INTERNATIONAL COURT OF JUSTICE

TERRITORIAL AND MARITIME DISPUTE
(NICARAGUA v. COLOMBIA)

MEMORIAL OF THE GOVERNMENT OF NICARAGUA

VOLUME I

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MEMORIAL OF THE GOVERNMENT OF NICARAGUA

INTRODUCTION

1. The Order of the Court of 26 February 2002 fixed 28 April 2003 as the time limit for the filing of the Nicaraguan Memorial in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. This Memorial is filed pursuant to that Order.

2. This case was brought before the Court on 6 December 2001 by means of an Application filed by the Republic of Nicaragua against the Republic of Colombia concerning a dispute over title to territory and maritime delimitation in the Caribbean Sea. In its Application the Government of the Republic of Nicaragua has asked the Court to adjudge and declare:

> "First, that the Republic of Nicaragua has sovereignty over the islands of Providencia, San Andres and Santa Catalina and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla and Quitasueño keys (in so far as they are capable of appropriation);
>
> Second, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary."

3. Jurisdiction is based on Article 36, paragraphs 1 and 2 of the Statute of the Court. Firstly, in accordance with the provisions of Article 36, paragraph 1, of the Statute, jurisdiction exists by virtue of Article

XXXI of the American Treaty on Pacific Settlement adopted at Bogotá, Colombia on 30 April 1948 and commonly known as the Pact of Bogotá. The Republic of Nicaragua and the Republic of Colombia are parties to this Pact, which was ratified by the former on 21 June 1950 without any pertinent reservation, whilst the latter ratified it on 14 October 1968 without any reservations. Secondly, in accordance with the provisions of Articles 36, paragraph 2, of the Statute jurisdiction also exists by virtue of the operation of the Declaration of the Applicant State dated 24 September 1929 and the Declaration of Colombia dated 30 October 1937.

4. The dispute now before the Court is longstanding. It dates back to the first years after the Independence from Spain of the respective territories of which Nicaragua and Colombia formed part. The Independence of the territories forming part of the Captaincy-General of Guatemala, of which present day Nicaragua was a province, dates from 15 September 1821. The Independence of the Vice-Royalty of Granada, of which present day Colombia was a part, is officially dated by Colombia from 20 July 1810 although there was a brief Spanish reconquest of the United Provinces of New Granada between 1814 and 1816.

5. Under the authority of a Royal Order of 20 November 1803 Colombia claimed sovereignty over the Mosquito Coast of Central America by means of a Decree of 5 July 1824. This provoked a reaction of the United Provinces of Central America, of which Nicaragua was a part, and negotiations were started with Colombia. An agreement was reached with Colombia and signed in Bogotá on 15 March 1825. This Treaty established that their respective

territories would be subject to the principle which later became known as the *uti possidetis iuris*. At the moment of the Independence of Colombia – be it 1810 or 1816 – or at the moment of the Independence of Nicaragua in 1821, Colombia had no part of the present day Nicaraguan territory under her possession (her *possidetis*) de *iure* or *de facto*. This includes the Mosquito Coast and its appurtenant islands, which she later claimed and some of which form part of the present dispute before the Court.

6. Colombia claims that she took possession of the islands of San Andres, Santa Catalina and Providencia in 1822 and has had them in her possession continuously since that period. The position of Nicaragua is that these islands and other maritime features presently in dispute appertained to her during the Colonial period, and hence at the moment of independence. Thus, by application of the principle of *uti possidetis iuris* these islands are legally part of the Nicaraguan territory.

7. The United Provinces of Central America as indicated above, contested the occupation by Colombia of San Andres immediately. This ambiguous possession of San Andres, to which we must add that of Santa Catalina and Providencia, but not that of the other islets, reefs and banks in dispute that were not under her possession, continued unchanged during the 19th century.

8. The claims of Colombia included not only what is present day Nicaraguan territory but up to 1900 also the Mosquito Coast of Costa Rica that was located between Nicaragua and the Colombian territory comprising present day Panama. This dispute was submitted to arbitration and President Loubet of France rendered an

Award on 11 September 1900 recognizing the sovereignty of Costa Rica over her Caribbean Coast. The effects of this Award provoked Colombia to look for other ways of obtaining recognition of her claims.

9. Shortly after this Award Panama was taken from Colombia by President Theodore Roosevelt of the United States and declared independent in 1903. Ten years later the United States negotiated the Chamorro-Bryan Treaty with Nicaragua in 1914[1] whereby Nicaragua, among other things, gave an option to the United States for building a canal anywhere in her territory and the lease of the Corn Islands (called Islas del Maiz by Nicaragua and Islas Mangles by Colombia) located off the Nicaraguan Caribbean Coast. This Treaty strained further the relations between Colombia and the United States since it explicitly recognized Nicaraguan sovereignty over the Mosquito Coast and over the Corn Islands.

10. The Treaty with Nicaragua came at a moment when Colombia was negotiating with the United States a Treaty of compensation for the loss of Panama. The Senate of the United States ratified this Treaty with modifications and the exchange of ratifications finally took place in Bogotá on 1 March 1922.

11. In the context of these negotiations, or at least contemporaneously with them, Colombia sought a settlement of the dispute with Nicaragua. Colombia proposed an agreement whereby Colombia would recognize the sovereignty of Nicaragua over her Atlantic or Caribbean Coast and over the Maíz (Corn) or Mangles Islands while

[1] See Chap. I, Sec. I, paras. 2.36-2.40 below.

Nicaragua would recognize Colombian sovereignty over the Archipelago of San Andrés.[2]

12. Nicaragua at first firmly refused any negotiation that would involve loss of sovereignty of the Archipelago of San Andrés. The position of Nicaragua towards the settlement proposed by Colombia changed radically after United States Marines occupied Nicaragua in 1927 and the President of Nicaragua became, in the words of former United States Secretary of War Henry Stimson, a simple "figurehead".[3] The occupation and control of Nicaragua and her Government by the United States lasted from 1927 to 1932. During this period the United States directly or indirectly exercised virtual control of all Government functions in Nicaragua including army and internal security forces, finances, customs collection, the only railroad, the National Bank and the elections.

13. The United States had a special interest that Nicaragua should accept the Colombian proposal because it would avoid any interference from Colombia in her plans of cutting a canal across Nicaragua that would naturally involve the Caribbean Coast of Nicaragua and the use of the Corn (Maíz) Islands. These rights had been acquired by the United States from Nicaragua in the Chamorro-Bryan Treaty, referred to in paragraph 9 above, and they gave the United States, in the words of the Secretary of State of the United States "more than an academic interest in the adjustment" between Nicaragua and Colombia. (See para. 2.97 below).

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[2] See Chap. II, Sec. I, paras. 2.85-2.86 below.
[3] See Chap. II, Sec. I, para. 2.44.

14. Under these circumstances Nicaragua was forced to accept the arrangement sought by Colombia in spite of the fact that it openly violated the mandates of the Nicaraguan Constitution that prohibited any disposal of Nicaraguan territory.[4] To this effect the Treaty known as the Bárcenas-Esguerra Treaty was signed on 24 March 1928 and reluctantly approved by Nicaragua by Decree of 6 March 1930. For her part, Colombia eagerly approved the Treaty by Law 93 of 17 November 1928.

15. The text of the Treaty, as signed in 1928, in its pertinent parts states,

> "The Republic of Colombia and The Republic of Nicaragua desirous of putting an end to the territorial dispute between them and to strengthen the traditional ties of friend ship which unite them, have decided to conclude the present Treaty...
> Article I. The Republic of Colombia recognizes the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between Cape Gracias a Dios and the San Juan river, and over Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andres, Providencia, and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago. The present Treaty does not apply to the reefs of Roncador, Quitasueño and
> Serrana, sovereignty over which is in dispute between Colombia and the United States of America.
> Article II. The present Treaty shall, in order to be valid, be submitted to the Congresses of both States and, once approved by them, exchange of ratifications shall take place at Managua or Bogotá as soon as possible."[5]

[4] See Chap. II, Sec. II, paras. 2.103-2.121 below.
[5] See NM Vol. II Annex 19.

16. When the 1928 Treaty went before the Nicaraguan Senate for ratification it was suggested that a limit be put to the Archipelago of San Andrés because if this was not done Colombia could claim any islands or reefs off the Coast of Nicaragua as being part of the Archipelago. For this reason the Nicaraguan Congress approved it with a Declaration that it was being ratified:

> "in the understanding that the archipelago of San Andrés that is mentioned in the first clause of the Treaty does not extend to the West of meridian 82 of Greenwich in the chart published in October 1885 by the Hydrographic Office of Washington under the authority of the Secretary of the Navy of the United States of North America."[6]

17. The Colombian Embassy in Managua was consulted as to whether the Declaration made by the Nicaraguan Congress would be accepted by the Government of Colombia and whether it would need to be submitted again to the Colombian Congress for approval. The Colombian Ambassador in Managua, Dr. Manuel Esguerra, who had cosigned the Treaty with the Nicaraguan Under Secretary of State, Dr. José Bárcenas, later reported that he had "consulted this point with the Ministry, which answered that it accepted it, and that since it did not alter the text or the spirit of the Treaty, it did not need to be submitted to the consideration of the Legislative Branch."[7] With this Ministerial approval, the Declaration of the Nicaraguan Congress became part of the minutes (Acta) of the exchange of ratifications that took place on 5 May 1930.[8]

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[6] See NM Vol. II Annex 19 and Chap. II, Sec. III, Part B.

[7] Informe del Ministro de Relaciones Exteriores al Congreso de 1930, Bogotá, Imprenta Nacional, 1930, p. 223.

[8] See Chap. II, Sec. I, Part B.

18. For the next 40 years the situation remained as on the day of the exchange of ratifications. On 6 June 1969 the situation changed and Colombia notified Nicaragua that the Declaration appended by the Nicaraguan Congress to the 1928 Treaty was a maritime boundary and that, therefore, Nicaragua had no maritime areas, including continental shelf, east of the 82° meridian of longitude West of Greenwich. This belated interpretation made by Colombia deprives Nicaragua of more than 50 % of her maritime areas in the Caribbean and amounts to a veritable despoilment of her territory since Colombia's vastly superior military forces immediately backed the Colombian interpretation.

19. A few years later, on 8 September 1972, the United States expressly renounced any claim to sovereignty over the cays of Roncador and Serrana and the Bank of Quitasueño. Nicaragua immediately reasserted her claim that these cays were specifically excluded from the 1928 Treaty and that they appertained to Nicaragua by virtue of the doctrine of *uti possidetis iuris* linked to the fact of the much greater adjacency of these features to the Nicaraguan mainland than to the Colombian.

20. The arbitrary Colombian interpretation of the 1928 Treaty that would deprive Nicaragua of the greater part of her maritime resources in the Caribbean and that for more than 30 years has been enforced by the Colombian naval forces and the Colombian refusal to recognize Nicaraguan sovereignty over the Roncador and Serrana cays and the Quitasueño Bank, induced Nicaragua to analyze more closely the dispute with Colombia. The conclusion reached by Nicaragua was that it was evident that the Declaration appended to the approval of the Treaty did not establish a line of delimitation and

that the provisions of the Treaty did not imply a renunciation by Nicaragua of Roncador, Serrana and Quitasueño. Nicaragua took the view that the belated and self-serving interpretation of Colombia constituted a violation of the Treaty whose main purpose, as expressed in its Preamble, was that of "putting an end to the territorial dispute between them." Nicaragua decided, furthermore, to set the historical record strait and thus recalled that the Treaty itself was invalid from its inception because it openly violated the Constitution of the period and the Unites States, that had special interests involved in the matter, had imposed the Treaty against the will of the Nicaraguan Government.

21. Having reached these conclusions Nicaragua made a public statement on 4 February 1980 declaring the nullity and invalidity of the 1928 Treaty and at the same time inviting Colombia to a constructive dialogue on the situation.[9] This Declaration was not accompanied by any material attempt to recover possession of the Archipelago on the part of Nicaragua. Colombia, for her part, has consistently rejected any dialogue on this matter and has simply maintained and reinforced naval patrols and the capture of any ships bearing the Nicaraguan flag that fishes or attempts to exploit or explore any resources east of the 82° meridian.

22. Before describing the content of the Memorial it is important to point out that in the 20th Century Nicaragua suffered two major earthquakes in the Capital City of Managua that largely destroyed her public records. The first of these occurred on 31 March 1931 the year after the ratification of the 1928 Treaty. Most of the

[9] See NM Vol. II Annex 73.

documentation surrounding the conclusion of this Treaty has therefore been lost to Nicaragua. The Survey of Relations of the Unites States and Nicaragua, 1909-1932, has a record of this event because the marines were still in Nicaragua and the United States Army engineers that were conducting a survey for a new canal[10] through Nicaragua helped control the ensuing widespread fire that broke out. The Survey recalls:

> "Every large Government building except the National Bank, and virtually all the archives of the Nicaraguan Government were burned."[11]

The situation was repeated on 22 December 1972 when another earthquake and fire destroyed most buildings in the center of Managua. For this reason, the public records of Nicaragua are scant and many of the facts cited in the Memorial are taken from official publications of other Governments and of scholars that are readily available to the public.

23. The Nicaraguan Memorial deals with this case in the following manner. Part I of the Nicaraguan Memorial addresses the issue of sovereignty. In Chapter I Nicaragua begins her case by putting before the Court the legal basis that confirms that at the moment of her independence she had full sovereignty over her Atlantic Coast and the appurtenant islands off the coast including the Archipelago of San Andrés. After presenting the historical background and the context in which the Bárcenas-Esguerra Treaty was concluded in 1928, Chapter II explains the reasons for the nullity and invalidity of

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[10] See below, Chap. II, Sec. I, paras. 2.74-2.76.

[11] *Survey of Relations from 1909 to 1932, United States Government Printing Office, Washington*, 1932 p. 112.

the Treaty and the consequences of its violation by Colombia. Additionally, Chapter II in a subsidiary fashion, in case the Court would consider the 1928 Treaty still valid, shows that the Declaration of the Nicaraguan Congress did not transform the Treaty into one of delimitation and furthermore that the provisions of the Treaty did not involve any renunciation of Nicaraguan sovereignty over the cays of Roncador and Serrana and the Bank of Quitasueño. The Chapter concludes with the reasons why, even if the Treaty had been validly concluded, its violation by Colombia justified its termination.

24. Part II of the Memorial consists of Chapter III and addresses the issue of delimitation. It makes clear that the delimitation involves the mainland coasts of Nicaragua and Colombia and, hence, the issue of the sovereignty over the islands, reefs, cays and banks is not central to the delimitation. After a short introduction, it addresses in Section II the delimitation requested and the applicable law. Section III describes the general geographical framework for the maritime delimitation between Nicaragua and Colombia and section IV defines the delimitation area. Sections V and VI describe the relevant legislation and claims of respectively Nicaragua and Colombia. The delimitation between the mainland coasts of Nicaragua and Colombia is addressed in sections VII and VIII. The following sections discuss the weight to be accorded to the various islands and cays in the delimitation area. This concerns the islands and cays in dispute between Nicaragua and Colombia, which dispute forms part of the present proceedings. Sections IX and X discuss the weight to be accorded the islands of San Andres and Providencia,

whereas section XI discusses the consequences of the presence of a number of small cays in the delimitation area.

PART I

THE ISSUE OF SOVEREIGNTY

CHAPTER I

THE MOSQUITO COAST AND ADJACENT ISLANDS

THE *UTI POSSIDETIS IURIS* AS A NORMATIVE PRINCIPLE

I. Introduction

1.1 The objective of this chapter is to show that the Mosquito Coast (Caribbean Coast) of Nicaragua and the adjacent islands appertain to Nicaragua in accordance to the principle of *uti possidetis iuris*.

1.2 The position of Nicaragua is that the Bárcenas-Esguerra Treaty, of 24 March 1928 is null and void.[12] Hence, the application of the *uti possidetis iuris* principle is decisive, not only because of the general legal significance of this principle, and its inclusion in the constitutional laws of the Parties, but also because the Molina-Gual Treaty of 15 March 1825 stated that this principle should govern matters of boundaries between Colombia and the United Provinces of Central America, one of the successors of which is Nicaragua.

1.3 The Mosquito Coast and adjacent islands were part of the Audiencia of Guatemala (which included the province of Nicaragua) at the time of independence from Spain in 1821.

1.4 Colombia in 1824, relying upon a Royal Order of 20 November 1803, claimed title over the Mosquito Coast. Taking into account that this is the only document that Colombia can invoke as a title over the

[12] See *supra* Introduction, para. 21 and *infra* Chap. II Sec. II.

Archipelago of San Andrés, Nicaragua shall devote a good part of this Chapter to refuting that claim.

1.5 The Royal Order of 1803 – an unclear, precarious, and on top of that, ephemeral title – implied a change in the traditional way of organizing the territorial domains of the Crown, and was seen as such by all interested parties at the time.

1.6 The Royal Order of 20 November 1803: 1) did not transfer territorial jurisdiction over the Mosquito Coast and adjacent islands from the Audiencia of Guatemala to the Viceroyalty of Santa Fe (Colombia); 2) it was never implemented, and, 3) it was in any case repealed by the Royal Order of 13 November 1806.

1.7 Therefore, Colombia's possession over San Andrés and Providencia, largely in name only and in any case dating from after the time of independence from the Spanish Crown, cannot prevail over a title founded on *the uti possidetis iuris* at the moment of independence.

II. Preliminary Observations

A. The Mosquito Coast and its Islands

1.8 The so-called Mosquito Coast is the coastal area or strip of the provinces of Comayagua (Honduras), Nicaragua and Costa Rica, which was always considered as a unit, including the coastal islands, within the Audiencia or Kingdom of Guatemala[13]. There are constant

[13] See, for example: "Diary of particular occurrences that took place on the two occasions that the Frigate Captain and Commander of the Corvair San Pío Don Gonzalo Vallejo was commissioned on the Mosquito Coast from the Tinto River to the settlements of Barlovento [...]" (20 February/15 July 1787), remitted to the Secretary of State of the Navy. Published by Manuel Serrano y

references to the *Mosquito Coast and adjacent islands* in the official documentation of the era.[14]

1.9 The islands of San Andrés, Providencia (and Santa Catalina), as well as the Corn Islands, the Misquito Cays, Roncador, Serrana, Serranilla, Bajo Nuevo and any other cays, and islets located adjacent to the coast were all dependencies of the Audiencia of Guatemala.

1.10 This was due to the organizational logic and other procedures followed by the Catholic Monarchy. As discovered territories, given the traditional jurisdictional distribution of space, it was impossible that they did not form part of the district of an Audiencia and, given the boundaries of the Kingdom, this had to be that of Guatemala. The islands followed the legal fate of their contiguous coast.

1.11 This is confirmed by the *"survey of the Islands and Mosquito Coast"* carried out by Ship Lieutenant José del Río on a mission ordered by the Captain-General of Guatemala between 21 March and 25 August

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Sanz in *Historical and geographical relations of Central America* (Collection of Books and Documents referring to the history of America. Vol. VIII), Madrid, Victoriano Suárez General Library, 1908, pp. 219-256; and by the *Boletín del Archivo General del Gobierno* (Guatemala), VI-2 (1941), pp. 134-150. Certain documentation gathered in the Captaincy-General of Guatemala around 1800 was extremely explicit, and includes a very interesting document that says it was *"done in January 1793"*: "Several news reports from the San Juan River, islands adjacent to the Mosquito Coast, provinces and districts that belong to the Kingdom of Goatemala. Description of the Port of Blufiers, idem of the Province of Nicaragua (Years 1791 to 1804)." *Apud Relaciones históricas y geográficas de América Central*, cit., pp. 287-328; and *Boletín del Archivo General del Gobierno* (Guatemala), VII-3 (April 1942), pp. 157-175, citing, especially, 169-171.

[14] Thus, for example, the Council of State in Aranjuez, 7 May 1792, considered the *"results of the general file on the settlements of the Mosquito Coast regarding the evacuation by the English of the adjacent islands called San Andrés, Providencia, and other contiguous ones."* (General Archive of Simancas, *Guerra Moderna*, Dossier 6950, File 4, p. 56). See NM Vol. II Annex 1.

of 1793. This survey included the islands of San Andrés, Providencia and Santa Catalina, Mangles and the entire Mosquito Coast up to Trujillo in present day Honduras.[15] It clearly underlines the fact that these territories were dependencies of the Captaincy-General of Guatemala. Similarly, the map entitled "Spanish North America, Southern Part", drawn and engraved for Thomson's new general atlas of 1816, depicts all the islands and features presently in dispute, as part of Central America (see NM Vol. I Map I).

1.12 It is worthwhile to note that Ricardo S. Pereira, the Consul General of Colombia in Spain, expressly acknowledged in 1883 that San Andrés and Providencia were "islands that were an integral part of the territory of the Mosquito," which implies that their fate was tied to that of the Mosquito Coast. It was a territory under a single jurisdiction.[16]

B. The Origin of the Dispute over the Mosquito Coast

1.13 According to the Constitution of the Republic of Colombia of 12 July 1821:

> "5. The territory of the Republic of Colombia shall be the territory included within the boundaries of the General

[15] "Dissertation on the trip made by order of the King by Ship Lieutenant of the Royal Navy José del Río to the Islands of San Andrés, Santa Catalina, Providencia, and Mangles, on the Mosquito Coast"; preceded by the letter with which it was sent to the Captain-General of Guatemala (Trujillo, 25 August 1793), and (5 March 1794) to the Secretary of War, including interesting considerations (General Archive of Simancas, *Guerra Moderna*, Dossier 6950, File 4, p 53, 53 bis, 54). See NM Vol. II Annex 3.

[16] R. S. Pereira, *Documentos sobre los Límites de los Estados Unidos de Colombia copiados de los originales que se encuentran en el Archivo de Indias de Sevilla.* 1883, p. 156. See NM Vol. II Annex 69.

Captaincy of Venezuela and the Viceroyalty and General Captaincy of the New Kingdom of Granada; but the designation of its specific limits shall be reserved for a more opportune moment."

1.14 On 5 July 1824 Colombia enacted a Decree that in Article 1 declared as illegal any attempt aimed at colonizing the Mosquito Coast between Cape Gracias a Dios (in present day Nicaragua) and including the Chagres River (in present day Panamá), "which belongs to the domain and property of the Republic of Colombia..."[17]

1.15 The United Provinces of Central America,[18] a Federation whose Members were the States of Costa Rica, Nicaragua, Honduras, El Salvador and Guatemala, considered the Colombia claims to the Mosquito Coast to be baseless.

1.16 The Constitution of the Central American Federation of 22 November 1824 provided as follows in Article 5: "The territory of the Republic is that which formerly comprised the Ancient Kingdom of Guatemala, with the exception, for the present of the Province of Chiapas." Accordingly, the United Provinces claimed the Mosquito Coast as a part of the Kingdom of Guatemala based on the Spanish Laws.[19]

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[17] The Decree was reproduced in Annex nº 2 of the Nicaraguan Note of 10 September 1919 (Deposited with the Registry, Doc. N. 4). The Decree does not mention the Archipelago of San Andrés, which confirms the unitary concept – that included the islands – held of the Mosquito Coast.

[18] The provinces of Central America declared their independence from the Spanish Crown on 15 September 1821. Months later they were annexed to Mexico (5 January 1822). But on 29 June 1823, the National Congress of Central America, acting as Constituent Assembly, declared the independence of the United Provinces of Central America.

[19] See B.F.S.P. Vol. XIII p. 725. See *infra* para.1.38.

C. APPLICATION OF THE *UTI POSSIDETIS IURIS* TO THE SETTLEMENT OF THE DISPUTE: THE MOLINA-GUAL TREATY OF 15 MARCH 1825[20]

1.17 To settle the territorial matter and decide the framework of relations with Colombia, the United Provinces of Central America sent Mr. Pedro Molina to Bogotá, soon after the 1824 Decree was enacted.

1.18 The records of the meetings held by Pedro Molina with the Minister of Foreign Affairs of Colombia, Pedro Gual, are fully reflected in a Colombian Note of 24 June 1918.[21] According to these documents, in this meeting (4 March 1825) Gual claimed Colombian sovereignty over the Mosquito Coast based on the Royal Order of 20 November 1803 and the Decree of 5 July 1824.

1.19 The Colombian Foreign Minister added that his Government:

> "had resolved not to abandon its rights, unless mutual concessions are made and through a special boundary treaty, and that if Mr. Molina had instructions from his government to enter into that negotiation he would have no problem venturing that it is quite possible that Colombia would be satisfied with establishing its dividing line in that area from the mouth of the San Juan River up to the entrance of Lake Nicaragua... In this way... Guatemala would keep... all the part of the Mosquito Coast up from the north bank of the San Juan river."[22]

1.20 This offer evinces the real intention of Colombia in claiming the Mosquito Coast. Its real object was to gain control of the San Juan River and access to the Great Lake of Nicaragua, which was perceived as the best possible interoceanic route through the

[20] B.F.S.P. Vol. XIII pp. 802-811.
[21] Deposited with the Registry, Doc. N. 1.
[22] *Memoria presentada al Congreso Nacional 1918*, Vol. I, p. 382. NM Vol. II. Annex 25.

Isthmus.[23] By offering to renounce their claim to practically all the Caribbean Coast of Nicaragua in exchange for the San Juan River, the Colombian game becomes perfectly clear (see below para. 1.103 and Chapter II, Section I, paras. 2.6-2.9).

1.21 Given that Mr. Molina replied that he "did not have instructions to carry out that demarcation," the Colombian Foreign Minister responded that in that case the attribution of territory would have to be with reference to "the uti possidetis of 1810 or 1820, whichever," and he agreed to draft some articles for consideration.[24]

1.22 On 10 March 1825, Mr. Gual delivered to the Central American representative a draft treaty and the next day a certified copy of the documents mentioned during their meeting on 4 March. Mr. Molina simply acknowledged receipt of the same on 12 March. Finally, on 13 March, the text of the *Molina-Gual Treaty* was approved.

1.23 The Treaty of " Perpetual, Union, League and Confederation" signed in Bogotá on 15 March 1825 by don Pedro Gual, on behalf of Colombia, and don Pedro Molina, on behalf of the United Provinces of Central America, provided in Article VII:

> "The Republic of Colombia and the United Provinces of Central America, oblige and bind themselves to respect their Boundaries as they exist at present, reserving to themselves to settle in a friendly manner, and by means of a special convention, the demarcation or divisional line between the two States, so soon as circumstances will permit, or so soon as one Party shall manifest to the other its disposition to enter into such negotiation."

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[23] The San Juan River is part of present day Nicaraguan territory. Its southern margin is the borderline with Costa Rica.
[24] *Memoria 1918*, op cit, p. 382.

1.24 And, according to Article V:

> "Both Contracting Parties mutually guarantee the integrity of their respective territories, against the attempts and invasions of the subjects or adherents of the King of Spain, on the same footing as they existed previously to the present war of independence."

The adverb "*naturally*" was interlined by the Federal Government of Central America before the word "existed" when it ratified the treaty in order to clarify the reference to the condition of the territories before the war of independence in Article V.

1.25 Article VIII provides that

> "...each of the Contracting Parties shall be at liberty to name commissioners, who may visit all the ports and places of the frontiers, and draw such plans of them as may appear convenient and necessary for establishing the line of demarcation, without any interruption on the part of the Local Authorities, but on the contrary with all the protection and assistance that such Authorities can possibly afford to them, towards the due execution of the business in which they are engaged, after the production of the Passport of the respective Government authorizing them to act."

1.26 Finally, according to Article IX:

> "The two Contracting Parties, desirous in the meantime, of providing a remedy against the evils which may be caused to either, by the Colonization of unauthorized Adventurers, on any part of the Mosquito Shore, from Cape Gracias à Dios to the River Chagres, inclusive, agree to employ their Forces by sea and land against any individual or individuals who may attempt to form Establishments on the said Shore, without having first obtained the permission of the Government, to which it belongs in dominion and property."

1.27 The Colombian Government ratified the treaty on 12 April 1825 and the Federal Government of Central America on 12 September of that same year with the clarification indicated in paragraph 1.24 above. The instruments of ratification were exchanged in the city of Guatemala on 17 June 1826.

1.28 On 4 September 1826 the Minister of Colombia to Central America requested the Secretary of State of the United Provinces, in order to negotiate the special convention of demarcation provided by the Molina-Gual Treaty, to instruct him on "what has been considered to date the natural limits between the two Republics." The Secretary of State answered on 8 January 1827 that "the natural limits that divide the territory of the Republic of Central America with that of Colombia (are) the Escudo de Veraguas in the sea of the North, the mouth of the Boruca river in the province of Costa-Rica on the South and the district of Chiriquí in that of Veraguas by land..."[25]

1.29 Once the Central American Federation broke up[26], the Constitution of Nicaragua of 12 November 1838 provided, in Article 2, that:

> "the territory of the State is the same as that previously included in the province of Nicaragua: her boundaries are on the East and North East, the sea of the Antilles; on the

[25] The Secretary of State transmitted the agreement of the President of the Republic of Central America, on that same date. The Agreement was adopted "taking into account the geographic chart and the laws contained in Book 2nd, Title 15, of the Compilation of the Indies and, finally, the *Compendium of the History of the City of Guatemala written by brother Domingo Juarros*, a work written with a view of all the data existing on the subject." See Nicaraguan Note of 20 March 1917, which is reproduced in Annex nº 31. *Memoria presentada al Congreso Nacional 1917*, Vol. II, Tipografía Alemana de C. Heuberger, Managua, p. 400. See NM Vol. II Annex 24. (Deposited with the Registry, Doc. N. 2)

[26] Decree of the Constituent Assembly of the State (of Nicaragua) on 30 April 1838.

North and North West the State of Honduras; on the West and the South the Pacific Sea; and on the South East the State of Costa Rica."[27]

1.30 The Molina-Gual Treaty provides the basis for the application of *uti possidetis iuris* to the solution of territorial disputes pending between Colombia and the Central American Republics that succeeded the United Provinces of Central America. The arguments of the parties are based on the *uti possidetis iuris.*

1.31 For example, in 1837 don Lino del Pombo, Secretary of State for Foreign Relations of Colombia, argued before the Government of Central America (Note of 2 March) the rights of Nueva Granada based on the 1803 Royal Order and the Molina-Gual Treaty. Although Don Lino reiterated that "Nueva Granada would not have, however, any problem in ceding to Central America her rights over the Mosquito Coast in exchange for a less extensive territory but easier to govern", believing that "reasons and politics" advised a renewal of negotiations.[28]

1.32 Even in the note of 6 August 1925 the Colombian Foreign Minister refers to the Molina-Gual Treaty as "the regulating norm of legal relations between Colombia and United Provinces of Central America", to the rights of which last Nicaragua is a successor. "It is undoubtedly that what was established there on issues of territorial boundaries is the norm to settle any dispute that may arise from its demarcation or definition."[29]

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[27] See NM Vol. II Annex 60a.

[28] This Note was amply transcribed by the Colombian Foreign Ministry in its Note of 24 June 1918 (Deposited with the Registry, Doc. N. 3).

[29] See See NM Vol. II Annex 27.

III. Consideration of the Titles

1.33 The *uti possidetis juris* principle is conclusive for deciding the sovereignty dispute between Nicaragua and Colombia. Not only does this principle have a general normative value, which is especially acknowledged in the Latin American region, but, as we have just seen, it was also explicitly included in the first constitutional laws of the Parties and agreed by them in the Molina-Gual Treaty (1825) as decisive for regulating matters of boundaries.

A. The Titles of the Parties before the Royal Order of 20 November 1803[30]

1.34 It is generally accepted that, before the Royal Order of 20 November 1803, the jurisdiction of the archipelago of San Andrés and over all the islands adjacent to the Mosquito Coast belonged to the Audiencia of Guatemala, of which the province of Nicaragua was part.

1.35 In fact, Article 1 of the Colombian Decree of 5 July 1824, attributed to the Royal Order of 1803 the effect of segregating the Mosquito Coast from Cape Gracias a Dios down to and inclusive of the Chagres River, "*from that jurisdiction of the Captaincy-General* [Guatemala] *to which it formerly belonged.*" (emphasis added).[31]

1.36 For Colombia, according to her Memorandum of 5 November 1915, the jurisdiction of the Audiencia of Guatemala was recent, brief and circumstantial: "only briefly, from 20 May 1792 to 30 November

[30] In Colombia the date of the Royal Order is often referred to as 30 November 1803, because that was the date on which the Order's notification to the Viceroy of Santa Fe was signed.

[31] This Decree is reproduced in Nicaraguan Note of 10 September 1919, annex 2. (Deposited with the Registry, Doc. N. 4).

1803, with a Royal Decree on that date, the Spanish Sovereign granted to the Captain-General of Guatemala authorization to send a Governor to the islanders."[32]

1.37 In fact, the jurisdiction of the Audiencia of Guatemala was longstanding, permanent and continuous. The Consul-General of Colombia in Spain, Ricardo S. Pereira, acknowledged in 1883, that:

> "The Viceroys of Santa Fe exercised in it (the Mosquitos territory) repeated acts of jurisdiction and domain, by virtue of the extraordinary powers that had been conferred to deal with the defense of that coast without, because of that, it being considered an integral part of the Viceroyalty" and "It was not until 1803, in which this incorporation took place by Special Royal Order when that coast was considered as a territory belonging to the Viceroyalty..."[33]

1.38 The boundaries of the Audiencia of Guatemala were established by the Royal Decree of 28 June 1568, confirmed in 1680 by Law VI, Title XV, of Book II of the Compilation of the Indies (*Recopilación de leyes de los Reynos de las Indias*), which annulled and substituted the provisions previously issued. The Audiencia of Guatemala covered, according the Law VI, Title XV, Book II, the "said province of Guatemala and those of Nicaragua, Chiapas, Higueras, Cabo de Honduras, Verapaz and Soconusco, *with the islands off the*

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[32] See NM Vol. II, Annex 23. The same position was reiterated in Colombian Note of 24 June 1918 (Deposited with the Registry, Doc. N. 3) and consolidated as official doctrine. This position was refuted by Nicaragua by the *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands of 24 March 1924*. Deposited with the Registry, Doc. N. 5.

[33] R. Pereira, *Documentos sobre límites de los Estados Unidos de Colombia copiados de los originales que se encuentran en el archivo de indias de Sevilla y acompañados de breves consideraciones sobre el verdadero uti possidetis juris de 1810*, p. 156. See NM Vol. II Annex 68.

Coast, bounded on the east by the Audiencia of Tierra Firme..." (emphasis added).[34]

1.39 At the end of the 18th century Great Britain – which was claiming the Atlantic Coasts of Central America - was forced to leave "the Country of the Mosquito, as well as the Continent in general, and the Islands adjacent, without exception."[35] In order to implement this Agreement, the Universal Ministry of the Indies issued the Royal Order of 24 September 1786, instructing the President of Guatemala to organize the evacuation of the English residents from the Coast of the Mosquito.[36]

1.40 The Royal Order of 20 May 1792, addressed to the President of Guatemala, partially revoked the previous order, allowing English residents to remain in the Coast of the Mosquito under certain conditions.[37]

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[34] La Ley VI, Título XV, Libro II, de la Recopilación de 1680 is reproduced unchanged in the "Novísima Recopilación" promulgated in 1774 by Carlos III. This was reproduced in Annex nº 23 of the Nicaraguan Note of 10 September 1919 (Deposited with the Registry, Doc. N. 4). Also in the *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands*, of the Nicaraguan Foreign Minister J. A. Urtecho, of 24 March 1924, p. 7. Deposited with the Registry, Doc. N. 5.

[35] Article 1 of the "Convention to explain, broaden and make effective that stipulated in article 6 of the Definitive Peace Treaty of 1783," concluded between Spain and Great Britain on 14 July 1786. See NM Vol. II Annex 11.

[36] The Royal Order is reproduced in *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands*, of the Nicaraguan Foreign Minister J. A. Urtecho, of 24 March 1924, pp. 17-20. Deposited with the Registry, Doc. N. 5.

[37] The Royal Order was reproduced as Annex nº 35 of the Nicaraguan Note of 10 September 1919 (Deposited with the Registry, Doc. N. 4). General Archive of Simancas, *Guerra Moderna, Dossier* 6950, file, 17. See NM Vol. II Annex 2.

1.41 The version sent to Santa Fe (Nueva Granada) made it clear, after communicating the royal decision:

> "I advise Your Excellency for your knowledge and fulfillment and so that you may in turn communicate it to the interested parties, explaining to them their dependency on the President of Guatemala as Chief of the settlements of the Mosquito Coast, to whom on this date I advise of this situation and ask that he send the Governor and Parish priest of his choice."

1.42 The Royal Order of 20 May 1792, mentioned by the Colombian authorities[38], had been preceded as we have seen, by those of 24 September 1786 and 20 August 1789. Even before that, the Royal Orders of 25 August 1783 clarified the central responsibility of the President of the Audiencia of Guatemala in dislodging the British and the auxiliary character of the action of other authorities.[39]

1.43 The intervention of the Archbishop-Viceroy of Santa Fe (Nueva Granada), Caballero y Góngora, in executing the Royal Orders was always done in agreement with the President of the Audiencia of Guatemala, and in acknowledgment of the latter's territorial jurisdiction.[40]

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[38] See *supra* para. 1.40.

[39] The Royal Orders of 25 August 1783 and 24 September 1786 figure as Annex n° 28 to the Note of 20 March 1917 (Deposited with the Registry, Doc. N. 2) and in Annexes n° 4 and 5 to the Note of 10 September 1919. See NM Vol. II Annex 24. (Deposited with the Registry, Doc. N. 4).

[40] From the Archbishop Viceroy of Santa Fe to His Excellency Mr. Antonio Valdés y Bazán, Secretary of War, 27 February, 1 March and 16 October 1788. General Archive of Simancas, *Guerra Moderna*, Dossier 6948, File 30, pp 263 and 266, and File 32, Page 278. Similarly, the correspondence from the Viceroy of Santa Fe of 19 March 1793, *Ibid.*, Dossier 7087, File 17. The "assistance" of the Viceroy of Santa Fe was not, on the other hand, exclusive. The President of Guatemala also requested these and obtained the same from the Captain-General of La Habana (See, for example, General Archive of Simancas, *Guerra Moderna*, Dossier 6950, File 4, pp. 27-30).

1.44 Finally, the British residents on San Andrés did not evacuate the island. In response to their petition, the Royal Order of 6 November 1795, issued in consultation with the Council of State and sent to the President of Guatemala, decided "for the time being not to force the English to evacuate the island of San Andrés and gather in the establishment of Bluefields,[41] and rather to influence and encourage them to the evacuation at the opportune time and using prudent measures." Tomás O'Neille was named as Governor, under the explicit hierarchical dependency of the Captain-General of Guatemala and he acted in that capacity during the following years. [42]

B. THE ROYAL ORDER OF 20 NOVEMBER 1803: POSITIONS

1.45 According to the notification of the Royal Order of 20 November 1803 to the Viceroy of Santa Fe:

> "The King has decided that the island of San Andres and the portion of the Coast of Mosquito from Cape Gracias a Dios inclusive to the Chagres River, be segregated from the Captaincy-General of Guatemala and made dependent on the Viceroyalty of Santa Fe,...I advise your Excellency in order that, through the Department entrusted to your direction, be issued the orders conducive to the carrying out of this sovereign decision..."[43]

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[41] City located in the Caribbean Coast of Nicaragua. Again, this emphasizes the connection of San Andrés to the mainland of Nicaragua.

[42] The copy of this Royal Order is found in the General Archive of Simancas, *Guerra Moderna*, Dossier 6950, File 4, p. 69. See NM Vol. II Annex 4.

[43] *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands, 1924*, pp. 35-48. Deposited with the Registry, Doc. N. 5, the reports issued by the Junta of Fortifications and Defense (Junta de Fortificaciones y Defensa) on 2 September and 21 October 1803, as well as (pp. 48-50) the text of the Royal Order as was notified to the Captain-General of Guatemala and to the Viceroy of Santa Fe. Given that the text of the notification varied in the two cases, the *Memorandum* goes on to

1.46 According to Colombia, the Royal Order of 20 November 1803 had the effect of transferring jurisdiction over the Mosquito Coast between the Chagres river and Cape Gracias a Dios and adjacent islands, from the Audiencia of Guatemala to the Viceroyalty of Santa Fe (Nueva Granada).[44] Nicaragua denies that the Royal Order had this effect, *inter alia*, because this was not the method of transferring jurisdiction in accordance with the Laws of the Indies and the Order was never carried out and was shortly afterwards set aside by a new Order in 1806.

1.47 The Nicaraguan arguments were presented by the Nicaraguan Minister of Foreign Affairs, J. A. Urtecho, in the *Memorandum Explanatory* of 24 March 1924, in the following way:

> "1st That the Royal Order of 1803 did not, as it could not, abrogate the statute VI, Title XV, Book II of the Compilation of the Laws of the Indies, statute which instituted the jurisdictional district of the Audiencia of Guatemala;
>
> 2nd That what was abrogated by the Royal Order of 1803 was the Commission entrusted to the Captain-General of Guatemala by Royal Order of September 24th 1786, in order to occupy, settle and defend the establishments of the Mosquito Coast from the mouth of the San Juan River to Rio Tinto, this last named establishment alone remaining immediately dependent on that military chief;
>
> 3rd That the Royal Order of November 20th 1803 having been objected to, on the score of the flaw of obreption, by the subinspector of militias and by the Captain-General of Guatemala in expostulation dated on May 29th and June 3rd 1804, the Minister of War did not insist on its being

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discuss the significance of the differences (pp. 50-56). See NM Vol. II Annexes 5 and 6.

[44] See, for example, Note of 24 June 1918 (Deposited with the Registry, Doc. N. 3); or, more recently, the *White Paper of Colombia 1980* pp. 19, 25-32.

carried out and, in consequence, said order was quite given up;

4th That besides being given up the Royal Order of November 20th 1803, the Ministry of War drew up the Royal Explanatory Order of November 13th 1806, in virtue whereof were renewed and reaffirmed all the royal orders that prior to 1803 had made the establishments of the Mosquito Coast immediately dependent on the Captain-General of Guatemala, this Royal Explanatory Order absolutely annulling the Royal Order of 1803 as coming after it."[45]

C. THE ROYAL ORDER OF 20 NOVEMBER 1803 DID NOT IMPLY A TRANSFER OF TERRITORIAL JURISDICTION OF THE MOSQUITO COAST TO THE VICEROYALTY OF SANTA FE

1.48 The Royal Order of 20 November 1803 arose in the ephemeral sphere of exceptional commissions (*comisión privativa*) that the King delegated to his representatives out of practical considerations, and not in the long-lasting sphere of territorial jurisdiction.

1.49 The editions of the Compilation of the Indies following 1803 and those commenting on those laws say nothing about the Royal Order, and maintain, unchanged, the same wording in the law establishing the boundaries of the district of the Audiencia of Guatemala.

1.50 Nicaragua argues, firstly, that the document was insufficient in rank - a Royal Order (Real Orden) and not a Royal Decree (Real Cédula)- to produce the transfer of territorial jurisdiction of the Mosquito Coast. It is surely not by chance that the diplomatic correspondence from

[45] *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands*, of 24 March 1924, p. 79. See also pp. 91-93. Deposited with the Registry, Doc. N. 5.

Colombia refers to the Royal Order of 1803 as the "Royal Decree (Real Cédula)," in order to justify, by heightening its hierarchical status, the argument that this modest Royal Order actually entailed a transfer of territorial jurisdiction.

1.51 The Nicaraguan Note of 20 March 1917 indicated that it would

> "be absolutely impossible to assert that a purely administrative act, as was the case of the aforementioned Royal Order (of 1803), could repeal a legislative act emanating from the only tribunal charged with exercising the supreme jurisdiction of the business of the Indies, such as the Council of the same name, according to Law II, Title II, Book II."[46]

1.52 Nicaragua argues, secondly, that the Royal Order of 20 November 1803 was no more than an exceptional commission (*comisión privativa*) commending to the Viceroy of Santa Fe the military vigilance of the Mosquito Coast and nearby islands, without said

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[46] *Memoria del Ministerio de Relaciones Exteriores de Nicaragua de 1917*, op. cit., p. 264. The notes also says: "By virtue of Law XIV, Title II, Book II a full meeting of the Council was required to deal with *serious matters*, among which are mentioned the repeal of laws and the taking apart of Audiencias...the procedures for these matters had to be the object of an advance and complete information, according to Law XII, Title II, Book II ... Thus, assuming that the Royal Order of 1803 was a law to dismember a territory, "the Government of Nicaragua does not understand how they could have been omitted... the solemn procedure for this type of matter demanded by the laws in force, how an incompetent authority could have undermined the only and legitimate Council of the Indies, in flagrant violation of Law III, Title I, Book II of the Compilation of Laws of the Indies, which orders 'that none of the royal councils, or Court, Alcaldes or Judges of our Royal Domain or in our Capital Chanceries, audiencias nor any other judge... shall pretend to cognizance of the Affaires of the Indies, or matter pertaining to our Council of the Indies,' among which one must undeniably include the boundaries of the Audiencias and Provinces". (The Law II, Title II, Book II and the Law III, Title II, Book II, are reproduced in the *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands* of 24 March 1924, pp. 3-4). Deposited with the Registry, Doc. N. 5.

commission implying, according to custom, a change in the territorial boundaries of the Audiencia of Guatemala.

1.53 The district of the Audiencias was the standard always used to structure the Spanish domain over American territory. It is compatible with any other divisions (such as military) and entitlements (such as commissions) that were more or less circumstantial and the result of the needs of a given moment.

1.54 The defence and population of the territories of America were matters pertaining to the Ministry of War, according to Law XI, Title VI, Book III of the Novísima Compilation of the Indies. Their management did not require the territorial modification of the Audiencias, created by the boundary laws of Title XV, Book II of the Compilation. The Spanish Monarchy at times due to special circumstances transferred administration as well as military, judicial or ecclesiastical responsibilities over certain territories without segregating them from the provinces to which they belonged under ordinary Law.[47] In order to change the territorial demarcations it was absolutely necessary for the same to be ordered in an explicit and clear manner by the Sovereign.[48]

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[47] Nicaraguan Notes of 20 March 1917 (Deposited with the Registry, Doc. N. 2) and 10 September 1919 (Deposited with the Registry, Doc. N. 4). *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands* of 24 March 1924, pp. 23-24. Deposited with the Registry, Doc. N. 5.

[48] *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands* of 24 March 1924, p. 28-30. Deposited with the Registry, Doc. N. 5. Mr. Urtecho refers to the arbitration of the King of Spain in the territorial controversy between Colombia and Venezuela in which Colombia, according to Mr. Urtecho (pp. 32-35), maintained this same theory, which was confirmed by the Royal Arbiter. (Asimismo, *Memoria de Relaciones Exteriores 1924*, Vol. I, pp. XXII ff.)

1.55 That had been the case, for example, for the colony of Osorno, located in the province of La Concepción of Chile but which was conferred in an exceptional commission to the President, Ambrosio O'Higgins, who retained it even after having been appointed Viceroy of Lima.[49]

1.56 And that was the case for the Mosquito Coast and Adjacent Islands. The Nicaraguan Note of 20 March 1917 develops this point:

> "The Royal Order of 1803, essentially military in nature, conferred upon the Viceroy of Santa Fe, in his position as Captain-General, the exceptional and extraordinary powers that had been granted to the Captain-General of Guatemala, as a result of the order of the evacuation of English citizens from the Mosquito Coast, according to the Treaty of Versailles of 1783..."[50]

1.57 With the Royal Order of 1803 the Viceroy of Santa Fe, in his military capacity, was commended with the mission previously given to the Captain-General of Guatemala, to occupy, populate and defend the territory between Cape Gracias a Dios and the Chagres River. This was an "exceptional commission" from which no civil or political jurisdiction was derived, just as the Viceroyalty of Nueva España did not derive said jurisdiction from the fact that it had orders to send a

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[49] This was brought up by the Secretariat of Justice in the note attached to the ruling made at the request of the Secretariat of war in the proceeding that led to the Royal Order of 13 November 1806 (see *infra* para. 1.76). This ruling was included as Annex n° 24 –duplicate- of the Note of 20 March 1917. See also Annex n° 6 Note of 10 September 1919 (Deposited with the Registry, Doc. N. 4).

[50] The attributions corresponding to the posts of President of the Audiencia and Captain-General, although usually brought together in a single individual, were noted distinctly, as is indicated by Law XLIII, Title XV, Book II (of the Compilation of the Indies)." The Viceroys were by law the natural Presidents of the Audiencias (Law IV, Title III, Book III) and Captains General of the province of their districts (Law III, Title III, Book III).

yearly amount for the sustenance of the settlements on the Mosquito Coast.

1.58 It was logical to commission the Viceroyalty of Nueva Granada with the defence of the Mosquitia and its adjacent islands, taking into account the condition of Cartagena de Indias as a strong naval port and at the same time maintaining these clearly Central American territories under the jurisdiction of the entity, the Audiencia of Guatemala, to which all of Central America belonged.

D. THE NON-EXECUTION AND POSTPONEMENT OF THE ROYAL ORDER OF 1803

1.59 Colombia asserts that the Royal Order of 20 November 1803 was executed immediately. But, in fact, it was never executed.

1.60 There are many reasons to assert that the Royal Order of 1803 was not executed, but rather was postponed and became irrelevant in the enormous and extremely complex gears of the Spanish monarchy's institutional machinery, subjected to growing tensions in her colonies and in European affairs. The Napoleonic Wars that would soon after establish Joseph Bonaparte as the King of Spain heightened this tension.

1.61 The Captain-General of Guatemala protested the Royal Order of 1803 and this unequivocally meant that, according to the laws at the time, its execution was suspended. Those in Guatemala responsible for the

Mosquito Coast and adjacent Islands continued to act and make decisions as if the Royal Order of 1803 did not exist[51].

1.62 The Captain-General of Guatemala did not stop taking the Mosquito Coast into account in his plans for the defence of the Kingdom of Guatemala. Thus, in December of 1804, the Junta of Fortifications and Defense agreed with the Captain-General on the convenience of creating officers in the militias company of Chontales, being a:

> "point through which there is communication with the Bay of Bluefields, and that in addition the Towns indicated by the Governor of Guatemala, and possessions of those areas are subject to attacks by the Mosquito and Zambo Indians, it is therefore of importance to cover them, with an opposing force whose vigor and discipline may contain the aforementioned Indians who want to destroy the country, or fight them off if they were to carry out any sudden invasion."[52]

1.63 At the same time, the Court continued to make decisions that affected the Coast and Islands and which can only be understood if the Royal Order of 1803 had been discarded, that is, if it had been left without effect.

1.64 There are many Royal Orders that assume that the Coast of the Mosquitos is under the jurisdiction of the Captaincy-General of Guatemala, such as that of 8 August 1804, ordering the creation of a guard post in San Juan of Nicaragua;[53] those of 20 and 28 November

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[51] The contrary actions of the Viceroy of Santa Fe can be explained because he did not receive a copy of the correspondence from the Captain-General of Guatemala, and thus was unaware of it, which lead to administrative confusion.

[52] Report of the Junta of Fortifications and Defense, 6 December 1804 (Military Historical Service, *Colección General de Documentos*, 5.1.12.9 [14]).

[53] M. M. Peralta, *Costa Rica y Costa de Mosquito: documentos para la historia de la jurisdicción territorial de Costa Rica y Colombia, 1898*, pp. 426-432.

1804, given to the Viceroy of Nueva España so that he would send one hundred thousand pesos yearly to the Captain-General of Guatemala in order to maintain the establishments of the Mosquitia;[54] those of 20 November and 13 December 1805, which refer to the amounts initially designated for the general maintenance of the settlements of the Mosquito Coast;[55] or that of 31 March 1808, regarding navigation and trade on the San Juan river and the plan to establish a town of up to three hundred residents "in the proximity of said river in Nicaragua".[56] Another Royal Order of 4 July 1810 warns the Viceroy of Santa Fe that boats of the Viceroyalty should not trade with Central America ports, including San Juan of Nicaragua, without abiding by the "specific rules and orders for their fitting out."[57]

1.65 In any case, one can be sure that no effective measures had been taken by the Viceroyalty by the time the islands fell into the hands of England on 26 March 1806, at which time it simply became impossible to put the Royal Order into practice.

Mentioned in the Nicaraguan Note of 20 March 1917. See NM Vol. II Annex. (Deposited with the Registry, Doc. N. 2).

[54] *Ibid.* pp. 455-456. Indies Archive (Sevilla), Shelf 102, Case 4, Dossier 11. Mentioned in the Nicaraguan Note of 20 March 1917. (Deposited with the Registry, Doc. N. 2). For that of 20 November 1804, see *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Island,* 1924, p. 69, fn. 1. Deposited with the Registry, Doc. N. 5. See NM Vol. II Annex 8.

[55] Mentioned in the Nicaraguan Note of 20 March 1917. (Deposited with the Registry, Doc. N. 2)

[56] Mentioned in the Nicaraguan Note of 20 March 1917. (Deposited with the Registry, Doc. N. 2)

[57] General Archive of the Indies, *Audiencia de Santa Fe,* Shelf, 118, Case 7, Dossier 9. M. M. Peralta, *Costa Rica y Estados Unidos de Colombia de 1573 à1881 su jurisdicción y sus límites territoriales según los documentos inéditos del archivo de indias de Sevilla y otras autoridades recogidos y publicados con notas y aclaraciones históricas y geográficas, 1886.* pp. 324-325. See NM Vol. II Annex 10.

1.66 The history immediately following that date is extremely confusing. The "definitive treaty of peace, friendship and alliance" signed in London between the King of Spain and His British Majesty on 14 January 1809 contributes nothing on this subject.[58]

1.67 It is therefore unknown when and under what conditions and authorities, the Island of San Andrés again came under the domain of the Spanish Monarchy; but one can assert that, following the removal of O'Neille as Governor by virtue of the Royal Order of 26 May 1805, there is no trace whatsoever in the appropriate central registries of the Spanish Authorities having appointed another governor for the Island.

1.68 A year before the crisis in the Spanish Monarchy that was caused by the abdications of the Kings of Spain in Bayonne in 1808, it was clear that the Royal Order of 1803 had already become one more of the many royal decisions made in response to very specific circumstances and later forgotten after the circumstances changed and it became impossible to put them into effect. Now, as before, the Court simply debated different plans to populate the area in order to provide a more effective defence for those territories.

[58] It was ratified in Seville on 15 February 1809. B.F.S.P. Vol. I, Part I, pp. 667-673. See NM Vol. II Annex 12.

E. THE ROYAL EXPLANATORY ORDER OF 13 NOVEMBER 1806[59]

1.69 The lack of execution of the 1803 Order is exemplified in a well-documented case. This affair involved the conflict of jurisdiction that arose between the Captain-General of Guatemala and the Intendant of the Comayagua Province, regarding the appointment of certain regular mayors and the issue of land titles distributed in Trujillo. The conflict attempted to clarify who was in charge of governing the settlements located on the Mosquito Coast.[60]

1.70 A large amount of documentation was generated in the course of this conflict. This included two letters from the Captain-General to the Secretary of War, expressing what he considered were the legal bases for believing that the settlements of the Mosquito Coast fell under his jurisdiction. These letters were both dated 3 March 1804, and were numbered 416 and 417.[61]

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[59] The Royal Order of 13 November 1806 is reproduced in M. M. Peralta, *Costa Rica y Costa de Mosquito: documentos para la historia de la jurisdicción territorial de Costa Rica y Colombia, 1898.* pp. 496-498. Indies Archive (Sevilla), Shelf 101, Case 4, Dossier 4. See NM Vol. II Annex 9.

[60] General Archive of the Indies, *Guatemala*, Dossier 649: *File of what was presented by the President of the Audiencia of Guatemala regarding the authorities frequently asked of the intendant governor of Comayagua regarding knowledge of business activities in Trujillo and the other posts of the Mosquito Coast; and on the approval or selection of the two ordinary mayors and the syndic carried out by the President, and the resolution issued by the Ministry of War making known its position in favor of the President.*

[61] Letter N° 416 of the Captain-General of Guatemala on 3 March 1804 and the documents accompanying it are Annex N° 24 of the Note of 20 March 1917. (Similarly, as Annex n° 38 of the Note of 10 September 1919- Deposited with the Registry, Doc. N. 4). See NM Vol. II Annex 24. (Deposited with the Registry, Doc. N. 2).

1.71 In the first of these, the Captain-General states that "The settlements of Mosquito have always depended directly on this Captaincy-General in the different branches of the power. Nobody had questioned as clear and obvious in view of the Royal Orders issued and the system followed ever since those colonies were founded. However," the Captain-General adds, "...the Intendant of Comayagua Col. Mr. Ramon Anguiano, under the excuse that those settlements are within the territory of his province, is now attempting to exercise in them the authority of his own Ordinance, which is that of the Intendants of Nueva España, from four December 1786."

1.72 According to this Ordinance, the Captain-General goes on to explain, "(the intendant) must be the judge *ad hoc* and sole chief of the four branches of justice, police, treasury and war, entirely independent of any other chief or tribunal, and with no other remedies beyond those of appeal, in certain cases, to the Royal Junta of treasury or the district audiencia." However, the Presidents of the Audiencia in fact have heard "the cases of those four branches in the new colonies. The King has commissioned them to settle those cases and make arrangements for the same. They are responsible for everything that happens there and report directly on all these matters to the Ministry of Your Excellency, where they were established by virtue of the Royal Order of 20 May 1790. Consequently, this system is incompatible with the powers of said Ordinance of Intendants," never applied there previously, "always under the concept that the settlements of the coast and their events were part of a single unity commissioned entirely to the Captaincy-General.[...]."

1.73 To justify his position, the Captain-General sent along with his letter a very complete "Note of the reasons that this Presidency and Captaincy-General has to consider under its immediate dependency the settlements of the Mosquito Coast." This letter listed all the royal provisions issued in his favour since 1782 regarding the Mosquito Coast and adjacent islands, to which we have already made reference.[62]

1.74 The Captain-General requested in his letter N°. 416 that the Secretary of War "inform H.M. so that he may send down the appropriate declaration that I shall continue taking care of the matters of the Mosquito Coast, as has been done by my predecessors. [...]"

1.75 In response to the request made by the Captain-General of Guatemala, the Royal Order of 13 November 1806 resolved that he was the one:

> "...that is to take exclusive and *absolute* cognizance of all affairs arising in the settlement at Trujillo *and other military posts on the Mosquito Coast*, concerning the four branches referred to, *in compliance with the royal orders issued since the year 1782, authorizing him to occupy, defend and settle that Coast, until, this purpose carried out in full or partially, His Majesty thinks it fit to alter the actual system* [...]"(emphasis added).[63]

1.76 The Royal Order went much further than resolving the jurisdictional conflict that arose in the settlement of Trujillo, and thus was

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[62] See *supra* para. 1.64.

[63] See Nicaraguan Note of 20 March 1917, that goes in length into the consideration of this Royal Order (transcribed in Annex n° 26 of the Note) (Deposited with the Registry, Doc. N. 2). Similar terms were used in the Note of 10 September 1919, reproduced in Annex N° 6, in the ruling of the Secretary of Justice on 12 October 1806. See NM Vol. II Annex 24. (Deposited with the Registry, Doc. N. 4).

communicated to the different interested authorities.[64] Above all, as a sovereign declaration, it was aimed at dispelling the doubts and difficulties arising from the complex and tensional history of the new colonies, particularly for those involved in government.

1.77 The decision contained in the Royal Order of 1803 thus cannot be reconciled with the facts or resolutions confirmed by the Royal Order of 13 November 1806. It may be concluded that this Royal decision of 1806 can only be understood as having left without force or effect the Order of 1803.

1.78 "Of this important document, enacted with such solemnity," reads the Nicaraguan Note of 20 March 1917 in reference to the Royal Order of 13 November 1806,

> "one can also infer the following facts: a) In fact the state of affairs created by the Royal Order... of 20 November 1803, if any, were abolished and annulled by the Royal Order of 13 November 1806, as the latter reestablishes, in that year 1806, the authority of the Captain of Guatemala, excluding any other, over military posts of the Mosquito Coast, with no exceptions; b) Making no exceptions by the Royal Order... about any military posts of the Mosquitos Coast,... thus included, *ipso facto*, the jurisdiction on the Archipelago of San Andrés, which belonged to it geographically; c) That as this Royal Order reestablished those prior to 1803, with which it conflicted, that submitted to the Captain-General of

[64] The Royal Order was transmitted by the Secretary of War not only to the Captain-General of Guatemala, but also to the Secretaries of Justice and of the Treasury, in both cases: "The Ministry under your charge may issue the orders conducing to its execution." It was also sent to the Governor of the Council of the Indies and to the Royal Audiencia of Guatemala (on 18 November), *"for your information and fulfillment, and with this objective Your Excellency should inform the Intendant governor of Comayagua Mr. Ramón Anguiano."* (Annex n° 26 II, and 27, of the Note of 20 March 1917). See NM Vol. II Annex 24. (Deposited with the Registry, Doc. N. 2).

> Guatemala all the military posts of the Mosquito Coast, the following, among others, became effective: I – The Royal Order of 23 January 1787 covering the entire Nicaraguan Mosquito Coast and part of that of Honduras... II. The Royal Order by means of which the Archipelago of San Andrés was placed under the dependency of the Captaincy-General of Guatemala [November 1795]...III. The Royal Order of 26 February 1796 to the President of Guatemala regarding the opening of the port of San Juan del Norte..."

1.79 The conclusion reached by the Nicaraguan Note is that:

> "the Royal Order of 13 November 1806 returned to the Captain-General of Guatemala the right and all jurisdiction over the military establishments of the Mainland of Mosquito and its islands that could have been taken away in 1803 by the Royal Order of San Lorenzo on 20 November of said year."[65]

F. The attitude of the former Sovereign

1.80 In order to confirm the attribution of the Mosquito Coast and its island dependencies to the Audiencia of Guatemala and, specifically, to its province of Nicaragua, it is important to review the accrediting documents of the territorial representation of the representatives that participated in the Constituent Assembly (*Cortes Constituyentes*) of Cádiz in 1812, as well as the configuration of electoral districts at that time.

1.81 The *Reply* of Costa Rica in the Arbitration with Colombia before the French President Loubet,[66] refers to the decrees of the Spanish

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[65] *Memoria del Ministerio de Relaciones Exteriores de Nicaragua, 1917*, op. cit., p. 236. See also, Note of 10 de September of 1919. See NM Vol. II Annex 24.

[66] *Reply to the Allegation of the Republic of Colombia* filed to the Arbitrator, the President of the Republic of France, Loubet, by the Agent of Costa Rica,

legislative Assemblies (*Cortes Españolas*) of 1 December 1811, as well as to Article 10 of the Constitution of 19 March 1812, to Article 1 of Decree CLXIV of 23 May 1812, that established the provincial representations of Guatemala, Nicaragua and Costa Rica, and to Articles 1 and 2 of Decree CCI of 9 October 1812, that reformed the Audiencia of Guatemala.[67] All of these have confirmed the laws and royal acts by virtue of which the mentioned provinces were constituted and subsisted, with the same boundaries that were established and defined by King Philip II in the 16th century.

1.82 Decree CLXIV of 23 May 1812 deserves special mention as it authorizes the "political division of the territories of Costa Rica and Nicaragua." According to Peralta "this document proves that at that time the *Coast of the Mosquito* and the entire Atlantic coast of *Nicaragua* and of *Costa Rica* continued to be under the peaceful jurisdiction of those provinces."[68]

1.83 Similarly, the Nicaraguan Minister of Foreign Affairs, J. A. Urtecho, devoted the document titled *Significance* (Supplement to the Memorandum of March 28, 1924), dated 8 September of the same year, to summarize Article 10 of the Spanish Constitution of 19 March 1812 as the "last constitutive law providing for territorial division amongst Hispanic American colonies," as well as Decree CLXIV of the Courts of Cádiz, on 23 May 1812. He underscores that this decree explicitly for the first time attributed to the provinces the

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Manuel M. de Peralta and published in Paris in 1899 under the title *Jurisdiction Territoriale de la République de Costa- Rica*. For the Loubet arbitration, see below paras. 1.106-1.111.

[67] M. M. Peralta, *Jurisdiction Territoriale de la République de Costa Rica*, Paris, 1899, p. 46, para. 47. See NM Vol. II Annex 69.

[68] *Ibid.*, pp. 55-56, para. 56. See NM Vol. II Annex 69.

islands adjacent to them, and *not* to the Audience to which they belonged, as had been done in Title XV, Book II, of the Compilation of the Indies of 1680. The Archipelago of San Andrés, of course, is adjacent to the province of Nicaragua.[69]

1.84 It is also of interest to study the attitude of the Spanish Crown toward the emancipated republics, as reflected in the treaties of recognition and those establishing diplomatic relations.

1.85 In the Marcoleta-Pidal Treaty with Nicaragua, signed in Madrid on 25 July 1850, Spain recognized the independence of Nicaragua with a territory that included adjacent islands:

> "Her Catholic Majesty ...renounces for ever, in the most formal and solemn manner, for herself and her successors," reads Article I, "...the sovereignty, rights and attributes which appertain to her over the American territory situated between the Atlantic Ocean and the Pacific, *with its adjacent islands*, formerly known under the denomination of the Province of Nicaragua, now the Republic of the same name." "In consequence," reads Article II, "Her Catholic Majesty acknowledges the Republic of Nicaragua as a free, sovereign and independent nation, with all the territories that now belong to *it from sea to sea*..." (emphasis added).[70]

1.86 Thus it was made clear, and acknowledged explicitly by the former sovereign power, that Nicaragua had an Atlantic (Caribbean, Mosquito) Coast from the time of her birth. Furthermore, since on the Pacific Coast there are no islands of any significance worth

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[69] *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Island*, 1924, p. 98. Deposited with the Registry, Doc. N. 5.

[70] B.F.S.P. (1852-1853), Vol. XLII, pp. 1206-1212. See NM Vol. II Annex 13.

mentioning in a Treaty of that nature, the reference in the Treaty is, naturally, to the Caribbean islands adjacent to the Mosquito Coast.

1.87 This reasoning is more persuasive when considering that in the treaty (of 30 January 1881), in which Spain acknowledges the independence of Colombia, no reference is made to "adjacent islands".[71]

G. THE DIFFERENCE IN HISTORICAL PERSPECTIVE

1. The fact of possession

1.88 The application of the *uti possidetis iuris* makes de facto possession by one party or the other, or by a third party, irrelevant in attempting to settle a territorial dispute between States that have separated from the Spanish Crown. Possession is nothing in the face of a title derived from a sovereign act.[72]

1.89 Nicaragua does not invoke her possession of the Atlantic Coast or the Corn Islands as titles of sovereignty, but rather as a confirmation of the same according to *uti possidetis iuris*. Possession is only relevant for justifying a decision that is not clear in terms of *uti possidetis*.

1.90 In the past Colombia has insisted on the importance of her occupation of San Andres and Providencia in 1822[73] and her continuous

[71] B.F.S.P. (1880-1881) Vol. LXXII, pp. 1216-1217. See NM Vol. II Annex 15.

[72] See for example para. 68 of the Judgment of 10 October 2002 in the *Cameroon Nigeria* case.

[73] See Memorandum of 5 November 1915, IV; Note of 24 June 1918 (Deposited with the Registry, Doc. N. 3); *White Paper of Colombia of 1980*, pp. 22-23. (Deposited with the Registry, Doc. N. 1).When the provinces of Central America declared their independence from Spain on 15 September 1821, San Andres and Providencia were actually under the occupation of a corsair, Luis

possession from that date onward. This *de facto* jurisdiction besides being irrelevant left much to be desired during those many years.

1.91 Nicaragua has rejected the legal effects of this possession – which in any case did not include the cays on the banks of Roncador, Serrana, Serranilla and Bajo Nuevo, or any of the other banks adjacent to the Mosquito Coast – since it is not a *possessio iuris*. The Nicaraguan Note of 20 March 1917 states that,

> "...mainly because said archipelago does not fall within the limits of the former Viceroyalty of the New Kingdom of Granada, and because the current possession by Colombia dates from the year 1824, that is, after the date of the aforementioned *uti possidetis*".[74]

1.92 The Note mentioned above adds that the Molina-Gual Treaty of 1825 provided a *modus vivendi* that had not ended, and because of this the later acts of sovereignty exercised over the archipelago by the Colombian government "is not legal reason to cause or confirm the domain over that territory nor to consolidate any material possession."[75]

1.93 The *White Paper of Colombia 1980*, however, does not limit itself to invoking possession to confirm historical titles, as previous

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Aury, flying the flag of the Federated Provinces of Buenos Aires and Chile. Colombian occupation began after Aury's death.

[74] *Memoria del Ministerio de Relaciones Exteriores, Managua, Nicaragua. 1917*, op. cit., p. 249.

[75] Similarly, the Nicaraguan Note of 10 September 1919 (Deposited with the Registry, Doc. N. 4). Colombia's "precarious possession" over the San Andrés Archipelago was precisely because of the *status quo* established by article VII of the Molina-Gual Treaty. (*Memoria del Ministerio de Relaciones Exteriores correspondiente a 1919*, op. cit., p. XXII). See also the *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Island*, 1924, pp. 80-82, 93-94. Deposited with the Registry, Doc. N. 5, which discards what is called the "prescriptive de facto possession".

Colombian documents had done,[76] rather it makes this the legitimating foundation of her sovereignty stating that even if the *Esguerra-Bárcenas Treaty* had not been signed and the many validations of Colombian title did not exist, the Archipelago still belonged to Colombia. And that the peaceful and uninterrupted possession of a territory by a State over a long period, along with the *animo domine* and the acquiescence of third States, was sufficient title for sovereignty.

1.94 In reality, following independence the exercise of jurisdiction by Colombia over the Archipelago of San Andrés and Providencia was merely nominal. "Throughout the 19th century the islanders' relations continued to be chiefly with the Central American coast rather than with Cartagena", observed J. J. Parsons.[77]

1.95 For a better understanding of the moment when the difference (re)appeared on the agendas of the parties, one only need recall that the Mosquito Coast and the adjacent islands, sparsely inhabited, were under the control of agents of his British Majesty who managed and protected the chiefs of the Mosquitos and Zambos (see below paras. 2.10-2.11).

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[76] Thus, the Commission's Report to the Colombian Senate for the authorization of the ratification of the Bárcenas-Esguerra Treaty had already devoted its section II to the acts of sovereignty of the Republic of Colombia, since it was established, over that territory. But it did so in order to reaffirm the titles originating from the *uti possidetis iuris*. This Report was reproduced in the "Report for the first debate" of the Colombian Senate, calling for a position to be taken on the Saccio-Vázquez Treaty of 1972 (*Anales del Congreso*, 12 December 1972, p. 1644). See also the Exposition of Motives of the bill through which the Saccio-Vázquez Treaty was approved (1°, third paragraph). See *infra* Chap. II, Sec. III, subsec. A, 3.

[77] J. J. Parsons. *San Andrés y Providencia: una geografía histórica de las islas colombianas del Caribe*, 1956. p. 117. See NM Vol. II Annex 70.

1.96 In the middle of the 19th century, knowledge about the territory of the Mosquitos was not extensive. In those times the Central American governments were attempting to attract European immigrants willing to colonize uninhabited and largely unknown areas. Nicaragua had only three hundred thousand inhabitants, and of these not even fifteen thousand were in the Mosquitia. The authorities of Managua were not able to set their sights on the Archipelago as long as they had not firmly established themselves in the Atlantic Coast, and it was neither easy nor quick to get the English out of that area.

1.97 The claim over the Mosquitia is in the Nicaraguan Constitution of 1858.[78] Shortly thereafter, through the Zeledón-Wyke Treaty of 28 January 1860, Great Britain recognized "as belonging to and under the sovereignty of Republic of Nicaragua the country hitherto occupied or claimed by the Mosquito Indians," and assumed the obligation that "The British protectorate of that part of the Mosquito Territory...cease" (Article I). The treaty established the *Mosquitia Reserve* "under the sovereignty of Republic of Nicaragua" (Article II).[79]

1.98 By a Decree of 4 October 1864 the Government of Nicaragua declared as property of the State the islands and islets adjacent to her Atlantic coast, placing regulations on commerce of imports and exports. The British Government felt that this decree contradicted the

[78] See Article I, NM Vol. II Annex 60b.

[79] Article II of the Treaty assigned to the Mosquito Indians a District within which they would enjoy the right to govern themselves and all other residents. Said District covered the areas between the Rama and Hueso rivers on the Atlantic. The differences over the interpretation of this treaty were resolved through the arbitration of the Austrian Emperor (Award of 2 July 1881) who affirmed Nicaragua's sovereignty. B.F.S.P. (1859-1860) Vol. L, pp. 96-105. See NM Vol. II Annex 14.

agreements of the Zeledón-Wyke Treaty, but Nicaragua replied that, by acknowledging her sovereignty over the Mosquitia and delimiting the territory assigned to the Mosquito indians, the adjacent islands and islets were under Nicaraguan sovereignty.

1.99 By 1869 Nicaragua had enacted legislation on the exploitation of turtle fisheries in an island "jurisdictional district" in the Caribbean, subjecting fishermen to a tribute that was imposed at least from 1896, and went as far as seizing several Cayman Island schooners in 1904.

1.100 In practice Nicaragua had only rid herself of the diminished British influence in the last decade of the 19th century, and formalized this in the first decade of the 20th century. In effect, on 5 March 1890, Isidro Urtecho, Political Delegate of the Republic in the Mosquita Reserve and Inspector General of the Atlantic Coast, decreed that "the jurisdiction that the municipal government of the Mosquita Reserve has been exercising in the islands of the Atlantic Coast, across from the territory of the Reserve" was "contrary to the full sovereignty and domain of the Republic in said islands" (the Corn Islands) and therefore, "consequently, from the time of the publication of this decree only authorities of the Republic may exercise jurisdiction in said islands."[80]

[80] President Roberto Sacasa approved the Urtecho Decree by means of another Decree on 18 March, published in the *Gaceta Oficial*, on the 23. On those same dates other decrees were approved (also published in the *Gaceta* on the 23rd) by virtue of which the "District of Corn Island" was established with "all the islands of the Atlantic Coast, across from the territory of the Reserve and which to date have been under their own jurisdiction" and declared "The ports of 'Brig Bay' and 'South Bay' on Corn Island and 'Pelican Bay' on Little Corn Island ... free ports for commerce to all nations, under the rules that will be established separately in the 'Ordinance of Corn Island'." See NM Vol. II Annexes 61 and 62.

1.101 Four years later, in February of 1894, under the Presidency of José Santos Zelaya, the Mosquita Reserve was abolished. The definitive withdrawal of the British was accomplished with the signing of the Altamirano-Harrison Treaty (19 April 1905). This treaty, which abrogated the Zeledón-Wyke Treaty, "recognize(d) the absolute sovereignty of Nicaragua" (Article II).[81]

1.102 Colombia, on the other hand, lived with her back turned to the territories she claimed. Measures such as the Decree of 5 July 1824 had about as much effect, M. M. Peralta noted, "as Papal bulls and mandates have among nonbelievers".[82] The only purpose in making the claim to the Mosquito Coast was in order to be taken into account in any canal projects in the territory of Nicaragua.[83]

1.103 Some years later, Colombia was offering herself to the Government of Her Britannic Majesty as a counterpart in negotiations over the boundaries of the Mosquitia, seeking to thus obtain, as the British consul in Central America Federico Chatfield was quick to notice, the backing of Great Britain in her territorial claims in the Caribbean.

1.104 Chatfield clearly did not believe in the quality of a title based on the Royal Order of 1803: "Nueva Granada should prove", Chatfield said in a note to Lord Palmerston, 15 April 1847,

> "that those rights and claims... are supported by something more solid than the Royal Order of San Lorenzo from 30 November 1803, or that said order was not simply a military measure... Without that proof I presume that the Government of Her Majesty will not be

[81] B.F.S.P. (1904-1905) Vol. XCVIII, pp. 69-71. See NM Vol. II Annex 16.
[82] Cited in the Nicaraguan Note of 10 September 1919 (Deposited with the Registry, Doc. N. 4).
[83] See above, para. 1.20 and below Chap. II, Sec. I, paras. 2.6-2.9.

able to commit itself to acknowledging the rights claimed by Nueva Granada in a territory of which others possess titles of some weight while hers are not legitimate."[84]

1.105 In 1883, R.S. Pereira bemoaned the lack of Colombian interest in the Mosquito territory, which included the Archipelago, and that she "has done nothing to date to assure our sovereignty."[85]

2. The Loubet Award of 11 September 1900

1.106 The Colombian claims to the Mosquito Coast affected the Caribbean Coast of Costa Rica as much as that of Nicaragua. Colombia and Costa Rica signed the first commitment to settle the dispute in 1880 (Castro-Quijano Otero Treaty of 25 December 1880[86]). An additional agreement of 20 January 1886 designated the King of Spain as sole Arbiter over their territorial dispute.[87] Given that these treaties expired before an Award was issued, the Parties signed the Treaty of 4 November 1896 (Esquivel-Holguín Convention), designating as arbitrator the President of the French Republic, Émile Loubet.

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[84] Chatfield noticed, in addition, that the "Viceroy of Nueva Granada never exercised legislative authority over this territory, and there are also no traces of there ever having been an establishment or local government subject to his command on the coasts of the Mosquitos or of Central America." The Opinion of Chatfield on the Royal Order of 1803 is reproduced as Annex n° 8 of the Nicaraguan Note of 10 September of 1919. B.F.S.P. See NM Vol. II Annex 77.

[85] R. S. Pereira, op. cit. p. 156. Pereira adds: "That Colombia does not need that territory nor has it given much evidence of coveting it, it is possible... we do not see why Colombia would relinquish the political convenience of being part of the Central American Confederation... just because today it lacks the means to occupy it and conveniently promote its civilization and progress." See NM Vol. II Annex 68.

[86] Article VII. B.F.S.P. LXXI, p. 215.

[87] The text of this Convention, signed *ad referendum* on 20 January 1886 and approved by decrees of 25 and 30 August of the same year, is included as Annex N° 3 of the Note of 20 March 1917 (Deposited with the Registry, Doc. N. 2). B.F.S.P. XCII, pp. 1034-1035.

1.107 The arbitration between Colombia and Costa Rica involved an exhaustive debate of the *uti possidetis iuris* between the Audiencia of Guatemala and the Viceroyalty of Nueva Granada. The Award, in fact, was based on the application of the principle of *uti possidetis iuris*.[88]

1.108 Colombia asserted her right to "une bande de terrain s'etendant, le long de la côte, jusqu'au Cap de Gracias-à-Dios" (a strip of land along the coast, up until Cape Gracias a Dios"). The *Loubet Award* (11 September 1900) denied these purported Colombian rights over the Atlantic coast claimed by Costa Rica, rejecting thus the value of the Royal Order of 1803 and the other alleged titles.[89]

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[88] The Arbiter stated in the motivation for the award that he proceeded to "a careful and in-depth study" of the pieces presented by the parties and "particularly: the Royal Decrees of 27 July 1513; 6 September 1521; the Royal Provision of 21 April 1529; the Royal Decrees of 2 March 1537; 11 January and 9 May 1541; 21 January 1557; 23 February and 18 July 1560; 4 and 9 August 1561; 8 September 1563; 28 June 1568; 17 July 1572; the capitulation of El Pardo, December 1573; the Compilation of Laws of the Indies of 1680, particularly laws IV, VI and IX of that Compilation; the Royal Decrees of 21 July and 13 November 1722; 20 August 1739; 24 May 1740; 31 October 1742; 30 November 1756; and the different instructions issued by the Spanish sovereign and directed to the high authorities of the Viceroyalty of Santafé as well as those of the Captaincy-General of Guatemala in the course of the 18th century and following years; the Royal Orders of 1803 and 1805; the stipulations of the treaty concluded in 1825 between the two independent Republics, etc." B.F.S.P. Vol. XCII p. 1038. See NM Vol. II Annex 21.

[89] It is true that the Loubet Award, after adjudicating all the islands, islets and banks located in the Atlantic near the coast to Colombia, if they were located to the east and southeast of Punta Mona, and to Costa Rica if they were located west and northwest of that same point, it refers to "the islands farther away from the Continent and located between the Mosquito Coast and the Isthmus of Panama..., that used to be part of the former Province of Cartagena, under the name of District of San Andrés" and not claimed by Costa Rica (M. M. Peralta, *Límites de Costa Rica y Colombia: nuevos documentos para la historia de su jurisdicción territorial con notas, comentarios y un examen de la cartografía de Costa Rica y Veragua*, pp. 441 and subsequent., 539 and ff.), understanding that "the territory of these islands, without exception, belongs to the United States of Colombia." This paragraph of the Award was immediately protested

1.109 There is only one Mosquito Coast. Clearly one cannot jump from the former Duchy of Veragua in Panamá (then still part of Colombia), to San Juan del Norte in Nicaragua, once the Atlantic Coast of Costa Rica had been *lost* by Colombia.

1.110 The *Loubet Award* had a sequel. Upon attaining independence from Colombia in 1903, Panama asserted against Costa Rica the same claims previously set forth by Colombia based on the Royal Order of 20 November 1803. A new arbitration was agreed upon with Costa Rica (Treaty of 17 March 1910) resolved by means of the *White Award* (12 September 1914) that in essence confirmed the Award by the French President.

1.111 The *White Award* states that "nothing therein shall be considered as in any way reopening or changing the decree in the previous arbitration rejecting directly or by necessary implication the claim of Panama to a territorial boundary up to Cape Gracias á Dios". Concerning the islands across from the coast, the arbitrator felt he did not need to

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by Nicaragua and acknowledging the rightness of the Nicaraguan protest, the Minister of Foreign Affairs of the French Republic, Theophile Delcassé, wrote on 22 October 1900 to the Minister of Nicaragua in Paris, to clarify the Award: "Taking said Convention into account, as well as the general rules of international law, the Arbiter, on nominatively designating the islands mentioned in the award, has not had in his mind to say anything farther than that the territory of these islands, mentioned in the Treaty signed on March 30th 1865 by the Republics of Costa Rica and Colombia, does not belong to Costa Rica. In these conditions the rights of Nicaragua over these islands stand unaltered and intact as heretofore, the Arbiter having by no means intended to decide a question not submitted to his judgment." Emphasis added. (Reproduced in the Annex n° 33 of the Nicaraguan Note of 20 March 1917 (Deposited with the Registry, Doc. N. 2). Also, Nicaraguan Note of 10 September 1919 (Deposited with the Registry, Doc. N. 4), and *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Island,*. 1924, pp. 83-84). Deposited with the Registry, Doc. N. 5. See NM Vol. II Annex 78.

take a position "nothing in this decree shall be considered as affecting the previous decree awarding the islands off the coast since neither party has suggested in this hearing that any question concerning said islands was here open for consideration in any respect whatever."[90]

3. The independence of Panama

1.112 Once the *Loubet Award* denied Colombia's claim over the Atlantic Coast of Costa Rica, it was absurd to claim, with the same titles discredited by the Award, sovereignty over a coast located farther north and also over the islands adjacent to that coast. In addition, once Panama separated from Colombia in 1903, Colombia lost, particularly following her acknowledgement of Panama as an independent State (Urrutia-Thompson Treaty, 6 April 1914, article III),[91] any legal basis to make claims based on her former sovereignty over Panama which in colonial time was the province of *Tierra Firme.* Colombia had been claiming the Mosquitia and adjacent islands on the base of their supposed adscription to this province that, in turn, was part of the Viceroyalty of Nueva Granada of which Colombia was successor.

1.113 This argument was set forth by the Nicaraguan Minister of Foreign Affairs, J. A. Urtecho, in his *Memorandum Explanatory* of 28 March 1924 and was broadly developed in a judgment of the Supreme Court of Nicaragua on 4 May 1928.

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[90] The dispositif of the *White Award* of 12 December 1914 is included as Annex n° 4 of the Note of 20 March 1917 (Deposited with the Registry, Doc. N. 2). See also in NM Vol. II Annex 22.

[91] Molley, Vol. III. 1910-1923. p. 2538. See NM Vol. II Annex 17.

1.114 According to Urtecho the Colombian assertion that her acknowledgement of Panama was made within the limits prescribed for that department by Colombian Law on 9 June 1855 (which excluded from it the Mosquito Coast and the adjacent islands), lacked logical and juridical consistency, as it was a fact that even after Panama's secession in 1903, Colombia went on claiming the territories in dispute with Nicaragua based on the alleged adscription of the territories in colonial times to the province of Tierra Firme, present day Panama.[92]

1.115 According to the Supreme Court of Nicaragua in its judgment of 4 May 1928:

> "Once Costa Rica and Panama had accepted the review of the Loubet Award by Arbitrator White, the last heir of the old Colombia in matters of boundaries with the Federal Republic of Central American and the States that succeeded it, it should be considered executed, and therefore the continental and island territory of the Nicaraguan Atlantic free of claims from the former Colombia and her successors, Nueva Granada, the United States of Colombia, and finally the Republic of Panama,"[93]

1.116 The Supreme Court of Nicaragua concluded in its judgment of 4 May 1928[94]:

> "Upon Colombia losing, with the independence of Panama in 1903, the territory that because its adjacency to Central America was tied to the matter of boundaries

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[92] *Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Island,* 1924, pp.94-95. Deposited with the Registry, Doc. N. 5.

[93] Boletín Judicial: La Gaceta. 1928, pp. 6324 – 6328. See NM Vol. II Annex 79.

[94] Idem. See NM Vol. II Annex 79.

contemplated in the 1825 treaty, Colombia lost its condition of heiress, her legal standing, and the right to benefit from the concession of the *status quo* established in Article VII (1825 Treaty), to maintain de facto possession over the Archipelago of San Andrés..."

IV. Conclusions

1.117 The Mosquito Coast and the adjacent islands which were subject to the territorial jurisdiction of the Audiencia of Guatemala, are Nicaraguan according to the principle of *uti possidetis iuris.* They were Nicaraguan before the Royal Order of 20 November 1803, and continued to be so after that Order.

1.118 They were Nicaraguan before the Order of 1803 according to provisions going back to the middle of the 16th century that were confirmed in Law VI, Title XV, Book II of the *Compilation of the Laws of the Kingdoms of the Indies*, promulgated on 16 May 1680.

1.119 They were Nicaraguan after 1803 because the Royal Order of 20 November 1803, which is not mentioned in the later Compilations of Laws of the Indies, did not transfer territorial jurisdiction over the *Mosquito Coast and adjacent islands* from the Audiencia of Guatemala to the Viceroyalty of Santa Fe (Colombia): 1) it was only an exceptional commission (*comisión privativa*) charging the Viceroy of Santa Fe with its defense without transferring territorial jurisdiction; 2) it was not executed; and, 3) in any case it was abolished by the Royal Order of 13 November 1806.

1.120 The explanatory Royal Order of 13 November 1806, based on a request (*representación*) of the Captain-General of Guatemala of 3 March 1804, confirms the territorial jurisdiction of the Audiencia of Guatemala over the Mosquito Coast and its dependencies.

1.121 Therefore, Colombia's possession over San Andrés and Providencia, largely in name and in any case dating after independence from the Spanish Crown, cannot prevail over a title founded on the *uti possidetis iuris*.

1.122 In any case, that de facto possession did not extend, during at least the whole of the 19th century, to the cays on the banks of Roncador, Serrana, Serranilla and Bajo Nuevo or on any other bank off the Mosquito Coast.

CHAPTER II

THE LEGAL STATUS OF THE 1928 TREATY

2.1 The purpose of the present Chapter is to establish that the sovereignty over the islands of Providencia, San Andres and Santa Catalina and all the appurtenant islands and cays still appertain to Nicaragua, notwithstanding the "Bárcenas-Esguerra Treaty" concerning Territorial Questions at Issue between Colombia and Nicaragua signed at Managua on 24 March 1928.

2.2 In Section I, Nicaragua will introduce the events leading up to the 1928 Treaty and the circumstances surrounding its conclusion. In Section II, she will show that the Treaty is invalid and can have no legal consequence whatsoever. In Section III, she will offer a legal analysis of the contents of the Treaty. And she will demonstrate in Section IV that, admitting the Treaty ever entered into force, it has been terminated as a consequence of its breach by Colombia.

2.3 This analysis will be carried out on the basis of the rules and principles embodied in the Vienna Convention on the Law of Treaties of 23 May 1969, which has been ratified by Colombia on 10 April 1985 and to which Nicaragua is not a Party. However, she accepts that, with respect to both interpretation of treaties (Articles 31 and 32 of the Convention) and their conditions of validity (Articles 46 to 53) and of termination (Articles 60 to 64), the Convention codifies existing rules of customary international law.

Section I

Historical Background and Contemporaneous Events Leading to the Signature and Ratification of the Barcenas-Esguerra Treaty of 1928

2.4 This Section explains the historical background that is necessary for understanding the reasons why Nicaragua signed the Barcenas-Esguerra Treaty with Colombia in 1928 and ratified it in 1930. The Section will be divided in two parts. Part A highlights episodes of Nicaraguan history after her independence from Spain in 1821 with special emphasis on the period of 1927-1930. Part B will deal with the events directly related to the conclusion of the Barcenas-Esguerra Treaty of 1928.

PART A. HISTORICAL BACKGROUND

1. The Independence of Nicaragua

2.5 During the Colonial period Nicaragua, together with the other four present day Central American Republics, constituted what was known as the Captaincy-General of Guatemala. This entity became independent of Spain on 15 September 1821 but on 5 January of the following year it was absorbed by the Mexican Empire of Agustín de Iturbide. This situation was short lived and in July 1823 the Central American Republics separated from Mexico and finally became independent of any other Power be it of the Old or of the New World. They ratified their independence and union by approving the Constitution of the Central American Federation on 22 November

1824 that included Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica. This Federation only lasted 15 years and on April 30, 1838 Nicaragua became the first member to separate from the Federation and declare her sovereignty and independence.

2. Influence of geography in the history of Nicaragua

2.6 The history of Nicaragua from her independence onwards has been the history of foreign intervention in her internal affairs or of outright occupation. This was not the fate of the other four provinces that had emerged to independence from the disintegration of the Captaincy-General of Guatemala. Geography is what made Nicaragua different. Nature had endowed her with Lake Nicaragua, the largest lake in Central America, more than 8,000 square kilometers in size that connected to the Caribbean by means of the San Juan River, and was only separated from the Pacific Ocean by a small strip of land of approximately 20 kilometers.

2.7 A former United States Minister to Nicaragua from 1912-1913 perceived the importance of the Nicaraguan geographical position on its historical development:

> "In all of these cases of Nicaraguan international controversies with Europe, Mexico, and Colombia the real cause of the trouble was the desire to control the interoceanic canal route."[95]

[95] American Policy in Nicaragua. Memorandum on the Convention Between the United States and Nicaragua relative to an Interoceanic Canal and a Naval Station in the Gulf of Fonseca, signed at Managua, Nicaragua on February 8, 1913. By George T. Weitzel, Former American Minister to Nicaragua, 1912-1913. Washington, Government Printing Office, 1916, p. 7.

2.8 The interest of these countries certainly is undoubted but Minister Weitzel fails to add the name of his own country to the list of interested parties to the Nicaraguan canal route! For it was the United States, as will be seen in the following narrative, which most persistently sought to obtain proprietary rights over this route.

2.9 The possibilities of interoceanic passage through Nicaragua were appreciated from the earliest days of her colonization. The Spanish Conquistadors from the very first sought the "uncertain strait" (estrecho dudoso) that would connect the Atlantic Ocean to the Pacific Ocean. When the Great Lake of Nicaragua was explored and the San Juan River discovered, this strait was sought incessantly through Nicaragua. The interest in Nicaragua as a possible interoceanic route was manifested soon after independence by the different maritime powers of the 19th Century: the Netherlands, France, Great Britain and the United States. In 1848, for example, Prince Louis Napoleon accepted a concession for the building of the "Napoleon Canal of Nicaragua" and is said to have commented: "In the New World there is a State so superbly located as Constantinople...We are referring to the State of Nicaragua...that is destined to reach an extraordinary degree of prosperity and greatness."[96]

[96] Cited in: Thos B. Atkins. *Nicaragua Canal.* An Account of the explorations and surveys for this canal from 1502 to the present time, and a statement showing the relations thereto of the Government of the United States. Presented by the Nicaragua Canal Construction Co., Warner Miller, President. NY Printing Co. (Republican Press), New York, 1890, p. 17.

2.10 Great Britain had shown an interest in Nicaragua since the Colonial period. She had established a special relation with the inhabitants of the Caribbean coast of Nicaragua, the so-called Mosquito Coast. Many of these were descendants of the Nicaraguan indigenous people and of Africans brought to the Caribbean by slave traders. After the independence of Nicaragua and the consequent loss of what protection Spain had afforded to her former Colony, Great Britain saw her chance to gain a firm foothold on what was considered the most feasible canal route to the Pacific. If Great Britain could control the Caribbean Coast of Nicaragua, there was no possibility of a canal being cut through Nicaragua without her consent.

2.11 Nicaragua was powerless to hinder the relations established by the British Government with the leader of the Mosquito natives who was proclaimed and recognized as "King of the Mosquitos" by the British Government. In 1844 Great Britain officially proclaimed a protectorate over the "Kingdom of the Mosquitos" and established as its limits Cape Camaron in present day Honduras and Bocas del Toro in present day Panama. This proclamation was followed in 1848 by the seizure of the port of San Juan del Norte located at the mouth of the San Juan River. The port was renamed Greytown.

2.12 Not only was Great Britain active but, as pointed out above, the United States did not remain far behind. The contemporaneous discovery of gold in California in 1848 drew the attention of the United States more strongly to the strategic position of Nicaragua in relation to a canal between both oceans or for any interoceanic

traffic. The United States Minister in Nicaragua, Mr. Elijah Hise, concluded a Treaty with the Nicaraguan representative, Mr. Buenaventura Selva, in June 1849 giving the United States a concession for building a canal through Nicaragua. This was seen by Great Britain as an intolerable provocation and the United States did not ratify the Treaty.

2.13 In order to avoid an armed conflict between the United States and Great Britain the Treaty known as the *Clayton-Bulwer Treaty* was signed in Washington on 19 April 1850. This compromise agreement was designed to harmonize contending British and United States interests in Central America. By this Treaty the Parties agreed, among other things, that neither Party would have exclusive control over any canal built across the Isthmus; that both Parties would have equal rights of navigation across it, and that neither Party would exercise dominion over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America (Art. I).[97]

4. First occupation of Nicaragua: William Walker 1855-1857

2.14 A few years after the signature of the Clayton-Bulwer Treaty the filibustering expedition of William Walker allowed him to become the only United States citizen to be President of a Latin-American Country. Walker arrived in Nicaragua with his mercenary army in mid-1855 after having tried the previous year to take from Mexico Baja California and the State of Sonora. By the end of 1855 he was virtual master of Nicaragua. He proclaimed himself president of Nicaragua on July 12, 1856 and in a special ceremony on 19 July

[97] B.F.S.P. Vol. XXXVIII p. 4.

was recognized by the United States Minister in Nicaragua, Mr. John Wheeler. During his occupation of Nicaragua, Walker tried to mold the Nicaraguan legal and social system to that of the Southern States of the United States, for example by enacting legislation establishing slavery in Nicaragua. He maintained himself against a coalition of Central American States until his defeat in May 1857. In order to avoid capture, he surrendered to the United States Navy and returned to the United States.

2.15 The magnitude of this war of occupation can be better understood by simply pointing out that more United States warring citizens died in this "filibuster war" than in the famous war between the United States and Spain a few decades later in 1898. The attempt to conquer Nicaragua proved more costly in American lives than the takeover of Spain's colonies: Cuba, Puerto Rico and the Philippines![98]

2.16 The United States Government was not publicly and officially involved in the Walker invasion but in fact it could be considered a covert war waged against Nicaragua. And it was a covert war because any official United States involvement would have been a violation of the Clayton-Bulwer Treaty that had been signed a few years before. It was not a coincidence that Nicaragua was selected for this "filibustering" invasion and not one of the other Central American neighbours. The reason clearly was that Nicaragua was a key transport link between Atlantic and Pacific Ocean shipping. Writing three quarters of a century later, in 1927, Henry L. Stimson in a defensive book that tried to explain the motivations for the then

[98] Bermann, Karl: *Under the Big Stick: Nicaragua and the United States Since 1848* (South End Press, Boston 1986), pp. 72-76.

current United States occupation of Nicaragua, had this to say about Walker:

> "...it is interesting to note that the two matters which have been principally seized upon by our critics in Latin America as evidencing a contrary and imperialistic policy on our part took place three-quarters of a century ago and largely under an influence which no longer exists in the United States. Our alleged spoliation of Mexican territory at the time of the Mexican War and the popular encouragement given in this country to the filibustering expedition of William Walker to Nicaragua eight years later have been the two incidents most commonly used by hostile critics to offset the long and honorable record to which I have referred.
>
> Both these took place at a time when negro slavery was a real and dominating power in the United States, seeking to acquire new territory under the Southern sun for the furtherance of its peculiar interest; and it was among the adherents of that slave power that the Mexican War and Walker Expedition received their most ardent support."[99]

2.17 By placing on an equal level the Mexican War and the Walker "expedition" General Stimson confirms the hidden United States hand in this affair. After all, General Stimson knew what he was talking about. He had been Secretary of War of the United States from 1911-1913, and later was Secretary of State and, during the Second World War he was again Secretary of War.

2.18 The United States Civil War (1861-1865) put an end to further military adventures in the 19th Century, although interest in the canal persisted and several attempts were made to reach agreements with private United States companies and some works were even started in the San Juan River.

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[99] Henry L. Stimson, *American Policy in Nicaragua*, New York, Charles Scribner's Sons, 1927, pp. 102-103.

5. The selection of Panama as the site for building a canal

2.19 By the end of the 19th Century the United States had decided that if any canal was to be built it had to be by the United States Government itself and not by any other State and that the United States should have complete control over it.[100] This meant that the Clayton-Bulwer Treaty had to be scrapped. This was finally accomplished with the Hay-Pauncefote Treaty of 18 November 1901 that definitely abrogated the Treaty of 1850 and gave the United States a free hand to build the canal.

2.20 At that point in time the United States was studying two options: the Panama route and the Nicaraguan route. The decision was finally taken to build the canal through Panama, which was then part of Colombia. Since agreement with Colombia was not forthcoming in the way the United States Government wanted, Panama was "taken" by President Theodore Roosevelt and the United States and the new Nation, which she had created ad hoc, signed a Canal Treaty in February 1904.

6. 1893-1909: Presidency of General Zelaya and first landing of United States Marines

2.21 In the meantime in Nicaragua, after a lengthy rule by the Conservative Party during the second half of the 19th Century, a successful liberal revolt had brought Jose S. Zelaya to power in

[100] Stimson, op cit, p. 106.

1893. The Encyclopaedia Britannica succinctly characterizes his rule as follows:

> "Zelaya, though a dictator, was a committed nationalist. He promoted schemes for Central American reunification and refused to grant the United States transisthmian canal-building rights on concessionary terms, thus encouraging the United States to choose Panama for the project. This, plus rumours that Zelaya planned to invite Japan to construct a canal that would have competed with the U.S. waterway, caused the United States to encourage Zelaya's Conservative opposition to stage a revolt."[101]

2.22 In November 1909 the execution by Zelaya of two "American soldiers of fortune, Canon and Groce, who held commissions in the revolutionary army, precipitated a crisis."[102] The United States notified the Chargé d'Affaires of Nicaragua in Washington that it was breaking relations. In this communication, known in Nicaraguan history as the "Knox note" after its signatory the United States Secretary of State, it was stated emphatically, among other things, that:

> "The Government of the United States is convinced that the revolution represents the ideals and the will of the majority of the Nicaraguan people more faithfully than the Government of President Zelaya, and that its peaceable control is well-nigh as extensive as that hitherto so sternly attempted by the Government at Managua."[103]

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[101] *History of Nicaragua: Independence, Encyclopaedia Britannica 2001*, Standard Ed. CD-ROM, 1994-2000, Publisher Britannica.com Inc.
[102] The United States and Nicaragua: *A Survey of Relations from 1909 to 1932, United States Government Printing Office, Washington*, 1932, p. 7.
[103] *Survey 1909-1932*, op cit, p. 8.

2.23 Although Zelaya resigned, the United States refused to recognize his successor, the liberal José Madriz. Moreover, American forces prevented the Government troops of President Madriz from routing the revolution. In view of this setback, President Madriz abandoned Nicaragua in August 1910. The discontented Liberal General Estrada, who had betrayed Zelaya and turned over to the rebels the garrison of the city of Bluefields on the Caribbean coast, assumed control of the Government. He immediately sought recognition by the United States.

7. The Dawson Pacts

2.24 In order to concede the recognition sought by General Estrada, the United States Minister to Panama, Mr. Thomas Dawson, "was sent to represent the views of the State Department". The conditions laid down by Mr. Dawson led the Liberal Estrada and his conservative colleagues to the signature of a series of pacts on 27 October 1910. These pacts were "commonly known as the Dawson Pacts, although Mr. Dawson was not a signatory."[104]

2.25 In these pacts the revolutionary coalition agreed to call elections for a Constituent Assembly the following November. This Assembly would convene in December and elect a President and a Vice-President for a period of 2 years. Furthermore, the signatories agreed to support the candidacy of General Estrada for President and that of Mr. Adolfo Diaz as Vice-President for that period. A constitution was to be drawn up guaranteeing, among other things, the rights of foreigners (Pact 1). Pact 2 established a claims commission that was

[104] *Survey 1909-1932*, op cit, p. 10.

to be appointed by the Government of Nicaragua "in harmony with that of the United States" and the American Agent would approve the election and number of its members and the plan of its proceedings. Pact 3 was an agreement to request the aid of the United States with the object of obtaining a loan to be guaranteed by the customs receipts of Nicaragua that would be collected in accordance with terms satisfactory to both Governments. The fourth Dawson Pact entailed that General Estrada could not be candidate in the next election and that the next President had to be from the Conservative Party.[105]

2.26 The political aspects of the Pacts were carried out as agreed: a Constituent Assembly was elected and, on 31 December 1910, General Estrada was elected President and Diaz Vice-President. The United States extended recognition to the new Government the following day.[106] The rule of Estrada was short-lived. His Minister of War as well as the Army were against him and he handed over the Presidency to Mr. Adolfo Diaz in May 1911.

2.27 Further civil war led to the intervention of United States marines in August 1912 in support of the Conservative, Adolfo Díaz. "In suppressing the revolution, seven American marines and bluejackets lost their lives."[107] Elections were held shortly after the suppression of the Revolution and Mr. Diaz, who had been acting President since 1911, and was the only candidate for President, was elected for a full term.

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[105] These Pacts are reproduced in *Survey 1909-1932*, op cit, pp. 125-126.
[106] *Survey 1909-1932*, p.11.
[107] *Survey 1909-1932*, op. cit, p. 22.

2.28 Toynbee points out that the Conservative Revolution of 1909-1910 that had ousted Zelaya,

> "was promoted by a Nicaraguan (or Costa Rican) clerk in the employment of an American oil company, who made to the revolutionary campaign fund a contribution six hundred times as large as the annual stipend which he was receiving from his American employers; and after the revolution had started, the triumph of the Conservatives was materially assisted by the intervention of US naval forces."[108]

This "clerk" was none other than Adolfo Diaz, the new President of Nicaragua. His dedication to the interests of the United States was finally amply rewarded.

2.29 The financial aspects of the Pacts were also carried out. Pact 3 led to a loan Convention between the United States and Nicaragua that was signed June 6, 1911 (Knox-Castrillo Convention).[109] This Convention provided that the security of the loan was to be the customs collections of Nicaragua and that Nicaragua could not alter the existing customs duties for imports or exports (Art. II); the use of the funds from this loan had to be periodically reviewed and reported to the Department of State (Art. III); and that the appointment of the collector of customs had to be approved by the President of the United States (Art. IV).

2.30 The United States Senate did not ratify this Convention but, in spite of this, the Collector-General was appointed. He was Mr. Clifford Ham, an American citizen who had been with the Philippine

[108] Arnold J. Toynbee, *Survey of International Affairs*, 1927, Oxford University Press, London: Humphrey Milford, 1929, p. 484.
[109] Reproduced in *Survey 1909-1932*, op cit, pp. 126-128.

Customs Service. He assumed office in December 1911 and was on duty until June 1928 when he resigned. Mr. Irving Lindberg who had been Deputy Collector-General since 1912 succeeded him.[110]

2.31 The Constituent Assembly approved the Decree establishing the Mixed Claims Commission provided for in Pact 2. It was to be composed of 3 members: 2 Nicaraguans, one freely appointed by the Nicaraguan Government and the other on the recommendation of the State Department, and the third an umpire designated by the State Department.

2.32 The National Bank was incorporated under the laws of Connecticut as the Banco Nacional de Nicaragua and opened for business in August 1912. Its management was under supervision of United States bankers.

2.33 The Pacific Railway of Nicaragua had been constructed from 1878 to 1903. It was taken over by American bankers and incorporated in Maine in June 1912. "The bankers appointed the J. G. White Co. as operating manager of the railway."[111]

8. Canal Treaties of Nicaragua and the United States 1913-1914

2.34 On 8 February 1913, a Treaty (Chamorro-Weitzel) was concluded, giving the United States an option on a canal route in return for a cash payment of US$3,000,000. This Treaty included provisions similar to those commonly called the Platt Amendment that had been inserted in the Treaty of the United States with Cuba of 1903. The Platt Amendment provisions in the Cuban Treaty meant that,

[110] *Survey 1909-1932*, op cit, pp.14-15.
[111] *Survey, 1909-1932*, op cit, pp. 26-27.

> "By its terms, Cuba would not transfer Cuban land to any power other than the United States, Cuba's right to negotiate treaties was limited, rights to a naval base in Cuba (Guantanamo Bay) were ceded to the United States, U.S. intervention in Cuba "for the preservation of Cuban independence" was permitted, and a formal treaty detailing all the foregoing provisions was provided for."[112]

2.35 The United States Senate refused ratification of the Chamorro-Weitzel Treaty because it did not want to accept the responsibilities brought on by the Platt Amendment provisions it contained.[113]

2.36 A new Treaty, which was concluded on 5 August 1914 (Chamorro-Bryan) omitted the explicit Platt Amendment type of provisions.[114] Although those provisions were eliminated, the new Treaty made even more of a mockery of Nicaraguan sovereignty. Article I of the Treaty granted in perpetuity to the United States the proprietary rights necessary and convenient for building a canal "by way of any route over Nicaraguan territory". Article II granted a lease of the Corn Islands; the right to establish a naval base "at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select"; and, furthermore, that these areas "shall be subject exclusively to the laws and sovereign authority of the United States." Even the carrot part of the deal, the three million dollars, carried a big stick: these funds could only be

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[112] *Platt Amendment, Encyclopaedia Britannica Standard Ed. 2001*, CD-ROM, 1994-2001, Publisher Britannica.com Inc.
[113] *Survey 1909-1932*, op cit, p. 29.
[114] The text of this Treaty is reproduced in *Survey 1909-1932*, op cit, pp. 128-130.

disposed of with the approval of "the Secretary of State of the US or by such person as he may designate." (Art. III)

2.37 The Platt Amendment type of provisions were really an inconvenience for the United States since they imposed an obligation of intervention for the preservation of the independence of the State under this type of protectorate. Without these obligations the United States could decide freely when and where to intervene, as in fact she did on many occasions throughout the Caribbean, without being held to defend the protectorate as a *de iure obligation*. Besides, in the present case, the provisions of the Chamorro-Bryan Treaty made any clauses of the Platt Amendment type superfluous. The United States could invoke at any moment and at her own discretion her right to protect her option to build the canal and the territories leased to her.

2.38 In fact, this is exactly the justification given by President Coolidge for the "second occupation of Nicaragua, 1927-1933."[115] In his speech to Congress on 10 January 1927, President Coolidge stated:

> "The proprietary rights of the US in the Nicaraguan canal route, with the necessary implications growing out of it affecting the Panama Canal, together with the obligations flowing from the investments of all classes of our citizens in Nicaragua, place us in a position of peculiar responsibility...It has always been and remains the policy of the US in such circumstances to take the steps that may be necessary for the preservation and protection of the lives, the property, and the interests of its citizens and of this Government itself."[116]

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[115] *Land and Naval Operations in which Marines have participated*, Washington, U.S. Marine Corps, Historical Division, 1948, p. 5.
[116] James W. Gautembein, ed.: *The Evolution of our Latin-American Policy: A Documentary Record*, New York, Columbia University Press, 1950, p. 626.

2.39 One of the consequences of the Chamorro-Bryan Treaty was that it occasioned frictions in the relations of the Central American States. The right the Treaty gave to the United States to build a naval base in the Gulf of Fonseca was seen by El Salvador as a violation of her rights in that historical bay and El Salvador had recourse to the Central American Court of Justice that had been established in the Washington Conferences of 1907. Costa Rica also had recourse to the Court because she considered that the Treaty violated her navigation rights in the San Juan River. The Court decided in favor of the applicants because it considered that the Treaty violated the rights of those States and, furthermore, that it violated express provisions of the Nicaraguan Constitution that prohibited treaties affecting her territory. Consequently, the Court decided that Nicaragua was under the obligation to restore the situation as it was before signing the Treaty.[117]

2.40 The provisions of the Chamorro-Bryan Treaty completed the United States domination of Nicaragua. By the time of this Treaty the United States had control over the finances, customs, mixed claims commission and the railroad of Nicaragua. The presence of the Marines was relatively symbolic in that only a Legation Guard of 130 men remained after crushing the revolution of 1912. But it was a powerful symbol. The Legation Guard was there as a reminder that at any moment many more of their colleagues could be called back in as, in effect, happened after the Civil War of 1926-1927. But, in the meantime, Nicaragua was relatively at peace for the next dozen years. Elections were held in 1916, 1920 and 1924, with the Conservatives winning the Presidency and control of Congress.

[117] See Sec. II of this Chap., Subsec. Part A.

2.41 The Nicaraguan Government inaugurated on 1 January 1925 was the result of an election that had not been controlled by the United States.[118] The elected Government was a coalition of a splinter of the Conservative Party in power since 1910 and the Liberal Party. The President, Mr. Carlos Solorzano, was from the Conservative Party and the Vice-President, Dr. Juan B. Sacasa, from the Liberal Party. The mainstream Conservative candidate that lost the elections was General Chamorro.

2.42 The United States Legation Guard that had been kept in Managua since 1912 was withdrawn from Nicaragua on 4 August 1925.[119] Two months later on 25 October, the Conservative candidate who had lost the elections in 1924 staged a coup d'état and took de facto control of the country as Commander in Chief of the Army. He forced the President to expel from Government all the members of the Liberal Party and to replace them with his supporters. Some months later President Solorzano resigned and General Chamorro, after having been appointed interim President by the Nicaraguan Congress and not receiving recognition from the United States Government, decided to resign. Finally, on 14 November 1926 the Nicaraguan Congress controlled by Chamorro designated Mr. Adolfo Diaz as President of Nicaragua. Diaz had been President of Nicaragua from 1910 to 1917 and had faithfully served the interests

[118] *A Brief History of the Relations Between the United States and Nicaragua 1909-1928*, United States Government Printing Office, 1928, p. 26.
[119] *A Brief History*, op cit, p. 28.

of the United States Government. General Chamorro considered that this special relation of Diaz with the United States would help his cause. Three days after the appointment of Diaz as President, on 17 November, the United States Chargé delivered a note of recognition to the Nicaraguan Minister of Foreign Affairs.[120]

2.43 Diaz did not lose much time in trying to bring his friendship to bear with the United States. On 20 February 1927 he even went beyond the wishes of the United States in proposing "that a an offensive and defensive treaty be negotiated between the US and Nicaragua for the purpose of securing the territorial integrity of Nicaragua and guaranteeing to the US its canal rights."[121] In fact, his proposal amounted to a new version of the Platt Amendment provisions he had wanted and had written into the First Canal Treaty of 1913 that the United States Senate had not ratified as indicated above in paragraph 2.35.

10. 1926-1927 Revolution and the Stimson Agreements

2.44 In the interim, a civil war had started in Nicaragua and the United States marines came back in greater force but did not take part overtly in helping one faction or the other. However, their presence put an end to the advance of what seemed the inevitable victory of the Liberal forces fighting the Government. In view of the chaotic situation, President Coolidge sent his personal representative, former United States Secretary of War General Henry L. Stimson, to

[120] *Papers Relating to the Foreign Relations of the United States 1926*, Vol. II, p. 807.
[121] *Brief History*, op cit, p. 45.

oversee the situation.[122] On his arrival to Nicaragua, Stimson found that all the Parties were ready to accept United States control of the elections and other legal proceedings he proposed. The sticking point of the negotiations was the insistence of the Liberals that President Diaz should resign and an interim President be appointed until elections were held. Diaz was ready to resign but on this point Stimson was adamant. In one communication with the Secretary of State, Stimson notes:

> "I deem retention of Diaz practically necessary for adoption of such constitutional method. Our settlement plan would make President a mere figurehead so far as Executive power is concerned. This has been and will be explained to Liberals. Diaz will accept this limitation of his powers and cheerfully and loyally cooperate with execution of plan. After careful consideration we know no other Nicaraguan whom we could trust to so cooperate."[123]

In his book published some months after the events, Stimson made no secret of his preference for Diaz and his insistence that he should remain in office: Diaz was ready to be a "figurehead".[124]

2.45 Stimson's inflexible position finally bore results and an agreement was reached bringing the civil war to an end in May 1927. Both factions had finally accepted that Díaz continue as President until elections were held the following year. These elections were to be held under the complete control of the United States.[125]

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[122] *Ibid*, op cit, p. 46.
[123] *Papers Relating to the Foreign Relations of the United States 1927*, Vol. III p. 335.
[124] Stimson, op cit, p. 66.
[125] *Papers Relating to the Foreign Relations of the United States 1927*, Vol. III p. 50.

2.46 The May 1927 Agreement was accepted by all but one of the generals fighting under General Moncada, who was the military leader of the Liberal Revolution. This was General Sandino who did not accept the Agreement and the tightening of the economic, political and military control of the United States over Nicaragua. He withdrew with his men to the mountains and waged a guerrilla war against the United States Marines that lasted until the last Marine was evacuated from Nicaragua in 1933. At the height of the war against Sandino in late 1928, there were 5,480 marines and naval forces in Nicaragua.[126] The first aerial bombings of an open city in world history took place in Nicaragua during this period. If we compare the number of forces in Nicaragua and her population of around 700,000 in 1928, at the time the impression is that of an early version of the Vietnam War. All the events that occurred from 1927 to 1933 must be seen in the light of this military occupation. The Nicaraguan Authorities from the President down could not but listen carefully to the "suggestions" of the United States Legation in Managua since they could not be oblivious to the fact that several thousand of the best armed men in the world were backing these suggestions.

2.47 Stimson spelled out the Agreement to the Secretary of State in a telegram dated 5 May 1927. It is an extensive message that might be summed up in these words:

> "...President Diaz proposes the creation by Nicaraguan law of an electoral commission to be controlled by Americans nominated by the President of the United States and offers to turn over to this board the entire police power of the State... He further offers to disband

[126] *Survey 1909-1932*, op cit, p. 107.

his army and to deliver their arms to the custody of the United States."[127]

11. United States Military Control

2.48 The first step in the implementation of the Agreement of 1927 was that both Parties, the Rebel and the Government forces, would be disarmed and their weapons turned over to the United States military forces. United States Admiral Latimer issued a proclamation on 10 May addressed to those who were in possession of weapons:

> "To avoid the regrettable and useless shedding of blood all individuals and leaders of groups, now having in their possession or in hiding serviceable rifles, machine guns or ammunition or who know the location of such munitions as may be hidden, should immediately deliver them to the custody of the nearest detachment of the American forces. Upon such delivery payment of 10 cordobas will be made..."[128]

12. United States Control of the Legislative and Judicial Branches

2.49 The next steps in the implementation of the Agreement involved the revamping of Congress and the Judicial Branch of the Government. The Liberal members of the Supreme Court and Congress who had been ousted by Chamorro were reinstated and their substitutes in turn were ousted. This was done under the instructions of Stimson. In a message sent by Stimson to the rebel leader, General Moncada, on 11 May he informs him:

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[127] *Papers Relating to the Foreign Relations of the United States 1927*, Vol. III pp. 339-342.
[128] *Ibid*, p. 345.

"I have recommended to President Diaz that the Supreme Court be reconstituted by the elimination of the illegal judges placed in that court under Sr. Chamorro...I have already advised that the Congress be reconstituted..."[129]

2.50 The changes in the judiciary went beyond the Supreme Court. It was in fact a complete overhaul of the judicial branch under the supervision of the United States. The United States Minister kept the Secretary of State informed of every detail of this overhaul. This included communications on the way the Supreme Court would decide on those cases that had been already decided by the previous Court and how the appellate courts would be reintegrated. This correspondence runs from 16 June to 29 September. The solution finally found for this revamping of the judicial branch met the approval of the State Department. Acting Secretary of State Carr wired the American Chargé in Managua his opinion on the way things would be settled. In his words to the Chargé: "Solution outlined by you is satisfactory to the Department."[130]

13. Control over Finances

2.51 Next came the control of the finances. A comptroller of customs appointed by the State Department was already in place from 1911 onwards. Customs collections represented approximately 50% of the revenues of the Government but the United States wanted a stricter control and to appoint a comptroller of internal revenue. Even the pliable Diaz resisted this last measure because it would have

[129] *Ibid*, p. 346.
[130] *Ibid*, pp. 389-398.

removed his last token powers in Nicaragua.[131] It was thought best not to insist for the present on this point and that prior to making a final decision an expert would be brought in to make an evaluation. This expert was to be Dr. Cumberland, who since 1923 had been Financial Adviser and Customs Receiver for the Haitian Government. He arrived in Nicaragua in December of 1927 and had presented his report by March of 1928. He found that the financial condition of the Government of Nicaragua was comparatively satisfactory. For this reason the Secretary of State informed the United States Minister in Managua on 19 April 1928 that he saw no urgency in implementing the financial plan because it would cause damage to the image of the United States:

> "A powerful weapon would be placed in the hands of those who criticize us in the US and elsewhere, who would undoubtedly charge that the Government of the US was taking advantage of a so-called military occupation of Nicaragua to impose upon it a permanent economic and financial domination."[132]

2.52 In another message on 28 April 1928, the Secretary of State told the Minister in Managua that official implementation of the plan was not really necessary:

> "We do not feel that it is at all impossible to solve this difficulty if the President will in good faith courageously use all the power at his disposal. A few men designated by General McCoy and appointed by the President of Nicaragua to key positions in the Finance Ministry, the railroad, the National Bank and the revenue service might be all that is required."[133]

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[131] *Ibid*, p. 416.
[132] *Papers Relating to the Foreign Relations of the United States 1928*, Vol. III pp. 533-535.
[133] *Ibid*, pp. 537-539.

2.53 The way this situation was handled brings to light the methods used by the United States to try to hide the hand that had Nicaragua in her grip. Toynbee describes the true nature of United States dominion:

> "In opening up Tropical America economically, the people of the US eschewed the outward visible signs of political control in the shape of 'spheres of influence', 'protectorates', and annexations...Yet, although the US did not paint the political map of Tropical America with her own colours, the undercurrent of events in Tropical America was much the same. In both regions, economic penetration brought political intervention in its train."[134]

14. Establishment and Control of the National Guard

2.54 Another step towards control of Nicaragua was the creation of a National Guard (Guardia Nacional). This was done by means of an Agreement between the United States and Nicaragua establishing the 'Guardia Nacional de Nicaragua , signed 22 December 1927. This Nicaraguan Army was to be trained and commanded by United States Marine officers and the Director-General of the Guardia was to be a United States Marine General.[135]

15. Total control of the 1928, 1930 and 1932 elections

2.55 The most difficult step taken to implement the Stimson Agreements was to spell out the legal framework under which the United States would exercise control of the elections.

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[134] Toynbee, op cit., p. 482.

[135] *Papers Relating to the Foreign Relations of the United States 1927*, Vol. III pp. 433-439.

2.56 The documentary records of the correspondence between the United States Legation in Managua and the Department of State for the first quarter of the year 1928 reflect the enormous pressure put on the Nicaraguan Government in order that the electoral law giving full powers to General McCoy be approved in its original form.[136] The Nicaraguan Congress was still dominated by the Conservatives and they were inflexibly opposed to its enactment. The opposition was based on very logical constitutional grounds that prohibited the appointment of a foreigner as Chairman of the National Board of elections who, furthermore, would have powers of legislation in the implementation of the electoral process. This was the position taken by General Chamorro, leader of the Conservative Party, and the large majority of Deputies who refused to enact the law.

2.57 General McCoy originally wrote the draft that was before the Deputies in English. This law would give him quasi-dictatorial powers over Nicaragua. All suggestions for toning down the draft of electoral law were rejected by the United States. For example, the Nicaraguan Foreign Minister suggested that the translation from English to Spanish presented to the Nicaraguan Congress was imperfect and that an improved version might obtain the approval of the Deputies.[137] Mr. Hughes had already reported that a suggested change was, for example, "if the provisions giving General McCoy authority to put into force measures that would have the force of law

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[136] See *Papers Relating to the Foreign Relations of the United States 1928*, Vol. III pp. 418-486.

[137] Telegram from the Chairman of the American Delegation to the Sixth International Conference of American States (Hughes) to the Secretary of State, reporting a meeting with the Nicaraguan Foreign Minister on January 21, 1928) See *Ibid*, p. 446.

could be changed to read: 'to have full force'..."[138] But the United States was adaman: that the powers of General McCoy had to be spelled out exactly as written.

2.58 The records show the great pressure put on the President in Managua and on the Nicaraguan Foreign Minister who was in Havana attending the Sixth International Conference of American States. The United States Chargé in Managua was also making forceful demands to the members of the Chamber of Deputies. He informed the Secretary of State on 18 January 1928 that he had made it clear to the Deputies "that there must be no diminution of the absolute powers which General McCoy must exercise."[139]

2.59 The control over the President was complete in every detail. The United States Minister in Managua reported on 1 February to the Secretary of State that President Diaz and Chamorro had summoned 50 prominent members of the Conservative Party to a meeting in order to discuss the electoral law. The Minister reports that he told Diaz to cancel the meeting and that Diaz "promised to recall the invitation and instead to confer with the Conservative leaders in small groups and to send them to the Legation."[140]

2.60 There was a strong resistance by the Conservative Party members to the total powers given to McCoy not only because of Constitutional or nationalistic scruples in giving these powers to a foreign general, but also because they felt that the United States was biased and wanted Moncada and the Liberal party to win the elections. This was explicitly mentioned to the Americans on several occasions.

[138] *Ibid*, pp. 438-439 Telegram of January 19, 1928.
[139] *Ibid*, pp. 436-437.
[140] *Ibid*, p. 459.

"Chamorro asserted that his attitude was largely the result of his belief that the Department of State had decided to have Moncada elected President."[141]

2.61 On January 17, 1928 the Minister of Foreign Affairs of Nicaragua, accompanied by the President of the Electoral Board of Nicaragua, visited the Secretary of State in Havana, Cuba. The Memorandum of the meeting prepared by the Assistant Secretary of State, Mr. White, reports that in the course of the meeting the Nicaraguans told the Secretary of State that the impression had been caused in Nicaragua that the United States wanted Moncada and the Liberals to win the elections and "that this impression had perhaps been caused because certain of the marines in Nicaragua had made statements and propaganda in favor of the Liberals."[142] The Chairman of the American Delegation in Havana reported on 8 February that the Minister of Foreign Affairs of Nicaragua had shown him a telegram he had received from President Diaz himself. "It stated that he was doing his best for the electoral law but that the difficulty was that Congress and the public in general feel that the US is supporting not the Liberal Party but General Moncada personally."[143]

2.62 The Secretary of State informed the United States Minister in Managua on 23 February 1928 that he had received the visit of the Nicaraguan Minister in Washington who had brought to his attention news reports from American papers conveying the impression that the American government favored the election of Moncada.

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[141] Conversation with the United States Chargé in Managua as reported by him to the Secretary of State on January 15, *Ibid*, pp. 422-423.
[142] *Ibid*, pp. 431-435 at p. 432.
[143] *Ibid*, p. 464.

Furthermore, that this was the impression given by American officials in Nicaragua whose attitude seemed partial to Moncada.[144]

2.63 The support of the United States for Moncada was also seen in the double standard used in measuring the qualifications of Moncada and Chamorro as candidates to the Presidency. In the case of Chamorro the Department of State made it clear on different occasions since the agreement with Stimson in May of 1927 that his candidature for president would not be approved by the United States. The alleged reason was that he had been de facto President for a few months during 1926. Moncada's fate was different. The Conservatives challenged the admission of his candidacy. One of the 3 members of the National Electoral Board chaired by General McCoy,[145] the Conservative member, presented a statement opposing the acceptance by the Board of General Moncada's nomination on several grounds. The most compelling ground for the challenge, because it had the same basis as the impediment on which Chamorro had been denied the right of being a candidate, was that General Moncada had been head of a revolutionary army that had tried to topple a legitimate Government – the Diaz Government – that had been recognized as legitimate by the United States in November 1926. General McCoy and the Liberal member of the Board decided to maintain Moncada's nomination.[146]

2.64 The other element provoking an inclination to support Moncada was the costly struggle the United States was waging against the rebels.

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[144] *Ibid*, p. 469.
[145] See para. 2.60.
[146] Report of the United States Minister in Managua to the Secretary of State on August 23. *Papers Relating to the Foreign Relations of the United States 1928*, Vol. III pp. 503-504.

The political and military cost of having more than 5,000 United States troops fighting in Nicaragua cannot be overlooked. A well informed observer at the time, the renowned historian Arnold Toynbee, wrote that:

> "...as time passed and the omens began to point to stalemate rather than check-mate, the statesmen at Washington found their acts subjected to a more and more critical and embarrassing scrutiny on the part of public opinion – first and foremost at home, in the second degree in Latin America, and in some degree throughout the world."[147]

If Chamorro or another Conservative leader were to have been elected President of Nicaragua, there could not be any foreseeable end to the fighting on the part of the Liberal rebel leader, General Sandino, and his men. Things might be different if his former boss, the former Liberal rebel leader, General Moncada, were to win the elections. This obvious detail would not have been lost upon the State Department nor to the wily Conservative General Chamorro. It was even believed by many that part of the arrangements made by Mr. Stimson with General Moncada – and the reason why Moncada accepted that Diaz should continue as President until the end of his period – was the guaranty of his being elected President in 1928. The fact is that he won the election in 1928 and the other Liberal leader of the revolution, Dr. Juan B. Sacasa won the next elections in 1932. Both elections were under the complete control of the United States.

2.65 The struggle of the United States against Chamorro was apparent even in details. On 18 February the United States Minister in

[147] Toynbee, 1927, op cit, p. 506.

Managua informed the Secretary of State that the Conservatives were restive and that:

> "In view of this situation we have decided to have the guardia take over the policing of Managua...The Government has shown an inclination to object this step but we shall insist upon it. The present police force is completely dominated by Chamorro."[148]

2.66 This was the reason why the Conservative Deputies opposed to the bitter end the attempts of the State Department to have the Nicaraguan Congress approve the Electoral Law giving absolute power to General McCoy. The State Department minced no words with the Conservatives and openly threatened to take serious action if the Law was not approved. On 17 January 1928 the Acting Secretary of State wired the Chargé in Managua and instructed him to deliver a note to President Diaz notifying him that if the Law was not enacted the State Department would consider it a "breach of faith" and that further delay in the enactment "would compel this Government to consider seriously what other measures it can and should take..."[149] This warning must be understood in the light of the more than 5,000 United States marines then in Nicaragua!

16. Presidential Electoral Decree

2.67 But in spite of the threats, the Chamber of Deputies finally rejected the Electoral Law prepared by General McCoy by a vote of 24 to 18. The Deputies knew its approval would be the death warrant of the Conservative Party. The United States Minister in Nicaragua

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[148] *Papers Relating to the Foreign Relations of the United States 1928*, Vol. III pp. 468-469.
[149] *Ibid*, p. 425.

reported the refusal of the Deputies to the Secretary of State on 13 March.[150] After this defeat of the electoral law, the United States Minister informed President Diaz that he must move to organize the National Board of Elections and that this could be done with a Presidential Decree containing in substance the electoral law prepared by General Mc Coy. The Acting Secretary of State approved this decision but reminded the United States Minister in Nicaragua: "We assume that you will submit the text of the decree for consideration here prior to promulgation."[151] The Decree was signed by President Diaz on 21 March and promulgated in the Gazeta on 26 March. General McCoy took office as Chairman of the National Board of Elections before the Supreme Court of Nicaragua on 20 March.[152]

2.68 The eminent historian, Arnold Toynbee, describes the contents of this Decree in the following terms:

> "On the 21st March Señor Diaz published a presidential decree investing the National Board of Elections-as now constituted under the Electoral Law of the 20th March, 1923, with General McCoy as Chairman-with full and general authority to supervise the elections of 1928; suspending the said Electoral law, and all subsequent laws and decrees relating to elections, in all other respects; and granting the Chairman of the Board extraordinary powers. For instance, he was empowered to require the removal of any of his colleagues or their proxies; to constitute a quorum by his presence alone, at his own discretion; and, also at his own discretion, to declare any action or determination an emergency measure and then pass it, at twenty-four hours 'notice,

[150] *Ibid*, p. 476.
[151] Telegram dated March 15th, *Ibid*, p. 478.
[152] *Ibid*, p. 481.

over his colleagues' heads. No action or decision of the Board was to be valid unless the Chairman concurred, and in case of a tie he was to have a casting vote."[153]

2.69 The powers granted by the Decree to General McCoy were so great that there was even friction with other American officials in Nicaragua. The Secretary of State had to send a message to General McCoy on 21 March informing him that the Guardia Nacional was not under his control and command and remained under "the control and command of the proper officers of the 2nd Brigade, United States Marines".[154]

2.70 General Moncada informed the United States Legation that he would be glad to enter into an agreement with the Conservatives for the supervision by the Unites States of the elections of 1932. This was reported by the United States Minister in Managua to the Secretary of State on 1 October 1928 pointing out that he considered that this request should be granted because; in his words, "Now that we control the National Guard we shall more than ever be subject to well founded criticism if we permit one party to perpetuate itself in power by dishonest elections." He added, as a further reason why the request should be accepted, that "The situation in Nicaragua is different from that in any other Central American countries because the strength of the two parties is so nearly equal and party feeling is so bitter."[155] The Secretary of State responded on 3 October that "The Department would of course be glad to give a most sympathetic answer" but that the United States Minister in Managua

[153] Toynbee, op cit, p. 510.
[154] *Papers Relating to the Foreign Relations of the United States 1928*, Vol. III p. 481
[155] *Ibid*, pp. 505-506.

should not be the intermediary between Moncada and the Conservatives because this might be seen "as indicating a desire on the part of this Government to instigate the Nicaraguan authorities to request continuance of the American occupation for another 4 years." (Emphasis added)[156] This epithet on the American presence in Nicaragua – occupation - was used by Secretary of State Kellogg who was an eminent jurist and became a few years later a Member of the Permanent Court of International Justice. The Nobel Peace prize co-sponsor of the *Briand-Kellogg Pact* was well aware of the words he was using.

17. 1928 Elections

2.71 The elections took place on 4 November 1928. The United States Minister in Managua reported the results to the Secretary of State on 12 November indicating that "The total reported vote was 132,949 and shows a Liberal party majority of 19,471 votes..."[157] The inauguration of Moncada took place on 1 January 1929. The United States Minister reported that same day that "General Beadle, the chief of the Guardia, was responsible for most of the arrangements for the inauguration..."[158] And so General Moncada was elected with the presence of one United States marine for every 24 voters, with the votes counted by American General McCoy and was sworn in office under the protection of United States General Beadle!

[156] *Ibid*, pp. 506-507.
[157] *Ibid*, p. 517.
[158] *Ibid*, p. 522.

2.72 The electoral victory of November 1928 marked the start of Liberal Party rule in Nicaragua that would only end in July 1979 with the overthrow of the Somoza Government. United States Marines controlled the Congressional elections held in November 1930 in exactly the same fashion as the General Election of 1928. Captain Johnson of the United States Navy was President of the National Board of Elections.[159] The total United States personnel in charge of the electoral Mission in the 1930 elections embraced 36 officers and 536 enlisted men and 153 additional marines. This personnel was evacuated shortly after the election.[160] The presence of the Marines in these elections had clearly changed the "near equality" of the two parties in the view of the United States Minister in Managua as expressed in the telegram to the Secretary of State on 1 October 1928 quoted in paragraph 2.70 above.

18. The Special Interests of the United States In Nicaragua

2.73 What were the special interests of the United States in Nicaragua that prompted the prolonged United Sates occupation? President Coolidge spelled out to Congress in his January 1927 speech, quoted above paragraph 2.38, the general interests that the United States was pursuing in the occupation of Nicaragua. The special envoy he sent to Nicaragua, Mr. Stimson, wrote after his return:

> "Nicaragua is also related to this Isthmian policy of the United Stated in a peculiar way not common to its four

[159] *Papers Relating to the Foreign Relations of the United States 1930*, Vol. III, p. 652.

[160] See telegram of 14 November 1930 of the United States Minister to Secretary of State Stimson, *Papers Relating to the Foreign Relations of the United States, 1930*, Vol. III p. 655.

Central American sisters. It contains within its boundaries the transisthmian route, which, by common consent is, next to the Panama route, most feasible for an interoceanic canal. Sooner or later, though not within the lives of this generation or possibly the next, a second canal will be constructed through the isthmus by that route, and this canal when completed will necessarily command the same dominating strategic relation to the safety of the United States as the present one at Panama.

By the Bryan-Chamorro Treaty, ratified in 1916, Nicaragua granted to the United States the permanent and exclusive right to construct such a canal. Any lodgment of a possibly hostile foreign influence upon the territory of Nicaragua would therefore in a double sense be perilous to the safety of the United States."[161]

19. A New Canal through Nicaragua

2.74 Mr. Stimson's prediction about a future canal through Nicaragua became a possibility sooner than even he expected. The roaring twenties were in full swing, the United States economy was booming, international commerce was thriving and the capacity of the Panama Canal seemingly would be surpassed in the near future. The need for a new canal was in the air. The cost was seen as negligible in the euphoria of the twenties and the military and commercial benefits enormous.

2.75 Against this background,

"On March 2, 1929, the Congress of the US passed a joint resolution providing for a new study of interoceanic canal

[161] Stimson, op cit, pp. 113-114.

routes. The resolution, approved by the President on March 4, 1929, expressed special interest in the possibility of the enlargement of the Panama Canal and in the project for a new canal through Nicaragua."[162]

2.76 Fieldwork on the survey of the Nicaraguan route began in August 1929 and was finished before July 1931. The report of the Interoceanic Canal Board, based on this survey, was presented to the United States Congress on 10 December 1931. It indicated that an interoceanic ship canal across Nicaragua was practicable and involved no problems that could not be solved successfully. The 1909-1932 Survey of Relations goes on to say that despite the advantages of such a canal, the recommendation of the Interoceanic Canal Board stated:

"73. The present conditions of world trade, the necessity for economy in expenditure of public funds, and the facts that traffic through the Panama Canal now requires only about 50 per cent of its capacity...lead to the conclusion that no immediate steps must be taken to provide increased facilities for passing water-borne traffic from ocean to ocean."[163]

2.77 The reasons given by the Canal Board can be reduced to one: The Great Depression that began in the United States after the stock market crash of October 1929 and spread to Europe and the industrialized world, drastically reduced international trade and, hence, traffic through the Panama Canal. The undertaking of expensive projects was obviously out of the question. This economic

[162] *Survey 1909-1932*, op. cit. p. 113.
[163] *Ibid*, pp. 113-114.

reality affected the plans of the United States in the Caribbean, and particularly in Nicaragua. With the canal project cancelled or postponed indefinitely and the financial woes in the United States, the interest of Washington in the fate of Nicaragua was drastically reduced. It became only a matter of leaving in power a Government loyal to its interests and of organizing an orderly withdrawal from Nicaragua.

20. The Withdrawal of United States Marines

2.78 The reason for United States withdrawal was not that the country had been pacified. The situation in Nicaragua in 1930 remained basically the same as in 1928 except for the deterioration of the national economy due to the international economic depression. Secretary of State Stimson sent President Moncada, on 24 November 1930, an extensive missive analyzing the situation in Nicaragua. He indicated that there were still 1,500 United States marines in Nicaragua, and that these marines, together with the more than two thousand Guardia Nacional trained and commanded by a United States General and staff of marine officers, had still not been able to control the situation that seemed "as unsettled as it was three years ago."[164]

2.79 Certainly the "unsettled" situation continued. The guerrilla warfare was still raging. But the interest of the United States in Nicaragua had waned. As noted by Toynbee, "At this stage, the policy of the US Government seems to have been to leave this trouble to be dealt

[164] *Papers Relating to the Foreign Relations of the United States 1930*, Vol. III, pp. 683-691, at p. 684.

with by the Nicaraguan National Guard under their US officers."[165] By February 1931, Mr. Stimson, at that time Secretary of State, announced that more marines would be withdrawn. It was only after the elections of 6 November 1932, again won by the Liberals, and again under the control of a United States military officer, Admiral Clark Woodward, who was appointed President of the National Board of Elections, and the coming into office of the new President on 3 January 1933, that United States military officers turned over command of the National Guard to Nicaraguan officers.[166] On 3 January 1933 the Nicaraguan Minister of Foreign Affairs sent a telegram to the Secretary of State informing him: "yesterday the last body stationed in Nicaragua of the US Army left the Republic."[167]

2.80 With the withdrawal of the United States marines the main justification of General Sandino for waging his warfare had ended and shortly after he laid down his arms and started peace negotiations with the new President, Dr. Sacasa. The *Encyclopaedia Britannica* describes these events:

> "The Marines withdrew upon the inauguration of Sacasa, and Sandino submitted to his government. A Nicaraguan National Guard (Guardia Nacional), trained by the U.S. Marines and commanded by General Anastasio Somoza García, was now responsible for maintaining order in the country. In 1934 high-ranking officers led by Somoza met and agreed to the assassination of Sandino. Somoza then deposed Sacasa with the support of factions of both

[165] Toynbee, 1930 Survey, p. 399.
[166] *Papers Relating to the Foreign Relations of the United States 1932*, Vol. V pp. 924-925, Telegram of United States Minister in Managua to the Secretary of State on 2 January 1933.
[167] *Ibid*, p. 925.

Liberals and Conservatives, and in a rigged election he became president on Jan. 1, 1937."[168]

2.81 No marines came back to restore Constitutional Government. After all, the man handpicked by the United States to head the armed forces of Nicaragua, General Somoza, was in charge of Nicaragua and would look after United States interests. Two years later, in 1939, Somoza was invited to Washington and was received by President Roosevelt with all honours. General Somoza and his sons ruled Nicaragua until overthrown in 1979.

PART B

THE CONCLUSION OF THE 1928 TREATY

2.82 As shown in the previous Chapter of the present Memorial, Nicaragua's title over the San Andrés group and the neighbouring islands and cays at the time of independence is firmly established in accordance with the *uti possidetis iuris* principle. Because Colombia was well aware of the legal situation, she took advantage of the U.S. occupation of Nicaragua to extort from her the conclusion of the 1928 Treaty. The various episodes and the surrounding circumstances of this extortion deserve some explanations. This Part will review the negotiations that led to the signature of the Treaty on 24 March 1928 and the events leading to its ratification on 5 May 1930.

[168] History of Nicaragua: The Somoza years, Encyclopaedia Britannica 2001, Standard Edition CD ROM, 1994-2001.

2.83 In its 1930 Report to Congress, the Colombian Ministry of Foreign Affairs points out that in 1922 it studied the possibility of reaching a negotiated solution of the dispute with Nicaragua and concluded that it was convenient to reach a direct agreement with Nicaragua on the basis that "Colombia would renounce any rights over the Mosquitia and the Mangles Islands on condition that Nicaragua would desist of any claims over the other islands, islets and keys of the Archipelago."[169] The Report continues to indicate that the Colombian Minister in Nicaragua, Dr. Manuel Esguerra, was given full powers to negotiate with Nicaragua on that basis and succeeded in concluding the Treaty of 24 March 1928.[170]

2.84 The Report is not entirely correct. The provisions of the 1928 Treaty did not reflect the proposal that Colombia had decided to make to Nicaragua in 1922 as is indicated in the preceding paragraph. The 1928 Treaty expressly excluded the cays of Roncador, Serrana and Quitasueño which was not part of the agreement as foreseen in 1922. For present purposes it must be pointed out that this modification of the original offer by Colombia is significant because it was not made because of any Nicaraguan request. As indicated in the following paragraph, Nicaragua up to 1927 simply had no intention of recognizing the sovereignty of Colombia over the San Andrés

[169] *Informe del Ministro de Relaciones Exteriores al Congreso de 1930*, Imprenta Nacional, Bogotá, 1930, at p. 213. The reference to the "Mosquitia" is to the Mosquito Coast; that is, the Caribbean Coast of Nicaragua. "Mangles" is the Colombian name of the islands known in Nicaragua as Islas del Maíz or Corn Islands. See NM Vol. II Annex 71.

[170] The narrative is contained in *Informe del Ministro de Relaciones Exteriores al Congreso de 1930*, op. cit. pp. 212-213.

Archipelago. The 1928 Treaty excluded these features because the United States was interested in them. This simply highlights the fact that the real negotiators of the Treaty were Colombia and the United States, and that Nicaragua was merely an onlooker awaiting instructions. This aspect of the negotiations will be dealt with in Section III below.

2.85 Before the Revolution of 1926 the Government of Nicaragua had been clearly opposed to the conclusion of any agreement involving the acceptance that the Archipelago of San Andrés was Colombian. As late as 1925 the Nicaraguan Minister of Foreign Affairs of Nicaragua "requested the good offices of the Secretary of State to persuade Colombia to submit to arbitration the question of the ownership of the San Andrés Archipelago".[171] The reply of the Secretary of State was that "The proposal of the Colombian Government, which would recognize the sovereignty of Nicaragua over the Mosquito Coast and the Corn Islands and the sovereignty of Colombia over the San Andrés Archipelago" constituted an arrangement that "would afford an equitable solution of the matter."[172]

2.86 In the report of the United States Chargé in Nicaragua to the Secretary of State after transmitting this message he indicates that the Nicaraguan "Minister, Dr. Urtecho, appeared to be greatly disappointed by Mr. Kellogg's note, and indicated an unwillingness

[171] *Papers Relating to the Foreign Relations of the United States 1925*, Vol. I p. 431.
[172] *Ibid.* pp. 433-434.

to discuss the desirability of terminating the controversy by accepting the proposal made by Colombia."[173]

2.87 After this failed attempt of the United States to have Nicaragua sign a treaty recognizing Colombia's sovereignty over the San Andres Archipelago, no further negotiations took place until after the visit of Mr. Stimson and the agreements he reached with the Nicaraguan Government and the rebels in May 1927.[174] Thus on 28 July 1927, the Untied States Minister in Managua, Mr. Eberhardt, informed the Secretary of State that the:

> "Colombian Minister has just returned to Managua and states that he expected to revive with the Nicaraguan Government the question of the San Andrés Archipelago. I (Eberhardt) have discussed the subject with Diaz who informs me that he favors the settlement proposed by Colombia as set forth in the Department's instruction 212 directed to Secretary Thurston under date of March 25 [21], 1925 and if the Department so desires will instruct Minister for Foreign Affairs to commence preliminary negotiation with Colombian Minister tending toward such settlement."[175]

2.88 As narrated above in paragraphs 2.48-2.72 from this moment up until the ratification of the Treaty in 1930, Nicaragua was under virtually total control of the United States: militarily, economically and politically. The situation now was ripe for obtaining the agreement of Nicaragua to the Treaty. The proposal that had "greatly disappointed" Minister Urtecho – as reported in paragraph 2.86 above – was now perfectly acceptable to President Diaz.

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[173] *Idem.*

[174] See para. 2.44 above.

[175] *Papers Relating to the Foreign Relations of the United States 1927*, Vol. I, pp. 322-323.

2.89 A Memorandum by the Assistant Secretary of State (Mr. White) on 1 August 1927 summarizes a meeting he had with the Colombian Minister to discuss the matter of a treaty with Nicaragua. The meeting was held at Mr. White's request and the following day the Colombian Minister returned with further proposals on how to reach an agreement.[176] These meetings indicate that the real negotiating parties were Colombia and the United States and that Nicaragua was not present and only awaited orders.

2.90 The transcript of the notes sent by the United States Minister in Nicaragua to the Secretary of State from August until November of that year illustrate the subordinate position of Nicaragua. In a note dated 31 August 1927, the United States Minister informs the Secretary of State:

> "It would, however, be appreciated by both President Diaz and this Legation if the Department would indicate whether a settlement along the lines proposed by the Department in its instruction No. 212 of March 25 [21], 1925, still seems advisable to the Department, or what, if any, additional representations and points might be brought up in negotiations tending toward the settlement of this old question."[177]

2.91 There are more notes from the United States Minister in Managua informing the Department of State that the President of Nicaragua was awaiting instructions from Washington, although, of course, the diplomatic language reads "The President asked me today to ascertain when the Department would be ready to express an opinion regarding the San Andres Archipelago."[178] And so it went on for the

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[176] *Ibid*, pp. 324-328.
[177] *Ibid*, p.329.
[178] Note of 4 October 1927, *Ibid*, p. 330.

rest of the year of 1927.[179] At one point the Secretary of State informs the Chargé in Nicaragua "that it has been necessary to consult another Department in connection with this question and your instructions have been delayed pending receipt of this reply."[180] We can only speculate on what other interests of the United States were at play in the context of these supposedly good offices they were conducting in the interests of two Latin American countries.

2.92 Finally, the United States Department gave the green light to proceed along the lines proposed by Colombia. The United States Minister in Nicaragua informed the Secretary of State on 4 February 1928 that he had transmitted the views of the Department of State to the President of Nicaragua. This transmission was done in a most illuminating fashion. The report of the Minister states that:

> "At the request of the Colombian Minister I called upon the President with him yesterday and repeated what I had already told the President about the Department's viewing with favor a settlement along the lines which Colombia had proposed. The President said that he would be very glad to have the matter settled in this way..."[181]

Thus, in order to complete the bilateral negotiations Colombia was conducting with the United States it was not only necessary to "inform" the President of Nicaragua of the views of the State Department but it was necessary to do so in the company of the Colombian Minister!

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[179] *Ibid*, pp. 329-331.
[180] *Ibid*, p. 330.
[181] *Papers Relating to the Foreign Relations of the United States 1928*, Vol. I p. 701.

2.93 On 23 March 1928, one day before the signature of the Treaty, the Secretary of State informed the United States emissary in Managua that:

> "As this treaty recognizes (Nicaraguan) sovereignty over Great and Little Corn Islands, which were leased to the US for a term of ninety-nine years by Nicaragua in the Convention signed at Washington on August 5, 1914, the Department feels that it would be a distinct advantage to have this proposed treaty concluded."[182]

2.94 Public opinion in Nicaragua was so averse to the content of this Treaty that the United States Minister in Nicaragua informed the Secretary of State on 27 March that:

> "an effort had been made to negotiate the Treaty before the return from Havana of Dr. Cuadra Pasos (the Foreign Minister), in order that he might avoid responsibility for relinquishing Nicaragua's claims to the San Andres Archipelago..."

For this reason the Treaty bears the name of his Deputy Barcenas Meneses who signed the Treaty on behalf of Nicaragua. Furthermore, the United States envoy informs that the "Nicaraguan Government has desired that the signature of this treaty be kept absolutely secret."[183] The Treaty was eventually made public on 22 September 1928.[184]

2.95 The opposition from all quarters to the Treaty becomes clear in a telegram of 14 September 1928 from the United States Minister in Managua to the Secretary of State in which he communicates the

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[182] *Ibid*, p. 702.
[183] *Idem*.
[184] *Papers Relating to the Foreign Relations of the United States 1928*, Vol. I p. 701., p. 705.

request of President Diaz that the State Department make known that the Treaty with Colombia had been entered into with the blessing of Washington. The opinion of the Minister was that "It would seem only fair to comply with his request as such action will save him, to some extent, from the bitter political attacks he will be subjected to [sic] for acceding to the Department's suggestion that Colombia's proposal be accepted." (Emphasis added) He further informed that the Legation had discussed this with the Liberal candidate, General Moncada, and he had "promised to use his influence to moderate the criticism of the Liberal press."[185]

2.96 It was not coincidental that this Treaty was signed a few days after the United States had backed President Diaz into a corner and made him sign the Electoral Decree of 21 March 1928 giving enormous powers to General McCoy (see para. 2.68 above). Neither was it coincidental that the Electoral Decree of 21 March 1928 and the Barcenas-Esguerra Treaty of 24 March 1928 were both signed in clear violation of the Nicaraguan Constitution.[186] The reality was that both the legal order of Nicaragua and her institutions were at that time subject to the will of the United States Government.

2. Ratification of the 1928 Treaty

2.97 The United States was very anxious for the Treaty to be promptly ratified. The Secretary of State does not leave the reasons for this interest in doubt. On 2 February 1929 he informed his envoy in Managua, Mr. Hanna, that

[185] *Ibid*, p. 704.
[186] See below Sec. II of this Chap., Subsec. Part A.

> "The Government of the US has more that an academic interest in this adjustment, since it involves Great and Little Corn Islands, leased to the US by Nicaragua in the convention of 1914, and therefore the Government of the US would be much concerned if the treaty...should fail."[187]

2.98 Some months later, on 7 October 1929, the Secretary of State warned Mr. Hanna that:

> "In any conversation you may hold on this subject, it is desired that you shall refrain from discussing the treaty arrangements affecting the Corn Islands to which this Government is a party, although you should, of course, make it clear that the government of the United States has no ulterior motive for its interest in the ratification of the Treaty..."[188]

2.99 The pressure for ratification was so great that the United States Minister in Colombia informed the Secretary of State on 10 September 1929 that the Congress of Colombia had already ratified the Treaty and that the Colombian Foreign Minister wanted United States "good offices" in order to obtain its ratification by the Nicaraguan Congress at its approaching December sessions. Furthermore, the United States Minister goes on to "respectfully suggest" to his superior "that the Legation at Managua be authorized to exert its good offices in the premises."[189] (Emphasis added) This in effect meant that the Legation at Managua was going to "exert its good offices" in the "premises" of the Nicaraguan Congress!

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[187] *Papers Relating to the Foreign Relations of the United States 1929*, Vol. I p. 934.
[188] *Ibid*, p. 937.
[189] *Ibid*, p. 935.

2.100 But, after all, the request of the United States Minister in Colombia was only natural. He knew the Nicaraguan Congress was composed of members who had either been put in office by Mr. Stimson in 1927, or had been put in office in the elections of 1928 controlled by the United States and all wanted to be returned to office in the 1930 elections that would also be under the total control of the United States. Besides, there were several thousand marines to back his good offices.

2.101 For this reason, and not withstanding the fact that this Treaty was "personally opposed" by President Moncada[190] and general public opinion[191], the effect of the exertions of the American Legation "in the premises" resulted in its discussion in the Nicaraguan Congress with the resulting approval of the Treaty by the Chamber of Deputies and the Senate on 6 March 1930.[192]

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[190] *Ibid*, p. 934.
[191] *Ibid*, p. 936.
[192] Gazeta N. 98, of 7 May 1930. See NM Vol. II Annexes 80 and 19.

Section II

The Invalidity of the 1928 Treaty

2.102 The "Treaty" of 24 March 1928 concerning Territorial Questions at Issue between Colombia and Nicaragua is marred by several defects that make it null and void as Nicaragua formally declared on 4 February 1980[193]:

- it was concluded in manifest violation of the Nicaraguan Constitution of 1911 that was in force in 1928 (A);
- the Nicaraguan Government at that time was deprived of its international capacity since it could not freely express its consent to be bound by international treaties (B).

PART A. THE 1928 TREATY WAS CONCLUDED IN MANIFEST VIOLATION OF THE NICARAGUAN CONSTITUTION THEN IN FORCE

2.103 At the time of the conclusion of the 1928 Treaty, the Constitution in force in Nicaragua was that of 11 December 1911, which remained in force until 1939[194]. Articles 2 and 3 of the Constitution of 1911 read thus:

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[193] See Declaration concerning the islands of San Andrés, Providencia and Surrounding Territories and the White Paper of that same date. See NM Vol. II Annex 73.

[194] The Constitution of 1939 maintained practically the same principles.

Article 2

"Sovereignty is one, inalienable and irrevocable, and essentially resides in the people, from whom the officials established by the Constitution and the laws derive their powers. Consequently, treaties may not be reached that oppose the independence and integrity of the nation or that in some way affect her sovereignty, except for those that promote union with one or more of the Republics of Central America".

Article 3

"Public officials only enjoy those powers expressly granted them by Law. Any action of theirs that exceeds these is null."

2.104 Nicaragua's acknowledgment in Article I of the Bárcenas-Esguerra Treaty of Colombian sovereignty over the San Andrés archipelago contravened the integrity of the nation and affected her sovereignty.

2.105 It is true that the Constitution of Nicaragua did not expressly state that the San Andrés archipelago was part of national territory. However, as shown in Chapter I above (paras. 1.37-1.38), this position had constantly been upheld since Colombia first asserted her claim over the islands. In addition, prior to independence, the Audience of Guatemala maintained its jurisdiction against the claims of the Audience of Nueva Granada. The 1850 Treaty in which Spain

acknowledged Nicaragua's independence also included adjacent islands.

2.106 One episode is particularly worthy of notice in this respect. As late as 4 May 1928, that is shortly after the signature of the Bárcenas-Esguerra Treaty, but before this fact was made known to the public,[195] the Nicaraguan Supreme Court of Justice denied a Colombian request for the extradition of a person, Mr. Luis Ortíz, who had committed a crime on the island of San Andrés. The Court judged that:

> "Colombia, in her request of the extradition of Ortíz, lacks the necessary and fundamental basis which is the right of sovereignty over the area where the crime was committed, and she does not even have the temporary interim possession authorized by Article VII of the Treaty of 1825 which it had until the cession of Panama".

2.107 As a consequence, the Court considered that to accept the extradition "would imply an attack on the very territorial sovereignty of the Republic" and

> "considered appropriate that the judicial procedures against Ortiz, whichever the Government whose interests had been damaged by him, should be continued by the appropriate Nicaraguan Judge, who is the District Criminal Judge of Bluefields, to whom the proceedings would be sent."[196]

2.108 This ruling clearly established that in conformity with the Nicaraguan legal system of the period, she had sovereignty over San Andrés at the time of the signing of the Treaty. Therefore, said

[195] See Sec. I, para. 2.94.
[196] *Boletin Oficial de la Gaceta*, n° 433, 31 May 1930, pp. 6324-6328.

Treaty clearly "opposes ... the integrity of the nation" and "affect(s) her sovereignty" and consequently could not be concluded save if the Constitution itself was amended, which was not the case.

2.109 The Judgment by the Central American Court of Justice[197] of 9 March 1917, which has been amply cited by the Chamber of the International Court of Justice in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Nicaragua intervening),[198] is of relevance.

2.110 The case before the Central American Court was initiated by El Salvador against Nicaragua *inter alia* because the latter, through the Chamorro-Bryan Treaty of 5 August 1914,[199] had violated her own Constitutional limitation upon the disposal of her territory in violation of Article II of the Treaty of Peace and Amity entered into by the republics of Central America that declared that "every disposition or measure that may tend to alter the constitutional organization in any of them is to be deemed a MENACE to the peace of said Republics."[200] The Court found that,

> "The Government of Nicaragua, in infringing a constitutional standard – such as that which requires the maintenance of territorial integrity – has consummated an act that menaces the Republic of El Salvador, which is

[197] The Court was established by the five Central American Republics in the additional Convention to the General Convention of the Central American Peace Conference, Washington, 20 December 1907. For a contemporary note on the Court, see Hudson, M.O., *The Central American Court of Justice*, (1932) 26 *A.J.I.L.* 759.

[198] See *e.g.*: *ICJ Report 1992*, p. 557, para. 330; and pp. 589- 601, para. 387-403.

[199] See Sec. I, para. 2.36 and para. 2.39.

[200] Text of Article II in *A.J.I.L.* 1917, p. 650 at p. 725.

> interested and obligated by the Treaties of Washington to maintain the prestige of the public institutions of Central America."[201]

2.111 The case was well known in the region and Colombia could not have been unaware of it and certainly not the United States. This precedent should therefore have alerted her, all the more since the rights in question under the Chamorro-Bryan Treaty were less detrimental to Nicaragua's sovereignty and territorial integrity, in that they were leases of territory, than those abandoned in the Bárcenas-Esguerra Treaty that permanently disposed of part of her territory.

2.112 According to Article 46 of the 1969 Vienna Convention on the Law of Treaties concerning "Provisions of internal law regarding competence to conclude treaties":

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> "2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith".

[201] *A.J.I.L.* 1917, p. 650 at p.726.

2.113 These provisions reflect the

> "well established ... rule of international law that the validity of a treaty may be open to question if it has been concluded in violation of the constitutional laws of one of the states party to it since the state's organs and representatives must have exceeded their powers in concluding such a treaty."[202]

2.114 In the case of the Bárcenas-Esguerra Treaty it is clear that the Nicaraguan officials who concluded the Treaty violated Article 2 of the Constitution since the acknowledgement of Colombian sovereignty over the San Andrés archipelago was contrary to the integrity of the nation and affected her sovereignty. The consequence is that the consent of Nicaragua to be bound by the Treaty was not only null according to Article 3 of the Constitution, but also constituted a flaw of consent which can be invoked at the international level as provided for in general international law as reflected in Article 46 of the Convention on the Law of Treaties with the result that the treaty is internationally invalid.

2.115 In the present case, the requirements referred to in paragraph 2 of Article 46 are fulfilled:

-the violation concerned "a rule of internal law of fundamental importance", included in the Constitution itself, a widely publicized document which expressly warned that any breach of this type would be considered a nullity;

- it was "manifest" and should have been "objectively evident to any State conducting itself ... in accordance with the normal practice and in good faith" since the violation was not that of an obscure law

[202] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, ninth* edition, Longman, London, p. 1285, para. 636; see also p. 1288.

requiring extensive research to find, nor of a provision that is difficult to interpret; the specific rule violated does not require any kind of interpretation. After the judgement of the Central American Court of Justice ignorance of this Constitutional limitation of the Nicaraguan Government could not be alleged by anyone in the Americas.

2.116 It is worth noting in this respect that Colombia herself believes that any shortcoming or violation of a constitutional provision regarding the steps to be carried out in enacting a law approving a Treaty, nullifies such a law and, for all purposes, nullifies the ratification of that law by the Government.

2.117 Thus, on 14 September 1979, Colombia and the United States signed an Extradition Treaty allowing for the extradition of Colombian nationals. This Treaty was approved by the Colombian Congress on 14 October 1980 and was sent to the President of the Republic for his approval and enactment into law. It was, however, approved not by the President, but by Minister Germán Zea to whom President Turbay of Colombia, absent for a 3-day official visit abroad, had delegated the exercise of "constitutional functions" during his absence as required by article 128 of the Constitution. For its part, the United States Senate quickly approved the Treaty, and it entered into effect on 4 March 1982. However, the Supreme Court of Colombia on 12 December 1986 ruled that Law 27, approving the Treaty, could not be considered valid "in as much as it was not constitutionally approved by the President of the Republic."[203]

2.118 In view of this Ruling, the then Colombian President Don Virgilio Barco felt the Ruling meant that presidential approval was needed for Law 27 and he proceeded to approve it again and publish it as

[203] 27 *ILM* 492 (1988) at p. 495.

Law 68 of 1986. Immediately, the constitutionality of this new Law was questioned on the basis that the President had approved a non-existent law since the Ruling of the Court had left Law 27 as null and void. The Supreme Court ruled that this new law was unconstitutional on 25 June 1987.[204]

2.119 Similarly, as noted by Professor Antonio Remiro Brotons,

> "on 23 October of 1992 the Colombian Council of State annulled the diplomatic note of 22 November 1952 in which the Minister of Foreign Affairs of that country, Mr. Uribe Holguin, recognized the Venezuelan nature of the archipelago (Los Monjes), claiming that in doing so the minister had gone beyond his powers".[205]

2.120 It appears therefore that even mistakes based on abstruse interpretations of the Colombian Constitution itself lead to the nullification of the ratification given by the Executive for a treaty.

2.121 Applying the same test to the "ratification" of the 1928 Treaty by the Nicaraguan Congress, it can only be concluded that the approval of the Congress was in manifest violation of the constitutional provisions then in force in Nicaragua and that, therefore, it was invalid *ab initio* and has never entered into force.

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[204] Text *Ibid* at p. 498.

[205] "*Problemas de Fronteras en Iberoamericana*", in La Escuela de Salamanca y el Derecho Internacional en America, ed. Araceli Mangas, Salamanca, 1993, p. 132.

PART B. THE NICARAGUAN GOVERNMENT WAS DEPRIVED OF ITS INTERNATIONAL CAPACITY DURING THE PERTINENT PERIOD SINCE IT COULD NOT FREELY EXPRESS ITS CONSENT TO BE BOUND BY INTERNATIONAL TREATIES

2.122 Colombia ought to have been all the more sensitive to a strict compliance with Nicaraguan constitutional requirements in that it was well known by the Colombian authorities that Nicaragua was at the time under occupation by the United States.[206]

2.123 According to the carefully drafted Article 52 of the 1969 Vienna Convention on the Law of Treaties:

> "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".

2.124 There can be no doubt that, given the circumstances in which it was concluded, the Bárcenas-Esguerra Treaty would be considered unquestionably void *ab initio* had it been concluded after the entry into force of the Charter. However, the 1928 Treaty "must be appreciated in the light of the law contemporary with it"[207] and that Law as expressed in the 1969 Convention has no retroactive effect.

2.125 However, this is not the end of the question.

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[206] The *occupation* of Nicaragua by the United States was acknowledged by the U.S. Government. See above, Sec. I, paras. 2.38 and 2.70.

[207] P.C.A., Max Huber's Arbitral Award of 4 April 1928, Island of Palmas, RIAA, Vol. II, p. 845.

2.126 Indeed, the Charter was not yet in force, but the Covenant of the League of Nations was, and 1928 was the year when the Briand/Kellogg Pact was signed.[208] And, as the International Law Commission put it in the commentary of the corresponding provision in its Draft Articles on the Law of Treaties:

> "With the Covenant and the Pact of Paris there began to develop a strong body of opinion which held that such treaties [which were brought about by the threat or the use of force] should no longer be recognized as valid."[209]

2.127 It must be noted that this trend was especially marked in the Americas, where the Sixth Conference of American States had just adopted, on 18 February 1928, two resolutions condemning the war of aggression and the war as an instrument of national policy in their mutual relations.[210] And while "[a] resolution presented to the Conference, declaring that no state had the right to intervene in the internal affairs of another was withdrawn in the face of firm American opposition",[211] based on a claim to a right of so-called "humanitarian intervention" to protect the lives and property of nationals, Article 8 of the celebrated Montevideo Convention on the Rights and Duties of States declares in firm terms that:

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[208] The cosponsor of this Pact was Mr. Frank Kellogg, Secretary of State of the United States when these events were taking place in Nicaragua. See above Sec. I, para. 2.70.

[209] Commentary of draft Article 49, *ILC Yearbook* 1966, Vol. II, p. 246, para. (1). See also: H. Lauterpacht, Report on the Law of Treaties, A/CN.4/63, *ILC Yearbook* 1953, p. 147, comment of draft Article 12 ("Absence of Compulsion"), para. 1 and 2, and ILC Report in *ILC Yearbook* 1963, Vol. II, commentary of draft Art. 36, p. 197, para. (1).

[210] See Ian Brownlie, *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1963, pp. 73-74.

[211] *Ibid.*, p. 74.

> "No State has the right to intervene in the internal or external affairs of another."[212]

This statement was seen as declaratory of the then existing law.

2.128 This has been clearly acknowledged "in the teachings of the most qualified publicists" in Latin America at the time. Thus, in his course at The Hague Academy in 1930, Ambassador J.M. Yepes, then the President of the Board of Legal Advisers of the Minister of Foreign Affairs of Colombia, wrote: "le Nouveau Monde a toujours été unanime à condamner la guerre (...) comme contraire à la morale internationale".[213] This same author also suggested that the principle of non-intervention

> "est comme l'épine dorsale du droit international au Nouveau Monde. Depuis le commencement de leur vie indépendante, toutes les Républiques américaines ont proclamé leur droit à se développer librement, sans contrôle ni intervention d'aucune autre puissance. La doctrine de Monroë n'était, au fond, que la proclamation solennelle du principe de non-intervention".[214]

In 1925, the American Institute of International Law adopted the Draft on the "Fundamental Rights on the American Continent" prepared by the Chilean, Alejandro Alvarez, who later became a Judge in this Court. According to this text:

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[212] See also the Declaration of Principles adopted in Buenos Aires on 23 December 1936 by the Inter-American Conference for the Maintenance of Peace; the Conference also adopted that same day an Additional Protocol relative to Non-Intervention (see *ibid.*, pp. 97-99).

[213] "La contribution de l'Amérique latine au développement du droit international public et privé", 32 *Recueil des cours*, 1930-II, p.743; see also p. 744: the very idea to outlaw war may "être revendiqué par l'Amérique latine comme une de ses contributions les plus importantes au progrès du droit des gens".

[214] *Ibid.*, p. 746.

"un État extra-continental ne peut ni directement ni indirectement (...) occuper même temporairement un territoire d'un État américain ...

"Les États d'Amérique ont toute liberté pour conduire leurs affaires intérieures et extérieures sous la forme qu'ils jugent convenable. Aucun État ne pourra donc intervenir dans les affaires intérieures et extérieures d'un autre État américain contre sa volonté. La seule ingérence qui pourra y être exercée sera une ingérence amiable et de conciliation sans aucun caractère de coercition."[215]

2.129 Nicaragua herself has forcefully maintained before the Court that the principle of non-intervention in the Americas precedes the Charters of the United Nations and of the Organization of American States. This was maintained by Nicaragua in a context in which it would have sufficed to simply invoke these last Charters without need of proving that this principle had a special significance in the Americas, long before they came into existence.[216]

2.130 It must also be kept in mind that both the prohibition of the use of force and of intervention in the internal affairs of States are peremptory norms of general international law within the meaning of Article 53 of the Vienna Convention on the Law of Treaties (*jus cogens*).[217] Therefore, even admitting that these rules were not of a peremptory nature at the time, Article 64 of the Vienna Convention

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[215] Alvarez (A.), *Le nouveau droit international public et sa codification en Amérique*, Paris, Librairie Arthur Rousseau, 1924, p.6.

[216] I.C.J. *Pleadings, Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Vol. IV, p. 86 and Vol. V, p. 426.

[217] See *e.g.*: *ILC*, commentary of draft Article 50 of the 1966 Draft Articles on the Law of Treaties, *ILC Yearbook*, vol. II, p. 248, para. (3) of the commentary.

would apply and the Treaty must be deemed as having become void and having terminated. Article 64 states,

> "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

2.131 Moreover and in any case, the capacity of concluding a treaty and of expressing consent to be bound lies in statehood.[218] "However, a state possesses this capacity only insofar as it is sovereign."[219] As the Permanent Court made clear in the *Wimbledon* case: "the right of entering into international engagements is an attribute of State sovereignty".[220] Therefore, "nullity is a consequence to be implied from an act done without capacity".[221] Moreover, in defining a treaty as an "agreement concluded between States" (Article 2, paragraph 1.(a)), the Vienna Convention makes implicit the need of "the existence of the necessary capacity, so that its absence deprives the resulting instrument of its character as a 'treaty'."[222]

2.132 As has been explained in the previous Section of this Chapter, the situation of Nicaragua at the time of the signing and ratification of the Bárcenas-Esguerra Treaty was that her territory was under the military occupation and the *de facto* financial and political control of the United States. The following facts, for example, are irrefutable and based directly on documents made public by the State Department of the United States and detailed above in Section I, paragraphs 2.41-2.81:

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[218] See Article 6 of the 1969 Vienna Convention.
[219] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, ninth edition*, Longman, London, 1992, p. 1217, para. 595.
[220] Judgment of 17 August 1923, Series A, N° 1, p. 25.
[221] Sir Robert Jennings and Sir Arthur Watts, *op. cit.*, p. 1219, fn. 14.
[222] *Ibid.*

- there were more than 5000 United States marines occupying Nicaragua at the time the Treaty was concluded;[223]
- the chief of the National Guard of Nicaragua was a United States General and the officers were United States marines;
- the elections were run under the absolute control of the United States marines. The President of Nicaragua was forced to bypass Congress and dictate an unconstitutional Executive Decree giving absolute powers over the elections to the United States marines. This unconstitutional Decree was dictated on 21 March 1928 three days before the conclusion of the also unconstitutional Bárcenas-Esguerra Treaty of 24 March 1928;[224]
- customs revenues were collected by an officer appointed by the State Department;[225]
- finances were controlled by persons designated *de facto* by United States General McCoy;[226] and
- the only Bank and the only railroad in Nicaragua were under the control of persons appointed with the approval of the State Department.[227]

2.133 The control over Nicaragua was not based on a Treaty and it was not always overt but in many cases *sub rosa*. Section I, paragraph 2.51 above, transcribes a communication between the Secretary of State of the United States and his Minister in Managua. The Secretary of State tells him in very clear terms that it was not convenient at the international level for the United States to be seen imposing tighter financial controls in Nicaragua, especially because an American

[223] See above Sec. I, para. 2.46.
[224] See above Sec. I, paras. 2.67 and 2.68.
[225] See above Sec. I, para. 2.51.
[226] See above Sec. I, para. 2.51.
[227] See above Sec. I, para. 2.52.

expert appointed by the State Department had indicated that the finances were not doing badly, but that this could be achieved surreptitiously:

> "A few men designated by General McCoy and appointed by the President of Nicaragua to key positions in the Finance Ministry, the railroad, the National Bank and the revenue service might be all that is required."

2.134 Therefore, while Nicaragua kept the appearance of a certain amount of sovereignty, the real power resided in the hands of the Unites States. This did not prevent her from concluding treaties. However, the circumstances prevented Nicaragua from concluding treaties that ran contrary to the interests of the United States as well as prevented her from rejecting the conclusion of treaties that the United States demanded her to conclude. The capacity of Nicaragua relating to undertakings of treaty commitments must be assessed within this specialized political context.

2.135 In the present case, as explained above,[228] the United States was interested in having Nicaragua accede to Colombian claims over the San Andrés Archipelago in order to clear all obstacles for cutting a Canal through Nicaragua and using the lease on the Corn (Maíz) Islands. The United States interest also arose from her desire to improve relations with Colombia, seriously damaged by the United States having brought about the independence of Panama in 1903, following Colombia's rejection of the Bidlack-Mallarino Treaty providing for the construction of an inter-oceanic canal through the

[228] See above Introduction, para. 13 and Sec. I, paras. 2.97 and 2.98.

Panamanian isthmus. Moreover, in 1914, the United States and Colombia had signed the Urrutia-Thompson Treaty by which Colombia acknowledged the independence of Panama in exchange for compensation in the sum of $ 25,000,000.00. However, this arrangement was not well received in Colombia (as is witnessed by the fact that the said Treaty was not ratified until 1922). Because of this, the United States was still concerned about improving relations with that country, which led her to pressure Nicaragua to accede to the Colombian claims over the San Andrés archipelago.

2.136 The situation under which the Treaty was signed in 1928 and ratified in 1930 clearly shows that this was an instrument that was really negotiated between Colombia and the United States and imposed on Nicaragua and her unwilling population (see paragraphs 2.150-2.151) The documents cited above in Section I, paragraphs 2.83-2.101 leave no doubt that it was only after the more pervasive occupation of the United States began in 1927, that the traditional policy of Nicaragua changed and she agreed to conclude the 1928 Treaty.

2.137 The dispute with Colombia was not the only territorial dispute of Nicaragua. She had a more politically tense and delicate dispute with neighbouring Honduras that involved more than 30,000 square kilometres of territory. The United States had no interests involved in this area and hence avoided involving herself in anyway similar to her involvement in bringing about the Barcenas-Esguerra Treaty of 1928. The Nicaraguan dispute with Honduras had to wait 30 more years for solution by the Court in 1960.

2.138 Therefore, whether it is viewed as imposed through coercion or as concluded by an incapacitated Administration, the treaty of 1928 cannot be considered a validly concluded Treaty. One of the signatories was not in a position to express her consent to be bound freely – and did not do so.

Section III

Content and Juridical Analysis of the 1928 Treaty

2.139 The present Section analyses the Bárcenas-Esguerra Treaty of 1928 under the assumption, which Nicaragua does not accept, that the Treaty was validly concluded and is in force. Sub section A will discuss the intention and meaning of the exclusion made in the Treaty of the cays of Serrana, Roncador and Quitasueño. Sub section B will explain the origin, intention and meaning of the condition under which the Nicaraguan Senate ratified the Treaty.

A. Exclusion of Certain Insular Features: Roncador, Serrana, Quitasueño

1. Introduction

2.140 In the first paragraph of Article 1 of the Bárcenas-Esguerra Treaty, Nicaragua acknowledged the sovereignty of the Republic of Colombia over the Archipelago of San Andrés. The Treaty did not provide a precise definition of the Archipelago of San Andrés.

2.141 According to the report by Governor O'Neille, issued at the beginning of the 19th Century when he was trying to have the Islands of the Archipelago annexed to the Viceroyalty of Santa Fe (Colombia),[229] the islands are "five in number, to wit: San Andrés, Providencia, Santa Catalina, San Luis of Mangle Grande, [or] Alto

[229] See *supra* Chap. I.

or Corn Island, and Mangle Chico, surrounded by several islets and cays of the same type."[230]

2.142 The Nicaraguan Congress, in approving the ratification of the Treaty in 1930 clarified – and this was accepted by Colombia in the exchange of ratifications – that the Archipelago of San Andrés mentioned in the first clause of the Treaty did not extend west of Meridian 82 of Greenwich.[231]

2.143 There was no exact definition of the terminal points to the North and South of that line of attribution of islands and other insular features, but there is no possible argument to support the view that cays such as Roncador, Serrana, Serranilla and Bajo Nuevo or the Quitasueño Bank now form, or may have formed, part of the so-called "Archipelago of San Andrés".

2.144 In any case, the second paragraph of Article I of the Bárcenas-Esguerra Treaty explicitly excluded from its scope of application Roncador, Quitasueño and Serrana, under the *de facto* possession of the United States, and no mention was made of Serranilla or of Bajo Nuevo, as Colombia was not at that time laying claim over these features.

2.145 The exclusion of these features from the Treaty did not involve a renunciation by Nicaragua of her title to them.

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[230] Reproduced in the Colombian Note of 24 June 1918 (Deposited with the Registry, Doc. N. 3).
[231] See *infra* Chap. II, Subsection B of this Section.

2. The Origin of the United State's claims: the Guano Islands Act (1856) and its application to certain cays and banks

2.146 The Guano Islands Act enacted by the United States Congress on 18 August 1856[232] conceded to the citizens of the United States authority to occupy and claim uninhabited islands "not within the lawful jurisdiction of any other government" where guano deposits were found. At the discretion of the President these islands could be considered as "pertaining to the United States," at least as long as they had guano. Its purpose, more than promoting the territorial expansion of the United States, was to guarantee the supply of a cheap fertilizer to the farmers of the Union.[233] The occupation of uninhabited islands and their appropriation by the United States in accordance with the Guano Islands Act clashed directly with the Latin American principle of *uti possidetis iuris* and the absence of *terrae nullius* in the territorial sphere controlled by the Spanish Crown.

2.147 According to the Guano Islands Act, the State Department issued certificates of fulfillment of the conditions imposed by the law in favor of W. Jennet for "Serrana and adjacent keys" in 1868, for Roncador and Quitasueño in 1869 and soon thereafter for Serranilla,

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[232] 48 U. S. C. 1411-1419.

[233] See the series of volumes under the title *Miscellaneous Letters relating to Guano Islands*, in State Department Archives or the 976-page study by the Office of the Legal Adviser of the State Department in 1932 under the title *Sovereignty of Islands Claimed under the Guano Act and of the Northwestern Hawaiian Islands, Midway and Wake*. J. B. Moore, *A Digest of International Law*, Washington D.C., 1908, Vol. I, pp. 556-580, provides information on the history of the Guano islands as of 1856; G. H. Hackworth, *Digest of International Law*, Vol. I, Washington, 1940, pp. 502-524.

with the Treasury Department considering them on the list of guano islands published in 1871 "as appertaining to the United States."[234]

2.148 Nevertheless, on 25 February (Serrana and Quitasueño) and 5 June (Roncador) 1919, outside of the context of guano exploitation, the United States President W. Wilson issued decrees reaffirming the appropriation of the cays and reserving them in order to establish navigational aids on them.[235]

3. The situation in 1928: Article I, second paragraph, of the Bárcenas-Esguerra Treaty; exchange of notes between Colombia-United States on 10 April 1928

2.149 According to the second paragraph of Article I of the *Bárcenas-Esguerra Treaty*: "The present Treaty does not apply to the reefs of Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America." An exchange of notes between the Governments of these countries, on 10 April 1928, confirmed the *status quo*.[236] Without settling the claims by both parties, Colombia acknowledged the right of the United States to maintain navigational aids in the cays and the

[234] J. B. Moore, *A Digest of International Law*, Washington D.C., p. 566. G. H. Hackworth, *Digest of International Law*, cit., p. 520-521, observed in 1940 that "Serranilla Keys are still included in the list of bonded Guano Islands. There is, however, no record of the Department of State having issued a certificate or proclamation with regard to these Keys".

[235] Consult G. H. Hackworth, *Digest of International Law*, cit., pp. 521-522.

[236] See NM Vol. II Annex 18.

United States acknowledged the rights of Colombian nationals to fish in the adjacent waters.[237]

2.150 Colombia has interpreted Article I, second paragraph, of the Bárcenas-Esguerra Treaty as an implicit relinquishment of any Nicaraguan claim over the sovereignty of the mentioned cays. The Government of the United States in an *Aide-Mémoire* of its Embassy in Managua, 16 July 1981, says that the United States Government did not take position on that statement. Nicaragua, for her part, has consistently rejected the Colombian interpretation.

2.151 The second paragraph of Article I of the Treaty was not included in the draft presented to the Government of Nicaragua by the Minister of Colombia in Managua, Mr. Manuel Esguerra. This provision, according to a Colombian source,

> "was requested by the North American government, considering that they had sovereign rights over the cays, and the substantial terms of the same were negotiated between the Colombian ambassador Enrique Olaya Herrera and the State Department."[238]

The terms finally adopted were the result of a Colombian proposal, as the initial State Department proposal, rejected by Colombia, had read: "It is understood that the present treaty does not include the

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[237] The text of the notes provides: "Taking into consideration that both Governments have alleged rights of sovereignty over said cays resolves to conserve the status quo on the matter. Consequently the Government of Colombia shall abstain from objecting to the maintenance by the United States of the Services it has established and may establish on said cays to assist in navigation and the Government of the United States shall abstain from objecting to the use of the waters belonging to the cays by Colombian nationals for the purpose of fishing."

[238] C. Moyano, *El Archipiélago de San Andres y Providencia*, 1983 p. 124. See NM Vol. II Annex 75.

cays of Roncador, Quitasueño and Serranilla (sic),[239] the sovereignty of which the two Parties agree to no longer claim from now on."[240]

2.152 After minutely reviewing the correspondence between the United States and Colombia with respect to the wording of the Treaty in relation to the reefs of Serrana, Roncador and Quitasueño, the Colombian Professor Moyano concludes that it was an "unquestionable fact that Nicaragua restricted herself to approve the provision proposed by Colombia without having taken part in its elaboration."[241] However, what is unquestionable in these circumstances is the right of Nicaragua, a country excluded from the negotiation of the 1928 Treaty and forced to accept clauses agreed by others that affected her territorial sovereignty, to demand that the interpretation of these clauses be made in a restricted manner and *contra proferentem.*

2.153 Obviously, if the point was to force the relinquishment of Nicaragua's rights to some cays in dispute between the United States and Colombia, it could have been stated in a much more clear and explicit manner. But the United States was not interested in that, unless it came along with a Colombian relinquishment.

2.154 For Colombia the cays were simply a bargaining chip in her negotiations with the United States in order to obtain Nicaragua's recognition of sovereignty over San Andrés and Providencia. That is why Colombia was willing, during the negotiation with the United

[239] The State Department's proposal incurred presumably in a confusion between Serranilla and Serrana. About the characteristic and localization of those cays, see *infra* Part II: The Maritime Delimitation, Chap. III, Subsec. XI.
[240] C. Moyano, *op.cit.* p. 125. See NM Vol. II Annex 75.
[241] *Ibid,* p. 125. See NM Vol. II Annex 75.

States, to acknowledge Nicaragua's sovereignty over these cays in order to transfer to Nicaragua the burden of relinquishing her claims in favour of the United States.

2.155 Thus in cable nº 28, of 31 August 1927, to the Colombian Ambassador in Washington, the Colombian Foreign Ministry authorizes that, "proceeding according to the Advisory Commission and the Foreign Relations Commissions of the Senate and the Chamber of Deputies", he assures, in case the United States did not accept arbitration over the cays,

> "a direct agreement with Nicaragua on these terms: Colombia acknowledges Nicaragua's absolute domain over the Mosquitia, the Mangles Islands and the cays of Roncador, Quitasueño and Serranilla,[242] with the express condition that in said cays the Colombian may exercise the fishing right for perpetuity. Nicaragua acknowledges Colombia's absolute domain over all the other islands of the Archipelago of San Andrés and Providencia."

The object is to facilitate the transfer of the cays to the United States:

> "It is considered preferable," the Note adds, "that Nicaragua be the one to receive and cede the cays to the United States because thus we can avoid any constitutional difficulty that might arise and the cession would be less discussed in Congress and the press."[243]

2.156 Article I, second paragraph, of the Barcenas-Esguerra Treaty did not have as a consequence the relinquishment by Nicaragua of her rights over the cays, but rather simply confirmed that there was a third party involved, the United States. The solution of the conflict

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[242] This adds to the confusion between Serranilla and Serrana. See *supra* footnote 239.

[243] Cited by C. Moyano, *El Archipiélago de San Andrés y Providencia*. pp. 525-526. See NM Vol. II Annex 75.

between Colombia and the United States would identify the party with which Nicaragua would have to decide the final determination of sovereignty over these features.

4. The Saccio-Vázquez Treaty, 8 September 1972: res inter alios acta*: the position of Nicaragua, before and after it was signed*

2.157 Although the situation resulting from the exchange of notes between the United States and Colombia on 10 April 1928 has been qualified by Colombia as a "provisional condominium regime",[244] the "Report for the first debate" in the Colombian Senate of the draft law by which the *Saccio-Vázquez Treaty* was approved in 1972 spoke of the "undetermined character" of this exchange of notes that resulted in a "really disadvantageous situation" for Colombia. The Report specified:

> "First. That neither Colombia nor the United States could exercise full sovereignty over said territories. Second. That Colombia could neither block other governments from considering that these territories had no owner. Third. That if this was continued the sovereignty of our country could be extinguished by the indecisive situation existing there."[245]

2.158 According to Colombia, this situation required clarification in the form of a new treaty, and in 1970 Colombia began the procedures for

[244] Exposition of Motives of the draft law by which Saccio-Vázquez Treaty was approved.
[245] *Anales del Congreso*, Colombia, 12 December 1972, p. 1644.

negotiations with the United States.[246] When the Nicaraguan Ministry of Foreign Affairs became aware of these negotiations, it sent a Memorandum to the United States State Department (N.026) dated 23 June 1971, in which it reserved Nicaragua's rights over the Continental Shelf and reiterated the statement in the same sense made on 3 June 1971 by Dr. Leandro Marín Abaunza, Minister of Foreign Affairs (in function) to Mr. Robert White, Chargé d´Affaires a.i. of the United States.[247]

2.159 It is necessary to underscore that this negotiation took place only after the dispute between Nicaragua and Colombia on jurisdiction over the continental shelf arose in 1969[248] and Colombia decided to give up the possibility of a negotiated solution with Nicaragua. Colombia then followed a policy based on: 1) the unilateral transformation of the Barcenas-Esguerra Treaty and the Protocol of exchange of ratifications into a treaty that purportedly established a maritime boundary that followed the Meridian 82° W; 2) the conclusion of treaties with other Caribbean neighbors willing to consent to it; and 3) the exclusion of Nicaragua from the area unilaterally "Colombianized" by means of a dissuasive naval presence.[249]

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[246] Note of 8 April of the then Foreign Minister, Alfonso López Michelsen, to the U.S. ambassador in Bogotá. The negotiations began in Bogotá on 25 June 1971.

[247] See NM Vol. II Annex 31.

[248] In fact the cable dispatch from *Associated Press* dated 2 June 1971, announced the beginning of the negotiations at the initiative of the Colombian Foreign Ministry" arguing that they were due to the interest shown by U.S. companies in exploring the underwater shelf adjacent" to Quitasueño, Roncador, Serrana and Serranilla.

[249] See *infra* Chap. II, Subsec. B of this Section.

2.160 The "protracted and detailed" negotiation included: 1) The United States renouncing her claims of sovereignty; 2) the fishing regime around the cays; and, 3) the regime of lighthouses and navigational aids.

2.161 According to Article 1 of the treaty the United States relinquishes "any and all claims of sovereignty over Quita Sueño, Roncador and Serrana." The fishing regime is established in Articles 2, 3, 4 and 5. Article 6 provided that the matter of navigational aids would be dealt with in separate notes, which were exchanged on the same date the Treaty was concluded. Article 7 expressed that the Treaty "shall not affect the positions or views of either Government with respect to the extent of the territorial sea, jurisdiction of the coastal state over fisheries, or any other matter not specifically dealt with in" this Treaty. The treaty included two more articles, one on the entry into effect (Article 8: "upon the exchange of instruments of ratification," that would lead to the immediate derogation of the exchange of notes of 10 April 1928), and the other about its duration (Article 9: "indefinitely unless terminated by agreement of both Governments").[250]

2.162 Colombia has interpreted Article 1 of the Saccio-Vázquez Treaty in her own interest as an acknowledgement by the United States of Colombian sovereignty.[251] This is not true. The Treaty, ratified by the United States in 1981, simply relinquishes her claims over the

[250] TIAS 10120 pp. 3-6.

[251] This is stated, for example, in the Exposition of Motives of the draft law by which the Saccio-Vásquez Treaty was approved: "Colombia has been left as the sole legitimate owner of said cays" (Introduction, second paragraph). Similarly, in the "Report for the first debate" of this draft law in the Colombian Senate (*Anales del Congreso*, 12 December 1972, p. 1644).

cays in exchange for certain advantages. Furthermore, the exchange of notes between the United States and Colombia when signing the Treaty on 8 September 1972, expressly reasserts the position of the United States that Quitasueño is a bank that, as such, does not generate rights of sovereignty.[252]

2.163 In a further exchange of notes, the Government of the United States of America indicated that it "agrees to grant in perpetuity to the Republic of Colombia ownership of the lighthouse located on Quita Sueño and the navigational beacons on Roncador and Serrana."[253] Colombia, on her part, recognized the right of the United States to fish in the waters of the cays. Similarly, the Parties agreed not to conclude, without the consent of the other, agreements with third parties that may affect or undermine the rights guaranteed by the Treaty to their vessels and nationals. The Treaty did not specify to which waters it referred.

2.164 Nicaragua made efforts to, first, block the negotiation of this Treaty, later to cause the failure of its ratification and, finally, to moderate its consequences through political declarations and clarifications of its purpose by the United States.

2.165 On 6 December 1971, referring to the Nicaraguan memorandum of 23 June 1971 (see above, para. 2.158), a Note of the Secretary of State to the Nicaraguan Ambassador in Washington, ended with the assurance that the Government of the United States would take into account the rights of the Nicaraguan Government over the continental shelf.

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[252] TIAS 10120, pp. 11-12.

[253] Note of 8 September 1972 (N. 693) from the United States Ambassador in Bogotá to the Colombian Foreign Minister. TIAS 10120 p. 24.

2.166 Once the treaty was signed: 1) The National Constituent Assembly of Nicaragua approved on 4 October 1972 a formal declaration of sovereignty over "the banks of Quitasueño, Roncador and Serrana, enclaved in our Continental Shelf and Patrimonial Sea,"[254] communicating it to the interested governments and the United Nations on 7 October; 2) on that same date, the Foreign Ministry of Nicaragua reiterated on behalf of the National Government Junta its formal protest to the Colombian Foreign Ministry and the United States State Department, with a detailed explanation of the legal basis for its claim (Notes N° 053 y 054)[255]; 3) similarly, the Nicaraguan Foreign Ministry mobilized its diplomatic network, particularly in Latin America and especially in Central America and the Caribbean, to report its rejection of the Saccio-Vázquez Treaty and the protest notes in this regard to the United States of America and the Republic of Colombia[256] and to request, in each case, support.[257]

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[254] See NM Vol. II Annex 81.

[255] "My Government, naturally, cannot under any circumstances accept agreements reached or that may be reached by other countries when these directly or indirectly affect national territory or the rights of full domain arising from the same, such as is the case of the treaty and exchange of notes of reference, and therefore it presents its most formal protest," these Notes read, that go on to reiterate, "that the banks located in that zone are part of its Continental Shelf, and because of this it is willing to use all peaceful procedures provided by International Law to safeguard its legitimate rights." See NM Vol. II Annexes 34 and 35.

[256] See for example Note R.E.D. N° 100/72, dated in Santo Domingo on 20 October 1972 from the Ambassador of Nicaragua, Alfredo López Ramirez to the Dominican Secretary of State Víctor Gómez Vergés. See NM Vol. II Annex 37.

[257] See for example Note G. 724, N° P 87 MREG, of 28 October 1972, to the Foreign Minister de Guatemala, Jorge Arenales Catalán, from the Nicaraguan Ambassador, Carlos Manuel Pérez Alonso, and the Guatemalan response (Note N° 28044, 14 November of the same year), in which the Government of Guatemala grants its fraternal support to Nicaragua, according to "the strict

2.167 Although the United States President sent the treaty to the Senate for its advice and consent on 9 January 1973,[258] it was shelved for years. The delay in United States ratification was in large measure due to efforts to take Nicaraguan concerns into account, as is acknowledged in the *Aide-Memoire* of the United States Embassy in Managua of 16 July 1981.

2.168 On 16 September 1975 the Assistant Secretary of State for Latin American Affairs, William D. Rogers, appeared before the Senate Foreign Relations Committee to explain the purpose of the Saccio-Vázquez Treaty: The Treaty, Rogers said,

> "does not refer to, nor does it affect, nor is it intended to affect the merits of any Nicaraguan claim or difficulty with Colombia. We have so stated formally to the Nicaraguan Government... We desire only to relinquish any rights we may have gained under the earlier 1928 agreement with Colombia and to withdraw from any quarrel about the islets."[259]

According to the State Department there was no reason for the Senate not to proceed with the advise and consent of the Treaty and Rogers felt the time was right since the Senate Foreign Relations Committee had invited to a luncheon on 25 September, as part of his

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observance of contracted obligations" in successive declarations of Meetings of Foreign Ministers of the Central American Republics (Antigua Guatemala, Resolution III of the First Meeting, 17-24 August 1955; Tegucigalpa, Resolution II of the Fifth Meeting, 21-23 July 1962; Panama, Resolution II of the Sixth meeting, 10-12 December 1962) "by means of which the Central American republics are committed to help each other with solidarity in any claim one of them may have with States outside the Central American system over issues regarding sovereignty and territorial integrity." See NM Vol. II Annexes 38 and 39.

[258] The Colombian Congress, had rushed to authorize the ratification on 12 December 1972.

[259] See NM Vol. II Annex 82.

official visit to Washington, the then President of Colombia, Adolfo López Michelsen, who was "largely responsible for the initiation of negotiations" when he had been Minister of Foreign Affairs.[260]

2.169 During the public hearings the Assistant Secretary of State for Inter-American Affairs testified, in response to questions asked by Chairman Sparkman, that: "We received a note from Nicaragua and we have made clear then and now that what we are doing here is essentially without any prejudice whatsoever to Nicaragua's continuing claim to the islands."[261]

2.170 In addition, Note N° 124 of the United States Embassy in Managua, of 23 November 1976, referring to a previous Note from the Foreign Ministry of Nicaragua, on 8 November, and a separate Memorandum aimed at requesting a review of the United States position in the dispute, assert that the position of the United States Government continued unchanged. That is, that the position of the United States was that the Vázquez-Saccio Treaty did not prejudice any claims over the cays in dispute; that it did not prejudice the jurisdictional claims of Nicaragua and, that the rest of the dispute between the Government of Nicaragua and the Government of Colombia should be negotiated bilaterally without involving the Government of the United States.

2.171 Nicaragua did manage, in mid-1978, to get the White House to agree with the President of the Senate Committee to translate this idea into

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[260] The text of this statement was circulated on 19 September 1975 by the United States Embassy in Managua to the Nicaraguan Ministry of Foreign Affairs.

[261] Cited in the letter from the Nicaraguan Ambassador in Washington, on 14 July 1981, to the members of the Senate Foreign Relations (A.M.D.G. N° 0294-81). See NM Vol. II Annex 42.

a "formal understanding" that should be an integral part of the Treaty, which involved renewed consultations with Colombia. As a result, on 23 May 1979, the Deputy Secretary of State transmitted to the Chairman of the Committee the text of a proposed formal understanding of the Treaty, which makes explicit that the provisions of the treaty did not confer rights or impose obligations upon, or prejudice the claims of, third states. Still not satisfied, the Senate Committee on 4 December of 1979, sent the Treaty to the full House, on receiving a written statement from the State Department confirming that the proposed understanding would be legally binding on both parties to the Treaty.

2.172 In response to a Note (N° 033) that the United States Embassy in Managua had sent on 30 January 1981 expressing that it was in the interests of both Governments to find a formula which would reflect the intention of the United States to relinquish its claims and at the same time reflect the position of the Government of Nicaragua that it was the sole legitimate title holder to these banks and cays, the Nicaraguan Foreign Ministry reiterated and amply explained its position in another Note (ACZ/gg. N° 027, 4 February 1981), proposing that:

> "The United States relinquish its supposed rights over Roncador, Serrana and Quitasueño before the Government and People of Nicaragua, or relinquish them unilaterally before the world... to prove the U.S. Government's intent not to damage the unquestionable rights of Nicaragua...".[262]

2.173 According to the resolution of ratification that was finally approved, the Foreign Relations Committee recommended that the Senate grant

[262] See NM Vol. II Annex 41.

consent to the ratification of the treaty with the understanding that: 1) the provisions of the treaty do not confer rights or impose obligations upon, or prejudice the claims, of third States; 2) the United States of America and the Republic of Colombia as well as other nations in the Western Hemisphere, are obligated under the Charter of the United Nation and the Charter of the Organization of American States to settle their differences peacefully, 3) as recognized by Senate Resolution 74, Ninety-third Congress, States may contribute to the development of international peace through law by submitting territorial disputes to the International Court of Justice or other impartial procedures for binding settlement of disputes.

2.174 Considering that this text was innocuous, Nicaragua in fact proposed that the Senate's advice and consent of the Saccio-Vázquez Treaty be granted subject to the understanding that:

> 1) The provisions of the Treaty did not alter the fact that the juridical status of Quitasueño, Roncador, and Serrana is in dispute between Colombia and Nicaragua, and the provisions of the Treaty did not prejudice the claims of either Colombia or Nicaragua;
>
> 2) The provisions of the Treaty did not exempt either Colombia or Nicaragua from their obligation to resolve their dispute over the juridical status of Quitasueño, Roncador, and Serrana in accordance with the Charter of the United Nations and the Charter of the Organisation of American States; and that
>
> 3) No provisions of the Treaty, nor of the exchange of notes, would be implemented prior to final resolution of the dispute by

those peaceful means indicated in the Charters of the United Nations and of the Organisation of American States, or by any other peaceful means agreed upon by Colombia and Nicaragua.[263]

2.175 But what is most important is the previously mentioned *Aide-Mémoire*, dated 16 July 1981 and presented by the United States Embassy in Managua to the Ministry of Foreign Affairs, to describe its considerable efforts to satisfy the concerns of Nicaragua, unfounded in the view of the United States Government, that the Saccio-Vázquez Treaty might in some manner prejudice the Nicaraguan claim to these banks or cays (Quitasueño, Roncador and Serrana).

2.176 The *Aide-Mémoire*, entitled *United States Legal Position*, emphasized that the basic United States interest since the early 1970's had been to withdraw the outstanding United States claim to the three cays, preserved in the 1928 agreement between United States and Colombia. At the same time, the Untied States had no interest in taking sides as between the other claimants to the cays. United States actions have been premised on these two principles. The *Aide-Mémoire* went on to state that the United States had not taken, and did not intend to take any position regarding the respective legal merits of the competing claims of Colombia and Nicaragua.

2.177 In conclusion, the United States relinquished all her hypothetical rights over the cays through the Saccio-Vázquez Treaty, but she did not do so by acknowledging Colombia's rights. To the contrary,

[263] See NM Vol. II Annex 42.

when ratifying the Treaty, the United States was careful to express her neutrality regarding the legitimate claims and interests of third parties, particularly Nicaragua, stating clearly that the treaty did not grant Colombia more rights than those she possessed before, nor did it prejudice the rights of Nicaragua.

2.178 In any case, an eventual cession by the United States of her claimed rights to Colombia would have been formally irrelevant in terms of Nicaragua, as the Nicaraguan-Colombian dispute was based upon the *uti possidetis iuris* principle.[264] If in 1821 there was no *terrae nullius* in Spanish America, the cays must have been Nicaraguan, regardless of the guano adventure or other similar events. The legitimate interests of Nicaragua could not be damaged by the Saccio-Vázquez Treaty, which in any case was *res inter alios acta.*

5. The uti possidetis iuris*: presumptions*

2.179 There is no explicit mention of Roncador, Serrana or much less the bank of Quitasueño in the acts of the Spanish Crown. Being at best cays, the application of *uti possidetis iuris* should be understood, as is the case of Serranilla and Bajo Nuevo, in terms of attachment or dependence on the closest continental territory, that of Nicaragua.[265] Colombia, more than three hundred and sixty nautical miles away, tries to tie them to the Archipelago of San Andrés and Providencia in

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[264] See *supra* Chap. I .

[265] Juan de Solórzano Pereira, *De Indiarum iure*. Liber II: De adquisitione Indiarum (Cap. I-15). Ed. y traducción de J.. M. García Añoveros *et al.*, Madrid, 1999: "The property is given to the inhabitants, but the authority and jurisdiction over those places belong to who has the domain over the mainland, as it is clearly in the Glosa using the *Venditor* Law argument" (II.6, ns. 19-22: pp. 186-188).

order to bring them closer to her jurisdiction, based on her claimed sovereignty over those islands. The uninhabited or uninhabitable cays would thus become a dependency of the Archipelago.

2.180 However, it should be mentioned that in the treaties concluded by Colombia with Costa Rica in the second half of the 19th century (1856, 1865, 1873), that never entered into force, the Mangles Islands (Corn Islands) are included and also the Island of San Andrés, Providencia, Santa Catalina and the Alburquerque cays, but nothing is said about Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo, and it is not known that the Colombian legislation, at that time, mentioned those features as part of the "Cantón of San Andrés".

2.181 In a 1916 Note the Assistant Secretary of State Francis White says to the Colombian Minister in Washington: "It would be good to definitively express that those islands have not been part of the Archipelago of San Andrés."[266]

2.182 In response to the Notes of the Nicaraguan Ambassador on 10 and 17 October 1972 asking for solidarity in the diplomatic battle against the ratification of the Saccio-Vasquez Treaty, the Costa Rican Foreign Minister, Gonzalo J. Facio, expressed in Note N° 68.682, of 18 October 1972:

> "After a careful study of the case, including the arguments provided by the Enlightened Foreign Ministry of Colombia in defence of its position, and following instructions from the President of the Republic, I am pleased to express the following: My government

[266] The *White Paper* of Nicaragua on the Case of San Andrés and Providencia, p. 21. (English version p. 18). See NM Vol. II Annex 73.

considers that the cays and islets called Quitasueño, Roncador and Serrana are located on the Continental Shelf of the Republic of Nicaragua. Consequently, according to article 2 of the Convention on the Continental Shelf..., in force between our States, Nicaragua exercises sovereignty over said banks...; Even if a treaty to which Central America was party established in general terms that the Archipelago of San Andrés and Providencia belong to Colombia, this general concept may not involve the banks, whether submerged or not, that are an integral part of the Nicaraguan Continental Shelf."[267]

2.183 The Costa Rican Foreign Minister Gonzalo Facio emphasized later, in 1981, once the *white papers* of Nicaragua and Colombia had been published, that the differences between, on the one hand, the islands of San Andrés and Providencia, and on the other, the uninhabited cays emerging from the Nicaraguan continental shelf, Roncador, Serrana and Quitasueño, is that the former are under the sovereignty of Colombia and the latter, lacking independent life from the continental shelf from which they emerge, should be under the sovereignty of Nicaragua.[268]

2.184 On the other hand, even if one accepts, for the sake of argument, that Roncador, Serrana (and Quitasueño) form part of the Archipelago of San Andrés and Providencia at the time of the emancipation from the Spanish Crown, the *uti possidetis iuris* principle would strengthen the right of Nicaragua. The eventual validity of the Barcenas-Esguerra Treaty could not affect the Nicaraguan title, as the cays

[267] See NM Vol. II Annex 36.

[268] Facio, G., *El diferendo entre Nicaragua y Colombia sobre el Archipiélago de San Andrés y Providencia, Relaciones Internacionales* (Escuela de Relaciones Internacionales, Universidad Nacional de Costa Rica, Heredia), 1981, año 2, num. 1, pp. 13-28. See NM Vol. II Annex 74.

were excluded from it. The occupation produced after the critical date of 15 September 1821 could also not be of relevance because it would go contrary to the nature and significance of the *uti possidetis* principle. In any event, the occupation of the cays by the United States in the mid 19th century demonstrates that Colombia did not effectively possess them at that time nor, of course, at the moment when the Bárcenas-Esguerra Treaty was agreed upon.

6. Conclusions

2.185 The express exclusion from the 1928 Treaty of the features of Roncador, Serrana and Quitasueño did not amount to a Nicaraguan renunciation of her claim of sovereignty over them. The text of the Treaty does not assert this and the negotiating history does not imply that this was the case. The rules of *contra proferentem* and *in dubio mitius* indicate that the clause that was added to the Treaty, in relation to these features, should be interpreted in a fashion that is the least onerous for Nicaragua.

2.186 In the Saccio-Vazquez Treaty the United States renounced any claim to sovereignty over the cays but this renunciation was not in favor of Colombia: (i) the United Sates Senate ratified it on the understanding that the Treaty would not confer rights or impose obligations or prejudice the claims of third states and, (ii) the United States Senate also noted that any territorial dispute should be submitted to the International Court.

2.187 The features explicitly excluded from the Bárcenas-Esguerra Treaty are not legally or geographically part of the Archipelago of San Andrés and Providencia, as they belong, according to the *uti*

possidetis iuris, to Nicaragua by virtue of their greater proximity to the continental coast that is Nicaraguan. In addition, since Quitasueño is a bank, it is simply part of Nicaragua's continental shelf.[269]

2.188 The Bárcenas-Esguerra Treaty did not mention Serranilla or Bajo Nuevo, since at that time Colombia was not claiming these features. The fact that these features are not mentioned in the treaty, and that they are located respectively 165 and 205 nautical miles from the nearest island of the Archipelago of San Andrés,[270] the Island of Providencia, is proof that they are not geographically or legally part of the "Archipelago of San Andrés". They appertain to Nicaragua since they are located on her continental shelf and, as a result of the application of the *uti possidetis iuris*, they also appertain to Nicaragua given their greater proximity to her mainland.

B. Reference to the Meridian of 82° West in Relation to the Allocation of Islands

2.189 The present section will deal with the question of how the Treaty of 1928, whose object was to settle a territorial dispute of sovereignty over several islands and the Caribbean Coast of Nicaragua, has been self-servingly converted by Colombia, forty years after its conclusion, into a purported Treaty of delimitation of maritime areas that were unknown and unrecognized by international law at the time of its conclusion.

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[269] See *infra* Chap. III, Sec. XI.

[270] See Chap. III, paras. 3.120 and 3.121 below.

1. The reference to the meridian of 82° West of Greenwich

2.190 The Bárcenas-Esguerra Treaty, concluded on 24 March 1928, was approved by the Nicaraguan President on 27 March 1928 and later submitted to the Nicaraguan Congress for its ratification. The text of the Treaty can be seen in Nicaraguan Memorial Volume II Annex 19 and is reproduced in paragraph 15 of the Introduction. The pertinent part of the Treaty for present purposes states,

> "The Republic of Colombia recognizes the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between Cape Gracias a Dios and the San Juan river, and over Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andres, Providencia, and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago. The present Treaty does not apply to the reefs of Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America." (Emphasis added)

2.191 The Nicaraguan Senate appointed a Commission of its members in order to study the Treaty and give its counsel. The Commission's report was read in Session XLVIII of the Senate on 4 March 1930. The considered opinion of the Commission was that the wording of the Treaty did not clarify the extent of "the other islands, islets and reefs forming part of the San Andrés Archipelago". The pertinent transcript of the minutes of the Session states that the Report of the Senate Commission charged with studying the Treaty,

> "was in favour of the ratification of the Treaty entered into by the two Republics the 24 of March of 1928, and approved by Executive Power on the 27 of the same

month and year; Treaty that puts and end to the matter pending between the two Republics over the Archipelago of San Andrés and Providencia and the Nicaraguan Mosquitia; in the understanding that the San Andrés archipelago mentioned in the first clause of the Treaty does not extend to the West of meridian 82 of Greenwich in the chart published in October 1885 by the Washington Hydrographic Office under the authority of the Secretary of the Navy of the United States of North America."[271]

2.192 The question then arose whether the addition of this declaration, this "understanding", to the ratification of the Treaty by Congress would imply the need of submitting it again to the Colombian Congress that had already ratified the Treaty on 17 November 1928. To deal with this matter, the Senate summoned the Minister of Foreign Affairs, Mr. Manuel Cordero Reyes, in order to obtain his views on this question. The Minister took part in Session XLIX of the Senate on 5 March 1930 and gave the views of the Nicaraguan Government and also that of the Colombian government that had been consulted on this matter. The Minister said,

> "that he understood that he had been called to hear the opinion of the Executive Power on the subject relating to the Colombian affair; that in a meeting at the Ministry of Relations with the Honourable Commission of Relations of the Senate, it was agreed by the Commission and the Advisors of the Government to accept as limit in this dispute with Colombia the West 82 meridian of Greenwich and of the Hydrographic Office of the Ministry of the Navy of the United States of 1885; that then Senator Paniagua Prado expressed his worries that by adding this amendment or clarification, it would be put (again) to the approval of the Colombian Congress and would be a cause for delay for its approval, and therefore, for putting end to this annoying subject. But that having taken this matter up with the Honourable Minister of

[271] See NM Vol. II Annex 80.

Colombia and he with his Government, which requested that the Treaty should not be altered because it would again have to be put to the consideration of the Congress; having insinuated to his Excellency Minister Esguerra, to deal again with his Government on this matter, and after having obtained an answer, he told me: that his Government authorized him to say that the Treaty would not be put to the approval of the Colombian Congress, in view of the clarification that demarcated the dividing line, that therefore, and although there was not anything in writing, he could assure the Honorable Chamber, in name of the Government, that the Treaty would be approved with no need to put it again to the approval of Congress.

"The Minister added, that the explanation does not reform the Treaty, because it only intends to indicate a limit between the archipelagoes that had been reason for the dispute and that the Colombian Government had already accepted that explanation by means of his Minister Plenipotentiary, only declaring, that this explanation be made in the ratification act of the Treaty: that this explanation was a necessity for the future of both nations because it came to indicate the geographic limit between the archipelagoes in dispute without which it would not be defined the matter completely; and that therefore he requested to the Honorable Chamber the approval of the Treaty with the proposed explanation..."[272]

2.193 The Session was then continued in secret and the Senate finally approved the Treaty with the declaration recommended by the Commission that restricted the Archipelago of San Andrés to areas East of the 82° meridian of longitude West. This condition was included in the Congressional Decree of ratification of 6 March 1930, which was promulgated by the President of Nicaragua in the Gazette, the official bulletin of the Republic of Nicaragua on 22 July 1930.[273] This Decree ratifies the Treaty,

[272] See NM Vol. II Annex 80.

[273] *La Gaceta*, Diario Oficial, Año, XXXIV, Managua, D.N., Wednesday, 2 July 1930, N° 144, pp. 1145-1146.

> "in the understanding that the San Andrés archipelago mentioned in the first clause of the Treaty does not extend to the West of meridian 82 of Greenwich in the chart published in October 1885 by the Washington Hydrographic Office under the authority of the Secretary of the Navy of the United States of North America."

2.194 The Decree further specifically orders that the Decree with the text of the understanding should be included in the Instrument of Ratification.[274]

2.195 On 5 May 1930, the Colombian and the Nicaraguan plenipotentiaries, respectively, Ambassador Manuel Esguerra and Minister of Foreign Affairs, Dr. Julian Irias, exchanged the instruments of ratification of the Treaty of 24 March 1928 concerning territorial questions at issue between the two countries. They specified in the Protocol of Exchange of Ratifications:

> "The undersigned, in virtue of the full powers which have been granted to them and on the instructions of their respective Governments, hereby declare that the San Andres and Providencia Archipelago mentioned in the first article of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich."[275]

2.196 The mutual understanding on the part of both Nicaragua and Colombia of the intent and meaning of the declaration that was added by the Nicaraguan Congress to the 1928 Treaty, as reported by the Nicaraguan Foreign Minister to the Senate (see above, para. 2.191) is confirmed in the Report of the Colombian Foreign Minister to his Congress. The Report of the Minister to Congress contains a transcription of a report by Ambassador Esguerra on the activities of

[274] See NM Vol. II Annex 19.
[275] See NM Vol. II Annex 19.

his Legation. His report of the process of ratification by Nicaragua states,

> "It was the Senate (of Nicaragua) that first considered the Treaty, and after approving it in a first debate it introduced to it a clarification clause on the western limit of the Archipelago, and fixing this limit on the 82 meridian of Greenwich. The Legation was consulted whether this clarification would be acceptable to the Government of Colombia and whether it would need subsequent approval by Congress, I consulted this point with the Ministry, which answered that it accepted it, and that since it did not alter the text or the spirit of the Treaty, it did not need to be submitted to the consideration of the Legislative Branch."[276]

2.197 The legal nature of this condition is obvious. In the wording accepted by the International Law Commission in the Draft Guide to Practice on Reservations to Treaties that it is elaborating, it is a "conditional interpretative declaration."

2.198 Draft Guideline 1.2.1 - Conditional Interpretative Declarations provides:

> "A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration".[277]

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[276] *Informe del Ministro de Relaciones Exteriores al Congreso de 1930*, Bogotá, Imprenta Nacional, 1930, p. 223. See NM Vol. II Annex 71.

[277] I.L.C., *Report on the Work of its 51st Session (1999)*, GAOR, 54th Session, Supplement N° 10, A/54/10, p. 207.

2.199 This is exactly the case here: the Nicaraguan Congress subordinated its acceptance of the Treaty to a precise definition of what was meant by the expression "San Andrés Archipelago" in Article I of the Treaty. This interpretation was a condition for the ratification and was formally accepted as such by Colombia in the Protocol of Exchange of Ratifications that was registered together with the Treaty itself by the League of Nations on 16 August 1930, under Registration Number 2426.[278] It then constitutes an "authentic interpretation" of the Treaty.

2.200 As explained in *Oppenheim's International Law, Ninth Edition*, the parties to a treaty may:

> "before, during, or after the conclusion of the treaty, agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure, as by an interpretative declaration or protocol or a supplementary treaty. Such authentic interpretations given by the parties override general rules of interpretation."[279]

2.201 It might be the case that "conditional interpretative declarations" must be assimilated to reservations as for their legal regime.[280] But this does not change the picture; as the ILC has noted: "A reservation to a bilateral treaty has an objective effect: if it is accepted by the

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[278] See LNTS, Vol. 16, 16 August 1930, pp. 340-341.

[279] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, Ninth Edition*, vol. I, *Peace*, Longman, London, 1992, p. 1268 - footnotes omitted. See also Jean Salmon ed., *Dictionnaire de droit international public*, Bruylant/AUF, Bruxelles, 2001, p. 604 or Patrick Daillier et Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, L.G.D.J., Paris, 7th ed., 2002, p. 254.

[280] See I.L.C., *Report on the Work of its 51st Session (1999)*, GAOR, 54th Session, Supplement N° 10, A/54/10, commentary of draft guideline 1.2.1, pp. 245-248, para (11) to (14).

other State, it is the treaty itself that is amended."[281] In the present case, the condition imposed by the Nicaraguan Congress was accepted by Colombia as witnessed by the Protocol of Exchange of Ratifications. If the Treaty were valid at all, *quod non*, this condition has become an integral part of the Treaty and binds both Parties.

2.202 But, of course, this authentic interpretation (or added provision) must, itself, be interpreted correctly. In this respect, there are clear differences between the Parties, and these differences are an integral part of the present dispute.

2. The claims and practice of the Parties

2.203 For several decades after the events described in paragraphs 2.189-2.193 above, Colombia had not suggested that the mention of the 82nd meridian in the Protocol of Exchange of Ratifications could be interpreted as effecting an overall delimitation of the respective maritime areas between the Parties. It was only forty years after its signature that, as part of a radical policy of expansion of the Colombian sovereignty and jurisdiction in the Caribbean, the authorities of Bogotá circulated a doctrine that Colombia and Nicaragua had agreed on meridian 82° W as a maritime boundary, and that this was the purpose of the understanding added to the Protocol of Exchange of Ratifications of the Bárcenas-Esguerra Treaty.

2.204 The definition of the 82nd meridian as a maritime boundary was claimed by Colombia for the first time in a diplomatic note to

[281] *Ibid.*, commentary of draft guideline 1.5.1 ("Reservations" to bilateral treaties), p. 299, para. (15).

Nicaragua of 4 June 1969, reserving her rights regarding reconnaissance permits and concessions for oil and gas exploration granted by Nicaragua in portions of her continental shelf.[282] The response of Nicaragua of 12 June 1969 was immediate and clear in the defence of her rights.[283] The Nicaraguan reaction provoked Colombia to reiterate and somewhat elaborate her claim that same year in a further Verbal Note of 22 September 1969,[284] in which she made "a formal declaration of sovereignty in the maritime areas located East of Meridian 82 of Greenwich, and particularly for the effects of exploration or exploitation of the submarine shelf and the living resources of the sea", considering "that the concessions granted by the Republic of Nicaragua to companies or individuals that go beyond said line, would lack any legal value". The reasons given for this were:

> "a. The definitive and irrevocable character of the Treaty on Boundaries signed by Colombia and Nicaragua on 24 March 1928.
>
> b. The clarification by the Complementary Protocol of 5 May 1930, in the sense that the dividing line between respective maritime areas or zones was set at Greenwich Meridian 82.
>
> c. The stipulation contained in Article 1 of the Treaty of 24 March 1928, which excludes the Roncador, Quitasueño and Serrana Cays from any negotiations between Colombia and Nicaragua.
>
> d. Finally, the arbitral award proffered by the President of France, Emile Loubet, on September 11, 1900, between Costa Rica and Colombia."

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[282] See NM Vol. II Annex 28.
[283] See NM Vol. II Annex 29 and para. 2.212 below for further details on this note.
[284] See NM Vol. II Annex 30.

2.205 Such assertions have, since then, been repeated several times[285] and the Colombian official maps of the region have been modified accordingly.

2.206 However, it must be noted that, even from the 1970s and up to now, the Colombian position in this respect has been far from firm and consistent.

2.207 Thus, in a speech at the Almirante Padilla Naval School of Cartagena, delivered on 3 July 1975, the President of Colombia himself, Alfonso López Michelsen, declared: "We are going to continue our talks with Venezuela and make contacts with Panama, Ecuador, Peru, Nicaragua and the countries neighbouring to the Archipelago of San Andrés and the cays ... to negotiate the territorial sea."[286] Whatever the mention of the "territorial sea" might imply, the Venezuelan President clearly meant that no delimitation with Nicaragua had been achieved.

2.208 Three years later, almost at the end of his mandate, in a speech of 24 May 1978 at the same Naval School in Cartagena, President López Michelsen, after praising the conventional delimitation policy of Colombia, stated: "There are still pending, it is true, more complex definitions such as the so called "diferendo" that we have had for several years with the sister Republic of Venezuela, *and the one we still maintain, unresolved, with the Republic of Nicaragua*."[287] Later on, in 1986, as a former President, López Michelsen debated with the then Foreign Minister Ramírez Ocampo, who had stated that there was nothing to negotiate with Nicaragua. In a letter to the President

[285] See e.g.: Note DM-571 of 20 October 1976 See NM Vol. II Annex 40.
[286] *El Tiempo*, Bogotá, 4 July 1975, pp. 1 y 14-C. See NM Vol. II Annex 83a.
[287] *El Tiempo*, Bogotá, 25 May 1978, italics added. See NM Vol. II Annex 83b.

of the Republic, asking him to convene the Advisory Commission of Foreign Relations, López Michelsen asserted: "I can reiterate in the most strong and irrefutable terms that we must negotiate with Nicaragua the delimitation of our marine and submarine areas... Invoke the Bárcenas-Esguerra Treaty over domain of the islands of the Archipelago... using meridian 82 as a reference point, is not an argument to abstain from opening talks about marine areas and the continental shelf".[288]

2.209 These speeches by Alfonso López Michelsen are particularly relevant, not only since he had been the President of the Republic of Colombia, but also because he held that position when most of the maritime delimitation treaties of Colombia were being negotiated in the Caribbean, and after he himself had been Foreign Minister. They are also relevant because his opinions on the subject are not politically oriented but rather are based on legal reasoning. For example, in an interview of which the Colombian newspaper *El Mundo* gives an account, he reminded the local press of the Guinea/Guinea-Bissau case of 1985 and told them that the International Court of Justice would not accept that treaties dating back before 1945 could have the effect of delimiting maritime spaces beyond the territorial sea. For this reason he concluded that "it is far better to open direct negotiations with Nicaragua solely on the matter of the marine and submarine areas than to start a conflict between both countries in the Court of The Hague." (El Mundo 12 September 1995) It is noteworthy that the man who made the reclaiming of maritime sovereignty the main mission of Colombians in the 20th

[288] "¿Negociar con Nicaragua? Negociar ¿qué? ", *El Siglo*, Bogotá, 21 March 1986. Cited in A. Zamorra, *Intereses Territoriales de Nicaragua*. Editorial Cira, Managua. 2000, p. 79.

century[289] does not lean on meridian 82° to consider as settled the entangled conflict of interests with Nicaragua. To the contrary, even as recently as 12 December 1999 the former President published an article in the newspaper *El Tiempo* of Bogotá in which he explicitly indicates that meridian 82° was adopted "*as the limit of allocation of the islands*: those that were to the west of the meridian for Nicaragua and those to the east for Colombia").[290]

2.210 One other such revealing inconsistency in the Colombian position is that the Facio-Fernández Treaty signed on 17 March 1977 by Colombia and Costa Rica (and never ratified by the latter), belies Colombia's apparent trust in the meridian 82° West as her maritime boundary with Nicaragua: Article 1.B of this Treaty places the limit of her border with Costa Rica at 82° 14' W.[291]

2.211 The Nicaraguan practice and position have always been remarkably constant and consistent: she has firmly rejected the Colombian claims immediately after they were first made and, affirmed positively her sovereign rights to her continental shelf.

2.212 Nicaragua took the cited (para. 2.204 above) Colombian Note of 4 June 1969 very seriously. Her Foreign Minister, Mr. Lorenzo Guerrero, by Note N° 00021, of 12 June 1969, officially responded to Colombia: confirming that the concessions made in the Atlantic Coast were within the continental shelf of Nicaragua, in accordance with the principles of international law and rejecting the view that

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[289] "Samper has created a new border litigation", *El Mundo*, Bogotá, 12 September 1995. See NM Vol. II Annex 83 c.

[290] "Nicaragua at the Crossroads", *El Tiempo*, 12 December 1999, See NM Vol. II Annex. Italics added.

[291] See NM Vol. II Annex 20 and Vol. I, Figure II.

the meridian 82° W was the limit of Nicaraguan national sovereignty, since it only marks the western border of the Archipelago of San Andrés. Minister Guerrero added "My Government considers inappropriate the reservation made by the Enlightened Government of Colombia as a result of the abovementioned Concessions, as these were granted in use of the clear and indisputable rights it holds and in full exercise of its sovereignty." He unequivocally asserted that his Government, "does firmly insist on the recognition and respect for its inalienable rights to the exploitation of existing natural resources in the national territory, of which the Continental Shelf is an inseparable part."[292]

2.213 Referring more precisely to the interpretation of the Nicaraguan legislative decree, incorporated in the Protocol of Exchange of ratifications of the Bárcenas-Esguerra Treaty, the Note explains:

> "A simple reading of the transcribed texts makes it clear that the objective of this provision is to clearly and specifically establish in a restrictive manner, the extension of the Archipelago of San Andrés, and by no valid means can it be interpreted as a boundary of Nicaraguan rights or creator of a border between the two countries. On the contrary, it acknowledges and confirms the sovereignty and full domain of Nicaragua over national territory in that zone."[293]

2.214 Later, the denial of Meridian 82° W as a maritime border was accompanied by documentation on the diplomatic battle waged against the conclusion of the Saccio-Vázquez Treaty.[294]

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[292] See NM Vol. II Annex 29.

[293] See NM Vol. II Annex 29.

[294] See, for example, the Memoranda of 23 June 1971 (Ministry of Foreign Affairs. Secretariat General, Diplomatic Section. N° 026) See NM Vol. II

2.215 Nicaragua maintained her firm position on the occasion of incidents concerning fishing activities as shown by the following examples in the past decade.

2.216 On 9 June 1993, helicopters from the Colombian Navy harassed the Nicaraguan boats "My Wave" and "All John" and, on 7 July, a Colombian coast guard seized the fishing boat "Sheena MC II", with Honduran flag, which was working with a Nicaraguan licence. The Nicaraguan Foreign Ministry protested these incidents on 11 June and 9 July 1993. According to these Notes, these incidents took place west of meridian 82°. The Foreign Ministry of Colombia, 19 July 1993 - maintained that the events had occurred east of said meridian. Given this circumstance, the Nicaraguan Ministry of Foreign Affairs, 26 July 1993 wrote[295]:

> "The Government of Nicaragua wishes to make it very clear that, even if the vessels referred to had been found at the coordinates referred to in the Note of Your Excellency, the results would have been the same, given that those waters, undoubtedly, also belong to Nicaragua and are part of the maritime spaces over which Nicaragua exercises full jurisdiction according to history, geography, custom and International Law. Therefore, the statements of claimed Colombian sovereignty over those waters are totally inadmissible."

Annex 31 or the Notes of 7 October 1972, N°053 and 054. See NM Vol. II Annexes 34 and 35. See above para. 2.158.

[295] Notes N° 930150, N° 930158, DM. 01418 and N° 930164, See NM Vol. II Annexes 44, 45, 46 and 47.

2.217 On 27 March 1995 the Colombian vessel "Sea Dog" was seized by the Nicaraguan Navy Force east of meridian 82° for fishing illegally.[296]

2.218 On 9 October 1995 Nicaragua protested the seizure by a Colombian corvette of the Venezuelan motorboat "Gavilán" which, with a Nicaraguan fishing licence, was fishing east of meridian 82°.[297]

2.219 On 27 November 1996 the Nicaraguan Naval Force seized the Colombian boat "Miss Tina" at longitude 82°, and the Colombian Foreign Ministry protested, understanding that the seizure had taken place east of that position.[298] Again, the Nicaraguan Ministry of Foreign Affairs answered[299] that:

> "...even if the seizure had taken place at coordinates 13° 47' N and 81° 57' W, both positions are unquestionably in waters within the maritime jurisdiction of Nicaragua".

The Note adds:

> "The Ministry of Foreign Affairs categorically rejects the mention made in the [Colombian] note that position 13° 43' N 82° 00' W constitutes the boundary of our two countries, since Nicaragua has signed no maritime delimitation treaty in the Caribbean Sea, neither with the Republic of Colombia, nor with any other country in the region and, consequently, the sovereignty, jurisdiction and rights of Nicaragua in the Caribbean Sea extend to all maritime spaces attributed to it by International Law in effect, including the islands, cays, banks, reefs and other geographical accidents adjacent to its coasts, as well as

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[296] See Colombian Note 0304, of 3 April 1995, and Nicaraguan of 4 and 5 of the same month and year, No. 950151 and 950162. NM Vol. II Annexes 49, 50 and 51.
[297] See Note N° 950459 - NM Vol. II Annex 52.
[298] See Note DM. VA. N° 004313, 29 January 1997. NM Vol. II Annex 53.
[299] See Note N° 970061, of 11 February 1997 NM Vol. II Annex 54.

the continental shelf and formations that emerge from it or are located on it."

2.220 Later, the Colombian Note DM N° 37678 of 18 July 1997,[300] refers to the incidents on 4 April and 28 May 1997 when Nicaraguan coast guards attempted to detain boats that were working with a Colombian license east of meridian 82°; Nicaragua:

> "...emphatically rejects that the maritime areas in which it asserts events took place ... belongs to any Economic Zone of Colombia but rather, to the contrary, are maritime areas which, based on current International Law, belong to Nicaragua."

Similarly, Nicaragua

> "...rejects any suggestion on the order that its authorities cannot defend the sovereignty and national sovereign rights over maritime areas that extend to the east of meridian 82°."[301]

2.221 On 28 October 1997, the Nicaraguan Naval Force seized east of the said meridian the Colombian boat "Gulf Sun" while it was carrying out illegal fishing activities. The Foreign Ministry of Nicaragua notified the Colombian Embassy in Managua "so it could take the necessary measures in the case to assure that similar incidents do not continue to happen."[302]

2.222 Later, on 19 February 1999, another Honduran fishing boat licensed to fish in Nicaraguan waters, the *Capitan Elo*, was captured by the Colombian navy, at latitude 14° 20' 00" N longitude 82° 00' 00" W, and taken to San Andres. Following the prevailing trend, the Foreign

[300] See NM Vol. II Annex 55.
[301] See Note N° 9700532 of 13 August 1997 NM Vol. II Annex 56.
[302] See Note N° 9700765, of 30 October 1997. NM Vol. II Annex 57.

Ministry of Nicaragua notified once more the Colombian Embassy in Managua[303] requesting:

> "an exhaustive investigation...in order to clarify this act and to avoid the repetition of similar incidents in the future."

More recently, on 14 December 2002 the fishing boat *Charly Junior,* was captured in Nicaraguan waters located at 14°52'00" and longitude 081°28'00. Nicaragua presented to Colombia "the most vigorous protest"[304] and requested the immediate release of said vessel and its crew.

2.223 The firm position adopted by Nicaragua as a reaction to the Colombian claim that the 82° meridian is a line of delimitation of their maritime areas, can be appreciated in *Artículos sobre Derecho del Mar*, published by the editorial services of the Ministry of Foreign Affairs of Nicaragua in 1971. The author was Dr. Alejandro Montiel Argüello, Foreign Minister of Nicaragua on two different occasions. He proposed three reasons to deny the status of the Meridian 82° W as a maritime boundary:

> "1. That at the time of the signing of the Bárcenas Meneses-Esguerra Treaty and its approval by the Congress of Nicaragua, that is, in 1928 and 1930, no one was thinking about the existence of rights of States over the underwater shelf, and then the 82 meridian could have been a border drawn at high sea, which is not reasonable to suppose this was the purpose.
>
> "2. That it would certainly be, at least, unusual for an important matter such as the delimitation of a boundary

[303] See Note N° 99/00093, of 23 February 1999, NM Vol. II Annex 58.
[304] See Note MRE/DM-JI/1703/12/02 of 16 December 2002, NM Vol. II Annex 59.

between two States to be not included in the body of a Treaty, but rather relegated to an interpretative declaration approved by the Congress of one of its signatories and in a statement in the protocol of exchange of ratifications; and

"3. That the determination of 82 meridian is only of a restrictive nature and not attributive of sovereignty, as can clearly be seen in the text of the protocol of exchange ... In fact, it reads that the Archipelago of San Andrés does not extend West of 82 meridian, which is equivalent to agreeing that there are no Colombian islands West of that Meridian, but it does not exclude the possibility that there may be Nicaraguan islands, not part of the Archipelago of San Andrés, to the East of said Meridian."[305]

2.224 The three grounds given by Foreign Minister Montiel, together with others, are compelling reasons to reject the Colombian interpretation.

3. The meridian of 82° West does not constitute a boundary

2.225 According to Article 31, paragraphs 1 and 2, of the 1969 Vienna Convention on the Law of Treaties:

"1. A treaty shall be interpreted in good faith 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.

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

[305] A. Montiel Argüello, *Artículos sobre Derecho del Mar*, Publicaciones del Ministerio de Relaciones Exteriores, Imprenta Nacional, Managua, 1971, p. 93. NM Vol. II Annex 72.

"(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

"(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

2.226 As the Court has consistently found, these provisions reflect customary international law.[306]

2.227 Consequently, not only must the 1928 Treaty be interpreted in accordance with these principles - that is, in particular, in its "context" as constituted e.g. by the declaration included in the Protocol of Exchange of Ratifications -, but also the Protocol itself must be interpreted accordingly.

2.228 The text of the latter is crystal clear: it is limited to the "San Andrés and Providencia Archipelago", the limits of which it specifies: "... the San Andrés and Providencia Archipelago mentioned in the first Article of the [1928 Treaty] does not extend west of the 82nd degree of longitude west of Greenwich."[307] It relates only to the second part of the first paragraph of the Treaty, according to which:

"The Republic of Nicaragua recognises the full and entire sovereignty of the Republic of Colombia over the islands

[306] See *e.g.*: Judgments of 3 February 1994, *Territorial Dispute Libyan Arab Jamahiriya/Chad), I.C.J. Report* 1994, pp. 21-22, para. 41; 15 February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, I.C.J. Report* 1995, p. 18, para. 33; 12 December 1996, *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, I.C.J. Report* 1996 (II), p. 812, para. 23; 13 December 1999, *Kasikili/Sedudu Island (Bostwana/Namibia), I.C.J. Report* 1999 (II), p. 1059, para. 18 or 17 December 2002, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, para. 37).

[307] See NM Vol. II Annex 19.

> of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago."

2.229 While the above quoted phrase includes a sketch definition of the San Andrés Archipelago ("San Andrés, Providencia and Santa Catalina" and the adjacent islands, islets and reefs), this was not seen as reassuring enough by the Nicaraguan Congress, in particular the Senate (see above, paras. 2.191-2.193), which made its approval of the Treaty subject to this further point in order to specify which "islands, islets and reefs" formed "part of San Andrés Archipelago". This condition was formally accepted by Colombia and, accordingly, the islands, islets and reefs laying west of the 82° meridian cannot be claimed to belong to Colombia. The Protocol of 1930 says nothing less, and nothing more.

2.230 Defining island possessions or archipelagos by means of meridians and parallels is far from unprecedented and it was, indeed, common practice at the time. Thus, for example, Article III of the Treaty of 10 December 1898 between Spain and the United States defining the "archipelago known as the Philippine Islands" gives a precise definition based on parallels and meridians, latitudes and longitudes. Previously, on 7 August 1895, Spain and Japan signed in Tokyo, a "Declaration determining the limits of their respective possessions to the West of the Pacific Ocean" whose number 1 provides that: "Pour le besoin de cette Déclaration, le parallèle qui passe par le milieu du Canal navigable de Bachi[308] est pris comme ligne de démarcation

[308] The Bachi (or Baschí) canal separates the islands of that name (also called Batanes) from the island of Formosa.

entre les possessions espagnoles et japonaises dans l'Ouest de l'Océan Pacifique."[309]

2.231 As noted by Professor B.H. Oxman,

> "[i]t is not uncommon for treaties dealing with cessions or allocations of sovereignty over islands or other territory to define the areas ceded or allocated between those states on the basis of lines drawn at sea. The essential purpose of those lines is to provide a convenient reference for determinating which islands and territories are ceded or allocated to a particular party. Among other things, this approach avoids the need to identify precisely all islands and other territory ceded."[310]

2.232 On the other hand, those treaties allocating territories or islands would usually not delimit the respective maritime jurisdiction of the Parties - except, of course, if otherwise expressly provided. In the same way as, "reciprocally", absent any provision to the contrary, a treaty defining a land boundary would not be interpreted as delimitating the maritime boundary at sea nor even as constituting an allocation of islands, as the Court recently recalled in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan.[311]

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[309] According to this treaty, Japan states that it has no claims or pretensions over the islands located to the south and southeast of the demarcation line and Spain declares the same regarding the islands north and northeast of that same line. See also Article 1, last para., of the Paris Convention of 12 May 1886 between France and Portugal, relating to the delimitation of their respective possessions in Western Africa, mentioned in the Award of the Arbitral Tribunal of 14 February 1985, *Délimitation de la frontière maritime Guinée/Guinée-Bissau*, *R.G.D.I.P.*, 1985, p. 505, para. 45.

[310] *Political, Strategic, and Historical Considerations*, in J.I. Charney and L.M. Alexander eds., *International Maritime Boundaries*, Vol. I, p. 32.

[311] Judgment of 17 December 2002, para. 51. See also I.C.J., Chamber, Judgment of 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *ICJ Report* 1984, p. 301, para. 119: "It is doubtful whether a treaty obligation which is in terms confined to the delimitation of the continental shelf can be extended, in a manner that would manifestly go

2.233 In this respect, the very title of the 1928 Treaty is revealing[312]: it concerns "Territorial questions at issue between Colombia and Nicaragua", not the maritime delimitation, nor the border between the two States.

2.234 This is confirmed by the preamble and the very text of the first paragraph of Article I:

"The Republic of Colombia and the Republic of Nicaragua, desirous of putting an end to the territorial dispute between them..."

Article I

"The Republic of Colombia recognises the full and entire sovereignty of the Republic of Nicaragua over the Moquito Coast between Cape Gracias a Dios and the San Juan river, and over Mangle Grande and Mangle Chico islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua recognises the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of San Andrés Archipelago".

2.235 As the Court and its predecessor have frequently recalled,

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beyond the limits imposed by the strict criteria governing the interpretation of treaty instruments, to a field which is evidently much greater, unquestionably heterogeneous, and accordingly fundamentally different".

[312] See *ibid.*, para. 72.

> "[h]aving before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it."[313]

2.236 In its Award of 14 February 1985, the Arbitral Tribunal which delimited the Maritime Boundary between Guinea and Guinea-Bissau noted that:

> "l'usage fréquent des termes possessions et territoire dans le texte de la convention [de 1886 relative à la délimitation des possessions françaises et portugaises dans l'Afrique occidentale] prouve que celle-ci avait en réalité pour objet les possessions coloniales de la France et du Portugal en Afrique de l'Ouest, mais que l'absence des mots eaux, mer, maritime ou mer territoriale constitue un indice sérieux de ce qu'il était essentiellement question de possessions terrestres."[314]

2.237 The same holds true in the present case. Moreover, the provisions of the 1928 Treaty - which is more simple and straightforward than the 1886 Convention mentioned in the Award of 1985 - leaves nothing to be desired in the nature of clarity: it aims at settling the territorial dispute between the Parties and, to this end it allocates sovereignty

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[313] P.C.I.J., Advisory Opinion, 15 September 1923, *Acquisition of Polish Nationality, Series B*, N° 7, p. 20; I.C.J., Judgment, 3 February 1994, *Territorial Dispute, ICJ Report* 1994, p. 25, para. 51; see also: Advisory Opinion, 3 March 1950, *Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Report* 1950, p. 8; Judgments, 12 November 1991, *Arbitral Award of 31 July 1989, ICJ Report* 1991, pp. 69-70, para. 48, or 27 June 2001, *LaGrand*, para. 77).

[314] *R.G.D.I.P.*, 1985, n° 2, p. 511, para. 56; see also p. 515, para. 71.
International Legal Materials, Vol. XXV, p. 251 at p. 279, para.56.
"The frequent use of the terms possessions and territory in the text of the Convention [of 1886 relative to the maritime boundary between French and Portugal respective possessions in the West Africa] proves that the colonial possessions of France and Portugal in West Africa were its object; but the complete absence of the words waters, sea, maritime or territorial sea is a clear sign that essentially land possessions were involved here."

over territories in dispute - that the Protocol of Exchange of ratifications specify in one respect; by no means do either of these instruments define a boundary between the Parties.

2.238 It can also be noted that Article 3 the 1939 Constitution of Nicaragua, which lists her neighbouring countries, does not mention Colombia:

> "The basis for national territory is the uti possidetis iuris of 1821. It extends between the Atlantic and Pacific Oceans and the Republics of Honduras and Costa Rica, and also includes the adjacent islands, territorial sea and the corresponding air space. The treaties or the laws shall establish the boundaries not yet determined."

2.239 Similarly, Article 3 of the 1945 Colombian Constitution (which reproduces the corresponding text of 1936), does not mention a common border with Nicaragua.

2.240 In this respect, it must be kept in mind that the San Andrés Archipelago is situated approximately 360 nautical miles from the most proximate point of the Colombian coast and approximately 105 miles from the coast of Nicaragua (and under 80 miles from the Corn islands, the Nicaraguan islands most proximate to the archipelago). Not only was there no need for maritime delimitation between the two countries, but, at that time, this was simply unthinkable: the usually accepted maximum permissible breadth of the territorial sea was three miles, at most six (as Colombia decided in 1930[315]) and there was no question of a continental shelf, a concept which only appeared in the legal sphere in 1945, and even less that of an exclusive economic zone.

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[315] See M. Whiteman, *Digest of International Law*, Department of State, Washington D.C., 1965, Vol. 4, p. 23.

2.241 The 82° meridian of longitude West is located approximately 100 nautical miles off the Nicaraguan coast in the direction of the Island of San Andrés and this latter island is located approximately 20 miles from the meridian whilst the other main island of the Archipelago, the Island of Providencia, is situated 40 nautical miles from it. If this meridian had been intended as fixing a boundary it would have meant that in 1930 Nicaragua and Colombia were claiming maritime areas unauthorized and even unknown in international law. And to top it all, this would mean that these outrageous claims, for the time period involved, were being sponsored by the United States, one of the maritime nations that most zealously defended the three nautical miles limit.

2.242 In this respect, the present case is similar to the case concerning the Maritime Boundary between Guinea and Guinea-Bissau. In its unanimous Award of 14 February 1985, the Arbitral Tribunal, after listing a series of treaties attributing sovereignty over islands notes:

> "À la connaissance du Tribunal, il n'a jamais été considéré à l'époque qu'aucun de ces instruments ait alors attribué à l'un des signataires une souveraineté en mer sur autre chose que les eaux territoriales communément admises."[316]

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[316] *R.G.D.I.P.*, 1985, n° 2, p. 519, para. 81.
International Legal Materials, Vol. XXV, p. 251 at p. 287, para. 81.
The English text reads as follows:
"To the knowledge of the Tribunal, it was never considered at the time that any of these treaty granted maritime sovereignty to any of the signatories over anything except the commonly recognized territorial waters."

2.243 Consequently, the Tribunal concludes:

> "tout indique que ces deux États [la France et le Portugal] n'ont pas entendu établir une frontière maritime générale entre leurs possessions de Guinée. Ils ont seulement indiqué, dans une région à la géographie complexe et encore mal connue, quelles îles appartiendraient au Portugal. En d'autres termes, dans le texte final de l'article Ier, dernier alinéa, de cette convention [la Convention de 1886 relative à la délimitation des possessions françaises et portugaises dans l'Afrique occidentale], le mot 'limite' n'a pas le sens juridique précis de frontière mais un sens plus large."[317]

2.244 This reasoning is all the more compelling in the present case in that neither the 1928 Treaty, nor the Protocol of Exchange of Ratifications of 1930 include the word "limit", or "boundary", or "border". Both instruments are clearly drafted in such a way as to exclude any ambiguity: they simply aim at allocating islands and, supposing they were valid, *quod non*, this would be their exclusive purpose and effect.

2.245 Another Arbitral Award is particularly relevant in the present case: the Award concerning the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal of 31 July 1989. In this Award, that the Court deemed valid by its Judgment of 12 November

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[317] *Ibid.*, para. 82.
International Legal Materials, Vol. XXV, p. 251 at p. 288, para. 82.
The English text reads as follows:
"...everything indicates that these two States [France and Portugal] had no intention of establishing a general maritime boundary between their possessions in Guinea. In a complex and still little known geographical area, they simple indicated which islands would belong to Portugal. In others words, in the last paragraph of the final text of Article I of this Convention, [of 1886 relative to the maritime boundary between French and Portugal respective possessions in the West Africa] the word "limit" does not have the precise legal meaning of boundary, but a wider meaning"

1991,[318] the Arbitral Tribunal was called to interpret an Agreement of 26 April 1960 concerning the sea boundary between France and Portugal. It firmly stated:

> "Le Tribunal estime que l'Accord de 1960 doit être interprété à la lumière du droit en vigueur à la date de sa conclusion. C'est un principe général bien établi qu'un fait juridique doit être apprécié à la lumière du droit en vigueur au moment où il se produit, et l'application de cet aspect du droit intertemporel à des cas comme celui de la présente espèce est confirmée par la jurisprudence en matière de droit de la mer." (*International Law Reports*, 1951, pp. 161 ss.; *The International and Comparative Law Quaterly*, 1952, pp. 247 ss.).
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> "À la lumière de son texte et des principes de droit intertemporel applicables, le Tribunal estime que l'Accord de 1960 ne délimite pas les espaces maritimes qui n'existaient pas à cette date, qu'on les appelle zone économique exclusive, zone de pêche ou autrement. Ce n'est, par exemple, que très récemment que la Cour internationale de Justice a confirmé que les règles relatives à la 'zone économique exclusive' peuvent être considérées comme faisant partie du droit international général en la matière (C.I.J., Recueil 1982, p. 74, Recueil 1984, p. 294, Recueil 1985, p. 33). Interpréter un accord conclu en 1960 de manière à comprendre aussi la délimitation d'espaces comme 'la zone économique exclusive' impliquerait une véritable modification de son texte et, selon un dictum bien connu de la Cour internationale de Justice, un tribunal est appelé à interpréter les traités et non pas à les réviser (C.I.J., Recueil 1950, p. 229, Recueil 1952, p. 196, Recueil 1966, p. 48). Il ne s'agit pas ici de l'évolution du contenu, ni même de l'étendue, d'un espace maritime qui aurait existé en droit international lorsque l'Accord de 1960 a été conclu, mais bel et bien de l'inexistence en droit international d'un espace maritime comme la 'zone

[318] *ICJ Report* 1991, pp. 75-76, para. 69.

économique exclusive' à la date de la conclusion de l'Accord de 1960."[319]

2.246 Similarly, the text of the 1928 Treaty must be interpreted in light of the law prevailing at the time of its conclusion. And it would be absurd to claim that it delimited maritime areas between the Parties such as their respective continental shelf or exclusive economic zone, which zones simply did not legally exist at the time. Any contrary assertion would amount not to interpreting the Treaty, but to revising it and changing legal history.

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[319] *R.G.D.I.P.* 1990, n° 1, pp. 269-270, para. 85. See also: I.C.J., Chamber, Judgment of 11 September 1992, *Land, Island and Maritime Frontier Dispute*, *ICJ Report* 1992, pp. 606-607, para. 415.

International Law Report, Vol. 83, p. 45, para. 85.

The English text reads as follows:

"The Tribunal considers that the 1960 Agreement must be interpreted in the light of the law in force at the date of its conclusion. It is a well established general principle that a legal event must be assessed in the light of the law in force at the time of its occurrence and the application of that aspect of intertemporal law to cases such as the present one is confirmed by case-law in the realm of the law of the sea. (*International Law Reports*, 1951, pp. 161 *et seq*; *The International and Comparative Law Quaterly*, 1952, pp. 247 *et seq.*)

In the light of the text, and of the applicable principles of intertemporal law, the Tribunal considers that the 1960 Agreement does not delimit those maritime spaces which did not exist at the date, whether they be termed 'exclusive economic zone', 'fisheries zones' or whatever. For example, it was only very recently that the International Court of Justice has confirmed that the rules relating to the 'exclusive economic zone' can be considered as forming part of general international law in the matter. (*ICJ Reports 1982*, p. 74; *ICJ Reports 1984*, p. 294; *ICJ Reports 1985*, p.33). To interpret an agreement concluded in 1960 so as to cover also the delimitation of areas such as the 'exclusive economic zone' would involve a real modification of its text and, in accordance with the well known dictum of the International Court of Justice, it is the duty of the court to interpret treaties, not to revise them (*ICJ Reports 1950*, p. 229; *ICJ Reports 1952*, p. 196; *ICJ Reports 1966*, p. 48). We are not concerned here with the evolution of the content, of even of the extent of a maritime space which existed in international law at the time of the conclusion of the 1960 Agreement, but with the actual non-existence in international law of a maritime space such as the 'exclusive economic zone' at the date of the conclusion of the 1960 Agreement."

2.247 This, indeed, was not the purpose of the Nicaraguan Congress when it conditioned its approval of the Treaty upon the insertion of the clause then included in the Protocol of Exchange of Ratifications. Nor was it the intent of Colombia when she accepted it. This comes across with complete clarity in the Congressional Records of Nicaragua and in the Report of the Colombian Minister of Foreign Affairs to his Congress as can be seen in paragraph 2.195 above.

2.248 Had the clarification made by the Nicaraguan Senate modified the Treaty, it should have been submitted again to the Colombian Congress in conformity with its Article II, since it would have been a different Treaty, concerning no longer the "territorial dispute" between the Parties, but the delimitation of an area involving thousands of square miles of their respective maritime territories - a change which, once again, could not have been contemplated at the time. In any case, the Treaty was not submitted again to the Colombian Congress, which reconfirms, if need be, that, by no means, was the clarification of the 1930 Protocol intended to modify or revise the 1928 Treaty. Moreover, any interpretation to the contrary would be another cause of nullity of the Treaty[320] which would not have been ratified in conformity with its own terms nor in accordance with the Colombian Constitution then in force.[321] The debate in the Nicaraguan Senate as well as the assurances formally given by Esguerra, show that both Parties were conscious of this

[320] See Article 46 of the 1969 Vienna Convention on the Law of Treaties.

[321] See Article 1 of Act 3 of 1910 revising the Colombian Constitution: "The borders between the Republic and neighbouring countries can only be modified through public treaties duly approved by both Congressional Chambers." M. A. Pombo et al, *Constituciones de Colombia recopiladas y precedidas de una breve reseña histórica. 2 Ed.* Imprenta de La Luz, Bogotá, 1911.

obligation and deliberately chose not to submit the Treaty to the Colombian Congress.[322]

2.249 In view of the above, the only possible conclusion is that it was not the purpose of either the Treaty or of the Protocol of Exchange of Ratifications to delimit the respective maritime areas belonging to the Parties: the only object of the Treaty was to determine sovereignty over the territories listed in Article I and the clarification made in the Protocol of 1930 only aimed at specifying the definition of the "San Andrés Archipelago" mentioned in said Article and at confining the territories on which Nicaragua supposedly "recognized the full and entire sovereignty of the Republic of Colombia" to islands, islets and reefs situated east of the 82° meridian West of Greenwich.

2.250 Since the meaning of the Treaty, interpreted in light of its context, is clear, it is not "necessary to resort to supplementary means of interpretation, such as the travaux préparatoires ... or the circumstances of its conclusion". However, as in other cases decided by the Court, this interpretation can be confirmed by recourse to such supplementary means.[323] In this respect, the reasons for the clarification made by the Nicaraguan Congress and the reasons why the Government of Colombia considered it unnecessary to submit the Treaty again to Congressional approval is worth noting. The response of the Government of Colombia considered that since the

[322] See above, paras. 2.191-2.192.

[323] Cf. I.C.J., Judgment of 17 December 2002, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, para. 53; see also: Judgments, 3 February 1994, *ICJ Report* 1994, p. 27, para. 55 or 15 February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)*, *ICJ Report* 1995, p. 21, para. 40).

clarification "did not alter the text or the spirit of the Treaty, it did not need to be submitted to the consideration of the Legislative Branch."[324]

2.251 In an environment of susceptibilities and mistrust, the fact that Article I, first paragraph, of the Treaty only refers to the main two Corn Islands (Great Corn Island and Little Corn Island), with no mention of the other islands, islets and cays adjacent to the Nicaraguan coast, while, on the contrary, it alluded to "the other islands, islets and reefs forming part of San Andres Archipelago", explains that the Nicaraguan legislators, even if feeling obliged to consent to a hateful treaty, would want to prevent future surprises.

2.252 The clarification of the Nicaraguan Congress accepted by Colombia in the exchange of ratifications as indicated above in paragraph 2.195 declares: "that the San Andres and Providencia Archipelago mentioned in the first article of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich". Nowhere does it impose any limitation on Nicaragua but only on the Archipelago. In other terms, the meridian 82° West of Greenwich establishes the limit of the archipelago itself - not of its maritime domain - and not of Nicaragua.

2.253 By the same token, it will be apparent that this definition only bears upon the Archipelago itself and has no bearing whatsoever to the North or South of the San Andrés and Providencia Archipelago which at most lies between parallels 12° 10' and 13° 25'; that is the stretch between the Albuquerque Cays and the Island of Santa Catalina. South and north of these limits, the 1928 Treaty as

[324] See paragraph 2.196 above.

interpreted by the 1930 Protocol of Exchange of Ratifications is silent and can be of no use to delimiting the respective maritime jurisdictions of the Parties. Therefore, even if the Treaty were found to be valid and were found to have established a maritime boundary, which Nicaragua does not accept, the limits to the south of the parallel of 12° 10' N and to the north of the parallel of 13° 25' N must in any case be decided by the Court in accordance with general rules of the law of the sea.

Section IV

Even if the 1928 Treaty ever entered into force, it has been terminated as a consequence of its breach by Colombia

2.254 As has been shown in some details in the previous Section of the present Chapter, Nicaragua ratified the 1928 Treaty on the express condition that "the San Andrés and Providencia Archipelago mentioned in the first Article of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich". The clarification was introduced in the Protocol of Exchange of Ratifications of 5 May 1930. This must be considered as an authentic interpretation of the Treaty, on which both Parties agreed and which was a condition for the ratification by the Nicaraguan Congress.[325]

2.255 This common understanding of the meaning of the Treaty was not challenged by Colombia until 1969 when, for the first time, she contended that the 82° meridian, which was clearly intended to circumscribe the western limit of the San Andrés archipelago, constituted the maritime border between herself and Nicaragua in their respective maritime areas.

2.256 This radical shift in the common interpretation of the Treaty clearly constitutes a material breach of this instrument.

2.257 There can be no doubt that an interpretation of a treaty that changes its meaning is a violation of that treaty. As Lord McNair has noted:

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[325] See above, para. 2.195.

> "The performance of treaties is subject to an over-riding obligation of mutual good faith. This obligation is also operative in the sphere of the interpretation of treaties, and it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties."[326]

2.258 It must also be admitted that a whimsical and self-serving interpretation of a fundamental clause, which radically changes the intention of the contracting parties, constitutes a material breach of the document. This is indeed the case here: admitting that the Treaty entered into force, *quod non*, this interpretation by Colombia several decades later, regarding the object and purpose of this instrument, twisted the meaning of the Treaty, that was aimed at resolving the "territorial conflict pending between" the Parties and made it a tool to revive that dispute. In effect, this Colombian interpretation in practice means that the Nicaraguan Atlantic Coast, the Nicaraguan sovereignty over which was "acknowledged" by Colombia, is a coast with limited maritime spaces. This sleight of hand makes the immense continental shelf shared by Colombia and Nicaragua suddenly belong to Colombia. In certain areas the 82° meridian runs as close as 70 miles from the Nicaraguan Coast whilst it is located over 500 miles from the Colombian coast. Figure VII gives a good indication of the division of maritime areas that has been imposed by Colombia on Nicaragua since she "discovered" in 1969, that 40 years earlier – anticipating by half a century the United Nations Convention on the Law of the Sea of 1982 - she had "delimited" with Nicaragua the maritime areas authorized by the 1982

[326] *The Law of Treaties*, Clarendon Press, Oxford, 1961, p. 465.

Convention. Colombia's interpretation of this Treaty is as far from being plausible as it is from being a good faith interpretation.

2.259 Such an eccentric interpretation aims at converting a purely "insular" provision of a territorial treaty, defining the maximal extent of the Archipelago of San Andrés, into a treaty drawing a 250 nautical mile maritime boundary line and dividing thousands of square miles of maritime areas.

2.260 Moreover, it must be kept in mind that this interpretation has not been a theoretical exercise, but rather that Colombia, all by herself, decided that this was the interpretation of the treaty and imposed a blockade to prevent Nicaragua from making use of her waters and continental shelf east of meridian 82. This has represented an enormous loss of resources for Nicaragua, as well as a loss of potential development for the inhabitants of Nicaragua's Atlantic coast. For this reason Nicaragua, in paragraph 9 of the application, reserved her rights to claim compensation. This reservation is maintained in this Memorial.

2.261 This material breach fulfils the conditions according to which Nicaragua had the right to terminate the Treaty in accordance with Article 60 of the 1969 Vienna Convention on the Law of Treaties:

> "1.A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
>
> (...)
>
> "3. A material breach of a treaty, for the purposes of this article, consists in:

"a) a repudiation of the treaty not sanctioned by the present Convention; or

"b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

2.262 This provision is a pure codification of a customary norm as the Court has acknowledged on several occasions.[327]

2.263 Nicaragua had made known that her acceptance of the Treaty was dependent on the interpretation then formally accepted by Colombia, according to which "the San Andrés and Providencia Archipelago mentioned in the first Article of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich". In accordance with the ordinary meaning of these terms, the scope of the Treaty was thus clearly limited to defining the extreme extension to the West of the archipelago, without any intention of delimiting the respective maritime areas on which the Parties may claim jurisdiction. By completely shifting this interpretation, Colombia has clearly breached "a provision essential to the accomplishment of the object or purpose of the treaty", and the condition itself subject to which Nicaragua had ratified the Treaty.

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[327] See *e.g.*: Advisory Opinion, 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971*, p. 47; Judgments, 2 February 1973, *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, ICJ Report* 1973, p. 18 or 25 September 1997, *Gabčikovo-Nagymaros Project, ICJ Report* 1997, p. 38, para. 46 and p. 62, para. 99.

PART II

MARITIME DELIMITATION

CHAPTER III

MARITIME DELIMITATION

I. Introduction

3.1 The present part of the Memorial will assess the delimitation of maritime boundaries between Nicaragua and Colombia, in the light of the outcome of the determination of sovereignty to be made by the Court. A number of possibilities can be envisaged in this respect. The Court can make a determination that all of the San Andres and Providencia group is Nicaraguan or Colombian. Apart from that, the Court may also determine that the islands referred to in Article I, paragraph 1, of the 1928 Treaty are Colombian and that the other features not included in this Treaty are Nicaraguan. The fact that the outcome of the territorial dispute is not known makes it necessary to address these and other possible outcomes and this will be done in the relevant section below.

3.2 As a necessary first step, the nature of the delimitation requested, and the applicable law, will be examined.

II. The Delimitation Requested and the Applicable Law

3.3 In the Application the Republic of Nicaragua requested the Court:

> "Second, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary

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

3.4 The present proceedings are essentially similar to the *Gulf of Maine* case. In that case it was held that, although both the Parties were parties to the Continental Shelf Convention, the provisions of Article 6 of the Convention were not applicable to a case involving a single maritime boundary. In the present case, Nicaragua is not a party to the Convention on the Continental Shelf in any event, but ratified the Law of the Sea Convention on 3 May 2000. Conversely, Colombia is a party to the Continental Shelf Convention, but is not a party to the Law of the Sea Convention. In any case the logic applied by the Chamber in the *Gulf of Maine* case is relevant in the circumstances of the present case.

3.5 In the result, the Chamber in effect applied the general principles of maritime delimitation. The key passages in the Judgment are as follows:

"156. The Chamber may therefore begin by taking into consideration, without its approach being influenced by predetermined preferences, the criteria and especially the practical methods that may theoretically be applied to determining the course of the single maritime boundary between the United States and Canada in the Gulf of Maine and in the adjacent outer area. It will then be for the Chamber to select, from this range of possibilities, the criteria that it regards as the most equitable for the task to be performed in the present case, and the method of combination of practical methods whose application will best permit of their concrete implementation.

'157. There has been no systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation, and this would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations. Codification efforts have left this field untouched. Such criteria have however been mentioned in the arguments advanced by the parties in cases concerning the determination of continental shelf boundaries and in the judicial or arbitral decisions in those cases. There is, for example, the criterion expressed by the classic formula that the land dominates the sea: the criterion advocating, in cases where no special circumstances require correction thereof, the equal division of the areas of overlap of the maritime and submarine zones appertaining to the respective coasts of neighbouring States; the criterion that, whenever possible, the seaward extension of a State's coast should not encroach upon areas that are too close to the coast of another State; the criterion of preventing, as far as possible, any cut-off of the seaward projection of the coast or of part of the coast of either of the States concerned; and the criterion whereby, in certain circumstances, the appropriate consequences may be drawn from any inequalities in the extent of the coasts of two States into the same area of delimitation."[328]

3.6 Of particular interest is the link which the Chamber saw between the modalities of the applicable law and the general approach to the delimitation process. As the Chamber observed in the two most significant paragraphs of the Judgment:

"194. 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

[328] *I.C.J. Reports 1984*, pp. 312-313.

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.

'195. To return to the immediate concerns of the Chamber, it is accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in second place, a political aspect. Within this framework, it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap. (emphasis added)."[329]

3.7 In the *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* the Court adopted the same approach and expressly invoked the *Gulf of Maine* case, quoting from paragraph 194 of the Judgment: see the Judgment in *Qatar v. Bahrain*, paragraphs 167-173, at paragraph 173. The same methodology was adopted by the Court in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, and paragraph 194 of the *Gulf of Maine* Judgment was once again

[329] *I.C.J. Reports 1984*, p.327.

quoted: see the Judgment of 10 October 2002, paragraphs 285-287, at paragraph 287.

3.8 The type of delimitation requested in the present proceedings is essentially the same as that requested in the *Gulf of Maine* case and the applicable law is similar. The appropriate methodology will be applied in due course, but it is necessary at this stage to establish the general geographical framework for the maritime delimitation.

III. The General Geographical Framework

3.9 The general geographical framework for the maritime delimitation between Nicaragua and Colombia is formed by the southwestern part of the Caribbean Sea. The coasts of Nicaragua, Costa Rica, Panama, Colombia, and Jamaica surround this part of the Caribbean Sea. The part of the Caribbean coast of Colombia starting from the terminal point of its land boundary with Panama generally runs in a northeasterly direction. The coast of Nicaragua runs on an essentially north-south axis.

3.10 There are a number of islands located in the southwestern part of the Caribbean Sea. Most of these islands are situated off the mainland coast of Nicaragua. To the north the most important island group is formed by the Cayos Miskitos. The main island of this group, Miskito Cay, has a total area of 8 square nautical miles. Further to the south there is another group of islands under the sovereignty of Nicaragua. Of these islands, the Corn (Maiz) Islands are placed furthest seaward, at 32 to 36 nautical miles from the Nicaraguan

mainland coast. The Corn Islands, consisting of Big Corn Island and Little Corn Island, are the most significant of these islands. Further seaward are the islands of San Andres and Providencia.

3.11 The islands of San Andres and Providencia are located much nearer to the Nicaraguan mainland coast than to that of Colombia. The distance between the Nicaraguan mainland coast and the islands of San Andres and Providencia is about 105 and 125 nautical miles respectively. As a result, the exclusive economic zone and continental shelf of the mainland coast of Nicaragua surrounds and extends beyond the islands. As a consequence the relationship between the mainland coasts of Nicaragua and the islands cannot be characterized as merely opposite. The maritime zones generated by the mainland coast of Nicaragua and the islands not only meet and overlap between these two coasts, but also extend beyond one of the coasts which face each other. In this sense the relationship between the mainland coast of Nicaragua and that of the islands of San Andres and Providencia is similar to that between the mainland coast of France and the Channel Islands in the *Anglo-French Continental Shelf* case.

3.12 On the other hand, the distances between the islands of San Andres and Providencia and the mainland coast of Colombia are respectively 385 and 384 nautical miles. This makes the relationship between these coasts one of oppositeness as the exclusive economic zones of the islands and the Colombian coast only overlap to the east of the islands.

3.13 An additional feature of the geography consists of a number of features situated either to the east of San Andres and Providencia

(Roncador) or further to the north (Quitasueño and Serrana) or in the vicinity of the Nicaraguan Rise (Serranilla and Bajo Nuevo). These features and their ramifications form the subject of separate analysis below in Section XI of this Chapter.

IV. The Delimitation Area

3.14 The judicial authorities always insist that the choice of the pertinent method of delimitation 'is essentially dependent upon geography': see the Judgment in the *Gulf of Maine* case, *I.C.J. Reports 1984*, p.93, paragraph 216. In the present case the delimitation area is a legal concept, but involves elements of both physical and political geography: see the *Gulf of Maine* case, ibid. pages 272-273, paragraph 41 and page 327, paragraph 195.

3.15 The coasts defining the delimitation area (see NM Volume I, Figure I) for present purposes are as follows:

(a) the mainland coast of Nicaragua from the terminus of the land boundary with Honduras (in the north) to the terminus of the land boundary with Costa Rica (in the south).

(b) The mainland coast of Colombia opposite the coast of Nicaragua, and fronting on the same maritime areas.

3.16 This assessment is not substantially affected by the question whether San Andres and its dependencies are determined to be Nicaraguan or

Colombian. As Nicaragua will explain in due course, even if, for the sake of argument, the San Andres group were determined to be Colombian, the consequences of such a determination would not affect the essential geographical relationship of the mainland coasts of the Parties.

3.17 Nor is the assessment affected by the presence of claims by third States: see Nicaraguan Memorial Volume I Figure II. For present purposes the coastal relationship of the parties must be assessed independently of third state claims. It is to be recalled that the incidence, to the south of Malta, of claims by Italy, in the *Libya/Malta* case, did not inhibit the Court from determining which of the coasts of Libya were opposite Malta and therefore constituted relevant coasts for the purposes of delimitation: see the Judgment in the *Libya/Malta* case: *I.C.J. Reports 1985*, pages 49-50, paragraph 68:

> "Within the bounds set by the Court having regard to the existence of claims of third States, explained above, no question arises of any limit, set by those claims, to the relevant coasts of Malta to be taken into consideration. On the Libyan side, Ras Ajdir, the terminus of the frontier with Tunisia, must clearly be the starting point; the meridian 15° 10'E which has been found by the Court to define the limits of the area in which the Judgment can operate crosses the coast of Libya not far from Ras Zarruq, which is regarded by Libya as the limit of the extent of its relevant coast. If the coasts of Malta and the coast of Libya from Ras Ajdir to Ras Zarruq are compared, it is evident that there is a considerable disparity between the lengths, to a degree which, in the view of the Court, constitutes a relevant circumstance which should be reflected in the drawing of the delimitation line. The coast of Libya from Ras Ajdir to Ras Zarruq, measured following its general direction, is

192 miles long, and the coast of Malta from Ras il-Wardija to Delimara Point, following straight baselines but excluding the islet of Filfla, is 24 miles long. In the view of the Court, this difference is so great as to justify the adjustment of the median line so as to attribute a larger shelf area to Libya: the degree of such adjustment does not depend upon a mathematical operation and remains to be examined." (emphasis added).

3.18 The coasts of Nicaragua and Colombia are essentially opposite: see Nicaraguan Memorial Volume I, Figure I. However, it is not necessary, for legal purposes, that coasts should be precisely parallel or 'directly' opposite. The position was explained by the Chamber in the *Gulf of Maine* case in terms of a relationship of 'frontal opposition'. In the words of the Chamber:

"But in putting forward its proposals for the delimitation, Canada has failed to take account of the fact that, as one moves away from the international boundary terminus, and approaches the outer openings of the Gulf, the geographical situation changes radically from that described in the previous paragraph. The quasi-right-angle lateral adjacency relationship between part of the Nova Scotia coasts, and especially between their extension across the opening of the Bay of Fundy and Grand Manan Island, and the Maine coasts, gives way to a frontal opposition relationship between the remaining coasts of Nova Scotia and those of Massachusetts which now face them. It is this new relationship that is the most characteristic feature of the objective situation in the context of which the delimitation is being effected. Moreover, when the geographical characteristics of the delimitation area were described it was shown that the relationship between the lines that can be drawn, between the elbow of Cape Cod and Cape Ann (on the United States side), and between Cape Sable and Brier Island (on the Canadian side), is one of marked quasi-parallelism. In this situation, even a delimitation line on the basis of the equidistance method would have to be drawn taking

> into account the change in the geographical situation, which Canada did not do when it was necessary. In any event what had to be avoided was to draw, the whole way to the opening of the Gulf, a diagonal line dominated solely by the relationship between Maine and Nova Scotia, even where the relationship between Massachusetts and Nova Scotia should have predominated"[330]. (emphasis added)

3.19 Both in the passage quoted and in later passages the Chamber used the description of the 'quasi-parallelism' of the two coasts: see ibid. pages 333-334, paragraph 216; and see also page 331, paragraph 206.

3.20 The relationship of the coasts of the Parties is of particular significance, as the Chamber explained in the *Gulf of Maine* case:

> "The Chamber has already considered this aspect in Section VI, paragraphs 188-189, in commenting on the delimitation line proposed by Canada. It then expressed its disagreement precisely in relation to the fact that the Party in question had proposed a delimitation that failed to take account of the fact that a change in the geographical perspective of the Gulf is to be noted at a certain point. Given the importance of this aspect, the Chamber considers that it will here be apposite, by way of reminder, to repeat its observation that it is only in the northeastern sector of the Gulf that the prevailing relationship of the coasts of the United States and Canada is part of lateral adjacency as between part of the coast of Maine and part of the Nova Scotian coast. In the sector closest to the closing line, the prevailing relationship is, on the contrary, one of oppositeness as between the facing stretches of the Nova Scotian and Massachusetts coasts. Accordingly, in the first sector, geography itself demands that, whatever the practical method selected, the

[330] *I.C.J. Reports 1984*, p.325, para. 189.

boundary should be a lateral delimitation line. In the second, it is once again geography which prescribes that the delimitation line should rather be a median line (whether strict or corrected remains to be determined) for delimitation as between opposite coasts, and it is moreover geography yet again which requires that this line, given the almost perfect parallelism of the two facing coasts involved, should also follow a direction practically parallel to theirs"[331]. (emphasis added)

3.21 The delimitation area in the present case consists of the figure shown in Nicaraguan Memorial Volume I, Figure I. It can be seen that the frontal opposition between Nicaragua and Colombia consists of coasts which are not parallel, but which are nonetheless opposite rather than adjacent. In the *Tunisia/Libya* case the Court, in relation to the second sector of the boundary, adopted the position that the criterion was the predominant relationship of the coasts: see *I.C.J. Reports 1982*, page 88, paragraph 126. In the present case the predominant relationship is one of oppositeness.

3.22 In conclusion, the following passage from the Judgment in the *North Sea* cases continues to be relevant:

"Before going further it will be convenient to deal briefly with two subsidiary matters. Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by

[331] *I.C.J. Report 1984*, p. 331, para. 206.

means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. If there is a third State on one of the coasts concerned, the area of mutual natural prolongation with that of the same or another opposite State will be a separate and distinct one, to be treated in the same way. This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem – a conclusion which also finds some confirmation in the difference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention (reproduced in paragraph 26 above) as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement."[332]

3.23 As the distinguished Court of Arbitration in the *Anglo-French Continental Shelf* case pointed out, these observations are generally applicable: *International Law Reports*, Volume 54, pages 61-62, paragraphs 85-86. Thus the principles set forth by the Court in the passage from the Judgment in the *North Sea* cases apply appropriately to the geographical situation in the south-western Caribbean.

3.24 The circumstances relating to San Andres and Providencia will be examined separately in due course.

[332] *I.C.J. Reports 1969*, pp. 36-37, para. 57.

V. The Relevant Legislation and Claims of Nicaragua

3.25 In her Application, Nicaragua states the position thus:

> "Since 1945 general international law has developed in such a way as to encompass sovereign rights to explore and exploit the resources of the continental shelf together with rights to an exclusive economic zone two hundred miles in breadth. The provisions of the 1982 Law of the Sea Convention have recognised and confirmed these legal interests of coastal States.
>
> In conformity with these developments, the Nicaraguan Constitution as early as 1948 affirmed that the national territory included the continental platforms on both the Atlantic and Pacific Oceans. The Decrees of 1958 relating to the exploitation of natural resources and to the exploration and exploitation of petroleum made it clear that the resources of the continental shelf belonged to Nicaragua. In 1965 Nicaragua declared a "national fishing zone" of 200 nautical miles seaward on both the Pacific and Atlantic Oceans."

3.26 Nicaragua ratified the Law of the Sea Convention on 3 May 2000, that is, prior to the filing of the Application on 6 December 2001.

3.27 Upon ratification the following declaration was made:

> "In accordance with article 310 of the United Nations Convention on the Law of the Sea, the Government of Nicaragua hereby declares:
>
> 1.That it does not consider itself bound by any of the declarations or statements, however phrased or named, made by other States when signing, accepting, ratifying or acceding to the Convention and that it reserves the right to state its position on any of those declarations or statement at any time.

2. That ratification of the Convention does not imply recognition or acceptance of any territorial claim made by a State party to the Convention, nor automatic recognition of any land or sea border.

In accordance with article 287, paragraph 1, of the Convention, Nicaragua hereby declares that it accepts only recourse to the International Court of Justice as a means of the settlement of disputes concerning the interpretation or application of the Convention.

Nicaragua hereby declares that it accepts only recourse to the International Court of Justice as a means for the settlement of the categories of disputes set forth in subparagraphs (a), (b) and (c) of paragraph 1 of article 298 of the Convention."

3.28 In accordance with the provisions of the Law of the Sea Convention and, in so far as relevant, the principles of general international law, Nicaragua claims a single maritime boundary based upon the median line dividing the areas where the coastal projections of Nicaragua and Colombia converge and overlap.

3.29 Over a long period Nicaraguan legislation has reflected developments in the law of the sea, and, in particular, those relating to the exploitation of the resources of the continental shelf. The Decrees of 1958 relating to the exploitation of natural resources and to the exploration and exploitation of petroleum made it clear that the resources of the continental shelf belonged to Nicaragua: see the Decree No. 316 of 12 March 1958 (General Act on the Exploitation of Natural Resources), and Decree No. 372 of 2 December 1958 (Special Act on the Exploration and Exploitation of Petroleum).[333]

[333] See NM Vol. II, Annexes 63 and 64.

3.30 In 1965 Nicaragua declared a 'national fishing zone' of 200 nautical miles on both the Atlantic and Pacific coasts: see Decree No. 1L of 5 April 1965 delimiting the national fishing zone of 200 nautical miles.[334]

3.31 In 1979 Nicaragua adopted Act No. 205, which provided, in material part, as follows:

> Article 1
>
> "The continental shelf of Nicaragua, throughout its extension, is an integral part and a natural prolongation of national territory, and is accordingly for all purposes subject to the sovereignty of the Nicaraguan nation.
>
> Article 2
>
> 'The sovereignty and jurisdiction of Nicaragua over the sea adjacent to its seacoasts shall extend up to 200 nautical miles.
>
> Article 3
>
> 'The sovereignty and national jurisdiction exercised over the continental shelf and the adjacent sea shall extend to the airspace and all the islands, cays, banks, reefs and other geographical features situated within the limits determined in the foregoing articles, whether these are on the surface of the waters or submerged, or are elevations rising from the continental shelf.
>
> Article 5
>
> 'All the minerals and natural resources within these areas of sovereignty and jurisdiction belong to the Nicaraguan nation and are independent of the actual or nominal occupation by Nicaragua of the areas, as determined above.
>
> 'Rights for the purpose of exploring and exploiting, utilizing and managing the minerals and natural resources

[334] See NM Vol. II, Annex 65.

shall belong exclusively to Nicaragua without prejudice to the rights and obligations contracted under international treaties or conventions.

Abrogation

Article 6

'The present Act abrogates all previous provisions which are in conflict with it."[335]

3.32 On 5 March 2002 the above Act of 1979 was supplanted by Law No. 420[336], the provisions of which follow:

LA GACETA
DIARIO OFFICIAL
Managua, D.N., Friday 22 March 2002, No.57

Law No. 420
(...)
LAW ON MARITIME AREAS OF NICARAGUA

Art.1 The maritime areas of Nicaragua include all zones currently allowed by International Law.

Art.2 The maritime areas of Nicaragua correspond to those referred to in International Law as:

1 The Territorial Sea;
2 The Interior Waters;
3 The Contiguous Zone;
4 The Exclusive Economic Zone;
5 The Continental Shelf

[335] Act No. 205 of 19 December 1979 Relating to the Continental Shelf and Territorial Sea. See NM Vol. II, Annex 66.
[336] See NM Vol. II, Annex 67.

Art.3 The breadth of the Territorial Sea is 12 marine miles, measured from the straight base line or low tide established along the length of the coasts.

Art.4 The state exercises sovereignty in maritime areas known as the Interior Maritime Waters that are located between the coasts and the Nicaraguan territorial sea.

Art.5 The Nicaraguan Contiguous Zone extends 24 marine miles from the base lines from which the breadth of the territorial sea is measured, in accordance with this Law and its regulations.

Art.6 In the Contiguous Zone to the territorial sea, the State shall exercise the control and supervision measures necessary to:

1 Prevent the violation of the laws and regulations related to customs, criminal law, tax law, immigration or health in its territory, in its interior maritime waters, or in its territorial sea.
2 Punish the violation of these laws and regulations committed in its territory, in interior maritime waters or territorial sea.

3 Prevent the unauthorized removal of archeological or historical objects found in its territory, in its interior maritime waters or territorial sea.

Art.7 The Exclusive Economic Zone of the Republic of Nicaragua extends 200 marine miles from the base line from which the territorial sea is measured.

Art.8 The Continental Shelf of Nicaragua covers the bed and subsoil of the submarine areas that extend beyond its territorial sea as an extension and natural projection of its territory under the sea to the minimum distance of 200 marine miles and a maximum of 350 marine miles, as recognized by International Law.

Art.9 In processes of maritime delimitation, the interests of the Nation shall be upheld, in agreement with the provisions of International Law.

Art.10 This Law repeals any other law that opposes it.

Art.11 This Law shall enter into effect upon its publication in La Gaceta, Diario Official.

VI. The Relevant Legislation and Claims of Colombia

3.33 In 1978, on the basis of Law No.10, Colombia established a twelve-mile territorial sea, a two-hundred mile economic zone and an undefined continental shelf. The material provisions are as follows:

> "Establishing rules concerning the territorial sea, the exclusive economic zone and the continental shelf, and regulating other matters.
>
> Article 1. The territorial sea of the Colombian nation, over which the latter exercises full sovereignty, shall extend beyond its mainland and island territory and internal waters to a distance of 12 nautical miles or 22 kilometres, 224 metres.
>
> National sovereignty shall also extend to the space over the territorial sea as well as to its bed and subsoil.
>
> Article 2. Ships of all States shall enjoy the right of innocent passage through the territorial sea, in accordance with the rules of international law.
>
> Article 3. The outer limit of the territorial sea shall be constituted by a line every point of which is 12 nautical miles from the nearest point of the baseline referred to in the next article.
>
> [.....]
>
> Article 7. An exclusive economic zone shall be established adjacent to the territorial sea; the zone shall extend to an outer limit of 200 nautical miles measured

from the baselines from which the breadth of the territorial sea is measured.

Article 8. In the zone established by the preceding article, the Colombian nation shall exercise sovereign rights for the purpose of exploring, exploiting, conserving and managing the living and non-living natural resources of the sea-bed, the subsoil and the superjacent waters; it shall also have exclusive jurisdiction for scientific research and the preservation of the marine environment.

Article 9. In pursuance of this Act, the Government shall identify the lines referred to in the preceding articles relating to its continental territory, the archipelago of San Andrés and Providencia, and other island territories; the said lines shall be published in the official maritime charts in accordance with the relevant international rules.

Article 10. National sovereignty shall extend to the continental shelf for the purposes of exploring and exploiting its natural resources.

[.....]

3.34 In 1984 Colombia promulgated the straight baselines Decree: Decree No. 1436 of 13 June 1984, in accordance with Article 9 of Law No. 10 of 1978 (see above para. 3.33). As the Court will recall, straight baselines and the concomitant basepoints are not necessarily to be given effect in the context of a delimitation in accordance with equitable principles: see the *Libya/Malta* case, *I.C.J. Reports 1985*, page 48, paragraph 64; infra, paragraph 3.55.

3.35 In any event, the legal validity of the Colombian system is open to serious challenge. In the conclusion to its analysis of the legislation the Bureau of Intelligence and Research of the United States Department of State observes that:

"With the exception of several select areas, straight baselines do not appear to be appropriate for the Colombian coastline. There are very few islands off either coast; those in the Pacific are mostly islands associated with the river deltas. Except for several bays, the coastline along both coasts is relatively smooth. And, in most areas, the changes in coastal directions do not create deep indentations."[337]

3.36 Colombia signed the Law of the Sea Convention on 10 December 1982, but has not ratified the instrument.

VII. The Delimitation Between the Mainland Coasts of Nicaragua and Colombia

A. Introduction

3.37 In approaching the central question of delimitation between the mainland coasts of Nicaragua and Colombia, the first reference must be to the Application of Nicaragua, which requests the Court "to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining, respectively to Nicaragua and Colombia ..." The Application refers to the principles of general international law as the applicable law in such a case, and these principles include the general principles of maritime delimitation relating to cases involving single maritime boundaries.

[337] Department of State, Bureau of Intelligence and Research, *Limits in the Seas*, No. 103, p.6.

B. The Principle of Equal Division of the Areas of Convergence

3.38 In the geographical circumstances the applicable criterion is the principle of equal division. This criterion was confirmed by the Chamber of the Court in the *Gulf of Maine* case. The two most relevant passages are as follows:

(i) 'To return to the immediate concerns of the Chamber, it is, accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect. Within this framework, it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap."[338] (emphasis added).

(ii) "At this point, accordingly, the Chamber finds that it must finally confirm its choice, which is to take as its starting point the above-mentioned criterion of the division – in principle, equal division – of the areas of convergence and overlapping of the maritime projections of the coastlines of the States concerned in the delimitation, a criterion which need only be stated to be seen as intrinsically equitable. However, in the Chamber's view, the adoption of this starting point must be combined with the parallel adoption of the appropriate auxiliary criteria insofar as it is apparent that this combination is necessitated by the relevant circumstances of the areas concerned, and provided they are used only to the extent actually dictated by this necessity. By this approach the

[338] *I.C.J. Reports 1984*, p.327, para. 195.

> Chamber seeks to ensure the most correct application in the present case of the fundamental rule of international law applicable, which requires that any maritime delimitation between States should be carried out in accordance with criteria that are equitable and are found more specifically to be so in relation to the particular aspects of the case under consideration."[339] (emphasis supplied)

3.39 The principle of equal division is also formulated in various other sections of the Judgment of the Chamber: see also pages 300-301, paragraph 115; pages 331-332, paragraph 209; page 334, paragraph 217; and page 339, paragraph 228.

3.40 The principle of equal division was also confirmed in the context of continental shelf delimitation by the Court in the *Libya/Malta* case: *I.C.J. Reports 1985*, page 47, paragraph 62. And the general principles were affirmed by the Court once again in the *Jan Mayen* case, where the Court summarized the position as follows:

> "Judicial decisions on the basis of the customary law governing continental shelf delimitation between opposite coasts have likewise regarded the median line as a provisional line that may then be adjusted or shifted in order to ensure an equitable result. The Court, in the Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* already referred to (paragraph 46 above), in which it took particular account of the Judgment in the *North Sea Continental Shelf* cases, said:
>
> "The Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases were delimitation has to be effected between States with opposite coasts". (*I.C.J. Reports 1985*, p.47, para.62)

[339] *ibid.*, p.328, para. 197.

It then went on to cite the passage in the Judgment in the *North Sea Continental Shelf* cases where the Court stated that the continental shelf off, and dividing, opposite States "can ... only be delimited by means of a median line" (*I.C.J. Reports 1969*, p.36, para. 57; see also p.37, para. 58). The Judgment in the *Libya/Malta* case then continues:

"But it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result." *(I.C.J. Reports 1985*, p.47, para. 62).[340]

3.41 This passage related to the delimitation of shelf areas. In the context of the delimitation of fishing zones, the Court applied the same basic principles:

"52. Turning now to the delimitation of the fishery zones, the Court must consider, on the basis of the sources listed in Article 38 of the Statute of the Court, the law applicable to the fishery zone, in the light also of what has been said above (paragraph 47) as to the exclusive economic zone. Of the international decisions concerned with dual-purpose boundaries, that in the *Gulf of Maine* case – in which the Chamber rejected the application of the 1958 Convention, and relied upon the customary law – is here material. After noting that a particular segment of the delimitation was one between opposite coasts, the Chamber went on to question the adoption of the median line "as final without more ado", and drew attention to the "difference in length between the respective coastlines of the two neighbouring States which border on the delimitation area and on that basis

[340] *I.C.J. Reports 1993*, p.60, para. 50.

affirmed "the necessity of applying to the median line as initially drawn a correction which, though limited, will pay due heed to the actual situation" (*I.C.J. Reports 1984*, pp. 334-335, paras. 217, 218).

"53. This process clearly approximates to that followed by the Court in respect of the *Libya/Malta* case in determining the continental shelf boundary between opposite coasts. It follows that it is also an appropriate starting-point in the present case: not least because the Chamber in the *Gulf of Maine* case, when dealing with the part of the boundary between opposite coasts, drew attention to the similarity of the effect of Article 6 of the 1958 Convention in that situation, even though the Chamber had already held that the 1958 Convention was not legally binding on the Parties. It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn."[341]

3.42 Whilst the principle of equal division and the equidistance method produce a similar result, they may be employed as part of a two-stage methodology as in the *Gulf of Maine* case: see the careful analysis of Professor Weil, *The Law of Maritime Delimitation-Reflections*, Cambridge, 1989, pages 194-196.

C. The Principle of Equal Division Applies in Delimitation of a Single Maritime Boundary

3.43 The jurisprudence consistently applies the principle of equal division to a variety of types of delimitation: to the continental shelf (*Libya/Malta* case and *Jan Mayen* case), and to fishery zones (*Jan Mayen* case). The applicability of the principle was also affirmed by

[341] *I.C.J. Report 1993*, pp. 61-62.

the Court of Arbitration in the *Anglo-French Continental Shelf* case: *International Law Reports*, Volume 54, page 96, paragraph 182.

3.44 There is no reason of principle or policy to prevent the application of the principle to a single maritime boundary, and this view is confirmed by the Judgment of the Chamber in the *Gulf of Maine* case. In the words of Chamber:

> "194. 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.
>
> "195. To return to the immediate concerns of the Chamber, it is, accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts, which has primarily a physical aspect to which may be added, in the second place, a political aspect. Within this framework, it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal

division of areas where the maritime projections of the coasts of the States between the delimitation is to be effected converge and overlap." [342]

3.45 In the *Guinea/Guinea-Bissau Arbitration* the Court of Arbitration applied the principles of general international law as the basis for the single maritime boundary called for by the Parties, invoking the provisions of the Law of the Sea Convention as evidence of the position in general international law: *International Law Reports*, Volume 77, pages 658-659, paragraphs, 42-43.

3.46 In its recent decision in the *Bahrain/Qatar* case the Court responded favourably to the application of neutral criteria as best suited for use in a multi-purpose delimitation, and relied on its previous case law. In the words of the Court:

"224. The Court will now deal with the drawing of the single maritime boundary in that part of the delimitation area which covers both the continental shelf and the exclusive economic zone (see para. 170 above).

225. In its Judgment of 1984, the Chamber of the Court dealing with the *Gulf of Maine* case noted that an increasing demand for single delimitation was foreseeable in order to avoid the disadvantages inherent in a plurality of separate delimitations; according to the Chamber, "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" (*I.C.J. Reports 1984*, p.327, para. 194).

226. The Court itself referred to the close relationship between continental shelf and exclusive economic zone for delimitation purposes in its Judgment in the case

[342] *I.C.J. Reports 1984*, p. 327.

concerning the *Continental Shelf (Libya/Malta)*. It observed that:

"even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 Convention demonstrates the two institutions – continental shelf and exclusive economic zone – are linked together in modern law." (*I.C.J. Reports 1985*, p.33, para.33)

"And the Court went on to say that, in case of delimitation, "greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts" (*ibid.*)

"227. A similar approach was taken by the Court in the *Jan Mayen* case, where it was also asked to draw a single maritime boundary. With regard to the delimitation of the continental shelf the Court stated that:

"even if it were appropriate to apply ... customary law concerning the continental shelf as developed in the decided cases [the Court had referred to the *Gulf of Maine* and the *Libya/Malta* cases], it is in accord with precedents to begin with the median line as a provisional line and then to ask whether 'Special circumstances' [the term used in Art.6 of the 1958 Convention on the Continental Shelf, which was the applicable law in the case] require any adjustment or shifting of that line" (*I.C.J. Reports 1993*, p.61, para. 51).

"228. After having come to a similar conclusion with regard to the fishery zones, the Court stated:

"It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn." (*ibid.*, p.62, para. 53.)

"229. The Court went on to say that it was further called upon to examine those factors which might suggest an

adjustment or shifting of the median line in order to achieve an "equitable result". The Court concluded:

> "It is thus apparent that special circumstances which might modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of 'relevant circumstances'. This concept can be described as a fact necessary to be taken into account in the delimitation process". (*ibid*, p.62, para. 55).

3.47 It is to be emphasized that the *Bahrain/Qatar* case involved the delimitation of the continental shelf and the exclusive economic zone in combination.

3.48 More recently, and more succinctly, the Court has confirmed the applicability of the same general methodology in the *Cameroon v. Nigeria* case: see the Judgment of 10 October 2002, paragraphs 286-290.

D. THE COURSE OF THE BOUNDARY

3.49 At this stage it is necessary to indicate the course of the delimitation within the delimitation area described earlier (paras. 3.15-3.24). The applicable law consists of the principles of general international law relating to the delimitation of a single maritime boundary, and this is the type of delimitation requested of the Court in the Application.

3.50 The appropriate form of delimitation within the geographical framework which obtains in this case is the principle of equal division: see above Subsection C of this Chapter. On this basis, the Court is requested to construct an equidistance line between the

mainland coasts of Nicaragua and Colombia, respectively, in order to divide the delimitation area in accordance with equitable principles.

3.51 According to the jurisprudence of the Court, such an equidistance line is to be considered provisional in the sense that it is subject to a process of adjustment resulting from any relevant circumstances. The question of relevant circumstances will be elaborated upon in due course.

3.52 The effect of the island groups of San Andres and Providencia on the delimitation calls for separate examination and therefore the examination of this question is reserved.

E. No Legal Basis for the Adjustment of the Median Line

3.53 As a matter of legal principle whether the methodology of delimitation is based upon the principle of equal division or upon the provisional median line subject to adjustment in order to ensure an equitable result, the 'appropriate auxiliary criteria' are still to be applied: see the Judgment of the Chamber in the *Gulf of Maine* case, *I.C.J. Reports 1984*, pages 327-328, paragraphs 195-197.

3.54 The presence of small islands must, of course, be considered. The delimitation in the region of the San Andres group will be examined in Subsection IX of this Chapter.

3.55 The question of adjustment also requires some consideration of basepoints and baselines. It is axiomatic that a coastal state cannot establish basepoints and baselines in order to change the course of

the equidistance line between opposite coasts. As the Court observed in the *Libya/Malta* case:

> "An immediate qualification of the median line which the Court considers must be made concerns the basepoints from which it is to be constructed. The line put forward by Malta was constructed from the low-water mark of the Libyan coast, but with regard to the Maltese coast from straight baselines (*inter alia*) connecting the island of Malta to the uninhabited islet Filfla. The Court does not express any opinion on whether the inclusion of Filfla in the Maltese baselines was legally justified: but in any event the baselines as determined by coastal States are not *per se* identical with the points chosen on a coast to make it possible to calculate the area of continental shelf appertaining to that State. In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain "islets, rocks and minor coastal projections", to use the language of the Court in its 1969 Judgment, quoted above. The Court thus finds it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya."[343] (emphasis added)

3.56 It is against this background that the Colombian Decree No.1436, establishing a system of straight baselines, is to be assessed. The relevant segments of this baseline regime stretch from the northern aspect of the Guajira Peninsula to the Panama land boundary terminus, and involve turning points 3 to 15. The system is described in detail by the U.S. Department of State in *Limits in the*

[343] *I.C.J. Reports 1985*, p.48, para. 64; and see also pp. 50-51, para. 70.

Seas, No.103, at pages 4-6.[344] The Office of the Geographer of the Department of State analysed each baseline segment and concluded:

> "With the exception of several select areas, straight baselines do not appear to be appropriate for the Colombian coastline. There are very few islands off either coast; those in the Pacific are mostly islands associated with the river deltas. Except for several bays, the coastline along both coasts is relatively smooth. And, in most areas, the changes in coastal directions do not create deep indentations."[345]

3.57 As the United States Department of State commentary makes clear, the regime of baselines on the relevant Colombian coast is substantially incompatible with the pertinent principles of general international law, such principles being reflected in Articles 4 and 7 of the Geneva Convention on the Territorial Sea and Contiguous Zone and in Articles 7 and 10 of the United Nations Law of the Sea Convention. The necessary conclusion must be that, in any event, as indicated in paragraph 3.55 above, a self-serving baselines system cannot be permitted to bring about an inequitable displacement of the median line.

F. The Relevance of Geology and Geomorphology

3.58 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. As demonstrated by the pertinent graphics, the parties have overlapping

[344] See NM Vol. II, Annex 76.
[345] U.S. Department of State in *Limits in the Seas*, No.103, p. 8.

legal interests within the delimitation area, and it is legally appropriate that these should be divided by means of an equidistance line.

VIII. The Delimitation Between the Mainland Coasts of Nicaragua and Colombia: Equitable Criteria confirming the Equitable Result

A. Introduction

3.59 In the present Section of the Memorial the equitable character of the delimitation proposed above will be assessed in the light of additional criteria: namely, the incidence of natural resources in the disputed area, the principle of equitable access to the natural resources of the disputed area, and security considerations, each of these elements being generally recognized as relevant circumstances in the process of delimitation.

B. The Incidence of Natural Resources in the Disputed Area: a Relevant Circumstance

3.60 Since the *North Sea Continental Shelf* cases it has been recognized that the incidence of natural resources in the disputed area may constitute a relevant circumstance affecting a delimitation. In the *Dispositif* in the *North Sea* cases the Court specified "the factors to be taken into account" to include the natural resources of the continental shelf areas involved "so far as known or readily ascertainable": *I.C.J. Reports 1969*, page 4 at pages 53-54.

3.61 In its Judgment in the *Continental Shelf* case (*Tunisia/Libyan Arab Jamahiriya*) the Court observed that:

"As to the presence of oil wells in an area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result."[346]

3.62 The Court reaffirmed this view in the *Libya/Malta* case. In that case, the Court observed:

"The natural resources of the continental shelf under delimitation "so far as known or readily ascertainable" might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation, as the Court stated in the North Sea Continental Shelf cases...). Those resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them."[347]

3.63 The Award of the Court of Arbitration in the *Guinea/Guinea-Bissau* case (1985) is also relevant. The relevant passages are complex and thus require full quotation:

"121. Les Parties ont invoqué les circonstances économiques en les qualifiant diversement et en appuyant leurs thèses respectives d'exemples relatifs notamment à leur économie, a l'insuffisance de leurs ressources et à leurs plans en vue de leur développement. Elles ont discuté de questions relatives au transport maritime, à la pêche, aux ressources pétrolières, etc., et la Guinée-Bissau a fait valoir en particulier l'intérêt que pourrait présenter pour elle à l'avenir le libre accès au port de Buba par le chenal d'Orango et l'estuaire du rio Grande."
"122 Le Tribunal constate que la Guinée et la Guinée-Bissau sont deux Etats en développement, confrontés l'un

[346] *I.C.J. Reports 1982*, p. 18 at pp. 77-78, para. 107.
[347] *I.C.J. Reports 1985*, p. 13 at p. 41, para. 50.

et l'autre à de grandes difficultés économiques et financiers qu'une augmentation des ressources provenant de la mer pourrait atténuer. Chacun d'eux aspire à juste titre à tirer de ses richesses présentes ou potentielles de juste profits au bénéfice de son peuple. Certes, pas plus que la Cour internationale de Justice en l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne) (I.C.J. Recueil 1982*, pp 77-78, paragraphe 107), le Tribunal n'a acquis la conviction que les problèmes économiques constituent des circonstances permanents à prendre en compte en vue d'une délimitation. Puisque seule une évaluation actuelle est du ressort du Tribunal, il ne serait ni juste ni équitable de fonder une délimitation sur l'évaluation de données qui changent en fonction de facteurs dont certains sont aléatoires.

123. Certains Etats peuvent avoir été dessinés par la nature d'une manière favorable á l'établissement de leurs frontières ou à leur développement économique; d'autres peuvent avoir été désavantagés. Les frontières fixées par l'homme ne devraient pas avoir pour objet d'augmenter les difficultés des Etats ou de compliquer leur vie économique. Il est vrai que le Tribunal n'as pas le pouvoir de compenser les inégalités économiques des Etats intéressés en modifiant une délimitation qui lui semble s'imposer par le jeu de considérations objectives et certaines. Il ne saurait non plus accepter que les circonstances économiques aient pour conséquence de favoriser l'une des Parties au détriment de l'autre en ce qui concerne cette délimitation. Il ne peut toutefois complètement perdre de vue la légitimité des prétentions en vertu desquelles les circonstances économiques sont invoquées, ni contester le droit des peuples intéressés à un développement économique et social qui leur assure la jouissance de leur plein dignité. Le Tribunal pense que ces préoccupations économiques si légitimement avancées par les Parties doivent pousser tout naturellement celles-ci à une coopération mutuellement avantageuse susceptible de les rapprocher de leur objectif qui est le développement."

124. Aux circonstances économiques, les Parties ont lié une circonstance tirée de la sécurité, laquelle n'est pas sans intérêt, bien qu'il convienne de souligner que ni la

zone économique exclusive ni le plateau continental ne sont des zones de souveraineté. Cependant les implications que cette circonstance aurait pu avoir sont déjà résolues par le fait que, dans la solution qu'il a dégagée, le Tribunal a tenu à ce que chaque Etat contrôle les territoires maritimes situés en face de ses côtes et dans leur voisinage. Cette préoccupation a constamment guidé le Tribunal dans sa recherche d'une solution équitable. Son objectif premier a été d'éviter que, pour une raison ou pour une autre, une des Parties voie s'exercer en face de ses côtes et dans leur voisinage immédiate des droits qui pourraient porter atteinte à son droit au développement ou compromettre sa sécurité." (emphasis supplied) (footnotes omitted). (Ibid at para 121-124).[348]

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[348] *Reports of International Arbitral Awards*, Vol. XIX, p. 140, pp. 193-194.

The English text reads as follows:

"121. The Parties have invoked economic circumstances, have qualified them in various ways and have based their respective arguments on examples relating for the most part to their economy, their lack of resources and their development plans. They have put forward arguments relating to maritime transport, fishing, petroleum resources, etc., and Guinea-Bissau has mentioned its particular interest in having *future* fee access to the port of Buba by the Orango channel and the Rio Grande estuary."

"122. The Tribunal has taken note that both Guinea and Guinea-Bissau are developing countries, both being confronted with considerable economic and financial difficulties which increased resources from the sea could help to attenuate. Both of the justly aspire to obtaining fair profits from this present or potential wealth for the benefit of their peoples. However, this Tribunal has not, any more than the International Court of Justice in the *Tunisia/Libya* case *(I.C.J. Reports 1983,* pp.77-78, paragraph 107), acquired the conviction that economic problems constitute permanent circumstances to be taken into account for purposes of delimitation.

"As the Tribunal can be concerned only with a contemporary evaluation, it would be neither *just* nor equitable to base a delimitation on the evaluation of data which changes in relation to factors that are sometimes uncertain."

"123. Some States may have been treated by nature in a way that favours their boundaries or their economic development; others may be disadvantaged. The boundaries fixed by man must not be designed to increase the difficulties of States or to complice their economic life. The fact is that the Tribunal does not have the power to compensate for the economic inequalities of the States concerned by modifying a delimitation

3.64 The factors invoked by President Lachs and his distinguished colleagues, Judges Bedjaoui and Mbaye, must apply in the circumstances of the present case. The division of resources will therefore result from the determination of a boundary based upon the principle of equal division, and the division of resources will be thus effected by operation of law.

C. The Principle of Equitable Access to the Natural Resources of the Disputed Area

3.65 In addition to the incidence of natural resources as a relevant circumstance, there is the recently formulated principle of equitable

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which it considers is called for by objective and certain considerations. Neither can it take into consideration the fact that economic circumstances may lead to one of the Parties being favoured to the detriment of the other where this delimitation is concerned. The Tribunal can nevertheless not completely lose sight of the legitimate claims by virtue of which economic circumstances are involved, nor contest the right of the peoples concerned to a level of economic and social development which fully preserves their dignity. The Tribunal is of the opinion that the economic preoccupations so legitimately put forward by the Parties should quite naturally encourage them to consider mutually advantageous cooperation with a view to achieving their objective, which is the development of their countries."

"124. To the economic circumstances, the Parties linked a circumstance concerned with security. This is not without interest, but it must be emphasised that neither the exclusive economic zone nor the continental shelf are zones of sovereignty. However, the implications that this circumstance might have had were avoided by the fact that, in its proposed solution, the Tribunal has taken care to ensure that each State controls the maritime territories situated opposite its coasts and in their vicinity. The Tribunal has constantly been guided by its concern to find an equitable solution. Its prime objective has been to avoid that either Party, for one reason or another, should see rights exercised opposite its coast or in the immediate vicinity thereof, which could prevent the exercise of its own right to development or compromise its security." (emphasis supplied) (footnotes omitted) (*International Law Reports*, Vol. 77, p. 635 at pp. 688-689).

access to the natural resources of the disputed area. In truth, the two principles are logically interrelated.

3.66 The Award of the Court of Arbitration in the *Guinea/Guinea-Bissau* case (above, para. 3.63) contains reference to considerations which are closely related to the concept of equitable access. The emphasis on the right to economic development in that Award must be presumed to rest on the premise that there is an *equal* right to development.

3.67 In any event the first formulation of the principle of equitable access in terms appears in the Judgment of the Court in the *Jan Mayen* case. The most relevant passages are as follows:

> "72. The Court now turns to the question whether access to the resources of the area of overlapping claims constitutes a factor relevant to the delimitation. So far as sea-bed resources are concerned, the Court would recall what was said in the Continental Shelf (*Libyan Arab Jamahiriya/Malta*) case:
>
> "The natural resources of the continental shelf under delimitation "so far as known or readily ascertainable" might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation, as the Court stated in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 54, para. 101(D) (2)). Those resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them". (*I.C.J. Reports 1985*, p.41 para 50)."
>
> "Little information has however been given to the Court in that respect, although reference has been made to the possibility of their being deposits of polymetallic sulphides and hydrocarbons in the area."

"73. With regard to fishing, both Parties have emphasized the importance of their respective interests in the marine resources of the area..."

[.....]

"75. As has happened in a number of earlier maritime delimitation disputes, the Parties are essentially in conflict over access to fishery resources: this explains the emphasis laid on the importance of fishing activities for their respective economies and on the traditional character of the different types of fishing carried out by the populations concerned. In the *Gulf of Maine* case, which concerned a single maritime boundary for continental shelf and fishery zones, the Chamber dealing with the case recognized the need to take account of the effects of the delimitation on the Parties' respective fishing activities by ensuring that the delimitation should not entail "catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned" (*I.C.J. Reports 1984*, p.342, para. 327). In the light of this case-law, the Court has to consider whether any shifting or adjustment of the median line as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned."

"76. It appears to the Court that the seasonal migration of the capelin presents a pattern which, north of the 200-mile line claimed by Iceland, may be said to centre on the southern part of the area of overlapping claims, approximately between that line and the parallel of 72° North latitude, and that the delimitation of the fishery zone should reflect this fact. It is clear that no delimitation in the area could guarantee to each Party the presence in every year of fishable quantities of capelin in the zone allotted to it by the line. It appears however to the Court that the median line is too far to the West for Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway the whole of the area of overlapping claims. For this reason also the median line thus requires to be adjusted or shifted eastwards (cf paragraph 71 above)."

[.....]

"90. The Court has found (paragraph 44 above) that it is bound to apply, and it has applied, the law applicable to the continental shelf and the law applicable to the fishery zones. Having done so, it has arrived at the conclusion that the median line provisionally drawn, employed as starting point for the delimitation of the continental shelf and the fishery zones, must be adjusted or shifted so as to attribute a larger area of maritime spaces to Denmark. So far as the continental shelf is concerned, there is no requirement that the line be shifted eastwards consistently throughout its length: if other considerations might point to another form of adjustment, to adopt it would be within the measure of discretion conferred on the Court by the need to arrive at an equitable result. For the fishery zones, equitable access to the resources of the southern part of the area of overlapping claims has to be assured by a substantial adjustment or shifting of the median line provisionally drawn in that region. In the view of the Court the delimitation now to be described, whereby the position of the delimitation lines for the two categories of maritime spaces is identical, constitutes, in the circumstances of this case, a proper application both of the law applicable to the continental shelf and of that applicable to the fishery zones."

[...]

"92. The southernmost zone 1, corresponds essentially to the principal fishing area referred to in paragraph 73 above. In the view of the Court, the two parties should enjoy equitable access, to the fishing resources of this zone..."[349] (emphasis supplied).

3.68 In the circumstances of the present case, there are no special considerations which would militate against the practical assumption that the principle of equal division of the dispatched areas would guarantee the desired standard of equitable access to the known

[349] *I.C.J. Reports 1993*, pp 70-72,79.

resources. Moreover, a stable regime for delimitation would enable Nicaraguan fishing boats to operate without harassment from the armed forces of the other Party.

D. Security Considerations

3.69 International tribunals have given firm recognition to the relevance of security considerations to the assessment of the equitable character of a delimitation.

3.70 The principle was expressed and applied by the distinguished Court of Arbitration in the *Guinea/Guinea-Bissau* case. In the words of the Court:

> "124. Aux circonstances économiques, les Parties ont lié une circonstance tirée de la sécurité, laquelle n'est pas sans intérêt, bien qu'il convienne de souligner que ni la zone économique exclusive, ni le plateau continental ne sont des zones de souveraineté. Cependant les implications que cette circonstance aurait pu avoir sont déjà résolues par le fait que, dans la solution qu'il a dégagée, le Tribunal a tenue à ce que chaque Etat contrôle les territoires maritimes situés en face de ses côtes et dans leur voisinage. Cette préoccupation a constamment guidé le Tribunal dans sa recherche d'une solution équitable. Son objectif premier a été d'éviter que, pour une raison ou pour une autre, une des Parties voie s'exercer en face de ses côtes et dans leur voisinage immédiat des droits qui pourraient porter atteinte à son droit au développement ou compromettre sa sécurité." (emphasis supplied) (footnotes omitted) (Ibid at para. 121-124).[350]

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[350] "124. To the economic circumstances, the Parties linked a circumstance concerned with security. This is not without interest, but it must be emphasised that neither the exclusive economic zone nor the continental shelf are zones of sovereignty. However, the implications that this

3.71 The principle has also been recognized by this Court in the *Libya/Malta* case (*I.C.J. Reports 1985*, p. 42, para. 51), and again in the *Jan Mayen* case (*ibid, 1993*, pp. 74-75, para. 81). In the latter Judgment the Court affirmed that the principles applied to all maritime delimitations:

> "Norway has agreed, in relation to the Danish claim to a 200-mile zone off Greenland, that "the drawing of a boundary closer to one State than to another would imply an inequitable displacement of the possibility of the former State to protect interests which require protection" It considers that, while Courts have been unwilling to allow such considerations of security to intrude upon the major task of establishing a primary boundary in accordance with the geographical criteria, they are concerned to avoid creating conditions of imbalance. The Court considers that the observation in the *Libya/Malta* Judgment (*I.C.J. Reports 1985*, p.42, para. 51) that "security considerations are of course not unrelated to the concept of the continental shelf", constituted a particular application, to the continental shelf", with which the Court was then dealing, of a general observation concerning all maritime spaces. In the present case the Court has already rejected the 200-mile line. In the Continental Shelf (*Libyan Arab Jamahiriya/ Malta*) case, the Court was satisfied that "the delimitation which will result from the application of the present Judgment is... not so near to the coast of either Party as to make

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circumstance might have had were avoided by the fact that, in its proposed solution, the Tribunal has taken care to ensure that each State controls the maritime territories situated opposite its coasts and in their vicinity. The Tribunal has constantly been guided by its concern to find an equitable solution. Its prime objective has been to avoid that either Party, for one reason or another, should see rights exercised opposite its coasts or in the immediate vicinity thereof, which could prevent the exercise of its own right to development or compromise its security." (International Law Reports, Vol. 77, p. 689, para. 124).

questions of security a particular consideration in the present case".[351]

"The Court is similarly satisfied in the present case as regards the delimitation to be described below".

3.72 The reasoning set forth by the Court of Arbitration in the *Guinea/Guinea-Bissau* case applies very aptly to the political and geographical circumstances of the present case. The equidistance method produces an alignment which effectively ensures 'that each State controls the maritime territories situated opposite to its coasts in their vicinity'.

E. The Factor of Proportionality

3.73 At this state of the pleadings the Government of Nicaragua will examine the question of proportionality on a preliminary basis.

3.74 As a matter of principle proportionality is not 'an autonomous' criterion or method of delimitation and this was affirmed by the Chamber in the *Gulf of Maine* case, *I.C.J. Reports 1984*, pages 334-335, paragraph 218. And the Chamber observed:

"...to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for a delimitation, or a method that can be used to implement such delimitation ... a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area ...."

[351] *I.C.J. Reports 1985*, p. 42, para. 5.

3.75 The principal feature of proportionality is, of course, that it relates to space but not to location. In other words proportionality as such cannot produce a delimitation. The judicial practice has been, with some exceptions, to use proportionality as a factor, the function of which is to check *a posteriori* that a delimitation based upon the standard criteria of equity does not produce an unreasonable disproportion between the areas: see Weil, op. cit., pages 79, 237-238.

3.76 In the first place, the precise formulation of the basic principle is to be established first. Thus, in the *North Sea Continental Shelf* cases, the Court described the proportionality 'factor' as follows:

> "A final factor to be taken into account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines. – these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions."[352] (emphasis supplied)

3.77 In the same case the *Dispositif*, paragraph 101(D)(3), addressed the same issue in similar language:

> "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coasts measured in the

[352] *I.C.J. Reports 1969*, p. 52, para 98.

general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitation between adjacent States in the same region." (emphasis supplied)

3.78 These formulations were subsequently referred to by the Court in the *Libya/Malta Continental Shelf* case (see *I.C.J. Reports 1985*, p.43, para. 55) and in the *Jan Mayen* case (see *I.C.J. Reports 1993*, pp.67-68, para. 66).

3.79 In certain geographical circumstances the issue of proportionality, in terms of a significant disparity in coastal lengths, may constitute a relevant circumstance. Thus, in the context of a single maritime boundary for the continental shelf and fishery zones, the Chamber in the *Gulf of Maine* case observed:

> "a maritime delimitation can ... not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction."[353]

3.80 In the *Libya/Malta* case the issue of proportionality (in terms of coastal lengths) was a 'relevant circumstance': see *I.C.J. Reports 1985*, page 49, paragraph 67. In this context the Court used a

[353] *Delimitation of the Maritime Boundary in the Gulf of Maine Area. Judgment, I.C.J. Reports 1984*, p. 323, para. 185.

standard of 'a very marked difference in coastal lengths' in order to bring the relevant circumstance into play. As the Court explains:

> "...; there remains however the very marked difference in lengths of the relevant coasts of the Parties, and the element of the considerable distance between those coasts referred to by both Parties, and to be examined below. In connection with lengths of coasts, attention should be drawn to an important distinction which appears to be rejected by Malta, between the relevance of coastal lengths as a pertinent circumstance for a delimitation, and use of those lengths in assessing ratios of proportionality. The Court has already examined the role of proportionality in a delimitation process, and has also referred to the operation, employed in the *Tunisia/Libya* case, of assessing the ratios between lengths of coasts and areas of continental shelf attributed on the basis of those coasts. It has been emphasised that this latter operation is to be employed solely as a verification of the equitableness of the result arrived at by other means. It is however one thing to employ proportionality calculations to check a result; it is another thing to take note, in the course of the delimitation process, of the existence of a very marked difference in coastal lengths, and to attribute the appropriate significance to that coastal relationship, without seeking to define it in quantitative terms which are only suited to the ex post assessment of relationships of coast to area. The two operations are neither mutually exclusive, nor so closely identified with each other that the one would necessarily render the other supererogatory. Consideration of the comparability or otherwise of the coastal lengths is a part of the process of determining and equitable boundary on the basis of an initial median line; the test of a reasonable degree of proportionality, on the other hand, is one which can be applied to check the equitableness of any line, whatever the method used to arrive at that line."[354] (emphasis added)

[354] *ibid.*, p. 49, para. 66.

3.81 This principle involving the disparity in the lengths of the relevant coasts of the parties was recognized and applied by the Court in the *Jan Mayen* case, as in the following passages from the Judgment:

> "65. It is of course this prima facie equitable character which constitutes the reason why the equidistance method, endorsed by Article 6 of the 1958 Convention, has played an important part in the practice of States. The application of that method to delimitations between opposite coasts produces, in most geographical circumstances, an equitable result. There are however situations – and the present case is one such – in which the relationship between the length of the relevant coasts and the maritime areas generated by them by application of the equidistance method is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution. The frequent references in the case-law to the idea of proportionality – or disproportion – confirm the importance of the proposition that an equitable delimitation must, in such circumstances, take into account the disparity between the respective coastal lengths of the relevant area."[355]

> "68. A delimitation by the median line would, in the view of the Court, involve disregard of the geography of the coastal fronts of eastern Greenland and of Jan Mayen. It is not a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coast (cf. *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985,* p.46, para. 59) nor of "rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline" (*North Sea Continental Shelf, I.C.J. Reports 1969,* pp. 49-50, para. 91). Yet the differences in length of the respective coasts of the Parties are so significant that this feature must be

[355] *I.C.J. Reports 1993*, p. 67.

taken into consideration during the delimitation operation. It should be recalled that in the *Gulf of Maine* case the Chamber considered that a ratio of 1 to 1.38, calculated in the Gulf of Maine as defined by the Chamber, was sufficient to justify "correction" of a median line delimitation (*I.C.J. Reports 1984*, p.336, paras. 221-222). The disparity between the lengths of coasts thus constitutes a special circumstance within the meaning of Article 6, paragraph 1, of the 1958 Convention. Similarly, as regards the fishery zones, the Court is of the opinion, in view of the great disparity of the length of the coasts, that the application of the median line leads to manifestly inequitable results.'

'69. It follows that, in the light of the disparity of coastal lengths, the median line should be adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan Mayen. It should, however, be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen. As the Court has observed.

"If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence." (*Continental Shelf (Libyan Arab Jamahiriya/ Malta), I.C.J. Reports 1985, p.45, para. 58)*'"[356]

3.82 The Court thus requires 'a very marked difference' in coastal lengths or a 'great disparity' of the lengths of coasts. In the *Tunisia/Libya*

[356] *I.C.J. Reports 1993*, pp. 68-69.

Continental Shelf case, the Court applied the test of proportionality in the following manner:

> "The Court notes that the length of the coast of Libya from Ras Tajoura to Ras Ajdir, measured along the coastline without taking account of small inlets, creeks and lagoons, is approximately 185 kilometres; the length of the coast of Tunisia from Ras Ajdir to Ras Kaboudia, measured in a similar way, and treating the island of Jerba as though it were a promontory, is approximately 420 kilometres. Thus the relevant coastline of Libya stands in the proportion of approximately 31:69 to the relevant coastline of Tunisia. It notes further that the coastal front of Libya, represented by a straight line drawn from Ras Tajoura to Ras Ajdir, stands in the proportion of approximately 34:66 to the sum of the two Tunisian coastal fronts represented by a straight line drawn from Ras Kaboudia to the most westerly point of the Gulf of Gabes, and a second straight line from that point to Ras Ajdir. With regard to sea-bed areas, it notes that the areas of shelf below low-water mark within the area relevant for delimitation appertaining to each State following the method indicated by the Court stand to each other in approximately the proportion: Libya 40; Tunisia 60. This result, taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity."[357]

3.83 In the *Libya/Malta Continental Shelf* case the Court analysed the coastal differences in the following paragraph:

> "Within the bounds set by the Court having regard to the existence of claims of third States, explained above, no question arises of any limit, set by those claims, to the

[357] *I.C.J. Reports 1982*, p. 91, para. 131.

relevant coasts of Malta to be taken into consideration. On the Libyan side, Ras Ajdir, the terminus of the frontier with Tunisia, must clearly be the starting point; the meridian 15° 10'E which has been found by the Court to define the limits of the area in which the Judgment can operate crosses the coast of Libya not far from Ras Zurruq which is regarded by Libya as the limit of the extent of its relevant coast. If the coasts of Malta and the coast of Libya from Ras Ajdir to Ras Zurruq are compared, it is evident that there is a considerable disparity between their lengths, to a degree which, in the view of the Court, constitutes a relevant circumstance which should be reflected in the drawing of the delimitation line. The coast of Libya from Ras Ajdir to Ras Zurruq measured following its general direction, is 192 miles long, and the coast of Malta to Ras il-Wardija to Delimara Point, following straight baselines but excluding the islet of Filfla, is 24 miles long. In the view of the Court, this difference is so great as to justify the adjustment of the median line so as to attribute a larger shelf area to Libya : the degree of such adjustment does not depend upon a mathematical operation and remains to be examined."[358]

3.84 The question of the disparity of lengths of coasts was also the subject of examination in the *Jan Mayen* case:

"A first factor of a geophysical character, and one which has featured most prominently in the argument of Denmark, in regard to both continental shelf and fishery zone, is the disparity or disproportion between the lengths of the "relevant coasts", defined by Denmark as the coasts lying between points E and F on the coast of Jan Mayen, and G and H on the coast of Greenland, defined as explained in paragraph 20 above. The following figures given by Denmark for the coastal lengths have not been disputed by Norway. The lengths of the coastal

[358] *I.C.J. Reports 1985*, p. 50, para. 68.

> fronts of Greenland and Jan Mayen, defined as straight lines between G and H, and between E and F, are: Greenland, approximately 504.3 kilometres; Jan Mayen, approximately 54.8 kilometres. If the distances between G and H and between E and F are measured along the successive baselines which generate the median line, the total figures are approximately 524 kilometres for Greenland and approximately 57.8 kilometres for Jan Mayen (see sketch-map NO.2, p. 80 below). Thus the ratio between the coast of Jan Mayen and that of Greenland is 1 to 9.2 on the basis of the first calculation, and 1 to 9.1 on the basis of the second."[359]

3.85 In the *Jan Mayen* case, the bases on which the adjustment of the median line was made were complex and it is not necessary to elaborate upon this aspect of the matter.

3.86 The pertinence of this jurisprudence for present purposes must now be considered. It will be obvious to the Court that the cases concerning islands or island States lying opposite long coast States have no bearing upon the issues of delimitation presently before the Court. In these cases the disparity in the lengths of the coasts of the 'long coast' state and the coast of the island opposite was very substantial indeed. The *Libya/Malta* and *Jan Mayen* cases can thus be set aside.

3.87 The *Tunisia/Libya Continental Shelf* case is, in geographical terms, not very similar to the situation presented in the present case. However, the coastal relationship has a certain analogy to the relationships of the mainland coasts of Nicaragua and Colombia. In the key paragraphs of the Judgment (paras. 130-131) the Court insists on establishing a legal relationship between the coasts of Tunisia and Libya, even when the coastal fronts were in an

[359] *I.C.J. Reports 1993*, p. 65, para. 61.

essentially oblique relation. There is some similarity here to the concept of frontal opposition which is referred to by the Chamber in the *Gulf of Maine* case: see above, paragraphs 3.18-3.20.

3.88 In the *Gulf of Maine* case the decision of the Chamber involved a highly specialized set of circumstances, which related to the intersection of the coast at the back of the Gulf by the land boundary between Canada and the United States. In these unusual circumstances the Chamber decided to correct the median line by means of a 'small transverse displacement' of the second (or central) segment of the delimitation line: see *I.C.J. Reports 1984* pages 334-337, paragraphs 217-222, and see paragraph 222, in particular. The precise political geography of the case now in front of the Court is entirely different, and it was the political geography of the Gulf, rather than the lengths of coasts as such, on which the Chamber relied.

3.89 Of the various cases, the *Tunisia/Libya* case is the most similar in geographical terms. In that case the relevant coastline of Libya stands in the proportion of 31:69 to the relevant coastline of Tunisia. In terms of coastal fronts the proportion becomes 34:66 (see above para. 3.82). The sea-bed areas involved within the areas relevant for delimitation appertaining to each State thus stand to each other in the proportion: Libya 40; Tunisia 60. And the Court concluded:

> "This result, taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity."[360]

[360] *I.C.J. Reports 1982*, p. 91, para. 131.

3.90 In the present case, the coastal frontages do not exhibit 'a marked difference in coastal lengths', and the test of proportionality, as a relevant circumstance or otherwise, does not reveal any necessity for correction of the median line.

F. The Interests of Other States in the Region

3.91 The interests of other States in the region do not constitute a relevant circumstance in the proper meaning of the term. As Professor Weil explains:

> "Taking account of delimitations affecting third States thus covers two concepts and two approaches which should be carefully distinguished. On the other hand, it may lead the court to limit its decision so as not to encroach upon future delimitations affecting States not party to the case. On the other hand, it may lead the court to extend its investigation to geographical facts falling outside the dispute before it. In the first case, it is the extent of the judicial function which is at issue. In the second, it is the determination of the relevant coasts and the area of delimitation. In neither case is the purpose of taking other delimitations into account to test the equidistance line. In short, therefore, it is not a relevant circumstance in the proper meaning of the term."[361]

3.92 Two points should be emphasized. In the first place, the assessment of the overall coastal relationships between Nicaragua and Colombia is not affected by the existence of the claims of third States, as the Court stated in its Judgment in the *Libya/Malta* case, *I.C.J. Reports 1985*, pages 49-50, paragraph 68 (see above, para. 3.17). And, secondly, the only consistent principle to emerge from the case law is the principle that the Court lacks the competence to make

[361] *The Law of Maritime Delimitation – Reflections*, Cambridge, 1989, p. 256.

determinations which may affect the claims of third States. It must be obvious that such an inhibition does not involve a recognition by the Court of the legal validity of the third State claims.

IX. The Delimitation in the Region of San Andres: the Nicaraguan Position on the Basis of Nicaraguan Title

A. Introduction

3.93 The purpose of this section of the Memorial is to examine the maritime delimitation applicable on the basis of Nicaraguan title to the San Andres and Providencia group of islands. The basis of Nicaraguan title has been elaborated upon in Chapter I above.

B. The Coastal Relationships

3.94 The relevant islands, San Andres and Providencia are, respectively, 105 nautical miles and 125 nautical miles from the Nicaraguan mainland coast. In addition San Andres and Providencia are, respectively, 385 nautical miles and 384 nautical miles from the Colombian coast at Cartagena. The coastal fronts of San Andres and Providencia are 7 and 4.5 nautical miles respectively in relation to the coast of Nicaragua which is approximately 250 nautical miles in length.

3.95 The relevant data show that both San Andres and Providencia fall within the continental shelf of Nicaragua and within its exclusive economic zone.

C. The San Andres Group: Its Relation to the Median Line Division of the Area of Delimitation

3.96 On the basis that the San Andres group falls under the sovereignty of Nicaragua, the issue which then arises is, what effect does the group have on the median line division of the overall delimitation area between the mainland coasts of Nicaragua and Colombia? In principle, the solution based upon equidistance, and the principle of equal division, would apply and the sovereignty of Nicaragua would not have any effect on the delimitation between the mainlands of Nicaragua and Colombia.

X. The Delimitation in the Region of San Andres: the Nicaraguan Position on the Basis of the Alleged Colombian Title

A. Introduction

3.97 The purpose of the present section of the Memorial is to examine the maritime delimitation on the hypothesis of an alleged Colombian title to the San Andres and Providencia group of islands. The Colombian assertion of title is, of course, contested, and the basis of Nicaraguan title has been elaborated upon in Chapter I above.

B. The Nicaraguan Position

3.98 In the opinion of the Government of Nicaragua the islands of San Andres and Providencia should be enclaved within the continental shelf areas appurtenant to Nicaragua and the exclusive economic

zone of Nicaragua, and accorded a territorial sea entitlement of twelve nautical miles. A number of key elements in the geographical and legal framework justify this form of delimitation as the appropriate equitable solution. These elements will now be examined.

C. The San Andres Group Does Not Form Part of the Coastal Front of Colombia

3.99 The various parts of the San Andres group are between 360 and 385 nautical miles from the nearest part of the Colombian mainland. The principal island is 7 nautical miles long and 1.7 nautical miles broad (at is widest point). The mainland coast of Colombia opposite the mainland coast of Nicaragua is approximately 400 nautical miles long. By comparison the coast of Nicaragua is approximately 250 miles long. For purposes of delimitation by a median line, the points contributing to a median line spread over a longer distance on the Nicaraguan coast than on that of Colombia. As the Court pointed in the *Libya/Malta* case:

> "...it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect... The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast."[362]

3.100 It is evident that in the context of the coastal relationships, the San Andres group can only have a minimal role in generating maritime rights.

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[362] *I.C.J. Reports 1985*, pp. 40-41, para.49.

3.101 Nicaragua is the major riparian State in this part of the Caribbean. San Andres and its dependencies lie within the exclusive economic zone of Nicaragua and are situated within the areas of continental shelf appurtenant to Nicaragua. San Andres is 105 nautical miles from the mainland coast of Nicaragua. Moreover, there are other Nicaraguan possessions in the vicinity, including the Corn Islands.

3.102 There is a certain analogy with the situation relating to the Channel Islands in the *Anglo-French Continental Shelf* case. There the Court of Arbitration reasoned as follows:

> "As to the conclusion to be drawn from those considerations in connection with the delimitation of the continental shelf, the Court thinks it sufficient to say that, in its view, they tend to evidence the predominant interest of the French Republic in the southern areas of the English Channel, a predominance which is also strongly indicated by its position as a riparian State along the whole of the Channel's south coast."[363] (emphasis added).

3.103 Whilst the geographical situation in the western Caribbean is not in all respects parallel, the predominance of the mainland coast of Nicaragua is sufficiently evident. The significance of the factor of predominant interest is recognized by Judge David Anderson in his commentary on the *Anglo-French* case in the compendium of practice edited by Charney and Alexander, *International Maritime Boundaries*, Volume II, page 1735 at page 1744. He refers to 'the

[363] *International Law Reports*, Vol.54, p. 98, para. 188.

predominant French position along the southern coast of the Channel".

E. The Principle or Factor of Proportionality

3.104 To allow the San Andres group to have a significant maritime extension of any kind would involve setting aside the principle or factor of proportionality. The relevant principles have been set forth by the Court of Arbitration in the *Anglo-French Continental Shelf* case in the following passages of the Award:

> "197. The Court refers to the presence of the Channel Islands close to the French coast as constituting a circumstance creative of inequity, and a "special circumstance" within the meaning of Article 6, merely *prima facie*, because a delimitation, to be "equitable" or "justified", must be so in relation to both Parties and in the light of all the relevant circumstances. The United Kingdom, moreover, maintains that the specific features of the Channel Islands region militate positively in favour of the delimitation it proposes. It invokes the particular character of the Channel Islands as not rocks or islets but populous islands of a certain political and economic importance; it emphasises the close ties between the islands and the United Kingdom and the latter's responsibility for their defence and security; and it invokes these as calling for the continental shelf of the islands to be linked to that of the United Kingdom. Above all, it stresses that at best it is only in the open waters of the English Channel to their west and north that they have any possibility of an appreciable area of continental shelf. In the light of all these considerations, it submits that to divide this area to the west and north of the islands between the Channel Islands and the French Republic by the median line which it proposes does not involve any "disproportion or exaggeration."'
>
> [.....]

'199. The Court considers that the primary element in the present problem is the fact that the Channel Islands region forms part of the English Channel, throughout the whole length of which the Parties face each other as opposite States having almost equal coastlines. The problem of the Channel Islands apart, the continental shelf boundary in the Channel indicated by both customary law and Article 6, as the Court has previously stated, is a median line running from end to end of the Channel. The existence of the Channel Islands close to the French coast, if permitted to divert the course of that mid-channel median line, effects a radical distortion of the boundary creative of inequity. The case is quite different from that of small islands on the right side of or close to the median line, and it is also quite different from the case where numerous islands stretch out one after another long distances' from the mainland. The precedents of semi-enclaves, arising out of such cases, which are invoked by the United Kingdom, do not, therefore, seem to the Court to be in point. The Channel Islands are not only "on the wrong side" of the mid-Channel median line but wholly detached geographically from the United Kingdom' (emphasis added).[364]

3.105 In the light of these considerations, the position of the San Andres group can be appreciated:

First: The presence of the San Andres group relatively close to the Nicaraguan coast, and within the continental shelf areas and exclusive economic zone of Nicaragua, constitutes a circumstance creative of inequity (see para. 199 quoted above).

Second: If the San Andres Group is not enclaved, this would result in a disproportion in the maritime areas as between Nicaragua and Colombia (see para. 198 of the Award in the *Anglo-French*, case).

[364] *International Law Reports*, Vol. 54, pp. 101-102.

Third: The existence of the San Andres group close to the Nicaraguan coast, if permitted to divert the course of the median line between the two mainlands, would effect a radical distortion of the boundary creative of inequity (see para. 199 quoted above).

Fourth: The San Andres group is not only 'on the wrong side' of the median line but wholly detached geographically from Colombia (see para. 199 quoted above).

F. STATE PRACTICE

3.106 Examples of full enclaves are rare: see Legault and Hankey, in Charney and Alexander (eds.), op. cit. Volume I, pages 212-213. Apart from the enclaving of the Channel Islands, the only other example is the Australia-Papua-New Guinea Agreement of 18 December 1978 (*Limits in the Seas*, No. 87). This latter delimitation is very complex and reflects highly specialized geographical and cultural desiderata.

3.107 The rarity of full enclaving simply reflects the fact that the geographical circumstances do not often call for a full enclave. However, the practice of both enclaving and semi-enclaving is recognized in the doctrine without reservation: see, for example, Weil, *The Law of Maritime Delimitation – Reflections*, 1989, pages 52, 230, 273; Legault and Hankey, in Charney and Alexander (eds.), op. cit, Volume I, pages 212-213, Lucchini and Voelckel, *Droit de la Mer*, Volume II, pages 145-147; Evans, *Relevant Circumstances and Maritime Delimitation*, 1989, pages 149-150.

3.108 The position in terms of practice is described in authoritative terms by Legault and Hankey:

> "Another method, which may be used independently or in conjunction with some other method such as equidistance is 'enclaving': that is, attributing a maritime belt to an island by means of a boundary consisting of arcs of circles drawn from appropriate headlands. This method invariably results in a reduced area of maritime space for the state whose island is enclaved, relative to what that state would have obtained if the island had been used as a basepoint in drawing an equidistant line.
>
> The enclaving method can produce either a full enclave, where the maritime belt accorded to the island is wholly separated from the offshore zone of the mainland coast of the state to which the island belongs, or, alternatively, a semi-enclave, where the maritime zone appertaining to the island merges with the maritime zone of the mainland coast. The semi-enclave effect occurs when the island is situated on or close to the equidistant line.
>
> Although, in principle, enclaves may be of any breadth, in practice they have invariably been 3 or 12 miles, representing the breadth of the territorial sea, or 13 miles, to allow an additional mile of economic zone or continental shelf beyond the territorial sea.
>
> Examples of full enclaves are found in the Australia-Papua New Guinea agreement of 18 December 1978 (No. 5-3) and the 1977 *Anglo-French Continental Shelf* award (No. 9-3). In the Australia-Papua New Guinea agreement, twelve Australian islands lying close to the coast of Papua New Guinea were accorded 3-mile territorial sea enclaves. In the *Anglo-French* award, the British Channel Islands, which lay within 12 miles of the French coast, were accorded 12-mile enclaves (3 mile of territorial sea and 9 miles of continental shelf and contiguous fishing zone)."[365]

[365] Legault and Hankey, op. cit., Vol. I, pp. 212-213.

3.109 The justification of the practice of enclaving and semi-enclaving must depend on the geographical and political circumstances in each case. There is, however, some evidence of a tendency in the State practice to deny a continental shelf entitlement to relatively small islands in order to avoid a distorting effect upon adjacent shelf areas. The Agreement between Italy and Tunisia signed on 20 August 1971, relating to the delimitation of the continental shelf, accorded semi-enclaves to certain Italian islands, as follows: a 12 nm zone for Lampione, and a 13 nm zone for Pantelleria, Lampedusa and Linosa: see: *Limits in the Seas*, United States Department of State, No.89, 7 January 1980; and Charney and Alexander (eds.), Volume II, pages 1611-1625.

3.110 A similar approach can be seen in the Award of the Court of Arbitration in the *Dubai-Sharjah* case. The critical passage of the Award reads as follows:

> "[This Court] has come to the conclusion that to allow to the island of Abu Musa any entitlement to an area of the continental shelf of the Gulf beyond the extent of its belt of territorial sea would indeed produce a distorting effect upon neighbouring shelf areas. The application of equitable principles here, so as to achieve a limitation that is a function or reflection of the geographical and other relevant circumstances of the area, must lead to no effect being accorded to the island of Abu Musa for the purpose of plotting median or equidistance shelf boundaries between it and neighbouring shelf areas. We are concerned in this Award, of course, only with the continental shelf boundary between the Emirates of Dubai and of Sharjah. The total area of sea enclosed by a 12 mile limit of territorial sea around Abu Musa has been calculated (by the Court's hydrographer) to amount to 544.5 square nautical miles, which includes an area of some 18.5 square nautical miles where the territorial sea boundary of the island proceeds in an arc beyond point E

on the Chart, which intersects a (notional) extension of the lateral equidistance line. The claim of half-effect for the island ultimately advanced by the Government of Sharjah in the Pleadings before the Court would have added a further 133.8 square nautical miles to that area; this, in the view of the Court and in the light of the considerations adverted to earlier, would have produced a disproportionate and exaggerated entitlement to maritime space as between the Parties to the present dispute. To give no effect to the continental shelf entitlement of the island of Abu Musa would preserve the equities of the geographical situation and would be consistent, for example, with comparable regional practice as applied to the islands of Al- Arabiyah and Farsi in the Saudi Arabian-Iranian agreement of January 1969, and Dayinah in the Abu Dhabi-Qatar agreement of March 1969, where the continental shelf rights of islands were limited to coincide with their respective territorial waters, but not used as base points for the purpose of constructing median or equidistance boundaries in respect of the continental shelves between opposite or adjacent States."[366]

G. Conclusion: The Presumption in Favour of a Full Enclave

3.111 The parallels with the situation of the Channel Islands are striking, and the decision in the *Anglo-French* case in respect of the method of enclaving has not attracted any criticism. The situation of the San Andres group generates indications that there is here an even stronger case for enclaving.

[366] *International Law Reports*, Vol. 91, p. 343, at p. 677.

3.112 The facts speak for themselves in this respect:

Population: In 1985 the population of San Andres and Providencia was 35,936. In 1977 the Channel Islands had a population of 130,000: see the Decision of 30 June 1977, paragraph 171.

Area: San Andres and Providencia have an area of 8 and 6 square nautical miles respectively. The Channel Islands have an area of 75 square miles.

Distance from the respective mainland's: San Andres and Providencia lie respectively 385 and 384 nautical miles from the mainland of Colombia. Guernsey, Jersey and Alderney lie respectively 55, 70 and 45 nautical miles from the mainland of the United Kingdom.

General length of the coasts of the islands measured as one straight line segment for each island: San Andres and Providencia have respectively 7 and 4.5 nautical miles of coastal length whilst Guernsey, Jersey and Alderney have a coastal length respectively of 9, 10 and 3 nautical miles.

3.113 In the light of these comparisons and in the light of the legal considerations set forth in paragraphs 3.107-3.110 above, it must be evident that the enclaving method alone represents the equitable solution. This is the solution dictated by the geographical and legal framework and which does not involve any 'disproportion or exaggeration'.

XI. The Presence of Small Cays in the Maritime Delimitation Area

A. Introduction

3.114 The previous sections of this Chapter addressed the maritime delimitation involving the mainland coasts of Nicaragua and Colombia, including the weight to be accorded to the islands of San Andres and Providencia in such a delimitation. The present section considers the weight to be accorded to a number of small cays located in the maritime area between the mainland coasts of Nicaragua and Colombia. This concerns certain small cays scattered throughout the western part of the delimitation area. The present section will also deal with the bank of Quitasueño, which has been included in various instruments of relevance for the present proceedings. However, there are no islands on this bank, which have maritime zones of their own. Before turning to the role of the small cays in the maritime delimitation, a short description of the political geography of those small cays and the bank of Quitasueño is provided.

B. Political Geography

3.115 The continental shelf extending from the Central American mainland coast is relatively shallow and there are numerous banks in this area.[367] Some of these banks are close to the sea surface in large areas and in some places small cays sit on top of them. The present

[367] For an overview of the geography of the area concerned see also NM, Vol. I, Figure III.

description of these banks and cays starts from the southwest of the area of relevance for the delimitation and deals with all the banks and cays lying between Cayos de Albuquerque in the southwest and the bank of Bajo Nuevo in the northeast.

3.116 The Cayos de Albuquerque are two small cays, Cayo del Norte and Cayo del Sur, which both are only a couple of hundred meters across, and which are located on the east side of an isolated coral bank. The approximate position of the Cayos de Albuquerque is 12° 11' N, 81° 50' W and they lie about 100 nautical miles to the east of the mainland of Nicaragua, 65 nautical miles to the east of the Corn Islands (Islas del Maiz) and 20 nautical miles to the south of the island of San Andres. The distance to Colombia is about 375 nautical miles.

3.117 The Cayos del Este Sudeste are located at the position 12° 24' N, 81° 27' W, about 35 kilometers to the northeast of the Cayos de Albuquerque on the southeastern part of an isolated bank. These cays include the Cayo del Este, Cayo Bolivar and Cayo Arena, none of which is more than a few meters high. The distance from these cays to the mainland of Nicaragua, the Corn Islands (Islas del Maiz) and the island of San Andres is respectively about 120, 90 and 20 nautical miles. The distance to Colombia is about 360 nautical miles.

3.118 The bank of Roncador lies about 75 nautical miles to the east of the island of Providencia and 190 nautical miles to the east of the mainland of Nicaragua, at an approximate position of 13° 34' N, 80° 04' W. The distance of the bank of Roncador to Colombia is about 320 nautical miles. The only cay on this bank, also called Roncador,

is located on the northern part of the bank and is composed of sand and corals.

3.119 The bank of Serrana is an extensive area with dangerous shoals. It is about 20 miles in length and 6 miles wide and is about 45 miles to the north of the bank of Roncador. There are a number of cays on this bank, including North Cay and Southwest Cay. The bank of Serrana is located at the position of 14° 24' N, 80° 16' W and lies 80 nautical miles from Providencia, 145 nautical miles from Cayo Miskito and 170 nautical miles from the mainland of Nicaragua. The distance to Colombia is about 360 nautical miles.

3.120 The bank of Serranilla lies about 80 miles to the north of the bank of Serrana, at the position of 15° 55' N, 79° 54' W. The small cays on Serranilla include East Cay and Beacon Cay, which are composed of sand and coral. The bank of Serranilla is located to the northeast of the mainland coast of Nicaragua, Cayo Miskito and the island of Providencia. The distance of these coasts to Serranilla is respectively 200, 190 and 165 nautical miles. The distance to Colombia is about 400 nautical miles.

3.121 The bank of Bajo Nuevo lies due east of the bank of Serranilla, at the location 15° 53' N, 79° 15' W, and is about 14 miles long and 5 miles wide. The most prominent cay on Bajo Nuevo is Low Cay, which is just 300 meters long and 40 meters wide and is composed of coral fragments and sand and about 5 feet high. Low Cay lies at a distance of about 205 nautical miles from Providencia and respectively 265 and 245 nautical miles from the Nicaraguan mainland and Cayo Miskito. The distance to Colombia is about 360 nautical miles.

3.122 The present Memorial has indicated the basis for sovereignty of Nicaragua over all of the abovementioned cays and consequently requests the Court to declare that Nicaragua has a title to all of them. However, it cannot be excluded that the Court reaches different conclusions in respect of this issue. The present section will address the role of the cays in the maritime delimitation between Nicaragua and Colombia, taking into account the different outcomes that are possible in respect of the question of sovereignty. However, independently of the outcome of the part of the present proceedings concerning sovereignty, the position of Nicaragua is that all these cays are of such a minor significance that their role in the maritime delimitation has in any case to be limited to an absolute minimum. How this is to be achieved is set out below in subsection C.

3.123 The bank of Quitasueño is situated between the Cayos Miskitos, the island of Providencia and the Bank of Serrana. The distance from Cayo Miskito, the main island in the Cayos Miskitos, to Quitasueño is about 90 nautical miles, and the distance to Providencia is some 40 nautical miles. The bank of Quitasueño, as defined by the 200 meters isobath, extends about 34 nautical miles in a north south direction and has a maximum width of some 13.5 nautical miles. Nicaragua considers that, as there are no cays on the bank,[368] it has no relevance for the maritime delimitation to be effected between herself and Colombia. No more would have to be said about Quitasueño, were it not for the fact that Colombia in the past has taken an equivocal position in respect of this bank. For instance, in an Exchange of

[368] See, for instance, *Sailing Directions (Enroute); Caribbean Sea; Vol. 2, Fifth Edition* (Defense Mapping Agency, 1995), p. 105; *East Coasts of Central America and Gulf of Mexico Pilot; Western Caribbean Sea and the Gulf of Mexico from Punta Tirbi to Cape Sable including Yucatan Channel; second edition* (Hydrographer of the Navy, 1993), p. 56.

Notes in connection with the Treaty concerning the status of Quita Sueño, Roncador and Serrana of 8 September 1972 between the United States and Colombia, the latter indicated that the 'physical status of Quita Sueño is not incompatible with the exercise of sovereignty'.[369] On the other hand, the United States indicated its legal position to be that 'Quita Sueño, being permanently submerged at high tide, is at the present time not subject to the exercise of sovereignty'.[370] The United States gave a more detailed view on the status of Quitasueño in a Note from the Secretary of State to the Nicaraguan Ambassador in Washington of 6 December 1971. This Note, responding to urgent demands from Nicaragua, which considered that the negotiations between the United States and Colombia over Roncador, Serrana and Quitasueño affected its rights, observes that the United States Government had investigated the natural condition of the Quitasueño bank and had come to the conclusion that the bank was permanently submerged in high tide. Therefore considered the Quitasueño bank as part of the high seas and not subject to any claim of sovereignty by any State.

3.124 Nicaragua consistently sought to obtain an assurance from the United States that her title to the cays on the banks of Roncador and Serrana and her rights over the continental shelf, including the areas of these banks and that of Quitasueño would not be prejudiced by the conclusion and ratification of the 1972 Treaty between the United States and Colombia. In response, the United States issued various

[369] See NM, Vol. II, Annex 33b TIAS 10120.
[370] See NM, Vol. II, Annex 33a.TIAS 10120.

statements indicating that the 1972 Treaty is without prejudice to the Nicaraguan position.[371]

3.125 There is a lighthouse on the bank of Quitasueño.[372] However, a lighthouse does not possess the status of an island and does not have a territorial sea of its own, nor does it affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.[373]

3.126 If the Court were to find that there are features on the bank of Quitasueño that qualify as islands under international law, the Court is requested to find that sovereignty over them rests with Nicaragua, for the same reasons as set out above for the cays lying on Roncador and Serrana.[374] In the maritime delimitation between Nicaragua and Colombia, the same considerations would apply as set out below in subsection C for the other cays concerned.

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[371] See further NM, Chap. II, paras. 2.158-2.178.

[372] Through an Exchange of Notes in connection with the Treaty concerning the status of Quita Sueño, Roncador and Serrana of 8 September 1972 between the United States and Colombia, the United States agreed to grant in perpetuity to Colombia the ownership of the lighthouse on Quitasueño (NM, Vol. II, Annexes 32b, 32a). The United States indicated that this grant was subject to the understanding that it was without prejudice to its legal position that Quitasueño, being permanently submerged at high tide was not subject to the exercise of sovereignty.

[373] United Nations Convention on the Law of the Sea, article 60(8), refers to artificial islands, installations and structures generally. Article 60(8) is reflective of customary international law.

[374] See further NM, Chap. II, Sec. III, Subsec. A.

C. The Weight of the Cays in the Maritime Delimitation between Nicaragua and Colombia

3.127 Nicaragua holds that all of the cays concerned, due to their size, location and other characteristics, do not have to be accorded any weight in establishing the maritime boundary between Nicaragua and Colombia. In case the cays are Nicaraguan, giving no weight to them implies that they are included in the maritime zones of Nicaragua generated by her other coasts.

3.128 Any cay that were to be found to be Colombian has to be enclaved in the maritime zones of Nicaragua. As will be recalled, Nicaragua submits that maritime delimitation law prescribes that the islands of San Andres and Providencia, if they were found to be Colombian, have to be enclaved in the maritime zones of Nicaragua by drawing a 12 nautical mile limit around them.

3.129 As far as the cays are concerned, even an enclavement in a 12 nautical mile limit would give them a disproportionate effect and lead to an inequitable result. This can be illustrated by an example. A hypothetical island, consisting of a single point, beyond 24 nautical miles from any other baseline, has a 12 nautical mile zone of over 450 square nautical miles. This stands in sharp contract with a (mainland) coast, which is formed by a straight line. In this case, it takes a stretch of more than 37 nautical miles to generate the same area of territorial sea.[375] As was set out above, almost all of the cays under consideration in this section are at more than 24 nautical miles from other coasts. Only a 12 nautical mile enclave around the Cayos

[375] See also the illustration included in NM, Vol. I, Figure IV.

de Albuquerque and the Cayos del Este Sudeste overlaps to a limited extend with a 12 nautical mile zone around the island of San Andres. This implies that 12 nautical mile enclaves around all of these cays equal an area of thousands of square nautical miles. Obviously, this cannot be an equitable result, taking into account the overall coastal relationship between Nicaragua and Colombia.

3.130 Nicaragua considers that the only possible equitable solution for the cays, in case they were to be found to be Colombian, is to delimit a maritime boundary by drawing a 3 nautical mile enclave around each individual cay. This would give each of these small cays a maritime area of more than 28 square nautical miles. There can be no doubt that this is an equitable result, if the size of this maritime area is compared to the size of the cays.

3.131 There is little precedent that is directly of relevance for this type of enclaving of small cays. There is no want of case law and state practice that have completely ignored minor insular features in establishing maritime boundaries. However, in general, such features are located on the same side of the maritime boundary as the other territories of the sovereign concerned. In these cases there is no need to address the maritime boundary around such features separately. Nonetheless, there are a number of examples in the case law, which indicate that, in order to achieve an equitable result, it is not necessary to give minor features a full 12 nautical mile territorial sea, even in cases it does not overlap with the territorial sea of larger islands or mainland.

3.132 In the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* the Court had to consider the

weight to be accorded to the very small island of Qit'at Jaradah. The Judgment of the Court of 16 March 2001 observes in this connection:

> "219. The next question to be considered is that of Qit'at Jaradah. The Court observes that Qit'at Jaradah is a very small island, uninhabited and without any vegetation. This tiny island, which-as the Court has determined (see paragraph 197 above)-comes under Bahraini sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature (...).
> In similar situations the Court has sometimes been led to eliminate the disproportionate effect of small islands (see *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 36, para. 57; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 48, para. 64). The Court thus finds that there is a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah.
> 220. The Court observed earlier (see paragraph 216 above) that, since it did not determine whether Fasht al Azm is part of Sitrah island or a separate low-tide elevation, it is necessary to draw provisionally two equidistance lines. If no effect is given to Qit'at Jaradah and in the event that Fasht al Azm is considered to be part of Sitrah island, the equidistance line thus adjusted cuts through Fasht ad Dibal leaving the greater part of it on the Qatari side. If, however, Fasht al Azm is seen as a low-tide elevation, the adjusted equidistance line runs west of Fasht ad Dibal. In view of the fact that under both hypotheses, Fasht ad Dibal is largely or totally on the Qatari side of the adjusted equidistance line, the Court considers it appropriate to draw the boundary line between Qit'at Jaradah and Fasht ad Dibal. As Fasht ad Dibal thus is situated in the territorial sea of Qatar, it

> falls for that reason under the sovereignty of that State.
> (...)
> 222. Taking account of all of the foregoing, the Court decides that, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary will follow a north-easterly direction, then immediately turn in an easterly direction, after which it will pass between Jazirat Hawar and Janan; it will subsequently turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita'a el Erge and Qit'at ash Shajarah on the Qatari side; finally it will pass between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side."

The delimitation effected by the Court results in an area lying only within 12 nautical miles of Qit'at Jaradah, which island falls under the sovereignty of Bahrain, being attributed to Qatar.[376]

3.133 The *Guinea/Guinea-Bissau* arbitration provides a further illustration of the fact that small islets may not be given a full 12 nautical mile territorial sea, even if this territorial sea does not overlap with the

[376] It can be noted that this area is within 12 nautical miles of the low-tide elevation of Fasht ad Dibal. However, in respect of this low-tide elevation the Court, after a discussion of the status of low-tide elevations under international law observes:

> "209. The Court, consequently, is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, or for recognizing Qatar as having such a right. The Court accordingly concludes that for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded."

territorial sea of other coasts. The maritime boundary established by the Court of Arbitration granted the islet of Alcatraz only a 2.25 nautical mile maritime belt of territorial sea to the north. The Court of Arbitration found it equitable to grant Alcatraz a 12 nautical mile territorial sea to the west. However, this concession was made without taking into account any reefs.[377] In other words, even to the west of Alcatraz, where it faces the open ocean, the Court of Arbitration considered that an equitable delimitation had to result in limiting the extent of the territorial sea of Alcatraz.

3.134 State practice offers abundant evidence of the fact that, in order to arrive at an equitable result, an entitlement of one State that does not overlap with a similar entitlement of another State nonetheless can be curtailed. This concerns, for instance, any bilateral delimitation agreement that arrives at the outer limits of the maritime zones of the States concerned at a point that is not equidistant from the relevant baselines of both States.[378] An example of such a delimitation is formed by the Agreement between the Government of Argentina and the Government of Chile relating to the Maritime Delimitation between Argentina and Chile of 29 November 1984.[379] The boundary runs along a meridian up to the outer limit of the exclusive economic zones of both States. Article 7 of the Agreement provides that the Chilean exclusive economic zone is also bounded by this meridian in the area where it does not overlap with the exclusive economic zone of Argentina. An example of a territorial sea delimitation involving this issue is provided by the Protocol between the Government of the Republic of Turkey and the Government of

[377] *Guinea/Guinea-Bissau* arbitration, Award of 14 February 1985, para. 111 a).
[378] For a graphic illustrating this situation see NM, Vol. I, Figure V.
[379] *Law of the Sea Bulletin* No. 4 (1985), p. 50.

the Union of Soviet Socialist Republics concerning the Territorial Sea Boundary between the Two States in the Black Sea of 17 April 1973.[380] A Protocol-Description[381] drawn up in connection with the Protocol defines the territorial sea up to a point that is only within 12 nautical miles of the baseline of Turkey, but beyond 12 nautical miles of the baseline of the former Soviet Union.[382]

3.135 Colombia herself has taken the position that no weight has to be given to small islets in connection with the delimitation of her maritime boundary with Venezuela in the Gulf of Venezuela and outside of the Gulf in the Caribbean Sea. Colombia borders the northwest entrance of the Gulf of Venezuela and Venezuela borders the rest of the Gulf. The land boundary between both States reaches the Gulf of Venezuela at Castilletes at the northwestern shore of the Gulf. At the entrance of the Gulf of Venezuela, beyond the 12 nautical mile territorial sea of the mainland coasts of both States, lie Los Monjes, a number of small islets under the sovereignty of Venezuela. Los Monjes are located 19 nautical miles from Colombia and 41.5 nautical miles from the mainland of Venezuela opposite the Colombian coast. Colombia has submitted that the maritime boundary between herself and Venezuela has to be an equidistance line between the mainland coasts, completely disregarding Los Monjes.[383] Such an equidistance line places these Venezuelan islets

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[380] UNTS Vol. 990, No. 14475.

[381] Protocol-Description of the Course of the Soviet-Turkish Sea Boundary Line between the Territorial Seas of the Union of Soviet Socialist Republics and the Republic of Turkey in the Black Sea of 11 September 1980.

[382] J.I. Charney and L.M. Alexander, *International Maritime Boundaries*, Dordrecht, 1993, p. 1682.

[383] See, for instance, the Letter of the Minister of Foreign Affairs of Colombia of 16 August 1987 to this Venezuelan counterpart (NM, Vol. II, Annex 43; or

inside the maritime zones of Colombia, not according them any belt of territorial sea at all.[384]

3.136 In conclusion, Nicaragua holds that the maritime delimitation the Court is requested to effect should not give any weight to the small cays scattered throughout the western part of the delimitation area. In case the cays are Nicaraguan the cays are located on the Nicaraguan side of the median line maritime boundary proposed by Nicaragua. In this case, the cays are included in the maritime zones of Nicaragua generated by her other coasts. In case any of the cays were found to be Colombian, such cays would be situated on the wrong side of the median line maritime boundary proposed by Nicaragua. In this case, the solution should be to draw a 3 nautical mile enclave around such cays. If the Court were to find that there are features on the bank of Quitasueño that qualify as islands under international law, in the maritime delimitation between Nicaragua and Colombia the same considerations as set out for the other cays concerned would apply to such islands.

Note D.M. 01861 of the Minister of Foreign Affairs of Colombia to the Minister of Foreign Affairs of Venezuela of 15 September 1993 (NM, Vol. II, Annex 48)

[384] For a graphic illustrating the delimitation line resulting from the Colombian position see NM, Vol. I, Figure VI.

XII. Conclusions

3.137 In cases involving multi-purpose delimitation, the Court should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge. The jurisprudence of the Court provides ample confirmation that the principle of equal division applies in delimitation of a single maritime boundary.

3.138 The coasts defining the delimitation area (see Volume I, Figure I) for present purposes are as follows:

(a) The mainland coast of Nicaragua from the terminus of the land boundary with Honduras (in the north) to the terminus of the land boundary with Costa Rica (in the south).

(b) The mainland coast of Colombia opposite the coast of Nicaragua, and fronting on the same maritime areas.

3.139 This assessment is not substantially affected by the question whether San Andres and its dependencies are determined to be Nicaraguan or Colombian. Even if, for the sake of argument, the San Andres group were determined to be Colombian, the consequences of such a determination would not affect the essential geographical relationship of the mainland coasts of the Parties.

3.140 The equidistance line which results from application of the principle of equal division is provisional in the sense that it is subject to a process of adjustment resulting from any relevant circumstances. In the circumstances of the present case there is no legal basis for the adjustment of the median line.

3.141 The relevant equitable criteria confirm the equitable character of the resulting median line. The relevant criteria are: the incidence of natural resources in the disputed area, the principle of equal access to the natural resources of the disputed area, and security considerations.

3.142 In the present case the test of proportionality does not reveal any necessity for correction of the median line.

3.143 In case the Court finds that Colombia has sovereignty in respect of the islands of San Andres and Providencia, these islands should be enclaved and accorded a territorial sea entitlement of twelve nautical miles, this being the appropriate equitable solution justified by the geographical and legal framework.

3.144 The Republic of Nicaragua has sovereignty over the following cays: the Cayos de Albuquerque; the Cayos de Este Sudeste; the cay of Roncador; North Cay, Southwest Cay and any other cays on the bank of Serrana; East Cay, Beacon Cay and any other cays on the bank of Serranilla; and Low Cay and any other cays on the bank of Bajo Nuevo.

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

3.146 Nicaragua holds that all of the cays concerned, due to their size, location and other characteristics, should not be accorded any weight in establishing the maritime boundary between Nicaragua and Colombia. In case the cays are Nicaraguan, giving no weight to them implies that they are included in the maritime zones of Nicaragua generated by her other coasts.

3.147 If any of the cays were determined to be Colombian, such cays would be accorded enclaves in accordance with the principles of maritime delimitation. Nicaragua considers that the only possible equitable solution for the cays, in the case they were to be found to be Colombian, is to delimit a maritime boundary by drawing a 3 nautical mile enclave around them.

SUBMISSIONS

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

(1) the Republic of Nicaragua has sovereignty over the islands of San Andres, Providencia, and Santa Catalina and the appurtenant islets and cays.

(2) the Republic of Nicaragua has sovereignty over the following cays: the Cayos de Albuquerque; the Cayos del Este Sudeste; the Cay of Roncador; North Cay, Southwest Cay and any other cays on the bank of Serrana; East Cay, Beacon Cay and any other cays on the bank of Serranilla; and Low Cay and any other cays on the bank of Bajo Nuevo.

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

(4) the Barcenas-Esguerra Treaty signed in Managua on 24 March 1928 was not legally valid and, in particular, did not provide a legal basis for Colombian claims to San Andres and Providencia.

(5) in case the Court were to find that the Barcenas-Esguerra Treaty had been validly concluded, then the breach of this Treaty by Colombia entitled Nicaragua to declare its termination.

(6) in case the Court were to find that the Barcenas-Esguerra Treaty had been validly concluded and were still in force, then to determine that this Treaty did not establish a delimitation of the maritime areas along the 82° meridian of longitude West.

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

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

(9) the appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua

and Colombia, is a single maritime boundary in the form of a median line between these mainland coasts.

The Hague, 28 April 2003.

Carlos J. ARGÜELLO GÓMEZ

Agent of the Republic of Nicaragua

LIST OF MAPS AND FIGURES

FIGURES

MAP

LIST OF DOCUMENTS DEPOSITED WITH THE REGISTRY

Document 1 Memorandum from the Minister of Foreign Affairs of Colombia to the Minister of Foreign Affairs of Nicaragua. 5 November 1915.

Document 2 Diplomatic Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs of Colombia. 20 March 1917.

Document 3 Diplomatic Note from the Minister of Foreign Affairs of Colombia to the Minister of Foreign Affairs of Nicaragua. 24 June 1918.

Document 4 Diplomatic Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs of Colombia. 10 September 1919.

Document 5 Memorandum explanatory of the controversy between Nicaragua and Colombia on the Dominion of San Andres Islands, from the Ministry of Foreign Affairs of Nicaragua to the Secretary of State of the United State of America of 24 March 1924.

LIST OF ANNEXES

(VOLUME II)

COLONIAL DOCUMENTS

TREATIES

NICARAGUAN LEGISLATION

BOOKS

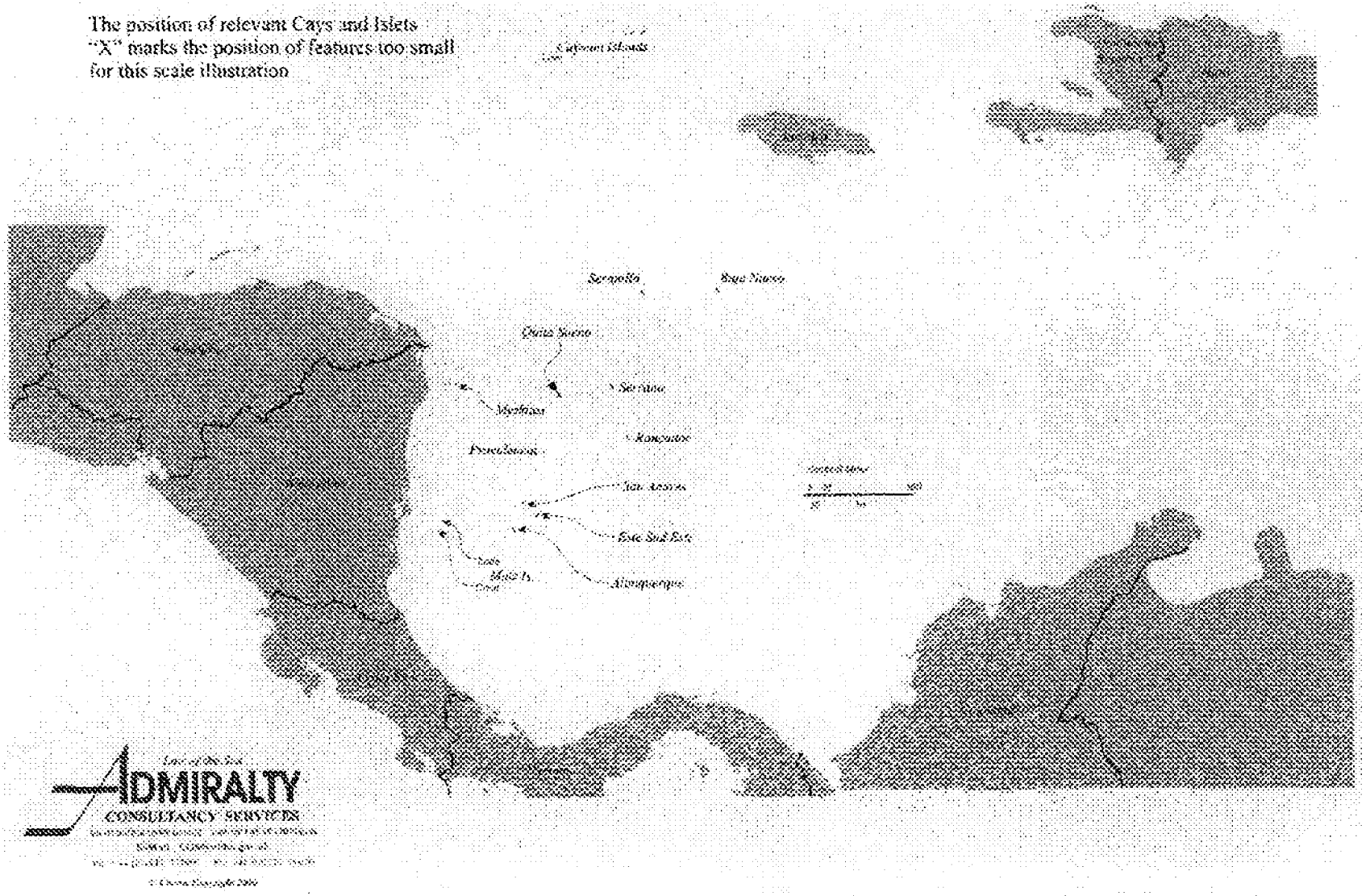
OTHER DOCUMENTS

FIGURE I

FIGURE II

FIGURE III

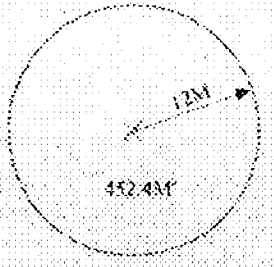
The position of relevant Cays and Islets
"X" marks the position of features too small
for this scale illustration

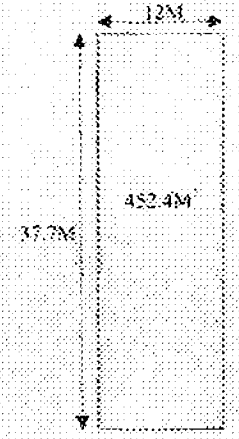


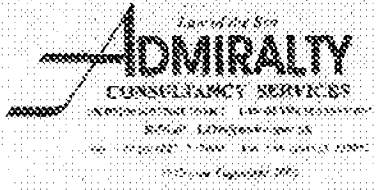
ADMIRALTY
CONSULTANCY SERVICES

FIGURE IV

The effect of small Cays.
The illustration shows equal geodetic areas of territorial sea, theoretically generated by:
A. A straight section of coast 37.7 nautical miles long
B. An isolated drying point feature







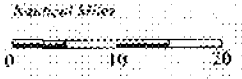
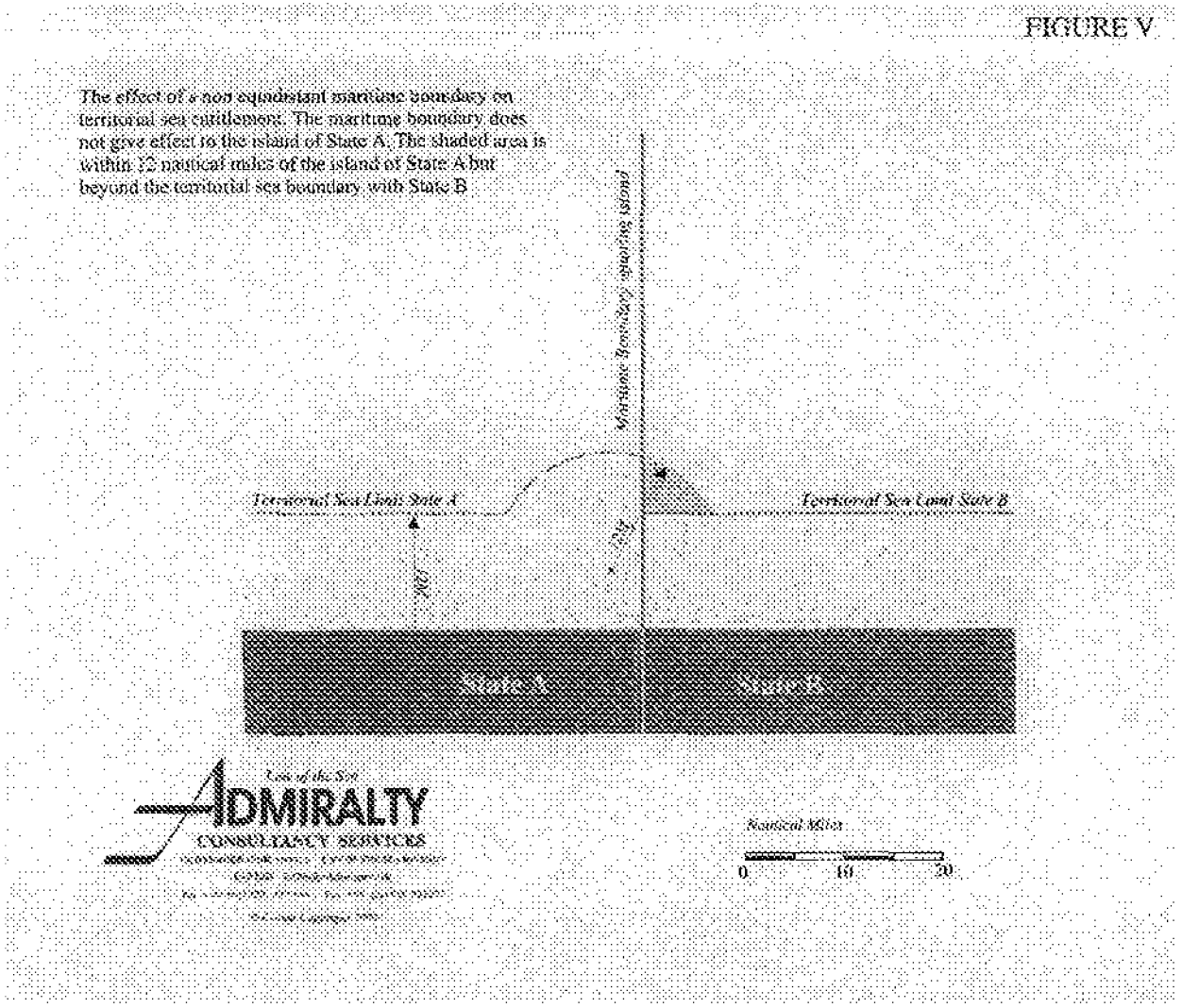


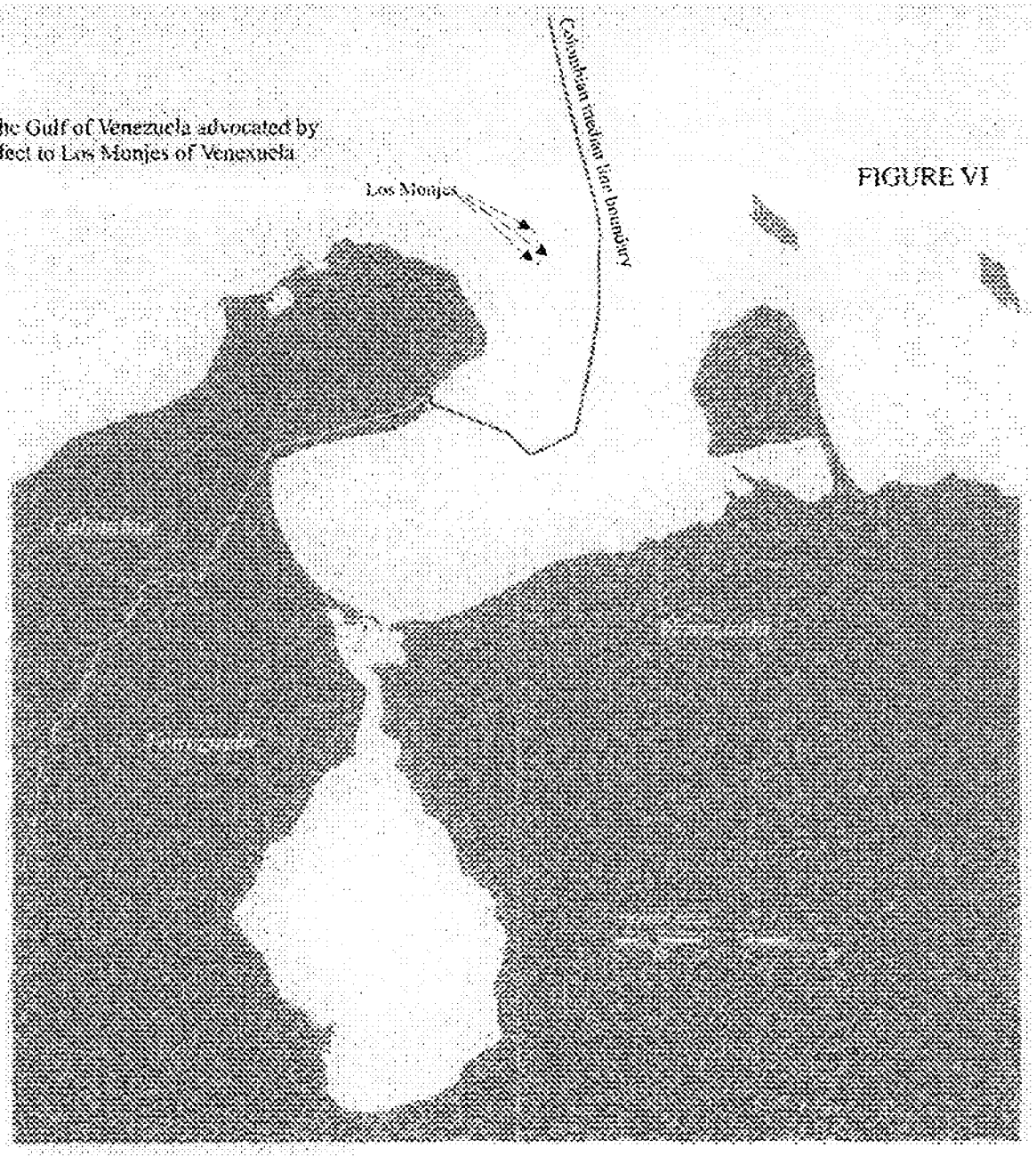
FIGURE V

The effect of a non equidistant maritime boundary on territorial sea entitlement. The maritime boundary does not give effect to the island of State A. The shaded area is within 12 nautical miles of the island of State A but beyond the territorial sea boundary with State B



Gulf of Venezuela
Maritime boundary in the Gulf of Venezuela advocated by Colombia, giving no effect to Los Monjes of Venezuela

FIGURE VI



ADMIRALTY
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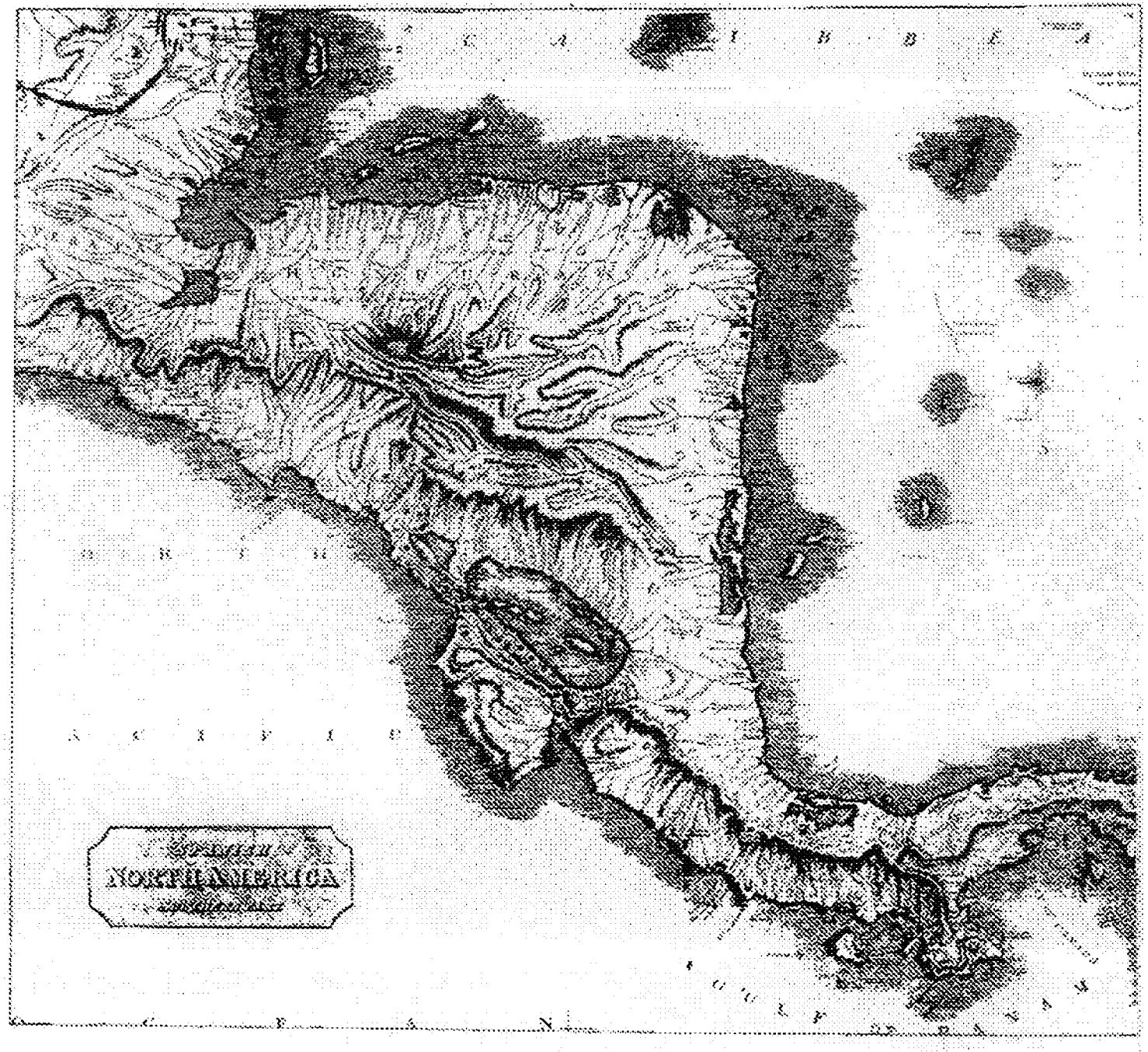
FIGURE VII



1815.—Map of S. Thompson.—Edinburgh