia is submitting this Counter-Memorial pursuant to the Court's Order dated 28 April 2016, fixing 28 September 2017 as the time-limit for its filing.

1.2 As Colombia will show, Nicaragua's contention that the Court should delimit the continental shelf beyond 200 nautical miles from Nicaragua's coast on the basis of a median line between Colombia's 200-nautical-mile entitlement from its mainland coast (ignoring completely Colombia's islands) and the outer limits of Nicaragua's putative outer continental shelf (OCS) is ill-conceived and factually and legally unfounded. It is also prejudicial to Colombia, to regional States in the Caribbean and to the international community at large. Accordingly, the Court should not proceed to any further delimitation of the continental shelf beyond the delimitation it already carried out in its 2012 Judgment in the *Territorial and Maritime Dispute* case.[1]

[1] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624 (hereinafter "*Territorial and Maritime Dispute*" and "2012 Judgment", respectively).

A. The Present Case in Context

(1) HISTORY OF THE PROCEEDINGS

1.3 Nicaragua instituted proceedings against Colombia in 2001. The case lasted 11 years, culminating in the Court's Judgment of 19 November 2012. During the first eight years of the case, Nicaragua asked the Court to delimit a single maritime boundary comprising the continental shelf and Exclusive Economic Zone (EEZ) which, by definition, could not extend more than 200 nautical miles from Nicaragua's coast. Nicaragua's considered position at that time was as follows:

> "The position of the Government of Nicaragua is that geological and geomorphological factors have no relevance for the delimitation of a single maritime boundary within the delimitation area."[2]

1.4 It was only in 2009, with Nicaragua's last written pleading, that Nicaragua radically changed its claim by requesting the Court no longer to delimit a single maritime boundary between the two countries, but the continental shelf supposedly lying beyond Nicaragua's 200-nautical-mile limit. Contrary to its original position, that claim was based entirely on geology and geomorphology. The Parties fully argued that claim, with Colombia demonstrating that it was legally and factually untenable.

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[2] *Territorial and Maritime Dispute*, Memorial of Nicaragua, pp. 215-216, para. 3.58.

1.5 In its 2012 Judgment, the Court ruled that Nicaragua had not established any entitlement to a continental shelf extending more than 200 nautical miles from its coast.[3] Accordingly, in the operative part of its Judgment, the Court decided that it could not uphold Nicaragua's relevant submission. The Court therefore delimited the single maritime boundary between the Parties, which had been Nicaragua's original request, out to a distance of 200 nautical miles from Nicaragua's coast. In Colombia's view, this should have been a full and final delimitation.

1.6 In June 2013, thirteen years after it had become a Party to the United Nations Convention on the Law of the Sea (UNCLOS or the Convention), Nicaragua filed a submission to the Commission on the Limits of the Continental Shelf (CLCS or the Commission).[4] This submission was strongly objected by Colombia, Costa Rica, Panama and Jamaica.[5]

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[3] 2012 Judgment, p. 669, para. 129.

[4] Republic of Nicaragua, Central America, Submission to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, 1982, June 2013 (Submission of Nicaragua).

[5] Note S-DM13-014681 dated 22 April 2013 from the Ministry of Foreign Affairs of Colombia (Annex 19); Note S-DM-13-035351 dated 24 September 2013 from the Ministry of Foreign Affairs of Colombia (Annex 20); Note Verbale dated 5 February 2014 (Annex 21); Note MCRONU-438-2013 dated 15 July 2013 from the Permanent Mission of Costa Rica to the United Nations (Annex 22); Letter dated 20 January 2014 from the Permanent Representative of Costa Rica to the United Nations (Annex 23); Note DGPE/DG/665/22013 dated 30 September 2013 from the Ministry of Foreign Affairs of Panama (Annex 24); Note DGPE/FRONT/082/14 dated 3 February 2014 from the Ministry of Foreign Affairs of Panama (Annex 25); Note LOS/15 dated 12 September 2013 from the Permanent Mission of Jamaica to the United Nations (Annex 26). In addition, the Governments of Colombia, Costa Rica and Panama objected jointly to Nicaragua's

1.7 Given the semi-enclosed nature of the Caribbean Sea, none of the other 22 Caribbean States considers that there are any areas of OCS in the Caribbean, and none has filed submissions with the CLCS to that end. To date, the Commission has taken no action with respect to Nicaragua's submission. Therefore, the current position before the CLCS is not materially different from that which existed when the Court rendered its 2012 Judgment.

1.8 On 16 September 2013, Nicaragua filed an Application Instituting Proceedings in the present case. Because Colombia considered that the Court lacked jurisdiction to entertain Nicaragua's claim, it filed Preliminary Objections. In one of those Preliminary Objections Colombia held that the *res judicata* principle prevented the Court from re-opening the dispute and entering into an analysis of the possibility to proceed to a second delimitation beyond 200 nautical miles.

1.9 While the majority of the Court did not accept Colombia's contention, eight judges considered that this dispute could not be re-opened, because if Colombia were forced to appear again before the Court and argue about an issue already decided in the 2012 Judgment, the *ne bis in idem* principle would be disregarded.[6] Colombia continues to believe this is the

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Submission: Joint Communication dated 23 September 2013 (Annex 27) and Joint Communication dated 5 February 2014 (Annex 28).

[6] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment of 17 March 2016* (2016 Judgment). See also Joint Dissenting Opinion of Vice-

case and deems that there is no room for a second delimitation. Nevertheless, Colombia has considered necessary to present its arguments in order to demonstrate that there can be no further delimitation of the continental shelf as between itself and Nicaragua.

(2) KEY ISSUES UNDERLYING THE CASE

1.10 In its Memorial, Nicaragua asserts that "(t)his case is the continuation of the Application made by Nicaragua concerning the delimitation of its continental shelf boundary with Colombia, which resulted in the Court's Judgment dated 19 November 2012".[7] This is incorrect.

1.11 It is also significant that the Court has labelled this case "*Question* of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast".[8] This underscores the fact that the case is not at all about the delimitation of a putative continental shelf beyond 200 nautical miles from Nicaragua's coast, as Nicaragua

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President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower.

[7] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, Memorial of the Republic of Nicaragua (Memorial of Nicaragua), p. 1, para. 1.1.

[8] Emphasis added. It is the first time that this is done in the Court's practice. In none of the previous cases concerning maritime delimitations it has dealt with has the title of the case been preceded by the words "*Question of*…".

puts it in its Application,[9] and the continental shelf of Colombia. It is really about the "Question" whether such delimitation is at all feasible.

1.12 There are serious legal, factual and policy issues underlying that "question", the response to which strongly militates against the Court proceeding to any further maritime delimitation between Nicaragua and Colombia. These include the following:

- Customary international law, as attested in the overwhelming practice of States, as well as the object and purpose of UNCLOS – including its *travaux préparatoires* – demonstrate that the *ipso jure* entitlements of coastal States to a 200-nautical-mile continental shelf, as an integral part of the EEZ regime, prevail over any putative outer continental shelf that another State may claim beyond 200 nautical miles from its baselines. Nicaragua is claiming continental shelf areas that fall wholly within the *ipso jure* 200-nautical-mile entitlements of Colombia's islands and mainland, not to mention the 200-nautical-mile notional

[9] In its Application, Nicaragua asserts that "(t)he dispute concerns the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia". *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, Application Instituting Proceedings, filed in the Registry of the Court on 16 September 2013 (Application), p. 2, para. 2.

entitlements of third States. As a result, the Court is faced with whether a Nicaraguan claim that flaunts these principles can be entertained.

- Under international law islands enjoy the same maritime entitlements as other land territories. All of Colombia's islands forming the Archipelago of San Andrés, Providencia and Santa Catalina (the San Andrés Archipelago or the Archipelago) are clearly not "rocks", and therefore possess the full suite of maritime entitlements accorded to other land territory. The Court is thus faced with the question whether Nicaragua's OCS claim, which ignores the continental shelf entitlements generated by Colombia's islands, as part of their *ipso jure* 200-nautical-mile EEZ regime, runs counter to the ordinary meaning of Article 121 of UNCLOS, customary rules governing the matter and the weight of State practice.

- The maritime entitlements to the east of the Colombian islands merge and overlap with the maritime entitlements generated by Colombia's mainland. According to what the Court found in its 2012 decision, the islands of San Andrés, Providencia and Santa Catalina lie at approximately 380 nautical miles from the Colombian mainland, the island of Roncador at 320 nautical miles, the islands of Bajo Nuevo and Serrana at 360 nautical

miles and the island of Serranilla at 400 nautical miles.[10] As a consequence, it can be easily appreciated that the projections of Colombia's EEZ with its attendant continental shelf, whether from its mainland or islands, preclude Nicaragua from sustaining any OCS claim which inevitably encroaches upon the 200-nautical-mile *ipso jure* entitlements from Colombia.

- States Parties to UNCLOS can only lawfully establish the outer limits of their continental margin beyond 200 nautical miles based on the prior recommendations of the CLCS. Since Nicaragua's delimitation claim requests the Court to delimit the area between the alleged outer limits of its margin and Colombia's 200-nautical-mile entitlement drawn from its mainland, it is necessarily asking the Court first to delineate the outer limits of the margin – a task that is expressly reserved to the CLCS. The question therefore arises whether, in the light of the institutional division of responsibilities in the United Nations system, it is at all appropriate for the Court to undertake such a task, effectively allowing a State Party to UNCLOS to bypass the requirements of Article 76 of UNCLOS and the CLCS rules and procedures.

[10] 2012 Judgment, p. 638, para. 22 and pp. 640-641, para. 24. All of these Colombian Islands are located in the San Andrés Archipelago. The maritime entitlements of the islands of Alburquerque Cays, East-Southeast Cays and Quitasueño are not discussed in this pleading insofar as they are located in the western sector of the Archipelago. Due to their geographical location, the 200 nautical miles entitlements projecting from these three islands would in any event entirely overlap with the entitlements appertaining to the islands of San Andrés, Providencia and Santa Catalina.

- The CLCS is a specialized body comprised of 21 scientific experts all well-versed in the fields of geology, geomorphology and hydrography. It has established rigorous scientific criteria that must be met by any State seeking to substantiate an outer continental shelf submission and establish the outer limits of the margin. The question thus arises whether a judicial body such as the Court is in a position to substitute itself for the CLCS.

- The Court has been careful not to prejudice third States in delimitation-related cases. Colombia fully respects and complies with the boundary treaties it has signed in the Caribbean Sea with, *inter alia*, Panama, Jamaica, Haiti and the Dominican Republic. In this case, however, Nicaragua's OCS claim and the delimitation line it advances trespass on areas that fall within 200 nautical miles of third States, thus prejudicing the legal interests of such States.

(3) THE CARIBBEAN AS A SEMI-ENCLOSED SEA AND THE SAN ANDRÉS ARCHIPELAGO

1.13 The Caribbean is a classic example of a semi-enclosed sea, as are, *inter alia*, the Black Sea, the Mediterranean Sea, the Baltic Sea, the North Sea and the Arctic Ocean.[11] It is also of

[11] M. H. Nordquist, S. N. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982. A commentary*, The Hague/London/Boston, Center for Oceans Law and Policy - University of

the utmost environmental importance, both regionally and globally.[12] With the purpose of preserving the environment and maintaining the delicate ecosystem equilibrium in the region, Colombia has adopted a series of protection measures in the San Andrés Archipelago, as will be further elaborated.[13] These measures have been adopted in order to protect the environment and inhabitants of the Archipelago, as well as future generations and the sustainability of the region as a whole.

Virginia School of Law / Martinus Nijhoff, (Virginia Commentary), Vol. III, 1995, p. 348; B. Vukas, "Enclosed and semi-enclosed sea", *Revue Iranienne des Relations Internationales / Center for International Studies, Tehran University*, 1973, Spring, Nos. 11-12, pp. 184, 187-188; L. M. Alexander, "Regionalism and the Law of the Sea: The Case of Semi-enclosed Seas", *Ocean Development and International Law*, 1974, Vol. 2, pp. 155, 158-159; E. Guhl, B. M. Ratter, G. Sandner, *et al*, *Conflictos territoriales en el espacio marítimo del Caribe: trasfondo de intereses, características y principios de solución*, 1997, *in passim;* N. A. Hu, "Semi-enclosed Troubled Waters: A new thinking on the application of the 1982 UNCLOS Article 123 to the South China Sea", *Ocean Development and International Law*, Vol. 41, 2010, p. 289; M. H. Loja, "Who owns the oil that traverses a boundary on the continental shelf in an enclosed sea? Seeking answers in natural law through Grotius and Selden", *Leiden Journal of International Law*, Vol. 27, 2014, pp. 908-909; D. Freestone and C. Schofield, "The Caribbean Sea and Gulf of Mexico", in D. R. Rothwell, A. G. Oude Elferink, *et al* (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p. 673; United Nations Economic Commission for Latin America and the Caribbean, "Major issues in the management of enclosed or semi-enclosed seas, with particular reference to the Caribbean Sea", UN Doc. LC/CAR/L.24, 2004, p. 2, available at: http://www.cepal.org/publicaciones/xml/1/20811/L0024.pdf (last visited 17 Sep. 2017); United Nations, Report of the Secretary-General, *Programme performance of the United Nations for the biennium 2004-2005*, 20 April 2006, UN Doc. A/61/64, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/275/24/PDF/N0627524.pdf?OpenElement (last visited 17 Sep. 2017); Proposed Work Programme for the Caribbean Sea Commision, UN Doc. LC/CAR/L.121, 4 June 2007, available at: http://repositorio.cepal.org/bitstream/handle/11362/27639/1/LCcarL121_en.pdf (last visited 17 Sep. 2017); see also *Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment*, *I.C.J. Reports 1985*, Separate Opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga, p. 78, para. 7.

[12] United Nations General Assembly, Resolution 63/214, 19 December 2008, "Towards the sustainable development of the Caribbean Sea for present and future generations".

[13] See Chapter 4 *infra*.

B. The Case of Colombia

1.14 For a number of reasons – legal, factual, and procedural – Colombia's position with respect to the "Question" of the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast is that:

(i) Nicaragua has not demonstrated and cannot demonstrate that it has a natural prolongation of its land territory which extends up to and beyond 200 nautical miles from its coast. Therefore, Nicaragua has no entitlement to an OCS.

(ii) Nicaragua's alleged OCS cannot encroach upon Colombia's entitlements to an *ipso jure* EEZ with its attendant continental shelf.

(iii) Based on the aforesaid, there is nothing to be delimited.

1.15 Indeed, with its claim Nicaragua seeks to re-write the Law of the Sea relating to OCS claims to the prejudice of Colombia and other States in semi-enclosed sea settings such as the Caribbean, to reorder the regime relating to the continental shelf that exists under UNCLOS, and to evade the burden of proof it would bear were it properly before the CLCS. To endorse Nicaragua's claim in such circumstances would have highly unsettling implications for States throughout the world.

1.16 Nicaragua has not proven that it has an OCS. Nicaragua must demonstrate that the OCS areas it claims constitute the contiguous and uninterrupted natural prolongation of its landmass into and under the sea towards Colombia. By relying on geomorphologic profiles that deliberately avoid the area in question, by extending its projection into the seabed in a dog-legged manner from Honduran territory towards Jamaica (not Colombia), and by failing to take into account the geological and geomorphological discontinuities that interrupt the physical continental shelf long before the Hess Escarpment is reached, Nicaragua has presented a distorted picture of the scientific facts.

1.17 Nicaragua also ignores the presence of several major discontinuities west and north of the San Andrés Archipelago. Indeed, a series of deep troughs, escarpment and fracture zone features represent examples of fundamental discontinuities in the physical continental shelf that truncate any natural prolongation from Nicaragua before the 200-nautical-mile limit is reached. These include a deep trench (the Providencia Trough) that lies between Nicaragua's mainland coast and Colombia's islands, extending to depths of over 2,500 metres, and a major fracture zone (the Pedro Bank Escarpment), stretching to the north. Colombia is including with this Counter-Memorial a scientific report produced by Dr Lindsay Parson, a widely recognized expert in the field of continental shelf claims,

and Mr Peter Croker, former Chairman of the CLCS[14]. This report details the relevant geology and geomorphology of the region and exposes the flaws in Nicaragua's thesis.

1.18 As to the law, the OCS regime is a conventional regime that is not opposable to Colombia. Moreover, Nicaragua must respect its obligations under a treaty that is binding on her. The negotiating history of UNCLOS makes it clear that, when the regime of the OCS was agreed, States did not consider that continental shelf claims beyond 200 nautical miles should encroach on, let alone prevail over or "trump", another State's *ipso jure* 200-nautical-mile entitlement to an EEZ, which includes an entitlement to its attendant continental shelf, whether that entitlement is generated by a mainland coast or by islands. This principle is reflected in subsequent State practice, which shows that the overwhelming majority of States claiming an OCS consciously avoid claiming areas falling within 200 nautical miles of the mainland or insular territory of another State. In fact, States Parties to UNCLOS which make submissions to the CLCS, routinely stop their OCS claims when they reach the 200-nautical-mile limit of another State with opposite coasts.[15] Nicaragua's claim in this case is plainly

[14] Dr Parson is the Managing Director of Maritime Zone Solutions Ltd. He is the Technical Lead and permanent member of the United Kingdom's delegation to the CLCS, and was the UK member of the Legal and Technical Commission of the International Seabed Authority between 2001 and 2006. Mr Croker is a former member of the CLCS who served on the Commission for three terms (1997-2012), and was Chairman of the Commission from 2002 to 2007.

[15] States that have stopped their OCS claims at the 200-nautical-mile limit of another State include Bahamas, Barbados, Canada, the Cook Islands,

incompatible with this principle and this, in and of itself, is a reason why that claim should be rejected.

1.19 Nicaragua's contentions in the case against Colombia also seek to do away with the principle of international law according to which islands have the same maritime entitlements as other land territory and are inconsistent with the way Nicaragua treats its own small islands and reefs.

1.20 With respect to the first point, Nicaragua's claim would deprive the Colombian islands comprising the San Andrés Archipelago from their *ipso jure* entitlement to a 200-nautical-mile EEZ with its attendant continental shelf. However, as Colombia will demonstrate in this Counter-Memorial, no OCS claim by one State may encroach upon another State's entitlement to an EEZ with its attendant continental shelf. The Court has already recognized that the islands of San Andrés, Providencia and Santa Catalina have an entitlement to an EEZ with its attendant continental shelf that extends up to 200 nautical miles in each direction, specifically east of Nicaragua's 200-nautical-mile range.[16] Colombia will demonstrate that all its islands in the area enjoy the same entitlements and that this is entirely consistent with State practice.

Federated States of Micronesia, Fiji, France, Gabon, Iceland, India, Japan, Kiribati, Maldives, Mozambique, Myanmar, New Zealand, Norway, Palau, Pakistan, Papua-New Guinea, Spain, Solomon Islands, Sri Lanka, Tonga, Tanzania, United Kingdom and Yemen, among many others. See further Annex 50.

[16] 2012 Judgment, p. 686, para. 168 and pp. 691-692, para. 180.

1.21 Moreover, any OCS grant to Nicaragua would run counter to the established international practice that the maritime titles of a State must be contiguous to its baselines; nowhere in its Memorial has Nicaragua established that it possesses a contiguous maritime title extending from its coast up to its 200-nautical-mile range and, from there, to any part of what it considers to be its OCS.

1.22 As for the second point, Nicaragua measures its continental shelf entitlement from a few scattered reefs situated well off its northern coast and from Little Corn Island in the south.[17] While these tiny features, some of which are not even islands, are claimed to be entitled to an OCS located well beyond Nicaragua's 200-nautical-mile limit, Nicaragua would amputate the 200-nautical-mile entitlements generated by Colombia's islands. This is entirely self-serving and is illustrative of the one-sided nature of Nicaragua's case.

1.23 Procedurally, Nicaragua's claims fail to comply with the requirement incumbent on all State Parties to UNCLOS to obtain a recommendation of the CLCS after passing an intensive vetting process that meets the Commission's stringent scientific methodologies. On two occasions, the Court has emphasized that "any claim of continental shelf rights beyond 200 miles (by a State Party to UNCLOS) must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits

[17] See Memorial of Nicaragua, Figure 1.2, p. 23.

of the Continental Shelf established thereunder".[18] Moreover, the Court has also noted that the fact that Colombia is not a Party to UNCLOS "does not relieve Nicaragua of its obligations under Article 76 of that Convention".[19] Merely lodging a submission with the CLCS does not satisfy those requirements; nor does it prove the existence of OCS entitlements.[20]

C. The Unsettling Implications of Nicaragua's Claim

1.24 There are additional reasons why the Court should decline to proceed to any further maritime delimitation between Colombia and Nicaragua. Indeed, in the unlikely eventuality that Nicaragua's claim to an OCS is accepted, such a decision would have alarming repercussions for all States in the Caribbean region as well as for the international community as a whole. Three reasons in particular should be mentioned:

(1) Nullification of 200-Nautical-Mile Entitlements by OCS Claims

1.25 As noted above, no other riparian State in the Caribbean Sea has ever claimed that it is entitled to continental shelf rights

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[18] 2012 Judgment, p. 669, para. 126, citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 759, para. 319 *(Nicaragua* v. *Honduras).*

[19] 2012 Judgment, p. 669, para. 126.

[20] This is the consistent position of doctrinal writings. See B. Kunoy, "The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf", *British Yearbook of International Law*, Vol. 83, 2013, pp. 61, 77; M. Lando, "Delimiting the Continental Shelf beyond 200 nautical miles at the International Court of Justice: the Nicaragua v. Colombia cases", *Chinese Journal of International Law*, Vol. 16, 2017, p. 154.

beyond 200 nautical miles from its coast therein. This regional practice stems from the recognition that there are no maritime areas in a semi-enclosed sea such as the Caribbean that are more than 200 nautical miles from the nearest land territory. As Costa Rica underscored during the recent oral proceedings in the *Costa Rica* v. *Nicaragua* delimitation case:

> "Nicaragua has twice raised the issue of the continental shelf beyond 200 nautical miles. Costa Rica does not request a delimitation of this zone because all of the areas of continental shelf in the Caribbean Sea lie within 200 nautical miles of the coast of one or more Caribbean State. Therefore Costa Rica finds it inappropriate to make such a claim in the confined geography of the region."[21]

Noticeably, Nicaragua chose to leave this contention unanswered.[22]

1.26 In these circumstances, it is understandable that, with the exception of Nicaragua, which only made a submission in 2013 after its cases concerning maritime delimitation with Honduras and Colombia were finished, no other Caribbean State has made an OCS submission to the CLCS relating to areas within the

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[21] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)*, Public Sitting 10 July 2017, CR 2017/14, p. 11, para. 3(c) (Lathrop).

[22] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)*, Public Sitting 13 July 2017, CR 2017/15, p. 47, para. 35 (Reichler).

Caribbean Sea.[23] Nicaragua's submission was strongly objected to by all its neighbouring States.

1.27 Nicaragua's OCS claim not only extends far inside the 200-nautical-mile entitlements of Colombia's mainland and islands, it also extends within 200 nautical miles of the coasts of Panama, Jamaica and Haiti. Hence, Nicaragua's claim encroaches into areas where third States may have legal interests in a manner that is prejudicial to them. Furthermore, it should be noted that Colombia is respectful of the maritime boundaries established in treaties signed with neighbouring States, whereby marine and submarine areas have been delimited within each State's 200-nautical-mile *ipso jure* entitlements.

1.28 Were such a claim to be countenanced by the Court, it would have serious consequences for the region by jeopardizing existing agreements and giving rise to heightened tensions amongst the riparian States and a whole series of new disputes. This would be a regrettable development for the relations between the Caribbean States and for the Court in its role as the principal judicial organ of the United Nations.

1.29 The adverse implications of Nicaragua's outer continental shelf claim are not limited to the immediate region; they have world-wide implications of the most disturbing kind.

[23] Other Caribbean States that have presented submissions before the CLCS are Bahamas, Barbados, Costa Rica, Guyana, France (French Guyana and Antilles), Surinam and Trinidad and Tobago. These submissions refer either to the Atlantic Ocean or to the Pacific Ocean. None of them refers to the Caribbean Sea.

1.30 Many coastal States have claimed OCS rights based on the regime of Article 76 of UNCLOS, and have made submissions to the CLCS, as they are obliged to do if they are parties to UNCLOS. The overwhelming majority of such States have exercised restraint in making their submissions by ensuring that they do not claim areas of OCS that encroach upon the 200-nautical-mile entitlements of other States. In other words, State practice attests to the fact that States do not interpret Article 76 as providing a legal basis for OCS claims from its baselines – whether situated on mainland territory or islands – within another State's *ipso jure* 200-nautical-mile EEZ with its attendant continental shelf.

1.31 Acceptance of Nicaragua's OCS claim would have disturbing effects over the orderly management of the seas, not only the Caribbean but other closed or semi-enclosed seas, and other regions around the world. Additionally, State practice confirms that insular features such as those of Colombia are accorded full maritime entitlements. Were the Court to entertain Nicaragua's claim, the entitlements of such features all around the globe would be called into question, which would be profoundly unsettling.[24]

1.32 Should the Court countenance this claim, it would also be sending a message to States that they are free to claim an OCS within the 200-nautical-mile entitlements of other States – a development that would be contrary to international law and

[24] See Chapter 4 *infra*.

bound to provoke numerous disputes where none existed before. Moreover, there is no guarantee that such claims would be limited to maritime areas where the coasts of two States are more than 400 nautical miles apart. If excessive OCS claims based on geology and geomorphology can encroach upon *ipso jure* 200-nautical-mile entitlements, there would be nothing to prevent States bordering closed or semi-enclosed seas from making such geological and geomorphological OCS claims beyond their 200-nautical-mile limits which would dramatically amputate the entitlements of other riparian States. This would also have the effect of running counter to the Court's ruling in its 1985 Judgment in the *Libya/Malta* case that "there is no reason to ascribe any role to geological and geophysical factors within that distance (200 nautical miles) either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims".[25]

1.33 In short, contrary to Nicaragua's contention in its Memorial,[26] there is a legal distinction between continental shelf rights that exist within 200 nautical miles of the baselines from which the breadth of a State's territorial sea is measured, as an integral part of the EEZ regime, and the claim of a coastal State to a continental shelf extending beyond 200 nautical miles. The former need not be proved; they exist as a matter of law. In contrast, OCS claims not only have to be proved on geological and geomorphological grounds; their outer limits must be based

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

[26] Memorial of Nicaragua, p. 18, para. 1.36.

on recommendations received from a United Nations scientific body, the CLCS.[27]

1.34 In the current case, Nicaragua has failed to prove that it has a continuous continental shelf extending through and beyond 200 nautical miles from its baselines; failed to show how such a claim that encroaches on the 200-nautical-mile entitlements of other States is compatible with customary international law or UNCLOS and failed to have its natural prolongation verified and its outer limits reviewed and confirmed scientifically by the CLCS. The mere fact that Nicaragua made a submission to the CLCS in June 2013 after the Court rendered its Judgment in 2012 does not change the situation that existed as of the date of the Judgment and proves nothing. This leads to the next problem with the Nicaraguan claim.

[27] 2012 Judgment, Dissenting Opinion of Judge Owada, p. 725, para. 14.

(2) USURPATION OF THE RESPONSIBILITIES OF THE CLCS

1.35 Apart from not being based on the natural prolongation of its land territory into and under the sea, Nicaragua's OCS claim against Colombia also has the effect of compelling the Court to usurp the role of the CLCS in the establishment of the outer limits of the continental shelf under UNCLOS. This is contrary to explicit treaty commitments and would undermine the international institutional divisions of responsibility.

1.36 The task of reviewing the claims of a State Party to UNCLOS (such as Nicaragua) concerning the outer limits of the continental shelf, and making recommendations on the basis of which the coastal State can establish such limits, is the exclusive prerogative of the CLCS under Article 76, paragraph 8, of UNCLOS. Nicaragua would dispense with the CLCS, which is comprised of technical scientific experts specifically experienced in the field, and replace it with the Court. This is inconsistent with the provisions of UNCLOS, which embody the package deal upon which OCS claims were legitimized, and at odds with the institutional division of responsibility. State Parties to UNCLOS should not be allowed to circumvent its provisions and carefully designed procedures by asking another body to determine their outer limits; this *modus operandi* would undermine the *raison d'être* behind the safeguards the State Parties prescribed to avoid excessive maritime claims.

1.37 Moreover, unlike in the Bay of Bengal cases, where delimitations were carried without a need to determine the precise outer limit of the OCS, the present case does not allow for such a scenario. The distinguishing factors include that, in this case: (i) the Respondent State is not a Party to UNCLOS and has persistently objected to the OCS regime provided therein; (ii) it concerns States with opposite coasts in a region where there are no areas beyond 200 nautical miles from the nearest land territory; (iii) Nicaragua's delimitation claim does depend on the prior identification of the outer limits of its alleged OCS, a task reserved to the CLCS; (iv) unlike the Bay of Bengal, the Caribbean Sea does not pose a "unique situation" regarding the existence of a continental shelf beyond 200 nautical miles; (v) the scientific facts are heavily contested and there is decisive scientific evidence which disproves Nicaragua's case; and (vi) the Applicant's OCS claim is also contested by many other States in the region and attempts to trespass upon their *ipso jure* 200-nautical-mile EEZ with their attendant continental shelves. The particular circumstances of this case thus make it completely inappropriate for the Court to substitute itself for the CLCS and proceed with a delimitation.

(3) NICARAGUA'S NON-RECOGNITION OF THE MARITIME ENTITLEMENTS OF ISLANDS

1.38 Nicaragua's contentions also have unsettling implications for other States that have legitimate claims to 200-nautical-mile entitlements from their islands. As observed above, States that claim OCS rights invariably refrain from claiming such rights within 200 nautical miles of land territories, including islands belonging to another State or States. Acceptance of Nicaragua's claim made against Colombia would be contrary to State practice, undermine the prudent restraint that States have hitherto shown in this respect, and sow the seeds of disruption and disputes.

1.39 It is one thing to give small islands a reduced effect for the delimitation of a single maritime boundary when the areas being delimited fall less than 200 nautical miles from the territory of both States. It is quite another matter, however, to ignore the entitlements of islands to their 200-nautical-mile EEZ with its attendant continental shelf, when the neighbouring State lies more than 200 nautical miles from that zone. However, that is precisely what Nicaragua seeks to achieve in the present case before the Court, despite the fact that it measures its own entitlement from a series of small reefs that lie a considerable distance off its mainland coast.

1.40 Nicaragua thus adopts a double standard: it accords to its own tiny features full 200-nautical-mile and OCS rights, while ignoring the 200-nautical-mile entitlements generated by

Colombia's islands. Yet State practice shows that islands having characteristics similar to those of Colombia are recognized as having 200-nautical-mile entitlements. Acceptance of Nicaragua's argument that Colombia's islands are not entitled to an EEZ with its attendant continental shelf would not be consistent with the manner in which States interpret their rights under international law. Moreover, an OCS claim based upon geology and geomorphology, is not considered a source of title within 200 nautical miles from another State's baselines, nor can it prevail over the *ipso jure* entitlements of that State, regardless of whether those 200-nautical-mile entitlements are generated by mainland or island territory.

D. The Unsubstantiated Premises Underlying Nicaragua's Case

1.41 Nicaragua's case is based upon a series of cumulative factual and legal meritless premises which it has not seriously addressed, much less proven, including:

(i) That the OCS regime is part of customary international law and opposable to Colombia.

(ii) That it has substantiated its OCS claim, including, but not limited to the fact that there is an uninterrupted and continuous natural prolongation of its land territory up to and beyond 200 nautical miles from its coast.

(iii) That it falls within the Court's judicial function, *modus operandi* and institutional capacity to delineate the outer edge of its claimed continental margin, which is required in the circumstances of the present case before any delimitation can be carried out.

(iv) That, under customary international law, Colombia's islands comprising the San Andrés Archipelago are not islands with *ipso jure* entitlement to a 200-nautical-mile EEZ with its attendant continental shelf.

(v) That, under customary international law, its claim to an OCS can encroach upon Colombia's mainland and island *ipso jure* entitlement to a 200-nautical-mile EEZ with its attendant continental shelf, and over third States' notional entitlements of the same nature.

(vi) That it has a contiguous maritime title extending from its baselines up to any area which it claims as its OCS, without the need to "leapfrog" or "tunnel-under" the entitlements of Colombia's islands or notional entitlements of third States.

1.42 For the reasons set forth in this Counter-Memorial, it will be seen that Nicaragua has failed to prove these premises. The conclusion can be no other that there is no room for a delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast.

E. The Structure of this Counter-Memorial

1.43 In the chapters that follow, Colombia will develop its position in more detail with respect to Nicaragua's claims.

Chapter 2 discusses the applicable law in the case, which is customary international law, and shows that the OCS regime does not constitute part of customary international law and is thus not opposable to Colombia. It also shows how the Parties have different burdens by virtue of the fact that Nicaragua is a Party to UNCLOS while Colombia is not. This chapter then turns to the conventional law applicable to Nicaragua (UNCLOS), and the procedures it must follow, with respect to the way it must prove, with scientific rigour, that the area which it claims legally and factually constitutes an outer continental shelf. It also explains why the Court should not arrogate for itself the functions of the CLCS as that would run counter to its judicial function.

Chapter 3 addresses the legal distinction between a State's *ipso jure* entitlement to a 200-nautical-mile EEZ, with its attendant continental shelf, and a continental shelf beyond 200 nautical miles, and then explains why *ipso jure* 200-nautical-mile entitlements prevail over OCS claims. As will be shown, unlike in the Bay of Bengal cases, which took place in a wholly different legal and geographical context, there is no scope for the creation of any "gray areas" in a semi-enclosed sea such as the Caribbean.

Chapter 4 demonstrates that, in addition to its mainland, Colombia's islands are full-fledged islands that generate an *ipso jure* 200-nautical-mile EEZ entitlement with its attendant continental shelf, in the same manner as any other land territory. These entitlements exclude any OCS claim advanced by Nicaragua.

Chapter 5 then shows that, in order to exist, OCS rights must be contiguous to the 200-nautical-mile maritime title generated from the State's baselines. OCS rights cannot leapfrog over or tunnel under the *ipso jure* maritime entitlements of other States, resurfacing on the other side; the natural prolongation – along with the corresponding title – must extend, uninterrupted, up to and beyond the State's 200-nautical-mile range. It will also be demonstrated that Nicaragua may not use the maritime entitlements of other States to manoeuvre itself toward an otherwise unreachable OCS claim.

Chapter 6 explains how both Nicaragua's outer continental shelf submission and its delimitation claim in this case prejudice the interests of third States in a manner that runs against the Statute of the Court and its jurisprudence.

Chapter 7 turns to the facts underlying Nicaragua's outer continental shelf claim. As Colombia will show, Nicaragua failed to prove that it has a natural prolongation of its land territory that extends beyond 200 nautical miles from its coast *vis-à-vis* Colombia and that it overlaps with Colombia's 200 nautical miles entitlements both from its mainland and its

islands. To the contrary, there are fundamental discontinuities and disruptions that interrupt any natural prolongation well before areas beyond 200 nautical miles from Nicaragua's coast are reached. This Chapter is to be read in conjunction with the scientific report presented as Appendix 1 to this Counter-Memorial.

Chapter 8 presents a summary of Colombia's case and the conclusions to be drawn from the specific factual and legal considerations characterizing the case – namely that for various reasons, the Court should not engage in any delimitation of the continental shelf beyond 200 nautical miles from Nicaragua's coast.

Colombia's Submissions then follow.

Chapter 2

APPLICABLE LAW AND BURDEN OF PROOF

A. Introduction

2.1 This case is unusual in that different laws and procedures apply to the Applicant and its Application, on the one hand, and to the Respondent and its defence, on the other. Both Parties are bound by the *res judicata* components of the Court's 2012 Judgment: for example, the Court's holding that the Colombian islands of San Andrés, Providencia and Santa Catalina are entitled to their respective EEZ, which, of course, comprises its continental shelf to 200 nautical miles in each direction, including east of Nicaragua's 200-nautical-mile range.[28] Beyond such *res judicata* items, their respective applicable law and corresponding burdens of proof diverge on certain issues.

2.2 The Applicant is a Party to UNCLOS and purports to rely on certain treaty-based rights which that Convention affords; proof of those rights is subject to the rules and procedures prescribed in and under the authority of the CLCS and UNCLOS.

2.3 By contrast, the Respondent is not a Party to UNCLOS and is only subject, in these proceedings, to customary international law.

[28] 2012 Judgment, pp. 686-688, para. 168 and p. 692, para. 180.

2.4 As a result, the Parties' corresponding burdens of proof vary. Nicaragua's respective law and burdens may be further specified as follows:

First, Nicaragua must establish that the OCS regime is part of customary international law and that it is, in spite of Colombia's objections, opposable to Colombia. This is a matter which falls to be decided by reference to international law, the provisions and legislative history of UNCLOS and subsequent State practice.

Second, Nicaragua, by requesting the Court to delineate the outer limits of its OCS in accordance with Article 76 of UNCLOS as part of its continental shelf boundary claim beyond 200 nautical miles from its coast,[29] must establish that the Court can arrogate and properly discharge the functions of the CLCS. This is a matter which falls to be decided by reference to international law and a comparative analysis of the law and rules of the CLCS.

Third, Nicaragua must establish that the matter falls within the Court's judicial function and its unique *modus operandi* and that the Court has the institutional capacity to settle this question. This is a matter which falls to be decided by reference to international law, the precedents of the Court and its prudential wisdom.

[29] Memorial of Nicaragua, p. 90, para. 3.84. Nicaragua's purported line of delineation is represented at p. 85, Figure 3.17 of its Memorial.

Fourth, Nicaragua must establish that it has substantiated its claim to an OCS, including, but not limited to the fact that there is a continuous and uninterrupted natural prolongation extending up to and beyond 200 nautical miles from its coast towards Colombia. This is a matter of fact which falls to be decided by application of the rigorous scientific methods and criteria of the CLCS inasmuch as Nicaragua is Party to UNCLOS, by reference to geological and geomorphological data, and under relevant customary international law.

Fifth, Nicaragua must establish that, under customary international law, one State's claim to an OCS prevails over another State's entitlement to a 200-nautical-mile EEZ with its attendant continental shelf. This is a matter which falls to be decided by reference to the text, legislative history and doctrinal writings illuminating UNCLOS as well as by reference to customary international law, including conforming State practice.

Sixth, Nicaragua must demonstrate its sole title to a contiguous submarine space extending from its coast up to any area which it claims as OCS. It must also demonstrate that one State's natural prolongation claim may utilize the maritime zones of other States as transit zones in which to manoeuvre itself to encroach upon yet another State's maritime zones which lay beyond. These matters fall to be decided by customary international law, State practice and geographical data.

Seventh, Nicaragua must demonstrate that its claims do not impinge on the notional rights of third States in the Caribbean Sea. This is a matter which falls to be decided in accordance with international law, geographical data, the Statute of the Court and judicial practice.

2.5 The divergence of applicable laws and burdens of proof thus has an important implication for the laws the Court must apply and the procedures it must follow in this case. In the present Chapter, Colombia will focus on the fact that, since the OCS regime of UNCLOS, both in its substantive and procedural aspects, does not constitute customary international law, it does not apply to Colombia as a non-Party, and it cannot prejudice Colombia's customary entitlement to an *ipso jure* 200-nautical-mile EEZ with its attendant continental shelf (B). It will also focus on the fact that Nicaragua has not respected the procedure by which it must prove that the area beyond 200 nautical miles constitutes the natural prolongation of its land territory (C). Moreover, Nicaragua's case requires the delineation of its alleged continental shelf beyond 200 nautical miles as a preliminary step for a delimitation. In doing so, the Court would perforce arrogate for itself, and fulfil, while upholding the same rigorous scientific standard, the role of the CLCS, which is contrary to its judicial function and expertise (D).

2.6 The subsequent Chapters will establish that Nicaragua utterly fails to fulfil its burden of proving each and every one of the legal and factual requirements of its case.

B. The OCS is a Non-Customary Internal UNCLOS Regime

2.7 Colombia, though not a Party to UNCLOS, considers that the provisions of UNCLOS which affirm the coastal State's *ipso jure* entitlement to a 200-nautical-mile EEZ, including the rights to the resources of both the water column and the continental shelf,[30] are congruent with customary international law,[31] a proposition generally acknowledged and judicially confirmed.[32] Because for Nicaragua, as a Party to UNCLOS, that law is conventional, both Colombia and Nicaragua converge on the substance of the law for this matter, albeit from different sources.

2.8 Indeed, in ruling on Nicaragua's similar submission in 2012, the Court has already recognised as customary the entitlement of the Colombian islands of San Andrés, Providencia and Santa Catalina to an EEZ with its attendant continental shelf radiating in every direction, specifically east of Nicaragua's 200-nautical-mile range.[33] Under customary international law, the coastal State's entitlement extends up to 200 nautical miles or until it encounters another State's 200-nautical-mile entitlement.[34]

30 UNCLOS, Articles 55-57.
31 See 2012 Judgment, p. 666, para. 114.
32 *Libya/Malta*, p. 33, para. 34.
33 See 2012 Judgment, p. 686, para. 168.
34 See Chapter 3 *infra*.

2.9 In contrast, the OCS is not an entitlement *per se*, but a contingent UNCLOS right which only vests in a claiming State Party upon its fulfilment of the procedural and data requirements of the CLCS, a Convention-based institutional procedure.[35] As Colombia will establish in this section, the OCS regime does not share the customary character of the EEZ with its attendant continental shelf; the OCS regime, a part of UNCLOS, is quintessentially conventional law. The regime requires wide-shelf coastal States Parties, to interact with an independent scientific and technical body with the objective of obtaining a recommendation; it also requires revenue-sharing, in essence a royalty, to be paid to the other States Parties to UNCLOS, not to non-Parties (1); the realisation of a State Party's claim to an OCS is contingent on a determination and the prior recommendations by the CLCS, an exclusively UNCLOS institution (2); and, in any case, neither Nicaragua, nor the Court, can rely on Article 76, specially paragraph 4 therein, *vis-à-vis* Colombia (3).

(1) The Privilege of Acquiring an OCS is Granted in Return for Revenue-Sharing

2.10 As will be elaborated in Chapter 3, recognition of an OCS claim in accordance with UNCLOS, upon proof of its existence, was granted to wide-shelf States in return for revenue-sharing under Article 82: a royalty to be paid by the wide-shelf States to the other States Parties in return for the right

[35] See Annex 49.

to exploit the resources that would have otherwise remained part of the Area and the Common Heritage of Mankind. Hence the observation that

> "(t)o rely on the entitlement to a continental shelf in article 76 without making payments under article 82 would be seen by many States as a violation of the 'deal' on which articles 76 and 82 are based".[36]

2.11 At the final Plenary Meeting on December 10, 1982, the President of the Conference, Ambassador Tommy Koh, stated that:

> "Even in the case of article 76, on the continental shelf, the article contains new law in that it has expanded the concept of the continental shelf to include the continental slope and the continental rise. This concession to the broad-margin States was in return for their agreement to revenue-sharing on the continental shelf beyond 200 miles. It is therefore my view that a *State which is not a party to this Convention cannot invoke the benefits of article 76*."[37]

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[36] J. Mossop, *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities*, Oxford University Press, 2016, p. 86 (available at the Peace Palace Library).

[37] Third United Nations Conference on the Law of the Sea (UNCLOS III), *Official Records*, Vol. XVII, 193rd Plenary Meeting, para. 48, UN Doc. A/CONF.62/SR.193 (UNCLOS III, Official Records), available at: http://legal.un.org/docs/?path=../diplomaticconferences/1973_los (last visited 17 Sep. 2017) (emphasis added). See B. M. Magnússon, *The Continental Shelf Beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement*, Brill Nijhoff, 2015, pp. 85-86 (available at the Peace Palace Library).

2.12 Article 82 of UNCLOS stipulates that the revenue-sharing would be distributed to States Parties. Since a non-Party State is unable to claim the benefits of Article 76, non-Party States may not be subjected to any part of the OCS regime, including any potential encroachment on their *ipso jure* 200-nautical-mile entitlements, by an OCS claim based upon Article 76: *pacta tertiis nec nocent nec posseder prosunt.* Moreover, this part of UNCLOS was negotiated as a package deal.[38] Professor Orrego Vicuña has explained:

> "The opinion that has the greatest support among writers is that the package deal as a whole, as such, cannot in any way be assimilated to an *opinio juris*, that is, be identified with the formation of a rule of customary law, since the latter will be formed in accordance with its own mechanisms principally founded in national practice. The treaty can contribute to this process, but is not the process in itself. It follows that the package deal is not 'generalizable' as a rule of customary law and the only way in which it could prevail over parallel custom-forming process would be for it to be regarded as an exception to the function and normal capacity of multilateral conventions in influencing the formation of rules of customary law".[39]

2.13 With the passage of time and extensive State practice, "parts or provisions of a treaty can always become customary law following an independent legal process that does not depend

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[38] See Virginia Commentary, Vol. II, 1993, pp. 486, 854.

[39] F. Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*, Cambridge University Press, 1989, p. 253 (available at the Peace Palace Library).

on the package deal".[40] This has occurred in the case of the EEZ, a transformation confirmed by the Court.[41] In contrast, however, as it relates to the specific case of the OCS, the relevant provisions of UNCLOS and their legislative history, as will be explained in Chapter 3, demonstrate that the potential for OCS exploitation was granted to wide-shelf States as part of a package deal in return for revenue-sharing with other States Parties. Since it is implausible to argue that revenue-sharing, or any other form of royalty payment, may become customary and apply to non-Parties, this package deal could not become customary because this critical component was explicitly confined to Parties to UNCLOS.[42]

2.14 Orrego Vicuña considers another possible implication for the interpretation of a package deal in international law:

> "There is also a second opinion with respect to the meaning of the package deal, in the point of view of which this concept alters the normal relations between treaty and custom, making the provisions of the former indivisible and hindering the selectiveness of its application, which in turn impede a third party from benefiting from given isolated provisions by means of customary law".[43]

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[40] F. Orrego Vicuña, footnote 39 *supra,* p. 253.

[41] F. Orrego Vicuña, footnote 39 *supra*, p. 253. See also *Libya/Malta*, p. 33, para. 34.

[42] W. T. Burke, "Customary Law as Reflected in the LOS Convention: A Slippery Formula", in J. P. Craven, *et al* (eds.), *The International Implications of Extended Maritime Jurisdiction in the Pacific,* Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, 1989, pp. 402, 405 (Annex 43).

[43] W. T. Burke, footnote 42 *supra*, p. 254; F. Orrego Vicuña, footnote 39 *supra*.

2.15 This approach is similar to the one taken at the final Plenary Meeting by the President of the Conference, who rejected any right of third States to invoke the benefits of Article 76.[44] This approach also imports that, since the OCS is a package deal, it does not constitute customary international law and cannot be opposable to a non-Party State such as Colombia.

2.16 Whichever approach to the relationship between package deals and customary international law is taken, the OCS regime does not constitute part of customary international law since the package deal in which it originated and which is its *raison d'être*, is confined to States Parties to UNCLOS.

(2) The Realization of an OCS Claim Requires a Prior Determination by the CLCS, an UNCLOS Institution

2.17 A wide-margin coastal State's claim to have its OCS recognized is subject to the provisions of Article 76, paragraphs 4-9, which are purely conventional rules and cannot be considered to reflect customary international law.[45]

2.18 Article 76 (8) requires a coastal State to submit information on the outer limit of its claimed OCS to the CLCS, an internal UNCLOS commission. It may, depending on the adequacy of the information, make recommendations on the

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[44] See UNCLOS III, Official Records, footnote 37 *supra.*

[45] Ø. Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy*, Brill, 2014, pp. 1-2 (available at the Peace Palace Library). See also 2012 Judgment, Declaration of Judge *ad hoc* Mensah, p. 763, para. 3 and p. 765, para. 8; 2016 Judgment, Declaration of Judge Robinson, para. 11.

limits of the OCS. The limits established on the basis of the CLCS' recommendations are final and binding.[46]

2.19 UNCLOS thus requires every State Party claiming an OCS to submit information to the CLCS, an independent panel of scientific experts that decides upon the claim based on scientific evidence.[47] The CLCS was an integral part of the package deal which created the OCS; not only would wide-shelf States be subject to revenue-sharing for any OCS, but any determination of the existence and outer limits of an OCS was to be established with "the greatest possible degree of precision", based upon recommendations of an independent scientific committee, the CLCS, which was an "essential component" of the compromise.[48]

2.20 As recalled by Professor Tullio Treves, the definition of the OCS retained in UNCLOS, favouring coastal States which purport to have entitlements beyond 200 nautical miles, is the fruit of a carefully constructed compromise including: (i) the recognition to all coastal States of an entitlement to a 200-nautical-mile continental shelf, as a minimum; (ii) the establishment of maximum outer limits; (iii) the impossibility for a coastal State to establish the outer limits of its OCS absent prior review and recommendations by the CLCS; and (iv) the obligation for the coastal State to pay a royalty with respect to

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46 UNCLOS, Article 76 (8).

47 Ø. Jensen, footnote 45 *supra*, p. 39.

48 Ø. Jensen, footnote 45 *supra*, pp. 24-25, 43-44. See also B. M. Magnússon, footnote 37 *supra*, p. 51; J. Mossop, footnote 36 *supra*, p. 71.

the economic exploitation of the continental shelf beyond 200 nautical miles.[49]

2.21 The CLCS does not operate with regard to non-Party States and no non-Party State has ever made a submission.[50] Ambassador Koh, it will be recalled, explained that a non-Party State may not "invoke the benefits of article 76".[51] As a non-Party cannot enjoy the benefits, it cannot be subject to an internal obligation and scrutiny by an internal scientific committee. Therefore, since the second critical component of the OCS package-deal regime may not apply to non-Party States, the OCS regime does not constitute customary international law and may not prejudice their rights.

(3) IN ANY CASE, NICARAGUA CANNOT RELY ON ARTICLE 76 OF UNCLOS *VIS-À-VIS* COLOMBIA

2.22 In addition to the reasons set forth above, Colombia submits that the Court should reject Nicaragua's contention that it can rely on Article 76, and specially paragraph 4 of UNCLOS *vis-à-vis* Colombia, either as a matter of applicable law or for interpretative purposes.

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[49] T. Treves, *« Codification du droit international et pratique des États dans le droit de la mer »*, *Collected Courses of the Hague Academy of International Law*, 1990, Vol. 223, pp. 90-91 (available at the Peace Palace Library).

[50] See B. M. Magnússon, footnote 37 *supra*, p. 84. But see T. Treves, footnote 49 *supra*, p. 83, referencing the opinion of T. Clingan who suggested that non-party States should be allowed to submit data to the CLCS.

[51] UNCLOS III, Official Record, footnote 37 *supra*, p. 48.

2.23 Article 76 (4) (a) gives a choice to State Parties to base their claimed continental margin by applying either the Gardiner formula or the Hedberg formula, or a combination of both. Both formulae depend on calculation of distance from the foot of the continental slope. The Hedberg formula is the easiest way, since it substitutes accurate scientific data with the determination of points at an arbitrary distance criterion of 60 nautical miles from the foot of slope. These points define an artificial limit to the physical rise, even if it does not exist, and thus the outer edge of the continental margin.

2.24 This formula is typical of a conventional agreement by which State Parties consent to alleviate their respective burdens of proof with respect to certain facts that can be hard to demonstrate. Moreover, it is not of a fundamentally norm-creating character and lacks the necessary practice and *opinio juris*.

2.25 Professor William T. Burke summarized the legal situation with characteristic precision:

> "This particular situation seems to be an especially unappealing one for insisting on the status of the convention principles as customary law. The appearance, or perhaps it is better stated as the odor, of picking and choosing is unusually strong in this vicinity. The agreement on the broad margin provisions rested not only on the trade-off of revenue sharing beyond 200 miles, but also on the acceptance of an elaborate, especially created third-party decision procedure

> designed to discourage easy claims and to assure that such claims as might be made were founded on a solid basis of scientific data regarding the critical characteristics of the area that justified the claim.
>
> To take the position now that the Article 76 provisions on the foot of the slope and the depth of the sediment are a matter of customary law appears to dispense with the aforementioned safeguards as if they are insignificant. It is impossible to argue plausibly that the requirement for sharing revenue from operations beyond 200 miles is established customary international law – no one in the world would believe that. And it is perfectly obvious that Article 76(8) and the contents of Annex II on the Commission on the Limits of the Continental Shelf are not found in general practice of states. But if these are not also customary law, and the other paragraphs of Article 76 are customary law, then there can be no assurance founded in international procedures that coastal states' claims beyond 200 miles have any substance to them other than air."[52]

Nor is this situation likely to evolve over time: "(g)iven that both article 76(8) and article 82 contain references to institutions created by the LOSC and to processes embedded within the LOSC regime, this may be an obstacle to them ever becoming customary international law."[53]

2.26 A State is subject to customary international law and those international obligations it has taken upon itself. Colombia

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52 W. T. Burke, footnote 42 *supra*, p. 405.

53 J. Mossop, footnote 36 *supra*, p. 88.

was an active participant in the Conference and signed the Convention when it was adopted; the fact that it has elected not to become a Party to UNCLOS shows that it intentionally refused to assume any UNCLOS obligations that are not customary international law. While, as a matter of law, Nicaragua is subject to all UNCLOS provisions, including those that concern the OCS and EEZ, Colombia is only subject to those provisions of UNCLOS that reflect customary international law, in particular, in this case, the EEZ with its attendant continental shelf provisions. It is not subject to the OCS regime. As Colombia has not ratified UNCLOS, the OCS regime is not opposable to it. Colombia's objection to any portion of the OCS regime as customary, and thus as applicable to itself, has been public and persistent.[54]

2.27 Consequently, Nicaragua's arguments regarding the existence and extent of its purported OCS based on the "Hedberg formula" (or "Gardiner formula", for that matter) must be rejected.[55]

2.28 Also, because Colombia is not subject to the OCS regime, its provisions may not prejudice its rights, including, but

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[54] *Territorial and Maritime Dispute*, Public Sitting 4 May 2012, CR 2012/16, pp. 43-45, paras. 39-50 (Bundy). Colombia has stated its position in this regard through statements of the President of the Republic and the Ministry of Foreign Affairs.

[55] See *e.g.* Memorial of Nicaragua, p. 76, paras. 3.58-3.60; p. 82, para. 3.66; p. 86, para. 3.72. Quite apart from the fact that Nicaragua cannot rely on the conventional formulae to prove the extent of its purported OCS *vis-à-vis* Colombia, Colombia will demonstrate that Nicaragua has not proved that it has any title to an OCS (See Chapter 7 *infra*).

not limited to, the customary right to a 200-nautical-mile EEZ with its attendant continental shelf, radiating in all directions from its mainland and insular territories.[56]

C. Nicaragua has not Respected the Procedure by which it Must Prove that the Area Beyond 200 Nautical Miles is its OCS

2.29 In this section, Colombia will first briefly recall the requirements established by UNCLOS with respect to the conventional procedure which must be followed by State Parties to UNCLOS to establish the existence and extension of an OCS (1). Colombia will also demonstrate that, contrary to what Nicaragua asserts, the Court did not hold in its jurisdictional decision of 2016 that the circumstances of the instant case permit it to proceed to a delimitation in the absence of recommendations from the CLCS. It will be shown that the particular circumstances of the present case require prior recommendations from the CLCS as a decisive element of proof, and that the procedure in order to provide such a proof has not been duly completed (2).

(1) The Conventional Procedure

2.30 Colombia is not a Party to UNCLOS, but Nicaragua is. The legal situation in such a context with respect to Nicaragua's procedural obligations has been made clear by the Court:

[56] 2012 Judgment, p. 686, para. 168.

> "the fact that Colombia is not a party to UNCLOS 'does not relieve Nicaragua of its obligations under Article 76 of that Convention'".[57]

2.31 In other words, in addition to the customary law requirements regarding the existence of a continuous and uninterrupted natural prolongation towards Colombia, Nicaragua must also respect "its obligations under Article 76" of UNCLOS in order to be able to prove its claim to an OCS.

2.32 Regarding the latter, Article 76, paragraph 8, of UNCLOS constitutes the sole means available for State Parties to UNCLOS to determine the existence of an area as OCS and the delineation of its outer limits. The State so claiming has to provide the requisite information to the CLCS. After reviewing this information, in case the Commission finds it probative, it makes "recommendations" on the basis of which the claimant State can establish the outer limits of its continental shelf.

2.33 The prerogatives of the CLCS are a critical component of the compromise package-deal which legitimized the OCS regime under UNCLOS.[58] As a consequence, no State can establish the limits of its outer continental shelf except on the basis of the prior recommendations of the CLCS. As a matter of fact, the CLCS has not yet made any recommendations with respect to Nicaragua's submission, and therefore has not validated the accuracy and sufficiency of its technical arguments.

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[57] 2012 Judgment, p. 669, paras. 126-127; 2016 Judgment, para. 81.

[58] See Section B *supra*.

2.34 This has been reiterated by the Court, which, in the cases concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* and *Territorial and Maritime Dispute*, stated:

> "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 Limits of the Continental Shelf established thereunder."[59]

(2) Nicaragua's Claim and the Court's Position with Regard to the Conventional Procedure

2.35 Nicaragua contends that it must be concluded from the 2016 Judgment that "(i)t is not necessary for the Court to wait for the Commission to issue a recommendation before it delimits this area."[60] But, as evidenced below, Nicaragua's interpretation of the 2016 Judgment is superficial and incorrect.

2.36 As recalled by the Court, Colombia's fifth preliminary objection raised the question:

> "whether a recommendation made by the CLCS pursuant to Article 76, paragraph 8, of UNCLOS, is a prerequisite in order for the Court to be able to entertain the Application filed by Nicaragua in 2013."[61]

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[59] *Nicaragua* v. *Honduras*, p. 759, para. 319; 2012 Judgment, pp. 668-669, para. 126.

[60] Memorial of Nicaragua, p. 17, para. 1.34.

[61] 2016 Judgment, para. 106.

2.37 It is important to recall that when the Court addressed this question, Nicaragua had not yet filed its Memorial. The Application filed by Nicaragua in 2013 was the sole element which the Court had at its disposal. While the Application was for its part unclear as to what Nicaragua's legal argument would be, in its Memorial, Nicaragua attempts to prove the existence and limit of the outer edge of the continental shelf beyond 200 nautical miles by merely referring to its submission to the CLCS. On the basis of this submission,[62] Nicaragua asks the Court to rule that:

> "the outer limit of Nicaragua's continental shelf, *delineated* in accordance with Article 76, overlaps with the continental shelf limit measured from the Colombian mainland, and with that measured from the Colombian islands of San Andrés and Providencia."[63]

2.38 Thus, the line marking Nicaragua's alleged OCS is the line of *delineation* of its outer limit. Furthermore, Nicaragua's thesis on what it calls the "provisional delimitation line",[64] which is central to its whole case, refers exclusively to the purported line of *delineation*.[65] Moreover, the specific geographical circumstances of this case, namely the fact that the coasts of the States involved are opposite, necessarily requires the delineation of the outer limit of the continental margin; that

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62 Memorial of Nicaragua, pp. 47-87.

63 Memorial of Nicaragua, p. 90, para. 3.84 (emphasis added). Nicaragua's purported line of delineation is represented at p. 85, Figure 3.17 of its Memorial.

64 Memorial of Nicaragua, p. 127, para. 5.12.

65 Memorial of Nicaragua, p. 128, Figure 5.1.

is, the terminus of Nicaragua's alleged OCS. All of the above would require the Court to assume the role of the CLCS in determining the outer limits of Nicaragua's claimed OCS.

2.39 Judge Donoghue's opinion in *Territorial and Maritime Dispute* is apposite in that

> "Nicaragua's proposed delimitation methodology blurs the usual distinction between delimitation of a maritime boundary and delineation of the outer limits of the continental shelf, because it requires delineation as an initial step in delimitation."[66]

2.40 In the instant case, the Court decided the question of its jurisdiction on the sole basis of the Application. In doing so, it recalled the following general points:

(i) "the role of the CLCS relates only to the delineation of the outer limits of the continental shelf, and not the delimitation".[67]

(ii) In view of the technical complexity of determining the outer edge of the continental margin and the outer limits of the continental shelf, the function of the CLCS is "to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical

[66] 2012 Judgment, Separate Opinion of Judge Donoghue, p. 757, para. 23.
[67] 2016 Judgment, para. 110.

miles, and to make recommendations in accordance with Article 76".[68]

(iii) The procedure of delineation is distinct from that of delimitation.[69]

2.41 It follows from the above that the 2016 Judgment, which was rendered without the Court knowing what Nicaragua's precise claim would be and, therefore, what were the actual circumstances of the case, only held in principle that since delimitation and delineation are two different procedures, and since delimitation can be made in certain circumstances in the absence of delineation, the recommendations of the CLCS are not necessarily a pre-condition for the admissibility of an Application like the one lodged in 2013 by Nicaragua.

2.42 Developing this notion, in its subsequent Judgment of 3 February 2017 in the case concerning the *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, the Court observed that whether a delimitation can be carried out absent a recommendation of the CLCS depends on the circumstances. It stated:

> "A lack of certainty regarding the outer limits of the continental shelf (…) *does not*, however, *necessarily* prevent either the States concerned or the Court from undertaking the delimitation of the boundary *in appropriate circumstances*

[68] 2016 Judgment, para. 111.
[69] 2016 Judgment, para. 112.

> before the CLCS has made its recommendations."[70]

2.43 One of the circumstances that require the prior recommendation from the CLCS before a delimitation can be carried out is where the claimed boundary line depends on the prior identification of the outer limits of the continental shelf. In his Declaration appended to the 2016 Judgment in the Preliminary Objections phase of this case, Judge Gaja explained the problem as follows:

> "There may be cases where a delimitation involving an extended continental shelf could be effected without difficulty by the Court or an international tribunal pending the delineation of the outer limits of the continental shelf. One such case arguably concerned the delimitation between Bangladesh and Myanmar, where the International Tribunal for the Law of the Sea found that it could make the delimitation by tracing a line with an arrow (...). However, *in most instances the delineation of the outer limits should come first*, because it would otherwise be difficult to pursue the 'equitable solution' required by Article 83 of UNCLOS."[71]

2.44 This is precisely the situation here. As noted above, Nicaragua's case relies on a prior delineation of the outer limit of its purported OCS claim, which is the sole prerogative of the CLCS under UNCLOS.

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[70] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, I.C.J. Judgment of 3 February 2017*, para. 94 (*Somalia* v. *Kenya)* (emphasis added).

[71] 2016 Judgment, Declaration of Judge Gaja.

2.45 Because Nicaragua's *delimitation* claim depends on the prior identification of the outer limits of its alleged OCS, the present case is clearly distinguishable from the two cases concerning the Bay of Bengal. In both of those cases, which involved delimitation between States with adjacent coasts and where the existence of an OCS was not only unopposed by the Parties, but also scientifically uncontested, the circumstances were such that the delimitation of the continental shelf beyond 200 nautical miles could be adjudicated despite the absence of a prior verification by the CLCS and the absence of recommendations on the basis of which outer limits could be delineated. In other words, the tribunals in those cases were never called upon to usurp the responsibilities of the CLCS in vetting and approving the outer limits of the Parties' OCS claims in order to effectuate the delimitation.

2.46 In *Bangladesh/Myanmar*, ITLOS explained:

> "444. (…) the Bay of Bengal presents a unique situation, as acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea. (…) the experts' reports presented by Bangladesh during the proceedings (…) were not challenged by Myanmar. (…)
>
> 445. (…) in their submissions to the Commission, both Parties included data indicating that their entitlement to the continental margin extending beyond 200 nm (…) based to a great extent on the thickness of sedimentary rocks pursuant to

> the formula contained in article 76, paragraph 4(a)(i), of the Convention.
>
> 446. In view of uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information submitted during the proceedings, the Tribunal is satisfied that there is a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nm."[72]

The Tribunal added that, in this particular case, the delimitation would be:

> "without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention."[73]

2.47 Similarly, in *Bangladesh* v. *India*, the Annex VII tribunal held that:

> "(i)n the present case both Parties have put forward claims to the continental shelf beyond 200 nm where they overlap. Both Parties agree that they have entitlements, and neither Party denies that there is a continental shelf beyond 200 nm in the Bay of Bengal",[74]

and

> "the decision of an international court or tribunal delimiting the lateral boundary of the continental

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[72] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 129-130, paras. 444-446 (*Bangladesh/Myanmar*).

[73] *Bangladesh/Myanmar*, p.103, para. 394.

[74] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014*, p. 21, para. 78 (*Bangladesh* v. *India*).

shelf beyond 200 nm is without prejudice to the delineation of the outer limits of that shelf."[75]

2.48 As noted above, both Bay of Bengal cases involved circumstances that are vastly different from the present case, including:

(i) All three of the States Parties to those cases were also Parties to UNCLOS. Unlike in the present case, there was no question of opposing a conventional legal regime to a State that was not a Party to the treaty establishing that regime.

(ii) The existence of an OCS in the area being delimited in the Bay of Bengal was uncontested. In the case of Nicaragua's submission, it has been strongly contested before the CLCS by no less than four States, namely Colombia, Costa Rica, Jamaica, and Panama.[76]

(iii) Unlike in the Bay of Bengal, no State in the Caribbean region ever made OCS claims in the Caribbean Sea. Nicaragua's case thus runs counter to this consistent and uniform regional practice.[77]

(iv) As will be shown by Colombia in Chapter 7 below, decisive public record scientific evidence disproves

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75 *Bangladesh* v. *India*, p. 22, para. 80.
76 See Annexes 19 to 28.
77 See para.1.26 and footnote 22 *supra*.

Nicaragua's technical arguments regarding the alleged existence of a natural prolongation from its land territory beyond 200 nautical miles towards Colombia. This markedly differs from the *Bangladesh/Myanmar* where ITLOS stated that:

> "Notwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question."[78]

(v) Unlike the Bay of Bengal, the Caribbean Sea does not pose a "unique situation" regarding the existence of a continental shelf beyond 200 nautical miles; nor was this acknowledged in the course of the negotiations at the Third United Nations Conference on the Law of the Sea.[79]

(vi) Contrary to the case of the Caribbean Sea, where there are no maritime areas situated more than 200 nautical miles from the nearest land territory, and there are no

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[78] *Bangladesh/Myanmar*, p. 115, para. 443.

[79] *Bangladesh/Myanmar*, p. 115, para. 444; The Final Act of the Third United Nations Conference on the Law of the Sea, Annex II, "Statement of understanding concerning a specific method to be used in establishing the outer edge of the continental margin", available at: http://www.un.org/depts/los/clcs_new/documents/final_act_annex_two.htm (last visited 17 Sep. 2017)

overlapping 200-nautical-mile entitlements between the opposite coasts of Nicaragua and Colombia in this region, in the Bay of Bengal there were overlapping 200-nautical-mile entitlements between the Parties and their OCS claims extended into the open sea and did not encroach solely on the 200-nautical-mile entitlements of other States.

(vii) The Bay of Bengal cases involved delimitation between adjacent States where the delimitation could be effectuated without the need to establish the outer limits of the continental margin. ITLOS simply fixed the line of delimitation in the area within 200 nautical miles, and decided that this line could be continued in the same direction beyond 200 nautical miles "until it reaches the area where the rights of third States may be affected."[80] The Annex VII Tribunal followed the same reasoning.[81]

2.49 In the present case, which involves States with opposite coasts, it is not possible to proceed with the delimitation leaving unanswered the question of delineation of the outer limit of Nicaragua's alleged OCS. For the Court to make a ruling on delimitation – even assuming, *arguendo*, that an OCS claim may encroach upon another State's *ipso jure* 200-nautical-mile EEZ, with its attendant continental shelf (*quod non*) as will be explained in Chapter 3 below, it would require a prior determination of the full extent of Nicaragua's entitlement, *i.e.*

[80] *Bangladesh/Myanmar*, pp. 118-119, para. 462.
[81] *Bangladesh* v. *India*, p. 165, para. 509 (3).

an authoritative, scientifically verified, recommendation from the CLCS regarding the delineation of the outer limit of its alleged continental shelf.

2.50 Finally, regarding the 2016 Preliminary Objections Judgment, it is worth emphasising that all that the Court decided was that a State can ask it to effect a delimitation of the OCS, not that such delimitation might in all circumstances be carried out without prior recommendations of the CLCS. Nor did the Court decide that it can proceed to the delimitation requested in the current case, since at the time it was not fully informed of the circumstances of the case, including the precise nature of Nicaragua's claim. In the words of ITLOS:

> "(…) the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case."[82]

2.51 Furthermore, the Court certainly did not decide, neither in 2012 nor in 2016, that the mere lodging of a submission with the CLCS should be understood as it being fully compliant with the requirements of the CLCS, nor that such a submission proves the existence and extent of Nicaragua's alleged natural prolongation up to a line of delineation established in accordance with the procedures set out in Article 76 of UNCLOS. Submissions are nothing but submissions that need to be vetted and verified scientifically by the CLCS; they cannot be

[82] *Bangladesh/Myanmar*, p. 101, para. 384.

taken at face value and as dispositive – as Nicaragua wishes the Court to do.

2.52 As observed by Judge Bhandari in his Separate Opinion to the 2016 Judgment,

> "there is no *proof* on record in these proceedings that Nicaragua has in fact furnished complete and sufficient information and documentation to the CLCS to issue its recommendation. Thus the possibility remains that at a future time the CLCS could request Nicaragua to supply additional or complementary evidence in support of its claim. Were this to be the case, the entire premise of the majority's conclusion that Nicaragua has now fully and faithfully complied with its obligations for receiving a CLCS recommendation would fail."[83]

2.53 In its 2016 jurisdictional decision, the Court was satisfied that Nicaragua had provided the CLCS with its submission, but it had simply no information with respect to the other conditions, and could therefore not decide whether the circumstances of the case were such that they permitted a delimitation, even if legally warranted (*quod non*), absent the prior recommendation of the CLCS.

2.54 In its Memorial, Nicaragua stated what are the circumstances of its claim, which seeks a delimitation between the outer limits of its alleged outer continental shelf and Colombia's 200-nautical-mile EEZ, with its attendant

[83] 2016 Judgment, Separate Opinion of Judge Bhandari, para. 5.

continental shelf. It is on the basis of these circumstances that the Court is now in a position to ascertain if it can proceed to the requested delimitation. Even without taking account of the other failings in Nicaragua's case, the conclusion at the very outset can be no other than that it cannot.

D. The Establishment of a Line of Delineation is the Exclusive Prerogative of the CLCS, not the Court

2.55 As observed in the previous section, Nicaragua has not followed the required conventional procedure, and it has not secured a recommendation by the CLCS. Rather, Nicaragua requests the Court to replace the CLCS regarding the verification of the extension of its natural prolongation beyond 200 nautical miles and the delineation of the outer limit of its purported OCS. Colombia considers that it would not be appropriate for the Court to assume this task, which is the exclusive prerogative of the CLCS, and that such a task would run counter to the Court's judicial function.

2.56 Given the conventional functions, composition, and expertise of the CLCS,[84] the Court and tribunals have recognized its special competences.

[84] Pursuant to Article 2 of Annex II to UNCLOS, the CLCS consists of 21 experts in geophysics, hydrography or geology. Members of the Commission are elected by States Parties to UNCLOS for five years and can be re-elected. The composition of the Commission is based on geographic representation. As set forth in Article 3 of Annex II, the functions of the Commission are in particular to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 of UNCLOS, particularly with respect to the outer limits. The limits established by a State on the basis of the CLCS' recommendation are final and binding.

2.57 In *Bangladesh/Myanmar*, ITLOS stated as follows:

> "376. There is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries."[85]

2.58 The Arbitral Tribunal in *Bangladesh* v. *India* took a similar line:

> "80. (…) Whilst the function of settling disputes with respect to the delimitation of maritime boundaries between adjacent or opposite States is entrusted to the dispute settlement procedures under Part XV of the Convention, the CLCS plays an indispensable role in the delineation of the continental shelf beyond 200 nm. On the one hand, the recommendations of the CLCS 'shall not prejudice matters relating to delimitation of boundaries', (Convention, Annex III, art. 9), and on the other hand, the decision of an international court or tribunal delimiting the lateral boundary of the continental shelf beyond 200 nm is without prejudice to the delineation of the outer limits of that shelf. In short, the mandates of these bodies complement one another."[86]

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85 *Bangladesh/Myanmar*, p. 99, para. 376.

86 *Bangladesh* v. *India*, p. 22, para. 80.

2.59 For its part, in its 2016 Judgment on the Preliminary Objections in this case, the Court confirmed that

> "(t)he procedure before the CLCS relates to the delineation of the outer limits of the continental shelf, and hence to the determination of the extent of the seabed under national jurisdiction. It is distinct from the delimitation of the continental shelf, which is governed by Article 83 of UNCLOS and effected by agreement between the States concerned, or by recourse to dispute resolution procedures."[87]

2.60 And, more recently, in *Somalia* v. *Kenya*, the Court reiterated that:

> "As the Court has recently observed, 'the role of the CLCS relates only to the delineation of the outer limits of the continental shelf, and not delimitation' (...). The two tasks are distinct".[88]

2.61 The law is therefore clear: delineation, which is distinct from delimitation, is a scientific matter for the CLCS, not the Court. Nicaragua purports to ignore this institutional division of responsibilities and the policies which compel it by requesting the Court to act in *lieu et place* of the CLCS.

2.62 Were the Court to assume a role which is reserved to the CLCS, it would be required to examine scientifically the data and information adduced by Nicaragua, and assess their relevance and accuracy. It would also be required to apply

[87] 2016 Judgment, para. 112.
[88] *Somalia* v. *Kenya*, para. 67.

scientific methods and standards higher and more exacting than the mere preponderance of evidence based upon a balance of probabilities.

2.63 Given that the process before the CLCS is different from judicial proceedings, Nicaragua would have to prove to the Court that its OCS claim meets a level of scientific certainty at least as high as the one that would have been applied by the CLCS.

2.64 It would not be Colombia's role to disprove Nicaragua's OCS claim – although in Chapter 7 *infra* Colombia shows that, on the record, Nicaragua has failed to sustain its claim; rather, it is Nicaragua which has the burden to prove that it has an OCS based upon the scientific evidence at least as robust as the CLCS would have required. In this regard, the Court has made clear that it is the duty of a party asserting certain facts to establish the existence of those facts. As noted by Judge Donoghue in her Separate Opinion in the *Territorial and Maritime Dispute* case, it was

> "Nicaragua's responsibility to prove to the Court the existence and extent of any entitlement to continental shelf beyond 200 nautical miles of its coast, it was not incumbent on Colombia to offer a competing understanding of the geological and geomorphological facts or to propose an alternative set of geographic co-ordinates setting forth the outer limits of Nicaragua's continental shelf."[89]

[89] 2012 Judgment, Separate Opinion of Judge Donoghue, p. 754, para. 10. See also *Application of the Interim Accord of 13 September 1995 (the*

2.65 In other words, it would not be enough for Nicaragua to prove that it is more likely than not that it has an OCS, or that it is more likely that the outer limit of the OCS is here rather than there. The task of the Court would not be to find which litigant State brings the most convincing arguments; it would have to determine whether the requisite scientific data has been adduced and if such data leads to scientifically certain results.

2.66 Should the Court proceed in the instant case on the basis of its own findings on the question of the existence and the location of the outer limits of the OCS, as Nicaragua requests it to, it would put at jeopardy both its authority and credibility, as well as the integrity of its judicial function and the coherence of international jurisprudence.

2.67 Since the two institutions do not share the same expertise or *modus operandi*, a discrepancy between the Court's findings and the Commission's recommendations could readily arise. Indeed, since the CLCS is not bound to respect the findings of the Court on the matters that are, under UNCLOS, assigned to its exclusive competence, it could adopt a contradictory position, in this or other cases, based on its own technical assessment of the scientific data.

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former Yugoslav Republic of Macedonia v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 668, para. 72; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68 (*Black Sea*).

2.68 Such a situation would risk weakening the authority of the Court, whose judgment could appear to be based on technically erroneous findings. While judgments of the Court are, under Article 60 of the Statute, "final and without appeal", a non-appealable judgment based on findings of facts that are inaccurate would have the effect of undermining the quality of the judgment. Conversely, the Court, by a judgment based on faulty scientific analysis, could create a precedent, which could be followed by the Court or other tribunals, or even pleaded before the CLCS.

2.69 With respect to the Court's judicial function, the Court emphasized in the *Northern Cameroons* case, and later restated in the *Frontier Dispute* case, that

> "even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."[90]

2.70 In the *Free Zones* case, the Permanent Court alluded to the same problem, when stating that:

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[90] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 29-30; *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 69, para. 45.

> "After mature consideration, the Court maintains its opinion that it would be incompatible with the Statute, and with its position as a Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties."[91]

Or, one might add, on the subsequent decision of another institution.

2.71 In order to verify the accuracy of Nicaragua's submission in the instant case the Court would be required to conduct an intricate scientific analysis, following a process that is essentially collaborative and not adversarial at all, *i.e.* an interactive process allowing a two-way flow of information between the CLCS and the State seeking a recommendation. What Nicaragua requests the Court to do is to issue a judgment that could be contradicted by subsequent recommendations of the CLCS.[92] This situation would be clearly inconsistent with the finality and binding effect of the Court's decisions. Furthermore, none of the above would be compatible with the Court's integrity as a judicial organ.

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[91] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 161.

[92] As anticipated by Judge Donoghue, this would be one of the "legal and institutional difficulties" that could emerge in the future: "(…) the Court's conclusions regarding the location of the outer limits, in a judgment that is binding on the parties, might differ from recommendations that later emerge from the Commission" (2012 Judgment, Separate Opinion of Judge Donoghue, p. 756, para. 18; p. 757, para. 23). See also 2016 Judgment, Declaration of Judge Bhandari, para. 8.

2.72 Moreover, even in the event that the Court were to decide to arrogate for itself the role of the CLCS and assume the duties assigned to the latter, the process that would have to be followed is a rigorous one. Colombia has attached to the present Counter-Memorial a description of the detailed scientific standards and procedures that the Court would be obliged to follow in order to replicate the process before the CLCS, and the standard of proof that Nicaragua would be held to.[93] As will become evident, the CLCS' procedure and standard of proof are not within the *modus operandi* of the Court and exceed the Court's scientific expertise.

2.73 For these reasons, in the absence of corroborated scientific proof that Nicaragua has an outer continental shelf extending up to the line of delineation on which its case rests, the Court should reject Nicaragua's claim and refrain from proceeding to any delimitation.

E. Conclusion

2.74 As Colombia has demonstrated, the OCS regime is a conventional regime which is confined to UNCLOS Parties. If a claim is proved, the CLCS makes a recommendation, on the basis of which the State establishes the outer limits of its continental shelf and they then become final and binding. The State's OCS is recognised in return for a royalty payment for the

[93] See Annex 49.

benefit of States Parties which do not have wide shelves. As a conventional regime, this process is subject to the decision-making of an independent UNCLOS body. As an internal UNCLOS regime, the OCS regime does not constitute customary international law[94] and therefore it is not opposable to Colombia.

2.75 UNCLOS is an integral package, in which "it is not possible for a State to pick what it likes and to disregard what it does not like."[95] If, as Ambassador Koh stated, the "rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations",[96] the converse must also be respected. Since Colombia, as a non-Party State, cannot claim any benefits under the OCS sections of UNCLOS, it may not be subjected to its corresponding obligations.[97]

2.76 Moreover, since Colombia is only subject to customary international law in this matter, Colombia's defence must also be examined based solely upon customary international law and not UNCLOS. The divergence of laws in this case means that while Nicaragua must prove any OCS claim based upon the provisions of UNCLOS and customary law, Colombia only has

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94 On the position of the United States, a non-Party, see J. Mossop, footnote 36 *supra*, pp. 82, 84-86. This position has been criticized as unreasonable and self-interest motivated by Professor W. T. Burke, see footnote 42 *supra*.

95 UNCLOS III, Official Records, footnote 37 *supra*, p. 47.

96 UNCLOS III, Official Records, footnote 37 *supra*, p. 47.

97 W. T. Burke, footnote 42 *supra*, pp. 402, 405; see also J. Mossop, footnote 36 *supra*, p. 84.

to prove that under the latter, an OCS claim (which, Colombia submits, Nicaragua's data fails to prove) may not, in any event, encroach upon another State's customary 200-nautical-mile EEZ with its attendant continental shelf *ipso jure* entitlement.

2.77 As Colombia will establish in Chapter 7 *infra*, Nicaragua has not proved the existence and extent of the OCS it asks the Court to uphold. While the Court has expressly recalled that a State Party to UNCLOS is required to respect and follow UNCLOS procedures, Nicaragua has not done so. Contrary to what Nicaragua contends, the Court did not decide in 2016 that it can proceed with the delimitation sought by Nicaragua. It only decided that it has jurisdiction over the "Question" of the delimitation beyond 200 nautical miles from Nicaragua's coast. The circumstances of the case as they appear after the Memorial show that Nicaragua relies on the determination of a line delineating the outer limits of its putative OCS – a determination which is under the exclusive prerogative of the CLCS. As this is not a situation of coastal adjacency where the scientific evidence is uncontested, the Court is not in a position to uphold or take for granted the line of delineation argued by Nicaragua. Absent this line of delineation, there is simply no case for another judicial delimitation of continental shelf areas between Nicaragua and Colombia.

2.78 If, *quod non*, the Court were disposed to assume the role of the CLCS, despite the fact that it is not specifically equipped to assume this function, it would have to adopt a procedure and

standards at least as rigorous as those employed by the CLCS. The rigorous scientific methodology, heavy burden of proof and high degree of scrutiny that Nicaragua's claim would have had to withstand under the CLCS procedure cannot be evaded simply by transferring the issue from the CLCS to the Court, as if the Court were the "soft-law window" for the Law of the Sea. The Court would have to submit Nicaragua's claim to the same burden of proof and rigorous scientific scrutiny as the CLCS. As demonstrated in Annex 49, this task is not within the judicial function, scientific expertise or *modus operandi* of the Court.

2.79 In this regard, it is to be noted that Nicaragua's evidentiary case is for all intents and purposes frozen. In its Memorial, filed on 28 September 2016, Nicaragua chose to present as the sole evidence supporting its OCS claim the 2013 Submission already made to the CLCS. It did not update it in any way and did not include any supplementary material whatsoever. Thus, both organs (the CLCS and the Court) have now before them an identical claim said to be supported with the same elements of proof. Were Nicaragua to attempt submitting to the Court additional information concerning this aspect of the case, Nicaragua would necessarily be modifying its Submission outside the established procedure and thus distancing itself from the request it already put before the CLCS.

2.80 Whether the Court has the facilities and resources to perform a function for which the drafters of UNCLOS designed and empowered the CLCS and, if so, whether exercising those

powers would be compatible with the Court's judicial function, is problematic. The answer to the first question must be sought in the text and the object and purpose of UNCLOS. The answer to the second question must be sought in the prudential wisdom of the Court.

2.81 Colombia respectfully submits that the answer to both of these questions is no. However, should the Court reject Colombia's submission and establish that it is within its judicial function to determine the scientific accuracy of Nicaragua's OCS claim, the Court would face the impossible task of having to apply standards that are at least as rigorous as those of the CLCS and verify, with at least the same degree of scientific scrutiny that the CLCS must apply,[98] that Nicaragua has a continental shelf extending beyond 200 nautical miles towards Colombia (and assuming that an OCS claim can even encroach on another State's EEZ with its attendant continental shelf, *quod non*). Moreover, this would have to be done without the expertise of the CLCS and its capacity to ask Nicaragua for specific new evidence to try to overcome the deficiencies in its Submission, all of which would be contrary to the Court's judicial function.

2.82 Colombia has also demonstrated that, in any event, Nicaragua cannot rely, as a matter of proof of the extent of its purported continental margin, on Article 76 (4) of UNCLOS *vis-à-vis* Colombia.

[98] For elaboration see Annex 49.

2.83 Lastly but not less importantly, Nicaragua must demonstrate that it has a continuous uninterrupted natural prolongation that extends up to and beyond 200 nautical miles towards Colombia, as required by customary international law. Again, as shown in Chapter 7, Nicaragua fails to make said demonstration.

Chapter 3

A STATE'S ENTITLEMENT TO A 200-NAUTICAL-MILE EEZ WITH ITS ATTENDANT CONTINENTAL SHELF PREVAILS OVER ANOTHER STATE'S COMPETING OCS CLAIM

A. Background

3.1 The Third Conference on the Law of Sea introduced a new concept to international law: the EEZ. Now customary international law, it appertains to a coastal State regardless of whether or not it is Party to UNCLOS. In its EEZ, a coastal State enjoys *ipso jure* exclusive jurisdiction over specified rights in the water column and the seabed and subsoil. Within 200 nautical miles from the coastal State's baselines there is, in effect, one national regime composed of the territorial sea and the EEZ, with its attendant continental shelf. With respect to the EEZ, the Court held in 1985, in *Libya/Malta*:

> "Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf."[99]

That continental shelf, which is incorporated in the EEZ, to which the Court refers, appertains to the coastal State and its islands;[100] it continues to its statutory limit of 200 nautical miles

[99] *Libya/Malta*, p. 33, para. 34.

[100] It will be recalled that the Court held in 2012 that Colombia's islands are entitled to an EEZ, meaning that the EEZ is customary

or until it encounters another State's EEZ with its attendant continental shelf.[101]

3.2 This was not merely a judicial invention. As will be shown, the UNCLOS legislative history confirms it in multiple places.[102] By contrast, a State claiming an OCS must prove what it contends by means of prescribed criteria of geology and geomorphology.[103]

3.3 Once an OCS claim has been proved, the rights the State acquires in that shelf might seem to be the same as those which pertain to a coastal State in the continental shelf of its EEZ, as a comparison of the texts of UNCLOS Articles 77 and 56 might, at first glance, suggest. But there is a significant difference. The rights which a coastal State enjoys in the EEZ with its attendant continental shelf are exclusive and unqualified, whereas the rights which a wide-shelf State may secure in the OCS are subject to a 7% levy for the international community; this levy or royalty is an acknowledgement that, unlike the EEZ with its attendant continental shelf, whose origin is as an entitlement of the coastal State, an OCS is a tolerated infringement on the Common Heritage of Mankind.

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international law and not dependent on being a Party to UNCLOS. See 2012 Judgment, p. 666, paras. 114-118 and pp. 686-687, para. 168.

101 UNCLOS, Article 57.

102 UNCLOS III, Official Records, Vol. I – XVII, 21st Plenary Meeting, UN Doc. A/CONF.62/SR.21, para. 6 (Costa Rica).

103 UNCLOS, Article 76; see also Chapter 2 *supra*.

3.4 In its reapplication to the Court of the claim which was rejected in 2012, Nicaragua seeks to deny Colombia its entitlement to an EEZ with its attendant continental shelf by claiming that Nicaragua's alleged OCS (whose insufficiency Colombia demonstrates later in this Counter-Memorial)[104] takes precedence over the EEZ with its attendant continental shelf entitlement of Colombia's mainland and the islands comprising the San Andrés Archipelago.

3.5 In this Chapter, Colombia will show that, in accordance with both UNCLOS, which binds Nicaragua, and customary international law, which applies to both Parties, any coastal State's entitlement to a 200-nautical-mile EEZ with its attendant continental shelf, encompassing the waters superjacent to the seabed, as well as the seabed and its subsoil,[105] prevails over another State's claim to extend its putative OCS into the same area. There are three principal reasons for this: (1) while the 200-nautical-mile EEZ with its attendant continental shelf is an *ipso jure* entitlement of coastal States, which pertains to them on the basis of the distance criterion, any OCS claim must be proven by the coastal State with reference to geological and geomorphological criteria;[106] (2) OCS claims were never intended to encroach upon another State's *ipso jure* entitlement to an EEZ with its attendant continental shelf, but only upon the International Area, which is the Common Heritage of Mankind;

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104 See Chapter 7 *infra*.

105 UNCLOS, Article 56 (1) (a).

106 See 2016 Judgment, Separate Opinion of Judge Greenwood, para. 18.

and (3) the economic rights assigned in the 200-nautical-mile EEZ with its attendant continental shelf are sovereign rights fully and exclusively exercised by the coastal State, whereas the OCS is a grant to a wide-shelf State in exchange for revenue-sharing with the other States Parties. Colombia will also demonstrate that the customary international law regime applies equally to EEZ with its attendant continental shelf generated by islands and mainland.

3.6 This Chapter will prove that this is compelled by customary international law as well as by UNCLOS, the latter through an exhaustive canvassing of the legislative history of UNCLOS III, in which the concepts of the EEZ and the OCS were forged; by a survey of preponderant subsequent State practice; and by the near unanimity of doctrine. Colombia will establish that not only would no other interpretation of customary and conventional international law finds support in the legislative history and State practice, but also no other would be reasonable, equitable or just.

B. The *Travaux Préparatoires* of UNCLOS Confirm that the EEZ of One State, with its Attendant Continental Shelf, Prevails Over the OCS Claim of Another State

3.7 For clarity, the UNCLOS *travaux* will be treated in five sections. The first will demonstrate the primacy which was assigned to the EEZ, with its attendant 200-nautical-mile

continental shelf, as "the keystone" of the new regime.[107] The second section will show that the negotiating Parties were clearly distinguishing between the OCS and the EEZ: the EEZ with its attendant continental shelf pertained to a coastal State as of right, while the OCS was contingent on the proof of prescribed geological and geomorphological facts. The third section will confirm that the OCS of one State, rather than encroach upon the EEZ with its attendant continental shelf of another, was intended only to infringe upon the international Area. Moreover, if a claim was proved through an internal scientific process, the permission to encroach was only to be granted in return for revenue-sharing with the other States Parties. The fourth section will prove that the OCS of one State was not to infringe upon the 200-nautical-mile zone of another State. The fifth section will show that this UNCLOS regime was to extend equally to the EEZ with its attendant continental shelf of mainland and islands.

[107] UNCLOS III, Official Records, Vol. III, Documents of the Conference, First and Second Sessions, Statement by the Chairman of the Second Committee at its 46th Meeting, UN Doc. A/CONF.62/C.2/L.86, p. 243.

(1) THE UNIVERSALIZATION AND CENTRAL IMPORTANCE OF THE 200-NAUTICAL-MILE LIMIT

3.8 By the 5th meeting of the Second Committee of the Law of the Sea Conference in 1974, three proposals with respect to extended coastal State jurisdiction were in play: (i) no more than 12 nautical miles of territorial sea; (ii) 12 nautical miles of territorial sea, plus an EEZ up to 200 nautical miles; and (iii) the extension of the territorial sea up to 200 nautical miles.[108]

3.9 The third proposal preceded the negotiations, having originated in claims by several States, including Peru, Brazil and Chile, to a territorial sea extending to a 200-nautical-mile limit.[109] The first proposal did not long survive, but the third proposal for a 200-nautical-mile territorial sea continued to receive support.[110] The second proposal, calling for a territorial

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[108] UNCLOS III, Official Records, Vol. II, Summary Records of Meetings of the First, Second and Third Committees, Second Committee, Second Session, 5th Meeting, UN Doc. A/CONF.62/C.2/SR.5, para. 59 (Tunisia).

[109] The concept of a 200-nautical-mile zone originated in Latin America. See Santiago Declaration on the Maritime Zones, 18 August 1952, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201006/volume-1006-I-14758-English.pdf (last visited 17 Sep. 2017). See also Montevideo Declaration on the Law of the Sea, 8 May 1970, available at: https://iea.uoregon.edu/treaty-text/1970-montevideodeclarationlawofseaentxt (last visited 17 Sep. 2017); Virginia Commentary, Vol. II, 1993, p. 494; UNCLOS III, Official Records, 48th Plenary Meeting, paras. 38-45 (Inter-American Juridical Committee of the Organization of American States); *Ibid*., Second Committee Meetings, 16th Meeting, UN Doc. A/CONF.62/C.2/SR.16, para. 32 (Peru); *Ibid*., 5th Meeting, UN Doc. A/CONF.62/C.2/SR.5, paras. 2-3 (Brazil); United States Department of State, *Limits in the Seas* (Limits in the Seas), No. 112, available at: https://www.state.gov/e/oes/ocns/opa/c16065.htm (last visited 17 Sep. 2017).

[110] Brazil: Draft articles containing basic provisions on the question of the maximum breadth of the territorial sea and other modalities or

sea of 12 nautical miles plus an EEZ up to 200 nautical miles, took shape as a compromise solution:[111] the coastal State would be entitled to extend its jurisdiction to the outer limit of 200 nautical miles, not as its sovereign territorial sea, but rather as an area in which the State would exercise specified sovereign rights in the water column, seabed and subsoil subject to various limitations.

3.10 As the concept of a coastal State's entitlement to jurisdiction up to 200 nautical miles began to gather support and then to win universal acceptance,[112] the negotiations shifted from the distance criterion to a focus on the coastal State's rights within the zone.[113] This zone, which would become the EEZ, was immensely important to coastal States, especially developing ones.[114] The EEZ, together with the Common

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combinations of legal regimes of coastal State sovereignty, jurisdiction or specialized competence, SC.II/L.25, reproduced in R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents* (UNCLOS Documents), Vol. V, 1984, p. 85; *Ibid*., Draft articles for inclusion in a convention on the law of the sea: working paper submitted by the delegations of Ecuador, Panama and Peru, SC.II/L.27 and Corr. 1-2, Vol. V, p. 88; see also *Ibid*., Ecuador: Draft articles on the nature and characteristics of the territorial sea, UN Doc. A/CONF.62/C.2/L.88, Article 6, Vol. V, p. 196; *Ibid*., Uruguay: Draft articles on the territorial sea, SC.II/L.24, Vol. V, pp. 91-92; UNCLOS III, Official Documents, Second Committee Meetings, 3rd Meeting, UN Doc. A/CONF.62/C.2/SR.3, paras. 8-15 (Madagascar); *Ibid.*, 46th Meeting, UN Doc. A/CONF.62/C.2/SR.46, para. 30 (Guinea); *Ibid.*, 135th Plenary Meeting, UN Doc. A/CONF.62/SR.135, para. 1 (Ecuador).

111 See Virginia Commentary, Vol. II, p. 550.

112 Virginia Commentary, Vol. II, pp. 548-550; see also UNCLOS III, Official Documents, Second Committee Meetings, 5th Meeting, UN Doc. A/CONF.62/C.2/SR.5, para. 5 (Brazil).

113 See *e.g.* UNCLOS III, Official Documents, Second Committee Meetings, 5th Meeting, UN Doc. A/CONF.62/C.2/SR.5, para. 40 (El Salvador).

114 See *e.g.*, UNCLOS III, Official Documents, Second Committee Meetings, 19th Meeting, UN Doc. A/CONF.62/C.2/SR.19, para. 52 (Iceland);

Heritage of Mankind, was depicted by Canada as one of "the two main pillars on which the regime of the seas should be based".[115] It received more support than any other issue and, in time, reached the level of "'consensus' or 'near consensus'".[116]

3.11 In the negotiations, Colombia was one of the States that expressly shared this conception of the EEZ. During the 29th Meeting, Colombia emphasized the importance of the EEZ and considered it to be "an irreversible trend in the new law of the sea, since it was the only formula that reconciled the interests of the coastal States with those of the international community."[117] Nor was Colombia alone; any attempt to diminish the coastal State's rights within the EEZ was stoutly opposed by coastal States, especially developing ones.[118] China, too, submitted that

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Ibid., 23rd Plenary Meeting, UN Doc. A/CONF.62/SR.23, para. 57 (Argentina); *Ibid.*, 21st Plenary Meeting, UN Doc. A/CONF.62/SR.21, para. 15 (Brazil); *Ibid.*, 25th Plenary Meeting, UN Doc. A/CONF.62/SR.25, para. 69 (Western Samoa); *Ibid.*, 26th Plenary Meeting, UN Doc. A/CONF.62/SR.26, para. 94 (Organization of African Unity); *Ibid.*, 30th Plenary Meeting, UN Doc. A/CONF.62/SR.30, para. 14 (Chile); *Ibid.*, 31st Plenary Meeting, UN Doc. A/CONF.62/SR.31, paras. 22-24 (Ecuador); *Ibid.*, 45th Plenary Meeting, UN Doc. A/CONF.62/SR.45 para. 7 (Mexico); *Ibid.*, 189th Plenary Meeting, UN Doc. A/CONF.62/SR.189, para. 18 (Chile); *Ibid.*, 187th Plenary Meeting, UN Doc. A/CONF.62/SR.187, para. 20 (Brazil); *Ibid.*, 138th Plenary Meeting, UN Doc. A/CONF.62/SR.187, para. 113 (Philippines).

115 UNCLOS III, Official Documents, 27th Plenary Meeting, UN Doc. A/CONF.62/SR.27, para. 13 (Canada).

116 UNCLOS III, Official Documents, Second Committee Meetings, 24th Meeting, UN Doc. A/CONF.62/C.2/SR.24, para. 64 (India); see also *Ibid*., 35th Plenary Meeting, A/CONF.62/SR.35, para. 35 (Panama); Limits in the Seas, No. 112.

117 UNCLOS III, Official Documents, Second Committee Meetings, 29th Meeting, UN Doc. A/CONF.62/C.2/SR.29, para. 16 (Colombia).

118 See e.*g. Ibid*., Second Committee Meetings, 25th Meeting, UN Doc. A/CONF.62/C.2/SR.25, para. 27 (Ivory Coast); *Ibid.*, 46th Meeting, UN Doc. A/CONF.62/C.2/SR.46, para. 30 (Guinea); *Ibid*., 24th meeting, UN Doc. A/CONF.62/C.2/SR.24, para. 7 (China).

the 200-nautical-mile limit for the coastal State's jurisdiction "had become the essence of the new law of the sea" and was intended to protect the State's "sovereignty, independence and resources", either through the EEZ or a territorial sea with limitations.[119]

3.12 The EEZ was, thus, a compromise solution: reducing the original demands for a 200-nautical-mile territorial sea, to a 200-nautical-mile zone of functional and resources-based jurisdiction. Like the territorial sea, it pertained to the coastal State as of right, but unlike the territorial sea, it only afforded specified sovereign rights to the coastal State.

3.13 The fact that the EEZ appertained to the coastal State as of right, was recognized by many States during the Plenary Meetings of the Conference.[120] For instance, Egypt stressed the importance of the proposition that any State has a right to establish the EEZ:

> "The development of the ideas of an exclusive economic zone and a patrimonial sea was a major contribution to the new law of the sea. The

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119 UNCLOS III, Official Documents, Second Committee Meetings, 48th Meeting, UN Doc. A/CONF.62/C.2/SR.48, paras. 30, 32 (China).

120 *Ibid*., 21st Plenary Meeting, UN Doc. A/CONF.62/SR. 21, para. 10 (Costa Rica); *Ibid.*, para. 54 (Barbados); *Ibid.*, 31st Plenary Meeting, UN Doc. A/CONF.62/SR.31, para. 60 (Yemen); *Ibid.*, 33rd Plenary Meeting, UN Doc. A/CONF.62/SR.33, para. 74 (Libyan Arab Republic); *Ibid.*, para. 55 (Liberia); *Ibid.*, 34th Plenary Meeting, UN Doc. A/CONF.62/SR.33, para. 36 (United Arab Emirates); *Ibid.*, 35th Plenary Meeting, UN Doc. A/CONF.62/SR.35, para. 49 (Pakistan); *Ibid.*, 40th Plenary Meeting, UN Doc. A/CONF.62/SR.40, para. 18 (Guinea-Bissau); *Ibid.*, 187th Plenary Meeting, UN Doc. A/CONF.62/SR.187, para. 18 (Brazil).

> drawbacks inherent in the regime of the continental shelf as laid down in the Geneva Convention had been overcome. The combination of the criteria of depth and exploitability in the Geneva Convention had been harshly criticized and widely disregarded: the depth criterion depended on geographic features and led to great discrepancies, while the criterion of exploitability fluctuated according to technological progress and thus favoured the developed nations over the developing ones. Accordingly, *everyone should recognize the right of coastal States to establish an exclusive economic zone beyond the territorial sea. Throughout the zone, States should exercise permanent sovereign rights over the exploration and exploitation of the natural resources of the sea-bed and the subsoil thereof and the superjacent waters...*".[121]

3.14 Similarly, the Organization of African Unity stated during the 26th Plenary Meeting that:

> "In order to end the continually increasing imbalance between developed and developing countries, *the Organization of African Unity believed that it was indispensable to recognize that all coastal States had the right to establish, beyond their territorial sea, an exclusive economic zone, whose breadth should not exceed 200 nautical miles*, in which they would exercise permanent *sovereignty over all the biological and mineral riches* without unduly prejudicing other legitimate uses of the sea."[122]

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121 UNCLOS III, Official Documents, 23rd Plenary Meeting, UN Doc. A/CONF.62/SR.23, para. 67 (Egypt) (emphasis added).

122 UNCLOS III, Official Documents, 26th Plenary Meeting, UN Doc. A/CONF.62/SR.26, para. 94 (Organization of African Unity) (emphasis added).

(2) DISTINCTION BETWEEN THE EEZ AND THE OCS

3.15 Nicaragua's proposed interpretation of the juridical "unity"[123] of the continental shelf within and beyond the 200-nautical-mile limit is not supported by the legislative history. The negotiating States distinguished between the continental shelf within 200 nautical miles and the shelf beyond that distance. The latter, the OCS, was considered supplemental to the entitlement *ipso jure* to the EEZ rather than its juridical equal; and geological and geomorphological considerations, which were prerequisites to an OCS claim, were considered then, as they are now, to be irrelevant to the coastal State's entitlement to an EEZ with its attendant continental shelf within the 200-nautical-mile limit.

3.16 The legislative history demonstrates that the extent of the continental shelf "to a distance of 200 nautical miles from the baselines"[124] was intended to be read in conjunction with the EEZ's limit of 200 nautical miles.[125] The definition of the continental shelf in Article 76 (1) dropped the specific reference to the EEZ only in 1981.[126]

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123 Memorial of Nicaragua, p. 40, paras. 2.22-2.23.

124 UNCLOS, Article 76.

125 UNCLOS, Article 57; see also *Libya/Malta*, pp. 33, 35, paras. 34, 39.

126 According to the Virginia Commentary, the words "exclusive economic zone" were only removed from the text in 1981, see Virginia Commentary, Vol. II, p. 872. This was probably due to the fact that Part V was dedicated to the EEZ and it would have been redundant in Part VI. See *Ibid*., p. 510.

3.17 The negotiating parties, including the US and the USSR, considered the OCS, where it existed, to lie beyond the 200-nautical-mile EEZ.[127] Any OCS rights were considered different and supplemental to an EEZ with its attendant continental shelf entitlement. Indeed, the concept of the continental shelf itself was considered by many to be superfluous within the 200 nautical miles, as it was absorbed by the concept of the EEZ.[128] The Spanish delegate stated:

> "the economic or national zone was complemented by the traditional idea of continental shelf. Within the national zone, there would be a single regime for both renewable and non-renewable resources. The continental shelf would no longer be operative within the economic zone, and outside that zone it would come within a residual category. Such a solution

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127 See UNCLOS Documents, Informal Suggestion by the USSR, Part VI, Article 76, C.2 Informal Meeting/14, 27 April 27 1978, Vol. V, p. 20. See also *Ibid*., United States of America: draft articles for a chapter on the economic zone and the continental shelf, UN Doc. A/CONF.62/C.2/L.47, Article 22(2), Vol. V, pp. 165, 167; *Ibid*., Proposal by Austria, Article 63 bis (ISNT II) (April 28, 1976), Vol. IV, 323; *Ibid*., Proposal by the Netherlands, Article 82 (ICNT), 17 April 1979, Vol. IV, 516; *Ibid*., Proposal by the Federal Republic of Germany, Article 76 and Annex II (ICNT/Rev.2) 5 August 1980, Vol. IV, 527; UNCLOS III, Official Documents, Second Committee Meetings, 17th Meeting, UN Doc. A/CONF.62/C.2/SR.17, para. 3 (Finland); *Ibid*., para. 32 (Spain); *Ibid*., 116th Plenary Meeting, UN Doc. A/CONF.62/SR.116, para. 51 (USSR); *Ibid.*, para. 63 *(*United States) (differentiating between the regime of scientific research within the EEZ and in the OCS beyond it); *Ibid*., 164th Plenary Meeting, UN Doc. A/CONF.62/SR.164, para. 158 (Algeria); *Ibid*., 128th Plenary Meeting, UN Doc. A/CONF.62/SR.128, para. 167 (Kenya).

128 See *e.g.* UNCLOS III, Official Documents, Second Committee Meetings, 17th Meeting, UN Doc. A/CONF.62/C.2/SR.17, para. 3 (Finland); *Ibid.*, 28th Plenary Meeting, , UN Doc. A/CONF.62/SR.28, para. 52 (Congo); *Ibid.*, UN Doc. A/CONF.62/SR.35, 35th Plenary Meeting, para. 21 (Switzerland); *Ibid.*, 37th Plenary meeting, UN Doc. A/CONF.62/SR.37, para. 56 (Malta); *Ibid.*, 40th Plenary Meeting, UN Doc. A/CONF.62/SR.40, para. 28 (Guinea-Bissau).

would cover the rights of States with an extensive shelf".[129]

3.18 Thus, the legislative history shows that Nicaragua's contention is wrong. It was the EEZ with its attendant continental shelf within the 200 nautical miles distance, rather than the continental shelf within and beyond that distance, which was considered the unified regime and constituted the coastal State's entitlement by right. This is consistent with the agreement that geological and geomorphological features were deemed irrelevant within 200 nautical miles from the baselines.

3.19 Although several proposals included geological and geomorphological factors as relevant for EEZ delimitation,[130] these proposals were rejected by the Conference. Geological and geomorphological references still appeared in some of these

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[129] UNCLOS III, Official Documents, Second Committee Meetings, 17th Meeting, UN Doc. A/CONF.62/C.2/SR.17, para. 32 (Spain) (the Spanish representative based his position upon Nicaragua's draft articles and a proposal by Colombia, Mexico and Venezuela. There was no rebuttal by Nicaragua.)

[130] See UNCLOS Documents, Proposal by Morocco, Article 14, 62 and 71 (RSNT II), 17 June 1977, Vol. IV, p. 390; *Ibid*., Turkey: Draft articles on delineation between adjacent and opposite States, UN Doc. A/CONF.62/C.2/L.34, Vol. V, 156; *Ibid*., Gambia, *et al:* Draft articles on the exclusive economic zone, UN Doc. A/CONF.62/C.2/L.82, Article 8, Vol. IV, pp. 184, 185; *Ibid*., Kenya and Tunisia: Draft articles on the delimitation of the continental shelf or the exclusive economic zone, UN Doc. A/CONF.62/C.2/L.28, Vol. V, p. 148; during the 29th Meeting of the Second Committee, Burma, referencing no country but itself, stated that according to its opinion, the proper delimitation "in situations where the application of the equidistance rule would result in the economic zone of one State overlapping the natural prolongation of another State, the natural prolongation principle should be determinant for the purpose of delimiting the sea-bed boundary" UNCLOS III, Official Documents, Second Committee Meetings, 29th Meeting, UN Doc. A/CONF.62/C.2/SR.29, para. 7 (Burma). Burma's proposal seems to have been an outlier; no other State appears to have agreed with it.

proposals, probably because the delimitation of the EEZ and the continental shelf were negotiated together and the proposals still referenced both regimes.[131] Most States considered such factors to be utterly irrelevant within 200 nautical miles from the baselines;[132] their absence is manifest in the delimitation article

[131] See Virginia Commentary, Vol. II, p. 492; many of the proposals to the effect that geological or geomorphological considerations would apply to the delimitation of the exclusive economic zone were joined to proposals which concerned the delimitation of both the exclusive economic zone and the continental shelf. See also, UNCLOS Documents, Proposal: Delimitation of Marine Spaces between States, Article 2, 2 May 1975, Vol. IV, p. 231; *Ibid.*, Proposal by Morocco, Article 14, 62 and 71 (RSNT II) 17 June 1977, Vol. IV, pp. 390, 391 (both of the articles for the delimitation of the exclusive economic zone and continental shelf are identical and presented in the same proposal); *Ibid*., Netherlands: Draft article on delimitation between States with opposing or adjacent coasts, UN Doc. A/CONF.62/C.2/L.14, Vol. V, 133-4; *Ibid*., Kenya and Tunisia: Draft articles on the delimitation of the continental shelf or the exclusive economic zone, UN Doc. A/CONF.62/C.2/L.28, Vol. V, p. 148; *Ibid*., France: Draft articles on the delimitation of the continental shelf or the exclusive economic zone, UN Doc. A/CONF.62/C.2/L.74, Vol. V, p. 181; *Ibid*., Algeria, *et al*., Articles 62 and 71 (RSNT II), Vol. IV, p. 468; *Ibid*., Spain, Articles 62 and 71 (RSNT II), Vol. IV, p. 467.

[132] See Virginia Commentary, Vol. II, pp. 841, 874; UNCLOS Documents, Informal Suggestion by the USSR, Part VI, Article 76, C.2 Informal Meeting/14, 27 April 1978, Vol. V, 21; *Ibid*., Canada, Article 62 (RSNT II), Vol. IV, p. 467; *Ibid*., Spain, Articles 62 and 71 (RSNT II), Vol. IV, p. 467; *Ibid*., Algeria, *et al*., Articles 62 and 71 (RSNT II), Vol. IV, p. 468; *Ibid*., Netherlands: draft article on delimitation between States with opposite or adjacent coasts, UN Doc. A/CONF.62/C.2/L.14, Vol. V, pp. 133-4; *Ibid*., Romania: draft articles on delimitation of marine and ocean space between adjacent and opposing neighbouring States and various aspects involved, UN Doc. A/CONF.62/C.2/L.18, Vol. V, pp. 138-9; *Ibid*., Greece: draft articles on the continental shelf, UN Doc. A/CONF.62/C.2/L.25, Vol. V, p. 145; *Ibid*., Japan: revised draft article on the continental shelf, UN Doc. A/CONF.62/C.2/L.31/Rev.1, Vol. V, p. 154; *Ibid*., Greece: draft article on the exclusive economic zone beyond the territorial sea, UN Doc. A/CONF.62/C.2/L.32, Vol. V, p. 154; *Ibid*., Ireland: draft article on delimitation of area of continental shelf between neighbouring States, UN Doc. A/CONF.62/C.2/L.43, Vol. V, p. 163; *Ibid*., France: draft articles on the delimitation of the continental shelf or the exclusive economic zone, UN Doc. A/CONF.62/C.2/L.74, Vol. V, p. 181; UNCLOS III, *Official Records*, Second Committee Meetings, 20th Meeting, UN Doc. A/CONF.62/C.2/SR.20, paras. 60-61 (Federal Republic of Germany).

for the EEZ[133] and the decision of the ICJ in *Libya/Malta* ratified this "development": the Court ruled that geological and geomorphological considerations are immaterial and are not a source of title whenever the delimited area is within 200 nautical miles from the baselines:

> "The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial."[134]

3.20 The implications of the Court's *dictum* are important. Since geological and geomorphological features do not constitute a source of title and are irrelevant and "completely immaterial" for the delimitation of the EEZ and the continental shelf within 200 nautical miles, an OCS claim, based upon geological and geomorphological criteria with the burden of proof on the State claiming the OCS, may not encroach upon

133 UNCLOS, Article 74.

134 *Libya/Malta*, p. 35, para. 39.

another State's EEZ with its attendant continental shelf, which pertain to the latter *ipso jure*.

3.21 The Court repeated this *dictum* in the 2012 Judgment when it ruled that "(i)t has repeatedly made clear that geological and geomorphological considerations are not relevant to the delimitation of overlapping entitlements within 200 nautical miles of the coasts of States".[135] This is, in the most literal sense, a *jurisprudence constante*. Despite this, Nicaragua has brought up, again, its OCS claim, based upon geology and geomorphology, within 200 nautical miles of Colombia's mainland and insular territories, this time to the east.

(3) The OCS, where Proved, was Intended to Infringe Solely Upon the Common Heritage of Mankind

3.22 Many negotiating States considered that, in principle, the 200-nautical-mile EEZ with its attendant continental shelf was a sufficient grant to a coastal State and that, as such, it constituted the maximum tolerable infringement upon the international maritime area which was to be reserved for the common heritage of mankind or the Area.[136] They proposed to abolish the concept of the continental shelf entirely, thus limiting the extent of the coastal State's jurisdiction to the 200-nautical-mile

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135 2012 Judgment, p. 703, para. 214.

136 Several States considered that the regime of the EEZ was in itself an infringement upon the common heritage of mankind. See UNCLOS Documents, Vol. V, pp. 342, 334 and 359. It should be noted that several delegations wanted the revenue-sharing to apply to the EEZ also; see *Ibid*., Vol. IV, pp. 52, 53, 160 and 239.

limit.[137] This point, which is sometimes overlooked, arises clearly in the legislative history and is important to an understanding of the final regime which UNCLOS established. The 200-nautical-mile limit, since it applied *ipso jure* to every coastal State and did not discriminate in favour of States that were lucky enough to have wide shelves, was considered, as Jamaica's representative put it, to

> "facilitate a more equitable sharing of the resources of the seas among the peoples of the world… (and) be more consistent with the principle of the common heritage of mankind (which) (m)any delegations felt that (…) by virtue of general recognition, had become part of customary international law."[138]

3.23 One must bear in mind, as noted earlier, that many States

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[137] Virginia Commentary, Vol. II, p. 844; UNCLOS III, *Official Records*, Second Committee Meetings, 16th Meeting, UN Doc. A/CONF.62/C.2/SR.16, para. 31 (Paraguay); *Ibid.*, 17th Meeting, UN Doc. A/CONF.62/C.2/SR.17, para. 1 (Zaire); *Ibid.*, para. 24 (Japan); *Ibid.*, 18th Meeting, UN Doc. A/CONF.62/C.2/SR.18, para. 34 (Uganda); *Ibid.*, para. 78 (Egypt); *Ibid.*, 19th Meeting, UN Doc. A/CONF.62/C.2/SR.19, para. 4 (Romania); *Ibid.*, paras. 21-23 (Switzerland); *Ibid.*, para. 20 (Denmark); *Ibid.*, 20th Meeting, UN Doc. A/CONF.62/C.2/SR.20, para. 39 (Lebanon); *Ibid.*, para. 33-35 (Tunisia); *Ibid.*, para. 61 (Federal Republic of Germany); *Ibid.*, para. 102 (Panama); *Ibid.*, para. 104 (Malta); *Ibid.*, UN Doc. A/CONF.62/C.2/SR.20, paras. 91-93 (Jamaica); *Ibid.*, 27th Meeting, UN Doc. A/CONF.62/C.2/SR.27, para. 18 (Khmer Republic); *Ibid.*, para. 65 (Afghanistan); *Ibid.*, paras. 54, 58 (Haiti); *Ibid.*, 28th Meeting, UN Doc. A/CONF.62/C.2/SR.28, para. 64 (Lebanon); *Ibid.*, 33rd Meeting, UN Doc. A/CONF.62/C.2/SR.33 para. 13 (Kenya); *Ibid.*, 44th Meeting, UN Doc. A/CONF.62/C.2/SR.44, para. 10 (Tanzania); UNCLOS Documents, Group of Land-locked and Geographically Disadvantaged States, Draft Principles of the Group of Land-locked and Geographically Disadvantaged States, Geneva Session 1975, Vol. IV, pp. 238-239; *Ibid*., Japan: revised draft articled on the continental shelf, UN Doc. A/CONF.62/C.2/L.31/Rev.1, Vol. V, p. 154.

[138] UNCLOS III, Official Documents, Second Committee Meetings, 20th Meeting, UN Doc. A/CONF.62/C.2/SR.20, para. 91-2 (Jamaica).

considered that the acceptance of the OCS would be unjust, excessive and "would make a mockery of the principle of the common heritage of mankind".[139]

3.24 Some other States argued that the coastal State should be entitled, exclusively, to exploit the resources of the continental shelf up to the continental margin, regardless of any criteria.[140] Some of them even objected to the very idea of the revenue-sharing compromise.[141] The record shows that this radical position was rejected by the Conference.[142]

3.25 The resulting compromise was a *quid pro quo*:[143] the

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139 UNCLOS III, Official Documents, 20th Meeting, UN Doc. A/CONF.62/C.2/SR.20, para. 104 (Malta); see also *Ibid*., pp. 1-2 (Gambia); *Ibid*., 18th Meeting, UN Doc. A/CONF.62/C.2/SR.18, para. 32 (Singapore); *Ibid*., 19th Meeting, UN Doc. A/CONF.62/C.2/SR.19, para. 22 (Switzerland); *Ibid*., 23rd Meeting, UN Doc. A/CONF.62/C.2/SR.23, p. 23 (Liberia); *Ibid*., 35th Meeting, UN Doc. A/CONF.62/C.2/SR.35, para. 9 (Liberia).

140 UNCLOS III, Official Documents, Second Committee Meetings, 20th Meeting, UN Doc. A/CONF.62/C.2/SR.20, para. 10 (El Salvador); *Ibid*., 19th Meeting, UN Doc. A/CONF.62/C.2/SR.19, para. 29 (Ecuador); UNCLOS Documents, Sri Lanka, *Aide Memoire*, Vol. IV, p. 514 (Sri Lanka's position might be attributed to its special circumstances *vis-à-vis* the Irish formula).

141 UNCLOS Documents, Iran: draft article on the continental shelf, UN Doc. A/CONF.62/C.2/L.84, Vol. V, p. 189; UNCLOS III, Official Documents, Second Committee Meetings, 20th Meeting, UN Doc. A/CONF.62/C.2/SR.32, para. 59 (Iran); *see Ibid.*, 44th Meeting, UN Doc. A/CONF.62/C.2/SR.44, para. 1 (Iran); *Ibid.*, 33rd Meeting, UN Doc. A/CONF.62/C.2/SR.32, para. 24 (India).

142 See *e.g.* UNCLOS Documents, Informal Suggestion by the USSR, Part VI, Article 76, C.2 Informal Meeting/14, 27 April 1978, Vol. V, p. 20-1 (The Soviet Union stressed that it was important to distinguish where the jurisdiction of the coastal State ended and the Area constituting the common heritage of mankind began).

143 The Virginia Commentary points out that: "As the conference proceeded, it became increasingly clear that there was a close link between acceptance of coastal State jurisdiction over the resources of the continental shelf and a system of revenue-sharing with respect to the exploitation of the

land-locked, geographically disadvantaged and narrow-shelf States agreed to grant the wide-shelf States the opportunity, if proven under the strict scrutiny of an independent professional commission composed of scientists, to exploit the resources that would have otherwise belonged to the common heritage of mankind, in return for revenue-sharing with the international community.[144] The mechanism in Article 82 stipulated the revenue-sharing condition for OCS exploitation, precisely because the OCS was considered to infringe upon the common heritage of mankind.[145] The revenue-sharing mechanism was considered especially important, as Ghana put it, in order that "the international community obtained some benefit from the exploitation of *what would otherwise have fallen within the international zone*".[146]

3.26 The point bears emphasizing: the opposition to the OCS

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continental shelf beyond 200 miles." Virginia Commentary, Vol. II, p. at 486; see also *Ibid*., p. 854 (citing the report of the Chairman of the Second Committee to the Plenary).

144 UNCLOS, Article 82. See Chapter 2 *supra*; Virginia Commentary, Vol. II, pp. 831, 834, 932; UNCLOS III, Official Documents, 94th Plenary Meeting, UN Doc. A/CONF.62/SR.94, Chairman of the Second Committee, para. 16 (Venezuela); *Ibid*., 100th Plenary Meeting, UN Doc. A/CONF.62/SR.100, Chairman of the Second Committee, para. 9 (Venezuela); *Ibid.*, 103rd Plenary Meeting, UN Doc. A/CONF.62/SR.103, para. 9 (Canada); *Ibid.*, 139th Plenary Meeting, UN Doc. A/CONF.62/SR.139, para. 172 (Syrian Arab Republic); *Ibid.*, at 103rd Plenary Meeting, UN Doc. A/CONF.62/SR.103, para. 22 (USSR).

145 UNCLOS III, Official Documents, Second Committee Meetings, 41st Meeting, UN Doc. A/CONF.62/C.2/SR.41, para. 20 (United States); UNCLOS Documents, Proposal by the Netherlands, Article 82 (ICNT) (April 17, 1979), Vol. V, p. 516.

146 UNCLOS III, Official Documents, Second Committee Meetings, 41st Meeting, UN Doc. A/CONF.62/C.2/SR.20, para. 65 (Ghana) (emphasis added). See also, *Ibid*., 127th Plenary Meeting, UN Doc. A/CONF.62/SR.127, para. 5 (Yugoslavia); *Ibid.*, 116th Plenary Meeting, UN Doc. A/CONF.62/SR.116, para. 39 (Canada).

was because it had the potential to allow a State to cut deeply into the Area whose resources had been declared to be the common heritage of mankind. Hence, the revenue-sharing compromise was considered by many of these opposing States as reasonable.[147] If the OCS had also been intended to be capable of encroaching upon another State's EEZ with its attendant continental shelf, it would have been opposed on this basis; a promise of contingent revenue-sharing would have been perceived as a derisory exchange for a State's full entitlement to all the revenues from the economic exploitation of its EEZ.

3.27 Moreover, it bears repeating that this compromise was an equitable solution to the conflicting interests that collided at the conference. The *travaux* demonstrate how the OCS regime and the EEZ regime were, together, designed to accommodate the distinct interests of two groups of States. While the OCS granted wide-shelf States the opportunity to reap financial benefits through resource exploitation if they could prove their claim to "their" extended shelf, the EEZ with its attendant continental shelf regime "stemmed (…) (from) the need to safeguard State

147 Jamaica, a country which opposed the OCS based upon its infringement upon the common heritage of mankind, viewed the revenue sharing as a reasonable compromise. See UNCLOS III, Official Documents, Second Committee Meetings, 20th Meeting, UN Doc. A/CONF.62/C.2/SR.20, para. 97 (Jamaica); see also *Ibid*., 102nd Plenary Meeting, UN Doc. A/CONF.62/SR.102, para. 47 (Jamaica); *Ibid.*, 38th Plenary Meeting, UN Doc. A/CONF.62/SR.102, para. 28 (United States); *Ibid.*, 100th Plenary Meeting, UN Doc. A/CONF.62/SR.102, Chairman of the Second Committee, para. 9 (Venezuela); *Ibid.*, 105th Plenary Meeting, UN Doc. A/CONF.62/SR.105, para. 28 (United States); *Ibid.*, 103rd Plenary Meeting, UN Doc. A/CONF.62/SR.103, para. 62 (United Kingdom); *Ibid.*, 116th Plenary Meeting, UN Doc. A/CONF.62/SR.103, para. 39 (Canada); *Ibid.*, at 116th Plenary Meeting, UN Doc. A/CONF.62/SR.116, para. 54-57 (Yugoslavia); *Ibid.*, para. 69 (Mauritius).

sovereignty (and) defend maritime rights within a 200-nautical-mile zone."[148] A critical part of the compromise was that the grant to wide-shelf States could not encroach upon other coastal States' 200-nautical-mile entitlements with their exclusive rights.

3.28 What may, at first glance, seem to be an outlier position on the subject was voiced by Peru during the 16th Meeting of the Second Committee: even if the continental shelf extends beyond 200 nautical miles, "(n)o country had stronger claims than the coastal State over any part of its continental shelf, since the shelf constituted a natural and indivisible part of its national territory".[149] That was reasonable and even prescient with respect to what became the OCS regime, but surely was not intended to relate to the EEZ entitlement. Recall that Peru was one of the first countries to declare a territorial sea of 200 nautical miles, and it would have been inconceivable that Peru, as a supporter of a 200-nautical-mile territorial sea,[150] would concede that another State's OCS, might infringe upon and trump its 200-nautical-mile territorial sea, *a fortiori*, its EEZ.[151]

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148 UNCLOS III, Official Documents, Second Committee Meetings, 48th Meeting, UN Doc. A/CONF.62/C.2/SR.48, paras. 30, 32 (China).

149 UNCLOS III, Official Documents, 16th Meeting, UN Doc. A/CONF.62/C.2/SR.16, para. 33 (Peru).

150 By the end of the Conference, Peru had returned to the majority view. During the 37th Meeting of the Plenary, Peru put forth its position that a coastal State should be entitled to extend its sovereignty to a 200-nautical-mile zone for protecting vital interest. Peru then stated that the supporters of a 200-nautical-mile EEZ shared a similar view for the protection of similar interests. See UNCLOS III, Official Documents, 37th Plenary Meeting, UN Doc. A/CONF.62/SR.37, para. 43-45 (Peru).

151 The proposition that the EEZ was perceived as similar to the territorial sea can be demonstrated by the Statement of the Lebanese

3.29 When one tracks the dynamics of the negotiations through the legislative history, it becomes clear that the geographically disadvantaged and narrow-shelf States could not allow the wide-shelf States to infringe upon their part of the compromise, the EEZ. That could hardly be a surprise. No reasonable negotiator would relinquish the right to exploit and receive 100% of the revenue from the seabed and subsoil of its EEZ, in exchange for a tiny fraction of 7% paid by another State for OCS exploitation to – and to be shared with – the other States Parties. That point was made by Romania's bitter observation that the revenue-sharing was *de facto* almost meaningless and did not even "compensate the large losses suffered by the international community as a whole", due to the OCS's infringement upon the International Area.[152]

3.30 In the same sense, Pakistan stated that:

> "It would (…) be prepared to give sympathetic consideration to other proposals based on geomorphological considerations (for the OCS)

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representative, referring to the Latin American States: "His delegation therefore thought that the position of the Latin American States which were advocating a 200-mile territorial sea and that of States which were claiming a 200-mile economic zone were very close to one another. The arguments of the former were at least clear-cut and frank, but those of the latter were not, since the economic zone would in reality be nothing other than an enlarged territorial sea". UNCLOS III, Official Documents, Second Committee Meetings, 28th Meeting, UN Doc. A/CONF.62/C.2/SR.28, para. 63 (Lebanon).

[152] UNCLOS III, Official Documents, Statement by the delegation of Romania, para. 7, UN Doc. A/CONF.62/WS/2, 2 April 1980, available at http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_13/a_conf62_ws_2.pdf&lang=E (last visited 17 Sep. 2017). See also *Ibid*., 188th Plenary Meeting, UN Doc. A/CONF.62/SR.188, para. 173 (Paraguay).

> *so long as they did not cause prejudice to the rights and jurisdiction of the continental coast states which the concept of the economic zone or patrimonial sea sought to establish*".[153]

3.31 Thus, the *travaux* evidence the contemporaneous understanding that the OCS was intended to infringe only upon the area that would otherwise belong to the common heritage of mankind, subject to strict scientific scrutiny,[154] in exchange for revenue-sharing, but not to infringe upon the EEZ with its attendant continental shelf entitlement of any State.

(4) THE EEZ WITH ITS ATTENDANT CONTINENTAL SHELF OF ISLANDS AND MAINLAND PREVAILS OVER THE OCS CLAIM OF ANOTHER STATE

3.32 The *travaux* demonstrate that the 200-nautical-mile EEZ with its attendant continental shelf was to prevail over any OCS claim purporting to encroach upon it, whether the coastal State's entitlement extended from mainland or islands. The entitlement of islands to the same maritime zones as mainland was debated in the negotiations. Some States wanted to diminish the entitlements of islands to an EEZ and possible OCS, but, rather than based on principle, this seemed due to concern for their specific circumstances.[155] The position that islands, radiating in

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153 UNCLOS III, Official Documents, Second Committee Meetings, 18th Meeting, UN Doc. A/CONF.62/C.2/SR.18, para. 74 (Pakistan) (emphasis added).

154 See Chapter 2 *supra*.

155 UNCLOS Documents, Algeria, Iraq, Ireland, Libyan Arab Jamahiriya, Madagascar, Nicaragua, Romania, Turkey, and United Republic of Cameroon: draft paragraph on the regime of islands, UN Doc. A/CONF.62/C.2/L.96, 11 Jul. 1977, Vol. V, p. 203; *Ibid*., Turkey: draft articles on the regime of islands, UN Doc. A/CONF.62/C.2/L.55 Article 3(2),

all directions, were entitled to the same maritime entitlements as mainland was widely supported.[156]

3.33 On this point, Nicaragua was an outlier at the Conference. In an effort to deny the insular territories of other States their rights to an EEZ and, possibly, an OCS, Nicaragua proposed that any islands belonging to a State, which lie further than 400 nautical miles from the State's mainland, would be denied any maritime zones *vis-à-vis* another State.[157] That proposal was not adopted, but Nicaragua, apparently never loath to try again, attempts to resuscitate it, once more, before the Court in the present proceedings, by claiming that the Archipelago should not be entitled in a delimitation to any maritime zones that "extend east of Nicaragua's 200 nm limit".[158]

3.34 Many States opposed the proposals that were intended to

Vol. V, p. 173; *Ibid*., Algeria, Iraq, Libyan Arab Jamahiriya, Madagascar, Nicaragua, Romania, Turkey, United Republic of Cameroon and Yemen, Article 128 (RSNT II), Vol. IV, p. 483; UNCLOS III, Official Documents, Second Committee Meetings, 29th Meeting, UN Doc. A/CONF.62/C.2/SR.29, para. 8 (Burma).

[156] See UNCLOS Documents, Proposals on the Regime of Islands (April 28, 1975), Vol. IV, p. 221; see also *Ibid.*, Proposal by the Libyan Arab Republic, Article 132 (ISNT II), Vol. IV, p. 347; *Ibid.*, Greece: draft article, UN Doc. A/CONF.62/C.2/L.22, Article 9, Vol. V, pp. 143, 144; *Ibid.*, Greece: draft articles in the continental shelf, UN Doc. A/CONF.62/C.2/L.25, Article 2, Vol. V, p. 145; UNCLOS III, Official Documents, Second Committee Meetings, 20th Meeting, UN Doc. A/CONF.62/C.2/SR.20, para. 24 (Denmark); *Ibid.*, para. 43 (Cyprus); *Ibid.*, 24th Meeting, UN Doc. A/CONF.62/C.2/SR.20, para. 27 (Ghana); *Ibid.*, para. 37 (West Samoa); *Ibid.*, 36th Meeting, UN Doc. A/CONF.62/C.2/SR.36, para. 35 (Fiji); *Ibid*., 189th Plenary Meeting, UN Doc. A/CONF.62/SR.188, para. 67 (Cyprus).

[157] UNCLOS III, Official Documents, Second Committee Meetings, 39th Meeting, UN Doc. A/CONF.62/C.2/SR.39, para. 56-57 (Nicaragua).

[158] Memorial of Nicaragua, p. 130, para. 5.20.

diminish the entitlements of islands.[159] The representative of Trinidad and Tobago went even further and stressed that "islands should be given more favourable treatment than continental land masses with respect to their jurisdiction over ocean space".[160] The delegate from New Zealand stressed that there was "no logical reason to distinguish between sovereign rights appertaining to islands and sovereign rights appertaining to other land territory".[161] And the delegate from Peru submitted that a similar "zone of 200 nautical miles (which) (…) extend(s) in every direction from any island or group of islands" is the only "logical and just" solution.[162]

3.35 What Nicaragua could not achieve diplomatically, it now tries, by its unilateral application, to achieve judicially. Nicaragua's special pleading to the effect that the San Andrés Archipelago should not be entitled in a delimitation to any maritime zones that "extend east of Nicaragua's 200 nm limit",[163] should be rejected, as it was by the Court's ruling in 2012, which recognized the entitlement of San Andrés,

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159 UNCLOS III, Official Documents, Second Committee Meetings, 39th Meeting, UN Doc. A/CONF.62/C.2/SR.39, para. 78 (Greece); *Ibid.*, 40th Meeting, UN Doc. A/CONF.62/C.2/SR.40, para. 6-7 (France) *Ibid.*, para. 39 (UK); *Ibid.*, 45th Meeting, UN Doc. A/CONF.62/C.2/SR.45, para. 8 (Italy); UNCLOS Documents, Uruguay: draft article on the regime of islands, UN Doc. A/CONF.62/C.2/L.75, Vol. V, p. 182.

160 UNCLOS III, Official Documents, Second Committee Meetings, 39th Meeting, UN Doc. A/CONF.62/C.2/SR.39, para. 45 (Trinidad and Tobago).

161 UNCLOS III, Official Documents, 38th Meeting, UN Doc. A/CONF.62/C.2/SR.39, para. 70 (New Zealand).

162 UNCLOS III, Official Documents, 37th Meeting, UN Doc. A/CONF.62/C.2/SR.37, para. 23 (Peru) (According to Peru, Chile and Ecuador also supported this proposition).

163 Memorial of Nicaragua, p. 130, para. 5.20.

Providencia and Santa Catalina in every direction, specifically to the east.[164]

(5) Summary Conclusions - the Analysis of the *Travaux Préparatoires* Confirms that the 200-nautical-mile EEZ and Continental Shelf Entitlements of One State Prevail over the OCS Claim of Another State

3.36 The UNCLOS legislative history confirms that the intention of the Conference was that an OCS claim of one State may not encroach upon an entitlement of another State to an EEZ with its attendant continental shelf. The option to prove an OCS claim was granted to wide-shelf States, enabling them to exploit the resources of an area which would have otherwise belonged to the common heritage of mankind, but not to encroach on another State's *ipso jure* EEZ with its attendant continental shelf.

3.37 The regime of the EEZ with its attendant continental shelf thus trumps any other State's OCS claim which purports to be based upon geological and geomorphological criteria, for these criteria are irrelevant to the delimitation of the EEZ with its attendant continental shelf within 200 nautical miles from the coast. The *travaux* demonstrate that this conclusion is applicable to an EEZ with its attendant continental shelf generated in every direction from islands as well as mainland.

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[164] It will be recalled that the Court held in 2012 that Colombia's islands are entitled to a customary EEZ with its attendant continental shelf in every direction. See 2012 Judgment, p. 166, para. 118 and pp. 686-687, para. 168.

3.38 In the Caribbean Sea, there are no maritime spaces which are beyond 200 nautical miles from the nearest land territory of any coastal State.[165] That is clearly the case of Nicaragua's alleged OCS, which encroaches within the 200 nautical miles of Colombia and other States in the area it claims.

C. The Preponderance of State Practice Confirms that the Entitlement of One State to an EEZ with its Attendant Continental Shelf, Prevails over the OCS Claim of Another State

3.39 Given that a survey of any area of human activity will contain clusters of practice along with outliers, the survey of State practice of delimitation with respect to the relation between EEZ and OCS[166] is all the more striking in its clear preponderance: the bulk of State practice confirms that when States conclude maritime boundary agreements, the OCS of one State has not been allowed to encroach upon another State's *ipso*

[165] See R. A. Kinzie III, "Caribbean Contributions to Coral Reef Science", *Oceanographic History: the Pacific and Beyond*, K. R. Benson and P. F. Rehbock (eds.), University of Washington Press, 2002, pp. 450, 451 (Annex 44); J. E. Knowles *et al*., "Establishing a marine conservation baseline for the insular Caribbean", *Marine Policy*, Vol. 60, 2015, pp. 84, 87; A. Singh, *Governance in the Caribbean Sea: Implications for Sustainable Development*, United Nations - Nippon Foundation Fellowship Programme, Research Paper, 2008, available at http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/singh_0809_guyana.pdf (last visited 17 Sep. 2017); C. Carleton, "Maritime Delimitation on Complex Island Situations: A Case Study on the Caribbean Sea", *Maritime Delimitation*, R. Lagoni and D. Vignes (eds.), Nijhoff, Vol. 153, 2006, pp. 167-168.

[166] A comprehensive record and analysis of delimitation practice may be found in J. Charney and L. Alexander (eds.), *International Maritime Boundaries*, Vol. I – Vol. VII, 1993-2016 (International Maritime Boundaries).

jure 200-nautical-mile entitlements. Thus, practice confirms the text of UNCLOS and its legislative history, as shown in the preceding sections, and also serves as a confirmation of the customary status of this regime.

3.40 For clarity of exposition, the relevant material will be treated in three parts: First, State practice within 200 nautical miles from baselines. Second, State practice with respect to delimitations in which OCS claims are involved. Third, the rare deviations from the preponderant practice, which have created so-called Gray Areas (areas where the OCS of one State encroaches upon the 200-nautical-mile zone of another State). In the following section, Colombia will demonstrate that in their submissions to the CLCS, States did not consider that their potential OCS claims were capable of encroaching upon another State's EEZ with its attendant continental shelf.

3.41 Together, the review of State practice will show that within 200 nautical miles from their baselines, the geological and geomorphological considerations – which are relevant to OCS claims – do not affect the delimitation practice of most States. States refrain from encroaching upon the 200-nautical-mile EEZ with its attendant continental shelf of other States when advancing OCS claims; Gray Areas, rare anomalies in State practice, stem from the need for minor boundary corrections due to idiosyncratic geographic, rather than geological or geomorphological circumstances in the area or from a special arrangement, arrived at by the States concerned

incorporating their respective gains and offsets. Overall, Gray Areas are complicated outcomes which States wisely tend to avoid.

(1) State Practice Within 200 Nautical Miles from the Baselines

3.42 Preponderant maritime delimitation practice has been to delimit the area within the 200-nautical-mile limit separately, leaving any supplemental OCS delimitation to future negotiations.[167] Even in circumstances where geological or geomorphological features existed, the parties usually disregarded them within the 200-nautical-mile areas and used either a negotiated formula or modified equidistance line.[168] In

[167] See *e.g*. International Maritime Boundaries, Vol. IV, Oman-Pakistan, Rep. 6-17, p. 2809; *Ibid.,* Denmark (Faroe Islands)-United Kingdom, Rep. 9-23, p. 2956; *Ibid*., Vol. VI, France (Wallis and Futuna)-New Zealand (Tokelau), Rep. 5-30, p. 4339; *Ibid.,* Vol. I, Mexico-United States, Rep. 1-5, p. 427; *Ibid.,* Vol. VI, Federated States of Micronesia-Palau, Rep. 5-31, p. 4348; *Ibid*., Vol. VI, Mauritius-Seychelles, Rep. 6-22, p. 4391; *Ibid*., Vol. VI, Denmark (Greenland)-Norway (Svalbard), Rep. 9-25, p. 4513; *Ibid*., Vol. VII, Cook Islands-New Zealand (Tokelau), Rep. 5-43, p. 4973.

[168] See *e.g*. International Maritime Boundaries, Vol. I, Colombia-Dominican Republic, Rep. 2-2, p. 477; *Ibid*., Vol. I, Colombia-Honduras, Rep. 2-4, p. 503; *Ibid*., Vol. I, Cuba-Haiti, Rep. 2-7, p. 551; *Ibid*., Vol. I, Cuba-Mexico, Rep. 2-8, p. 565; *Ibid*., Vol. I, France (Martinique)-Saint Lucia, Rep. 2-10, p. 591; *Ibid*., Vol. I, France (Guadeloupe and Martinique)-Venezuela, Rep. 2-11, p. 603; *Ibid*., Vol. I, Trinidad and Tobago-Venezuela, Rep. 2-13(2), p. 655; *Ibid*., Vol. I, Trinidad and Tobago-Venezuela, Rep. 2-13(3), p. 675; *Ibid*., Vol. I, United States (Puerto Rico and the Virgin Islands)-Venezuela, Rep. 2-14, p. 691; *Ibid*., Vol. I, Dominica-France (Guadeloupe and Martinique), Rep. 2-15, p. 705; *Ibid*., Vol. I, Argentina-Uruguay, Rep. 3-2, p. 757; *Ibid*., Vol. I, Australia-France (New Caledonia), Rep. 5-1, p. 905 (equidistance was used for the area within and beyond the 200-nautical-mile EEZ); *Ibid*., Vol. I, Australia-Solomon Islands, Rep. 5-4, p. 977; *Ibid*., Vol. II, Australia (Heard/McDonald Islands)-France (Kerguelen Islands), Rep. 6-1, p. 1185 (equidistance was used within and beyond the EEZ); *Ibid*., Vol. II, India-Maldives, Rep. 6-8, p. 1389; *Ibid*., Vol. II, India-Thailand, Rep. 6-11, p. 1433; *Ibid*., Vol. II, Italy-Tunisia, Rep. 8-6, p. 1611;

the rare instances when historic, environmental or economic circumstances were taken into consideration with the delimitation of the EEZ, their effect, together with geographical features, only led to an adjustment of the boundary line.[169] After UNCLOS was signed, geology and geomorphology seldom played a part in delimitation within 200 nautical miles.[170] An instructive example of this practice can be found in the delimitation between Denmark and Norway. Although significant geological and geomorphological features were present, the Parties did not take

Ibid., Vol. III, Colombia-Jamaica, Rep. 2-18, p. 2179; *Ibid*., Vol. III, Cuba-Jamaica, p. 2205; *Ibid*., Vol. III, Dominican Republic-United Kingdom (Turks and Caicos Islands), Rep. 2-22, p. 2235; *Ibid*., Vol. III, Cape Verde-Senegal, Rep. 4-8, p. 2279; *Ibid*., Vol. III, Papua New Guinea-Solomon Islands, Rep. 5-16(2), p. 2323; *Ibid*., Vol. III, Denmark-Netherlands, Rep. 9-18, p. 2497; *Ibid*., Vol. III, Finland-Sweden (Bogskär Area), Rep. 10-13, p. 2540; *Ibid*., Vol. IV, United States-Mexico, Rep. 1-5(2), p. 2621 (equidistance was used to delimit the area both within and beyond the 200-nautical-mile zone) (in the Rev. 1-5, Vol. I, it was stated that there were no relevant geological or geomorphological features that could have offset the equidistance line, this report only deals with the OCS); *Ibid*., Vol. IV, Oman-Pakistan, Rep. 6-17, p. 2809; *Ibid*., Vol. IV, Bulgaria-Turkey, Rep. 8-13, p. 2871; *Ibid*., Vol. IV, Belgium-Netherlands, Rep. 9-21, p. 2921; *Ibid*., Vol. IV, Denmark (Greenland)-Iceland, Rep. 9-22, p. 2942; *Ibid*., Vol. V, Cameron-Nigeria, Rep. 4-1 (add. 2), p. 3605; *Ibid*., Vol. VI, Mauritius-Seychelles, Rep. 6-22, p. 4391; *Ibid*., Vol. VI, Denmark (Greenland)-Norway (Svalbard), Rep. 9-25, p. 4513.; *Ibid*., Vol. VII, Bahamas-Cuba, Rep. 2-23, p. 4721 (because the area was comprised by overlapping EEZs and territorial sea, OCS claims had no effect on the delimitation); *Ibid*., Vol. VII, Kenya-Tanzania, Rep. 4-5(2), p. 4781; *Ibid*., at Vol. VII, Cook Islands-New Zealand (Tokelau), Rep. 5-43, p. 4973.

[169] See B. H. Oxman, "Political, Strategic and Historic Considerations", International Maritime Boundaries, Vol. I, p. 3; see also B. Kwiatkowska, "Economic and Environmental Considerations", *Ibid*., p. 75.

[170] See *i.e* International Maritime Boundaries, Vol. I, Argentina-Chile, Rep. 3-1, pp. 719, 723; *Ibid.*, Vol. IV, Australia-Indonesia, Rep. 6-2(6), p. 269; *Ibid.*, Vol. VII, Grenada-Trinidad and Tobago, Rep. 2-31, p. 4705; see also *Ibid.*, D. H. Anderson, "Developments in Maritime Boundary Law and Practice", Vol. V, p. 3214.

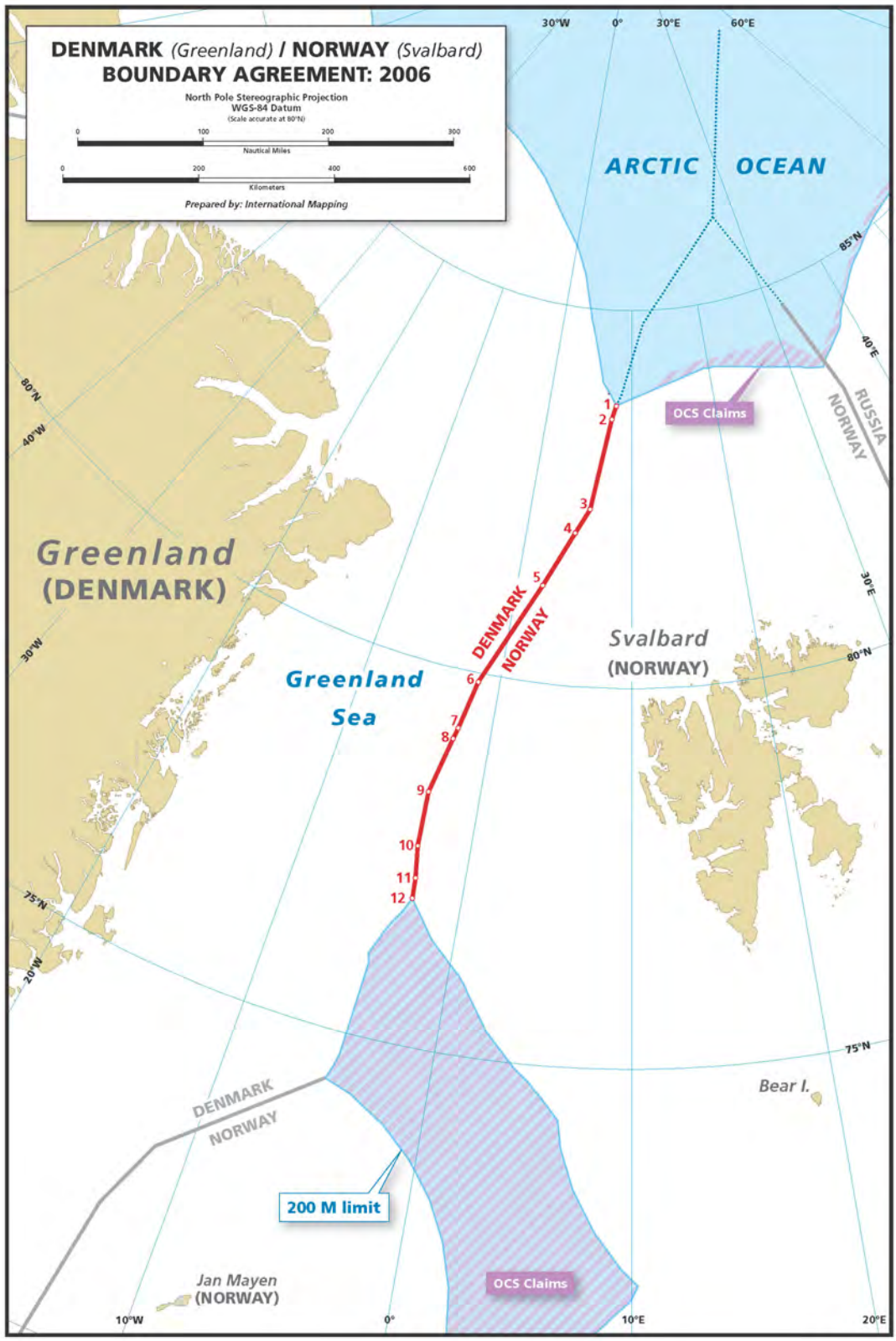
DENMARK (Greenland) / NORWAY (Svalbard)
BOUNDARY AGREEMENT: 2006
North Pole Stereographic Projection
WGS-84 Datum
(Scale accurate at 80°N)
0 100 200 300
Nautical Miles
0 200 400 600
Kilometers
Prepared by: International Mapping
ARCTIC OCEAN
OCS Claims
RUSSIA
NORWAY
Greenland
(DENMARK)
Greenland
Sea
DENMARK
NORWAY
Svalbard
(NORWAY)
Bear I.
DENMARK
NORWAY
200 M limit
OCS Claims
Jan Mayen
(NORWAY)
30°W
0°
30°E
60°E
85°N
80°N
75°N
40°W
30°W
20°W
40°E
30°E
10°W
0°
10°E
20°E
1
2
3
4
5
6
7
8
9
10
11
12

Figure 3.1

account of them for purposes of the delimitation within 200 nautical miles from their baselines.[171]

3.43 Another instructive example is the delimitation in the Black Sea between Bulgaria and Turkey within 200 nautical miles from their respective baselines. The natural prolongation of the shelf from the countries along the western coast of the Black Sea is greater than the prolongation from the countries along the eastern coast of the Black Sea; nonetheless, geological and geomorphological considerations were disregarded in favour of an equidistance line.[172]

[171] International Maritime Boundaries, Vol. VI, Denmark (Greenland)-Norway (Svalbard), Rep. 9-25, pp. 4513, 4524.

[172] International Maritime Boundaries, Vol. IV, Bulgaria-Turkey, Rep. 8-13, pp. 2871, 2874.

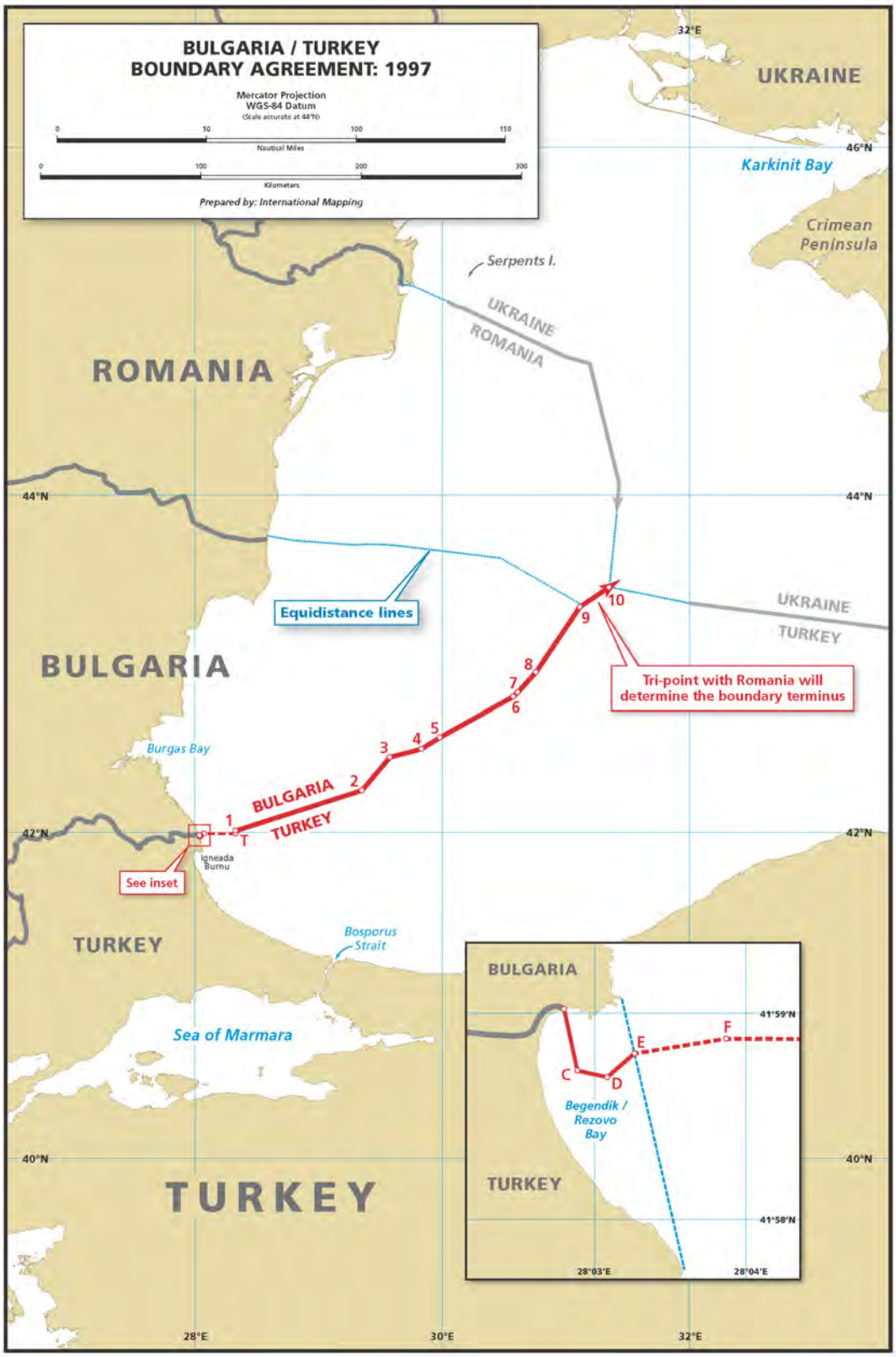
BULGARIA / TURKEY
BOUNDARY AGREEMENT: 1997
Mercator Projection
WGS-84 Datum
(Scale accurate at 44°N)
0 50 100 150
Nautical Miles
0 100 200 300
Kilometers
Prepared by: International Mapping
32°E
UKRAINE
46°N
Karkinit Bay
Crimean Peninsula
Serpents I.
UKRAINE
ROMANIA
ROMANIA
44°N
44°N
Equidistance lines
UKRAINE
TURKEY
BULGARIA
Tri-point with Romania will determine the boundary terminus
Burgas Bay
BULGARIA
TURKEY
T
1
2
3
4
5
6
7
8
9
10
42°N
42°N
Igneada Burnu
See inset
TURKEY
Bosporus Strait
Sea of Marmara
BULGARIA
41°59'N
F
E
C
D
Begendik / Rezovo Bay
TURKEY
41°58'N
28°03'E
28°04'E
40°N
40°N
TURKEY
28°E
30°E
32°E

Figure 3.2

3.44 In the Faroe Islands delimitation between the United Kingdom and Denmark, geological and geomorphological features within 200 nautical miles were disregarded and a modified equidistance technique was applied.[173] Professor Jonathan Charney and Robert Smith, the former Geographer of the U.S. State Department, comment that:

> "From a geomorphological point of view, the Faroe Islands are divided from Scotland by the Faroe-Shetland Channel, but this feature does not represent a major break in the continental shelf. Moreover, *as the Channel lies within the 200 n.m. limits of the two sides, geomorphology would not have had a role to play in the delimitation*".[174]

[173] International Maritime Boundaries, Vol. IV, Denmark (Faroe Islands)-United Kingdom, Rep. 9-23, p. 2956.

[174] International Maritime Boundaries, Vol. IV, Denmark (Faroe Islands)-United Kingdom, Rep. 9-23, p. 2964 (emphasis added).

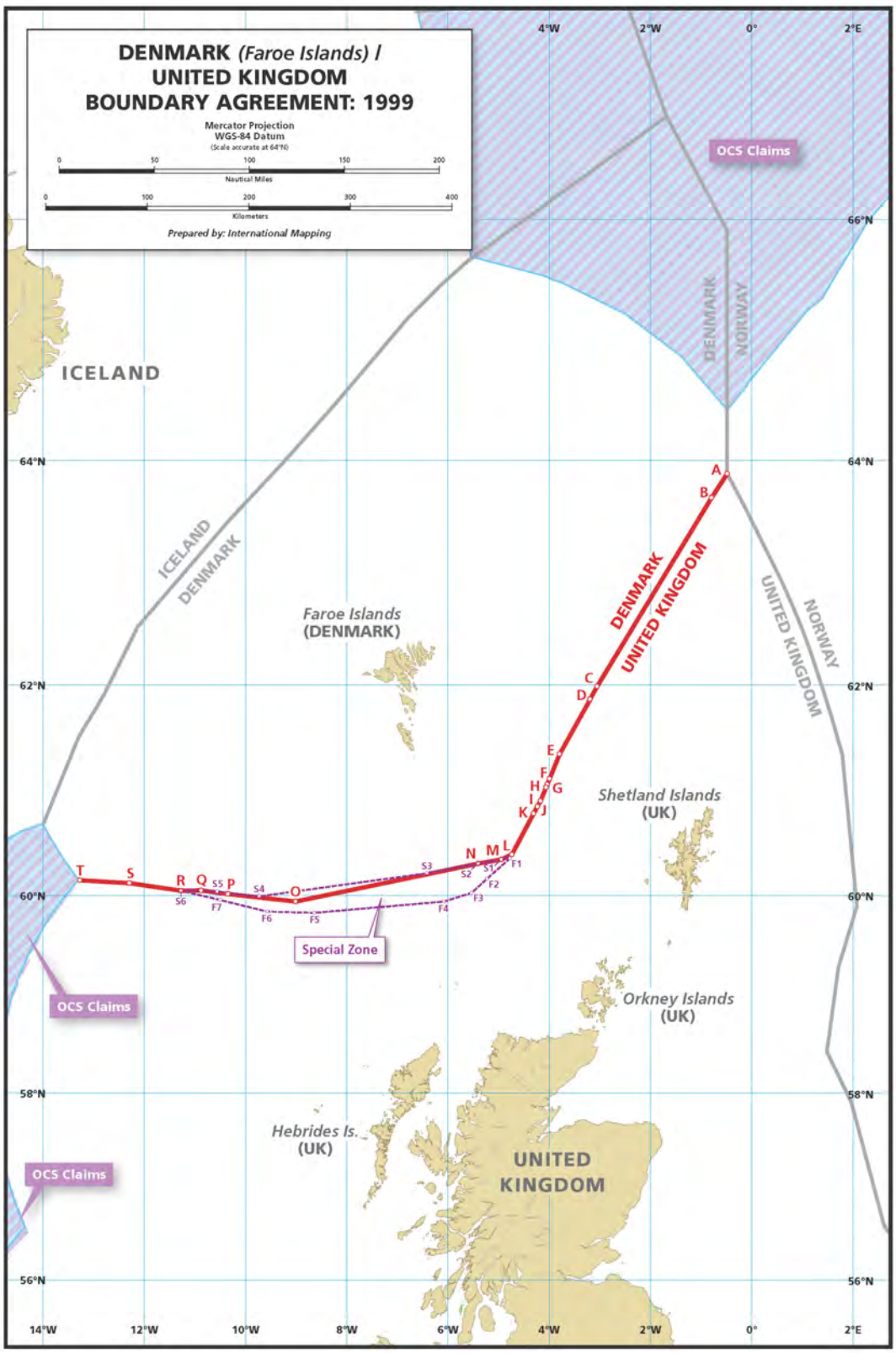
DENMARK (Faroe Islands) / UNITED KINGDOM BOUNDARY AGREEMENT: 1999
Mercator Projection
WGS-84 Datum
(Scale accurate at 64°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
OCS Claims
ICELAND
DENMARK
NORWAY
UNITED KINGDOM
Faroe Islands (DENMARK)
Shetland Islands (UK)
Orkney Islands (UK)
Hebrides Is. (UK)
UNITED KINGDOM
Special Zone
A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
4°W
2°W
0°
2°E
66°N
64°N
62°N
60°N
58°N
56°N
14°W
12°W
10°W
8°W
6°W

Figure 3.3

3.45 The delimitation agreement between the Federated States of Micronesia and the Republic of Palau is especially instructive of the relationship between EEZ and OCS in State practice.[175] The parties delimited the area within 200 nautical miles from their coastlines based on equidistance, disregarding potential geological or geomorphological considerations. However, since the parties were aware of the existence of such features in the area and there was a possibility of a future submission to the CLCS,[176] they stipulated in their treaty that "no Party shall claim an extended continental shelf that intrudes into the Exclusive Economic Zone (…) of the other party".[177]

3.46 Ambassador David Colson, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs from the U.S., and Dr Smith conclude that:

> "Care has been taken to ensure that Exclusive Economic Zone rights take precedence over those related to the continental shelf beyond 200 n.m. from relevant baselines and to avoid any potential

[175] International Maritime Boundaries, Vol. VI, Micronesia-Palau, Rep. 5-31, p. 4348.

[176] International Maritime Boundaries, Vol. VI, Micronesia-Palau, Rep. 5-31, p. 4350; CLCS, Submission by Palau, available at: http://www.un.org/depts/los/clcs_new/submissions_files/submission_plw_41_2009.htm (last visited 17 Sep. 2017). It should be noted that Palau's 2009 submission to the CLCS indicates that its shelf beyond 200 nautical miles extends into Micronesia's 200-nautical-mile zone. Nevertheless, Micronesia has made no comment to the CLCS concerning Palau's submission. Micronesia's silence may be entirely understandable, as Article 2 (3) of their delimitation treaty ensures that the EEZ take precedent over any OCS claim, relieving it of the necessity of protesting.

[177] International Maritime Boundaries, Vol. VI, Micronesia-Palau, Rep. 5-31, p. 4358.

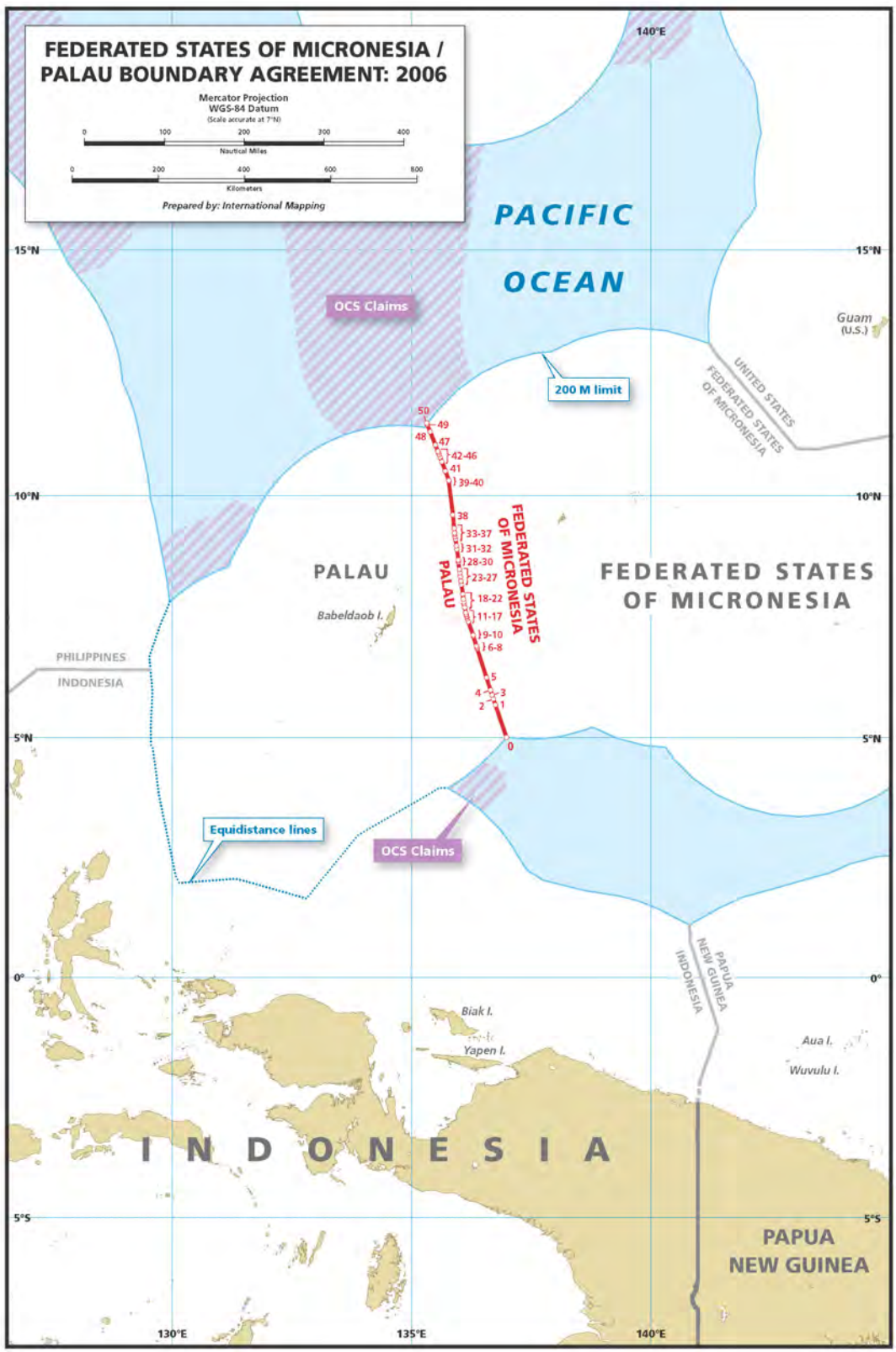
FEDERATED STATES OF MICRONESIA / PALAU BOUNDARY AGREEMENT: 2006
Mercator Projection
WGS-84 Datum
(Scale accurate at 7°N)
0 100 200 300 400
Nautical Miles
0 200 400 600 800
Kilometers
Prepared by: International Mapping
PACIFIC OCEAN
OCS Claims
200 M limit
Guam (U.S.)
UNITED STATES FEDERATED STATES OF MICRONESIA
50
49
48
47
42-46
41
39-40
38
33-37
31-32
28-30
23-27
18-22
11-17
9-10
6-8
5
4
3
2
1
0
FEDERATED STATES OF MICRONESIA
PALAU
PALAU
FEDERATED STATES OF MICRONESIA
Babeldaob I.
PHILIPPINES
INDONESIA
Equidistance lines
OCS Claims
PAPUA NEW GUINEA INDONESIA
Biak I.
Yapen I.
Aua I.
Wuvulu I.
INDONESIA
PAPUA NEW GUINEA
140°E
15°N
10°N
5°N
0°
5°S
130°E
135°E
140°E

Figure 3.4

overlap between Exclusive Economic Zone and outer continental shelf rights".[178]

(2) State Practice in OCS Delimitation

3.47 The preponderance of State practice in OCS delimitation has been that OCS claims do not encroach upon another State's 200-nautical-mile entitlement.[179] The OCS delimitation between Denmark (Greenland) and Iceland is an instructive example of this practice. The pertinent issue in this inquiry is not the final delimitation line (which rests between their respective outer limits), but the outer limits claimed by the States; Iceland's outer limit was capped, not by the edge of its continental margin, but by Greenland's 200-nautical-mile entitlement.[180] This indicates that Iceland did not consider that it had an OCS claim within Greenland's 200-nautical-mile zone.

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[178] International Maritime Boundaries, Vol. VI, Micronesia-Palau, Rep. 5-31, p. 4354.

[179] Until today the treaties which delimited the OCS are: International Maritime Boundaries, Vol. VII, Denmark (Greenland)-Iceland, Rep. 9-22 (2), p. 5259; *Ibid*., Vol. V, Australia-New Zealand, Rep. 5-26, p. 3759; *Ibid*., Vol. I, Australia-France (New Caledonia), Rep. 5-1, p. 905 (the Parties delimited the entire area including beyond the 200-nautical-mile distance using the equidistance method); *Ibid.*, Vol. I, Trinidad and Tobago-Venezuela, Rep. 2-13(3), p. 675; *Ibid*., Vol. I, Australia-Solomon Islands, Rep. 5-4, p. 977 (the delimitation used equidistance and began beyond the 200 miles of each State); *Ibid*., Vol. II, Australia (Heard/McDonald Islands)-France (Kerguelen Islands), Rep. 6-1, p. 1185 (equidistance was used when the line extended beyond their respective 200-nautical-mile zones); *Ibid*., Vol. VI, Denmark (Faroe Islands)-Iceland-Norway, Rep. 9-26, p. 4532; *Ibid*., Vol. VI, Barbados-France (Guadeloupe and Martinique), Rep. 2-30, p. 4223; *Ibid*., Vol. I, Argentina-Uruguay, Rep. 3-2, p. 757.

[180] See map in International Maritime Boundaries, Vol. VII, Denmark (Greenland)-Iceland, Rep. 9-22 (2), pp. 5259, 5268.

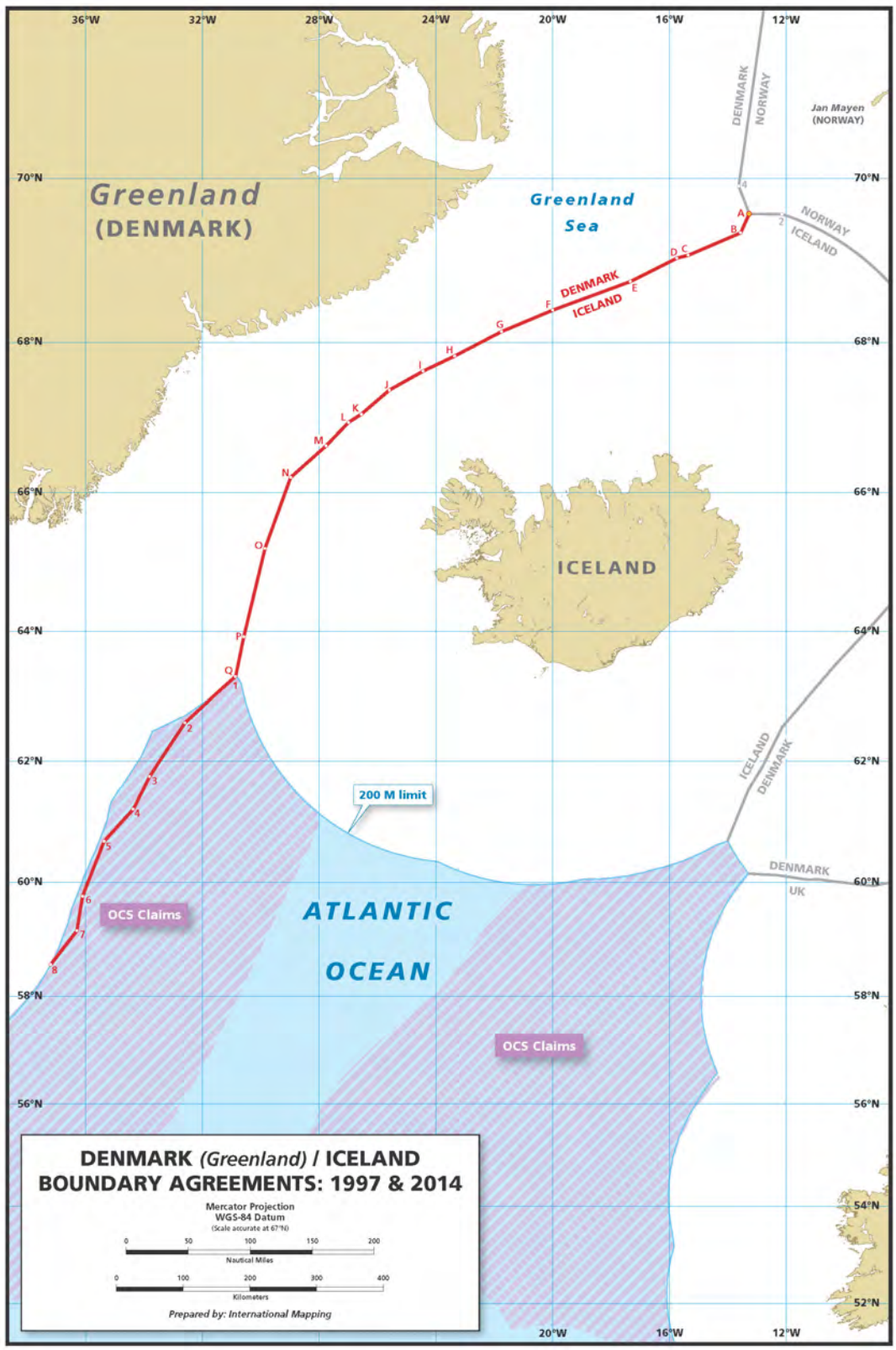
36°W
32°W
28°W
24°W
20°W
16°W
12°W
70°N
68°N
66°N
64°N
62°N
60°N
58°N
56°N
54°N
52°N
Greenland
(DENMARK)
Greenland
Sea
ICELAND
Jan Mayen
(NORWAY)
DENMARK
NORWAY
ICELAND
DENMARK
UK
A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
1
2
3
4
5
6
7
8
200 M limit
OCS Claims
OCS Claims
ATLANTIC
OCEAN
DENMARK (Greenland) / ICELAND
BOUNDARY AGREEMENTS: 1997 & 2014
Mercator Projection
WGS-84 Datum
(Scale accurate at 67°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping

Figure 3.5

3.48 Similarly, in the OCS delimitation between Denmark, Norway and Iceland, no OCS claim encroached upon another States' 200-nautical-mile zone; instead, a modified equidistance line was used, without regard to geology and geomorphology.[181] Their OCS delimitation began at their respective 200-nautical-mile entitlements.

[181] International Maritime Boundaries, Vol. VI, Denmark (Faroe Islands)-Iceland-Norway, Rep. 9-26, p. 4532.

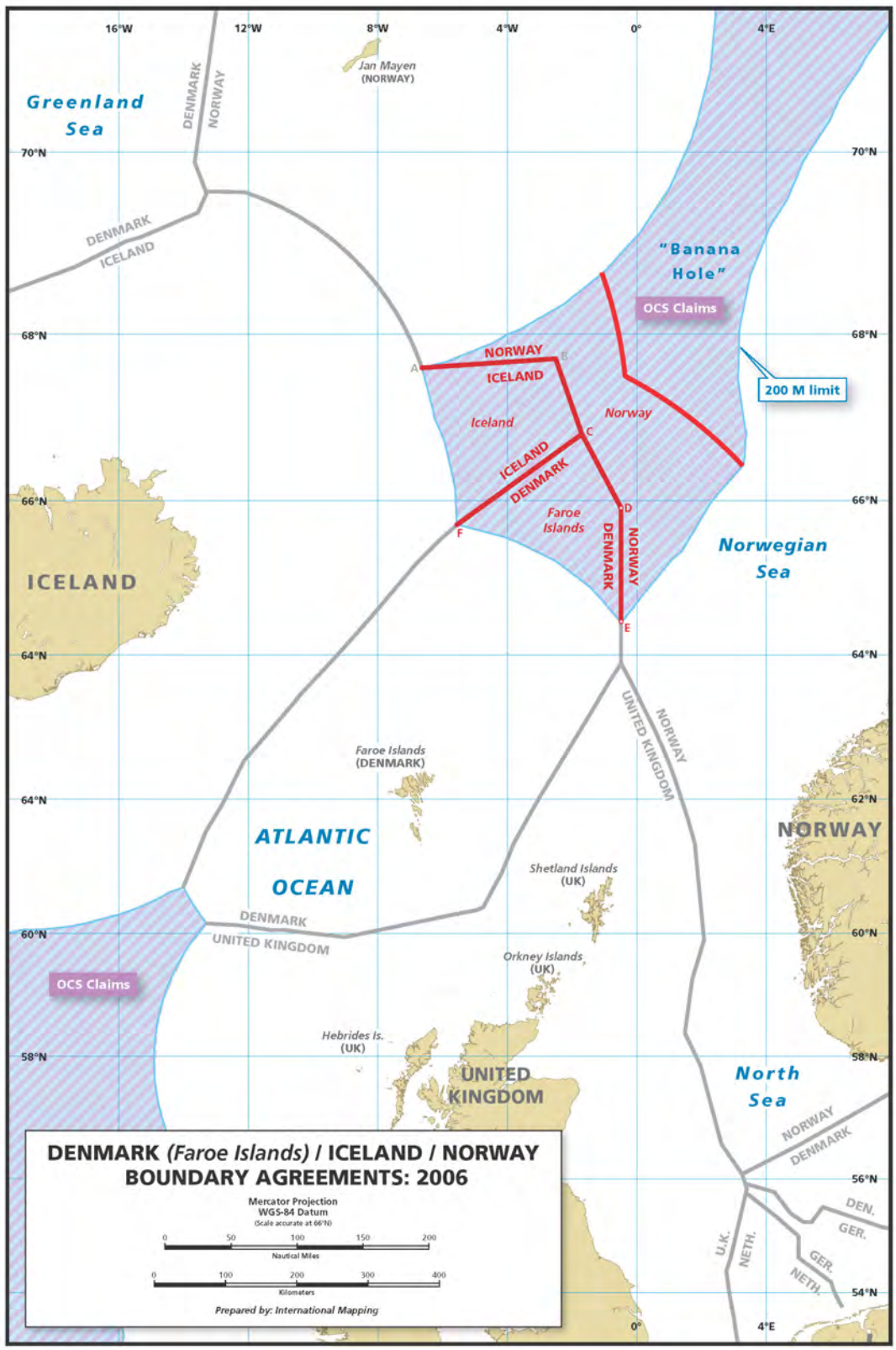
DENMARK (Faroe Islands) / ICELAND / NORWAY
BOUNDARY AGREEMENTS: 2006
Mercator Projection
WGS-84 Datum
(Scale accurate at 66°N)
Nautical Miles
Kilometers
Prepared by: International Mapping
Greenland Sea
Jan Mayen (NORWAY)
ICELAND
Faroe Islands (DENMARK)
ATLANTIC OCEAN
Shetland Islands (UK)
Orkney Islands (UK)
Hebrides Is. (UK)
UNITED KINGDOM
NORWAY
Norwegian Sea
North Sea
"Banana Hole"
OCS Claims
200 M limit
Iceland
Norway
Faroe Islands
DENMARK
ICELAND
NORWAY
UNITED KINGDOM
U.K.
NETH.
GER.
DEN.

Figure 3.6

3.49 The Australia-New Zealand 2004 agreement (in force since 2006)[182] exemplifies delimitation practice with respect to the EEZ of one State's islands and another State's OCS.[183] Australia and New Zealand delimited the entire area between their coasts extending over 1,200 nautical miles and including the OCS from both mainland and islands.[184] The official map published by the parties demonstrates their respective EEZ and OCS entitlements:[185]

[182] International Maritime Boundaries, Vol. V, Australia-New Zealand, Rep. 5-26, p. 3759.

[183] International Maritime Boundaries, Vol. V, Australia-New Zealand, Rep. 5-26, p. 3759.

[184] International Maritime Boundaries, Vol. V, Australia-New Zealand, Rep. 5-26, p. 3759.

[185] Land Information New Zealand, "Exclusive Economic Zone & continental shelf boundaries between New Zealand & Australia", available at http://www.linz.govt.nz/sea/nautical-information/maritime-boundaries/exclusive-economic-zone-continental-shelf-boundaries-between-new-zealand-australia (last visited 17 Sep. 2017). See also International Maritime Boundaries, Vol. V, Australia-New Zealand, Rep. 5-26, p. 3767.

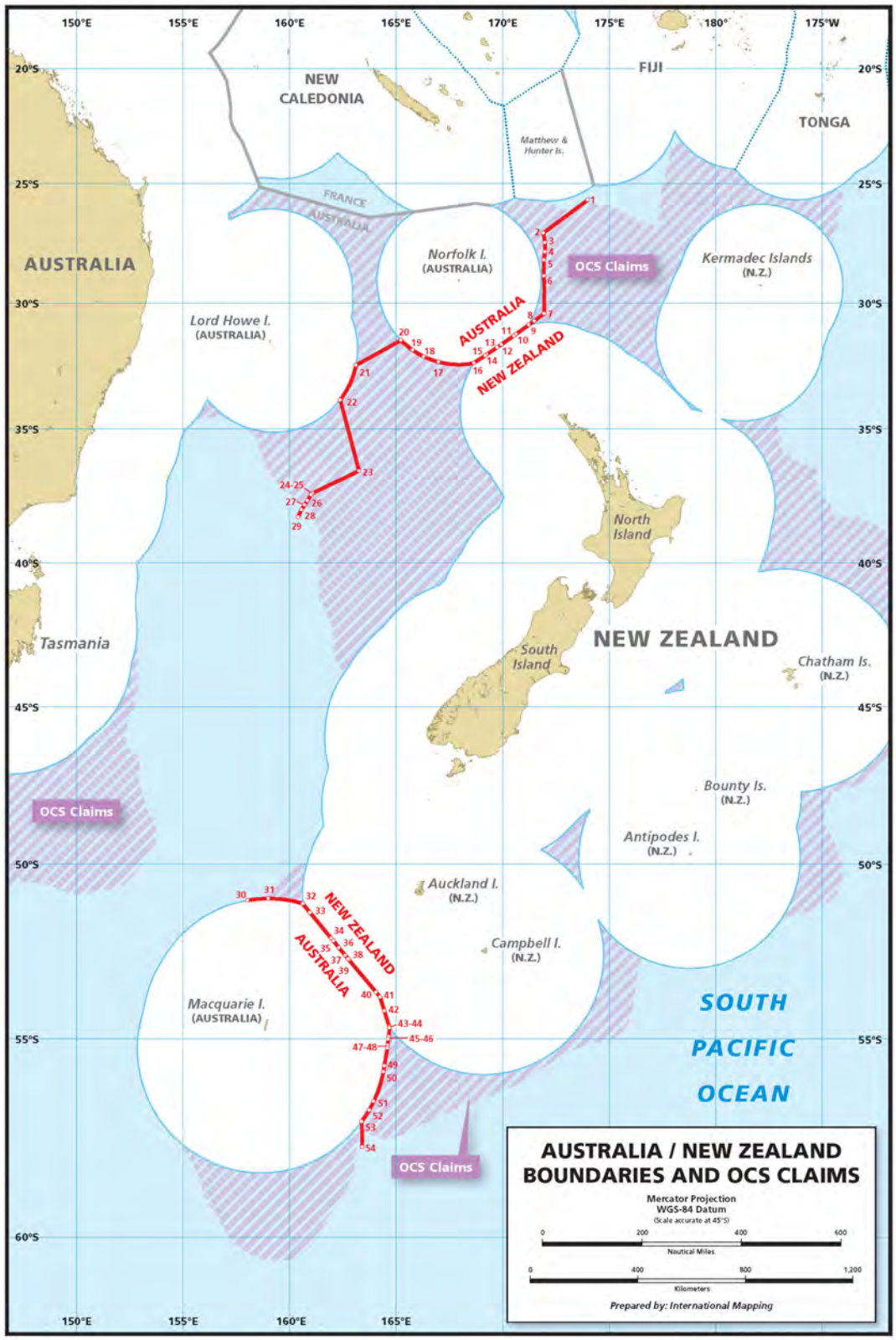
150°E
155°E
160°E
165°E
170°E
175°E
180°
175°W
20°S
25°S
30°S
35°S
40°S
45°S
50°S
55°S
60°S
NEW CALEDONIA
FIJI
TONGA
Matthew & Hunter Is.
FRANCE
AUSTRALIA
AUSTRALIA
Norfolk I. (AUSTRALIA)
OCS Claims
Kermadec Islands (N.Z.)
Lord Howe I. (AUSTRALIA)
AUSTRALIA
NEW ZEALAND
North Island
NEW ZEALAND
South Island
Tasmania
Chatham Is. (N.Z.)
Bounty Is. (N.Z.)
Antipodes I. (N.Z.)
OCS Claims
Auckland I. (N.Z.)
NEW ZEALAND
AUSTRALIA
Campbell I. (N.Z.)
Macquarie I. (AUSTRALIA)
SOUTH PACIFIC OCEAN
OCS Claims
AUSTRALIA / NEW ZEALAND BOUNDARIES AND OCS CLAIMS
Mercator Projection
WGS-84 Datum
(Scale accurate at 45°S)
0
200
400
600
Nautical Miles
0
400
800
1,200
Kilometers
Prepared by: International Mapping

Figure 3.7

3.50 As the map shows, all landmasses, including islands, received their complete 200-nautical-mile EEZ with its attendant continental shelf entitlements in every direction, and any delimitation between these zones was effected using equidistance, without regard to geology or geomorphology.

3.51 The maritime boundary (red line) dividing the OCS entitlements of both States shows that geology and geomorphology were ignored within the EEZ, and no OCS claim encroaches upon the respective 200-nautical-mile zones. In the delimitation, islands were accorded the same EEZ rights as mainland; no OCS claim encroaches upon their 200-nautical-mile zone radiating in all directions.[186] It is noteworthy that the south-western segment of the northern maritime border follows the 350-nautical-mile arc of Lord Howe Island, giving the island not only its full EEZ with its attendant continental shelf, but also a significant portion of its OCS.

(3) Gray Areas in State Practice

3.52 In practice, the creation of a Gray Area has been used as an adjustment technique to accommodate incompatible EEZ entitlements, especially when one State's full EEZ entitlement would cause a "cut-off" of an adjacent or opposite State. A review of International Maritime Boundaries shows that Gray

[186] See V. Prescott and G. Triggs, "Islands and Rocks and their Role in Maritime Delimitation", International Maritime Boundaries, Vol. V, pp. 3245, 3255; see also C. Yacouba and D. McRae, "The Legal Regime of Maritime Boundary Agreements", International Maritime Boundaries, Vol. V, pp. 3281, 3289.

Areas are uncommon in State practice. In the few instances in which they were created, their function was to address minor anomalies, caused by extreme geographical circumstances and, of critical importance to this inquiry, not due to claims based on geology or geomorphology. The analysis of the cases where Gray Areas were created demonstrates that the special circumstances for their creation do not obtain in the Caribbean Sea, with which this case is concerned. In State practice, Gray Areas manifest a general pattern: (1) they are a response to geography and not geomorphology; (2) they are created on a small segment of the delimited area; and (3) they are usually responses to the undesirable consequences of the delimitation line that emerges from the application of the law that would normally apply. One of the reasons why Gray Areas are so infrequent is that they generate significant enduring practical complications, by separating the rights to exploit the seabed and the superjacent waters.[187] Thus, it is not surprising that States have proved averse to creating Gray Areas. The delimitation between the Russian Federation and Norway in the Barents Sea serves to illustrate why.

3.53 After 40 years of maritime dispute,[188] Norway and the Russian Federation delimited the entire area within and beyond 200 nautical miles from their respective coastlines.[189] The delimitation treaty was a package deal based upon coastal length

[187] See D. H. Anderson, "Developments in Maritime Boundary Law and Practice", International Maritime Boundaries, Vol. V, p. 3214.

[188] B. M. Magnússon, footnote 37 *supra*, pp. 85-86.

[189] International Maritime Boundaries, Vol. VII, Norway-Russian Federation, Rep. 9-6 (3), p. 5167.

and relevant circumstances.[190] The delimitation line was intended not only to achieve an equitable solution but also to divide "the overall disputed area in two parts of approximately (the) same size".[191] The delimitation line in the south, created a Gray Area of around 3,400 sq. km; as part of the package, Norway transferred all water column rights to Russia,[192] which averted separating the water column from the seabed.

[190] International Maritime Boundaries, Vol. VII, Norway-Russian Federation, Rep. 9-6 (3), pp. 5183-5185.

[191] Norway-Russian Federation, *Joint Statement on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean*, available at: https://www.regjeringen.no/globalassets/upload/ud/vedlegg/folkerett/030427_english_4.pdf (last visited 17 Sep. 2017); see also B. M. Magnússon, footnote 37 *supra*, p. 202.

[192] International Maritime Boundaries, Vol. VII, Norway-Russian Federation, Rep. 9-6 (3), pp. 5181-5182.

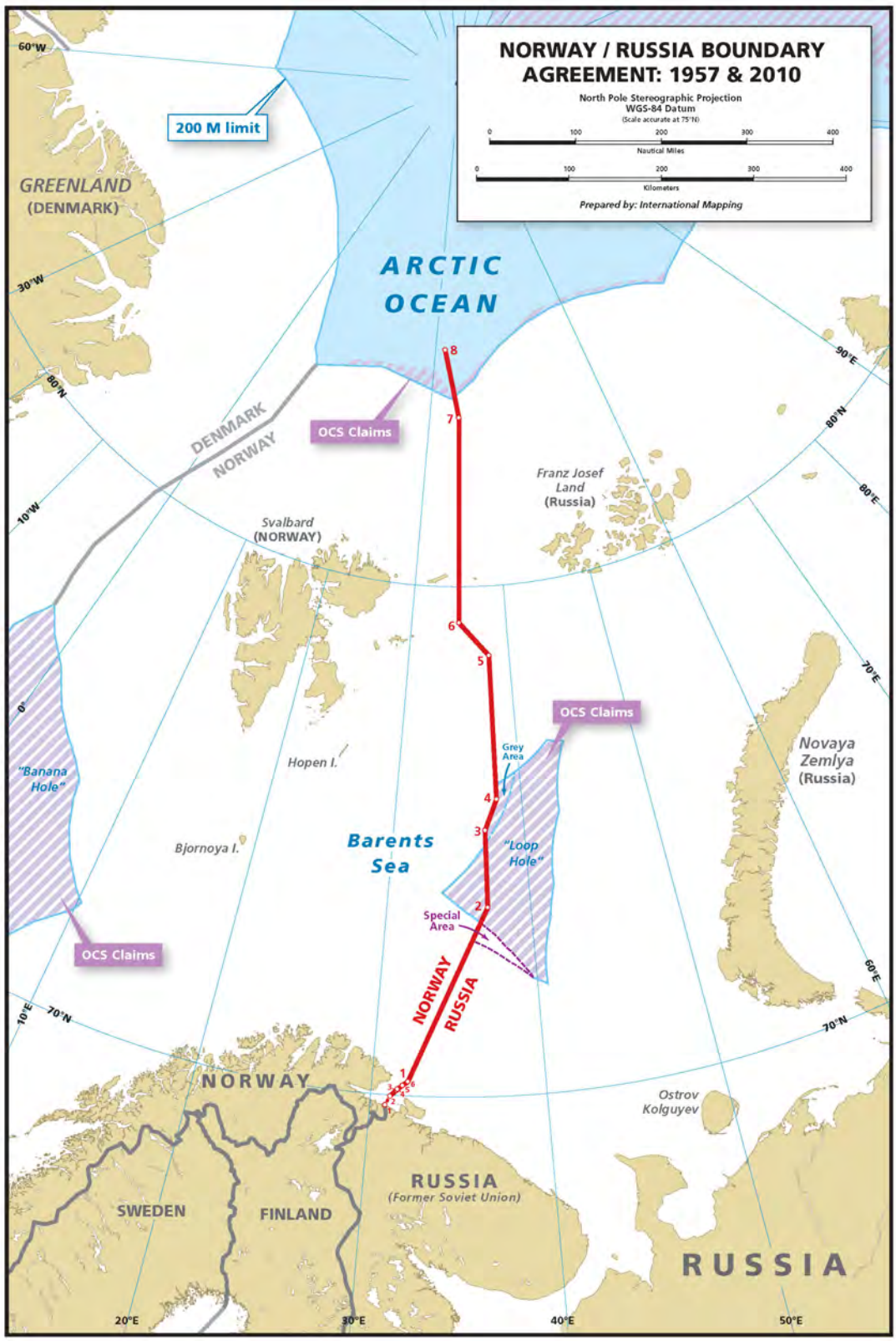
NORWAY / RUSSIA BOUNDARY AGREEMENT: 1957 & 2010
North Pole Stereographic Projection
WGS-84 Datum
(Scale accurate at 75°N)
0 100 200 300 400
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
200 M limit
GREENLAND (DENMARK)
ARCTIC OCEAN
OCS Claims
DENMARK
NORWAY
Svalbard (NORWAY)
Franz Josef Land (Russia)
Hopen I.
Bjornoya I.
"Banana Hole"
Barents Sea
Grey Area
"Loop Hole"
Special Area
OCS Claims
OCS Claims
NORWAY
RUSSIA
Novaya Zemlya (Russia)
Ostrov Kolguyev
NORWAY
SWEDEN
FINLAND
RUSSIA (Former Soviet Union)
RUSSIA
60°W
30°W
10°W
0°
10°E
20°E
30°E
40°E
50°E
60°E
70°E
80°E
90°E
70°N
80°N
1
2
3
4
5
6
7
8

Figure 3.8

3.54 Another example of States averting Gray Areas is provided by the United Kingdom and Ireland. Because the initial 1988 delimitation of the continental shelf between them had not used equidistance, when the parties proceeded in 2011 to delimit their respective EEZs, two small areas laid beyond 200 nautical miles from the Irish baselines but within the UK's 200-nautical-mile space. Since a single delimitation line was used, Ireland transferred the rights to the small Gray Areas to the United Kingdom. An area of similar size was transferred by the UK to Ireland in 2013.[193]

[193] International Maritime Boundaries, Vol. VII, Ireland-United Kingdom, Rep. 9-5 (3), pp. 5152-5153.

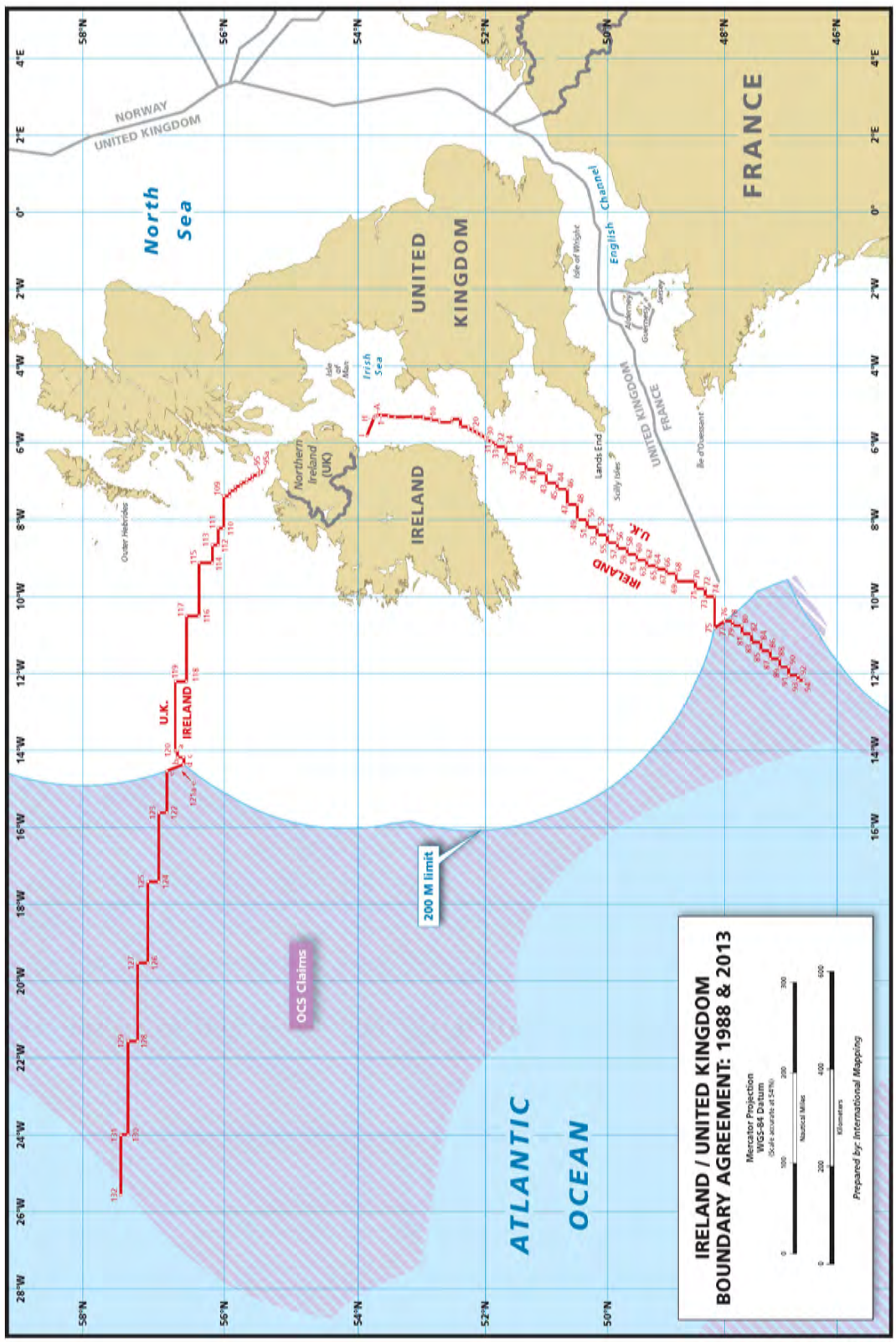
IRELAND / UNITED KINGDOM
BOUNDARY AGREEMENT: 1988 & 2013
Mercator Projection
WGS-84 Datum
Nautical Miles
Kilometers
Prepared by: International Mapping
200 M limit
OCS Claims
ATLANTIC
OCEAN
North Sea
Irish Sea
English Channel
NORWAY
UNITED KINGDOM
IRELAND
UNITED KINGDOM
FRANCE
Northern Ireland (UK)
Outer Hebrides
Isle of Wight
Lands End
Scilly Isles
Jersey
Guernsey
Alderney
Ile d'Ouessant
U.K.
IRELAND
U.K.
FRANCE

Figure 3.9

3.55 Besides the fact that both delimitations were negotiated *quid pro quo* arrangements, it is evident that the parties did not view the creation of enduring Gray Areas as desirable long-term arrangements, and obviously not as a desirable long-term solution. Hence, they swapped their respective rights in the Gray Area in order to maintain the unity of the EEZ. This is consistent with State practice which uses a single delimitation line to delimit continental shelf and water column entitlement within 200 nautical miles.[194] As Judge Anderson explains:

> "There are obvious practical reasons for using the same line for regulating fisheries, pollution control and oil and gas operations. The existence of different boundaries for different purposes results in a situation of overlapping functional jurisdictions, which can all too easily lead to practical problems calling for consistent monitoring, *e.g.*, through the creation of a bilateral oversight commission. Such problems are best avoided by agreeing upon a single, all-purpose boundary. Some older agreements relating solely to the continental shelf remain in force, but the new ones having this limited scope relate to areas beyond the 200 n.m. limit".[195]

3.56 The complications resulting from Gray Areas are further explained by Leonard Legault and Blair Hankey:

> "It does not require a great deal of imagination to envisage the kinds of problems that would arise if

[194] C. Yacouba and D. McRae, International Maritime Boundaries, Vol. V, p. 3288.
[195] D. H. Anderson, International Maritime Boundaries, Vol V, p. 32.

> one state were to have jurisdiction over rich hydrocarbon resources in the continental shelf, while another state had jurisdiction over valuable fishery resources in the superjacent waters. The domestic litigation in the late 1970s and early 1980s over oil and gas lease sales on the United States continental shelf, in areas such as Georges Bank, illustrates the conflict of interests between oil and gas exploitation, on the one hand, and fisheries and environmental concerns, on the other. Such unavoidable conflicts are likely to be greatly exacerbated if both divergent political interests and separate sovereign powers are allowed to compete in the same geographical space."[196]

They then stress that the "creation of a substantial grey area should be avoided to the greatest extent possible".[197]

3.57 India and Maldives provide another example of State aversion to the creation of Gray Areas. The extension of the delimitation line as a continental shelf boundary would have "under normal circumstances" created a Gray Area since the "terminus (was identified) as being 203 n.m. from Indian territory and 197 n.m. from the nearest point of Maldives".[198] However, as Charney and Alexander note, "Maldives had already made a unilateral extension of the line and thereby

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196 L.H. Legault and B. Hankey, "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case", *American Journal of International Law*, Vol. 79, 1985, p. 985 (available at the Peace Palace Library).

197 L.H. Legault and B. Hankey, "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case", *American Journal of International Law*, Vol. 79, 1985, p. 988.

198 International Maritime Boundaries, Vol. II, India-Maldives, Rep. 6-8, pp. 1389, 1391.

abandoned any interest in the potential gray area".[199]

3.58 As no *jus cogens* issues arise here, Magnússon, after surveying State and tribunal practice with regard to the OCS, found, unsurprisingly, that "States enjoy more flexibility in negotiations deciding the method they wish to use to delimit their maritime boundaries than is enjoyed by international courts and tribunal".[200] Thus, Australia and Indonesia intentionally separated the entitlements to the seabed and the water column in 1981 and created a Gray Area,[201] though not because of a conflict between an OCS claim and an EEZ entitlement. The negotiation that led to the 1997 agreement "faced the problem of continuing the 1972 seabed boundary westwards".[202] It solved it by creating a 1,800 sq. nautical miles Gray Area in which Australia was granted continental shelf rights, beyond its 200-nautical-mile zone but within Indonesia's EEZ.[203] It has been explained that "(t)here were offsetting gains and losses of water and seabed for both countries".[204] While Indonesia secured a large portion of the area under negotiation as its EEZ, its gain

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199 International Maritime Boundaries, Vol. II, India-Maldives, Rep. 6-8, pp. 1389, 1391.

200 B. M. Magnússon, footnote 37 *supra*, p. 142. See also UNCLOS III, Official Document, 23rd Plenary Meeting, UN Doc. A/CONF.62/SR.23, para. 70 (Egypt); *Ibid*., 126th Plenary Meeting, UN Doc. A/CONF.62/SR.126, para. 179 (Mexico).

201 International Maritime Boundaries, Vol. IV, Australia-Indonesia, Rep. 6-2(6), pp. 2697, 2699-2700, 2710.

202 International Maritime Boundaries, Vol. IV, Australia-Indonesia, Rep. 6-2(6), p. 2707.

203 International Maritime Boundaries, Vol. IV, Australia-Indonesia, Rep. 6-2(6), p. 2708-9; see also C. Yacouba and D. McRae, Vol. V, p. 3288; B. M. Magnússon, footnote 37 *supra*, p. 194.

204 International Maritime Boundaries, Vol. IV, Australia-Indonesia, Rep. 6-2(6), pp. 2697, 2711.

AUSTRALIA / INDONESIA
BOUNDARY AGREEMENTS:
1971-1997
Mercator Projection
WGS-84 Datum
(Scale accurate at 10°S)
Nautical Miles
Kilometers
© International Mapping, 2014.
Maritime Boundary
200 M limit
Seabed Boundary
Unit Area
Provisional Fisheries Surveillance Line
OCS Claims
Cooperation Zone
INDONESIA
AUSTRALIA
PAPUA NEW GUINEA
New Guinea
Celebes Sea
Banda Sea
Arafura Sea
Timor Sea
Gulf of Carpentaria
Java Sea
Sulawesi
Borneo
Java
Christmas I. (AUSTRALIA)
INDIAN OCEAN
TIMOR-LESTE

Figure 3.10

was offset by Australia's acquisition of seabed within Indonesia's EEZ.[205]

3.59 This unique delimitation is limited to the respective 200-nautical-mile entitlements of both parties; as the opposing coastlines are less than 400 nautical miles apart,[206] the overlapping EEZ entitlements were solved through a swap. Indeed, Australia did not submit this potential OCS claim to the CLCS because it lies within the 200-nautical-mile zone of Indonesia and did not diminish the International Area;[207] plainly the Parties appreciated that their respective 200-nautical-mile zone entitlements could be delimited as they saw fit.

3.60 The latter point is significant. The Australia-Indonesia treaty delimited their respective 200-nautical-mile zones and not an overlap between a State's customary EEZ with its attendant continental shelf entitlement and another State's OCS claim. It is thus irrelevant for the present case because there are no overlapping EEZs between Colombia and Nicaragua in the area in which Nicaragua makes its claims. There, Colombia, by virtue of the projections of both its insular territories and its mainland coast, has the sole entitlement to a 200-nautical-mile EEZ with its attendant continental shelf.[208]

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[205] International Maritime Boundaries, Vol. IV, Australia-Indonesia, Rep. 6-2(6), p. 2705, 2708.

[206] B. M. Magnússon, footnote 37 s*upra*, p. 194.

[207] International Maritime Boundaries, Vol. IV, Australia-Indonesia, Rep. 6-2(6), pp. 2708-2709; B. M. Magnússon, footnote 37 *supra*, p. 194-195.

[208] See Chapter 4 *infra*.

3.61 The tribunals in the Bay of Bengal cases resorted to small corrections with their corresponding anomalies, but not to accommodate geomorphological considerations; rather, adjustments were made to offset the effect of concave coasts. In *Bangladesh/Myanmar* and *Bangladesh* v. *India* the tribunals used a single line to delimit the EEZs and the OCS (the existence of which was not in doubt). By doing so, due to the *sui generis* geographic circumstances of the case, the tribunals created Gray Areas which were beyond Bangladesh's 200-nautical-mile zone (Bangladesh's OCS) but within Myanmar's and India's 200-nautical-mile zone, and which fell on the Bangladeshi side of the boundary. The result was that Bangladesh was granted the rights to the seabed and the subsoil while the other State in each case was granted rights to the water column. In these resulting Gray Areas, inconsistent claims were to be negotiated.[209]

[209] *Bangladesh/Myanmar*, p. 476.

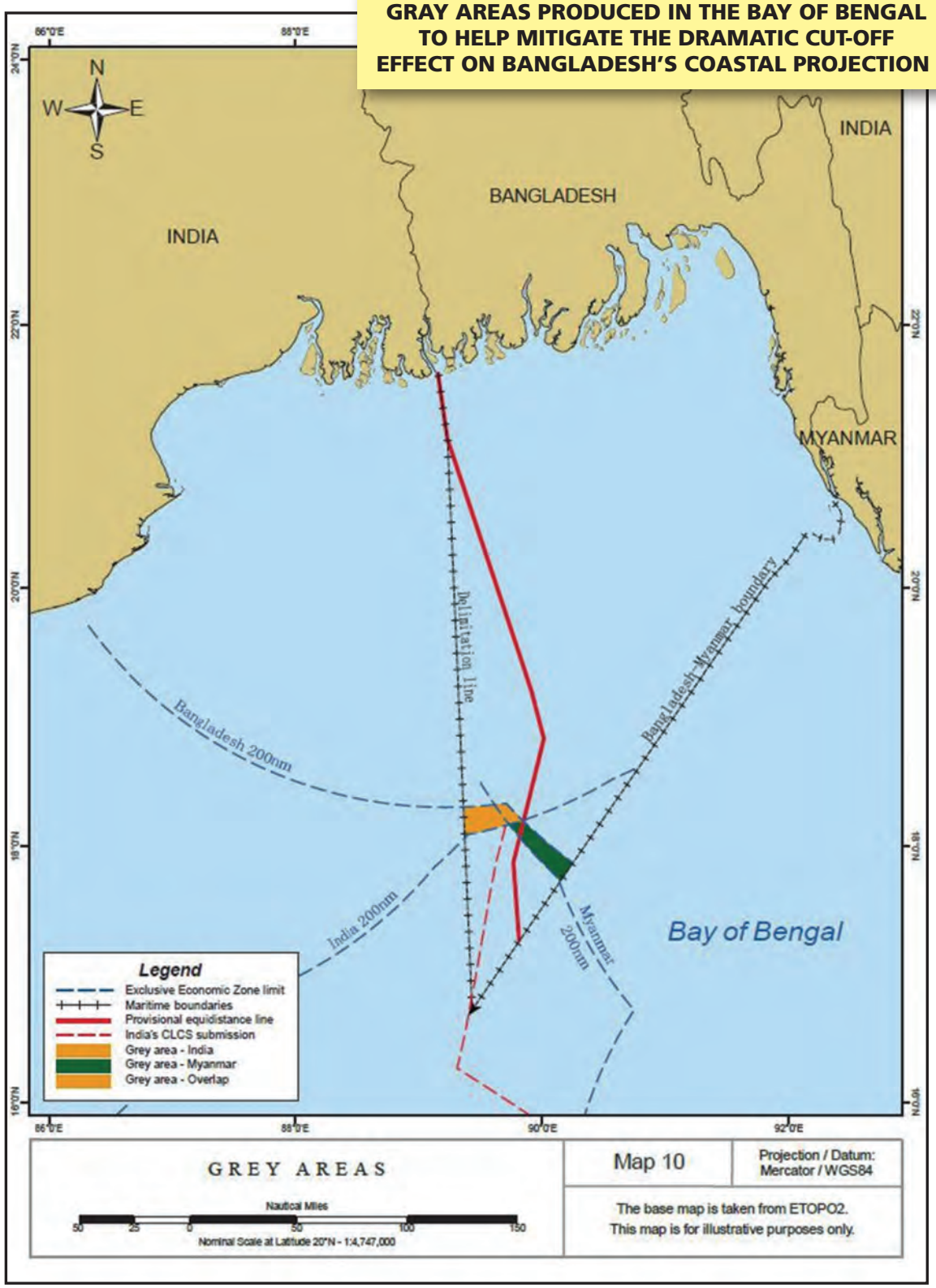
GRAY AREAS PRODUCED IN THE BAY OF BENGAL TO HELP MITIGATE THE DRAMATIC CUT-OFF EFFECT ON BANGLADESH'S COASTAL PROJECTION
INDIA
BANGLADESH
INDIA
MYANMAR
Delimitation line
Bangladesh-Myanmar boundary
Bangladesh 200nm
India 200nm
Myanmar 200nm
Bay of Bengal
Legend
Exclusive Economic Zone limit
Maritime boundaries
Provisional equidistance line
India's CLCS submission
Grey area - India
Grey area - Myanmar
Grey area - Overlap
GREY AREAS
Nautical Miles
Nominal Scale at Latitude 20°N - 1:4,747,000
Map 10
Projection / Datum: Mercator / WGS84
The base map is taken from ETOPO2.
This map is for illustrative purposes only.

Figure 3.11

3.62 In the geographical circumstances,[210] the lateral delimitation line was extended beyond 200 nautical miles in order to avoid a cut-off effect on Bangladesh.[211] ITLOS stated that:

> "when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result."[212]

3.63 The geographical circumstances and the cut-off effect were the reasons behind the deviation which created the Gray Area:

> "The Tribunal, therefore, takes the position that, while an adjustment must be made to its provisional equidistance line to abate the cut-off effect of the line on Bangladesh's concave coast, an equitable solution requires, in light of the coastal geography of the Parties, that this be done in a balanced way so as to avoid drawing a line having a converse distorting effect on the seaward projection of Myanmar's coastal façade.
>
> (…)
>
> The Tribunal decides that, in view of the geographic circumstances in the present case, the provisional equidistance line is to be deflected at the point where it begins to cut off the seaward

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210 See Magnússon, footnote 37 *supra*, p. 176.

211 See International Maritime Boundaries, Vol. VII, Bangladesh-India, Rep. 6-23 (Add. 1), pp. 4985, 4992; see *Ibid*., Vol. VII, Bangladesh-Myanmar, Rep. 6-24 (Add.1), pp. 4999, 5000.

212 *Bangladesh/Myanmar*, pp. 90-91, para. 292.

> projection of the Bangladesh coast. The direction of the adjustment is to be determined in the light of those circumstances."[213]

3.64 Thus, the small Gray Areas were created to avoid a cut-off effect, which would have otherwise resulted in the *sui generis* geographic circumstances. They were not created in response to a claimed overlap between an EEZ and an OCS claim, the latter based on geology and geomorphology – which was, in any case, never to arise, given that it was a lateral delimitation; in this case, it was extreme geography rather than geomorphology which warranted the creation of the Gray Areas through the adjustment of the equidistance line due to the geography of the region. If those circumstances in the Bay of Bengal were the reason for the creation of Gray Areas, suffice it to say that such circumstances do not obtain in the Caribbean Sea as between Nicaragua and Colombia.

3.65 The delimitations in the Bay of Bengal demonstrate that in unique situations where the geographic circumstances compel it, minor border adjustments via the creation of Gray Areas have been deemed acceptable deviations in State practice. Gray Areas were never created in response to a claim of an OCS encroachment over an EEZ with its attendant continental shelf title or on any large scale, as Nicaragua proposes.

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213 *Bangladesh/Myanmar*, pp. 98-99, paras. 325-329.

(4) SUMMARY CONCLUSIONS – STATE PRACTICE

3.66 The *Limits in the Seas* summarizes the law succinctly:

> "Regardless of the seafloor features, a State may claim, at a minimum, a 200-mile continental shelf. Under other LOS Convention provisions a state has the right to claim a 200-mile EEZ which includes jurisdictional rights over the living and nonliving resources of the seafloor and seabed. Thus, for those states whose physical continental margin does not extend farther than 200 miles from the baseline, the concept of the continental shelf is of less importance than before."[214]

3.67 The analysis of State practice demonstrates that, as a general matter, the OCS of one State may not encroach upon the 200-nautical-mile entitlement of another State. State practice confirms the irrelevance of geological and geomorphological considerations for delimitation within the 200-nautical-mile limit of a coastal State. Only one delimitation treaty creates a Gray Area (Australia-Indonesia), and it is actually consistent with State practice inasmuch as it stems from overlapping EEZs and not an OCS encroachment upon an EEZ. As for the Bay of Bengal cases, they were based on different geographical features and are not relevant to Nicaragua's claims against Colombia.

3.68 None of the features that called for a Gray Area solution in the few other cases in which they were created obtain in the Caribbean Sea. To fabricate a Gray Area in these circumstances

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[214] Limits in the Seas, No. 112.

would be inconsistent with international law and State practice. This is because: (i) Gray Areas have been responsive to special geographical circumstances which do not include a putative OCS overlap of an EEZ entitlement and such circumstances do not obtain in the instant case; (ii) Gray Areas have been created to deal with overlapping EEZ entitlements through mutual gains and offsets; (iii) Gray Areas are intentionally avoided by States due to their ensuing complications; and (iv) due to their problematic character, Gray Areas are only created in small pockets and not on a large scale, as would be required were Nicaragua's claim accepted.

3.69 In contrast to the instances of special arrangements discussed above, no overlapping EEZ entitlements can be resolved through gain and offset in the entire area, for Colombia's mainland and all of Colombia's islands in the Caribbean Sea, are each entitled to their *ipso jure* 200-nautical-mile zones. Moreover, as mentioned earlier, in the Caribbean Sea there are, in fact, no areas beyond 200 nautical miles from any State.[215]

D. State Practice in CLCS Submissions

3.70 Colombia has conducted an extensive analysis of State practice with respect to submissions of OCS claims to the CLCS.[216] The analysis reveals that in 73 out of the overall 77

[215] See footnote 165 *supra*.
[216] See Annex 50.

submissions, States did not claim an OCS that would have encroached upon another State's 200-nautical-mile entitlement. Of these 73 submissions, with the exception of submissions that terminated at points set by previous awards or by pre-existing treaties, 39 reached the 200-nautical-mile limit of other States. Of these 39 submissions, 35 involved States that could have potentially claimed an OCS that would have encroached upon the 200-nautical-mile entitlement of another State, but they stopped at the other State's 200-nautical-mile zone.

3.71 The practice of halting the OCS claims of one State at the 200-nautical-mile limit of neighbouring States is worldwide. A list of submissions made by States that respect the 200-nautical-mile limit of their neighbours may be found at Annex 50. These examples are taken from Europe, Africa, Asia, the Americas and Oceania, and include countries such as France, Australia, Japan, the United Kingdom, Pakistan, New Zealand, Ghana, Canada, Spain, Fiji, Norway, Palau, Sri Lanka, Trinidad and Tobago, Mozambique, Tanzania, the Bahamas and others.

3.72 Denmark's CLCS submission with respect to the area north of the Faroe Islands serves as a representative example of the way States have avoided encroaching upon the 200-nautical-mile entitlements of other States. The Executive Summary of Denmark's submission states that:

> "The outer limits of the continental shelf north of the Faroe Islands extend to the distance of 350 nautical miles from the baselines from which the

territorial sea lines around the Faroe Islands are measured. To the west, north-west, and south-east, the outer limits of the continental shelf are delineated by the 200 nautical mile limits of Iceland, Jan Mayen and the mainland of Norway, respectively. To the northeast, the outer limits are delineated by straight lines connecting fixed points in accordance with article 74(4) and Article 76(7) of the Convention."[217]

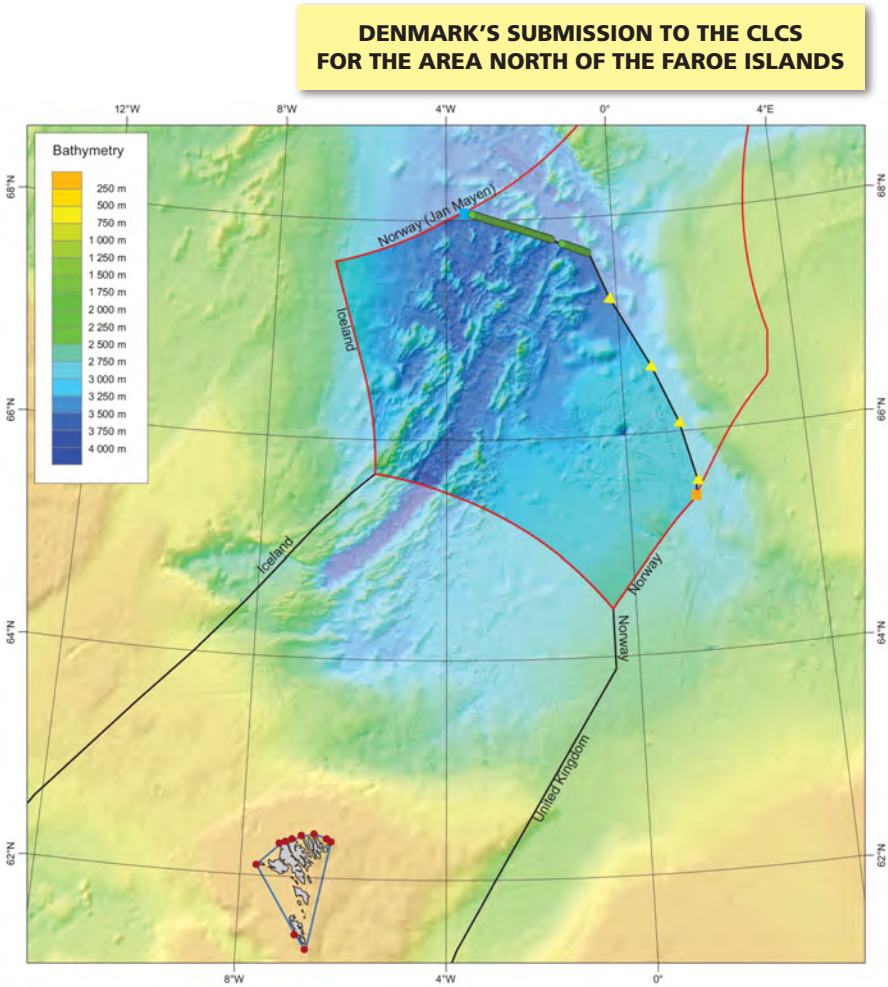

Figure 3.12

[217] Submission by Denmark, The Continental Shelf North of the Faroe Islands, Executive Summary, Section 6, available at: http://www.un.org/depts/los/clcs_new/submissions_files/dnk28_09/dnk2009executivesummary.pdf (last visited 17 Sep. 2017).

3.73 Japan's CLCS submission places a number of points of the limit of its OCS claim on the 200-nautical-mile limit of nearby States. Thus, with respect to the Southern Kyushu-Palau Ridge Region, the submission indicates that one of the fixed points on the outer limits of the OCS claim is located on the 200-nautical-mile line from the baselines of Palau. Another fixed point is located on the 200-nautical-mile limit from the baselines of the Federated States of Micronesia.[218] In the Minami-lo To Island Region, a fixed point is located on the 200-nautical-mile line drawn from the baselines of the United States.[219] And in the Ogasawara Plateau region, part of Japan's outer limits again stops at a fixed point on the 200-nautical-mile line from the baselines of the United States.[220]

[218] Submission by Japan, Executive Summary, available at http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf (last visited 17 Sep. 2017).

[219] Submission by Japan, Executive Summary, available at http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf (last visited 17 Sep. 2017).

[220] Submission by Japan, Executive Summary, available at http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf (last visited 17 Sep. 2017).

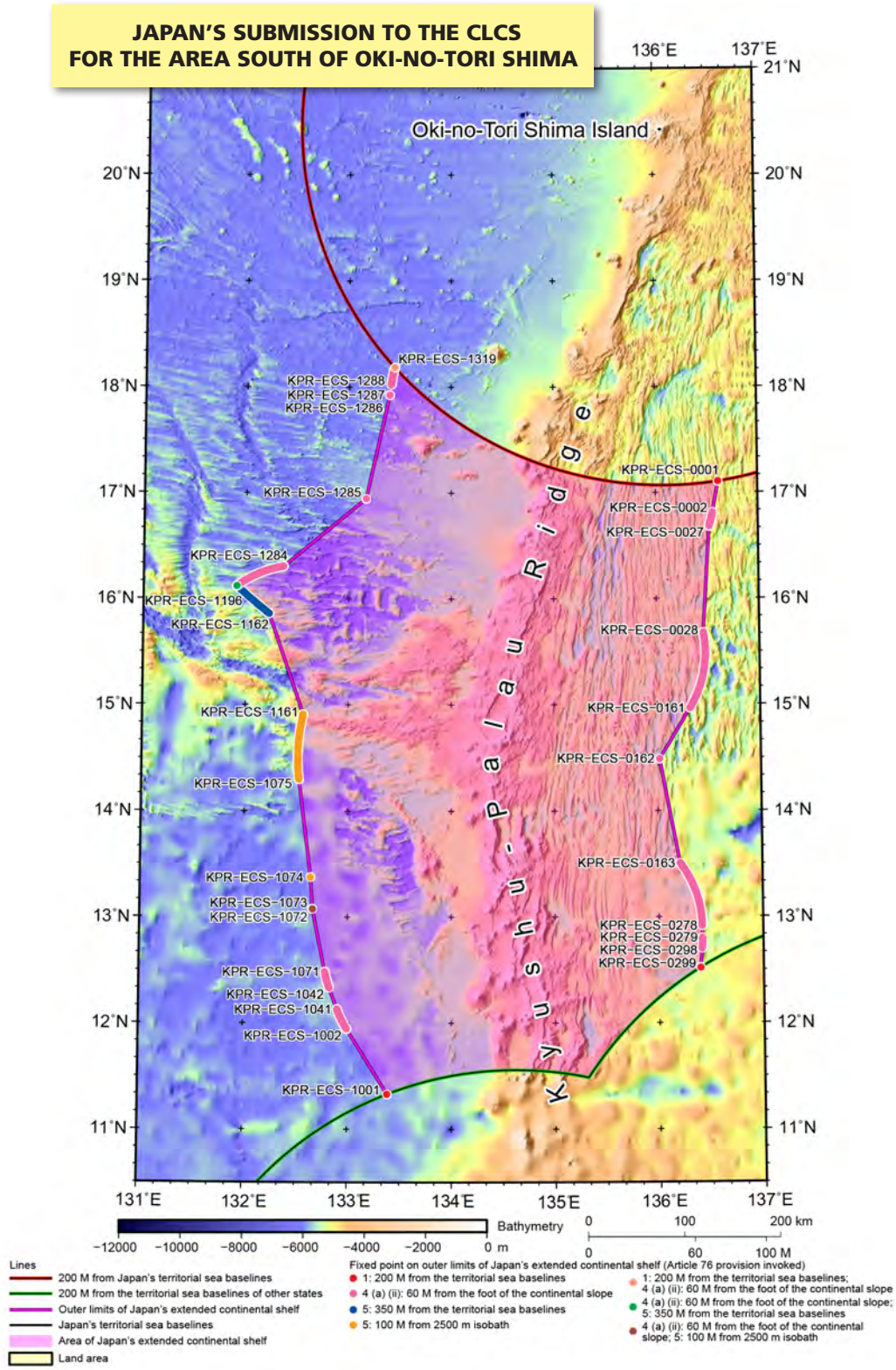
JAPAN'S SUBMISSION TO THE CLCS
FOR THE AREA SOUTH OF OKI-NO-TORI SHIMA
Oki-no-Tori Shima Island
KPR-ECS-1319
KPR-ECS-1288
KPR-ECS-1287
KPR-ECS-1286
KPR-ECS-1285
KPR-ECS-1284
KPR-ECS-1196
KPR-ECS-1162
KPR-ECS-1161
KPR-ECS-1075
KPR-ECS-1074
KPR-ECS-1073
KPR-ECS-1072
KPR-ECS-1071
KPR-ECS-1042
KPR-ECS-1041
KPR-ECS-1002
KPR-ECS-1001
KPR-ECS-0001
KPR-ECS-0002
KPR-ECS-0027
KPR-ECS-0028
KPR-ECS-0161
KPR-ECS-0162
KPR-ECS-0163
KPR-ECS-0278
KPR-ECS-0279
KPR-ECS-0298
KPR-ECS-0299
Palau Ridge
Kyushu-
136°E
137°E
21°N
20°N
19°N
18°N
17°N
16°N
15°N
14°N
13°N
12°N
11°N
131°E
132°E
133°E
134°E
135°E
Bathymetry
−12000 −10000 −8000 −6000 −4000 −2000 0 m
0 100 200 km
0 60 100 M
Lines
200 M from Japan's territorial sea baselines
200 M from the territorial sea baselines of other states
Outer limits of Japan's extended continental shelf
Japan's territorial sea baselines
Area of Japan's extended continental shelf
Land area
Fixed point on outer limits of Japan's extended continental shelf (Article 76 provision invoked)
1: 200 M from the territorial sea baselines
4 (a) (ii): 60 M from the foot of the continental slope
5: 350 M from the territorial sea baselines
5: 100 M from 2500 m isobath
1: 200 M from the territorial sea baselines; 4 (a) (ii): 60 M from the foot of the continental slope
4 (a) (ii): 60 M from the foot of the continental slope; 5: 350 M from the territorial sea baselines
4 (a) (ii): 60 M from the foot of the continental slope; 5: 100 M from 2500 m isobath

Figure 3.13a

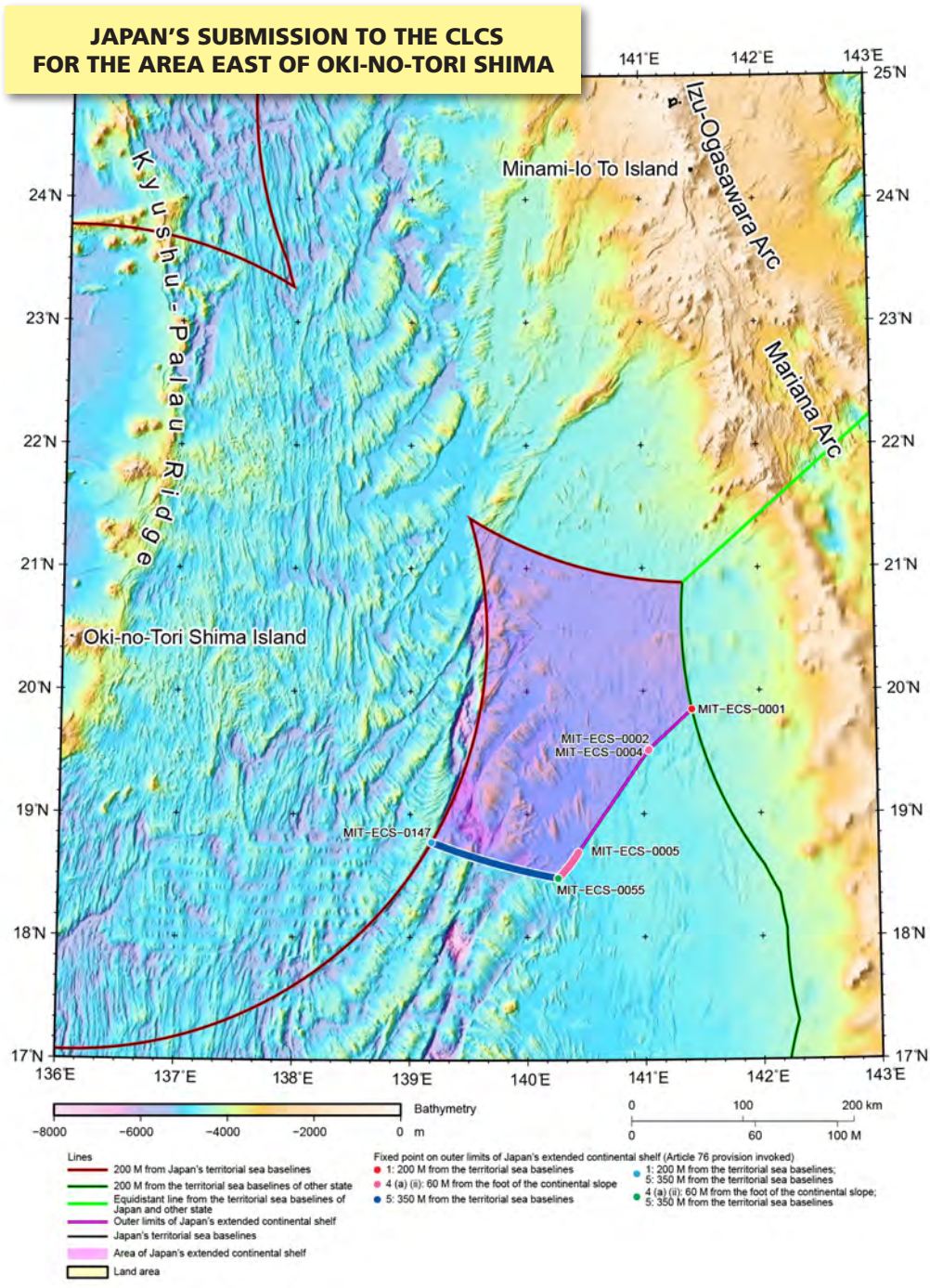
JAPAN'S SUBMISSION TO THE CLCS
FOR THE AREA EAST OF OKI-NO-TORI SHIMA
Minami-Io To Island
Izu-Ogasawara Arc
Mariana Arc
Kyushu-Palau Ridge
Oki-no-Tori Shima Island
MIT-ECS-0001
MIT-ECS-0002
MIT-ECS-0004
MIT-ECS-0147
MIT-ECS-0005
MIT-ECS-0055
Bathymetry
Lines
200 M from Japan's territorial sea baselines
200 M from the territorial sea baselines of other state
Equidistant line from the territorial sea baselines of Japan and other state
Outer limits of Japan's extended continental shelf
Japan's territorial sea baselines
Area of Japan's extended continental shelf
Land area
Fixed point on outer limits of Japan's extended continental shelf (Article 76 provision invoked)
1: 200 M from the territorial sea baselines
4 (a) (ii): 60 M from the foot of the continental slope
5: 350 M from the territorial sea baselines
1: 200 M from the territorial sea baselines; 5: 350 M from the territorial sea baselines
4 (a) (ii): 60 M from the foot of the continental slope; 5: 350 M from the territorial sea baselines

Figure 3.13b

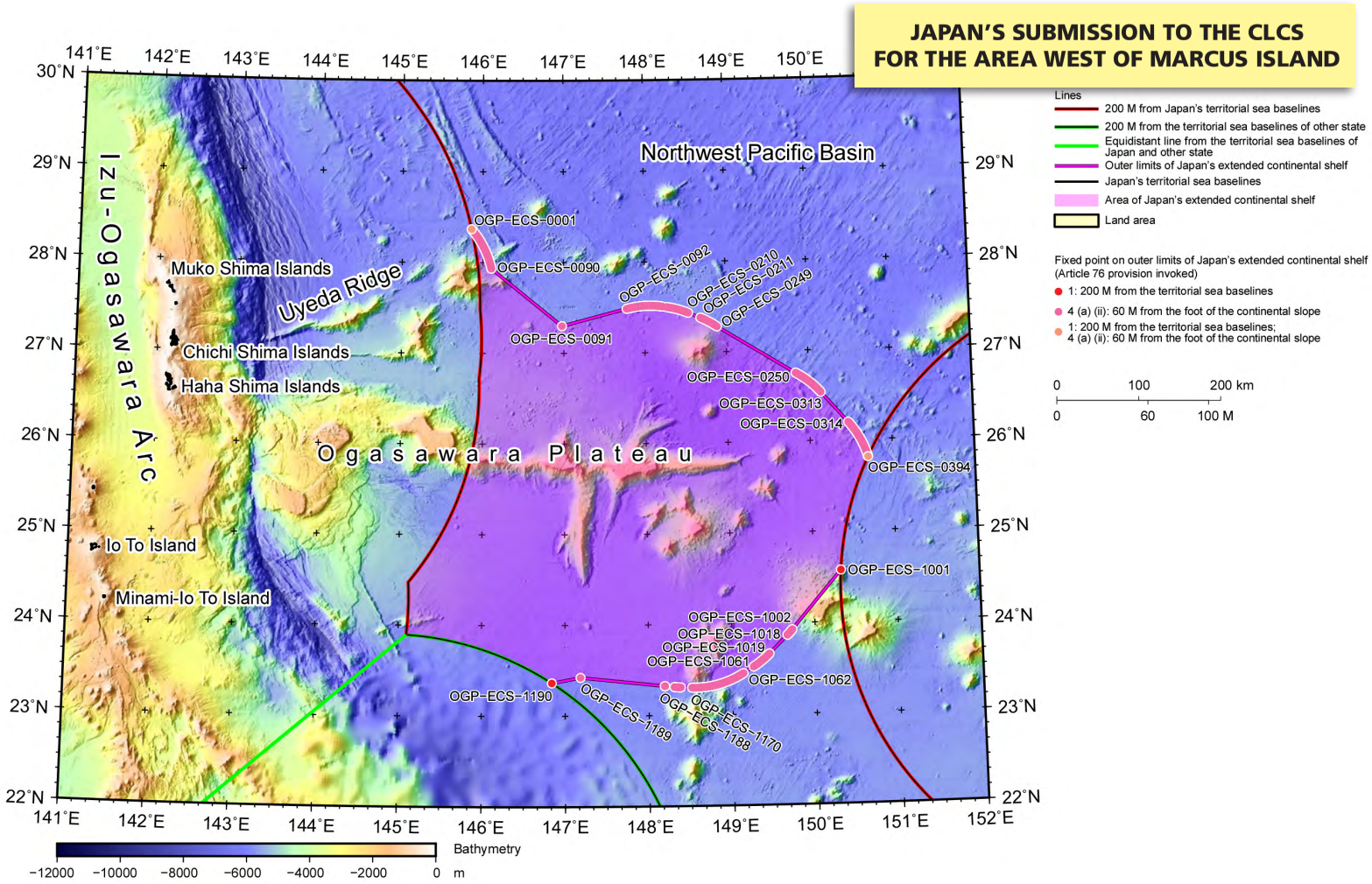
JAPAN'S SUBMISSION TO THE CLCS
FOR THE AREA WEST OF MARCUS ISLAND
Northwest Pacific Basin
Izu-Ogasawara Arc
Uyeda Ridge
Muko Shima Islands
Chichi Shima Islands
Haha Shima Islands
Ogasawara Plateau
Io To Island
Minami-Io To Island
OGP-ECS-0001
OGP-ECS-0090
OGP-ECS-0092
OGP-ECS-0210
OGP-ECS-0211
OGP-ECS-0249
OGP-ECS-0091
OGP-ECS-0250
OGP-ECS-0313
OGP-ECS-0314
OGP-ECS-0394
OGP-ECS-1001
OGP-ECS-1002
OGP-ECS-1018
OGP-ECS-1019
OGP-ECS-1061
OGP-ECS-1062
OGP-ECS-1190
OGP-ECS-1189
OGP-ECS-1188
OGP-ECS-1170
Lines
200 M from Japan's territorial sea baselines
200 M from the territorial sea baselines of other state
Equidistant line from the territorial sea baselines of Japan and other state
Outer limits of Japan's extended continental shelf
Japan's territorial sea baselines
Area of Japan's extended continental shelf
Land area
Fixed point on outer limits of Japan's extended continental shelf (Article 76 provision invoked)
1: 200 M from the territorial sea baselines
4 (a) (ii): 60 M from the foot of the continental slope
1: 200 M from the territorial sea baselines; 4 (a) (ii): 60 M from the foot of the continental slope
0 100 200 km
0 60 100 M
Bathymetry
−12000 −10000 −8000 −6000 −4000 −2000 0 m

Figure 3.13c

3.74 France adopted a similar methodology with respect to its OCS submission in the areas of French Guyana and New Caledonia. France's Executive Summary states that the OCS would not encroach upon Australia's EEZ: "The extension is limited to the west by the area under Australian jurisdiction (EEZ)". Accordingly, one of the fixed points along the western part of France's submission is specified as based on application of the Gardiner formula and the "Australian 200 mile limit".[221]

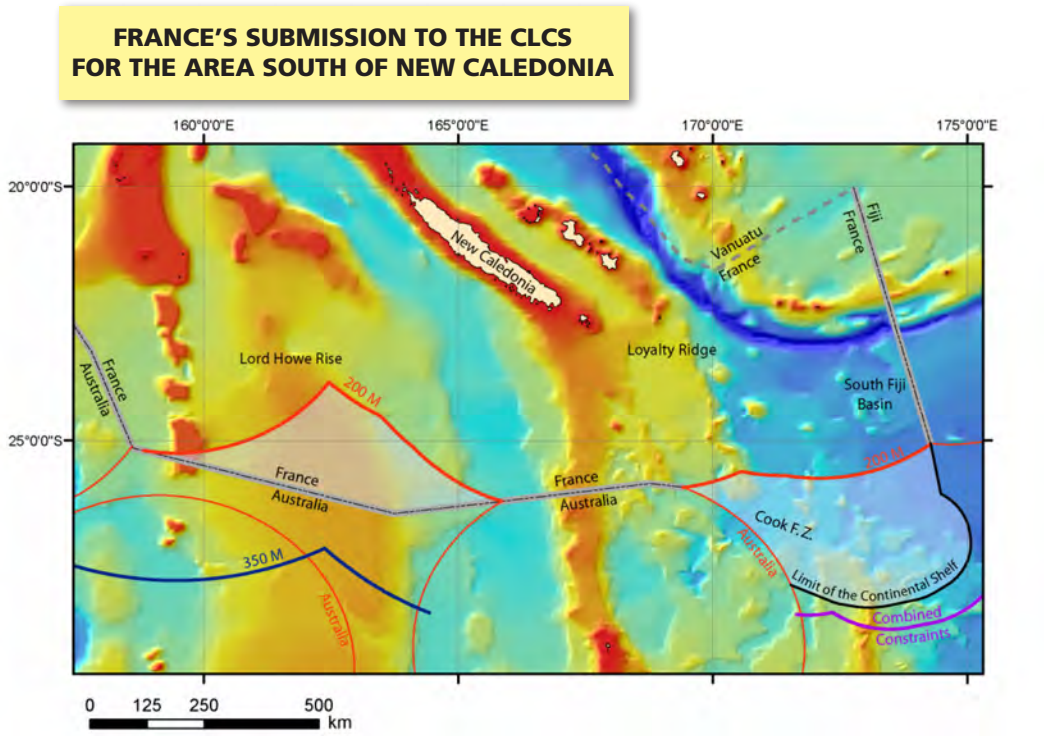

Figure 3.14

[221] Submission by France in respect of the Areas of French Guiana and New Caledonia, Executive Summary, para. 2.2.1, available at: http://www.un.org/depts/los/clcs_new/submissions_files/fra07/fra_executivesummary_2007.pdf (last visited 17 Sep. 2017).

3.75 Similarly, Spain in its submission concerning the area west of the Canary Islands, avoided encroaching upon Morocco's 200-nautical-mile entitlement. Spain specifically limited its submission in the south to a fixed point (No. 448), at "the intersection with the 200M computed line from third parties".[222]

[222] Submission by Spain with respect to the Area West of the Canary Islands, Executive Summary, available at: http://www.un.org/depts/los/clcs_new/submissions_files/esp77_14/esp_2014_en.pdf (last visited 17 Sep. 2017).

SPAIN'S SUBMISSION TO THE CLCS FOR THE AREA WEST OF THE CANARY ISLANDS

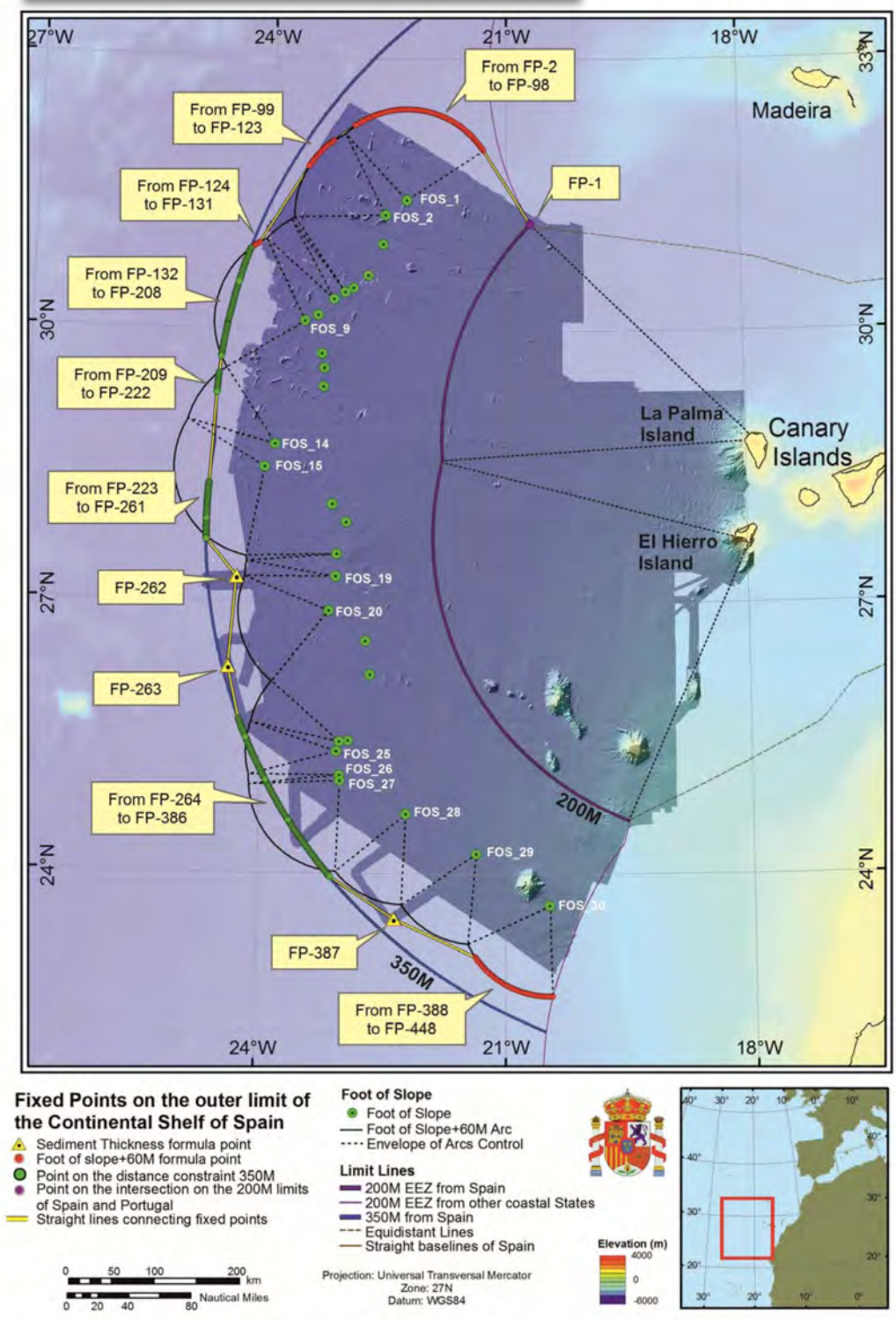

Figure 3.15

3.76 The Bahamas also respected the 200-nautical-mile limits of the United States by commencing its OCS limits at a fixed point (No. 1), at "the 200M line measured from the territorial sea baselines of the United States of America".[223]

[223] Submission by The Bahamas, Executive Summary, Section 6.3, available at: http://www.un.org/depts/los/clcs_new/submissions_files/bhs71_14/BHS-ES-DOC.pdf (last visited 17 Sep. 2017).

THE BAHAMA'S SUBMISSION TO THE CLCS FOR THE AREA NORTHEAST OF GRAND BAHAMA ISLAND

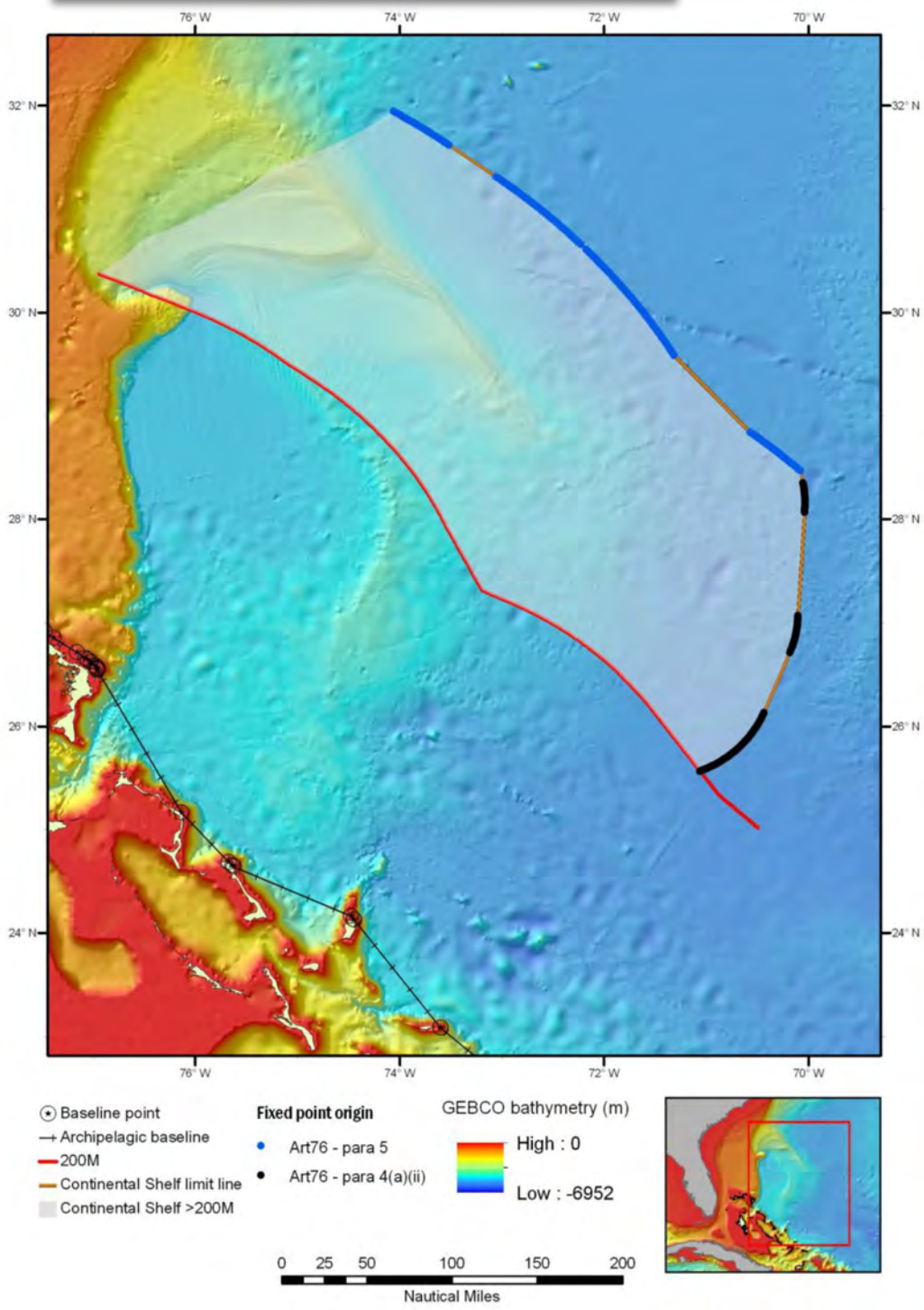

Figure 3.16

3.77 Thus, the majority of States recognize that OCS claims should only be made where the maritime areas concerned lie beyond 200 nautical miles from the nearest land territory, be it mainland or insular, and should not infringe on the 200-nautical-mile entitlements of other States. Of the 77 submissions, only four States' claims failed to respect another State's 200-nautical-mile entitlement: China, the Republic of Korea, Somalia and, of course, Nicaragua.

3.78 In the vast majority of State practice, OCS claims did not encroach upon another State's EEZ, not only in delimitation practice, but also in requests to the CLCS for delineation of the outer limit of the continental shelf.

E. The OCS in Doctrine

3.79 Article 38 (1) (d) of the Statute of the International Court of Justice directs the Court, "as subsidiary means for the determination of rules of law", to consult "the teachings of the most highly qualified publicists of the various nations." Colombia's submission that the UNCLOS based OCS regime may not encroach upon another State's customary right to an EEZ with its attendant continental shelf, both under UNCLOS and under customary international law, is well established in doctrine. Although some outliers exist,[224] the great majority of legal scholarship supports Colombia's position.

[224] See S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation*, 2016; S. Kaye, "The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice", *Australian Journal of International Law* 1998, Vol. 19, p. 49; M. D. Evans, *Relevant Circumstances and Maritime Delimitation*, Oxford University Press, 1989, p. 57.

3.80 The conventional nature of the OCS, which precludes any encroachment upon a non-Party State's customary EEZ and 200 nautical miles continental shelf rights, has been accepted in legal scholarship. The fact that the OCS was granted to wide-shelf States in return for revenue-sharing and subject to the determination of the CLCS is also accepted in most legal scholarship.[225] Doctrine also recognizes that the OCS was intended to encroach upon the Area, the common heritage of mankind, rather than another State's EEZ with its attendant continental shelf, as the provisions of Article 76 are intended to protect the rights of the international community.[226]

3.81 This Section will demonstrate that the type of OCS claim which Nicaragua is making is not supported by most international legal scholars. Indeed, legal scholarship confirms that an OCS may not encroach upon another State's EEZ: (1) It is not the proof of natural prolongation, upon which a claim to an OCS claim must rely that is the basis for title within 200 nautical miles from any State's baselines; the latter is a right *ipso jure*, and (2) most scholarship favours the use of a single

[225] See W. T. Burke, footnote 42 *supra*, pp. 402-404; See also Ø. Jensen, footnote 45 *supra*; S. V. Suarez, *The Outer Limits of the Continental Shelf, Legal Aspects of their Establishment*, Springer, 2008, p. 73 (available at the Peace Palace Library); J. Mossop, footnote 36 *supra*, p. 87; B. Kunoy, footnote 19 *supra*, pp. 66-67, 71-72; International Law Association Committee on the Legal Issues of the Outer Continental Shelf, *Draft Report on Article 82 of the 1982 UN Convention on the Law of the Sea for the 2008 ILA Conference*, Rio de Janeiro, Brazil, para. 1.2, available at https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS15/ABLOS15-10.pdf (last visited 17 Sep. 2017).

[226] See Ø. Jensen, footnote 45 *supra*, p. 111.

maritime delimitation line, comprising both the EEZ and the continental shelf, and the avoidance, especially on a large scale, of Gray Areas.

(1) NATURAL PROLONGATION IS NOT THE SOURCE OF TITLE WITHIN 200 NAUTICAL MILES FROM A STATE'S BASELINES

3.82 Most legal scholars concur that within 200 nautical miles from the baselines, the concept of natural prolongation is no longer the source of legal title. Rather, the regime of the EEZ grants the State title over the water column, the seabed and the subsoil, regardless of its geology and geomorphology.

3.83 Although Malcom Evan's personal conclusion was an outlier, he analysed correctly the Court's determination in *Libya/Malta* and concluded that:

> "Natural prolongation would only provide the legal basis of title to a continental shelf where a geological shelf extended beyond 200 miles from *any* state, i.e. it would not conflict with a 200-mile zone drawn from the coast of another state".[227]

3.84 Øystein Jensen writes that:

> "the relevance of geological facts to the purpose of maritime delimitation was seriously hampered by the development of exclusive economic zones from the mid-1970s (as a customary practice

[227] M. D. Evans, footnote 224 *supra*, p. 51.

> before UNCLOS) onwards. In reality, a significant portion of the continental shelf concept was 'consumed', since coastal states were secured sovereign rights in the water and the seabed out to 200 nautical miles, regardless of the nature of the seabed. Thus, the ICJ in the *Libya-Malta* case stated that the geological features of the seabed would be uninteresting for the delimitation of the continental shelf *within* 200 nautical miles". [228]

Jensen then quotes the excerpt from the Court's Judgment in *Libya/Malta*, already cited above, and continues:

> "The *Libya-Malta* case thus indicated that geological and geomorphological factors would not have significance in delimitation disputes. The situation was, and still is, that the vast majority of delimitation disputes relate to the sea areas where the distance between the respective states' baselines is less than 400 nautical miles. Therefore, the relevance of geology and geomorphology seemed to be evaporating in the law of maritime delimitation"[229]

3.85 It is accepted that the concept of the natural prolongation does not apply within EEZs,[230] only surviving for delimitations of the seabed and subsoil beyond the EEZ, *i.e.*, beyond 200 nautical miles from the baselines of any State.[231] Professor Thomas Cottier states:

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228 See Ø. Jensen, footnote 45 *supra*.
229 See Ø. Jensen, footnote 45 *supra*, pp. 139-140.
230 See Ø. Jensen, footnote 45 *supra*, pp. 140-141.
231 See Ø. Jensen, footnote 45 *supra*, p. 141.

> "the EEZ includes full jurisdiction over shelf rights. While the shelf can exist independently, the EEZ necessarily includes the continental shelf. As the Court phrased it: 'there can be a continental shelf where there is no exclusive economic zone, (but) there cannot be an exclusive economic zone without a corresponding continental shelf'. It is important to note that up to the 200 nm limit, the existence of the EEZ is no longer dependent upon the existence of a shelf in the physical sense. *Thus, to the extent of 200 nm, the doctrine of natural prolongation as a legal title to the shelf no longer applies* under the definition of Article 76 of the 1982 Convention. *Shelf rights therefore directly rely upon the EEZ*."[232]

Professor Cottier notes the "absorption of the traditional shelf through the concept of the EEZ":

> "The adoption of the 'distance principle' declared applicable to the shelf by the Court … demonstrates that a shelf zone, even if it exists independently, is increasingly defined by, and inseparable from, criteria established for the EEZ. This is true with respect to delimitation between adjacent or opposite coasts that are less than 400 nm apart. In this scenario, present international law ultimately defines the expense of shelf zones on the basis of the more comprehensive concept of the EEZ. It will be seen that traditional geomorphological criteria of the shelf, which relate to natural prolongation are no longer applied within 200 nm from the coast."[233]

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[232] T. Cottier, *Equitable Principles of Maritime Boundary Delimitation*, Cambridge University Press, 2015, para. 123 (available at the Peace Palace Library) (emphasis added).

[233] T. Cottier, *Equitable Principles of Maritime Boundary Delimitation*, Cambridge University Press, 2015, para. 123, p. 124.

3.86 Judge Anderson also concluded that pursuant to developments in international law after UNCLOS, confirmed by the Court in *Libya/Malta*, the concept of natural prolongation ceased to be relevant for delimitations within 200 nautical miles from a State's baselines:

> "Those recent developments about entitlement to shelf rights were crystallised in the Libya/Malta case, which concerned delimitation. The acceptance into the law of the distance criterion had a direct effect upon the law relating to the delimitation of the continental shelf. In the way in which there is no longer a role for geological or geophysical factors in establishing the entitlement of the coastal state, so also is there no role for those factors in delimiting the continental shelf within 200 nm of two or more coastal states… Where the case concerns boundaries which do not exceed 200 nm from the relevant coasts, the presence of submarine features such as channels, ridges, banks, troughs, caps or spurs should not affect a delimitation reached in accordance with the rules of international law: other principles and factors would be determinative."[234]

3.87 Leonard Legault and Blair Hankey, stress that "(a)lthough the term 'natural prolongation' has geomorphological and geological origins, it has become essentially a legal concept expressive of the basis of title and of the outer limit of that title":

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[234] D. H. Anderson, "Some Recent Developments in the Law Relating to the Continental Shelf", *Journal of Energy and Natural Resources Law*, Vol. 6, 1988, pp. 95, 97 (available at the Peace Palace Library).

> "Where the physical continental shelf extends to a distance of less than 200 miles, natural prolongation is defined solely in terms of geographical adjacency measured from the coast, that is, by the distance criterion; *thus, title in respect of the continental shelf up to 200 miles from the coast is determined on precisely the same basis as title in respect of the economic zone* (although that zone does not require the doctrinal underpinning of 'natural prolongation' that is inherent in the concept of the continental shelf). Where the physical continental shelf extends beyond 200 miles from the coast, natural prolongation is defined by a combination of geological-geomorphological and geographical or distance criteria."[235]

3.88 David A. Colson also concludes that "the Court in 1985 erased natural prolongation as a factor insofar as the exclusive economic zone was concerned but expressly left open the possibility that international law might deem geological and geomorphological factors relevant to delimitation on the outer continental shelf."[236] Colson opined that "(f)ollowing the advent of the 200-nautical-mile zone, *Libya-Malta* held that such facts are not relevant because they are *unrelated to title in this zone*, but it left open the possibility of their relevance to delimitation of the outer continental shelf."[237]

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[235] L. H. Legault and B. Hankey, footnote 196 *supra*, pp. 982-983 (emphasis added).

[236] D. A. Colson, "The Delimitation of the Outer Continental Shelf between Neighboring States", *American Journal of International Law*, Vol. 97, 2003, pp. 100 (available at the Peace Palace Library).

[237] D. A. Colson, "The Delimitation of the Outer Continental Shelf between Neighboring States", *American Journal of International Law*, Vol. 97, 2003, pp. 100, pp. 102-103 (emphasis added).

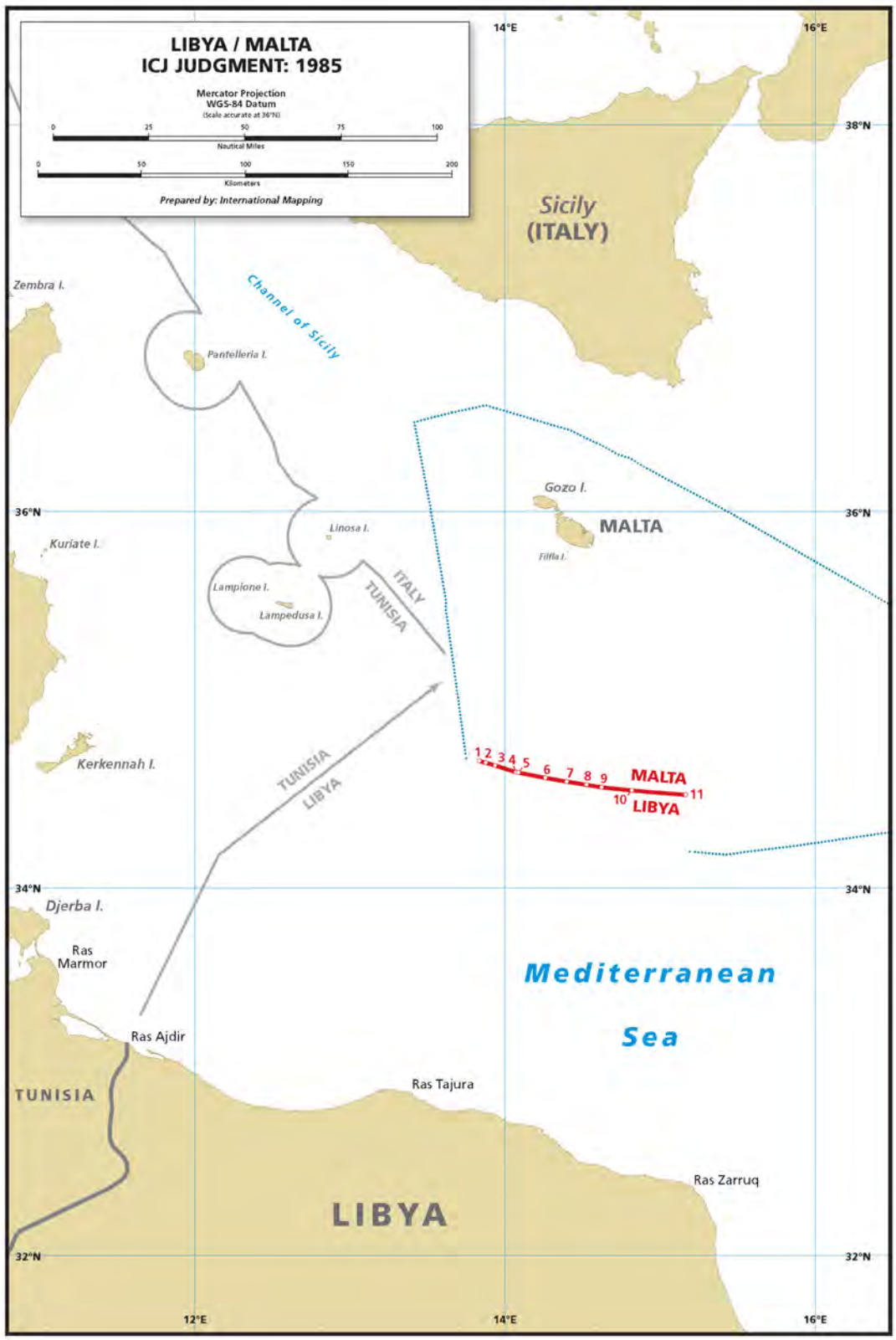
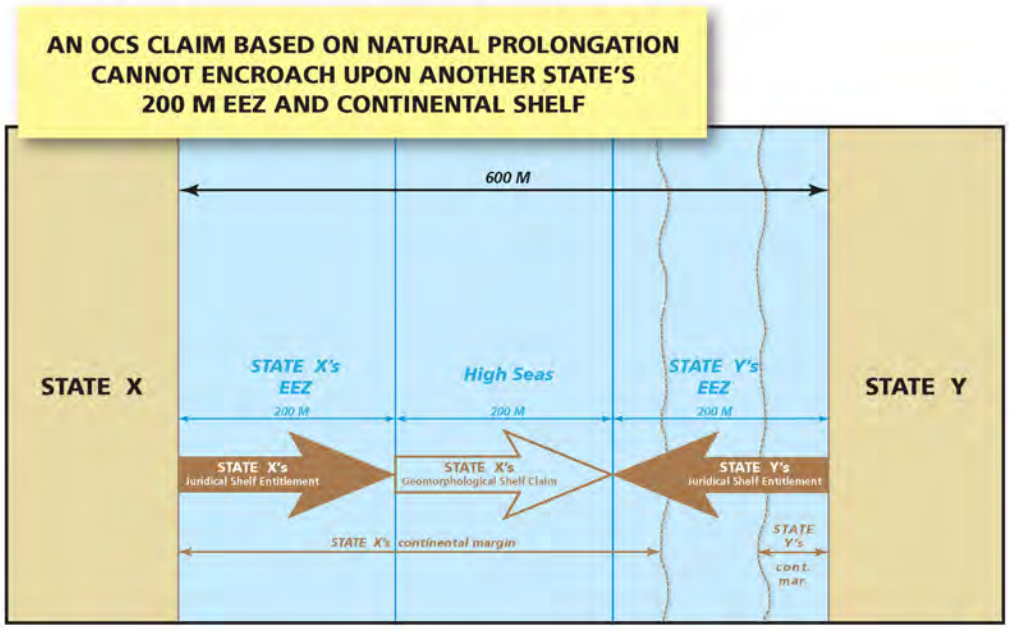

LIBYA / MALTA
ICJ JUDGMENT: 1985
Mercator Projection
WGS-84 Datum
(Scale accurate at 36°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping
14°E
16°E
38°N
Sicily
(ITALY)
Zembra I.
Channel of Sicily
Pantelleria I.
Gozo I.
36°N
MALTA
Linosa I.
Kuriate I.
Filfla I.
Lampione I.
Lampedusa I.
ITALY
TUNISIA
1 2 3 4 5 6 7 8 9 MALTA
10 LIBYA 11
Kerkennah I.
TUNISIA
LIBYA
34°N
Djerba I.
Ras
Marmor
Mediterranean
Sea
Ras Ajdir
TUNISIA
Ras Tajura
Ras Zarruq
LIBYA
32°N
12°E
14°E
16°E

Figure 3.17

3.89 After noting that natural prolongation was no longer relevant for delimitations within any State's 200-nautical-mile zone, Jensen explored various scenarios of potential maritime delimitation, concluding that an OCS claim, which is based upon natural prolongation, cannot encroach upon another State's 200-nautical-mile zone:

> "In example 1, let us imagine two states located 600 nautical miles opposite each other. States X and Y each have proclaimed their exclusive economic zones of 200 nautical miles, so that an outer continental shelf area of equivalent size lies between them. States X and Y make their submissions to the Commission. The Commission finds that the continental shelf of state Y plunges down to the deep ocean floor only 50 nautical miles off its coast. The continual shelf of state X, on the other hand, proves to extend beyond its 200 nautical mile limit, all the way under the 200 mile intersection, intruding even into the 200 nautical mile zone of state Y. In this situation, the *Commission will recommend that the continental shelf of state Y should cover the seabed only out to 200-miles*."[238]

[238] Ø. Jensen, footnote 45 *supra*, p. 142 (emphasis added).



Source: *The Commission on the Limits of the Continental Shelf,* Oystein Jensen, 2014.

Figure 3.18

3.90 In Jensen's example, even though the natural prolongation of State Y extends into the 200-nautical-mile zone of State X, due to the fact that an OCS is based upon the concept of natural prolongation, which no longer grants title or affects delimitations within 200 nautical miles, State X is entitled to its entire 200-nautical-mile zone.

3.91 Colson, who, like the majority of scholars, accepted the fact that natural prolongation was no longer the basis for title within 200 nautical miles from the coast and hence was irrelevant for delimitation within that distance, subjected a similar scenario to analysis:

> "It may be useful to begin with a simple example. Assume that countries A and B are opposite and

> 500 nautical miles apart. Each maintains a 200-nautical-mile zone claim; thus, a 100-nautical-mile strip lies between these two zones. Furthermore, assume that country A has a very narrow continental shelf, which drops off to the deep seabed within 75 nautical miles of the coast. Country B, however, is a broad margin state. Its continental shelf (in the terms of Article 76) actually extends through its 200-nautical-mile zone, the entire 100-nautical-mile strip, and into the 200-nautical-mile zone of country A. In such a situation, in concept, the law seems to provide (1) that country A is entitled to its entire 200-nautical-mile zone, including the portion of outer continental shelf attributable to country B that intrudes into its 200-nautical-mile zone; but (2) that country A is not entitled to any of the outer continental shelf in the 100- nautical-mile strip, as that is attributable solely to country B."[239]

(2) Support for a Single Delimitation Line and Avoidance of Gray Areas

3.92 Any encroachment by an OCS upon another State's EEZ would in effect create a Gray Area by separating the continental shelf rights (deriving from an OCS claim) from the water column rights (deriving from EEZ rights). State practice and legal scholarship manifest a preference for a single delimitation line. For this reason, as explained earlier, Gray Areas are a rare phenomenon in maritime delimitation practice, created under extreme geographical circumstances and only on a small scale, due to the problems attendant on separating water column and seabed rights.[240] Professor Cottier writes that:

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239 D. Colson, footnote 236 *supra*, pp. 103-104.

240 See Chapter 5 *infra.*

> "The case law and state practice on maritime delimitation has approximated the two zones (EEZ and Continental Shelf) by the use of single boundary lines. The Court in *Qatar v. Bahrain* observed that the concept of a single maritime boundary stems not from multilateral treaty law but from state practice, and that it finds its explanation in the desire of states to establish one uninterrupted boundary line delimiting the various – partially coincident – zones appertaining to them. The Tribunal in *Guyana v. Suriname* recalled that while the regimes are separate, a single maritime boundary avoids the difficult practical problems that could arise were one party to have rights over the water column and the other rights over the seabed and subsoil below the water column".[241]

3.93 On the basis of his review, Professor Cottier proposes that "the prevailing convergence and similarities of the shelf and the EEZ, and the evolution towards a single homogeneous zone, call for a principle of identical boundary lines".[242] He concludes that State practice supports the use of a single maritime boundary.[243]

3.94 Nor is Professor Cottier alone in deprecating the creation of Gray Areas. As mentioned above, Judge David Anderson also supports a single maritime boundary and objects to the creation of Gray Areas due to their inherent problems:

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241 T. Cottier, footnote 232 *supra*, p. 124.
242 T. Cottier, footnote 232 *supra*, p. 125.
243 T. Cottier, footnote 232 *supra*, pp. 126-129.

> "The existence of different boundaries for different purposes results in a situation of overlapping functional jurisdictions, which can all too easily lead to practical problems calling for consistent monitoring, *e.g.*, through the creation of a bilateral oversight commission. Such problems are best avoided by agreeing upon a single, all-purpose boundary."[244]

3.95 A Chamber of the Court has also expressed its concern over separating water column and seabed rights in the *Gulf of Maine* case:

> "In reality, a delimitation by a single line, such as that which has to be carried out in the present case, i.e., a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard, moreover, it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation".[245]

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[244] D. H. Anderson, footnote 234 *supra*, p. 32.

[245] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 327, para. 194; see also, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 93, para. 173

3.96 Commenting on this judgment of the Chamber, Legault and Hankey also support the use of a single delimitation line and warn of the severe problems that a separation between maritime entitlements in the same area through the creation of Gray Areas can produce.[246] They stress that "it seems more immediately evident that the parallel jurisdiction of two states in the same maritime space would carry great potential for administrative chaos and political conflict."[247]

3.97 Professor Orrego Vicuña states that when considering a separation between overlapping entitlements "(i)t is also necessary to take into account in this regard the difficulties that could derive from the overlapping of different jurisdictions over the same geographical ambit and how these considerations of convenience can strengthen the trend in favor of a single maritime boundary line."[248]

3.98 As the comprehensive analysis conducted by Professor Orrego Vicuña demonstrates, most South American States, and notably Colombia, were proponents of the single maritime boundary long before UNCLOS was signed. From the Santiago

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(*Qatar* v. *Bahrain*); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 440, para. 286 (*Cameroon* v. *Nigeria: Equatorial Guinea intervening*); *Award in the Arbitration Regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, 17 Sep. 2007, Vol. XXX R.I.A.A*, para. 334.

246 L. H. Legault and B. Hankey, footnote 196 *supra*, pp. 983-988.

247 L. H. Legault and B. Hankey, footnote 196 *supra*, pp. 984-986.

248 F. Orrego Vicuña, footnote 39 *supra*, pp. 196-197.

Declaration on the Maritime Zones of 18 August 1952 and the subsequent delimitation treaties signed by Colombia, Colombia has persisted in implementing the trend of a single maritime boundary (as have other South American countries).[249] This "very clear trend" was followed by many other States outside the region.[250] A single maritime boundary was used except in "very special cases" because the "strength of this integrating trend has been so powerful".[251]

3.99 As Legault and Hankey explain, the creation of a large scale Gray Area, as Nicaragua is trying to persuade the Court, should be "avoided to the greatest extent possible":

> "This factor is of especially great practical importance where a single maritime boundary is to be extended for continental shelf purposes beyond the area in which the 200-mile limits of the parties overlap. If the boundary were to be extended seaward in a manner consistent with its final direction at the 200-mile limit, at a point well away from the equidistant point, there would be two possible outcomes. If the single maritime boundary principle were maintained, one party would have continental shelf jurisdiction within the gray area, and neither party would have fisheries or exclusive economic zone jurisdiction. Alternatively, if the parties were willing to accept overlapping jurisdiction in the gray area, one party would have continental shelf jurisdiction and the other party would have fisheries and water column jurisdiction in exactly the same area. *This suggests that the creation of a*

249 F. Orrego Vicuña, footnote 39 *supra*, pp. 206-208.
250 F. Orrego Vicuña, footnote 39 *supra*, p. 208.
251 F. Orrego Vicuña, footnote 39 *supra*, pp. 208-209.

substantial gray area should be avoided to the greatest extent possible."[252]

(3) SUMMARY CONCLUSION ON DOCTRINE

3.100 The above review of doctrine supports Colombia's submission that an OCS may not encroach upon another State's EEZ with its attendant continental shelf. The principle of natural prolongation is no longer the source of title within 200 nautical miles from the coast of any State; accordingly, an OCS claim based upon natural prolongation (geology and geomorphology) cannot trump any entitlement within 200 nautical miles from another State's coast. Moreover, a review of doctrine also demonstrates the preference for a single maritime boundary; deviations have been extremely rare, spatially limited and constructed only under special circumstances. The consensus is that it "should be avoided to the greatest extent possible".[253]

3.101 This analysis shows that Nicaragua's claim is contrary to the legislative history of UNCLOS, subsequent State practice, sound legal policy and the teaching of publicists. Its proposition that an OCS may encroach upon another State's customary right to a 200-nautical-mile EEZ with its attendant continental shelf is baseless.

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[252] L. H. Legault and B. Hankey, footnote 196 *supra*, p. 988 (emphasis added).

[253] L. H. Legault and B. Hankey, footnote 196 *supra*.

F. Conclusion

3.102 In this Chapter, Colombia has established that the EEZ with its attendant continental shelf is both customary as well as conventional international law. Not only the text of UNCLOS but its legislative history, State practice and doctrine support the conclusion that no OCS claim by one State may encroach upon another State's entitlement to its 200-nautical-mile EEZ with its attendant continental shelf, emanating from all its landmasses.

3.103 Colombia has demonstrated that the UNCLOS negotiating Parties conceived the OCS as a regime supplementary to the EEZ, which in turn was conceived as the coastal State's entitlement *ipso jure*. The OCS, insofar as it could be proved by a State claiming it, was envisioned to encroach upon the International Area, reserved as the Common Heritage of Mankind and not, as Nicaragua proposes, on another State's EEZ with its attendant continental shelf. This is why the OCS regime was subject to a revenue-sharing mechanism, to compensate the international community for the infringement on the Area. The recommendation approving any OCS claim was conditioned on withstanding the meticulous scrutiny by an independent scientific commission precisely in order to safeguard said Common Heritage.

3.104 The understanding of the Conference is confirmed by subsequent State practice which demonstrates that a State's OCS claim may not encroach upon another State's entitlement to a

200-nautical-mile EEZ with its attendant continental shelf, from both its mainland and islands. This understanding is one of the pillars of the CLCS. As noted by the Court in its 2016 Judgment, Nicaragua's position is that: "the role of the CLCS is to protect the common heritage of mankind against possible encroachments by coastal States (and) to protect the international community from excessive claims".[254] Thus, Nicaragua has recognized that OCS claims are only possible in the International Area, not in the EEZ with its attendant continental shelf entitlement of other States.

3.105 Colombia has established that in State practice, consistent with the Court's ruling in *Libya/Malta* and the 2012 Judgment, geological and geomorphological considerations are deemed irrelevant for delimitation within 200 nautical miles from the baselines. Hence, no OCS claim, which is based upon such features, may be sustained within 200 nautical miles from another State's baselines. State practice with respect to OCS shows that claims do not encroach upon another State's 200-nautical-mile zones from both its mainland and islands. The delimitation between Australia and New Zealand, in which islands were granted not only their 200-nautical-mile zone but also a significant OCS *vis-à-vis* the other State's OCS, is a prime example for this juridical equality.

3.106 Colombia has also shown that the episodic deviations from this practice, through the creation of a Gray Area, insofar

[254] 2016 Judgment, para. 102.

as something so case and fact-specific and idiosyncratic can be precedential, have no place in the Caribbean. Gray Areas in State practice were created due to special geographical circumstances (such as the *sui generis* concavity of coasts in the Bay of Bengal), or overlapping EEZs and not an overlap between an OCS claim and a State's EEZ entitlement. Due to their problematic character, Gray Areas have been small scale and States have avoided their creation when possible. Since no special geographical circumstances exist in the space which Nicaragua asserts is the relevant area and since the only EEZ in that area is Colombia's, no deviation from general State practice, as illustrated by the Australia-New Zealand delimitation, is warranted in the instant case.

3.107 To conclude, no OCS claim by Nicaragua, even if it were supported by the requisite geological and geomorphological evidence, *quod non*,[255] may be sustained within the 200-nautical-mile distance from Colombia's mainland and insular territories, whose EEZ with its attendant continental shelf entitlements prevail over any alleged OCS claim by Nicaragua. The foregoing is, of course, also true for any 200-nautical-mile entitlement emanating from any other Caribbean State, such as Panama and Jamaica, which cover a significant part of the maritime spaces claimed by Nicaragua.[256]

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[255] See Chapter 7 *infra*.

[256] Colombia fully respects and complies with the boundary treaties it has signed in the Caribbean Sea with, *inter alia*, Panama, Jamaica, Haiti and the Dominican Republic. See Chapter 6 *infra*.

Chapter 4

COLOMBIA'S MAINLAND AND ISLANDS EEZ WITH ITS ATTENDANT CONTINENTAL SHELF EXTENDS TO ITS FULL ENTITLEMENT OF 200 NAUTICAL MILES

A. Introduction

4.1 In this Chapter, Colombia will prove that, in conformity with customary international law, both its mainland and the islands which conform the San Andrés Archipelago are entitled to an EEZ, with its attendant continental shelf, east of Nicaragua's 200-nautical-mile line, in the area which Nicaragua claims to be relevant in this case.

4.2 As explained in Chapter 3 *supra*, the customary international law entitlement of coastal States to an EEZ with its attendant continental shelf, from both mainland and islands, may not be encroached by another State's geologically and geomorphologically based OCS claim – as Nicaragua purports.

4.3 Thus, in the area east of Nicaragua's 200-nautical-mile line, the EEZ with its attendant continental shelf entitlement of Colombia's mainland and the San Andrés Archipelago, which is a unit composed of several islands, retain their full extension of 200 nautical miles *ipso jure* entitlements in every direction. Therefore, Nicaragua cannot claim any title, based upon an alleged OCS, beyond its 200-nautical-mile limit and within the maritime entitlements of Colombia. These entitlements are

depicted in the following sketch-map:

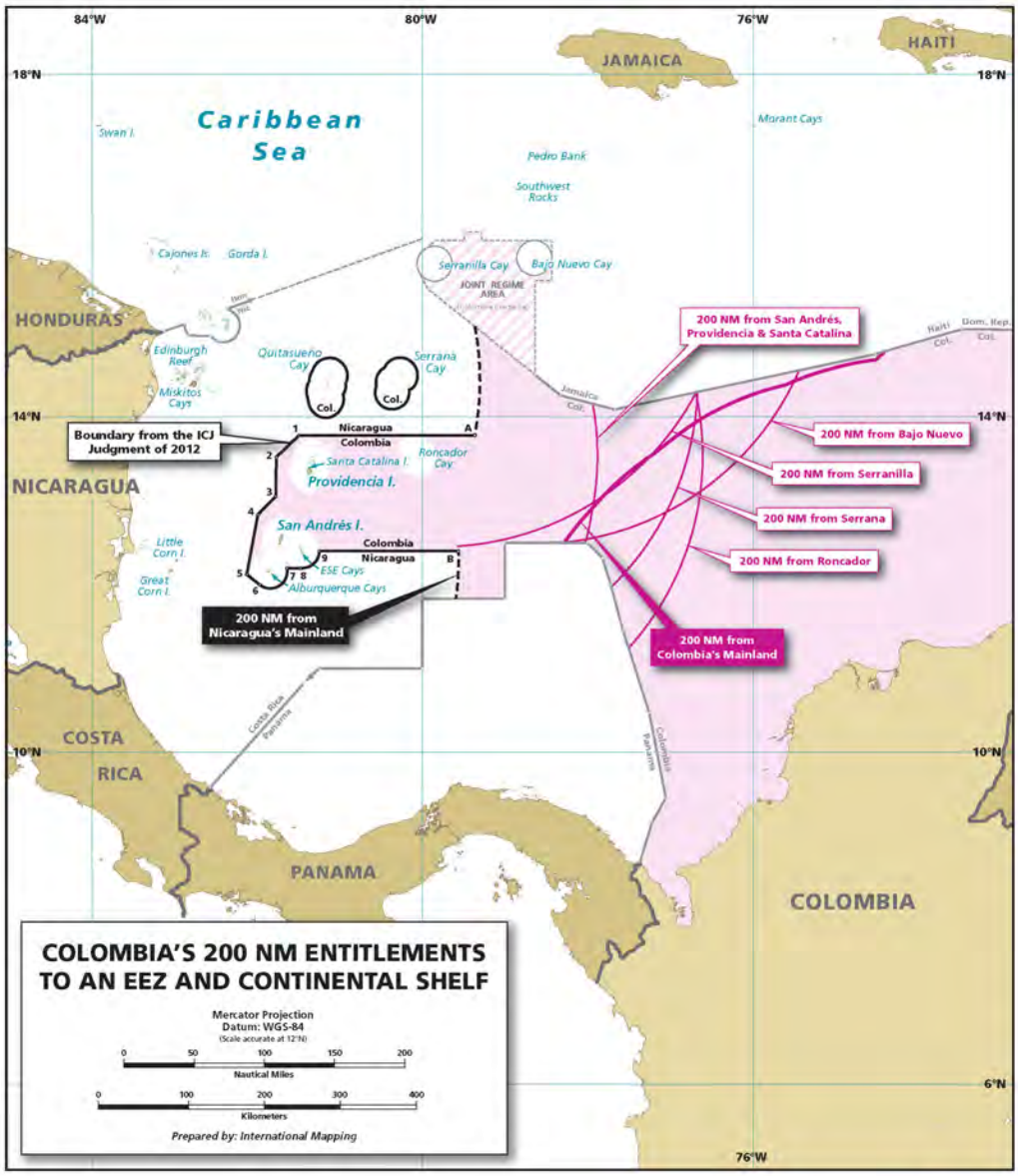

Figure 4.1

4.4 Section B will recall that, under customary international law, Colombia's mainland and the islands that conform the San Andrés Archipelago generate and are entitled *ipso jure* to an EEZ with its attendant continental shelf, extending up to 200 nautical miles from their baselines. Section C will illustrate the extent of the entitlement of Colombia's mainland to a 200-nautical-mile EEZ, with its attendant continental shelf. Section D will illustrate the extent of the 200-nautical-mile entitlement of Colombia's islands to an EEZ with its attendant continental shelf.

B. Colombia's Mainland and Islands Generate and are Entitled *Ipso Jure* to EEZs, Including their Attendant Continental Shelves of 200 Nautical Miles

4.5 There is no debate on the fact that customary international law recognizes Colombia's right to the continental shelf up to 200 nautical miles from its coasts. Nicaragua acknowledged this in the course of the *Territorial and Maritime Dispute* case.[257] Under customary international law, as elaborated in Chapter 3 *supra*, Colombia's mainland and islands are entitled, *ipso jure*, to an EEZ, with its attendant continental shelf, up to 200 nautical miles in every direction, including east of Nicaragua's 200-nautical-mile line,[258] which comprises the "waters superjacent to the seabed and the seabed and its subsoil".[259]

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257 2012 Judgment, p. 666, para. 115.

258 See 2012 Judgment, p. 686, para. 168.

259 UNCLOS, Article 56 (1) (a).

4.6 Colombia has consistently claimed its entitlement to an EEZ with its attendant continental shelf, extending up to 200 nautical miles off the coasts of its mainland and islands, over which its sovereignty is exercised "for the purposes of exploring and exploiting the natural resources."[260] No State has objected to Colombia's entitlement. To the contrary, it is the uncontested existence of Colombia's entitlement which has shaped the maritime boundaries negotiated by Colombia in the Caribbean Sea, in particular with countries like Panama and Jamaica.

4.7 Both Colombia and Nicaragua agree that Colombia is in principle entitled to exercise its sovereign rights over the continental shelf up to 200 nautical miles from its baselines. Indeed, according to Nicaragua, "Colombia's continental shelf (…) extends to a distance of 200M from the territorial sea baselines (…)".[261] This was Nicaragua's position in the original case as recalled by the Court in its 2012 Judgment:

> "In the course of the hearings, Nicaragua acknowledged that, (…) Article 76 entitled (Colombia) to a continental shelf extending to a limit of 200 nautical miles from the baseline (of its mainland) from which the breadth of the territorial sea is measured (see sketch-map No. 2, p. 663)."[262]

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[260] Law 10 of 4 August 1978, "Whereby rules on Territorial Sea, Exclusive Economic Zone and Continental Shelf are set, and other provisions are issued", Article 10 (Annex 10).

[261] Memorial of Nicaragua, p. 88, para. 3.78.

[262] 2012 Judgment, p. 662, para. 105. Colombia retained the same wording in Note S-DM-13-014681 of 22 April 2013 (Annex 19). See also, Memorial of Nicaragua, Annex 3.

4.8 Nicaragua's position is correct insofar as Colombia is entitled to an EEZ with its attendant continental shelf extending to 200 nautical miles from its baselines, but it is incorrect both in separating the continental shelf from Colombia's EEZ regime within 200 nautical miles and in stating that such entitlement is based upon the application of Article 76 of UNCLOS. First, as explained in Chapter 2, since Colombia is not a Party to this Convention, UNCLOS is inapplicable to it and Colombia is only subject to customary international law in this regard. Second, under customary international law, Colombia is entitled to a 200-nautical-mile continental shelf as an integral part of the *ipso jure* EEZ regime, which includes the water column, the seabed and the subsoil.

4.9 In the same manner as Colombia's mainland, the islands of the San Andrés Archipelago are entitled *ipso jure* to an EEZ, with its attendant continental shelf, of 200 nautical miles from its baselines: "islands, regardless of their size (...) enjoy the same status, and therefore generate the same maritime rights, as other land territory".[263] This principle is generally recognized as part of customary international law.

4.10 Therefore, based upon customary international law, which applies to Colombia in these proceedings, Colombia's mainland and the islands of the San Andrés Archipelago are entitled, *ipso jure*, to an EEZ with its attendant continental shelf,

[263] *Qatar* v. *Bahrain*, p. 97, para. 185.

extending to 200 nautical miles in every direction. Hence, since the alleged natural prolongation, upon which Nicaragua's OCS claim is based, is not a source of title within Colombia's 200 nautical miles entitlement,[264] there are no overlapping entitlements between the Parties east of Nicaragua's 200-nautical-mile range. Colombia will now demonstrate its EEZ with its attendant continental shelf entitlements in the area which Nicaragua claims to be relevant in this case.

C. The EEZ and Attendant Continental Shelf of Colombia's Mainland

4.11 The limit of Colombia's mainland 200-nautical-mile entitlement is to be calculated from the baselines from which the breadth of the territorial sea is measured. The 200-nautical-mile EEZ entitlement of Colombia's mainland with its attendant continental shelf is illustrated in the following sketch-map.

[264] See Chapter 3 *supra*.

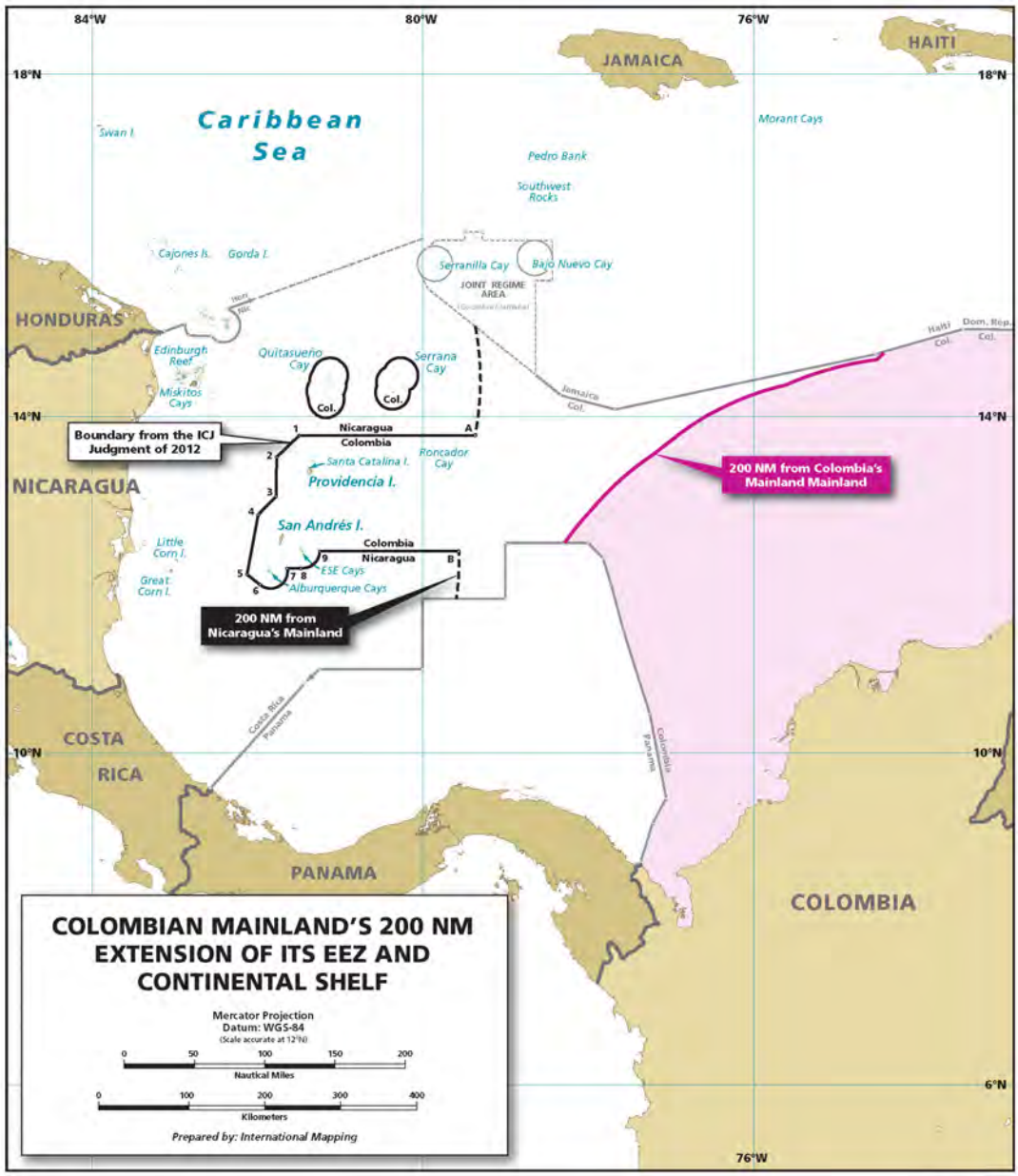

84°W
80°W
76°W
18°N
14°N
10°N
6°N
JAMAICA
HAITI
Caribbean Sea
Swan I.
Morant Cays
Pedro Bank
Southwest Rocks
Cajones Is.
Gorda I.
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
HONDURAS
Edinburgh Reef
Quitasueño Cay
Serrana Cay
Col.
Miskitos Cays
Haiti
Dom. Rep.
Jamaica
Boundary from the ICJ Judgment of 2012
Nicaragua
Colombia
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
San Andrés I.
Little Corn I.
Great Corn I.
ESE Cays
Alburquerque Cays
200 NM from Nicaragua's Mainland
200 NM from Colombia's Mainland Mainland
Costa Rica
Panama
COSTA RICA
PANAMA
COLOMBIA
COLOMBIAN MAINLAND'S 200 NM EXTENSION OF ITS EEZ AND CONTINENTAL SHELF
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping

Figure 4.2

D. The EEZ and Attendant Continental Shelf of Colombia's Islands

4.12 This section will demonstrate the entitlements of Colombia's islands to a 200-nautical-mile EEZ, with its attendant continental shelf. Part (1) will address the entitlements of the islands of San Andrés, Providencia and Santa Catalina which are not disputed. Part (2) will demonstrate that the islands of Roncador, Serrana, Serranilla and Bajo Nuevo generate analogous entitlements.

(1) The EEZ and Attendant Continental Shelf of San Andrés, Providencia and Santa Catalina

4.13 In the previous incarnation of this case, the Court, in concurrence with the positions of the Parties,[265] ruled that San Andrés, Providencia and Santa Catalina, to which the Court referred to as the "principal",[266] or "major", islands,[267] generate a territorial sea, an EEZ and a continental shelf.[268] The Court was particular in that these islands possess substantial entitlements to the east,[269] extending into the area which Nicaragua now purports to claim as relevant for delimitation:

> "(…) to the east the maritime entitlement of the three islands (San Andrés, Providencia and Santa Catalina) extends to an area which lies beyond a line 200 nautical miles from the Nicaraguan

[265] 2012 Judgment, p. 686, para. 168.
[266] 2012 Judgment, p. 697, paras. 195, 196; p. 710, para. 236; p. 716, para. 244.
[267] 2012 Judgment, p. 654, para. 76.
[268] 2012 Judgment, p. 686, para. 168.
[269] 2012 Judgment, p. 708, para. 230.

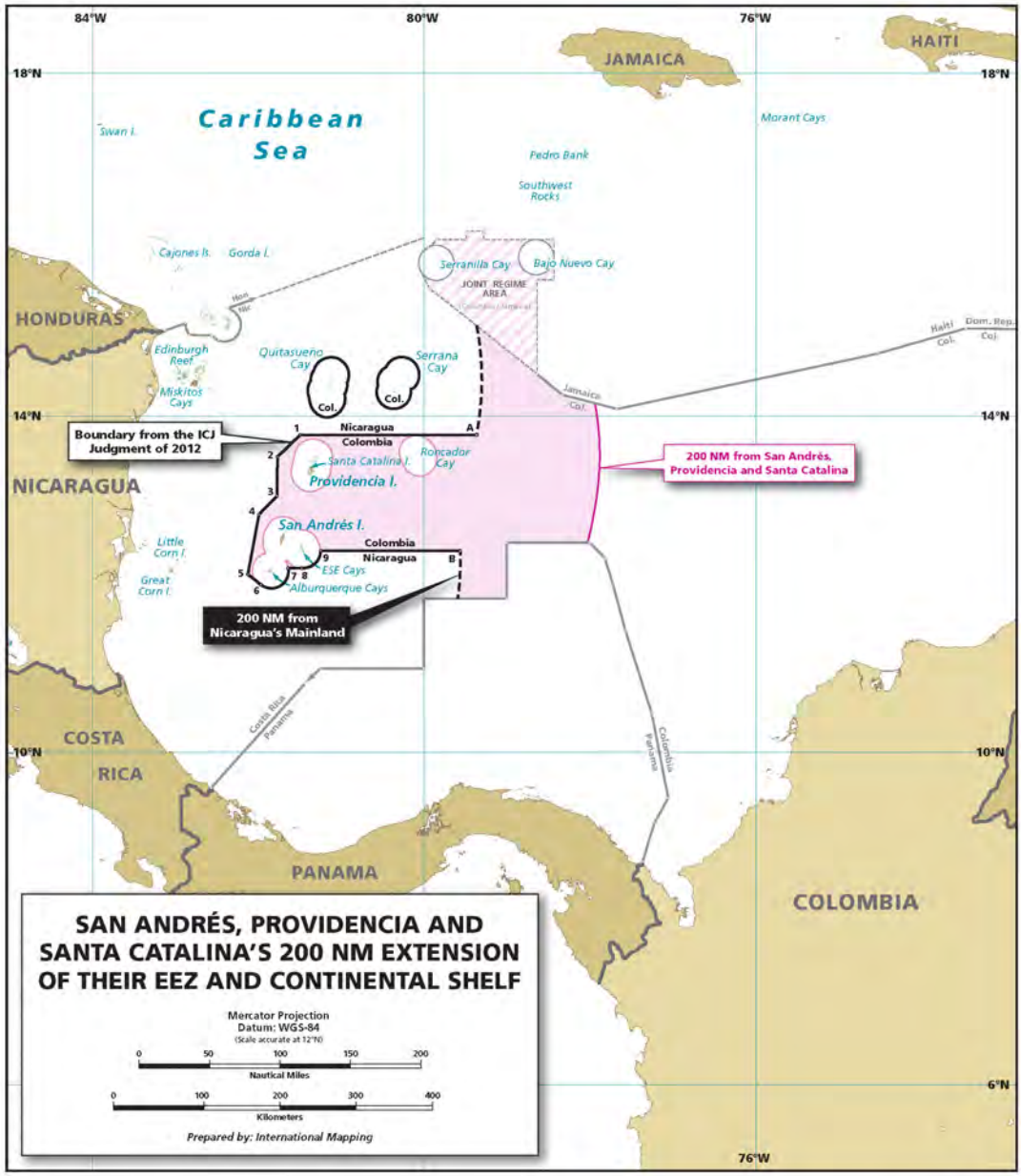
> baselines and thus falls outside the relevant area as defined by the Court".[270]

4.14 In contrast to Nicaragua's submission, the Court recognized that San Andrés, Providencia and Santa Catalina should not be cut-off from their entitlements east of Nicaragua's 200-nautical-mile range:

> "San Andrés, Providencia and Santa Catalina should not be cut off from their entitlement to an exclusive economic zone and continental shelf to their east, including in that area which is within 200 nautical miles of their coasts but beyond 200 nautical miles from the Nicaraguan baselines."[271]

4.15 The entitlements of these islands to the east, on which there is *res judicata* between the Parties, are illustrated on the following sketch-map:

[270] 2012 Judgment, pp. 686-688, para. 168.
[271] 2012 Judgment, p. 716, para. 244.


84°W
80°W
76°W
18°N
14°N
10°N
6°N
JAMAICA
HAITI
Caribbean Sea
Swan I.
Morant Cays
Pedro Bank
Southwest Rocks
Cajones Is.
Gorda I.
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
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Edinburgh Reef
Quitasueño Cay
Serrana Cay
Col.
Miskitos Cays
Haiti Col.
Dom. Rep. Col.
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Boundary from the ICJ Judgment of 2012
Nicaragua
Colombia
Roncador Cay
Santa Catalina I.
Providencia I.
200 NM from San Andrés, Providencia and Santa Catalina
NICARAGUA
San Andrés I.
Little Corn I.
Great Corn I.
Colombia
Nicaragua
ESE Cays
Alburquerque Cays
200 NM from Nicaragua's Mainland
Costa Rica Panama
Colombia Panama
COSTA RICA
PANAMA
COLOMBIA
SAN ANDRÉS, PROVIDENCIA AND SANTA CATALINA'S 200 NM EXTENSION OF THEIR EEZ AND CONTINENTAL SHELF
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping

Figure 4.3

4.16 In the current reprise of its case, Nicaragua does not challenge the fact that San Andrés, Providencia and Santa Catalina generate a full 200 nautical miles entitlement. Nicaragua's only and unsupported contention is that the delimitation that its seeks should:

> "not accord the islands a continental shelf beyond Nicaragua's 200 nm limit. In the 2012 Judgment, the Court accorded Colombia's islands very *substantial* continental shelf rights, extending along a 82 nm-wide corridor out as far as the 200 nm limit measured from Nicaragua's baselines."[272]

4.17 Nicaragua's claim is therefore that through a process of delimitation between, on the one hand, the islands' undisputed entitlement to an *ipso jure* EEZ with its attendant continental shelf, and, on the other hand, Nicaragua's purported OCS claim, the islands should not be "accorded" (*i.e.*, should be deprived of) one half of their EEZ entitlement, with its attendant continental shelf. The result would be that the three Colombian islands would have no maritime entitlement whatsoever east of Nicaragua's 200-nautical-mile limit.

4.18 As Colombia established in Chapter 3, natural prolongation upon which an OCS claim is based is not a source of title within 200 nautical miles from another State's baselines,

[272] Memorial of Nicaragua, p. 130, para. 5.19 (emphasis added). In fact, what the Court actually qualified as "substantial" in its 2012 Judgment was not the entitlements of these islands within the 200-nautical-mile limit from Nicaragua, but their projection to the east of that line (see 2012 Judgment, p. 708, para. 230).

whether measured from the mainland or islands. Thus, even if Nicaragua were able to establish the factual prerequisites of an OCS claim within what it considers the relevant area (*quod non*), its proposition would still fail since there are no overlapping competing entitlements beyond Nicaragua's 200-nautical-mile limit and therefore there can be no delimitation. The Court should confirm its prior decision recognising the entitlements of San Andrés, Providencia and Santa Catalina to their full 200-nautical-mile EEZ with its attendant continental shelf.

(2) THE EEZ AND ATTENDANT CONTINENTAL SHELF OF COLOMBIA'S OTHER ISLANDS

4.19 In the Memorial, Nicaragua contends that:

> "The rocks and cays of Quitasueño, Alburquerque, Bajo Nuevo, Eastsoutheast Cays, Roncador, Serrana and Serranilla fall under the definition of 'rocks' in Article 121(3) and are entitled to a territorial sea, but not to a continental shelf or exclusive economic zone".[273]

4.20 Nicaragua does not explain why it qualifies these islands as rocks under Article 121 (3) of UNCLOS or, indeed, why Article 121 (3) even applies to Colombia.

4.21 For its part, the Court did not address this question in its 2012 Judgment. When discussing the maritime entitlements of the Colombian islands, all of which were located inside the

[273] Memorial of Nicaragua, pp. 88-89, para. 3.80; p. 108, footnote 127 and p. 131, paras. 5.21-5.22.

relevant area for the delimitation in that case, that is within 200 nautical miles from the Nicaraguan coast, the Court considered that it was not:

> "necessary to determine the precise status of the smaller islands, since any entitlement to maritime spaces which they might generate within the relevant area (outside the territorial sea) would entirely overlap with the entitlement to a continental shelf and exclusive economic zone generated by the islands of San Andrés, Providencia and Santa Catalina."[274]

4.22 In this section, Colombia will establish that Roncador, Serrana, Serranilla and Bajo Nuevo, as islands of the San Andrés Archipelago, are entitled to their full 200-nautical-mile EEZ with its attendant continental shelf, east of Nicaragua's 200 nautical miles. Colombia will demonstrate that:

(i) Under customary international law, developed through State practice based upon Article 121 (3) of UNCLOS, the limitation with respect to the EEZ and the continental shelf entitlements of islands, applies only to rocks, a geological term which refers to a specific type of island, a feature made solely of solid rock. It is thus a geological criterion, rather than a geographical size criterion;

(ii) Only when a feature fulfils the geological requirement of being made solely of solid rock, is it necessary to assess if it is capable of sustaining human habitation or

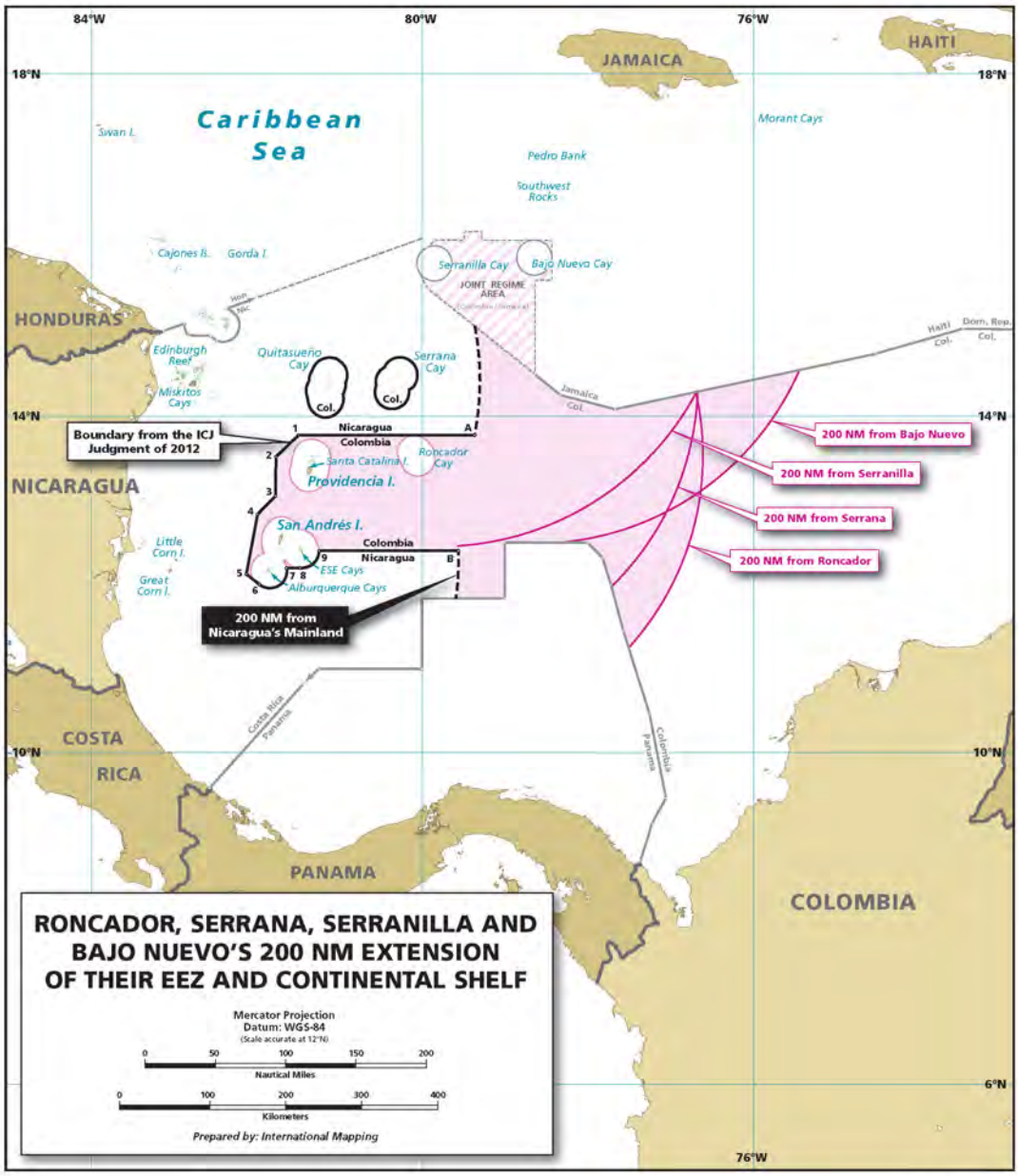
[274] 2012 Judgment, p. 692, para. 180.

economic life of its own, in order to determine if it is entitled to an EEZ with its attendant continental shelf. According to customary international law, islands that do not fulfil that geological criterion retain their *ipso jure* 200-nautical-mile entitlements regardless of their size or ability to sustain human habitation or economic life of their own;

(iii) None of Colombia's islands is made solely of solid rock;

(iv) Therefore, based upon State practice and customary international law, these islands are entitled to an EEZ with its attendant continental shelf, which extends to the full 200 nautical miles from their baselines; and

(v) Even if the Court were to dispense with the geological requirement, Colombia will demonstrate that all of its relevant islands are capable of sustaining human habitation or economic life of their own, in accordance with the standard established in State practice. The 200 nautical miles' EEZ with its attendant continental shelf entitlement to the east of Roncador, Serrana, Serranilla and Bajo Nuevo islands is depicted in the following sketch-map:


84°W
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Pedro Bank
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Serranilla Cay
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JOINT REGIME AREA
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Edinburgh Reef
Quitasueño Cay
Serrana Cay
Miskitos Cays
Col.
Haiti
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Nicaragua
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San Andrés I.
Little Corn I.
Great Corn I.
ESE Cays
Alburquerque Cays
200 NM from Nicaragua's Mainland
200 NM from Bajo Nuevo
200 NM from Serranilla
200 NM from Serrana
200 NM from Roncador
Costa Rica
Panama
COSTA RICA
PANAMA
COLOMBIA
RONCADOR, SERRANA, SERRANILLA AND BAJO NUEVO'S 200 NM EXTENSION OF THEIR EEZ AND CONTINENTAL SHELF
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping

Figure 4.4

4.23 In contrast to Nicaragua's unsupported contentions, Colombia's analysis will be based on a careful examination of the circumstances of those Colombian islands that are critical to this case, *i.e.* the islands which have the most eastern position, namely Roncador (c), Serrana (d), Serranilla (e) and Bajo Nuevo (f). Colombia's position is based upon a detailed examination of the applicable law (a), which shows that international law recognizes these islands' entitlement to an EEZ with its attendant continental shelf. Before presenting each island's characteristics, Colombia will provide a general overview of their geography and socio-economic specificities (b).

(a) Applicable Law

4.24 Article 121 (3) of UNCLOS did not reflect customary international law at the time that UNCLOS was adopted. Nor does the 1958 Convention on the Continental Shelf contain any equivalent wording; such wording is therefore entirely an UNCLOS conventional creation and not a codification of previously existing customary rules.[275]

[275] The purely conventional origin of the rule expressed in Article 121 (3) is reflected in the United Kingdom's practice in this regard. The UK maintained a 1976 claim to a 200-nautical-mile fishing zone around the very small rocky feature of Rockall, but gave it up when it acceded to UNCLOS in 1997. See House of Commons (H.C.) Hansard, Written Answers, 21 July 1997, col. 397: for Richard Cook (U.K. Foreign Secretary), available at: https://publications.parliament.uk/pa/cm199798/cmhansrd/vo970721/text/70721w04.htm (last visited 17 Sep. 2017). This shows that the UK, at least before 1997, did not consider Article 121 (3), as customary international law, and complied with it only when it had duly consented to it.

4.25 Until recently, the Court refrained from recognizing a customary status to Article 121 (3).[276] In its 2012 Judgment, the Court affirmed the customary law status of Article 121 (3). According to the Court:

> "the entitlement to maritime rights accorded to an island by the provisions of paragraph 2 is expressly limited by reference to the provisions of paragraph 3. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the long-established principle that 'islands, regardless of their size,... enjoy the same status, and therefore generate the same maritime rights, as other land territory' (....) and the more extensive maritime entitlements recognized in UNCLOS and which the Court has found to have become part of customary international law. The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law."[277]

4.26 The proposition that a conventional rule can become customary law due to practice has been recognized by the Court.[278] Since non-Parties to UNCLOS are only subject to customary international law, the extent of such customary law, developed from a conventional rule, should be interpreted

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[276] In its Judgment in *Qatar* v. *Bahrain*, the Court only held that: "Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, (…) reflects customary international law". It took no position with respect to paragraph 3. See *Qatar* v. *Bahrain*, p. 97, para. 185.

[277] 2012 Judgment, p. 674, para.139.

[278] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 74 (*North Sea Continental Shelf*).

primarily by reference to State practice, including "that of States whose interests are specially affected."[279]

4.27 Nonetheless, since Nicaragua purports to rely on Article 121 (3), before turning to State practice, it may be useful to look closely at the wording of that provision.

4.28 Article 121 of UNCLOS provides that:

> "1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

4.29 Paragraph 3 of Article 121 is generally considered to have been poorly drafted. It has notably been described as having been drafted "with the following idea: 'I cannot exactly define what I mean, but show me an offshore territory and I will

[279] See on this practice, J. M. Van Dyke, *et al*, "The EEZ of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?", *San Diego Law Review*, Vol. 25, 1988, pp. 430-433.

let you know if it is a paragraph 3 rock'."[280]

4.30 E. D. Brown underlined that it was an "entirely new rule of unique vagueness",[281] D. P. O'Connell,[282] H. Dipla[283] and R. R. Churchill and V. Lowe – who happens to be Counsel for Nicaragua – insist on the subjectivity of the rule, its vagueness and ambiguity, and on its "poor drafting"[284]**.** According to L. L. Herman it is "replete with uncertainties",[285] while J. R. Stevenson and B. H. Oxman point to the "unclear effects of this text."[286]

4.31 Whatever its other deficiencies, neither this provision nor any other provision in UNCLOS, defines "rock" as a special kind of island. Paragraph 3 simply presents two conditions that must be met for denying a "rock" an EEZ and continental shelf. These conditions rely on the notions of habitability and economic life, terms that are themselves quite imprecise.

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[280] R. W. Smith, "The Effect of Extended Maritime Jurisdiction", A. W. Koers and B. H. Oxman, (eds), *The 1982 Convention on the Law of the Seas*, The Law of the Sea Institute, University of Hawaii, Honolulu, 1984, p. 345 (available at the Peace Palace Library).

[281] E. D. Brown, "Rockall and the Limits of National Jurisdiction of the United Kingdom", *Marine Policy*, 1978, p. 205 (Annex 45).

[282] D. P. O'Connell, *The International Law of the Sea*, Vol. II, Oxford, 1982, p. 731 (available at the Peace Palace Library).

[283] H. Dipla, *Le régime juridique des îles dans le droit international de la mer*, Paris, 1984, p. 41 (available at the Peace Palace Library).

[284] R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 2nd edition revised and enlarged, 1988, Manchester University Press, pp. 41-42 (available at the Peace Palace Library).

[285] L. L. Herman, "The Modern Concept of Off-Lying Archipelagos in International Law", *Canadian Yearbook of International Law*, Vol. 23, 1985, p. 194.

[286] J. R. Stevenson and B. H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session", *American Journal of International Law*, Vol. 69, 1975, p. 786.

(i) Interpretation of the Term "Rocks" in Article 121 (3)

4.32 This section will establish that the ordinary meaning of the term "rock" in Article 121 (3) of UNCLOS, and especially in the customary implementation of the Article, refers to a geological rather than a geographical criterion. In short, a rock is a rock. That means that for the limitation in Article 121 (3) with respect to the EEZ, with its attendant continental shelf, to apply, the feature must first be a geological "rock", meaning a feature made solely of solid rock. The second criterion, that is the ability to sustain human habitation or economic life of its own, only applies to features that are "rocks" in the geological sense; if a feature is not a "rock" in the geological sense, the habitation and economic life qualifications do not apply and the feature is entitled to an EEZ, with its attendant continental shelf, regardless of whether it can sustain human habitation or economic life.

a. The Term "Rock" in the Context of Article 121

4.33 Article 121 (3) only concerns rocks that qualify as islands under Article 121 (1), because rocks which are not islands – for example low-tide elevations – do not generate any entitlement at all, and are therefore of no concern to Article 121.[287]

[287] Low-tide elevations do not generate entitlements as such, but can be considered for the establishment of the baseline when they are situated

4.34 The subject-matter of Article 121 (3) is "Rocks which cannot sustain human habitation or economic life of their own" ("*Les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre"; "Las rocas no aptas para mantener habitación humana o vida económica propia"*). Therefore, two cumulative elements are necessary for Article 121 (3) to apply: (i) the feature must be a "rock"; and (ii) it must be a rock "which cannot sustain human habitation or economic life of (its) own".

4.35 The notion of rocks which cannot sustain human habitation or economic life of their own is significantly different from to the notion of islands which cannot sustain human habitation or economic life of their own. UNCLOS III invested considerable efforts into defining the term "island" in Article 121 (1), "(a)n island is a naturally formed area of land, surrounded by water, which is above water at high tide". It is implausible to assume that having invested time and energy in defining a concept, the Conference would use a different term to refer to the same exact concept. In other words, if the drafters of UNCLOS intended the limitation in Article 121 (3) to extend to all islands, as they were defined in Article 121 (1), they would have used the term island. The fact that the drafters of UNCLOS did not use the term island in Article 121 (3) implies that "rocks" is not synonymous with "islands".

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wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island.

4.36 Thus, the term "rock" must have a different meaning than "island". A "rock" must be a particular type of island. A "rock" may not be defined through the second condition, meaning by reference to the ability to "sustain human habitation or economic life". Such a proposition would in essence transform the word "rocks" into "islands"; a result which the drafters of UNCLOS clearly intended to avoid. Thus, "rocks" must have a different meaning. Analysis of State practice, indicative of customary international law, will show that a "rock" has a precise geological denotation, which cannot be ignored by jumping to a reference to the ability to "sustain human habitation or economic life". This is also the ordinary meaning of the word "rock" under Article 121 (3).

4.37 The *travaux* are inconclusive on this issue, although they contain several interesting elements. During the Caracas session the notion of "rock" appeared for the first time in this context. It was defined as a "naturally formed rocky elevation of ground".[288] Thus, at this stage, the notion of rock referred to a geological feature.[289]

4.38 Libya proposed that "small islands and rocks, wherever they may be, which cannot support human habitation or

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[288] UNCLOS III, Official Documents, Second Committee Meetings, 3rd Meeting, UN Doc. A/CONF.62/C.2/L.62/Rev. 1, available at: http://legal.un.org/docs/?path=../diplomaticconferences (last visited 17 Sep. 2017).

[289] R. Kolb, « *L'interprétation de l'article 121, paragraphe 3, de la convention de Montego Bay sur le droit de la mer : les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre'* », *Annuaire français de droit international*, Vol. 40, 1994, p. 891.

economic life of their own, shall have no territorial sea".[290] In Libya's understanding of those terms, "rocks" on the one hand, and "small islands", on the other hand, were to be distinguished. Jonathan L. Charney explains that before the appearance of the term "rocks", the terms "islet" or "small island" were widely used.[291] Indeed, a Romanian proposal distinguished between "islets" ("naturally formed elevations of land less than one square kilometre in area"), and "islands similar to islets" (more than one square kilometre, but less than… square kilometre"), and contended that "the practice of States, customary law, and international legal theory demonstrated widespread agreement on the need to distinguish clearly between islets and *rocks,* on the one hand, and proper islands, on the other".[292] But the term "rocks" and not "small islands" was finally retained. This means that a "rock" was not perceived merely as a small island, but one of a particular kind. Size does not matter: what define a rock are not its dimensions but the material it is made of.

4.39 Although the *travaux* are far from conclusive in this respect, one thing that they demonstrate is that while proposals to extend the limitation in Article 121 (3) based upon geographical criteria to all small islands, were raised, they were rejected by the Conference. The Conference deliberately chose

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290 UNCLOS Documents, Vol. IV, p. 347.

291 J. L. Charney, "Note and Comment: Rocks That Cannot Sustain Human Habitation", *American Journal of International Law*, Vol. 93, 1999, p. 869.

292 W. van Overbeek, "Art. 121 (3) LOSC in Mexican State Practice in the Pacific", *International Journal of Estuarine and Coastal Law*, Vol. 4, No. 4, pp. 252- 267, p. 259.

the term "rocks", which has a natural geological and geomorphological meaning, in order to limit the extent of the exception in Article 121 (3). If the *travaux* do not resolve the question of the proper interpretation of the term "rocks", they do demonstrate that the term "rocks" does not apply to all small islands; a conclusion that would be reached if only the second criterion applied.[293]

4.40 This simple textual reading of Article 121 (3), which is "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",[294] confirms that the State Parties intended to avoid the limitation in Article 121 (3) from applying to all insular features. Rather, it was limited to a specific type of island, defined by the term "rock", which was considered by the State Parties to be the correct way to characterize its nature.

4.41 ITLOS confirmed this conclusion by regarding Australia's Heard Island as falling outside the scope of Article 121 (3), despite its being completely covered by snow and ice and therefore not capable of sustaining human habitation or economic life of its own.[295] In deciding the case, the Tribunal proceeded on the basis that Heard Island has an EEZ, in which

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293 It should be noted that Colombia is only subject to the State practice which evolved through the application of this Article. As Colombia will demonstrate, State practice follows the interpretation giving the term "rock" a geological meaning, different from the term "island".

294 Vienna Convention on the Law of Treaties, Article 31, para.1.

295 "*Volga" (Russian Federation* v. *Australia), Prompt Release, Judgment, ITLOS Reports 2002*, p. 17, para. 23 and p. 20, para. 32.

the Volga was detained by Australia.[296] Vice-President Vukas disassociated himself from all of the Tribunal's positions "which are based on the proclaimed exclusive economic zone around Heard Island and the McDonald Islands",[297] explaining that:

> "According to *Encyclopaedia Britannica* '(m)uch of its (Heard Island's) surface is covered with snow and ice . . . The McDonalds are a group of uninhabited rocky islets 25 miles (40 km) west of Heard Island'.
>
> Taking into account all these data, one should not ignore article 121, paragraph 3, of the LOS Convention, where we find many of the elements obviously present in this group of Australian islands/isles/islets/rocks: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'
>
> Although the terminology used in article 121, paragraph 3, is vague, and the relationships between the components of this rule are rather unclear, taking into account the legislative history of this provision, we must agree with the conclusions arrived at by Barbara Kwiatkowska and Alfred H. A. Soons:
>
> 'As the term « rocks » should be construed as not implying any specific geological features, the essential element of the definition is the second one . . ., namely that it covers only rocks (islands)

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296 *"Volga" (Russian Federation* v. *Australia), Prompt Release, Judgment, ITLOS Reports 2002*, p. 20, para. 32.

297 "*Volga" (Russian Federation* v. *Australia), Prompt Release, Judgment, ITLOS Reports 2002*, Declaration of Vice-President Vukas, p. 42, para. 2.

> « which cannot sustain human habitation or economic life of their own » (…)'"[298]

4.42 ITLOS' majority holding is correct, since giving to Article 121 (3) the meaning suggested by Judge Vukas would mean replacing the term intended by the negotiating States, "rocks", with another term, specifically defined two paragraphs before, "island". Such a determination is not only textually unsustainable, it is unreasonable; if the negotiating States intended to avoid applying the capability limitation in Article 121 (3) to all islands, adopting such a wide interpretation would have frustrated their effort. Shifting the focus only toward the second condition, as Judge Vukas proposed, would undermine the compromise achieved with respect to the entitlement of islands, which was intentionally limited by the first criterion, the geological criterion of a feature being a "rock".[299]

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[298] *"Volga" (Russian Federation* v. *Australia), Prompt Release, Judgment, ITLOS Reports 2002,* Declaration of Vice-President Vukas, p. 44, para. 6, quoting B. Kwiatkowska and A. H. A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", *Netherlands Yearbook of International Law*, Vol. XXI, 1990, p. 153.

[299] Although Colombia is only subject to the customary application of this provision, adduced through the analysis of State practice, a purely textual analysis of Article 121 (3) also supports this position. For Judge Vukas' interpretation to apply, Article 121 (3) should read "Rocks, which cannot sustain …" (*« Les rochers, qui ne se prêtent pas »* ; "*Las rocas, no aptas para mantener*..."). In such case the phrase beginning with "which" would have the effect of defining what must be understood as "rocks" – *i.e.*, "*islands* which cannot sustain …". But it reads "Rocks which cannot sustain …", which is necessarily to be understood as meaning that some rocks "can sustain …", while others "cannot sustain …". Therefore, the very word "rocks" must necessarily mean "a peculiar kind of island", independently of the question whether they can, or cannot, "sustain human habitation …". Thus, a rock is then a kind of island that is not characterized as unable to sustain human habitation or economic life of its own. What characterizes a rock as a particular island is necessarily something different.

4.43 The Court's jurisprudence with respect to the term "rock" is sparse; nonetheless, it demonstrates the Court's resolve to distinguish between "rocks" and "small islands".

4.44 In the *North Sea Continental Shelf* cases, the Court made reference to "islets, rocks and minor coastal projections", thus suggesting that "rocks" must be distinguished from islets and that they are different types of features.[300] Indeed, rocks may be small islands, however, they qualify as "rocks" because they are islands solely made of "rocks".

4.45 Also, In the *Libya/Malta* case, it was a small rocky feature, Filfla, which the Court expressly qualified as an "uninhabited rock".[301]

Filfla Islet, MALTA

Figure 4.5

300 *North Sea Continental Shelf*, p. 36, para. 57.
301 *Libya/Malta*, p. 20, para. 15.

4.46 The Arbitral Tribunal in the *Philippines* v. *China* award reached a different conclusion than ITLOS and the Court. There, the Tribunal struggled to demonstrate that the term "rocks" has no specific geological or geomorphological meaning and, ultimately, no meaning at all.[302] That conclusion is, as shown above, doubtful on its face and the reasoning on which it purports to be based is not persuasive.

4.47 The Tribunal refers to the definition of "rock" found in a dictionary of English terms,[303] however, Arabic, Russian, Chinese, Spanish and French versions of the Convention are equally authentic. Confining a terminological inquiry to an English dictionary is legally incomplete.[304] Before drawing any conclusion from a purely lexicological approach, the Tribunal should at least have noted, for example, that in the French language the term "rocher" has the very specific meaning of « *une grande masse de matière minérale dure (roche), formant une éminence généralement abrupte* », which clearly refers to a geological or geomorphological character.[305] Similarly, in the Spanish language the term "roca" means "*material sólido de origen natural formado por una asociación de minerales o por uno solo, que constituye una parte importante de la corteza*

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302 *The South China Sea Arbitration (Philippines* v. *China), Award of 12 July 2016, PCA Case No. 2013-19*, paras. 479-482 (*South China Sea Arbitration*).

303 *South China Sea Arbitration*, para. 480.

304 See Vienna Convention on the Law of Treaties, Article 33.

305 See S. Karagiannis, « *Les rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre et le droit de la mer* », *Revue Belge de Droit International*, Éditions Bruylant, 1996/2, p. 565, quoting the French dictionary « *Robert* ».

terrestre", which also refers to the same geological and geomorphological character.[306]

4.48 Also, the Tribunal contends that the Court's 2012 Judgment in the *Territorial and Maritime Dispute* case confirms its view that the term "rock" has no geological or geomorphological meaning. According to the Tribunal, "this was also the conclusion reached by the International Court of Justice in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* when it held Colombia's Quitasueño, a 'minuscule' protrusion of coral, to be an Article 121 (3) rock."[307] The Tribunal justifies its conclusion by quoting paragraph 37 of the 2012 Judgment, which reads:

> "(i)nternational law defines an island by reference to whether it is 'naturally formed' and whether it is above water at high tide, not by reference to its geological composition (...). The fact that the feature is composed of coral is irrelevant."[308]

4.49 The citation and reasoning of the Tribunal are flawed for various reasons.

4.50 *First*, the Court does not discuss the notion of "rock" in Article 121 (3), but only addresses the question whether Quitasueño is an "island" based upon Article 121 (1),

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306 Diccionario de la Real Academia Española, online edition, available at http://dle.rae.es/?id=WYwJeO6 (last visited 17 Sep. 2017). Another meaning of *roca* is "*piedra, o vena de ella, muy dura y sólida*", which also refers to its geological nature.

307 *South China Sea Arbitration*, para. 480.

308 2012 Judgment, p. 645, para. 37.

determining that since this feature is above water at high tide, it is an island, whatever its geological composition; there is no insight into the Court's stance regarding the very notion of "rocks" in paragraph 3 of that same provision.

4.51 *Second*, Quitasueño was never qualified by the Court as a "protrusion of coral"; which it is not. All that the Court stated was that: "the photographic evidence shows that QS 32 is composed of solid material, attached to the substrate, and not of loose debris."[309]

Quitasueño Cay (QS-32)

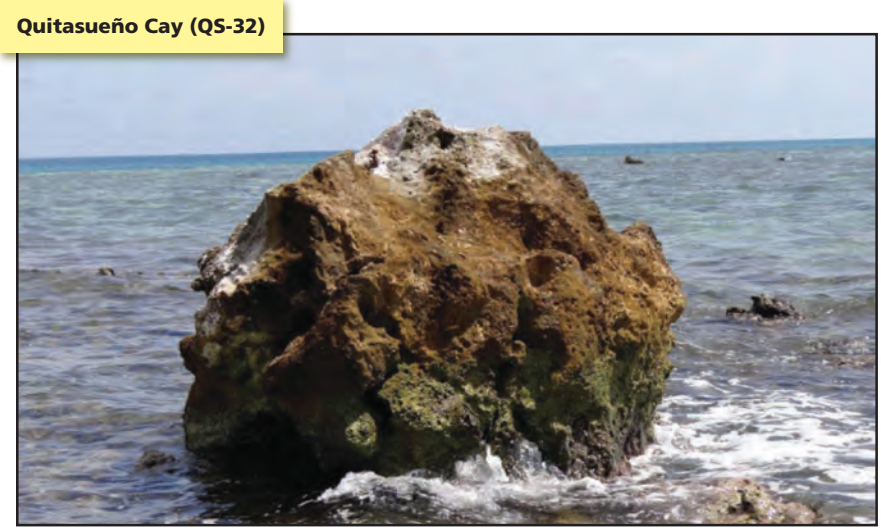

Figure 4.6

Quitasueño (including QS 32, see the picture above) is correctly described as a group of "coral islands that has formed over centuries by the gradual accretion of the skeletons of the coral polyp in temperate waters".[310] This kind of formation is the outcome of a classical phenomenon that leads to the creation of

309 2012 Judgment, p. 645, para. 37.

310 *Territorial and Maritime Dispute*, Public Sitting 4 May 2012, CR 2012/17, p. 13, para. 31 (Crawford).

a category of rocks, namely "biochemical sedimentary rocks". Biochemical sedimentary rock are undoubtedly a geological product. Therefore, it is simply wrong to suggest that since the Court accepted that Quitasueño is a rock, then the notion of rock cannot have a geological meaning. To the contrary, since Quitasueño is composed of biochemical sedimentary rocks, the fact that the Court viewed it as a rock confirms – and not contradicts – that the term "rocks" has a geological meaning.

4.52 *Third*, the Arbitral Tribunal argues that interpreting the term "rock" as referring to features with geological or geomorphological characteristics "would lead to an absurd result".[311] But that is a classic *petitio principii*: the fact that such or such treaty provision, when interpreted in accordance with the ordinary meaning to be given to its terms, leads to a result that the interpreter considers absurd must be explained; it is a threshold and not a conclusion and it has never been a sufficient reason to immediately reject the result with no further inquiry. According to Article 32 of the Vienna Convention on the Law of Treaties, in case an interpretation made in accordance with the ordinary meaning leads to an absurd result, the interpreter should have recourse to supplementary means of interpretation. But this is not the method the Tribunal applied; it simply concluded that the word "rocks" has no meaning of its own. Such an approach cannot convince.

4.53 A survey of academic writings demonstrates that the

311 *South China Sea Arbitration*, para. 481.

proponents of the theory that a "rock" is nothing but a small island were inconsistent with respect to the size beyond which an island will no longer be considered a "rock". This renders the criterion of "smallness" as extremely vague, subjective and capricious as the length of the Chancellor's foot and hardly operational. This is why those who adhere to this thesis are finally driven to contend that a "rock" is nothing other than an island which cannot sustain human habitation or economic life of its own. Such conclusion, however, is just an attempt to rewrite Article 121 (3).

4.54 Regardless of the fact that only State practice stemming from the application of Article 121 (3) is applicable to Colombia, to rewrite this provision in such a way would undermine the conviction of the negotiating State to apply the limitation in Article 121 (3) solely to geological "rocks", rather than to all islands.

4.55 Prescott[312] and Dipla[313] have argued that the notion of "rock" refers to a geological (or geomorphological) feature, meaning that a "rock" should be formed of solely a rocky elevation, surrounded by water. Since all "rocks" are islands, the term "rock" means land of a certain composition, rather than a land of a certain size. This position is most consistent with an interpretation respecting the natural meaning of the term "rock" and was maintained by Colombia in its pleadings in the previous

312 J. R. V. Prescott, *The Maritime Political Boundaries of the World*, Methuen, 1985, p. 38, p. 73; (available at the Peace Palace Library).
313 H. Dipla, footnote 283 *supra*.

case.[314]

4.56 It follows from the above that an interpretation of Article 121 (3), leads to the conclusion that the term "rock" cannot be without signification, and cannot refer to all kinds of islands, but to a particular kind of island, that is to say a peculiar kind of "naturally formed area of land". Any other approach would be contrary to "the principle that words should be given appropriate effect whenever possible."[315] It would undermine the conviction of the negotiating State to avoid the application of Article 121 (3) to all islands. As Jonathan Charney put it, habitability and economic life should not be used to define the term "rocks", rather they are intended to narrow the scope of the provision to specific "rocks" that in addition cannot sustain either habitability or economic life:

> "The general rule of treaty interpretation gives meaning to all words of a text, so that references to 'habitability' and 'economic life' must have meanings independent of the nature of the feature itself. They must narrow the scope of the provision to rocks that also are either uninhabitable or have no economic life of their own".[316]

4.57 The proposition that the criteria of habitability and economic life should not be used to define the term "rock", but

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314 *Territorial and Maritime Dispute*, Public Sitting 27 April 2012, CR 2012/12, p. 17, paras. 37-40 (Bundy).

315 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 126, para. 134.

316 J. Charney, see footnote 291 *supra*, p. 870.

rather only apply if established that the feature in question is a "rock", is supported also by Rothwell and Stephens:

> "Article 121(3) of the LOSC is somewhat of an anomalous provision as it applies only to 'rocks', and not to more substantial territory that may be as incapable of sustaining human habitation or economic life as a remote islet".[317]

4.58 Were the Court to conclude that State practice is not based on a definition of "rock" that turns upon geological criteria, and rule that size should be indicative of the term "rock", all of Colombia's features are in any case large enough to qualify as islands, as will become evident later in the Chapter.

4.59 There is no accepted size criterion for what constitutes a "rock". However, Robert Hodgson's categorization, referenced by other scholars,[318] distinguished among the following: rocks, less than 0,001 sq. miles in area; islets, between 0,001 and 1 sq. miles; isles, between 1 and 1,000 sq. miles; and islands, larger than 1,000 sq. miles.[319] Even if the Court were to reject a geological definition and embrace a purely geographical one, the only credible size definition for a "rock" would be a feature that

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317 D. R. Rothwell and T. Stephens, *The International Law of the Sea*, Hart Publishing, 2016, p. 90 (available at the Peace Palace Library).

318 See B. H. Dubner, "The Spratly 'Rocks' Dispute – a 'Rockapelago' Defies Norms of International Law", *Temple International and Comparative Law Journal*, Vol. 9, 1995, pp. 303-304; L. Diaz, *et al*, "When is a 'Rock' an 'Island'? – Another Unilateral Declaration Defies 'Norms' of International Law", *Michigan State Journal of International Law*, Vol. 15, 2007, pp. 519, 535.

319 Quoted by W. van Overbeek, footnote 292 *supra*, p. 253, footnote 10.

is less than 0,001 sq. miles large (which equals 0,002 sq. km). An extremely small feature indeed.

b. State Practice in Interpreting the Term "Rocks"

4.60 A series of further indications pertaining to State practice, including that of States whose interests are specially affected, point to a narrow interpretation of the term "rock" consistent with its ordinary textual meaning. The following examples refer to features which were considered to be geological "rocks", thus subject to the implementation of the rule of customary international law which is analogue to Article 121 (3).

4.61 One of the first State Parties to UNCLOS that introduced Article 121 (3) in its domestic legislation, namely Mexico, has adopted a restrictive interpretation. Initially, prior to ratifying UNCLOS, the 1976 Mexican legislation stated that islands generate an EEZ "with the exception of those islands which cannot maintain human habitation or which do not have an economic life of their own".[320] This was duly amended in 1986 by a new text providing that "islands shall have an exclusive economic zone; however rocks that cannot sustain human

[320] Article 3 of the Law regulating the eighth paragraph of Article 27 of the Constitution, Official Journal of Mexico, 13 February 1976, available at: http://www.dof.gob.mx/nota_detalle.php?codigo=4840744&fecha=13/02/1976 (last visited 17 Sep. 2017). See also C. R. Symmons, *The Maritime Zones of Islands in International Law*, Kluwers Academic Publishers, 1979, p. 125 (available at the Peace Palace Library).

habitation or economic life of their own shall not".[321] This clearly reflects the fact that, according to Mexico, rocks are not just "islands that cannot sustain" certain human activities, but are areas of land of a particular nature.

4.62 Among its many little islands, the only feature for which Mexico would appear not to claim an EEZ with its attendant continental shelf is a series of "rocks" in the strict sense, namely Rocas Alijos.[322]

Rocas Alijos, MEXICO

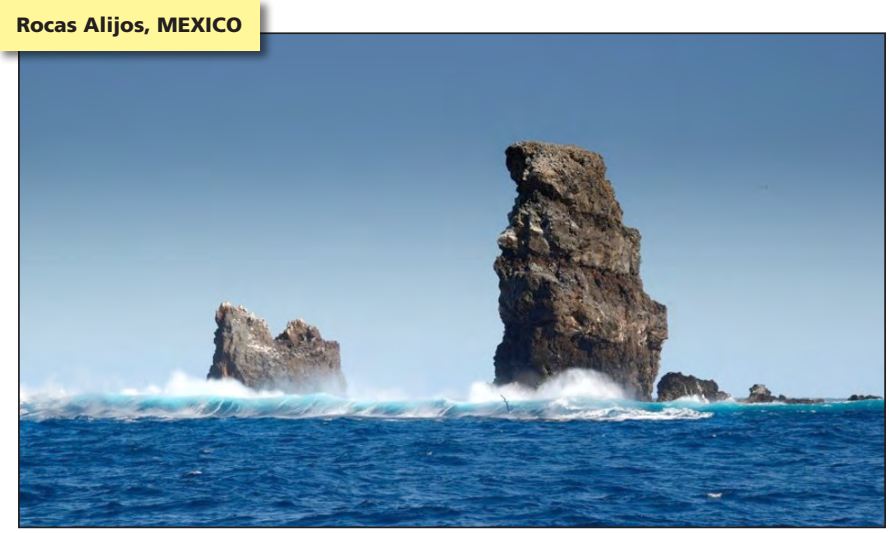

Figure 4.7

[321] See W. van Overbeek, footnote 292 *supra*, p. 261.

[322] See S. Karagiannis, footnote 305 *supra*, pp. 613-614; M. H. Nordquist, J. Norton Moore, *et al.*, *The Law of the Sea Convention: US Accession and Globalization*, Leiden, 2012, p. 329 (available at Peace Palace Library); Alex G. Oude Elferink, "Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes", *IBRU Boundary and Security Bulletin* (Summer 1998), p. 58 at p. 59 (available at Peace Palace Library); C. R. Symmons, footnote 320 *supra*, p. 126.

4.63 By contrast, Mexico is reported to claim an EEZ from the baselines of Roca Partida, which would qualify as a geological rock, and in addition lacks fresh water and supports no animal life on land. It seems that Mexico considers that this rock is part of a group of other features, namely Clarion, Socorro, and San Benedicto, which form what is called the Revillagigego Archipelago, a place "that today may not be inhabited or may not have an economic life of their own but, because they are located in marine areas endowed with abundant mineral resources, it is anticipated that in the future when they become economically viable for commercial exploitation activities, they may be inhabited and they may also eventually have an economic life of their own."[323]

Roca Partida, MEXICO

Figure 4.8

[323] J. Vargas, *Mexico and the Law of the Sea: Contributions and Compromises*, Martinus Nijhoff, 2011, p. 229 (available at Peace Palace Library).

4.64 J. L. Charney suggested that a feature would not be subject to Article 121 (3) if, despite its rocky nature, it were found to have mineral resources, such as oil or gas, or other resources of value such as newly harvestable fishery species, or even a location for a profitable business (such as a casino), whose exploitation could sustain an economy sufficient to support that activity through the purchase of necessities from external sources.[324] As a consequence, Mexico's position would not be that Roca Partida is not a rock, but, rather, that it is a rock which may sustain human habitation or economic life of its own.

4.65 When the United Kingdom became a Party to UNCLOS in 1997, it renounced its claim that an EEZ, with its attendant continental shelf, was generated by Rockall, which is clearly nothing more than a "rock" *stricto sensu*.

Rockall, U.K.

Figure 4.9

[324] J. L. Charney, footnote 291 *supra*, p. 871.

4.66 The following paragraphs will elaborate on various small islands for which States have claimed an EEZ with its attendant continental shelf. The review of State practice, which is a principal generator of customary international law applicable to Colombia, will illustrate that features which were islands, but not "rocks" in the geological sense, were claimed by a wide range of States to be entitled to an EEZ with its attendant continental shelf. Thus, State practice confirms that the term "rock" has been and, hence, should be interpreted in a geological rather than a geographical sense.

4.67 The United Kingdom's position regarding Ducie Island, an atoll belonging to the Pitcairn Islands, demonstrates that small islands, which geologically are not rocks, are not considered by the United Kingdom as covered by Article 121 (3).[325] In 1992, the United Kingdom declared an EEZ attached to this feature, which is a very small and uninhabited island, but certainly not a "rock" in the geological sense.[326] It has a total area, including the lagoon, of 3,9 sq. km. It is 2,4 km long, northeast to southwest, and about 1,6 km wide. The land area is only 0,7 sq. km.

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325 There are four islets on the rim of the atoll: Acadia Islet (largest islet, along the north and east rim); Pandora Islet (second largest, in the south); Edwards Islet (immediately east of Pandora Islet); Westward Islet (smallest, west of Pandora Islet).

326 *Law of the Sea Report of the UN Secretary General*, 10 November 1993, UN Doc. N° A/48/527, para. 26.

Ducie Island, U.K.

Figure 4.10

4.68 Oeno Atoll, also belonging to the Pitcairn Islands, is illustrative of the United Kingdom's practice in claiming EEZ for certain islands.[327] The atoll measures about 4 km in diameter. There are two larger and three smaller islets on or within the rim of the atoll. Their aggregate land area is only 0,68 sq. km. The main island (Oeno) is about 0,65 sq. km in area. It has a forest and scrub with pandanus and palm trees. There is also a water tap installed on the island.

327 *Law of the Sea Report of the UN Secretary General*, footnote 326 supra, para. 26.

Oeno Atoll, U.K.

Figure 4.11

4.69 Venezuela's Aves Island, a sand feature located far from the Venezuelan mainland coast and which is not a geological "rock", has been given full effect by certain third States despite the fact that it is small in size, about 375 metres in length and 50 metres wide, which makes it similar in size and composition to Bajo Nuevo. Consisting mostly of sand and with some vegetation, the island has no human habitation.[328] In 1978, Venezuela established a permanent scientific station on the island, staffed by scientists, and protected by naval personnel.[329] Aves Island was given full effect in the Maritime Boundary Treaty between the United States and Venezuela;[330] in doing so, the United States recognized Venezuela's right to claim an EEZ

328 International Maritime Boundaries, Vol. V, p. 3411.

329 D. Freestone, "Maritime Boundaries in the Eastern Caribbean", Carl Grundy-Warr (ed.), *International Boundaries and Boundary Conflict Resolution: Proceedings of the 1989 IBRU Conference*, International Boundaries Research Unit Durham University, 1990, p. 199 (available at Peace Palace Library).

330 Limits in the Seas, No. 91.

and continental shelf from Aves Island. The Netherlands and France, have also given Aves Island the treatment of a full-fledged island.[331]

Aves Island, VENEZUELA

Figure 4.12

4.70 Howland Island, belonging to the United States, provides another instructive example.[332] This 1,62 sq. km island has no lagoon, seemingly no natural fresh water resources, no economic activity and it is only visited every two years by the U.S. Fish and Wildlife Service.[333] An airstrip and a lighthouse

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331 C. W. Dundas, "Middle American and Caribbean Maritime Boundaries", International Maritime Boundaries, Vol. V, pp. 3410-3411. See also *Ibid*., Vol. I, the Netherlands (Antilles)-Venezuela, Rep. 2-12, p. 615; Limits in the Seas, No. 105; C. Carleton, "Maritime Delimitation in Complex Island Situations: A Case Study on the Caribbean Sea", R. Lagoni and D. Vignes (eds.), *Maritime Delimitation*, Leiden/Boston, Martinus Nijhoff Publishers, 2006, p. 177 (available at the Peace Palace Library); International Maritime Boundaries, Vol. I, Report 2-11, pp. 603-614.

332 Y. Song, "The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean", *Chinese Journal of International Law*, Vol. 9, 2010, pp. 663, 689-690.

333 U.S. Fish and Wildlife Service, "Howland Island National Widlife Refuge, available at: https://www.fws.gov/refuge/howland_island/ (last visited 17 Sep. 2017).

were constructed in 1937 to support the famous aviator Amelia Earhart's round-the-world flight, but have been inactive since 1942.[334] In 1974 the Howland Island National Wildlife Refuge was established and currently covers more than 410,000 acres (around 1,660 sq. km).[335] The United States claims a fishing zone of 200 nautical miles around the island. It appears that the neighbouring country, Kiribati, accepts this claim.[336]

Howland Island, U.S.

Figure 4.13

4.71 Another example of a small atoll from which the United States claims an EEZ is Baker Island. It has a total land mass of

334 University of North Carolina, "Lighthouses of U.S. Pacific Remote Islands", available at: https://www.unc.edu/~rowlett/lighthouse/umi.htm (last visited 17 Sep. 2017).

335 U.S. Fish and Wildlife Service, footnote 333 *supra*.

336 Treaty between the United States and Kiribati, signed on 6 September, 2013, U.S. Senate, 114th Congress, 2nd Session, Treaty Doc. 114-13, pp. 1 to 6. See also R. Crocombe, *The Pacific Islands and the USA*, Institute of Pacific Studies, University of the South Pacific, 1995, p. 21 (Annex 46); International Maritime Unit, Maritime Briefing, Vol. 2, N° 8, *Undelimited Maritime Boundaries in the Pacific Ocean Excluding the Asian Rim*, by J. R. V. Prescott and G. Boyes, IBRU, 2000, p. 38 (available at the Peace Palace Library).

around 1,5 sq. km and is uninhabited except for periodic visits by scientists and every two years by the U.S. Fish and Wildlife Service.[337] Baker Island has no natural fresh water or economic activity.[338] It has an airstrip and a lighthouse, which has been inactive since 1942.[339] In 1974 the Baker Island National Wildlife Refuge was established and currently covers more than 410,000 acres (around 1,660 sq. km).[340]

Baker Island, UNITED STATES

Figure 4.14

4.72 The United States' Kingman Reef is even more illustrative. It is said to be a very small feature of around 0,0044 sq. km, with no terrestrial plants, no natural resources and supporting no economic activity. However, it does possess

337 "Baker Island", *Encyclopaedia Britannica*, available at: https://www.britannica.com/place/Baker-Island (last visited 17 Sep. 2017).

338 Y. Song, footnote 332 *supra*, p. 690.

339 University of North Carolina, footnote 334 *supra*.

340 U.S. Fish and Wildlife Service, "Baker Island National Widlife Refuge", available at: https://www.fws.gov/refuge/Baker_island/about.html (last visited 17 Sep. 2017).

abundant and diverse marine fauna and flora. In 1983, the United States proclaimed that Kingman Reef was entitled to an EEZ.[341]

Kingman Reef, U.S.

Figure 4.15

4.73 The practice of the United States, inasmuch as it is not a Party to UNCLOS, is particularly relevant for assessing its view with regard to the customary interpretation of Article 121 (3). This practice clearly confirms a very restrictive interpretation of this rule.

4.74 The delimitation treaty between Australia and France (New Caledonia) is another example of State practice in this

341 U.S. President, "Presidential Proclamation 5030: Exclusive Economic Zone of the United States of America", 10 March 1983, Federal Regulation, Vol. 48, p. 605, available at: https://www.boem.gov/US-Mexico-Presidential-Proclamation-5030/ (last visited 17 Sep. 2017); see also U.S. Department of State, Public Notice 2237, "Exclusive Economic Zone and Maritime Boundaries, Notice of Limits", Federal Regulation, Vol. 60, No. 163, 23 August 1995, p. 43825, available at: https://www.gpo.gov/fdsys/pkg/FR-1995-08-23/pdf/95-20794.pdf (last visited 17 Sep. 2017).

regard. The location of the boundary was significantly affected by Australia's Middleton Reef, located 150 km north of Lord Howe island and measures 8,9 km by 6,3 km; at high tide only a small sand cay known as "The Sound", which measures 100 metres by 70 metres, is above water.[342] According to Charney and Alexander, "France agreed or conceded to give full effect to this reef as one of Australia's basepoints".[343] Middleton Reef is part of Australia's "New Lord Howe Commonwealth Marine Reserve".[344]

Middleton Reef, AUSTRALIA

Figure 4.16

[342] Australian Government, Department of the Environment and Energy, "Elizabeth and Middleton Reefs Ramsar Wetland Ecological Character Description", available at: http://www.environment.gov.au/water/wetlands/publications/elizabeth-and-middleton-reefs-ramsar-wetland-ecd (last visited 17 Sep. 2017).

[343] International Maritime Boundaries, Vol. I, Australia-France (New Caledonia), Rep. 5-1, pp. 905, 906.

[344] Australian Government, Department of the Environment and Energy, "New Lord Howe Commonwealth Marine Reserve", available at http://www.environment.gov.au/topics/marine/marine-reserves/temperate-east/lord-howe (last visited 17 Sep. 2017).

4.75 Australia's EEZ declaration from both Middleton Reef and Elizabeth Reef, was recognized by New Zealand as part of their delimitation.[345] The EEZs of Australia and New Zealand, and their respective boundaries are depicted by the following map:[346]

[345] International Maritime Boundaries, Vol. V, Australia-New Zealand, Rep. 5-26, p. 3759.

[346] Land Information New Zealand, "Exclusive Economic Zone & continental shelf boundaries between New Zealand & Australia", available at: http://www.linz.govt.nz/sea/nautical-information/maritime-boundaries/exclusive-economic-zone-continental-shelf-boundaries-between-new-zealand-australia, (last visited 17 Sep. 2017).

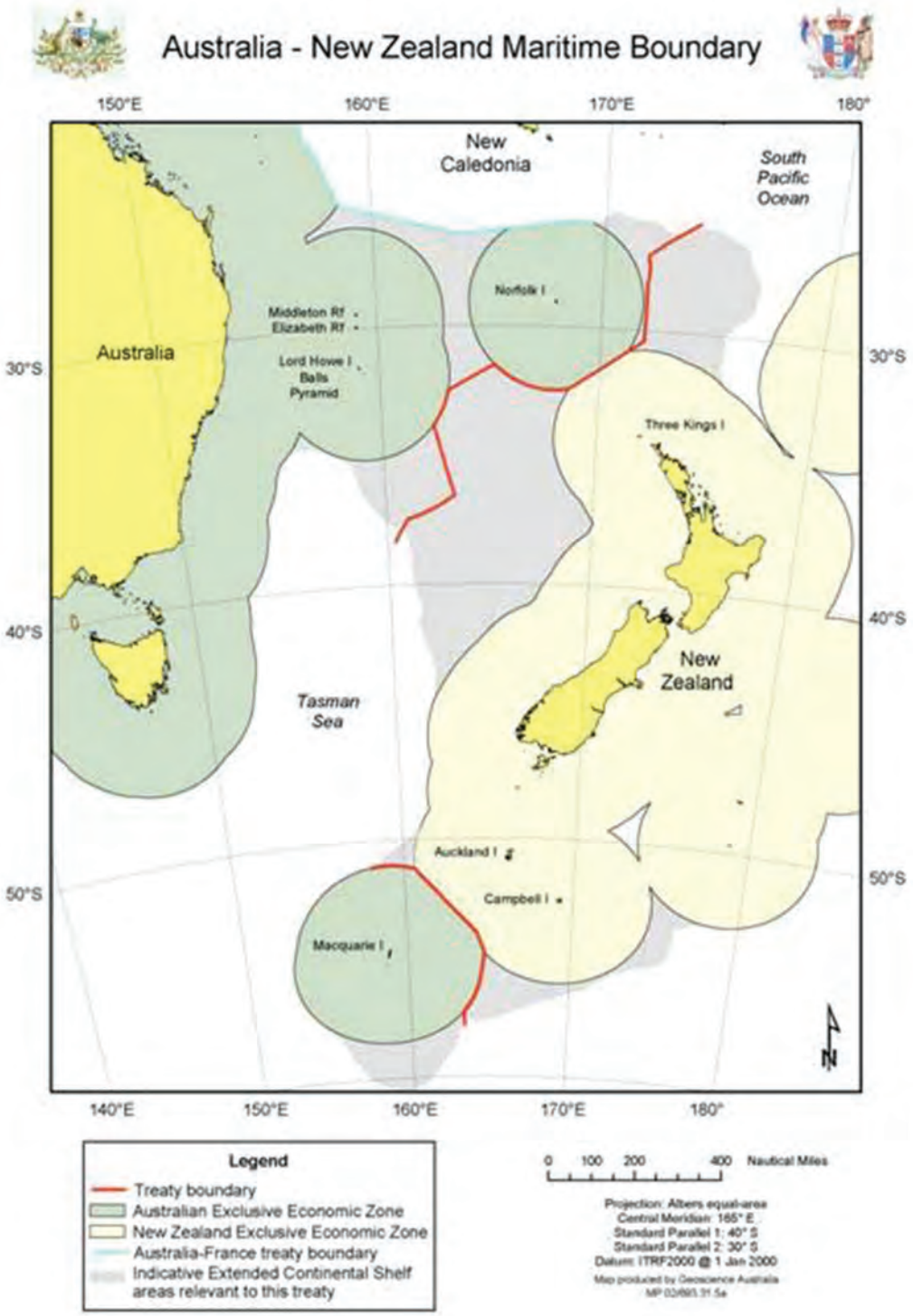
Australia - New Zealand Maritime Boundary
150°E
160°E
170°E
180°
New Caledonia
South Pacific Ocean
Norfolk I
Middleton Rf
Elizabeth Rf
Australia
Lord Howe I
Balls Pyramid
30°S
Three Kings I
40°S
New Zealand
Tasman Sea
Auckland I
Campbell I
50°S
Macquarie I
140°E
150°E
160°E
170°E
180°
Legend
Treaty boundary
Australian Exclusive Economic Zone
New Zealand Exclusive Economic Zone
Australia-France treaty boundary
Indicative Extended Continental Shelf areas relevant to this treaty
0 100 200 400 Nautical Miles
Projection: Albers equal-area
Central Meridian: 165° E
Standard Parallel 1: 40° S
Standard Parallel 2: 30° S
Datum: ITRF2000 @ 1 Jan 2000
Map produced by Geoscience Australia

Figure 4.17

4.76 New Zealand thus recognizes Australia's claim to extend a 200-nautical-mile EEZ from Middleton Reef (discussed above), and also from Elizabeth Reef, which measures 8,2 km by 5,5 km; the only part of Elizabeth Reef, which is above water at high tide is a small sand cay known as "Elizabeth Island" that measures 400 metres in diameter.[347]

Elizabeth Reef, AUSTRALIA

Figure 4.18

4.77 The Federated States of Micronesia recognized the Marshall Islands' claim to an EEZ extending from Ujelang Atoll, which affected the boundary between the parties.[348] Ujelang Atoll is a small uninhabited feature with a total land area of 1,74 sq. km.[349] Ujelang is clearly not a geological rock:

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[347] Australian Government, Department of the Environment and Energy, footnote 342 *supra*.

[348] International Maritime Boundaries, Vol. VI, Federated States of Micronesia-Marshall Island, Rep. 5-28, p. 4316.

[349] Charles Strut University, "Marshall Islands Atoll Information - Ujelang Atoll", available at: http://marshall.csu.edu.au/Marshalls/html/atolls/ujelang.html (last visited 17 Sep. 2017).

Ujelang Island, MARSHALL ISLANDS

Figure 4.19

4.78 In the delimitation treaty between Cook Islands and Kiribati, the Cook Islands recognised Kiribati's claim of an EEZ around Vostok, an uninhabited coral island with a total land mass of 0,1 sq. miles (around 0,25 sq. km).[350] Vostok, although very small, is clearly not a geological rock:

Vostok Island, KIRIBATI

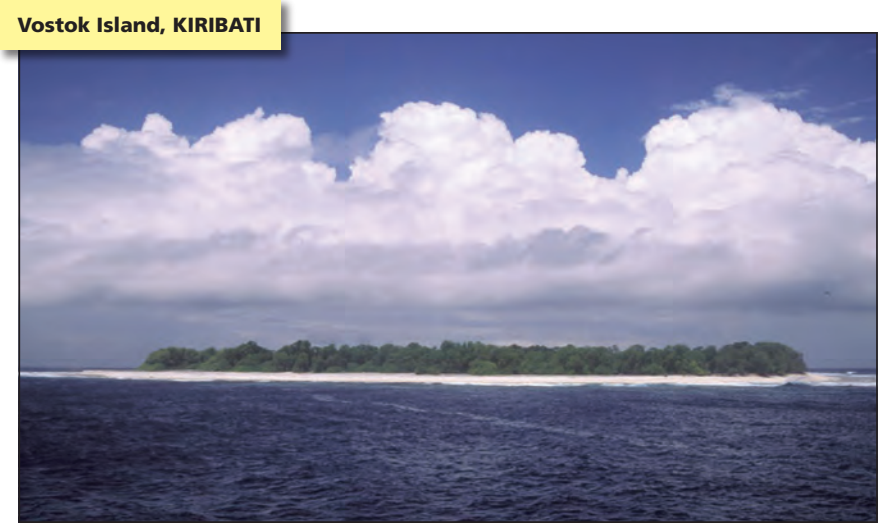

Figure 4.20

[350] International Maritime Boundaries, Vol. VII, Rep. 5-32, p. 4847; "Vostok Island", Encyclopaedia Britannica, available at: https://www.britannica.com/place/Vostok-Island (last visited 17 Sep. 2017).

4.79 The same treaty also recognises the entitlement of Flint Island, which is about 2,5 miles (4 km) long, about 0,5 mile (0,8 km) wide and has an approximate land area of 1 sq. mile (about 2,6 sq. km).[351] Although larger in size than Vostok, Flint Island is also an uninhabited coral island, and clearly not a geological rock.

Flint Island, KIRIBATI

Figure 4.21

4.80 France's Tromelin is, according to French official documents:

> *« habitée seulement par des missions scientifiques ou météorologiques, dépourvue d'eau potable et balayée par des alizés qui rendent toute culture impossible, ne peut être*

[351] United States National Geospatial Intelligence Agency, "Pub. 126, Sailing Directions (Enroute), Pacific Islands", p. 43, available at: https://msi.nga.mil/MSISiteContent/StaticFiles/NAV_PUBS/SD/Pub126/Pub126bk.pdf (last visited 17 Sep. 2017); see also "Flint Island", *Encyclopaedia Britannica*, available at: https://www.britannica.com/place/Flint-Island (last visited 17 Sep. 2017).

abordée que dans des conditions particulièrement difficiles ».[352]

Tromelin Island, FRANCE

Figure 4.22

4.81 Although it is a very small feature (1,7 km long, 0,7 km large, and a total land area of 0,85 sq. km),[353] France proclaimed an EEZ for Tromelin. It is not a geological rock, and the only ongoing dispute concerns its sovereignty, which is contested by Mauritius. But there is no dispute that Tromelin would be entitled to an EEZ with its attendant continental shelf of 296,580 sq. km.

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352 French Senate, « *Étude d'impact du Projet de Loi autorisant l'approbation de l'accord-cadre entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur la cogestion économique, scientifique et environnementale relative à l'île de Tromelin et à ses espaces maritimes environnants* », available at: https://www.senat.fr/leg/etudes-impact/pjl11-299-ei/pjl11-299-ei.html (last visited 17 Sep. 2017).

353 French Government, Decree No. 78-146 of 3 February 1978, *« portant création, en application de la loi du 16 juillet 1976, d'une zone économique exclusive au large des côtes des îles Tromelin, Glorieuses, Juan de Nova, Europa, et Bassas da India »*, available at: https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000883905 (last visited 17 Sep. 2017).

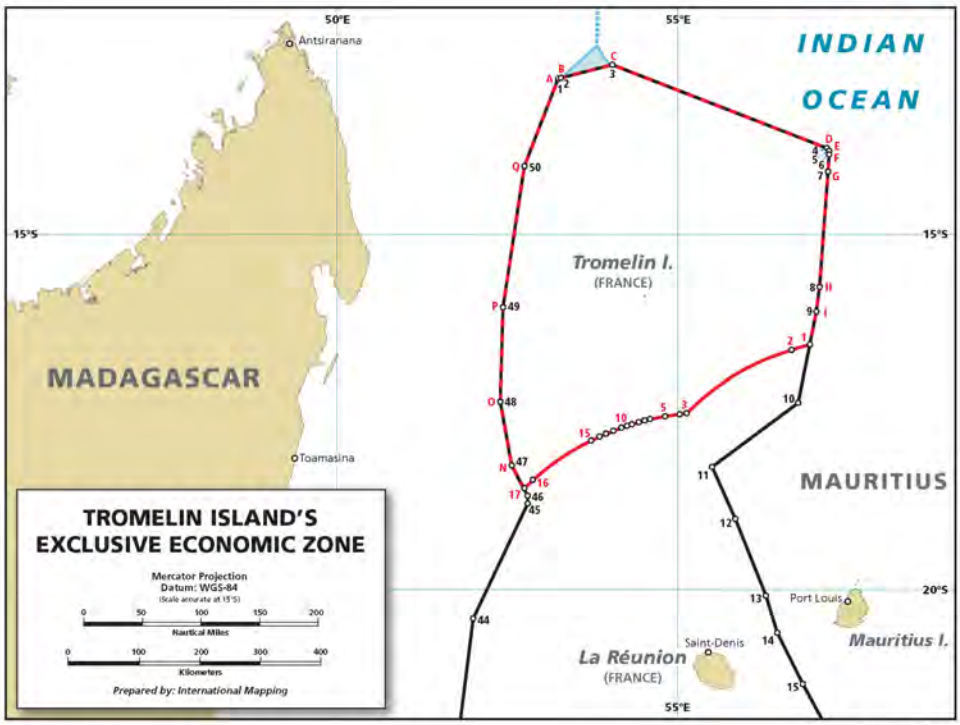

Figure 4.23

4.82 The same is true for Clipperton Island. The highest part of the island is a rock, but the rest is made of sand beaches forming a thin circle capturing the waters of a lagoon. The emerged feature is very small and uninhabited. Nonetheless, France claimed that it is entitled to an EEZ.[354] When Mexico protested the French EEZ claim, France agreed to allow Mexican vessels to fish in the waters around Clipperton Island but has maintained its claim.[355]

354 French Government, Decree No. 78-147 of 3 February 1978 *« portant création, en application de la loi du 16 juillet 1976, d'une zone économique exclusive au large des côtes de l'île de Clipperton »*, available at : https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000883905 (last visited 17 Sep. 2017).

355 Y. H .Song, see footnote 332 *supra,* p. 76.

Clipperton Island, FRANCE

Figure 4.24

4.83 France's Matthew Island is no more than 0,68 sq. km and is only partially a rocky feature. France claims an EEZ from this feature which extends for over 432,473 sq. km.[356]

Matthew Island, FRANCE

Figure 4.25

[356] French Senate, J.-É.Antoinette, J. Guerriau et R. Tuheiava, « *Rapport d'information: Zones économiques exclusives ultramarines : le moment de vérité* », 9 April 2014, p. 80, available at: https://www.senat.fr/rap/r13-430/r13-4301.pdf (last visited 17 Sep. 2017). See also, Communication from the Government of France to the United Nations Secretariat, 6 December 2010, p. 2, available at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA.htm (last visited 17 Sep. 2017).

4.84 The same holds true for Bassas da India, which is a very small atoll of 0,2 sq. km of dry land. According to a document from the French Senate: "*les terres émergées de Bassas da India représentent 0,2 km^2 de superficie et sont quasiment totalement submergées à marée haute car elles ne culminent qu'à 2,4 mètres d'altitude. Par conséquent, la faune et la flore aérienne sont totalement absentes et l'île est inhabitable*."[357] This notwithstanding, France claims a 200 nautical mile entitlement for Bassas de India, of 121,556 sq. km.[358]

Bassas da India, FRANCE

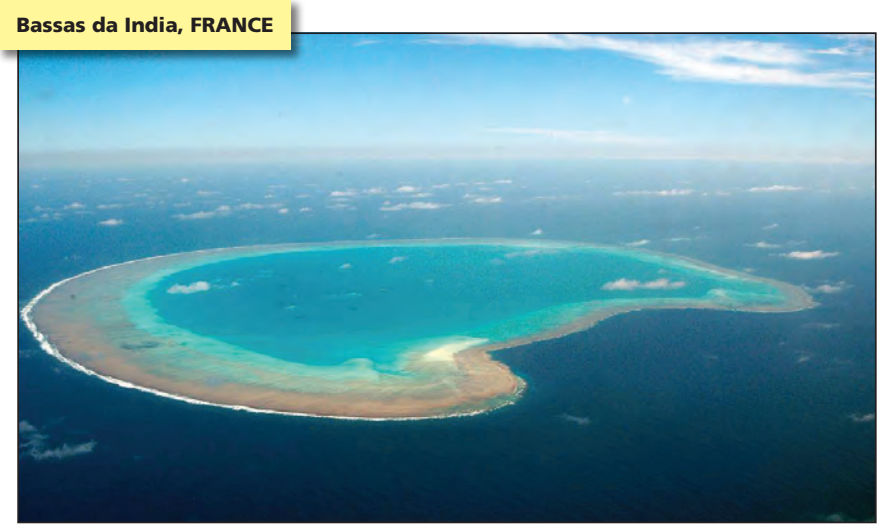

Figure 4.26

[357] French Senate, J.-É. Antoinette, J. Guerriau et R. Tuheiava, footnote 356 *supra*, p. 77.

[358] French Senate, J.-É. Antoinette, J. Guerriau et R. Tuheiava, footnote 356 *supra*, pp. 77-78.

4.85 Kiribati's McKean Island is a treeless island nearly 0,5 mile (around 0,8 km) round in shape.[359] It is ringed by a reef flat, with a beach rising to five metres above sea level. The centre of the island is depressed, with a shallow, hypersaline, guano-laced lagoon. This small island is certainly not made of "rock". Kiribati's EEZ claim for this island has not been opposed by the United States.[360]

McKean Island, KIRIBATI

Figure 4.27

4.86 Theva-i-Ra Reef (or Ceva-i-reef, or Conway Reef) is an atoll type island 450 km southwest of the Fiji Islands, part of the Republic of Fiji. According to U.S. sources, "(o)n the middle of the reef is a sand cay, 1.8m high, 0.2 mile long (around

359 United States National Geospatial Intelligence Agency, footnote 351 *supra*, p. 103.

360 Treaty between the United States and Kiribati on the Delimitation of Maritime Boundaries, footnote 336 *supra*. See also R. Teiwaki, *Management of Marine Resources in Kiribati*, 1988, University of the South Pacific, Vol. 2, No. 8, p. 86; J. R. V. Prescott and G. Boyes, footnote 312 *supra*, p. 38; U.S. Secretary of State, Letter of submittal of the Treaty between the United States and Kiribati on the Delimitation of Maritime Boundaries, 28 October 2016, U.S. Senate, 114th Congress, 2nd Session, Treaty Doc. 114-13.

0.32 km), and 73m wide."[361] The reef is uninhabited. In 1981 Fiji claimed an EEZ for this, not rocky, island.[362] In the maritime delimitation treaty between France and Fiji, full effect was given to this island, which significantly affected the boundary location.[363]

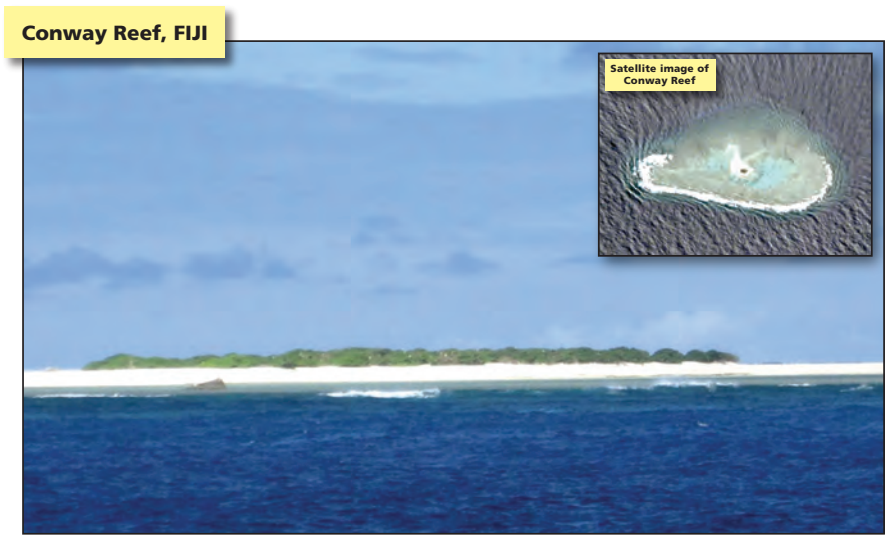

Figure 4.28

4.87 The positions of the Pacific States with respect to the Japanese claims of EEZ from Okinotorishima and Minamitorishima, are illustrative of how States perceive the distinction between a "rock" and any other "island" under customary international law. Japan has declared an EEZ from

361 United States National Geospatial Intelligence Agency, footnote 351 *supra*, p. 140; see also J. R. V. Prescott and G. Boyes, footnote 312 *supra*, p. 28.

362 Marine Spaces Act (Chapter 158A), 19 Nov. 1981, Fiji Royal Gazette Supplement, No. 41, 27 Nov. 1981, available at: http://www.state.gov/documents/organization/58567.pdf (last visited 17 Sep. 2017).

363 Limits in the Seas, No. 101. See also, International Maritime Boundaries, Vol. I, Rep. 5-6, pp. 995, 997.

both Okinotorishima and Minamitorishima, two small features in the Pacific Ocean under Japanese sovereignty. While China, Taiwan and the Republic of Korea protested Japan's EEZ declaration for Okinotorishima, their silence with respect to Minamitorishima suggests their acceptance of the claim.[364]

4.88 Okinotorishima is composed of two small rocks which were covered by concrete in order to prevent their erosion.[365] Okinotorishima is clearly a geological "rock" and hence should be considered a "rock" under international law (in case the Court decided to adhere to the size criterion, Okinotorishima is much less than 0,001 sq. mile). Japan's claim is therefore probably based upon the claim that Okinotorishima may sustain economic life. China and the Republic of Korea on the other hand, claim that Okinotorishima cannot sustain human habitation or economic life and thus should be deprived of an EEZ.[366] This example adds confirmation to the proposition that States consider the standard for the ability to sustain economic life as very low.

364 Y. Tanaka, *The International Law of the Sea*, Cambridge University Press, 2015, pp. 66-67; Y.H. Song, footnote 332 *supra*, pp. 691-694.
365 Y.H. Song, footnote 332 *supra*, pp. 691-694.
366 Y.H. Song, footnote 332 *supra*, p. 671.

4.89 This is how Okinotorishima looks today after it was covered in concrete:

Okinotorishima, JAPAN

Okinotorishima, JAPAN

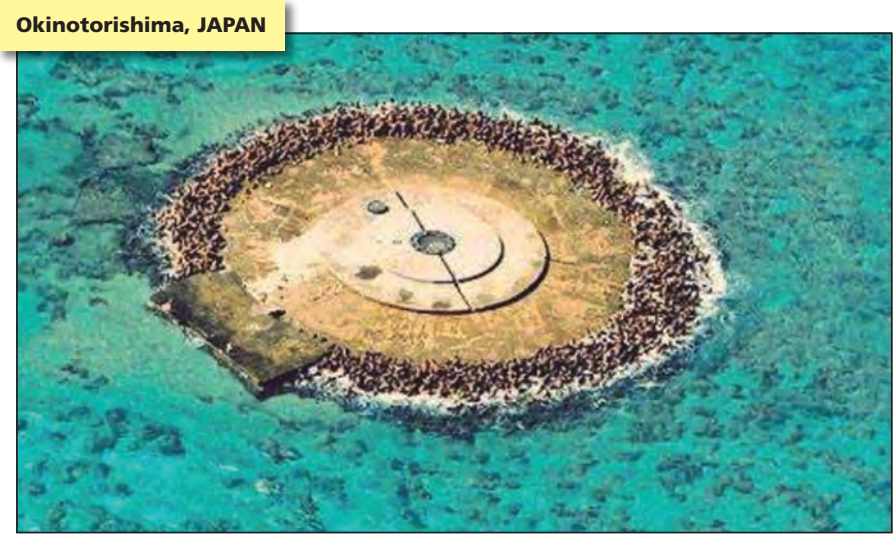

Figure 4.29

4.90 This is how Okinotorishima looked before it was covered in concrete:

Okinotorishima, JAPAN

Figure 4.30

4.91 In contrast to Okinotorishima, which is a clear geological "rock" and an extremely tiny feature, Minamitorishima, although small in size, is considered by States to be entitled to an EEZ. Minamitorishima has no permanent population, however, it houses "around 30 officials from the Japan Meteorological Agency, the Maritime Self-Defense Force and the Japan Coast Guard, which are engaged in observation and other activities there"; the island also has an airstrip.[367] The total land size of the island is 1,2 sq. km.

[367] Y.H. Song, footnote 332 *supra*, p. 692.

Minamitorishima, JAPAN

Figure 4.31

4.92 While China, Taiwan and the Republic of Korea objected to Japan's EEZ claim from Okinotorishima, they did not oppose its claim from Minamitorishima, which is recognized as having an EEZ. These States did not consider Minamitorishima as a "rock" and thus subject to Article 121 (3). While Okinotorishima is clearly a feature made of solid rock, Minamitorishima is an island and it has never been treated as a "rock". This demonstrates the discrepancy between what States consider to be "rocks" and Nicaragua's purported claim that Colombia's islands are "rocks".

4.93 State practice demonstrates that States only refrained from claiming or recognising an EEZ, with its attendant continental shelf, from islands that were geologically identifiable as "rocks", *i.e.* features solely made of solid rock.

By contrast, States declared or recognised EEZs from features that, although small in size, were not geologically a "rock".

4.94 Professor Bernard H. Oxman commented that State practice with respect to Article 121 (3) confirms that whether an island's EEZ entitlement was recognised was not affected by size or habitability.[368] Oxman's analysis demonstrates that, apart from Rockall, "instances of states refraining from making EEZ or continental shelf claims because of paragraph 3 of Article 121 are not easily ascertained".[369] According to Oxman:

> "As one might expect, there is overwhelming evidence of the application of the basic principle reflected in paragraph 2 of Article 121 and scant if any evidence that state practice suggests anything more than a widespread (albeit not ubiquitous) tendency to ignore or refrain from applying the exception introduced by paragraph 3 of that article in the establishment of EEZs and continental shelves."[370]

4.95 Furthermore, with respect to submissions to the CLCS which include small islands, Oxman suggests that they demonstrate a wide-spread practice of according maritime zones to very small islands:

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368 B. H. Oxman, "On Rocks and Maritime Delimitation", *Essays on International Law in Honor of W. Michael Reisman*, M. H. Arsanjani *et al.* (eds.), Nijhoff, 2010, pp. 893, 900-901 (available at the Peace Palace Library).

369 B. H. Oxman, footnote 368 *supra*.

370 B. H. Oxman, footnote 368 *supra*.

> "While much attention has been drawn to objections by China and the Republic of Korea to Japan's submission in respect of Oki-no-Tori Shima, submissions to the Commission on the Limits of the Continental Shelf pursuant to paragraph 8 of Article 76, and the general absence of objection by other states to those submissions on grounds of paragraph 3 of Article 121, confirm the prevailing practice of affording small islands full effect in accordance with the principle set forth in paragraph 2 of Article 121 of the LOS Convention. Small islands, often at some distance from the mainland, play different roles in many of these submissions."[371]

Because Oxman finds that governments have not been liberal in the application of Article 121 (3) both to themselves and to other States, he concludes with respect to the scope of application of the exclusion in Article 121 (3) that "(t)he exception in paragraph 3 should be strictly construed. The burden of persuasion should be borne by those advocating its application. The established rule in paragraph 2 of Article 121 should govern unless it is clearly demonstrated that the exception in paragraph 3 must be applied."[372] In view of predominant State practice, it is submitted that Nicaragua did not, and could not, fulfil this burden.

4.96 Oxman's position was shared by Myron H. Nordquist. Although Nordquist explored Article 121 (3) from a textual perspective (and, as such, his approach would not be applicable to Colombia), he concluded that since Article 121 (3) was an

371 B. H. Oxman, footnote 368 *supra*.
372 B. H. Oxman, footnote 368 *supra*.

exception to the general principle in Article 121 (2) that islands should be recognised an EEZ and continental shelf,

> "(t)he application of general accepted guidelines for interpreting treaty text requires one to scrutinize the exception carefully and unless merited, not read the exception too broadly to cut down the general rule. Not reading the exception too broadly in this case means recognizing a constructive presumption that a 'rock' is an island entitled to the full treatment as land for purposes of maritime entitlement under UNCLOS".[373]

4.97 Thus, based upon State practice, Colombia submits that the customary interpretation of Article 121 (3), that is applicable to it, is that under which the term "rock" should be construed restrictively, in the geological sense of the term. This is in line with the fact that, as recognized by the Court,[374] paragraph 3 is in effect an exception to paragraph 2 and should therefore be interpreted restrictively. Islands, as small as they may be, which are not "rocks" in the geological sense, are not subject to the limitation in Article 121 (3) and are thus entitled, under customary international law, to a 200-nautical-mile EEZ with its attendant continental shelf in every direction.

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[373] M. H. Nordquist, "Textual Interpretation of Article 121 in the UN Convention on the Law of the Sea", *Coexistance, Cooperation and Solidarity*, J. P. Hestermeyer (ed.), Brill, 2012 (available at the Peace Palace Library).

[374] 2012 Judgment, p. 674, para. 139.

(ii) Interpretation of "Which Cannot Sustain Human Habitation or Economic Life of their Own"

4.98 As further explained below, none of Colombia's relevant islands in the Caribbean Sea is a "rock" in the geological sense and thus is not subject to the limitation in Article 121 (3); however, should the Court decide to the contrary, Colombia will now elaborate on the meaning of the requirement of the capacity to sustain human habitation or economic life.

4.99 This condition is based on a presumption of a potentiality, rather than a contemporary observation: the operative words are "cannot" and not "does not". This means that a "rock" which can potentially sustain either human habitation or economic life of its own will enjoy full entitlements, while a "rock" which cannot, will not. These two conditions are alternative, not cumulative. The question is therefore not if the "rock" in fact does sustain, or has ever sustained, human activities, it is only whether it can or cannot.[375]

4.100 Like the first criterion of a geological "rock", this issue also turns upon relevant State practice. Thus, Colombia will first survey the alternative requirements of either the capability to sustain human habitation (a) or an economic life of its own (b). It will then demonstrate that State practice supports an extremely low standard for fulfilling either requirement (c).

375 See Y. Tanaka, footnote 364 *supra*.

a. Capability to Sustain Human Habitation

4.101 Authors diverge on the meaning of the capacity to sustain human habitation. Some suggest that the question to be answered is not whether human beings can survive on the rock under examination, but if the rock is technically capable of sustaining human habitation. To be such, some suggest that the minimum requirement be based on three criteria: whether there is fresh water; whether it is possible to grow food and whether there is material to build houses or shelters of some kind.[376] This seems to be the approach taken by the Arbitral Tribunal in *Philippines* v. *China*.[377] More generally, the "habitation test" applied by a part of doctrine focuses on the sole question of fresh water.[378]

4.102 If a rocky island of a certain size could offer such facilities, it would not be an Article 121 (3) rock. Thus, a feature like Rockall, which does not provide fresh water or food, is accepted by the United Kingdom as a typical Article 121 (3) rock. As will be demonstrated below, it is clear that State practice does not validate any "habitation test" when it comes to islands, even small ones, which are not rocks.

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376 G. Xue, "How much can a rock get? A reflection from the Okinotorishima Rocks", in *The Law of the Sea Convention: US Accession and Globalization*, M. H. Nordquist *et al* (eds.), Martinus Nijhoff Publishers, 2012, p. 356.

377 *South China Sea Arbitration*, para. 490.

378 E. D. Brown, footnote 281 *supra*, p. 150; S. Karagiannis, footnote 365 *supra*, p. 573.

4.103 Gidel wrote that an island must have the natural conditions allowing the stable residence of organized groups of human beings.[379] Jon M. Van Dyke and Robert A. Brooks contend that "only if stable communities of people live on the island and use the surrounding ocean areas, the island can generate an EEZ or a continental shelf."[380] They wrote that: "from the perspective of history, if a rock or reef cannot sustain human habitation permanently for 50 people, then it cannot claim an EEZ or a continental shelf."[381] Many of these views seem based on nothing more than *ipse dixit*.

4.104 On the other hand, after an examination of the *travaux*, J. L. Charney denied that the need for habitation must be permanent.[382] Indeed, neither the word "permanent" nor the word "stable" are used in Article 121 (3). Oude Elferink, Counsel for Nicaragua, writes that: "(i)n any case, there are no indications that there was a consensus at either the Third United Nations Conference on the Law of the Sea or in subsequent practice that 'human habitation' has to be interpreted in these broad terms."[383]

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379 G. Gidel, *Le Droit International Public de la Mer : le temps de paix*, Vol. III, Mellottée, 1934.

380 J. Van Dyke and R. A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, 1983, p. 286.

381 J. Van Dyke and D. Bennett, "Islands and the Delimitation of Ocean Space in the South China Sea", *Ocean Yearbook*, Vol. 10, 1993, p. 79.

382 J. L. Charney, footnote 291 *supra*, p. 868.

383 G. Oude Elferink, "The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts ", *Ocean Development and International Law*, Vol. 32, 2001, p. 174.

4.105 In any event, the habitability criterion does not require that the rock must be currently inhabited, but that habitation is possible. The way of assessing such ability to sustain human habitation could be by looking at past and present habitation, but other means are possible. As to whether this human presence has to be permanent or may be intermittent, *e.g.* stops by fishermen, one doctrinal position has argued that habitability must mean more than occasional shelter to a few.[384]

4.106 Some scholars assert that the requirement of habitability refers to a civilian population and that "soldiers and lighthouse keepers are not sufficient".[385] But other scholars argue that an island should not be automatically disqualified from generating an EEZ and a continental shelf simply because only scientific personnel inhabit it; rather, it should be demonstrated that the island cannot sustain other kinds of habitation.[386] On this particular issue, the Court said that Pedra Branca, a definitively geological rock, on which there has been a lighthouse for a long time, is an "uninhabited and uninhabitable island".[387]

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384 M. Gjetnes, "The Spratlys: are they rocks or islands?", *Ocean Development and International Law*, Vol. 32, 2001, p. 196.

385 M. Gjetnes, footnote 384 *supra*, p. 195. See also the position of Turkey during the *travaux préparatoires*, quoted by Kolb, footnote 289 *supra*, p. 891.

386 M. Gjetnes, footnote 384 *supra*, p. 196.

387 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 36, para. 66.

Pedra Branca, SINGAPORE

Figure 4.32

4.107 But it should be stressed that when States base their claim that a rock generates entitlements on the mere presence of a lighthouse and on the people who operate it, they do not base their claim on a contention that such rock is capable of sustaining human habitation, but on the demonstration that it hosts an economic activity and that in the future it may be inhabited.

4.108 The question arises as to the number of inhabitants that the feature should be able to sustain. Different authors argue that if a rock can sustain a "stable community" of at least fifty people, then it meets the requirement of habitability.[388] But this is a doctrinal invention and has never been considered as relevant by courts. Even the Arbitral Tribunal in *Philippines* v. *China* was cautious in this respect, suggesting that it should be

388 J. Van Dyke and D. Benett, footnote 381 *supra*, p. 79.

more than one person, without further explanation.[389]

4.109 In any case, it is obvious that fresh water can be produced anywhere via desalinization, food can be grown on artificial elevated land, and material for permanent habitation can also be brought to any feature by human intervention. As rightly said by Karagiannis "quasiment tout rocher peut finir par se prêter à l'habitation humaine si un gouvernement décide de tout faire pour qu'il en soit ainsi."[390] Thus, if at a certain period, a rock showed no capacity to sustain human habitation, it is possible that, later, this situation changes and it could acquire such capacity.

b. Capability to Sustain Economic Life on Its Own

4.110 This second criterion is alternative, not cumulative. J. L. Charney explained that it is only necessary to prove that the island can sustain human habitation or economic life, not both.[391] This is also the position of G. Oude Elferink.[392]

4.111 Moreover, B. Kwiatkowska and A. H. A. Soons observed in this context "that an increasing number of ocean law and policy commentators alleged that a lighthouse or other aid to navigation built on an island gives the island an economic life of

389 *South China Sea Arbitration*, para. 491.
390 S. Karagiannis, footnote 365 *supra*, p. 575.
391 J. L. Charney, footnote 291 *supra*, p. 871.
392 G. Oude Elferink, footnote 383 *supra*, p. 174.

its own due to its value to shipping".[393]

4.112 As will be further elaborated below, Professor Jonathan L. Hafetz proposed that establishing a preservation of maritime environment around an island may demonstrate that the island can sustain an economic life.

c. State Practice with Respect to the Capability to Sustain either Human Habitation or Economic Life

4.113 Inasmuch as the rule applicable to Colombia is of a customary nature, State practice is particularly significant for determining what is required. In this regard, the practice explained below demonstrates that: (1) the standard of "human habitation or economic life of its own" does not apply to features which are not rocks in the geological sense; (2) if it is applied to rocks in the geological sense, the standard of "human habitation or economic life" is extremely low.

4.114 The United States, for instance, contends that all its features are capable of sustaining human habitation, even the smallest.[394] As mentioned above, the United States declared an EEZ from Howland Island, which has no lagoon, seemingly no natural fresh water resources, no economic activity and it is only

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[393] B. Kwiatkowska and A.H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human habitation or Economic Life of Their Own", *Netherlands Yearbook of International Law*, Vol. 21, 1990, pp. 167-168, cited in R. Beckman and C. Schofield, "Moving beyond Disputes over Islands Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait", *Ocean Development and International Law*, Vol. 40, 2009, p. 10.

[394] See J. van Dyke *et al.*, footnote 279 *supra*, pp. 425-494.

visited every two years by the U.S. Fish and Wildlife Service.

4.115 Similarly, the United States declared an EEZ for Kingman Reef which has no terrestrial vegetation, no natural resources and supports no economic activity, besides abundant and diverse marine fauna and flora.

4.116 Both EEZ assertions by the United States are probably based upon the proposition that the islands are not geological rocks and thus not subject to the customary limitation based upon Article 121 (3).

4.117 As recalled above, the French Senate commented on Tromelin that:

> *« l'île de Tromelin, dont les dimensions n'excèdent pas 1,5 km de longueur sur 0,7 km de largeur et dont l'altitude maximum est de 7 mètres, est habitée uniquement par des missions scientifiques ou météorologiques, car dépourvue d'eau potable et balayée par des alizés qui rendent toute culture impossible et ne peut être abordée que dans des conditions difficiles.*
>
> *La partie terrestre de l'îlot ne présente donc pas d'intérêt économique. Elle abrite une station météorologique et les équipes chargées de l'entretenir, station que Météo France souhaite automatiser.»*[395]

[395] French Senate, *« Rapport n° 143 (2012-2013) de M. Gilbert Roger, fait au nom de la commission des affaires étrangères, de la défense et des forces armées, sur le projet de loi autorisant l'approbation de l'accord-cadre entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur la cogestion économique, scientifique et environnementale relative à l'île de Tromelin et à ses espaces maritimes*

4.118 Yet, France claims an EEZ for this feature, meaning that France either considers that it is not a "*rocher*" (rock), in the geological sense, or that the habitation test is met.

4.119 Aves Island, which is recognized by certain third States as having an EEZ with its attendant continental shelf, and consists mostly of sand and vegetation, has no supply of fresh water other than rainfall and has never been inhabited. From 1878 to 1912 it was occupied intermittently by a U.S. company under the U.S. Guano Islands Act. Venezuela asserted its claim to the island in 1895 (based on an 1865 arbitration agreement with the Netherlands). In 1978, a permanent scientific station was established, staffed by scientists and protected by Naval personnel. Aves Island again demonstrates that the "habitation or economic life" test is very low.

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environnants », p. 6, available at: https://www.senat.fr/rap/l12-143/l12-1431.pdf (last visited 17 Sep. 2017).

4.120 Brazil has claimed entitlements for Saint Peter and Saint Paul Rocks, which are clearly rocks (around 0,0159 sq. km) in the geological sense.

Saint Peter & Paul Rocks, BRAZIL

Figure 4.34

4.121 It has been reported that the Brazilian Navy inaugurated in 1998 the Saint Peter and Saint Paul Archipelago Scientific Station.[396] The station is manned with four researchers, who are rotated in and out every 15 days.[397] There is also a 6 metres high lighthouse.[398]

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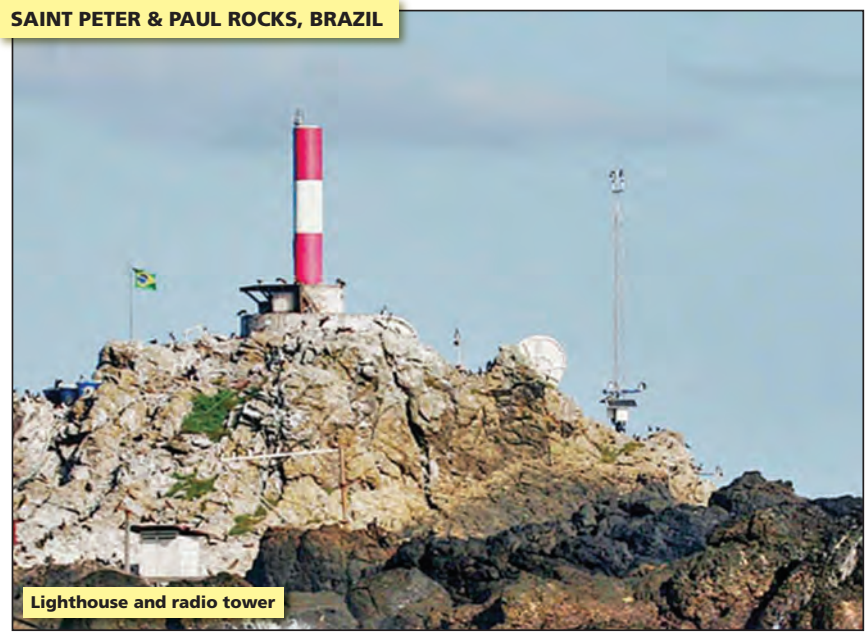
396 C. Engel de Alvarez and D. Viania, "The Research Station of St Peter and St Paul Archipelago", in *Saint Peter and Saint Paul Archipelago, Brazil in the mid-Atlantic*, Vedas Ediçoes, 2017, p. 128, available at: https://www.mar.mil.br/secirm/publicacoes/livros/arquipelagospsp-ingles.pdf (last visited 17 Sep. 2017).

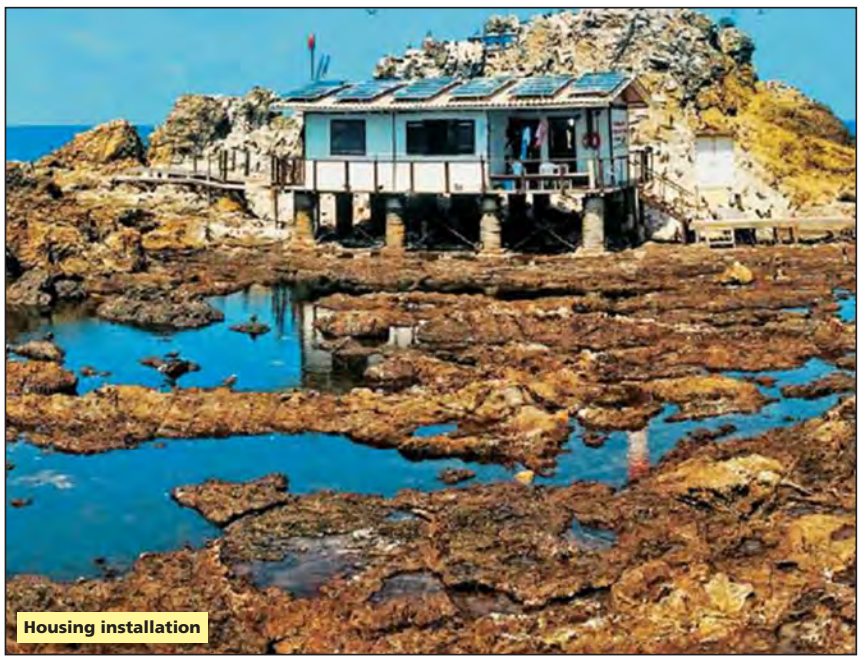
397 L. Ferraz, "Expedição ao Arquipélago de São Pedro e São Paulo e Fernando de Noronha", 19 April 2017, Marinha do Brasil, available at: www.marinha.mil.br/content/expedicao-ao-arquipelago-de-sao-pedro-e-sao-paulo-e-fernando-de-noronha (last visited 17 Sep. 2017).

398 University of North Carolina, "Lighthouses of Brazil: Atlantic Islands", available at: www.unc.edu/~rowlett/lighthouse/bris.htm (last visited 17 Sep. 2017).

SAINT PETER & PAUL ROCKS, BRAZIL



Lighthouse and radio tower



Housing installation

Figure 4.35

4.122 Brazil presented a submission before the CLCS claiming that these features are entitled to an OCS.[399] The United States subsequently sent a note to the CLCS regarding Brazil's submission, highlighting only the issues of sediment thickness and the Victoria-Trindade feature;[400] neither the United States, nor any other State contested the right of Brazil to claim entitlements for Saint Peter and Paul Rocks.[401] This practice once again points to an extremely low requirement of human habitation or economic life with respect to Article 121 (3) and the implementation of the analogue rule of customary international law.

4.123 As mentioned above, Mexico declared an EEZ from Roca Partida, clearly a geological rock. Mexico's position appears to be based upon the proposition that Roca Partida is a rock which may sustain human habitation or economic life of its own.

4.124 This State practice demonstrates that either these States did not consider these features as geological rocks, or that they considered the features to be capable of sustaining economic life

399 See "Submission by Brazil to the Commission on the Limits of the Continental Shelf (CLCS) on the Outer limits of the continental shelf beyond 200 nautical miles from the baselines" and "Executive Summary", p. 8, available at: www.un.org/depts/los/clcs_new/submissions_files/bra04/bra_exec_sum.pdf (last visited 17 Sep. 2017).

400 Letter dated 25 August 2004 from the Permanent Mission of the United States to the Legal Counsel of the United Nations regarding the Brazilian Submission to the CLCS, available at: http://www.un.org/depts/los/clcs_new/submissions_files/bra04/clcs_02_2004_los_usatext.pdf (last visited 17 Sep. 2017).

401 Y. Song, footnote 332 *supra*, p. 77.

or human habitation. Regardless of the reason, this practice demonstrates that small features were recognized as having EEZ with its attendant continental shelf and that the standards for a rock and human habitation or economic life are extremely low in customary international law.

4.125 Colombia thus submits that State practice demonstrates that: (i) features that are islands but not rocks in the geological sense are entitled to an EEZ with its attendant continental shelf; and (ii) in any event, the human habitation and economic life test, if it applies, is very low.

(b) General overview on Colombia's Islands

4.126 The Court is already familiar with Colombia's islands since it unanimously decided in 2012 that Colombia has sovereignty over the islands of Roncador, Serrana, Serranilla, and Bajo Nuevo, among others. These are naturally-formed islands and clearly not rocks.

4.127 What is important to point out at this juncture is that these islands are part of the territorial, cultural, environmental and political unity of the San Andrés Archipelago. Hence, they are considered and used by the inhabitants of the Archipelago as pertaining to a unit. As a Raizal fisherman explains: "I see the Archipelago as one single territory. I do not see it detached with Providencia on one side, the northern cays (Roncador, Serrana, Serranilla and Bajo Nuevo) on another side, San Andrés on a

different side and the southern cays on another side. No. For me is just the same thing."[402]

4.128 As a result of the territorial, cultural, environmental and political unity of the San Andrés Archipelago, the inhabitants of the islands of San Andrés, Providencia and Santa Catalina, since time immemorial, have been inextricably linked to the other islands, in particular Roncador, Serrana, Serranilla and Bajo Nuevo.[403]

4.129 Although these islands, as of today, are not permanently inhabited, as a matter of national policy,[404] by people other than the Naval officers stationed there, the inhabitants of the Archipelago – and among them, especially the Raizales – have had for centuries a constant periodic presence there for purposes of exploiting the abundant natural resources, such as guano, fish, spiny lobster, queen conch, turtles, coconuts and seabird eggs. As skilled sailors, they frequently navigate to these islands from San Andrés and Providencia for extended periods.[405] This traditional practice has continued over the years and persists in present times. Examples of the Roncador's Visitors Log support

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402 Affidavit by Mr Milford Danley McKeller Hudgson (Annex 34).

403 See Annexes 34 to 42.

404 In this regard, Law 1 of 1972 "Whereby a Special Statute for the Archipelago of San Andrés and Providencia is issued" establishes that for reasons of national sovereignty the islands of Roncador, Serrana, Serranilla and Bajo Nuevo, among others, are considered of public utility, which, accordingly, belong to the State and are inalienable (the State cannot transfer its property rights in any way) and imprescriptible (no inhabitant can acquire property rights by means of prescription). See Annex 2.

405 See Annexes 34 to 42.

such regular visits.[406] Similarly, commercial fishing vessels from San Andrés also visit Roncador, Serrana, Serranilla and Bajo Nuevo with frequency and stay there for considerable periods of time.[407] As a result, in these islands there is a permanent rotating human presence all year long.

4.130 The fact that the islands of Roncador, Serrana, Serranilla and Bajo Nuevo are an integral part of the San Andrés Archipelago[408] and that there has been constant and periodic presence of the Raizales there, has long been recognized by Colombian authorities. For instance, as early as 1934 a Report of the Colombian Senate's Special Commission in relation to the Cays of Roncador and Quitasueño noted that:

> "Geographically, the cays of Roncador and Quitasueño and la Serrana can and must be considered as an integral part of the Archipelago of San Andrés and Providencia. The latter lands are those which are closer to the islets in question and the natives of our archipelago are those who, since immemorial times, have exercised acts of dominion and possession over them, consisting mainly of turtle and tortoise fishing."[409]

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406 National Navy of Colombia, Selected Entries in the Report Book on Motor Vessels, Advanced Navy Detachment # 22 "Roncador" (Annex 10).

407 See Annexes 11 to 15.

408 It was also what other States considered, as found by the Court in its 2012 Judgment, p. 660, para. 95.

409 Colombian Senate, "Report of Special Commission that studied the memorial of Mr Ernesto Restrepo Gaviria, in relation to the Cays of Roncador and Quitasueño, 16 November 1934", *Territorial and Maritime Dispute*, Counter-Memorial of the Republic of Colombia, Volume II.A, Annex 118.

4.131 The historic presence of the Raizales in the islands of Roncador, Serrana, Serranilla and Bajo Nuevo is well documented. For instance, in 1941, while conducting the Fifth George Vanderbilt Expedition, the famous ornithologists James Bond and Rodolphe Meyer de Schauensee landed in Serranilla and found that "fishermen with their families were living there for the purpose of catching turtles as well as gathering tern eggs and guano."[410]

4.132 The constant and periodic presence of the Raizales in the islands of the Archipelago such as Roncador, Serrana, Serranilla and Bajo Nuevo does not conform to the Western lifestyle, but rather with the Raizal traditions, customs and idiosyncrasies developed by these populations for centuries. Due to their historical ties to the sea, the Raizal fishermen's lifestyle includes spending several months a year in Roncador, Serrana, Serranilla and Bajo Nuevo – not enduring "a night or two on their shores" as Nicaragua put it[411] – fishing, cooking on bonfires, collecting rainwater or well water for their basic needs, using natural herbs as Lavinda for tea or infusions and coconut as the base of cooking, among others. Furthermore, graves can be found in the islands.[412] The Raizales integration of Roncador, Serrana, Serranilla and Bajo Nuevo cays as inherent to their way of life

410 J. Bond and R. Meyer de Schauensee, "The Birds", *The Academy of Natural Sciences of Philadelphia*, Monographs, Number 6, Results of the Fifth George Vanderbilt Expedition (1941), Wickersham Printing Company, 1947, p. 10 (Annex 47).

411 *Territorial and Maritime Dispute*, Public Sitting 1 May 2012 CR 2012/15, p. 31, para. 82 (Lowe).

412 Affidavit by Mr Artimas Alcides Britton Davis (Annex 36).

may, to a certain extent, be compared to the "nomad's way of life", which created "legal ties" between nomadic tribes and certain uninhabited territories, as described by the Court in the *Western Sahara* advisory opinion.[413]

4.133 Due to the dependence of the Raizal fishermen for their subsistence on the natural resources of the islands – like turtles and seabirds – and the delicate ecosystem balance that could be jeopardized if significant human settlements were developed in the islands, the Raizales have never permanently settled in Roncador, Serrana, Serranilla or Bajo Nuevo, although it can be said that they have been and continue to be permanently inhabited on a rotating basis.

4.134 Turning to the assessment of economic life, due regard must be given to environmental protection measures. Professor Jonathan L. Hafetz suggests that establishing a preservation of maritime environment around a feature can serve to demonstrate an economic life. He states that the "(p)reservation of the marine environment through devices like MACPAs (Marine and Coastal Protected Areas) can bring net economic benefits and sustainable development, thus demonstrating why marine conservation can constitute an economic use within the meaning of Article 121 (3)."[414] In support of this position, based upon the

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413 *Western Sahara*, *Advisory Opinion, I.C.J. Reports 1975*, pp. 64-65, para. 152.

414 J. L. Hafetz, "Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention", *American University International Law Review*, Vol. 15, 2000, pp. 626-627.

objectives of Article 121 (3), he brings as an illustrative example:

> "a State that establishes a marine park or protected area around a pristine coral reef should not be penalized by being forced to forego the expansion of its maritime jurisdiction that it would likely have gained from pursuing a more traditional form of economic development. Instead such States should be given an incentive to preserve the marine environment where such preservation is also economically beneficial and thus consistent with the 'economic life' criterion of Article 121 (3)."[415]

4.135 Professor Hafetz further explains that recognizing maritime preservation zones as sources of economic life is consistent with the purpose of UNCLOS and is good policy:

> "Measures to protect the marine environment can yield economic benefits in various forms, including increased fishing stocks, tourist spending, products from coral reefs, and health benefits from reduced pollution. Such measures can and should satisfy the 'economic life of their own' requirement of Article 121(3), thus enabling a 'rock' to achieve the formal legal status of an 'island' and thereby potentially extending a coastal State's continental shelf and EEZ rights. This interpretation of Article 121(3) is consistent with UNCLOS III's text, UNCLOS III's objects and aims, subsequent developments in international law, and the public policy of preserving the marine environment where it is economically beneficial to do so."[416]

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415 J. L. Hafetz, footnote 414 *supra*, p. 627.

416 J. L. Hafetz, footnote 414 *supra*, p. 627.

4.136 In this regard, it is worth highlighting the unique environmental characteristics of the Archipelago – including the invaluable environmental resources and services of Roncador, Serrana, Serranilla and Bajo Nuevo – which have led to the adoption of different protection measures by the Colombian government.

4.137 For instance, in 1996 the Colombian Ministry of Environment issued Resolution No. 1426 which declared the San Andrés Archipelago – including, of course, the islands of Roncador, Serrana, Serranilla and Bajo Nuevo – as a Special Management Area, due to the remarkably high productivity and biodiversity of its ecosystem and the need to "ensure the perpetuation of its natural resources and cultural values, the healthy environment for its inhabitants and the continued availability of resources".[417]

4.138 Thus, the management and protection of the environment and the renewable resources in the Special Management Area were entrusted to the Ministry of Environment and the Corporation for the Sustainable Development of the Archipelago of San Andrés, Providencia and Santa Catalina (CORALINA). Their powers and duties included, for instance, protecting the environment by "regulating the activities that are carried out within the area" and "regulating land use according to its

[417] Ministry of Environment, Resolution Number 1426 of 1996, "Whereby the Special Management Area 'The Corals' of the Archipelago of San Andrés, Providencia and Santa Catalina is reserved, its boundaries are marked out and it is declared", Excerpts from the Reasoning and Articles 1 and 2 (Annex 3).

characteristics and potential".[418]

4.139 Furthermore, in 2000, UNESCO declared the ecosystem of the San Andrés Archipelago as the Seaflower Biosphere Reserve under its Man and the Biosphere (MAB) Program. In this regard, it has been noted that

> "The Seaflower Biosphere Reserve houses important ecosystems such as tropical dry forest, mangrove forests, seagrass meadows or seagrass beds, soft bottoms and coralline sand beaches, which are very well preserved (Taylor et al., 2011). Likewise, it has more than 77% of the shallow coralline areas of Colombia (Invemar 2005, 2009, Coralina-Invemar 2012), the world's third biggest coral reef, deep ecosystems (including deep corals), key species, great richness and diversity of fish, corals, sponges, gorgonacea, macroalgae, queen conch, lobsters, birds, reptiles, insects, among others, which provide countless ecosystem services such as food, coastal protection, recreation, etc. (Conservation International 2008, Burke et al., 2008)."[419]

4.140 Then, in 2005, the Ministry of Environment, Housing and Territorial Development of Colombia issued Resolution No. 107 declaring a zone within the Archipelago (comprising, among others, the cays of Roncador and Serrana) as the Seaflower Marine Protected Area, given the importance of the Archipelago "due to its ecosystems and resources of strategic

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[418] Ministry of Environment, Resolution Number 1426 of 1996, Article 2 (Annex 3).

[419] Colombian Ocean Commission, "Contributions to the Knowledge of the Seaflower Biosphere Reserve", Excerpts, 2015, p. 15 (Annex 16).

value that provide environmental goods and services at the base of the sustainable development and preservation of the country's environmental heritage".[420]

4.141 In this context, the Colombian government, through its national and local authorities, has progressively established a sustainable development model aimed at the rational use of those resources and services, as well as their conservation for future generations.

4.142 In fact, for decades the authorities and inhabitants of the Archipelago have been fully aware of these environmental constraints and have structured their activities around the need for environmental sustainability and the development of planning instruments of administrative units like the Archipelago Department of San Andrés on one hand and the Municipality of Providencia on the other.[421]

4.143 This approach is reflected in a series of political, legal and technical instruments, which include limitations on the

[420] Ministry of Environment, Housing and Territorial Development, Resolution number 107 of 2005, "Whereby a Marine Protected Area is declared and other provisions are enacted", Preamble (Annex 4).

[421] See for example: Strategic Line of Environmental and Cultural Sustainable Development in the Municipal Agreement No. 007 of 2012 (May 28), "Through which the Municipal Development Plan of Providencia and Santa Catalina Islands 2012-2015 'Opportunities for all' is adopted"; Strategic Line of Economic Development and Environmental Sustainability in the Municipal Agreement No. 005 of 2008 (May 28), "Through which the Municipal Development Plan of Providencia and Santa Catalina Islands 2008-2011 'Opportunities for all' is adopted"; Environmental Objectives in Decree No. 325 of 2003 (November 18) Land Use Plan of San Andrés 2003-2020.

exploitation of certain resources and restrictions to the marine and land use. As an example, for decades the environmental authorities in the Archipelago have imposed fishing bans in the waters surrounding Roncador, Serrana, Serranilla and Bajo Nuevo in order to protect species such as spiny lobster and queen conch; and have entirely banned turtle fishing and the use of autonomous and semi-autonomous diving equipment.[422]

4.144 In 1968, the Board of Directors of the Colombian Institute for Agrarian Reform (INCORA) issued Resolution No. 206,[423] which declared Roncador, Serrana, Serranilla and Bajo Nuevo – among other features of the Archipelago – as "special reserve zones, with the purpose of preserving the flora, fauna, lake levels, creeks and natural scenic beauties",[424] establishing that within these "intangible preservation zones", it was forbidden to "occupy the land", as well as engage in "all kinds

[422] See for example: Board of Directors of the National Institute for the Renewable Natural Resources and the Environment (INDERENA), Agreement No. 0085 of 1 December 1988 "Whereby regulatory measures for the fishing activities in the Archipelago of San Andrés and Providencia and especially in its Cays and Banks of Roncador, Serrana and Quitasueño are established"; and Agreement No. 0017 of 8 May 1990 "Whereby regulatory measures for the fishing activities in the Archipelago of San Andrés and Providencia and especially in the area of the Vásquez Saccio Treaty 1972 are established". Further evidence of these fishing bans and regulations can be found in Colombia's Counter-Memorial in *Territorial and Maritime Dispute*, Vol. II.B, Appendix 5 (Licensing of foreign fishing vessels in the San Andrés Archipelago, pp. 74, 75, 79, 90, 97, 111) and Appendix 6 (Operation and permanence of United States fishing vessels in the cays of Roncador, Quitasueño and Serrana, pp. 127, 131, 134).

[423] Colombian Institute for Agrarian Reform, Resolution Number 206 of 1968, "Whereby certain areas from the Archipelago of San Andrés and Providencia are removed from the territorial reserve of the State and certain sectors therein are declared as special reserves" (Annex 5).

[424] Colombian Institute for Agrarian Reform, footnote 423 *supra*, Article 3.

of activity in industry, cattle or agriculture".[425]

4.145 In 2005, the Board of Directors of CORALINA, the environmental authority of the Archipelago, issued Agreement No. 025, which established the internal zoning and regulation of uses in the Seaflower Marine Protected Area. Regarding the islands of Roncador and Serrana, they are defined as a Special Use Zone, which means that "the degree of human intervention will be restricted to activities such as research, monitoring, environmental education, ecotourism, low impact recreation, anchorage, access channel, sustainable fishing, among others".[426]

4.146 The establishment of these types of restrictions intended to preserve the environment of the Archipelago is common. In fact, the whole Archipelago, including the islands of San Andrés, Providencia and Santa Catalina, are subject to a special legal regime, expressly provided for in the Colombian Constitution.[427] This regime includes restriction and regulation of the rights of movement and residence in the Archipelago, considering that it presents "a high index of demographic density which has made the development of the human communities on the islands difficult" and that "the natural and

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[425] Colombian Institute for Agrarian Reform, footnote 423 *supra*, Article 5.

[426] Corporation for the Sustainable Development of the Archipelago of San Andrés, Providencia and Santa Catalina (CORALINA), Agreement No. 025 of 2005, "Whereby the Marine Protected Area of the Seaflower Biosphere Reserve is internally zoned, and the General Regulatory Framework of Uses and other provisions are enacted", Article 1 and Annexes 7 and 8 (Annex 6).

[427] Republic of Colombia, Political Constitution, 1991, Article 310 (Annex 7).

environmental resources of the Archipelago are endangered, making it necessary to adopt immediate measures to avoid irreversible damage to the ecosystem."[428] In this regard, the exercise of special functions for controlling population density, regulating land use and preserving the environment were entrusted to the Archipelago Department[429] and a special fishing regime has also been established.[430]

4.147 Clearly, the protection measures adopted by the Colombian Government have been of the utmost importance in preserving the environment of the Archipelago. In this regard, it has been noted that due to these conditions, the Seaflower Marine Protected Area is a "remarkable example of reef integrity" and "perhaps among the unique places within the Caribbean that can be preserved for its natural values and in the future, have the opportunity to be managed as an exceptional example of sustainable development".[431]

4.148 Thus, although Roncador, Serrana, Serranilla and Bajo Nuevo are capable of sustaining both human habitation and an

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[428] Presidential Decree Number 2762 of 1991, "Whereby measures are adopted to control the population density in the Archipelago Department of San Andrés, Providencia and Santa Catalina" (Annex 8).

[429] Law 47 of 1993, "Whereby special rules are laid down for the organization and operation of the Archipelago Department of San Andrés, Providencia and Santa Catalina", Article 4 (Annex 9).

[430] See Law 915 of 2004, "Whereby the Frontier Statute for Economic and Social Development of the Archipelago of San Andrés, Providencia and Santa Catalina is established".

[431] M. C. Prada Triana, "Comparative Study of a Section of the Seaflower MPA as Potential World Heritage Site", Corporación para el Desarrollo Sostenible del Archipiélago de San Andrés, Providencia y Santa Catalina (CORALINA), 2009, pp. 18 and 30. (Annex 48).

economic life of their own, legal and environmental concerns have barred any eventual permanent human settlement in them.

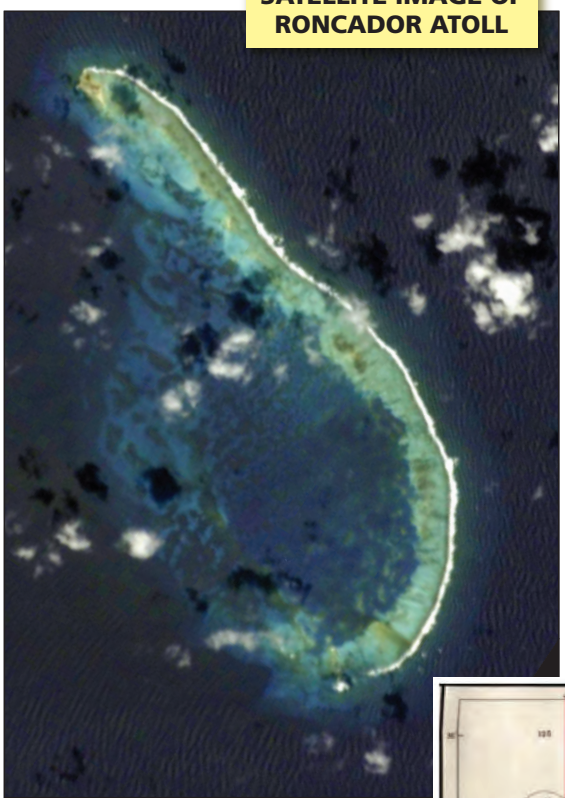
4.149 In any event, as will be evident from the analysis below, none of these islands qualifies as a geological rock under customary international law and thus none is subject to the limitation represented in Article 121 (3).

(c) Roncador

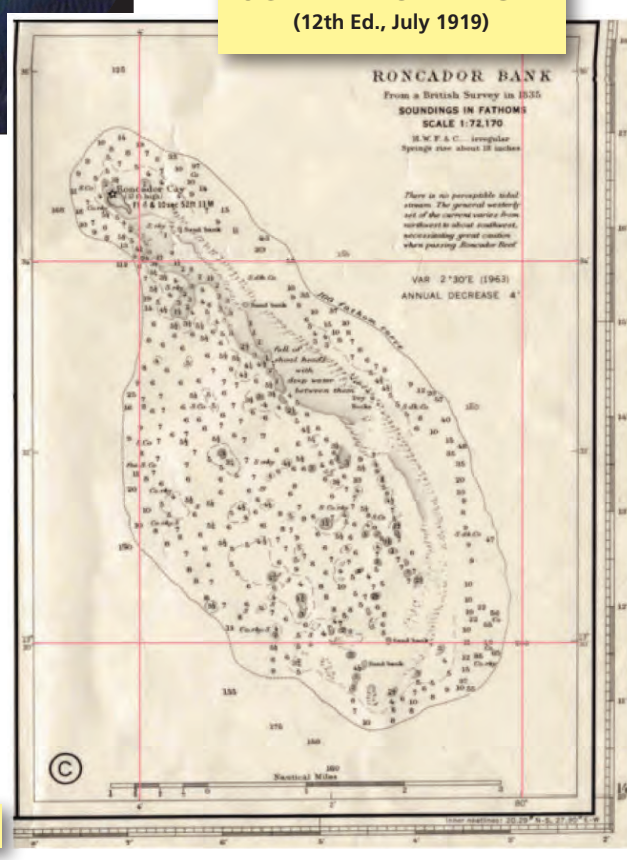
(i) Relevant Facts

4.150 Roncador Cay is the largest island in the eponymous atoll, which is pear-shaped and located on a bank bordered by the 200-metre isobath, over the top of the Cunas Ridge. The atoll is located some 75 nautical miles east of the island of Providencia and 45 nautical miles off Serrana. It is 15 km long in a northwest to southeast trend, reaching maximum amplitude of about 7 km and a broad perimeter of 24 km. This atoll has a total area, including the lagoon, of about 20 sq. km. There are three islands on the rim of the atoll: Roncador Cay, Middle Cay and South Cay.

SATELLITE IMAGE OF RONCADOR ATOLL



U.S. NAVAL CHART 1374
(12th Ed., July 1919)



Excerpt: Inset "C" from original chart

Figure 4.36

4.151 Roncador Cay is located in the northwest border of the atoll. It is some 550 metres long and 300 metres wide and about 4,5 metres above sea level for a total land area of about 0,07 sq. km.[432] There is a small lagoon of shallow water in the north of the Cay, which is a natural reservoir for migratory birds and other species. Roncador Cay is obviously an island, not a rock.

4.152 The vegetation of Roncador Cay is composed of bushes, thickets and palm trees. It has a well-preserved coral formation and varied fauna, such as angelfish, starfish, barracudas, sharks, dolphins and numerous other species. As mentioned before, this flora and fauna is under the protection of Colombian agencies charged with the preservation of the environment.

[432] 2012 Judgment, p. 640, para. 24.

Figure 4.37

4.153 Roncador Cay is constantly visited by fishermen coming from San Andrés, Providencia and Santa Catalina, who have traditionally engaged in artisanal fishing and who stay there for considerable periods of time. It has houses and shelters, some of them recent and some others partly ruined. Furthermore, there are facilities for marine research and for a detachment of the

Colombian Navy and Coastguard that operates in the island. With speedboats, a helicopter, and naval support, this unit carries out tasks against proscribed fishing activities, illicit drug-trafficking, as well as search and rescue operations.

Figure 4.38

RONCADOR CAY DETACHMENT

Figure 4.39

4.154 The Cay has a heliport, solar panels, a fuel plant, a water well, rain water reserve tanks and a sewage water recycling plant. It also has a 79 feet high lighthouse that has been operating since 1978, providing safety to maritime commerce. The lighthouse stands on the northernmost end of the reef and its white light flashes every 11 seconds. Moreover, Colombia has

installed Information and Communications Technology (ICT) facilities in Roncador. Indeed, since January 2015 a "Vive Digital" Kiosk has been operating there, giving fishermen and Naval officers permanent access to internet and telephone communication through satellite technology, as well as printing, scanning and copying services. This kiosk has high consumption rates of internet and telephone, demonstrating that human activity on this island is important. The data from February to April 2017 are as follows:

"VIVE DIGITAL" KIOSK IN RONCADOR		
February	Downloaded Gigabytes	223
March	Downloaded Gigabytes	191
April	Downloaded Gigabytes	215
TOTAL INTERNET TRAFFIC (IN GIGABYTES)		**630**
February	Hours on the phone	5
March	Hours on the phone	24
April	Hours on the phone	23
TOTAL HOURS ON THE PHONE		**52**

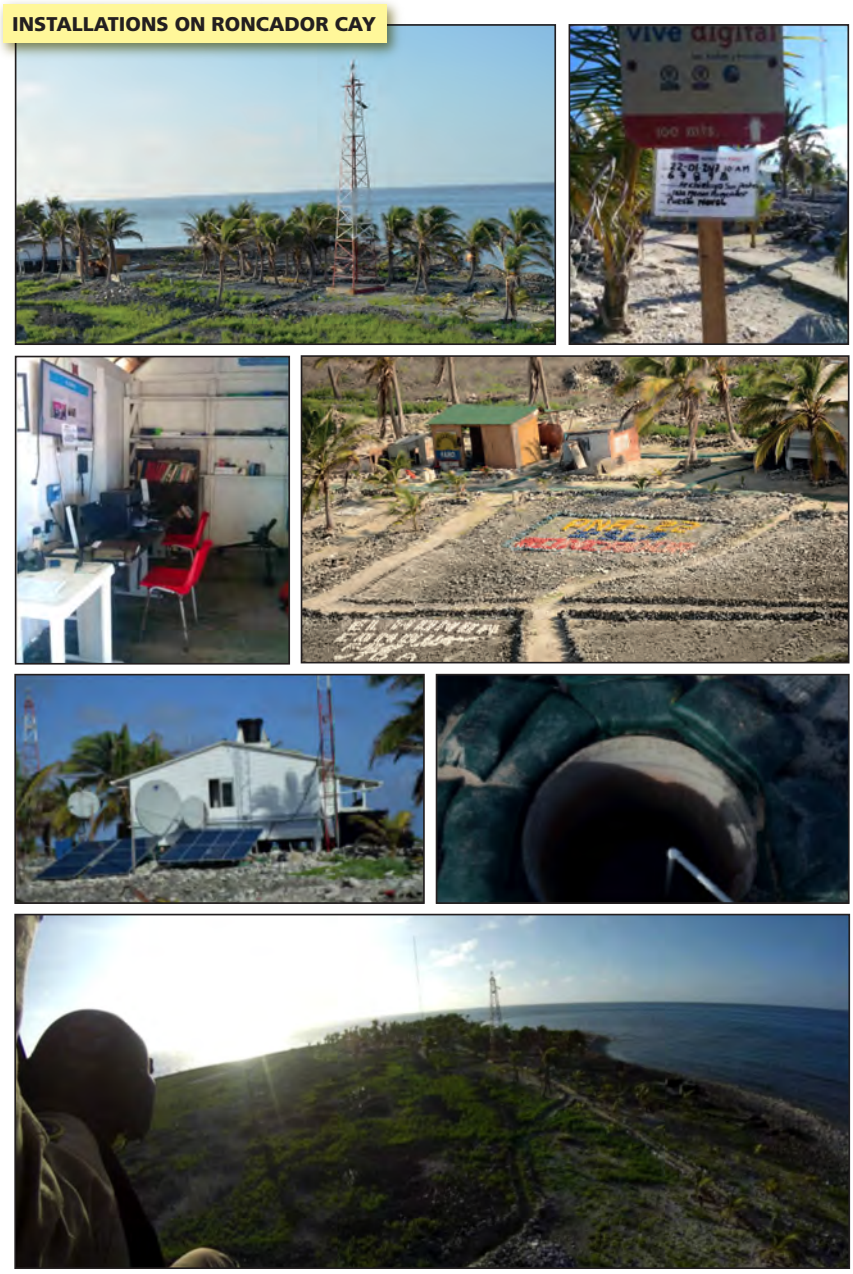


Figure 4.40

4.155 Regarding human habitation in Roncador, Raizal fishermen who visit the island consider that:

> "It is possible to live in the cays. If I decide to go and live in one cay I would choose Roncador, my favourite cay, because the

fishing bank is close and it is very productive, full of fish. You can catch queen conch nearby the cay. You will not starve. You bring your nylon to fish and you can find fish right there at the seashore. Besides, the island has many coconut palm trees full of coconuts."[433]

(ii) Roncador is an Island, not a Geological "Rock"

4.156 Roncador Cay is obviously not a geological rock comparable to Rockall or Rocas Alijos:

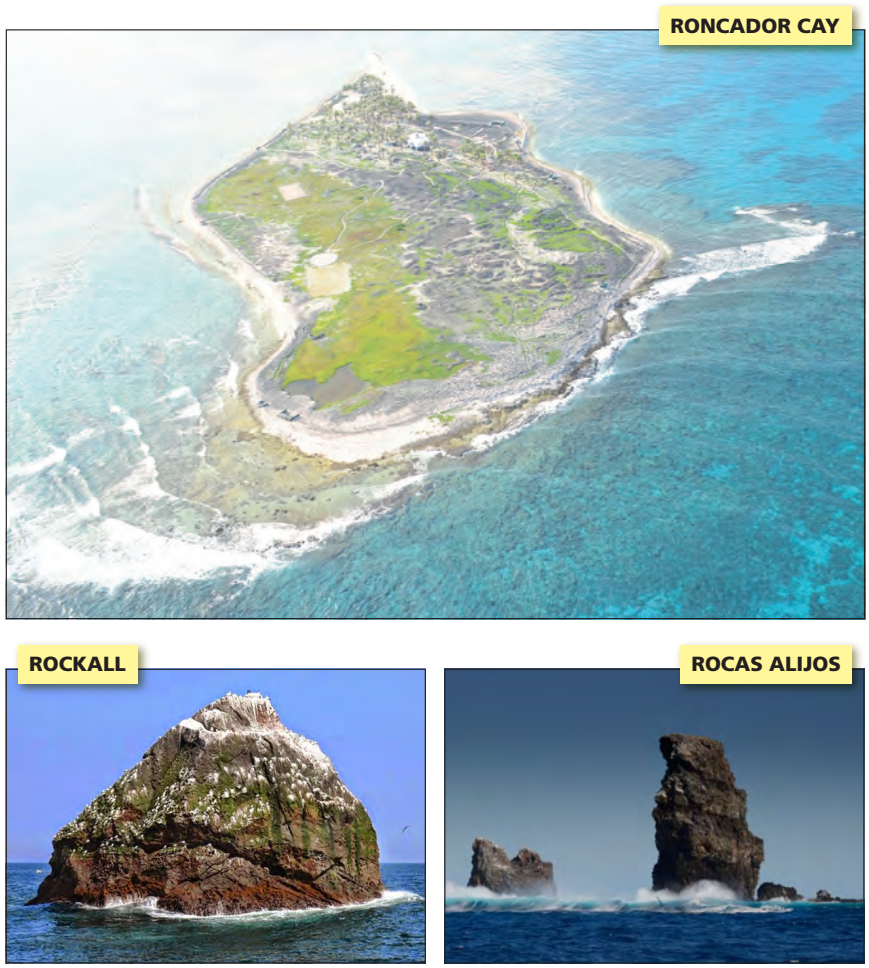


Figure 4.41

[433] Affidavit by Mr Julio Eusebio Robinson Hawkins (Annex 37).

4.157 Moreover, Roncador Cay has been considered by foreign States as an island of a certain importance for a long time. Indeed, other States have in the past 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 number 1496, dated 23 May 1913.[434] After 1913, the German Government continued to accredit its consular agents with jurisdiction extending to Roncador. Thus in 1937, it requested again the Colombian Government's agreement to appoint a Consul whose jurisdiction would include San Andrés, Providencia and Roncador. The Colombian President approved the request.[435] Clearly, a foreign State would not request a consul to be accredited over another State's rock.

4.158 Thus, even if Roncador was found to be a geological rock – which it is obviously not – it would still have the capacity to sustain human habitation or economic life of its own, as demonstrated by the facts recalled above, as well as the long standing and current use made of this island.

---

[434] Presidential Decree Number 1496 of 23 May 1913. *Territorial and Maritime Dispute*, Counter-Memorial of the Republic of Colombia, Volume IIA, Annex 94.

[435] Ministry of Foreign Affairs, Executive Resolution Number 90 of 1937. *Territorial and Maritime Dispute*, Counter-Memorial of Colombia, Volume IIA, Annex 119.

(iii) The Maritime Entitlement of Roncador

4.159 Roncador thus generates a 200-nautical-mile *ipso jure* EEZ, with its attendant continental shelf, as follows:

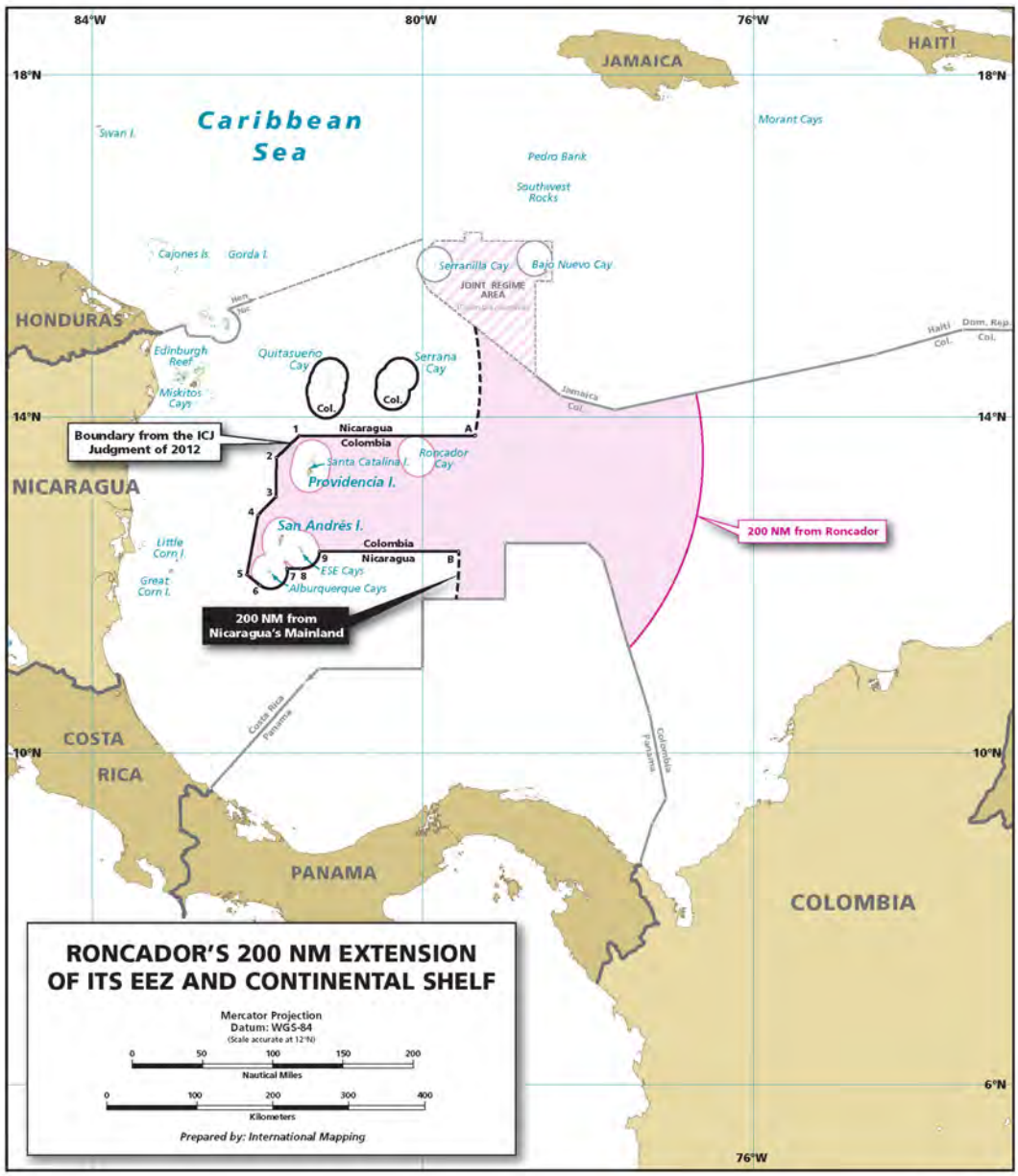
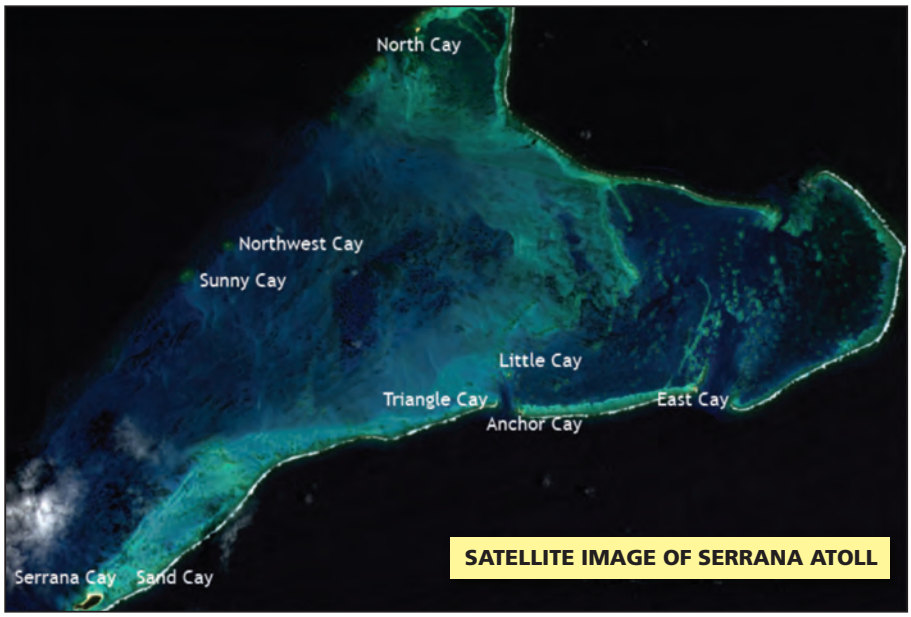


Figure 4.42

(d) Serrana

(i) Relevant Facts

4.160 Serrana Cay is the largest island on the eponymous atoll, which extends for 25 km in a northeast to southwest trend, reaching maximum amplitude of about 23 km and a broad perimeter of 83 km. The atoll includes a shallow-water lagoon and has a total area of 237 sq. km. There are several islands on the rim of the atoll: Serrana Cay (also known as Southwest Cay), Triangle Cay, Little Cay, Anchor Cay, East Cay, North Cay, Northwest Cay, Sand Cay and Sunny Cay.


North Cay
Northwest Cay
Sunny Cay
Little Cay
Triangle Cay
East Cay
Anchor Cay
Serrana Cay
Sand Cay
SATELLITE IMAGE OF SERRANA ATOLL

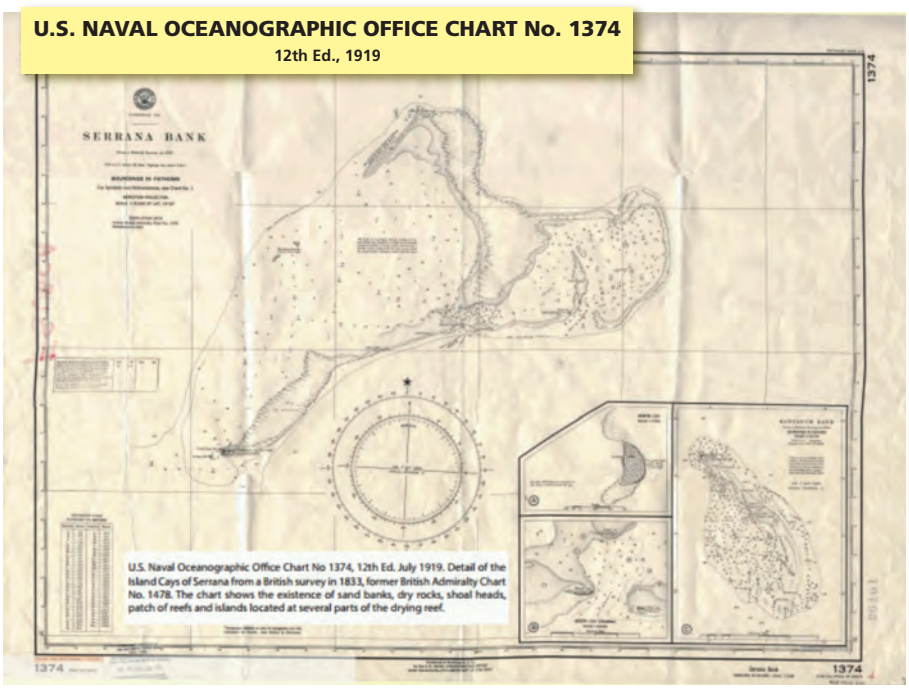

U.S. NAVAL OCEANOGRAPHIC OFFICE CHART No. 1374
12th Ed., 1919
SERRANA BANK
1374
U.S. Naval Oceanographic Office Chart No 1374, 12th Ed. July 1919. Detail of the Island Cays of Serrana from a British survey in 1833, former British Admiralty Chart No. 1478. The chart shows the existence of sand banks, dry rocks, shoal heads, patch of reefs and islands located at several parts of the drying reef.
1374
1374

Figure 4.43

4.161 As acknowledged by the Court in 2012, Serrana Cay, the largest island in the atoll, is about 1,000 metre long and 400 metre wide (with a total land mass of about 0,26 sq. km).[436] It is covered by grass, coconut palms and stunted brushwood, some 10 metres high. Serrana is located some 45 nautical miles north of Roncador and 80 nautical miles northeast of Providencia. As noted earlier, the Cay is constantly visited by fishermen coming from San Andrés, Providencia and Santa Catalina, who have traditionally engaged in artisanal fishing and stay there for considerable periods of time. Between March and August turtle fishermen used to come from those islands, but now turtle catch is totally banned.

AERIAL PHOTOGRAPHS OF SERRANA CAY

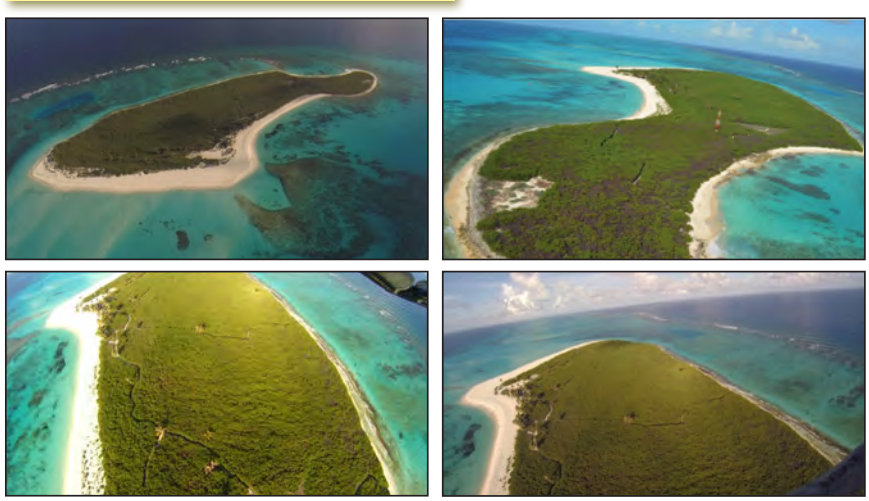


Figure 4.44

436 2012 Judgment, p. 640, para. 24.

4.162 In Serrana Cay there is a detachment of the Colombian Marine Infantry that carries out law enforcement activities relating mainly to the control of fishing and illicit drug trafficking, as well as search and rescue operations. The island is equipped with a 6-metre-wide well for the water supply of the marine infantry corpsmen and fishermen who visit and stay in the cay. Furthermore, there are facilities such as solar panels, a heliport and a lighthouse operated by the Colombian Navy. In addition, Serrana is equipped since January 2015 with a system permitting access to internet, telephone, printing, scanning and copying services, which have been rendered necessary for servicing personal and economic activity in the island. From February to April 2017, the data are as follows:

"VIVE DIGITAL" KIOSK IN SERRANA		
February	Downloaded Gigabytes	243
March	Downloaded Gigabytes	256
April	Downloaded Gigabytes	345
TOTAL INTERNET TRAFFIC (IN GIGABYTES)		**844**
February	Hours on the phone	18
March	Hours on the phone	28
April	Hours on the phone	30
TOTAL HOURS ON THE PHONE		**77**

SERRANA CAY

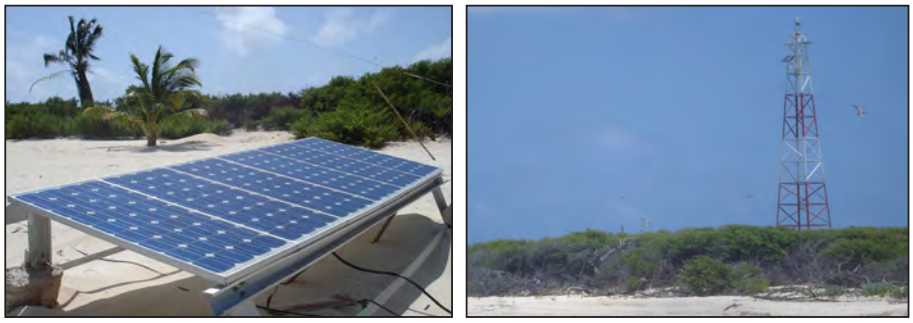


Figure 4.45

INSTALLATIONS ON SERRANA CAY

Figure 4.46

4.163 While there are currently no crops on the island Raizal fishermen consider that it would be possible, because "the soil in those cays (Roncador and Serrana) is very good, is sand mixed with soil"[437] and:

> "(…) if someone wanted to grow crops in Serrana they could do it because it is the same kind of soil the southern cays have, that is Bolívar (East-South-East) and Albuquerque (South-South-West) and other fishermen have managed to grow crops in there. For example, in Albuquerque there are growing basil and yam right now. They also are raising hens in Albuquerque and Bolívar. So if one can grow crops in Bolívar and Albuquerque, it can be done in the northern cays (Roncador, Serrana, Serranilla and Bajo Nuevo) as well because it is the same kind of soil".[438]

(ii) Serrana is an Island, not a Geological "Rock"

4.164 Since Article 121 (3) and its customary implementation only apply to "rocky" features, it is not applicable to Serrana. Therefore, as a full-fledged island, it generates entitlements to an EEZ with its attendant continental shelf.

437 Affidavit by Mr Anselmo Dawkins Duffis (Annex 38).

438 Affidavit by Mr Milford Danley McKeller Hudgson (Annex 34).

Figure 4.47

PHOTOGRAPHS OF SERRANA CAY

Figure 4.48

Serrana's geological composition is in sharp contrast with features that have been recognized as rocks such as Rockall or Rocas Alijos:

Figure 4.49

4.165 In any event, even if Serrana was found to be a geological rock, it would still be capable of sustaining human habitation or economic life of its own, as demonstrated by the facts recalled above, as well as the long standing and current use that is made of this island.

(iii) The Maritime Entitlement of Serrana

4.166 Serrana thus generates a 200-nautical-mile *ipso jure* EEZ, with its attendant continental shelf, as follows:

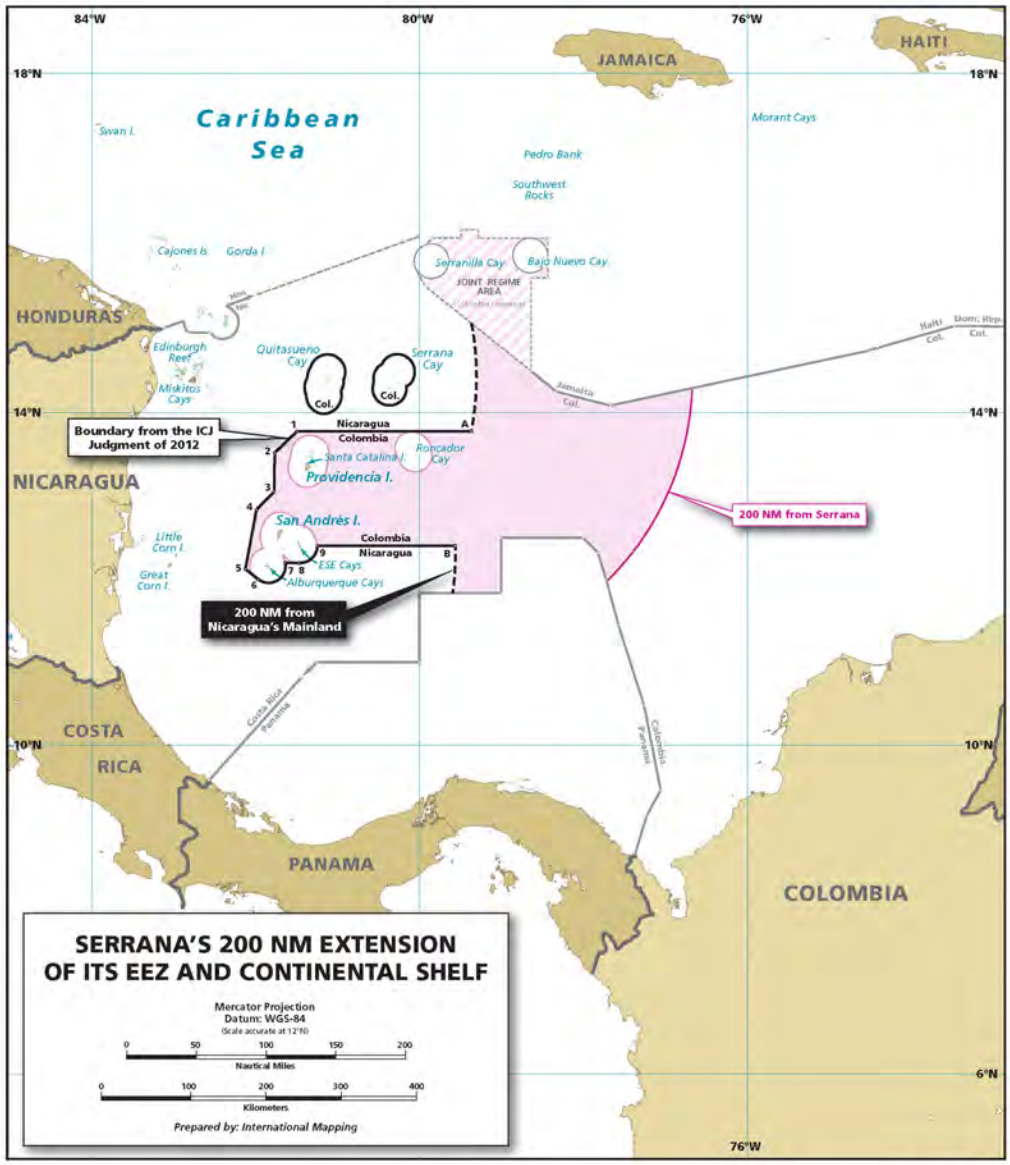


Figure 4.50

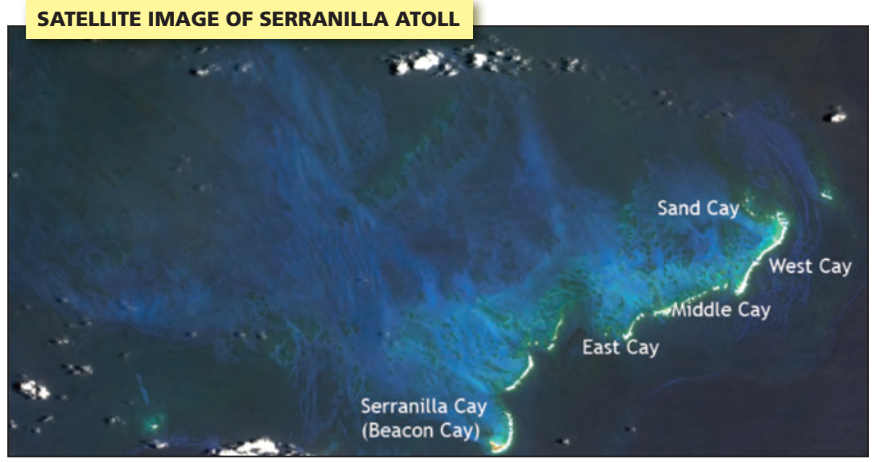
(e) Serranilla

(i) Relevant Facts

4.167 Serranilla Cay is the largest island in the eponymous

atoll, which is about 40 km long and 32 km wide, covering an area of over 1,200 sq. km. There are several islands emerging from the atoll: Serranilla Cay (also known as Beacon Cay), East Cay, Middle Cay, West Cay and Sand Cay. It is located 165 nautical miles from Providencia and 80 nautical miles north from Serrana.

SATELLITE IMAGE OF SERRANILLA ATOLL



U.S. NAVAL OCEANOGRAPHIC OFFICE CHART No. 1489
12th Ed., 1920

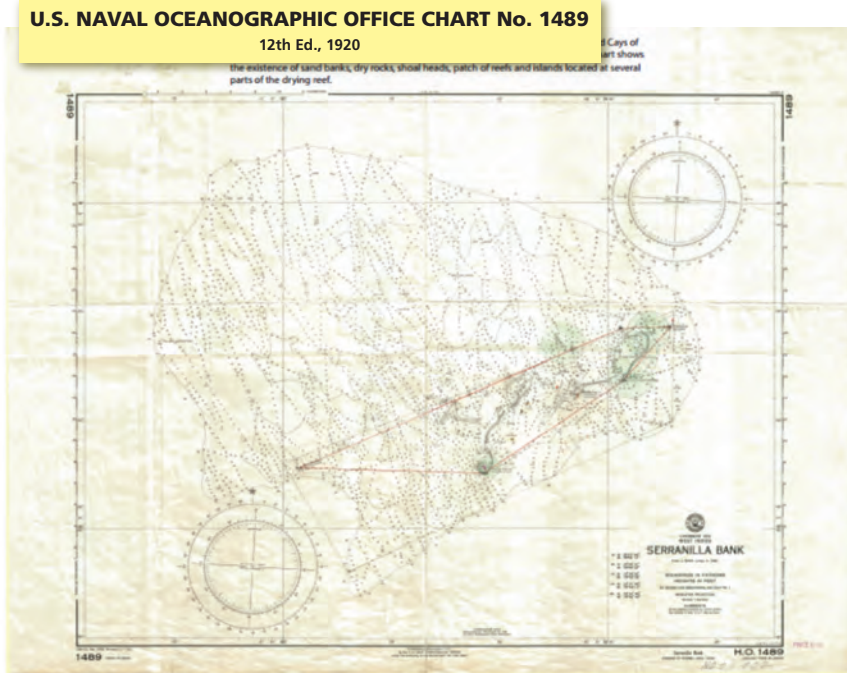


Figure 4.51

4.168 Serranilla Cay is 650 metres long and some 300 metres wide, with a total land mass of about 0.12 sq. km.[439] It has a large group of coconut palms, grass and varied vegetation and, as noted earlier, it is permanently inhabited on a rotating basis by fishermen coming from San Andrés, Providencia and Santa Catalina, who stay there for considerable periods of time.

AERIAL PHOTOGRAPHS OF SERRANILLA CAY

Figure 4.52

[439] 2012 Judgment, p. 641, para. 24.

4.169 Currently, there is a detachment from the Colombian Navy entrusted with tasks of controlling fishing activities and illicit drug-trafficking, as well as search and rescue operations. Facilities on the cay include solar panels, a fuel plant, weather and radio stations, landing facilities for small aircraft and a 108 feet high lighthouse operated by the Colombian Navy since 1977.

SERRANILLA CAY

Figure 4.53

PHOTOGRAPHS OF SERRANILLA CAY

Figure 4.54

4.170 In the same manner as Roncador and Serrana, Serranilla is equipped since January 2015 with a system permitting internet access, telephone, printing, scanning and copying services. From February to April 2017, the data are as follows:

"VIVE DIGITAL" KIOSK IN SERRANILLA		
February	Downloaded Gigabytes	124
March	Downloaded Gigabytes	219
April	Downloaded Gigabytes	241
TOTAL INTERNET TRAFFIC (IN GIGABYTES)		**584**
February	Hours on the phone	10
March	Hours on the phone	37
April	Hours on the phone	59
TOTAL HOURS ON THE PHONE		**106**

(ii) Serranilla is an Island, not a Geological "Rock"

4.171 It is obvious that Serranilla is not a rocky feature. In any event, even if Serranilla were found to be a geological rock, it is clearly capable of sustaining, in accordance with the customary international law standard, human habitation or economic life of its own, as demonstrated by the facts mentioned above.

PHOTOGRAPHS OF SERRANILLA CAY

Figure 4.55

4.172 As to human habitation, a marine detachment is permanently on the island, and scientists also temporarily inhabit the site when conducting scientific expeditions. Additionally, fishermen, and among them especially the Raizales, frequently stay on the island for long periods in order to carry out their activities. As one Raizal fisherman says: "It is clear that people can live in the cays. You can build shelters or lodging because the cays are big enough. I would live in Serranilla because it is more comfortable to live in, it has

coconut trees, it has water."[440]

4.173 Serranilla's economic life is additionally illustrated by the fact that, prior to signing a maritime delimitation agreement in 1993, Colombia concluded fishing agreements with Jamaica in 1981 and 1984 regarding the areas of Serranilla and Bajo Nuevo, aimed at limiting the number of foreign fishermen accepted to stay there. According to these agreements: (i) certain Jamaican vessels were authorized to undertake fishing activities in the waters surrounding Serranilla and Bajo Nuevo, and (ii) a maximum number of Jamaican fishermen (36 in the 1981 Agreement and 28 in the 1984 Agreement) were permitted "temporary stationing" in Serranilla,[441] on the condition that they obtained prior approval of the Colombian Authorities should they execute installations and works within the cays.[442] Furthermore, the 1984 Agreement expressly recognised that "Bajo Nuevo and Serranilla allow the habitation and can sustain of their own the life of the Jamaican fishermen and facilitate the artisanal fishing activities foreseen in this Agreement".[443]

4.174 Serranilla's geological composition is in sharp contrast to features that have been recognized as rocks such as Rockall or Rocas Alijos:

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440 Affidavit by Mr Beltrán Juvencio Fernández Hoy (Annex 39).

441 Evidently, Colombia authorized only temporary stationing, because permanent stationing was always possible.

442 Fishing Agreements between the Republic of Colombia and Jamaica (Annexes 17 and 18).

443 Fishing Agreement between the Republic of Colombia and Jamaica of 1984, Preamble (Annex 18).

Figure 4.56

(iii) The Maritime Entitlement of Serranilla

4.175 Serranilla thus generates a 200-nautical-mile *ipso jure* EEZ, with its attendant continental shelf, as follows:

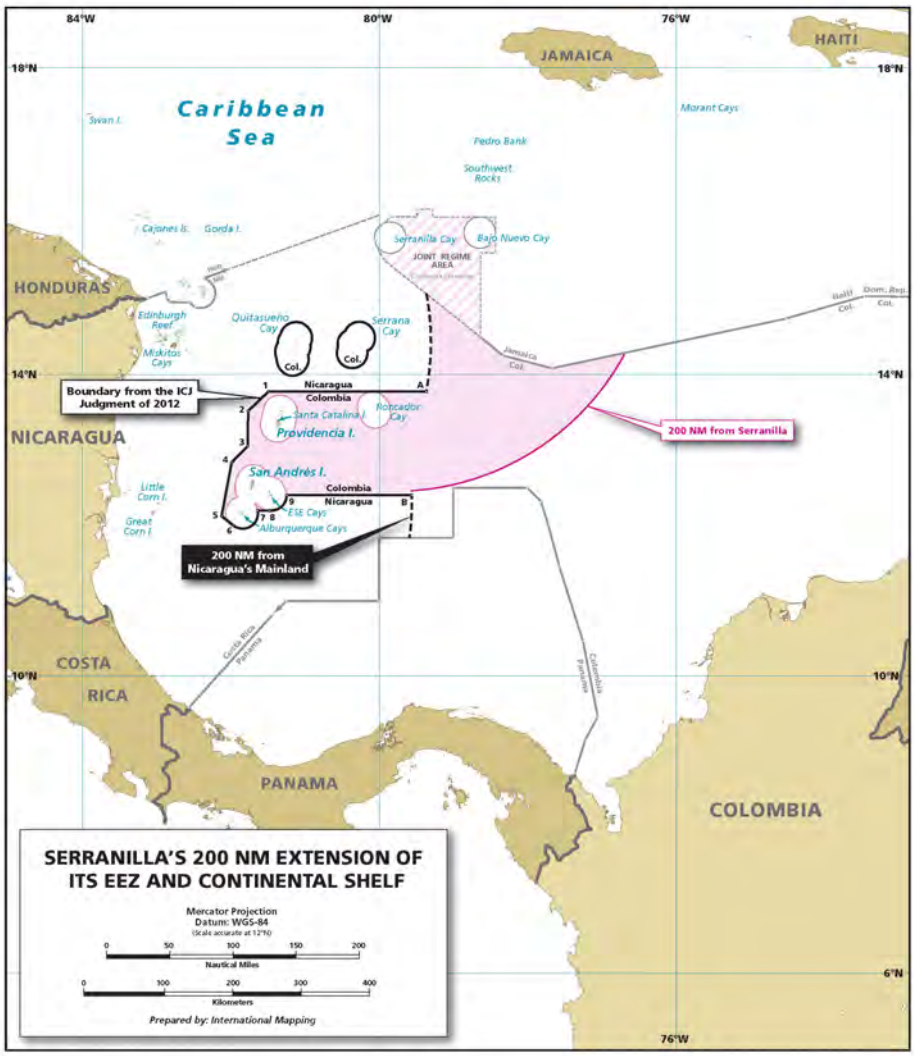


Figure 4.57

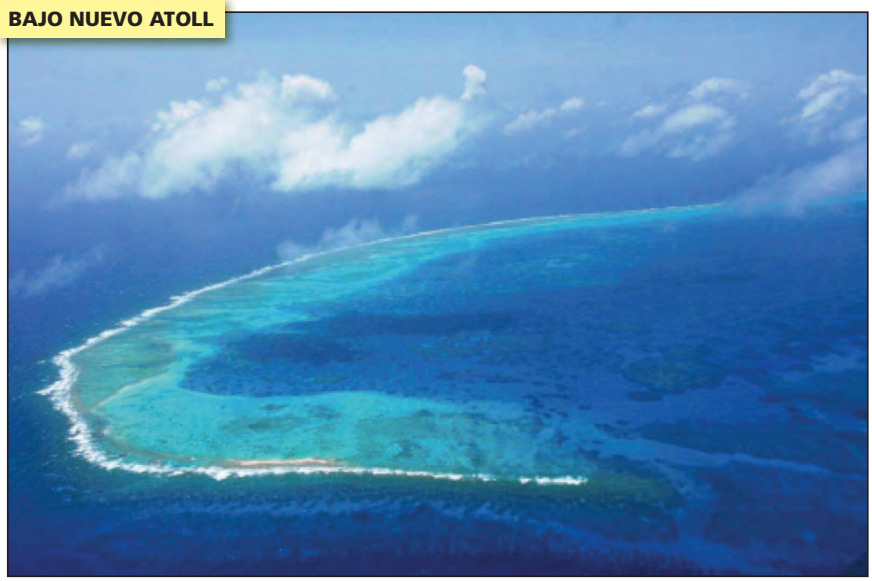
(f) Bajo Nuevo

(i) Relevant Facts

4.176 Bajo Nuevo is the largest island of the eponymous atoll, which extends across 29 km from northeast to southwest and 11 km from northwest to southeast. It is some 69 nautical miles east of Serranilla and 138 nautical miles north-northeast of Serrana.

There are four cays in the atoll: West Cay, Sand Cay, Bajo Nuevo Cay (also known as Low Cay) and Middle Cay. These islands, including the waters of the internal lagoon, sum a total of 50 sq. km. in a perimeter of 56 km.

BAJO NUEVO ATOLL



SATELLITE IMAGE OF BAJO NUEVO

Figure 4.58

4.177 Bajo Nuevo Cay is at the northern end of West Reef, it is 300 metres long and 40 metres wide, with a total land mass of 0,007 sq. km.[444] It has a lighthouse operated by the Colombian Navy, is frequently visited by fishing vessels from San Andrés, Providencia and Santa Catalina and is subject to the national fishing regulations.

THE LIGHTHOUSE ON BAJO NUEVO

Figure 4.59

444 2012 Judgment, p. 641, para. 24.

4.178 Around the island, the fringing reef is a natural limit and the protection barrier waves, winds and currents that enclose an internal lagoon compounded by shallow water of a maximum of 40 metres depth, including abundant patch reefs, coral heads and sand bars that form an integral part of the fringing reef system bordering the island's shore.

(ii) Bajo Nuevo is an Island, not a Geological "Rock"

4.179 It is beyond doubt that Bajo Nuevo is an island, since it is a naturally formed area of land permanently above high tide. It is also clear that Bajo Nuevo is not a geological rock under international law, as represented in the customary application of Article 121 (3), as it is not made solely of solid rock.

4.180 The significant difference between Bajo Nuevo and any feature recognized as a "rock" under customary international law is quite clear, in the following pictorial contrast:

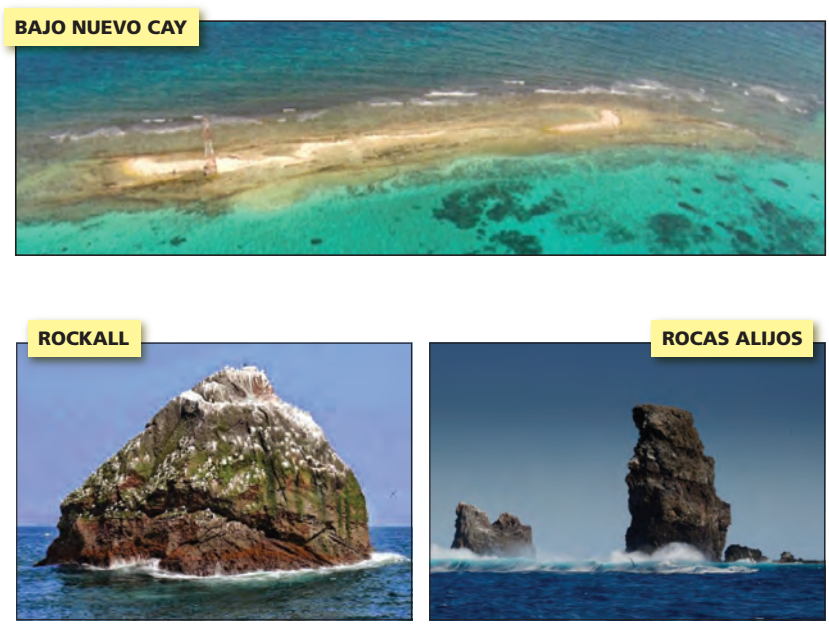


Figure 4.60

4.181 As in the case of Serranilla, Bajo Nuevo's economic life is illustrated by the fact that Colombia concluded fishing agreements with Jamaica in 1981 and 1984 regarding the waters surrounding these cays, aimed at limiting the number of foreign fishermen accepted to stay there. As explained before, under these agreements: (i) certain Jamaican vessels were authorized to undertake fishing activities in the waters surroundings both cays, and (ii) a maximum number of Jamaican fishermen (24 in the 1981 Agreement and 12 in the 1984 Agreement) were permitted temporary stationing in Bajo Nuevo,[445] on the condition that they obtained prior approval of the Colombian Authorities should they execute installations and works within the cays.[446] Furthermore, the 1984 Agreement expressly recognised that "Bajo Nuevo and Serranilla allow the habitation and can sustain of their own the life of the Jamaican fishermen and facilitate the artisanal fishing activities foreseen in this Agreement".[447]

[445] As mentioned in footnote 441 *supra*, it is evident that Colombia authorized only temporary stationing because permanent stationing was always possible.

[446] Fishing Agreements between the Republic of Colombia and Jamaica (Annexes 17 and 18).

[447] Fishing Agreement between the Republic of Colombia and Jamaica of 1984, Preamble (Annex 18).

(iii) The Maritime Entitlement of Bajo Nuevo

4.182 Bajo Nuevo thus generates a 200-nautical-mile *ipso jure* EEZ, with its attendant continental shelf, as follows:

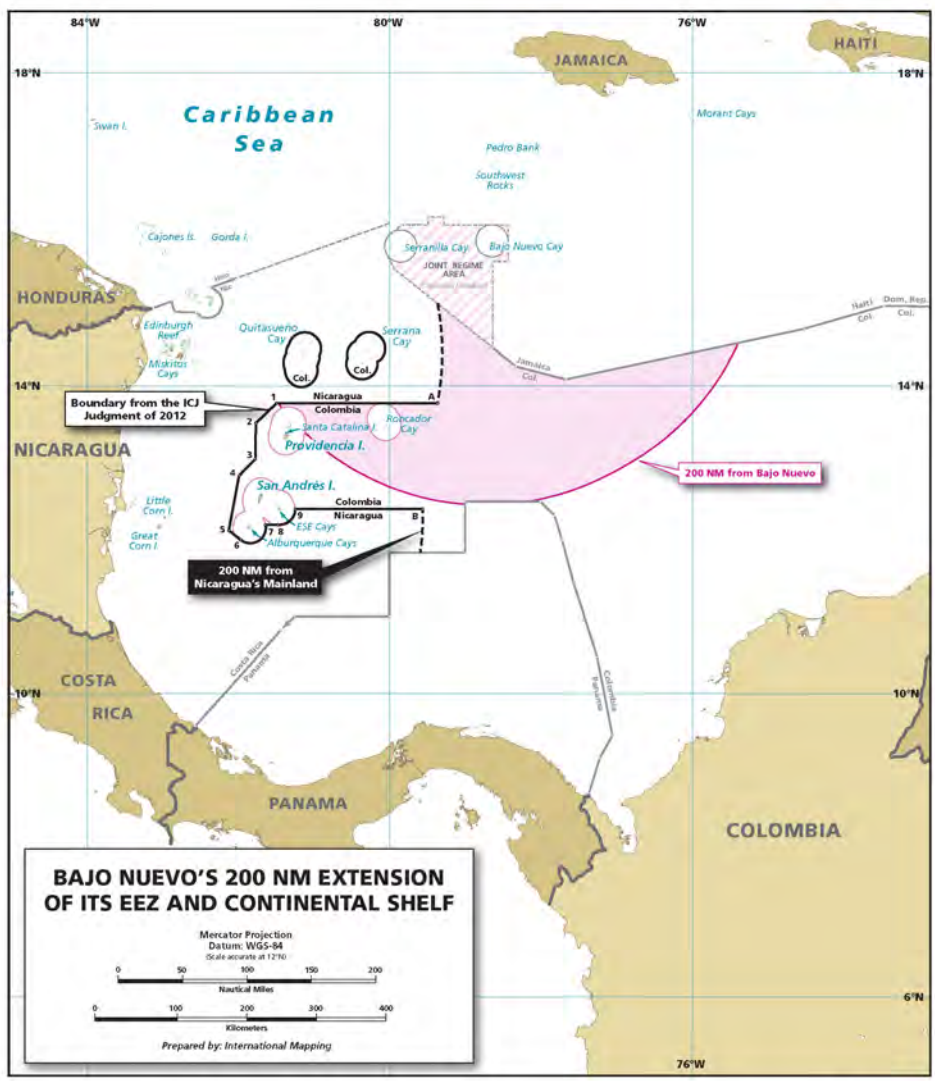


Figure 4.61

E. Conclusion

4.183 In this Chapter, Colombia demonstrated that the term "rock" in its conventional formulation in Article 121 (3) of UNCLOS, falls to be interpreted and applied under customary international law, in terms of geology. Hence, in order for the limitation in Article 121 (3) to apply to an island, it must be a "rock" in the geological sense, and additionally it must be deprived of the ability to sustain human habitation or economic life of its own. A contrary proposition would be opposed to the ordinary meaning of Article 121 (3) and subsequent State practice, which is especially important in ascertaining the customary interpretation of such Article which applies to Colombia.

4.184 Moreover, Colombia has established that under customary international law, as demonstrated from a review of State practice, the standard to fulfil the requirement of an ability to sustain human habitation or economic life is extremely low and must be assessed in terms of *posse* and not *esse*. Practice shows that a minimal potential for economic life or human habitation has been enough to conclude that a geological rock does not fall prey to the limitation in Article 121 (3).

4.185 Colombia has also established that in addition to the islands of San Andrés, Providencia and Santa Catalina, the rest of Colombia's islands in the Caribbean are also not "rocks" in the geological sense of the term. Thus, Roncador, Serrana,

Serranilla and Bajo Nuevo are not subject to the limitation of the customary rule which originated in Article 121 (3) of UNCLOS. All the islands of the San Andrés Archipelago generate an *ipso jure* 200-nautical-mile EEZ with its attendant continental shelf.

4.186 In case it was considered that the term "rock" refers to all "islands", Colombia has also established that all its islands are capable of sustaining human habitation and their own economic life. Therefore, since establishing at least one of these two alternative conditions, removes an island from the limitation in Article 121 (3), all of the islands of the San Andrés Archipelago generate a 200-nautical-mile EEZ with its attendant continental shelf.

4.187 Finally, Colombia has demonstrated the extent of each island's entitlement to a 200-nautical-mile EEZ with its attendant continental shelf, in every direction. The combined entitlements of Colombia's islands are as follows:

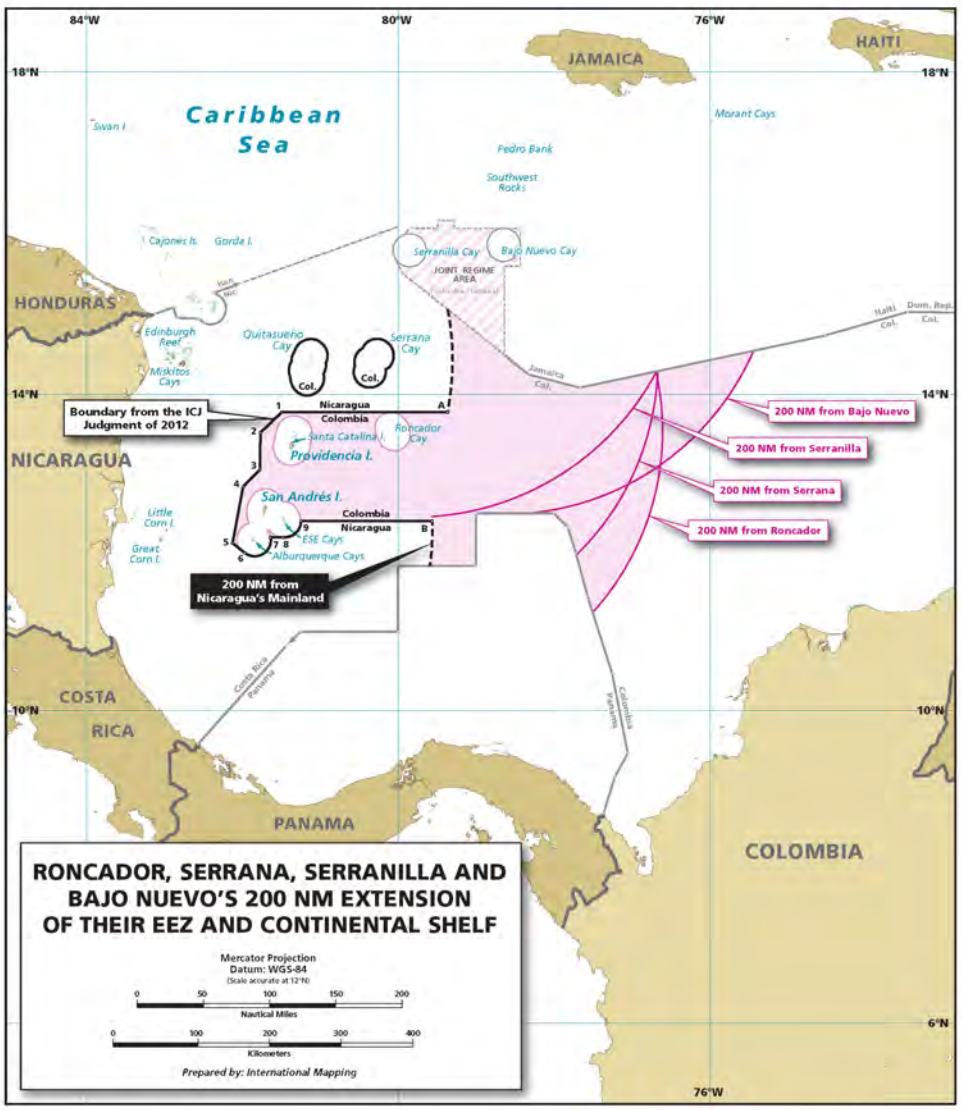


Figure 4.62

4.188 Since natural prolongation, upon which an OCS is founded, is not a source of title within 200 nautical miles from another State's baselines, there are no overlapping entitlements between the Parties in the area Nicaragua claims to be relevant, and therefore there is no basis for delimitation.

Chapter 5

A REQUISITE OF EEZ AND OCS IS THAT THEY BE CONTIGUOUS TO THE *TERRA FIRMA* THAT GENERATES THEM

A. Introduction

5.1 Having already established that Nicaragua cannot sustain any OCS claim within Colombia's mainland and insular EEZ with its attendant continental shelf, this Chapter will prove that Nicaragua cannot, with the aim of avoiding this legal obstacle, 'leapfrog' over or 'tunnel' under Colombia as well as another State's EEZ with its attendant continental shelf, to then resume its claim beyond the San Andrés Archipelago. This would be contrary to the principle of contiguity of maritime entitlements which flows naturally from the general principle according to which the "land dominates the sea".

5.2 The balkanization or fragmentation of maritime jurisdictions, which would result if Nicaragua's OCS claim were to be sustained, not only runs counter to this foundational principle of the Law of the Sea but also has calamitous consequences for the public order of the oceans.

5.3 In this Chapter, Colombia will establish that any maritime entitlement of a State must be contiguous to the coastline that generates it. Whatever seaward jurisdiction a State may claim, it must be part of a maritime zone that begins at the

baselines from which that State measures its territorial sea and continues, without interruption, until it reaches the extent permissible for that jurisdiction.[448] Because Nicaragua is unable to demonstrate such contiguity, its claim is contrary to international law.

B. Nicaragua's OCS Claim Disregards International Law because Maritime Entitlements should be Contiguous to the Coastline that Generates them

5.4 Nicaragua's OCS claim disregards international law because maritime entitlements should be contiguous to the coastline that generates them. The controlling principle in this regard is that according to which the "land dominates the sea"; this principle has been recognized in the Court's jurisprudence[449] and has even been labelled as "axiomatic" by Nicaragua.[450] It is meant to avoid the balkanization of the oceans and precludes the possibility of any State to have its alleged maritime entitlements 'leapfrog' over or 'tunnel' under those of other States (1). This is well established in State practice which has avoided such methods (2). Moreover, as established in Chapter 7 *infra*, it is worth stressing that Nicaragua has been unable to demonstrate a continuous and uninterrupted natural prolongation beyond 200 nautical miles towards Colombia; as a result, it has sought to

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448 While multiple States may not possess simultaneous title in the same area with regard to the resources of the seabed, subsoil or superjacent waters, contiguous zone rights of one State may co-exist with another State's resource based rights in an EEZ.

449 *North Sea Continental Shelf*, p. 51, para. 96; *Black Sea*, p. 89, para. 77 and pp. 96-97, para. 99.

450 *Territorial and Maritime Dispute*, Reply of Nicaragua, p. 156, para. 6.25.

claim an alleged OCS entitlement by first transiting though Honduras and Jamaica, only to eventually encroach on Colombia's *ipso jure* EEZ with its attendant continental shelf entitlements. All this clearly means that its OCS claim is not contiguous to its coast as required by international law (3). Lastly, since as established in Chapter 4 *supra* the Colombian islands have *ipso jure* 200-nautical-mile entitlements *tous azimuts*, Nicaragua is prevented from establishing any contiguous maritime entitlement to any area beyond 200 nautical miles from its coast (4).

(1) THE LAND DOMINATES THE SEA

5.5 According to the principle that the "land dominates the sea", any maritime entitlement must originate in sovereignty over a coastal land territory. In 1969, it became part of international jurisprudence when the Court ruled that "the land is the legal source of the power which a State may exercise over territorial extensions to seaward".[451] More recently, the Court has explained that "(t)he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts."[452]

5.6 Maritime entitlements are thus inextricably connected to the land territory that generates them. A logical corollary of this

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451 *North Sea Continental Shelf*, p. 51, para. 96.

452 *Black Sea*, p. 61, para. 77.

principle is that any maritime entitlement must be contiguous to the coastline of the State. Thus, any maritime zone must constitute the uninterrupted extension of that coastline.

5.7 Indeed, every maritime zone originates in and is directly contiguous to the State's baselines. The link to the baselines is the embodiment of the principle that the "land dominates the sea"; the baselines are the edge of the State's sovereign territory, from which all seaward maritime zones project. As one commentator succinctly put it:

> "(…) the consistency of the Court's view is beyond doubt that the territorial sovereignty of the coastal State must be the starting point for determining the maritime rights to which the State is entitled under international law (…)".[453]

5.8 To subscribe to the principle that without land there cannot be a maritime entitlement is, perforce, to reject any contention that 'blocks', 'patches', 'fragments' or 'specks' of maritime zones may exist without being directly tethered to a coastal territory.

5.9 To allow 'leapfrogging' or 'tunnelling' for OCS claims is to violate this foundational principle of the Law of the Sea. If a State's maritime entitlement is not contiguous, that is, if it is not linked to that State's baselines, the land no longer dominates

[453] B. B. Jia, "The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges", *German Yearbook of International Law*, Vol. 57, 2014, p. 13.

the sea. Hence, a coastal State's maritime entitlement cannot just leap over or burrow under another State's entitlements and, then, continue beyond them. A State's OCS claim must necessarily terminate when it reaches another State's 200-nautical-mile *ipso jure* entitlements such as those of Colombia in the present case.[454]

5.10 To abandon the principle that the "land dominates the sea" and, consequently, adopt the altogether novel system that would allow States to claim blocks of ocean floor without the restraint of having to tether their claims to direct contiguity to mainland or insular territories would have disastrous consequences. It would generate conflicts without criteria to restrain and resolve them and allow for, indeed encourage, the encroachment on other State's well-established entitlements, as well as the erosion of the Common Heritage of Mankind. It would also destabilize the regime of maritime entitlements by creating a balkanized ocean, with severe jurisdictional and public order consequences, which the Court itself has recognised must be avoided.[455]

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454 See Chapters 3 and 4 *supra*.

455 2012 Judgment, p.708, para. 230.

(2) The State Practice of Avoiding the Fragmentation and Balkanization of the Oceans

5.11 The proposition that maritime entitlements must be contiguous to the baselines from which they emanate is well established in State practice. A survey of said practice demonstrates that there is not one case in which a maritime claim of a State that reached another State's entitlement leaped over or tunnelled under it, in order to then continue on the far side.[456] On the contrary, States have sought to avoid the balkanization of maritime jurisdictions, preferring a single, coherent and clear distribution of maritime zones.

5.12 State practice, especially in the context of closed or semi-enclosed seas, reveals a similar pattern of recourse to a continuous maritime boundary arrangement which links several delimitation treaties. The end point of a delimitation treaty with one State is used as the starting point for the delimitation treaty with another State, even though that State is not a Party and hence not obligated to accept such a starting point. The resulting continuation of one maritime boundary into the next creates a single, seamless, coherent and clear system of boundaries between the various States, promoting clarity and order.[457] Here, practice reflects an appreciation that balkanization, through

[456] International Maritime Boundaries, Vol. VII, Introduction, Regional Overview Maps.

[457] This practice was accurately described in *Libya/Malta*, Separate Opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga, pp. 78-80, paras. 7-14.

untethered patches and blocks, would undermine the public order of the oceans.

5.13 An indicative example of this State practice can be found in the Baltic Sea. The map below illustrates said maritime delimitations:[458]

[458] International Maritime Boundaries, Vol. VII, Introduction, Regional Overview Maps, Baltic Sea (Region 10). Figure 5.1 was prepared specially for this Counter-Memorial, on the basis of a map included in this publication.

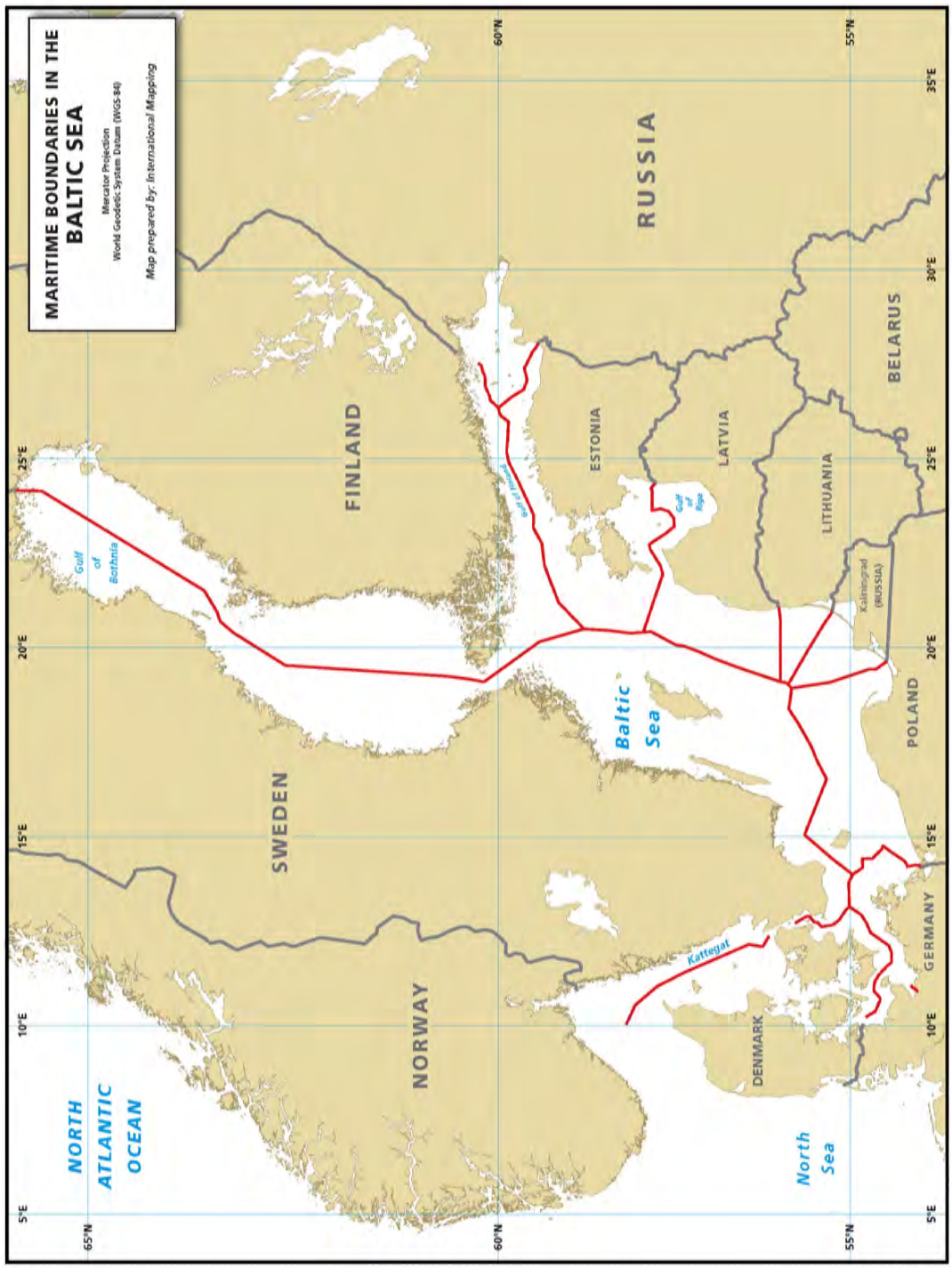
MARITIME BOUNDARIES IN THE
BALTIC SEA
Mercator Projection
World Geodetic System Datum (WGS-84)
Map prepared by: International Mapping
RUSSIA
FINLAND
SWEDEN
NORWAY
ESTONIA
LATVIA
LITHUANIA
BELARUS
POLAND
GERMANY
DENMARK
Gulf of Bothnia
Gulf of Finland
Gulf of Riga
Baltic Sea
Kattegat
Kaliningrad (RUSSIA)
North Sea
NORTH ATLANTIC OCEAN
5°E
10°E
15°E
20°E
25°E
30°E
35°E
65°N
60°N
55°N

Figure 5.1

5.14 As can be seen, all the States around the Baltic Sea (Sweden, Finland, the Russian Federation, Estonia, Latvia, Lithuania, Poland, Germany and Denmark), carefully followed the practice of avoiding the balkanization of the seas. The maritime boundaries established by these States, by means of almost 20 treaties, are all interconnected, forming a single, contiguous and continuous maritime boundary between the littoral States.

5.15 The delimitation practice of the States of Northern and Western Europe (the United Kingdom, Norway, Denmark, Iceland, Germany, the Netherlands, Belgium and France) also demonstrates the rejection of leapfrogging. Regardless of whether these States were delimiting the area within 200 nautical miles, or beyond it, like Iceland, Norway and Denmark,[459] they avoided the fragmentation of the oceans.[460] The following figure illustrates this point:[461]

[459] International Maritime Boundaries, Vol. IV, Estonia-Finland-Sweden, Rep. 10-21, pp. 3129-3130. These three States are Parties to UNCLOS.

[460] International Maritime Boundaries, Vol. VII, Introduction, Regional Overview Maps, Northern and Western Europe (Region 9).

[461] International Maritime Boundaries, Vol. VII, Introduction, Regional Overview Maps, Northern and Western Europe (Region 9). Figure 5.2 was prepared specially for this Counter-Memorial, on the basis of a map included in this publication.

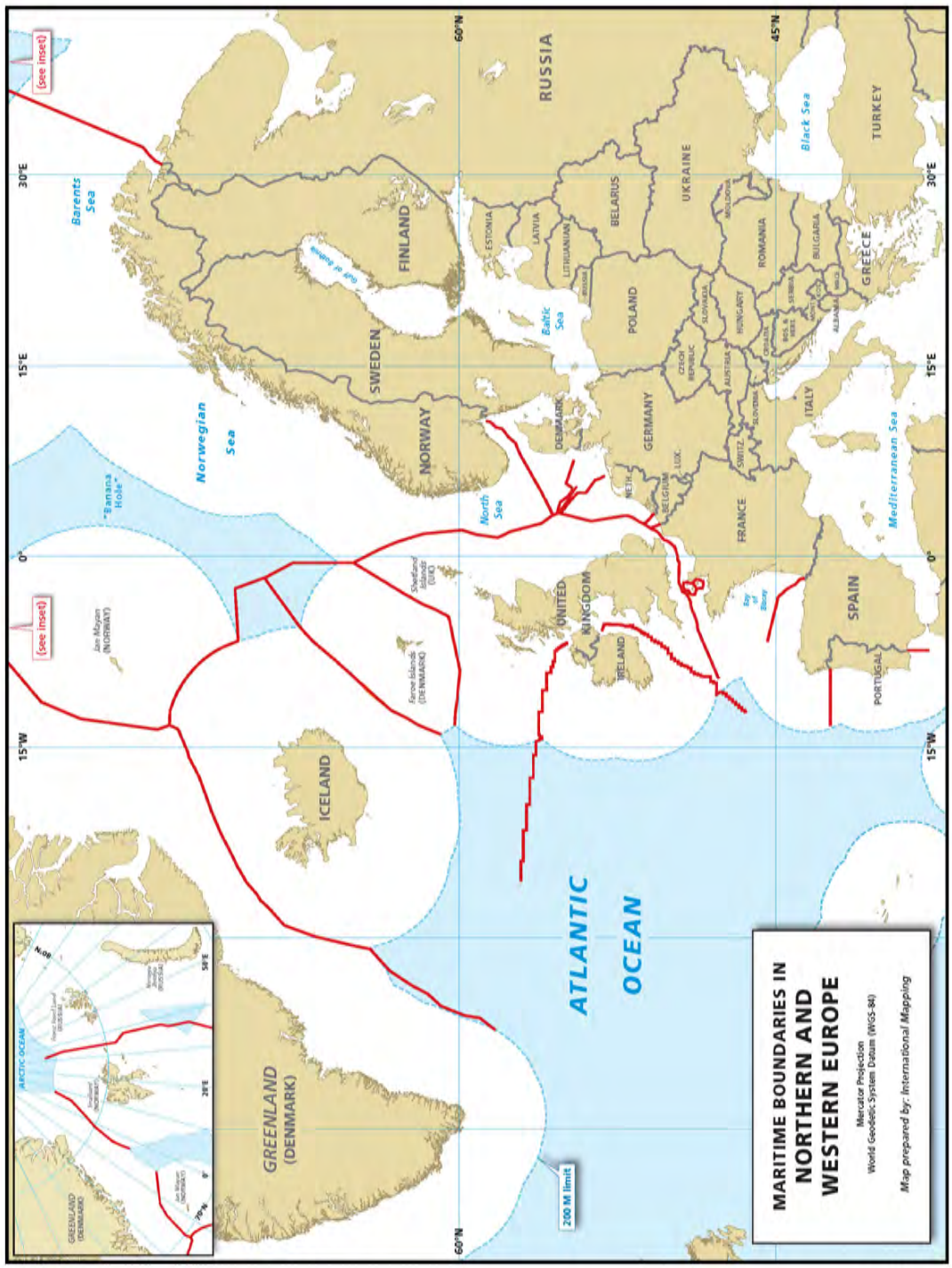
MARITIME BOUNDARIES IN NORTHERN AND WESTERN EUROPE
Mercator Projection
World Geodetic System Datum (WGS-84)
Map prepared by: International Mapping
ATLANTIC OCEAN
Norwegian Sea
Barents Sea
North Sea
Baltic Sea
Black Sea
Mediterranean Sea
Bay of Biscay
Gulf of Bothnia
"Banana Hole"
200 M limit
(see inset)
(see inset)
RUSSIA
FINLAND
SWEDEN
NORWAY
ESTONIA
LATVIA
LITHUANIA
BELARUS
UKRAINE
MOLDOVA
POLAND
DENMARK
GERMANY
NETH.
BELGIUM
LUX.
CZECH REPUBLIC
SLOVAKIA
HUNGARY
AUSTRIA
SWITZ.
SLOVENIA
ROMANIA
BULGARIA
SERBIA
MNTG.
BOS. & HER.
CROATIA
ALBANIA
GREECE
TURKEY
ITALY
FRANCE
SPAIN
PORTUGAL
UNITED KINGDOM
IRELAND
ICELAND
GREENLAND (DENMARK)
Faroe Islands (DENMARK)
Shetland Islands (UK)
Jan Mayen (NORWAY)
60°N
45°N
30°E
15°E
0°
15°W

Figure 5.2

5.16 Similar State practices can be found in parts of the Mediterranean, the Pacific Ocean,[462] the Indian Ocean[463] and of course, the Caribbean Sea.[464]

5.17 The survey of different sub-regions shows a general practice on the part of States in semi-enclosed seas to conclude a set of coherent maritime boundaries.[465] This coherent and orderly delimitation of the oceans allows for the stable management of maritime boundaries.

5.18 The Court is aware of the perils of straying away from such practice. In its 2012 Judgment, it emphasized the dangers associated with Nicaragua's earlier proposal for the carving-up of the Caribbean. In that case, and consistent with its tendency to make excessive claims, Nicaragua requested the Court to enclave all the Colombian islands within Nicaraguan waters. The Court rejected Nicaragua's claim and stated that

> "(…) the Nicaraguan proposal would produce a disorderly pattern of several distinct Colombian enclaves within a maritime space which otherwise pertained to Nicaragua with unfortunate consequences for the orderly

[462] International Maritime Boundaries, Vol. VII, Introduction, Regional Overview Map, Central Pacific and East Asia (Region 5).

[463] International Maritime Boundaries, Vol. VII, Introduction, Regional Overview Map, Indian Ocean / Southeast Asia (Region 6).

[464] International Maritime Boundaries, Vol. VII, Introduction, Regional Overview Map, Middle America and the Caribbean (Region 2); *Ibid.*, Introduction, Regional Overview Map, Persian Gulf (Region 7); *Ibid.*, Introduction, Regional Overview Map, Mediterranean / Black Sea (Region 8); *Ibid.*, Introduction, Regional Overview Map, Caspian Sea (Region 11).

[465] The delimitations in Africa, and North and South America were mostly ocean facing.

> management of maritime resources, policing and the public order of the oceans in general, all of which would be better served by a simpler and more coherent division of the relevant area."[466]

5.19 The Court's rejection of a claim that would have led to the balkanization of the Caribbean Sea applies, with equal force, to this case. To accept the Applicant's OCS claim would result in allocating an untethered patch of ocean floor to Nicaragua. Such a result, which runs counter to the consistent practice of States, would produce significant and undesirable management problems.

(3) NICARAGUA'S OCS CLAIM IS NOT CONTIGUOUS TO ITS BASELINES AND THUS MUST BE REJECTED

5.20 Having established that a State's OCS entitlement must be directly and uninterruptedly contiguous to the baselines that generates it, Colombia will now demonstrate that, wholly apart from its factual and procedural deficiencies, no single part of Nicaragua's OCS claim may, in any scenario, be shown to be contiguous to its baselines.

5.21 An OCS claim's continuity and contiguity is based upon proof of geomorphological and geological natural prolongation of the land territory. A State cannot lay claim to a natural prolongation of its land territory if its continuity and contiguity was interrupted by geomorphological disruptions or geological discontinuities within 200 nautical miles.

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[466] 2012 Judgment, p. 708, para. 230.

5.22 As shown in Chapters 2 and 7, Nicaragua did not meet its conventional and customary burden of proof in accordance with the required scientific rigour and has thus failed to prove that there are no geomorphological or geological features which interrupt the continuity of its natural prolongation within the 200-nautical-mile limit. Likewise, Nicaragua failed to prove any geographical continuity of its OCS claim in relation to its 200 nautical miles entitlements, since its entire claim must transit through third States' maritime entitlements.

5.23 In relation to the latter of these points and as addressed in Chapter 7 *infra*, Nicaragua's "dog-leg" natural prolongation claim follows a circuitous path: it transits through Honduras' EEZ and continental shelf, invades Jamaica's corresponding EEZ and continental shelf, and then swings into an almost 90 degrees turn, from where it speeds straight south into Colombia's *ipso jure* EEZ with its attendant continental shelf. Not only is this absurd and unprecedented but represents an absolute contempt for the basic principles of the Law of the Sea. This is leapfrogging in overdrive.

5.24 Once Nicaragua's purported natural prolongation reaches the 200-nautical-mile maritime entitlement of another State, it ceases to be a legitimate source of title. Nicaragua may not disregard the titles of third States and use their maritime zones to create 'transit corridors' or disconnected areas to claim an OCS. If allowed, such a proposition would destabilize the

international system of maritime entitlements and create chaos where order exists. Therefore, it must be rejected.

(4) THE *IPSO JURE* TITLES OF COLOMBIA'S ISLANDS PREVENT NICARAGUA FROM ESTABLISHING A CONTINUOUS AND CONTIGUOUS TITLE BEYOND 200 NAUTICAL MILES FROM ITS COAST

5.25 Nicaragua is required to establish a continuous and contiguous maritime entitlement, legally, geophysically, and geographically, to any section of the area it claims as its OCS. This section expands on Chapter 4 and elaborates on the entitlements of certain Colombian islands and the extent to which such entitlements block and thereby prevent Nicaragua from establishing any contiguous maritime entitlement to any area beyond 200 nautical miles from its coast.

5.26 It might be recalled here that the San Andrés Archipelago is a geographic, political, environmental and cultural unit comprised of multiple islands, all of them under the sovereignty of Colombia. Because of their location, the following are particularly important for the current analysis: San Andrés, Providencia, Santa Catalina, Roncador, Serranilla and Bajo Nuevo. All of these, as fully-fledged islands, are entitled to an *ipso jure* EEZ with its attendant continental shelf, since: "islands, regardless of their size… enjoy the same status, and therefore generate the same maritime rights, as other land

territory."[467] Such entitlements preclude any OCS claim by Nicaragua.

(a) San Andrés, Providencia and Santa Catalina

5.27 In the 2012 Judgment, the Court held that the entitlement of the islands of San Andrés, Providencia and Santa Catalina extend to the east of Nicaragua's 200-nautical-mile range.[468] Since, as established in Chapter 3 *supra*, no OCS claim may encroach upon another State's EEZ with its attendant continental shelf, the 200-nautical-mile entitlement of these Colombian islands, extending in all directions east of Nicaragua's 200-nautical-mile range, in itself, blocks Nicaragua from establishing a contiguous title to a maritime zone extending from its baselines to any purported areas east of its 200-nautical-mile limit and within San Andrés, Providencia and Santa Catalina's 200-nautical-mile entitlements.

[467] *Qatar* v. *Bahrain*, p. 97, para. 185, 2012 Judgment, p. 674, para. 139. See also figures 4.3, 4.42, 4.57 and 4.61 *supra*.

[468] 2012 Judgment, p. 687, para. 168 and p. 708, para. 230.

(b) Roncador

5.28 In the 2012 Judgment, the Court concluded that Roncador was an island but decided that it was unnecessary to determine the exact extent of its maritime entitlements.[469] In accordance with international law, as elaborated in Chapter 4, the island of Roncador is entitled to its full 200-nautical-mile EEZ with its attendant continental shelf to the east *tous azimuts*.[470] State practice demonstrates that islands similar to Roncador are entitled to the full extent of their 200-nautical-mile maritime entitlements.[471] Since Nicaragua may not establish any OCS where Colombia possesses an EEZ with its attendant continental shelf entitlement, its OCS claim is not only blocked by the EEZ with its attendant continental shelf entitlements of San Andrés, Providencia and Santa Catalina, but also by those of Roncador.

(c) Serranilla and Bajo Nuevo

5.29 The 200-nautical-mile *ipso jure* EEZ with its attendant continental shelf entitlements of the islands of Serranilla and Bajo Nuevo continue uninterrupted from their baselines into the area which Nicaragua claims as its OCS in this case. As such, the maritime zones of these islands not only further block a contiguous maritime title for Nicaragua, but in effect prevent

469 2012 Judgment, p. 692, para. 180.
470 See Chapter 4 *supra*.
471 See Chapter 4 *supra*.

Nicaragua from establishing an OCS claim in this part of the Caribbean Sea.

C. Conclusion

5.30 As Colombia has established in this Chapter, under international law, maritime entitlements must be directly contiguous to the baselines which generate them, in conformity with the principle according to which the "land dominates the sea". Hence, a State's alleged OCS entitlement may not leapfrog over or tunnel under another State's *ipso jure* entitlement and then resume its seaward thrust on the other end. This is confirmed by State practice in different sub-regions of the world where the coherent and harmonious sharing of maritime zones has prevailed.[472]

5.31 Nicaragua's purported OCS claim fails on multiple fronts. Not only does it disregard international law and State practice, but also, as a question of fact, Nicaragua could not in any scenario, gain title beyond its 200-nautical-mile limit.

5.32 From a geological and geomorphological perspective, Nicaragua's natural prolongation of its land territory does not extend beyond its 200-nautical-mile limit from its coast.[473]

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[472] See International Maritime Boundaries, Vol. VII, Introduction, Regional Overview Maps.

[473] See Chapter 7 *infra*.

5.33 Moreover, Nicaragua may not use the maritime zones of Honduras and Jamaica as transit routes for its purported natural prolongation claim. Natural prolongation ceases to be a source of title upon encountering another State's *ipso jure* 200-nautical mile zone. No State may use a proximate State's maritime areas to gain access to another State's maritime entitlements with the intention of encroaching upon them.

5.34 In addition, since the recognition of the 200-nautical-mile EEZ with its attendant continental shelf entitlements of San Andrés, Providencia and Santa Catalina is *res judicata*, and the islands of Roncador, Serranilla and Bajo Nuevo are fully entitled to their *ipso jure* EEZ with its attendant continental shelf, Nicaragua's case must still fail due to the inexistence of a contiguous maritime title to any part of the area it claims.

5.35 Allowing such a claim, far removed from any title generated by Nicaragua's baselines, would allow a State's OCS claim to leapfrog over or tunnel under another State's 200-nautical-mile EEZ with its attendant continental shelf, balkanize the Caribbean Sea and constitute a dangerous precedent for the public order of the oceans. Nicaragua's submissions should thus be rejected in their entirety.

Chapter 6

THE RIGHTS OF THIRD STATES WOULD BE DIRECTLY AFFECTED BY NICARAGUA'S OCS CLAIM IN THE SEMI-ENCLOSED CARIBBEAN SEA

A. Introduction

6.1 Colombia has established that under customary international law, besides its mainland, all of its islands are entitled to their full 200-nautical-mile EEZ with its attendant continental shelf, in all directions.[474] These entitlements project in the area which Nicaragua claims as relevant. Since an OCS claim, based upon geology and geomorphology is not a source of title within 200 nautical miles from any State, *i.e.*, within the maritime zone covered under the EEZ regime, Nicaragua's OCS claim may not encroach upon the area of Colombia's EEZ with its attendant continental shelf. Thus, there are no overlapping entitlements within the area Nicaragua argues as relevant in this case.

6.2 This Chapter addresses the legal implications of Nicaragua's claim in certain contrary-to-fact scenarios. If the Court were to reduce the effect of Colombia's islands in the area east of Nicaragua's 200-nautical-mile range, or were to decide

[474] Colombia fully respects and complies with the boundary treaties it has concluded in the Caribbean Sea with, *inter alia*, Panama, Jamaica, Haiti and the Dominican Republic.

to disregard the *inter se* division of rights derived from the Colombia-Jamaica and Colombia-Panama delimitation treaties, this Chapter will establish that the EEZ with its attendant continental shelf-based entitlements of third States, specifically Panama and Jamaica, would prevail in this area over Nicaragua's OCS claim.

6.3 Since the *inter se* agreements between Colombia and these States only divide their respective rights, within any area, as between themselves, and as such do not affect the entitlements of these States *vis-à-vis* Nicaragua, any decision by the Court to reduce Colombia's rights, would not avail Nicaragua, for it could not affect the rights of Jamaica or Panama in the same area.

6.4 In other words, if the Court were to reduce Colombia's EEZ with its attendant continental shelf rights in any area within 200 nautical miles from the baselines of either Jamaica or Panama, such State could have a claim to such area as its EEZ with its attendant continental shelf. Under international law, the EEZ with its attendant continental shelf may not be encroached by another State's OCS claim. Since the Court may not prejudice the rights of States which are not participating in these proceedings, as will be explained, the Court would not be in a position to grant any OCS to Nicaragua.

6.5 The jurisprudence of the Court shows that it has generally avoided drawing a maritime boundary between two

Parties in an area where a third State, whether intervening or not, could have legal interests (B). While the Court has previously been able to draw partial boundaries, which refrained from prejudicing the rights of third States, Nicaragua's ambitious claim stretches so far from its coast that even the shortest of all maritime delimitations would inevitably trespass into areas where, aside from Colombia's sovereign rights, third States possess entitlements, regardless of how such rights were internally divided *inter se* between the States concerned. Indeed, the whole area beyond 200 nautical miles from the Nicaraguan coast in which, it asserts, a boundary remains to be drawn, is located closer to Colombia, Jamaica or Panama than it is to Nicaragua. This fact would be even more significant if some of Colombia's treaty and customary international law rights were not allowed their full effect.

6.6 Nicaragua does not feign ignorance of this geographical fact and is aware that its claim disrupts the neighbourly relations established between Colombia and, respectively, Panama and Jamaica, amongst others. By asserting that it will not claim areas located on the Panamanian and Jamaican sides of the maritime delimitations agreed between those States and Colombia, Nicaragua deludes itself into believing that it can use agreements to which it is not a Party to confine the legal interests of these third States in the proceedings *vis-à-vis* Nicaragua itself. But Nicaragua cannot benefit from *res inter alios acta* established on the basis of entirely different coastal projections. Panama and Jamaica, amongst others, could have

legal interests *vis-à-vis* Nicaragua that project well beyond the boundaries concluded with Colombia, that is to say within the area which Nicaragua contends is to be delimited (C).

6.7 Because of Nicaragua's exaggerated claim to an OCS within the semi-enclosed Caribbean Sea, the Court is confronted with an unprecedented situation in which it cannot draw a single point of any new purported maritime boundary between Colombia and Nicaragua without trespassing into maritime areas where third States could have existing and contingent legal interests against Nicaragua; any reduction of Colombia's rights deriving from the *inter se* arrangements with those States, would effectively activate the entitlements of such States in the area. If those entitlements were to revert into effect, they would prevail over Nicaragua's OCS claim (D).

B. The Court, as a Matter of Principle, does not Draw Maritime Boundaries that Encroach into Areas where Third States have Legal Interests

6.8 The jurisprudence attests to the fact that, "as a matter of principle",[475] the Court will not draw a maritime boundary between two Parties in an area where a third State possesses legal interests. Indeed, the Court's practice is to stop the delimitation before it reaches an area that is located closer to the coast of a third State than it is to the coast of one of the Parties to the proceedings.

[475] *Territorial and Maritime Dispute, Application of Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 372, para. 86.

6.9 Many aspects of the law of maritime delimitation have fluctuated over time. However, the jurisprudence of the Court has been remarkably consistent in relation to the need to protect the legal interests of third States during the process of delimitation. In this respect, the Court has stressed that, where the entitlements of several coastal States are involved, the protection afforded by Article 59 of the Statute may not be sufficient.[476] Thus, ever since the 1982 Judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case,[477] "the Court has always taken care not to draw a boundary line which extends into areas where the rights of third States may be affected".[478] Because 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",[479] it either resorts to the directional arrow technique,[480] or ends the delimitation before reaching areas where third States possess legal interests.[481]

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476 *Cameroon* v. *Nigeria: Equatorial Guinea intervening*, p. 421, para. 238.

477 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 90, Map No. 3 and p. 91, para. 130 *(Tunisia/Libya).*

478 2012 Judgment, p. 707, para. 228.

479 *Nicaragua* v. *Honduras*, p. 756, para. 312; *Case of the Monetary Gold removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954: I.C.J. Reports 1954*, pp. 32-33; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55*; East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 100-105, paras. 23-35.

480 *Black Sea*, p. 129, para. 209; *Nicaragua* v. *Honduras*, p. 759, para. 319; *Cameroon* v. *Nigeria: Equatorial Guinea intervening*, p. 448, para. 307; *Qatar* v. *Bahrain*, pp. 115-116, paras. 249-250; *Tunisia/Libya*, p. 90, Map No. 3 and p. 91, para. 130.

481 *Libya/Malta*, pp. 24-28, paras. 20-23 and p. 54 Map No. 3.

6.10 According to its jurisprudence, the Court shields the legal interests of third States regardless of whether they filed an application for permission to intervene, accepted or not, and of whether they indicated an area of interest by any given modality. Thus, in the *Cameroon* v. *Nigeria* case, Sao Tome and Principe, which did not apply for permission to intervene in the case, obtained the same protection afforded to Equatorial Guinea.[482]

6.11 Moreover, the jurisprudence shows that the Court, at the very least, ends the maritime delimitation before it reaches areas that are located closer to the coast of a third State than to the coast of one of the parties to the proceedings. Thus, the directional arrow is drawn before it reaches the equidistance line (or lines) between, respectively, the third State and the parties to the proceedings that have not concluded a delimitation agreement with the former. However, when, as here, due to the exorbitant claim of one of the parties to the proceedings, the maritime delimitation is supposed to be effected in an area that in its entirety is located closer to the coasts of a third State than those of that Party, the Court would be precluded from drawing any boundary between the parties, such as the case of the present proceedings.

[482] *Cameroon* v. *Nigeria: Equatorial Guinea intervening*, p. 421, para. 238.

C. Nicaragua Cannot Invoke Maritime Delimitation Treaties to which it is not a Party in Order to Confine the Legal Interests of the Parties to those Agreements

6.12 The situation may arise in which a third State has concluded a maritime delimitation agreement with only one of the Parties to the proceedings. This was, for example, the position of Equatorial Guinea in the *Cameroon* v. *Nigeria* case, and of Costa Rica and Honduras in the *Territorial and Maritime Dispute* case. Indeed, Equatorial Guinea was bound by an agreement with Nigeria[483] and Costa Rica and Honduras had signed maritime delimitation agreements with Colombia.[484] These treaties do confine the legal interests of Equatorial Guinea and of Costa Rica and Honduras *vis-à-vis*, respectively, Nigeria and Colombia. However, they do not limit the legal interests of Equatorial Guinea, Costa Rica and Honduras *vis-à-vis* Parties with whom they have no delimited boundaries: *i.e.* Cameroon and Nicaragua respectively, which were Parties to the relevant proceedings but were third States *vis-à-vis* the agreements.

6.13 In the *Cameroon* v. *Nigeria* case, Cameroon suggested that any delimitation drawn on the Nigerian side of the 2000 boundary between Nigeria and Equatorial Guinea could not affect the legal interests of Equatorial Guinea because the latter

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[483] International Maritime Boundaries, Vol. IV, Nigeria-Equatorial Guinea, Rep. 4-9, p. 3759.

[484] Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between Colombia and Costa Rica, 17 March 1977, *Territorial and Maritime Dispute*, Counter-Memorial of the Republic of Colombia, Vol. IIA, Annex 5; Maritime Delimitation Treaty between Colombia and Honduras, 2 August 1986, *Ibid*., Annex 10.

had "manifested its lack of interest" for those areas.[485] But that argument did not persuade the Court which rightly ended the delimitation between the Parties before it could affect Equatorial Guinea's legal interests on the Nigerian side of the agreed boundary.[486]

6.14 More recently, in the *Territorial and Maritime Dispute* case, Nicaragua argued that any delimitation drawn on the Colombian side of the 1977 boundary between Colombia and Costa Rica could not affect the legal interests of Costa Rica because the latter had renounced those areas *erga omnes*.[487] Nicaragua also invoked the 1986 boundary between Colombia and Honduras[488] in order to confine Colombia's legal interests to the area located south of the 15th parallel.[489] Nicaragua now suggests that not only Costa Rica, but also Panama and Jamaica, have no legal interests beyond the boundaries that they have established with Colombia.[490] But Nicaragua cannot have it both

485 *Cameroon* v. *Nigeria: Equatorial Guinea intervening*, Observations écrites de la République du Cameroun sur la requête de la Guinée équatoriale à fin d'intervention, 4 juillet 2001, p. 6 para. 14, pp. 6-8, para. 17 and p.11, para. 30 (available in French only).

486 *Cameroon* v. *Nigeria: Equatorial Guinea intervening*, p. 448, para. 307.

487 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Costa Rica for Permission to Intervene*, Public Sitting 15 October 2010, CR 2010/16, pp. 27-28, paras 31-34 (Reichler).

488 Maritime Delimitation Treaty between Colombia and Honduras (with map), 2 August 1986. *Territorial and Maritime Dispute*, Counter-Memorial of the Republic of Colombia, Vol. IIA, Annex 10.

489 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene*, Public Sitting 20 October 2010, CR 2010/19, p. 29, para. 43 (Pellet).

490 Communication MINIC-NU-049-13 of the Permanent Mission of Nicaragua to the United Nations, 20 December 2013 (Annex 32);

ways. It cannot, on the one hand, rely on the relative effect of treaties for the purpose of arguing that those States' recognition of Colombia's sovereign rights is not opposable to itself and, on the other hand, rely on those same agreements for the purpose of confining their legal interests *vis-à-vis* itself.

6.15 In fact, in the *Territorial and Maritime Dispute* case, the Court rejected Nicaragua's self-contradicting arguments by stressing that:

> "(…) States may conclude maritime delimitation treaties on a bilateral basis. Such bilateral treaties, under the principle *res inter alios acta*, *neither confer any rights upon a third State*, nor impose any duties on it. Whatever concessions one State party has made to the other *shall remain bilateral and bilateral only*, and will not affect the entitlements of the third State."[491]

6.16 Likewise, the Court's examination of the Costa Rican request to intervene in that same case attests to the recognition of the legal interests of that State *vis-à-vis* Nicaragua beyond the boundary with Colombia. Indeed, the Court stressed that "Costa Rica's interest of a legal nature may only be affected if the maritime boundary that the Court ha(d) been asked to draw between Nicaragua and Colombia were to be extended beyond a

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Communication MINIC-NU-050-13 of the Permanent Mission of Nicaragua to the United Nations, 20 December 2013 (Annex 33).

[491] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application of Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 444, para. 72 (emphasis added).

certain latitude southwards".[492] This conclusion, which flows from the principle *res inter alios acta*, is confirmed in many opinions that were appended to the judgment in that case.[493] In its 2012 Judgment on the merits, the Court was able to draw a maritime delimitation between Colombia and Nicaragua without trespassing into what Costa Rica itself defined as its "minimum area of interest". Colombia will demonstrate, however, that in the circumstances of the present case it is not possible to draw a delimitation beyond 200 nautical miles from Nicaragua's coast without trespassing into areas where countries like Jamaica and Panama possess legal interests.

6.17 In other words, Nicaragua cannot rely on the maritime delimitation agreements concluded by Colombia in order to confine the projections of Panama or Jamaica *vis-à-vis* itself. Although Nicaragua pretends to substitute itself for Colombia in the delimitations agreed between that State and, respectively, Jamaica and Panama, reliance on the law of State succession is inapposite here. The present case has nothing to do with the one, for example, of Guinea-Bissau and Senegal in relation to the maritime boundary established by France and Portugal during

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[492] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application of Costa Rica for Permission to Intervene*, Judgment, I.C.J. Reports 2011, p. 372, para. 89.

[493] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application of Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011,* Dissenting Opinion of Judge Abraham, pp. 387-388, paras. 12-13; Dissenting Opinion of Judges Cançado Trindade and Yusuf, p. 410, para. 18; Dissenting Opinion of Judge Donoghue, pp. 414-415, para. 4; Declaration of Judge Xue, pp. 749-750, para. 12.

colonial times.[494] Nor is the present situation similar to the one of Slovenia, Croatia and Montenegro with respect to the continental shelf boundary established between Yugoslavia and Italy.[495] Nicaragua is not the sovereign of the San Andrés Archipelago. Thus, it certainly cannot succeed to the delimitation agreements established between the coastal projections of that Colombian territory and the territory of other States. While Nicaragua has also invoked the jurisprudence relating to territorial frontiers,[496] the analogy is misplaced with regard to maritime boundaries that are established in areas where the entitlements of three or more States overlap due to a multitude of different coastal projections. Indeed, in the 1986 Judgment in the *Frontier Dispute* case, the Court stressed that:

> "But the process by which a court determines the line of a land boundary between two States can be clearly distinguished from the process by which it identifies the principles and rules applicable to the delimitation of the continental shelf. The legal considerations which have to be taken into account in determining the location of the land boundary between parties are in no way dependent on the position of the boundary between the territory of either of those parties and the territory of a third State, (…). On the other hand, in continental shelf delimitations, an agreement between the parties which is perfectly valid and binding on the treaty level may, when

494 *Case concerning the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal, Award of 31 July 1989, R.I.A.A., Volume XX*, pp. 119-213.

495 Limits in the Seas, No. 9.

496 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application of Costa Rica for Permission to Intervene*, Public Sitting 15 October 2010, CR 2010/16, pp. 27-28, paras. 32-33 (Reichler).

> the relations between the parties and a third State are taken into consideration, prove to be contrary to the rules of international law governing the continental shelf (…). It follows that a court dealing with a request for the delimitation of a continental shelf must decline, even if so authorized by the disputant parties, to rule upon rights relating to areas in which third States have such claims as may contradict the legal considerations – especially in regard to equitable principles – which would have formed the basis of the decision."[497]

6.18 The fact that Nicaragua cannot benefit from the agreements concluded by Colombia with third States has important consequences for Nicaragua's OCS claim. As Colombia will demonstrate, these consequences are detrimental to Nicaragua's case; even if the Court were to reduce the effect of any of Colombia's EEZ with its attendant continental shelf entitlements in the area Nicaragua deems relevant, third States retain their customary *ipso jure* 200-nautical-mile entitlements in any void that would thus be created.

D. Any Delimitation Beyond 200 Nautical Miles from the Nicaraguan Coast would Inevitably Encroach into Areas where Third States have Legal Interests *vis-à-vis* Nicaragua

6.19 Costa Rica, Panama and Jamaica, with reason, have not claimed an OCS in the Caribbean Sea. Nor has any other Caribbean State other than Nicaragua. Together with Colombia, those three States all vigorously protested Nicaragua's claim to

[497] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 578, para. 47.

the CLCS.[498] Their entitlements *vis-à-vis* Nicaragua, like those of Colombia, are based on 200-nautical-mile projections. Panama's notional entitlement *vis-à-vis* Nicaragua could extend beyond the 1976 boundary line with Colombia.[499] Likewise, Jamaica's and Haiti's notional entitlements *vis-à-vis* Nicaragua could extend beyond their respective boundaries with Colombia.[500]

[498] Annexes 19 to 28.

[499] Treaty on the delimitation of marine and submarine areas and related matters between Panama and Colombia, 20 November 1976, *Territorial and Maritime Dispute*, Counter-Memorial of the Republic of Colombia, Vol. IIA, Annex 4.

[500] Maritime Delimitation Treaty between Jamaica and Colombia, 12 November 1993, *Territorial and Maritime Dispute*, Counter-Memorial of the Republic of Colombia, Vol. IIA, Annex 14. International Maritime Boundaries, Vol. I, Colombia-Haiti, Rep. 2-3, p. 491.

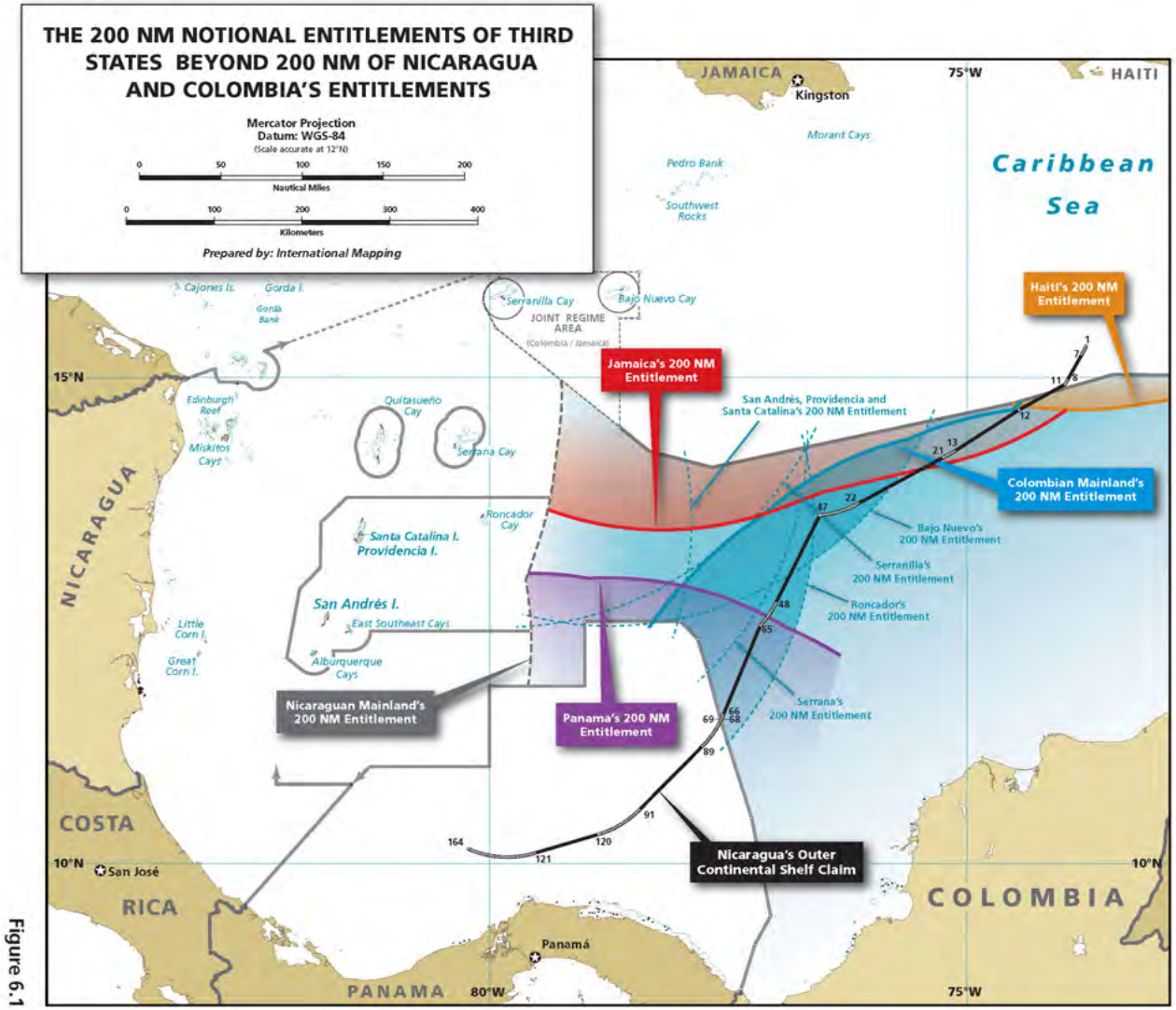
THE 200 NM NOTIONAL ENTITLEMENTS OF THIRD STATES BEYOND 200 NM OF NICARAGUA AND COLOMBIA'S ENTITLEMENTS
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
JAMAICA
Kingston
HAITI
75°W
Morant Cays
Pedro Bank
Southwest Rocks
Caribbean Sea
Cajones Is.
Gorda I.
Gorda Bank
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
Haiti's 200 NM Entitlement
Jamaica's 200 NM Entitlement
San Andrés, Providencia and Santa Catalina's 200 NM Entitlement
Colombian Mainland's 200 NM Entitlement
15°N
Edinburgh Reef
Miskitos Cays
Quitasueño Cay
Serrana Cay
NICARAGUA
Roncador Cay
Santa Catalina I.
Providencia I.
San Andrés I.
East Southeast Cays
Albuquerque Cays
Little Corn I.
Great Corn I.
Bajo Nuevo's 200 NM Entitlement
Serranilla's 200 NM Entitlement
Roncador's 200 NM Entitlement
Serrana's 200 NM Entitlement
Nicaraguan Mainland's 200 NM Entitlement
Panama's 200 NM Entitlement
Nicaragua's Outer Continental Shelf Claim
COSTA RICA
10°N
San José
Panamá
PANAMA
80°W
75°W
COLOMBIA
1
2
11
8
12
13
21
22
47
48
65
66
68
69
89
91
120
121
164

Figure 6.1

6.20 This map shows exactly why the Court cannot delineate Nicaragua's purported outer limit of the continental shelf nor draw a maritime delimitation between the two Parties beyond 200 nautical miles from the Nicaraguan coast. Any delimitation between the Parties to the proceedings would not only encroach on Colombia's 200 nautical miles entitlements; it would inevitably trespass into areas where Jamaica and Panama could have legal interests *vis-à-vis* Nicaragua, if Colombia's rights are reduced or disallowed. Colombia has previously shown that the concept of the EEZ, an area that encompasses both the continental shelf and the column of water within 200 nautical miles of a coast, precludes competing OCS claims over the same areas.[501] Even if those third States' 200 nautical miles entitlements would not trump Nicaragua's OCS claim, *quod non*, they would still, at a minimum, constitute plausible legal interests which must be protected.

6.21 As established in Chapter 5 *supra*, Nicaragua's OCS claim simply ignores reality. Not only will a delimitation beyond 200 nautical miles off the Nicaraguan coast inevitably trespass into areas where third States possess legal interests, it will also necessarily imply that Nicaragua is allowed to leapfrog maritime zones appertaining to other coastal States.

6.22 Furthermore, as will be further discussed in Chapter 7 *infra*, Nicaragua's "dog-leg" natural prolongation claim intrudes into the maritime entitlements of Honduras and Jamaica, before

[501] See Chapter 4 *supra*.

miraculously manoeuvring itself into Colombia's maritime zones. It should be noted that any recognition by the Court of the validity of any part of Nicaragua's "dog-leg" natural prolongation (*quod non*) would prejudice the rights of Honduras and Jamaica. Nicaragua could then use its newly recognized "dog-leg" natural prolongation to prejudice the rights of Honduras beyond 200 nautical miles, or of Jamaica within its EEZ with its attendant continental shelf. Neither of these States is a party to these proceedings and may not make their case against the incursion of Nicaragua's natural prolongation into their 200-nautical-mile maritime zones; however, were the Court to decide to replace the CLCS and make a determination, such a determination of the validity of Nicaragua's claim (*quod non*), could be used by Nicaragua *vis-à-vis* those States. It should be noted in this respect that Jamaica objected to any consideration by the CLCS of Nicaragua's purported OCS claim; any recognition of it by the Court would prejudice Jamaica.

E. Conclusion

6.23 Even if the Court were to reduce or disallow the legal effect of Colombia's treaty and customary international law rights, Nicaragua would not be the beneficiary, as third States' EEZ with their attendant continental shelf rights would substantively prevail over Nicaragua's OCS claim, thus precluding the possibility of judicial action in the present case. All this presupposes that Nicaragua has proved the requisite

existence of its natural prolongation. It has not, as will be demonstrated in the following Chapter.

6.24 Beyond 200 nautical miles from the Nicaraguan coast, no boundary can be drawn between Colombia and Nicaragua without encroaching into areas where third States could then have an EEZ with its attendant continental shelf, an *ipso jure* entitlement that would trump any competing OCS claim by Nicaragua.

Chapter 7

NICARAGUA'S FAILURE TO DEMONSTRATE THAT THE NATURAL PROLONGATION OF ITS LAND TERRITORY EXTENDS BEYOND 200 NAUTICAL MILES FROM ITS COAST

Chapter (pages 325 to 388) not reproduced

Chapter 8

SUMMARY AND CONCLUSIONS

8.1 Colombia has shown that, in the particular circumstances that characterize this case, there is no room for the Court to proceed with any delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast. This conclusion is based on a number of considerations under international law, as well as on Nicaragua's failure to sustain its burden of proof that the continental shelf areas situated beyond 200 nautical miles from its coast constitute the natural prolongation of its territory into and under the sea.

8.2 *First*, Nicaragua has not proved that the areas it seeks to delimit in the present proceedings constitute the natural prolongation of its land territory. To the contrary, Colombia has shown that there are a series of fundamental discontinuities and disruptions in the continental shelf off Nicaragua's coast that interrupt any natural prolongation well before the 200-nautical-mile limit is reached. As a question of fact, therefore, Nicaragua has not established that it has a natural prolongation of its land territory beyond 200 nautical miles from its coast that overlaps with Colombia's 200-nautical-mile entitlements to the EEZ with its attendant continental shelf;

8.3 *Second*, Article 76 of UNCLOS contains an indivisible regime that is not opposable to Colombia, a State that has chosen to remain outside of that treaty. This regime is not part of customary international law and in consequence its application is reserved exclusively for the States that are bound by the Convention.

8.4 *Third*, notwithstanding what was said in the previous paragraph, the object and purpose of the outer continental shelf regime in UNCLOS, together with its negotiating history and subsequent State practice, shows that it was never intended that OCS claims should encroach over the *ipso jure* rights of a coastal State to a 200-nautical-mile EEZ with its attendant continental shelf, measured from its mainland or insular territory. No outer continental shelf submission that encroaches on another State's *ipso jure* 200-nautical-mile entitlement has ever been endorsed by the CLCS, and the overwhelming weight of State practice points to the same result. If any part of Nicaragua's OCS claim were to be accepted, it would encroach upon Colombia's *ipso jure* entitlement to a 200 nautical miles EEZ with its attendant continental shelf generated from its mainland and islands. This would be contrary to international law in that Colombia's 200-nautical-mile *ipso jure* entitlement to an EEZ with its attendant continental shelf, prevails over any putative OCS of Nicaragua.

8.5 *Fourth*, due to the semi-enclosed nature of the Caribbean Sea, there are no maritime areas that are situated more than 200

nautical miles from the nearest land territory of neighbouring States. In short, there are no areas for claiming an OCS in the Caribbean. All other Caribbean States except Nicaragua accept this reality. State practice, especially that of the States particularly affected, shows that no Caribbean State – with the isolated exception of Nicaragua – has ever claimed continental shelf rights beyond 200 nautical miles from its coast in the Caribbean Sea or made a submission to that effect to the CLCS. State practice on maritime delimitation also points to a general understanding of the States of the region to the effect that all delimitations of maritime entitlements in the Caribbean Sea have been carried out within 200 nautical miles from the mainland or insular coasts of each of the States involved.

8.6 *Fifth*, Colombia is entitled to a 200-nautical-mile EEZ with its attendant continental shelf, both from its mainland and its islands. With regard to the islands of San Andrés, Providencia and Santa Catalina, the Court in its 2012 Judgment already decided that they are entitled to an EEZ with its attendant continental shelf in all directions. This entitlement extends approximately 100 nautical miles east of the 200-nautical-mile limit from Nicaragua's coast. The same applies to other islands of the San Andrés Archipelago, in particular Roncador, Serrana, Serranilla and Bajo Nuevo, which have been shown to be islands that generate full entitlements. The entitlements of Colombia's islands and the entitlement of its mainland project into the area claimed by Nicaragua as its OCS. Nicaragua's claim that the Colombian islands should not be

accorded any continental shelf rights east of Nicaragua's 200-nautical-mile limit is thus fundamentally misplaced and runs contrary to established customary international law and the 2012 Judgment. Moreover, Nicaragua's OCS claim also encroaches on Colombia's 200-nautical-mile entitlements from its mainland – a further reason why Nicaragua's claim is misguided. As a result, the notion that a claimed Nicaraguan OCS can nullify Colombia's *ipso jure* EEZ with its attendant continental shelf entitlements, should be rejected.

8.7 *Sixth*, the principle that the "land dominates the sea" is well-established in international law. It requires that any maritime title must be a contiguous, uninterrupted extension of the landmass. Nicaragua's claim to an outer continental shelf violates this principle in three respects: (i) it is not based on a continuous natural prolongation of its land territory into and under the sea; (ii) it uses the maritime entitlements of other States as transit corridors to manoeuvre itself into Colombia's maritime zone; and (iii) it seeks to leapfrog over Colombia's and other States' 200-nautical-mile maritime entitlements. To avoid fragmentation of the oceans, maritime titles must be contiguous to the baselines of the coasts from which they emanate. Consistent with this principle, there is not a single instance of State practice in which a State's maritime entitlement reached the 200-nautical-mile limit, and then "leapfrogged" over or "tunnelled under" the 200-nautical-mile entitlements of another State, only to resurface further seaward on the other side. Nor has any such claim ever been endorsed by the CLCS. To the

extent that Nicaragua's claim to an OCS seeks to do that, it must be rejected.

8.8 *Seventh*, in its Memorial Nicaragua clearly states that its delimitation claim relies on the delineation of the outer limits of its alleged OCS. Yet, Nicaragua has not complied with the procedures for establishing said outer limits, as it is obliged to as a State Party to UNCLOS. The Court has made it clear that Nicaragua remains obliged to comply with these procedures notwithstanding the fact that Colombia is not a Party to UNCLOS. Under Article 76, paragraph 8 of UNCLOS, Nicaragua can only establish the outer limits of its alleged OCS based on recommendations from the CLCS. However, the CLCS has not reviewed that claim and has not made any such recommendations, and the mere filing of a submission is not sufficient to establish an entitlement.

8.9 *Eighth*, in the delimitation scenario proposed by Nicaragua, the first step in the process, the identification of the relevant area, is premised on the delineation of the outer limits of an alleged continental margin that has not received the approval of the CLCS. It is true that the delineation of the outer limits of an OCS and the delimitation of continental shelf areas are distinct operations and that, in principle, the latter can be undertaken independently of a recommendation from the CLCS. However, in cases in which this has been done it is because the specific circumstances warranted it: they were cases involving States Parties to UNCLOS in which there was no doubt that the

continental margin did extend beyond 200 nautical miles, the parties were in agreement in that respect, and the coastal geography made it possible to carry out a delimitation of the OCS without the need of a prior delineation of its outer limits, inasmuch as it involved States with adjacent coasts. None of these circumstances obtains in the present case and, on the contrary, the very methodology put forward by Nicaragua pre-supposes that it will be for the Court to undertake for itself the operation of delineation, as a first step in the process of delimitation. The Court should not accede to do this because it is a judicial body, inherently unsuited to do that, and because this would contradict what the Court itself has stated in its case-law and would disregard the terms of a convention that Nicaragua is bound to observe. For these reasons also, Nicaragua's claim must fail.

8.10 *Ninth*, the CLCS is a body comprised of 21 experts in geology, geomorphology and hydrography who are specially qualified to assess outer continental shelf claims. A submission not only has to be vetted by a seven-member sub commission, but by the CLCS as a whole. The procedure before the CLCS is a collaborative process in which submissions made by States are frequently not accepted, or where additional data and proof, as well as substantive amendments, are required. To this end, the CLCS requires rigorous scientific proof. This is a very different process from judicial proceedings and it requires specialized scientific and technical knowledge. In Colombia's respectful

view, it is not a task for which the Court should substitute itself for the CLCS.

8.11 *Tenth*, Nicaragua's OCS claim also encroaches upon the maritime entitlements of other States of the region. Nicaragua seeks to overcome this difficulty by relying on Colombia's *inter se* delimitation agreements with these States. But Nicaragua is not a Party to those agreements and cannot rely on them to limit the entitlements of any of those States *vis-à-vis* itself. If the Court were to reduce the EEZ entitlement of Colombia, with its attendant continental shelf, secured by Colombia as a Party to its treaties with those States, they would then be entitled to claim as their EEZ and continental shelf any such area which lies within their respective 200-nautical-mile limits; such entitlement would prevail over any competing OCS claim by Nicaragua. Consistent with its established jurisprudence, the Court should thus refrain from prejudicing the potential maritime entitlements of third States *vis-à-vis* Nicaragua, particularly in areas lying beyond 200 nautical miles from the Nicaraguan coast but within 200 nautical miles from the coasts of such States.

* * *

8.12 Nicaragua's Application should thus be dismissed inasmuch as it goes against customary international law and established State practice. But that is not all: Nicaragua's claim has a number of unsettling implications for the Law of the Sea

and the international community as a whole that should not be countenanced.

8.13 As Colombia explained throughout this Counter-Memorial, Nicaragua's claim, if accepted, even partially, would undermine the established public order of the oceans on three levels: the institutional, the global and the local Caribbean level.

8.14 If claims to an outer continental shelf in a semi-enclosed sea are allowed to prevail over the 200-nautical-mile *ipso jure* entitlements of coastal States, this would run counter to the object and purpose of the OCS regime agreed under UNCLOS and well-established State practice. New disputes would be likely to arise, and States would be thrown into confusion as to their maritime entitlements.

8.15 Nicaragua's attempt to nullify the maritime entitlements of the Colombian islands would similarly have a disruptive effect in the light of the extensive State practice in the matter.

8.16 Were the Court to uphold Nicaragua's submissions, it would have to entirely disregard overwhelming State practice and effectively rewrite customary international law. Colombia believes that the Caribbean Sea – a confined, semi-enclosed sea with a "crowded geography"[602] – should not serve as a testing ground for innovative delimitation experiments which would

[602] The expression was used by Judge Donoghue (2012 Judgment, Separate Opinion, p. 759, para. 29).

undermine established practice and significantly complicate the orderly management of the oceans.

8.17 Based on the foregoing, Colombia is of the firm view that Nicaragua has not established that it has an outer continental shelf beyond 200 nautical miles from its coast, nor did it establish that such a putative OCS overlaps with Colombia's EEZ with its attendant continental shelf. There are no overlapping maritime entitlements to be delimited, and it would be inappropriate in the particular circumstances of this case for the Court to proceed to a delimitation. Consequently, Nicaragua's request for delimitation should be dismissed and given Nicaragua's propensity to treat the door to the World Court as a revolving one, that dismissal should be with prejudice.

SUBMISSIONS

With respect to the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast,* for the reasons set out in this Counter-Memorial, and reserving the right to amend or supplement these Submissions, Colombia respectfully requests the Court to adjudge and declare that:

Nicaragua's request for a delimitation of the continental shelf beyond 200 nautical miles from its coast is rejected with prejudice.

CARLOS GUSTAVO ARRIETA PADILLA
Agent of Colombia

APPENDIX

Scientific Report:
Shortfalls in the Geological and Geomorphological Evidence for Natural Prolongation from the Nicaraguan Coast

Dr Lindsay Parson and Mr Peter Croker

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Annex 11 Ministry of Defense, General Maritime Direction, Sailing Record, Miss Ida, 14 January 2015

Annex 12 Ministry of Defense, General Maritime Direction, Sailing Record, Equivel, 17 February 2015

Annex 13 Ministry of Defense, General Maritime Direction, Sailing Record, Genesis III, 17 October 2015

Annex 14 Ministry of Defense, General Maritime Direction, Sailing Record, Miss Suseth, 15 February 2016

Annex 15 Ministry of Defense, General Maritime Direction, Sailing Record, Mar Azul, 19 September 2016

Annex 16 Colombian Ocean Commission, "Contribution to the knowledge of the Seaflower Biosphere Reserve", Excerpts, Bogotá, 2015

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Annex 18 Fishing Agreement between the Republic of Colombia and Jamaica, Bogotá, 30 August 1984

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Annex 45 E.D. Brown, "Rockall and the Limits of National Jurisdiction of the United Kingdom", Part 1, *Marine Policy*, IPC Business Press, 1978

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Annex 47 J. Bond and R. Meyer de Schauensee, "The Birds", *The Academy of Natural Sciences of Philadelphia, Monographs*, Number 6, Results of the Fifth George Vanderbilt Expedition (1941), Wickersham Printing Company, 1944

Annex 48 M. C. Prada Triana, "Comparative Study of a Section of the Seaflower MPA as Potential World Heritage Site", Corporación para el Desarrollo Sostenible del Archipiélago de San Andrés, Providencia y Santa Catalina (CORALINA), 2009

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