INTERNATIONAL COURT OF JUSTICE

MARITIME DELIMITATION
BETWEEN NICARAGUA AND HONDURAS
IN THE CARIBBEAN SEA

(NICARAGUA v. HONDURAS)

REJOINDER

OF THE REPUBLIC OF HONDURAS

VOLUME I

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CHAPTER 1:

INTRODUCTION

1.01. The Republic of Honduras submits this Rejoinder pursuant to the Order of the Court of 13 June 2002 and in response to the Reply filed by Nicaragua on 13 January 2003.

1.02. In preparing this Rejoinder, Honduras has followed the injunction in Article 49(3) of the Rules of the Court that "the Reply and Rejoinder ... shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them." Accordingly, Honduras has not repeated the arguments set out in its Counter Memorial, although it has been obliged by the strategy adopted by Nicaragua in its Reply to clarify some of those arguments and respond to attempts by Nicaragua to misrepresent the Honduran position. For the avoidance of doubt, except where the contrary is clearly indicated in this Rejoinder, Honduras stands by, and reaffirms, all of the arguments set out in its Counter Memorial.

A. THE SUBJECT OF THE DISPUTE BEFORE THE COURT

1.03. It is important to recall that it is Nicaragua which has brought this case before the Court by unilateral application and consequently has defined the dispute which the Court is asked to determine. Nicaragua has defined that dispute as one about the location of a single maritime boundary between Honduras and Nicaragua in the Caribbean. Nicaragua has not requested the Court to determine which State has sovereignty over the islands, rocks and cays immediately north of parallel 14°59.8′[1] (and, indeed, prior to the filing of its Memorial has not protested any activities authorised by Honduras pursuant to its sovereignty over these islands, rocks and cays). Having quite clearly (and, it must be presumed, deliberately) chosen not to raise the question of sovereignty over the islands, rocks and cays in its Application, Nicaragua cannot be allowed to introduce this issue by the back door in any of its subsequent pleadings.

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[1] As in the Honduran Counter-Memorial, this will be referred to for the sake of simplicity as "the 15th parallel" or "parallel 15".

1.04. Nor has Honduras sought to widen the dispute before the Court. As the Honduran Counter Memorial made clear, the arguments which Honduras made regarding the importance of *uti possidetis juris* in respect of the islands, rocks and cays north of the 15th parallel and the extensive evidence which Honduras put before the Court regarding Honduran *effectivités* thereon are relevant because they go to the question whether there is a traditional boundary line along the 15th parallel between the Honduran and Nicaraguan maritime spaces.

1.05. Accordingly, Honduras wishes to make clear that it understands the dispute before the Court to be confined to the location of the single maritime boundary in the relevant area and not to concern sovereignty over the islands, rocks and cays. Nevertheless, the placement of that boundary must give effect to – and cannot ignore – the established sovereignty of Honduras over the islands north of the 15th parallel which Nicaragua now claims.

B. THE NICARAGUAN CLAIM

1.06. Now that Nicaragua has laid all of its arguments and supporting documentation before the Court, it can be seen that Nicaragua's claim for a line to constitute a single maritime boundary –

(1) assumes that there is no existing maritime boundary, so that the Court is invited to proceed as if writing on a clean sheet;

(2) is based on the contention that the only way in which a boundary can be drawn which will achieve an equitable result is by the use of the bisector method advanced by Nicaragua in its Memorial and repeated in the Reply;

(3) presents a distorted picture of the geography of the relevant area in order to justify a line which could not be justified on equitable principles if the true geographical position were used.

As set out in the Nicaraguan Memorial, this approach completely ignored both the effect of the islands, rocks and cays which lie to the north of the 15th parallel and disregarded the practice both of the parties and of third States in relation to the islands and the surrounding maritime spaces and continental shelf.

1.07. By contrast, Honduras demonstrated in its Counter Memorial that there is an existing maritime boundary at the 15th parallel. Recognition of that boundary is clearly reflected both in the practice of Honduras and Nicaragua and that of third States. In marked contrast to the line advanced by Nicaragua, this existing boundary also reflects and accords with

sovereignty over the many islands in the area, leaving all of the Honduran islands on the Honduran side of the maritime boundary and all of the Nicaraguan ones on the Nicaraguan side. By contrast, the line proposed by Nicaragua would leave a large number of islands which are clearly Honduran isolated within a Nicaraguan maritime space.

1.08. In its Reply Nicaragua feigns outrage at the approach taken by Honduras. It begins by complaining that Honduras has failed to present an argument based on the law of the sea. In fact, as Chapter 2 of this Rejoinder makes clear, the Honduran case is firmly located in the principles of the law of the sea and reflects the consistent jurisprudence of the Court and of international arbitral tribunals to issues of maritime delimitation. If, as Honduras has shown, there is an existing boundary at the 15th parallel, then application of the principles of the law of the sea gives effect to that boundary and there can be no question of those principles being employed to substitute a different boundary on the basis that it might be more equitable.

1.09. For that reason, Honduras devoted much of its Counter Memorial to setting out the evidence of *effectivités* which established the existence of the boundary at the fifteenth parallel.[2] This evidence demonstrated, *inter alia*, that Honduras had consistently exercised sovereignty over the islands just to the north of the 15th parallel without any form of protest from Nicaragua, had granted oil concessions and licensed fishing activities in the waters north of the 15th parallel (again without protest from Nicaragua) and had carried out all the normal acts of government (including the application of its civil and criminal law, the regulation of immigration, the conduct of surveys and other public works and the operation of naval and military patrols) that could be expected with regard to small islands and maritime areas. Honduras also demonstrated that there was a tacit agreement between itself and Nicaragua regarding the use of the 15th parallel as the dividing line between oil concessions granted by the two States.

1.10. Although Nicaragua had, in its Memorial, made for the first time a claim to named islands north of the 15th parallel, it offered no evidence whatever in support of that claim, which was plainly an afterthought which Nicaragua advanced solely for the purpose of boosting its maritime claim. Faced with the substantial body of evidence which Honduras put forward in its Counter Memorial, Nicaragua has now attempted to put before the Court material in support of its own claim.[3] It is clear, however, that this evidence is extremely weak and does not begin to compare with that offered by Honduras. Moreover, the evidence falls very far short of that required to be

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2 HCM, Chapter 6.

3 NR, Chapter VI.

demonstrated under international law, as reflected in the recent jurisprudence of the Court. A detailed analysis of Nicaragua's evidence and comparison with that set out in the Counter Memorial are to be found in Chapters 4 and 5 of this Rejoinder.

C. NICARAGUA'S TACTIC WITH REGARD TO *EFFECTIVITÉS*

1.11. Nicaragua is obviously aware of the weakness of its claim with regard to the *effectivités* and has therefore adopted the well-worn tactic of seeking to minimise their importance so as to cover up this deficiency in its case. It has attempted to do so in four ways:-

(1) by denying that the islands have any relevance to the location of the maritime boundary;[4]

(2) by advancing an argument regarding the critical date which is designed to exclude all evidence of anything which occurred after 1977;[5]

(3) by adopting a very narrow definition of what constitutes material circumstances for the purpose of determining a single maritime boundary and then seeking to exclude everything which does not fall within that definition;[6] and

(4) by ignoring the significance of Honduran *effectivités* (and the absence of its own *effectivités*) in favour of its proposed bisector method.[7]

The present Rejoinder will respond to each of these steps in Nicaragua's reasoning. It should, however, be said at the outset that none of them has any merit.

(1) THE RELEVANCE OF THE ISLANDS

1.12. With regard to the first step, namely the sweeping statement that the islands have no bearing on the delimitation, this is manifestly at odds with the provisions of the 1982 Law of the Sea Convention, the jurisprudence of the Court and considerations of principle. It is also at odds with Nicaragua's belated efforts to address the islands, as reflected in three Chapters of its Reply devoted to the issue of *effectivités*. Thus, it is well

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4 A constant theme but one which is particularly evident in Chapter V of the Reply.

5 NR, paras. 1.26 to 1.27.

6 NR, Chapters III and V.

7 NR, Chapter IX.

established that, as a matter of principle, islands are to be taken into account for the purposes of drawing a maritime boundary, a fact recently reaffirmed by the Court in its decision in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (2001).[8]

1.13. Nicaragua's response is to ignore these authorities completely and to make the astonishing assertion that "both parties agree that the islands and islets in the area have no consequences on [sic] the delimitation of the boundary line" (Reply, para. 1.19). Honduras has agreed nothing of the kind, as even a cursory reading of the Honduran Counter Memorial would indicate. The passage in the Counter Memorial on which Nicaragua seeks to found this illusory agreement is the penultimate sentence of paragraph 7.28, which reads "Honduras does not use these islands as basepoints, and claims neither shelf nor economic zone for the islands as such". That sentence does not say that the islands have no consequences for the determination of the boundary line, a fact which is evident if one reads the whole paragraph:-

> "Thus they are true islands within the meaning of Article 121 of the 1982 United Nations Law of the Sea Convention and, except to the extent that the traditional boundary precludes it, would be entitled to a territorial sea of 12 miles. *They demonstrate the practicality of a boundary along the parallel, as claimed by Honduras, and the complete impracticability of the boundary claimed by Nicaragua. Their significance as relevant circumstances is beyond doubt given their location*, yet Nicaragua seems to ignore them, making a sweeping assertion of sovereignty over the islands, based on the Nicaraguan Constitution, but offering no proof of the exercise of that sovereignty. And by a series of lengthy citations to the jurisprudence, Nicaragua argues that small, insignificant islands do not qualify as "basepoints" where, being given "full-effect", they would distort a maritime boundary. It is all irrelevant. Honduras does not use these islands as basepoints and claims neither shelf nor economic zone for the islands as such. Its claim is based on its mainland and the long history of an established, accepted boundary."

1.14. Taken as a whole, this passage (and especially the part emphasised above) makes clear that, far from Honduras agreeing that the islands have no consequences for maritime delimitation, it has consistently asserted that they are highly important both in relation to the evidence of the existence of an agreed boundary and as relevant circumstances. It is simply that Honduras is not advancing a claim that the islands each have their own

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[8] ICJ Reports 2001, para 195.

shelf and Exclusive Economic Zone. Each island does, of course, have its own territorial sea.

(2) THE ALLEGED CRITICAL DATE

1.15. Nicaragua's second tactic – its critical date argument – is similarly misconceived. In its Reply Nicaragua asserted, for the first time, that the dispute regarding the maritime boundary "crystallised" in 1977 and that, accordingly, all evidence of actions taken after this "critical date" should be disregarded by the Court. It is doubtful whether the concept of the critical date is of much value in a case like the present where the conduct of both States go back a long way and are based on a pattern of practice manifesting a tacit agreement between the parties. But even if the concept is relevant here, it is well established that where the acts said to have occurred after the critical date "are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them", the Court will take them into account (see *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*.[9]

1.16. That is plainly the case here, since the Honduran actions after 1977 are a continuation of acts before that date. The practice of granting oil concessions, licensing fishing, the placing of geographical marker points in the islands and the practice of both parties in using the 15th parallel as the boundary for their respective oil concessions all have their origins well before 1977.

1.17. The Court will also note, in this regard, the arbitrary nature of the date selected by Nicaragua. While the Reply confidently asserts that 1977 is to be taken as the critical date, this is the first time that Nicaragua has made any such suggestion. A survey of the Nicaraguan Memorial will show that 1977 is not accorded any form of special treatment. On the contrary, it does not even constitute a critical dividing line for the chapters of the Memorial, which treat 1979 as the dividing line.

(3) RELEVANT CIRCUMSTANCES

1.18. Nicaragua's desperate attempt to exclude from consideration those matters in respect of which she knows her position to be weak by the expedient of defining material circumstances as narrowly as possible is similarly unconvincing. In this context, Nicaragua asserts that the grant of oil concessions, the evidence of fishing activities and the practice of third

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[9] ICJ Reports 2002, para 135.

States is all irrelevant to the determination of a shelf boundary. Honduras is not, however, making a shelf claim but endeavouring to show the location of an existing single maritime boundary and provide evidence of its longstanding sovereignty over islands and maritime spaces in the area now claimed by Nicaragua. As will be demonstrated in Chapter 5, there is ample support in the jurisprudence of the Court for the proposition that the grant of oil concessions and the use by two adjacent States of the same line as a terminus for their concession areas is highly relevant in this regard. Similarly, the act of a State in licensing fishing activities (and it is that, not the fishing activities themselves, on which Honduras relies) is plainly a relevant circumstance in determining the location of a boundary.

1.19. While Nicaragua is right in asserting that treaties concluded with third States are *res inter alios acta* and cannot, in and of themselves, be determinative of the location of a boundary, they are relevant – as are other instances of the practice of third States – when they manifest recognition of title to islands or maritime spaces and where they serve to confirm the existence of a tacitly agreed boundary.

(4) Equitable Principles and an Existing Boundary

1.20. Finally, Nicaragua's insistence on the use of an artificial bisector method to produce what it portrays as an equitable result, irrespective of the existence of a boundary based on practice and tacit agreement, is unwarranted. Nicaragua has not been able to furnish a single instance of this Court – or any other international tribunal – setting aside an existing boundary evidenced by practice over a long period of time in favour of the application of equitable principles.

D. THE INEQUITABLE NATURE OF NICARAGUA'S OWN APPROACH

1.21. Even on its own terms, Nicaragua's approach to delimitation would not produce an equitable result. As will be demonstrated in this Rejoinder, the Nicaraguan approach is seriously deficient in a number of important respects. In particular, it is based on a manipulation of the geographical position which is designed to obscure the true picture.

1.22. These matters will be addressed in detail in Chapters 6 and 7 of this Rejoinder. At present, it is sufficient to highlight the following features of the Reply:

(1) Nicaragua entirely fails to take into account that the traditional boundary line is, in part, a boundary between the territorial seas of the two States;

(2) it appears that Nicaragua no longer maintains its reliance on the so-called "Nicaraguan Rise" as one of the bases for its claimed line;

(3) on the other hand, Nicaragua appears to have revived an argument based on the supposed projection into the sea of the direction of the land boundary as a relevant circumstance, a thesis which is at odds with the jurisprudence of the Court and of other tribunals;

(4) the approach urged on the Court by Nicaragua entirely ignores the islands, rocks and cays north of the 15th parallel, irrespective of whether these are claimed by Nicaragua, yet it is clear from the 1982 Law of the Sea Convention and the jurisprudence of the Court that they cannot be dismissed in this way;

(5) Nicaragua presents a distorted picture of the coastline which is designed to minimise the significance and general direction of the Honduran coast.

1.23. The result is that the line suggested by Nicaragua would produce an inequitable result, even if it were possible to disregard the fact that there is an existing boundary between the maritime spaces of the two States.

1.24. By contrast, as will be demonstrated in Chapter 8 of this Rejoinder, the traditional boundary is equitable. Indeed, it is noticeable that an equidistance line would be significantly more favourable to Honduras, since it would lie to the south of the 15th parallel.

E. THE STARTING POINT

1.25. Honduras, seeking to minimise the points of difference with Nicaragua, can accept a starting point for the Court's line at 3 miles from the terminal point adopted in 1962, rather than 12 miles from the coast, as proposed in it Counter Memorial, but not premised on the bisector method, which is contrary to principle. Honduras also recognises that continuing changes in the geography of the mouth of the River Coco affects the initial part of the boundary line and is prepared to negotiate a solution to be agreed with Nicaragua from the terminus point adopted in 1962 up to the 3 mile point. This starting point and the line as a whole, along the 15th parallel, is further considered and illustrated in Chapters 8 and 9.

F. THE STRUCTURE OF THE REJOINDER

1.26. In the light of the above considerations, the Rejoinder of Honduras is organized as follows.

Chapter 2 shows that the approach taken by Honduras is firmly located within the principles of maritime delimitation in the law of the sea;

Chapter 3 responds to the arguments of Nicaragua regarding the principle *uti possidetis juris*;

Chapter 4 responds to Nicaragua's case regarding its alleged exercise of sovereignty over the islands, rocks and cays north of the 15th parallel;

Chapter 5 addresses Nicaragua's critique of the evidence submitted by Honduras regarding Honduran *effectivités*;

Chapter 6 responds to Nicaragua's argument regarding the geographical factors;

Chapter 7 demonstrates the inequitable character of the line proposed by Nicaragua;

Chapter 8 considers the Honduran line;

Chapter 9 summarises the Honduran case and is followed by the formal submissions of Honduras.

CHAPTER 2:

HONDURAS' CASE IN LAW

INTRODUCTION

2.1. It is apparent from the Nicaraguan Reply that Honduras and Nicaragua are in agreement with regard to at least one matter, namely the identification of the law applicable to the present case. In its Counter Memorial, Honduras stated that:

> "the law applicable to the case is [...] the positive customary international law of the sea, as reflected by the practice of States, the relevant articles of the 1982 Convention, and the international case law, beginning with the judgments of the International Court of Justice."[1]

Nicaragua made clear, in Chapter VIII of its Reply[2], that it concurred:

> "In any case, both Parties agree at least on the sources of the rules to be applied and it is then sufficient for the Court to take note of the agreement of the Parties in this respect as it has often done in the past."[3]

Honduras agrees.

2.2. The Parties nevertheless draw very different conclusions regarding the application of these legal principles to the facts of the present case. In the main, these differences are not the product of divergent interpretations of the applicable legal principles (although there are undoubtedly some such differences). Rather, the differences between the Parties stem

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1 HCM, p 60, para 4.8.

2 In particular at paras 8.5 and 8.6.

3 NR, p 169, para 8.6.

primarily from the fact that Nicaragua and Honduras start from opposite assumptions as to the factual and legal situation prevailing in the region with regard to the limits of their respective jurisdictions in relation to the islands and maritime areas now claimed by Nicaragua.

2.3. Honduras bases its case on the fact that there exists a traditional maritime boundary between the two countries which both States are obliged to respect and to which the Court, in accordance with well established principle and precedent, will give effect. That traditional maritime boundary is constituted by a line starting at a point three nautical miles due east of the point determined by the Honduras/Nicaragua Mixed Commission as the terminus of the land boundary between the two States. This terminal point of the land boundary should be joined to the starting point by agreement of the Parties. But Honduras makes no claim to territory south of the River Coco, so this sector, when agreed to by the Parties, will circumvent Nicaraguan territory and territorial waters until it joins with the starting point.[4] From that point, the boundary follows a line lying just to the south of the 15th parallel, at 14°59.8′ north latitude until meridian 82.[5] This line is further considered in Chapter 8, below.

2.4. As demonstrated in the Counter Memorial of Honduras, this traditional line has been established by the long and consistent practice of both Parties and is entirely compatible with the applicable principles of the modern law of the sea regarding delimitation. On the part of Honduras, there has been a consistent display of effective sovereignty and jurisdiction throughout the area north of the 15th parallel.[6] That sovereignty has been manifested by a long-standing application and enforcement of Honduran laws and regulations (including its civil and criminal legislation), regular naval and military patrols and regulation of such matters as lobster fisheries and the exploration for petroleum resources.[7] These Honduran *effectivités* are further considered in Chapter 5 of this Rejoinder.

2.5. Moreover, the practice of Nicaragua regarding the 15th parallel also points clearly to the conclusion that there is a traditional line of delimitation located there. It is striking that neither in its Memorial nor in the Reply has Nicaragua been able to provide the Court with any evidence whatever of the exercise of sovereignty and jurisdiction on its part in those areas north of the 15th parallel to which it now lays claim. On the contrary, the evidence clearly demonstrates that Nicaragua has not regulated oil, gas and

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4 See para 8.05 below.

5 As in the Counter-Memorial, this line will be referred to for convenience as the 15th parallel or parallel 15 (HCM, para 1.4).

6 HCM, Chapter 7, p 137ff, para 7.15-7.25.

7 HCM, Chapter 6, p 87ff.

fisheries activities in this area. Indeed, oil concession practice by Nicaragua reveals that Nicaragua has long accepted that it does not exercise sovereignty and jurisdiction north of the 15th parallel, and it has accepted without protest Honduran oil concession practice reaching south to the 15th parallel. The absence of Nicaraguan *effectivités* is further considered in Chapter 4 of this Rejoinder.

2.6. It may also be noted that there is a consistent pattern of practice by Third States showing that they also regard the area north of the 15th parallel as being under Honduran jurisdiction. This is shown, in particular, by relevant treaties concerning the region, beginning with the 1928 treaty between Nicaragua and Colombia.[8]

2.7. In contrast, faced with the evidence, Nicaragua invites the Court to start from the premise that there is no such traditional line of delimitation. Nicaragua tries to argue its case as if the Court were asked to settle a dispute where the two Parties had not previously agreed on a line of delimitation; Nicaragua argues as if there was an *absence of any previous practice demonstrating the long standing agreement between the Parties* on a line, "*de facto*" respected by both Parties, until Nicaragua unilaterally contended that she was not anymore bound by this traditional line.

2.8. In order to avoid any reference to the reality of this "*modus vivendi*", Nicaragua treats this case as if it were almost entirely an exercise in dividing a geomorphological feature without reference to the coastlines that face the maritime area to be delimited. Furthermore, Nicaragua advances an argument whereby it is suggested that the Court can decide an "equitable" boundary without reference to the situation consolidated by the outcome of the Court's decision of 1960 in the *Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua) and without reference to a situation which existed on the ground with the full acceptance of both Parties until Nicaragua itself decided to interrupt it.

2.9. This approach by Nicaragua leads it to proceed in two ways. The first consists in the arbitrary construction of a method of delimitation combining geometry ("the bisector method")[9] and taking into consideration a doubtful geomorphological feature happily found to be located in the place where it is precisely needed[10] (although the latter seems to have almost disappeared in Nicaragua's argument as further developed in its

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8 *Ibid* at p 126 ff, para 6.68 to 6.75.

9 NM, p 95-122, para 20-83; NR, p 180-182, para 9.6 to 9. 15.

10 NM, p 6, para 5 and HCM, p 24-25, para 2.21-2.24.

Reply).[11] The second way by which Nicaragua seeks to persuade the Court to approach the question of delimitation "*de novo*" is based on a blinkered but determined vision of the circumstances relevant to the case, whereby five critical elements are to be ignored, namely:

1) Honduras' effective administration of the maritime area (including the islands) north of the 15th parallel;

2) the consideration and due taking into account of the 15th parallel as a "*de facto*" line subject to tacit agreement of both States;

3) the fact that Nicaragua has confined itself to exercising administration only south of parallel 15;

4) the existence of numerous boundary treaties circumscribing the relevant area; and

5) the geographical circumstances that support the traditional line applied by the Parties.

2.10. Honduras must react to this biased strategy by Nicaragua. It will do so by examining successively the legal relationship existing in this case between sovereignty and delimitation (**Section A**) and the proper way in which the principles and rules applicable to the delimitation of the maritime area in dispute should be applied by the Court (**Section B**).

A. SOVEREIGNTY AND DELIMITATION IN THE PRESENT CASE

(1) NICARAGUA'S AMBIVALENT YET INCONSISTENT POSITION REGARDING THE ISLANDS NORTH OF THE 15TH PARALLEL (14°59.8′).

2.11. In its Counter Memorial, Honduras has already drawn the attention of the Court to the peculiar and unconventional treatment accorded by Nicaragua in its Memorial to the issue of sovereignty over the islands north of the 15th parallel. Immediately before setting out its Submissions to the Court, the Nicaraguan Memorial devotes a special paragraph to what it describes as "Islets and Rocks Claimed by Nicaragua".[12] This assertion by

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[11] NR, p 180-182, para 9.6. to 9.15.

[12] NM, p 166. At footnote 28 on page 68 of its Counter-Memorial, Honduras made the following observation with regard to this odd presentation by Nicaragua's Memorial: "it is to be noted that this section has the appearance of an afterthought, placed as it is after Nicaragua has presented its main arguments, and in a form without paragraph numbering".

Nicaragua (more as an after-thought than as argument) of purported "sovereign rights" over the islands seemed to Honduras to be nothing less than a surreptitious attempt "to transform a delimitation case into a litigation on the attribution of sovereignty over insular territories".[13] Honduras had no option but to react to this line of argument as developed by Nicaragua in its Memorial, and did so in its Counter Memorial. Further to Nicaragua's Reply, Honduras maintains and confirms its earlier submissions regarding the islands, not least because Nicaragua now clearly recognises the central importance of the islands. The burden of proof is on the party that alleges a right and Nicaragua has failed to prove its claim.

2.12. In its Reply, Nicaragua now advances an entirely different line of argument, notwithstanding that it has not withdrawn its "paper claim" to the islands. Quite surprisingly, in its Reply, on the one hand it accuses Honduras of being erroneously attached to a "territorial" and "sovereignty-related" claim line,[14] while at the same time Nicaragua advances the argument that it has itself a "title" to what it describes as the "islets" located in the area north of the 15th parallel.[15] Consequently, Nicaragua devotes much of Chapter VI of its Reply to the alleged basis of its claim to the islands.[16]

2.13. The inherent contradiction in Nicaragua's Reply is not the only surprise. In a quite remarkable passage, Nicaragua claims that both Parties "consider that the islands or islets in the area have no effect on the delimitation".[17] If that is indeed so, then one is forced to ask why Nicaragua devotes so much attention (in three separate Chapters of its Reply) to the very issue of Nicaragua's claimed sovereignty over the islands north of the 15th parallel and why it accuses Honduras of attributing too much weight to this issue. At one and the same time, Nicaragua presents the role of the islands in the present case as being marginal[18] but devotes much effort to convincing the Court that it owns these very same islands.[19] The inconsistency of Nicaragua's position is plain.

2.14. Two fundamental points must be made at the outset. The first is that it is not Honduras but Nicaragua which has brought this case before the Court. Honduras is not responsible for the wording of Nicaragua's Application. It is for Nicaragua to make its choice about how to formulate

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13 HCM, p 68, para 4.32.

14 NR, p 20, para 2.21.

15 See, for instance, NR, p 92, para 6.4 and 6.5.

16 NR, Chapter VI, p 91ff, in particular Section II, p 126 to 139.

17 NR, p 10, para 1.17.

18 NR, p 10, para 1.19.

19 NR, p 126-139, para 6.88-6.118.

its case and, once it has done so, it must live with the consequences. Nicaragua maintains that the delimitation of the single maritime boundary should be made on the basis of its "geographical/geomorphological "bisector method"; but it articulates, contrary to the strict formulation of its Application and of its submissions, that it claims the islands north of the 15th parallel. Thus, its case is confused and suggests a case both on delimitation of the maritime areas and on title to the islands over which Honduras has long exercised authority pursuant to its sovereignty.

2.15. The second point is that it is absurd for Nicaragua to suggest that the two countries concur in considering "that the islands or islets in the area have no effect on the delimitation", particularly since Nicaragua's confused case challenges Honduras' title to the islands. The basis for Nicaragua's pretence is said to be paragraph 7.28 of the Honduran Counter Memorial. What Honduras actually says there is that:

> "[...] Nicaragua argues that small, insignificant islands do not qualify as 'basepoints' where, being given 'full effect' they would distort a maritime boundary. It is all irrelevant. Honduras does not use these islands as basepoints, and claims neither shelf nor economic zone for the islands as such. Its claim is based on its mainland and the long history of an established and accepted boundary."

This argument is entirely logical and in no way sustains Nicaragua's extraordinary suggestion that Honduras regards the islands as having no effect on the delimitation. Its logic flows from the fact that Honduran sovereignty over the islands (including, in particular, Bobel Cay, Savanna Cay, Port Royal and South Cay)[20] is one of the factors which led to the establishment of an accepted boundary along the 15th parallel (in effect, the fact of Honduran sovereignty over the islands and the existence of the established boundary are two sides of the same coin). Moreover, the existence of this established boundary means that Honduras does not need to use the islands as basepoints in establishing a new boundary. To say that is entirely different from saying that the islands have no effect on the delimitation. Not only is this suggestion refuted by the role which the islands have played in the establishment and maintenance of the traditional boundary, but Honduras made clear (in the very paragraph of the Counter Memorial on which Nicaragua relies) that:

> "[The islands] demonstrate the practicality of a boundary along the parallel, as claimed by Honduras, and the complete impracticality of the boundary claimed by Nicaragua. Their significance as relevant circumstances is beyond doubt, given their location [...]".

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20 HCM in particular p 140-141, para 7.26 to 7.28.

2.16. Nicaragua's suggestion that the Parties agree that the islands have no effect on the delimitation is equally inconsistent with Nicaragua's own position, as set out in its Reply. Far from treating the islands as irrelevant to the delimitation exercise, the reason why Nicaragua itself claims sovereignty over the islands (although it is unable to demonstrate any actual display of sovereignty over them) is precisely because the line of delimitation it proposes attributes those islands to Nicaragua as something of an afterthought.

2.17. Nicaragua is perfectly well aware of this elementary proposition. Nicaragua wants the islands to be on its side, as part of its maritime zone and territory. This is why, from the beginning, as demonstrated by the formulation of its Memorial culminating in its appended paragraph at page 166, Nicaragua articulates a claim of sovereignty over:

> "Hall Rock; South Cay, Arrecife Alargado, Bobel Cay, Port Royal Cay, Porpoise Cay, Savanna Cay, Savanna Reefs, Cayo Media Luna, Burn Cay, Logwood Cay, Cock Rock, Arrecifes de la Media Luna, and Cayo Serranilla".[21]

This claim is not put forward in the final "submissions to the Court" of Nicaragua. Thus, its request for a single maritime boundary remains ambiguous and equivocal. But it is for Nicaragua to clarify its case, not for Honduras to do so on its behalf.

(2) THE LEGAL PRINCIPLES APPLICABLE TO THE ISLANDS NORTH OF THE 15TH PARALLEL (14°59.8′).

2.18. Turning to the legal principles applicable to the islands and the establishment of sovereignty over them, Honduras notes that Nicaragua (despite the fact that it persists in referring to the islands as "islets") does not contest the fact that all of the relevant islands fall within the definition of "islands" in Article 121 of the Law of the Sea Convention.[22]

2.19. Honduras and Nicaragua are not in agreement, however, on the standards to be applied to establish title over the islands. Nicaragua relies on limited and highly selective quotations from various international arbitral awards, including the arbitral awards in the *Island of Palmas* case and *Eritrea/Yemen (Phase I),* and the Judgment of the International Court of Justice in the *Minquiers and Ecrehos* case. These appear intended to set

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21 NM, p 167.

22 HCM, p 68, para, 4.30 (Nicaragua makes no reference to this paragraph in its Reply, although it states that it does "not consider that it is necessary ... to establish if there are any islands in the area of relevance for the delimitation that fall under the delimitation of rocks of article 121(3)" of the 1982 Convention: NR, para 3.18.

the bar at a high level for establishing sovereignty. But Honduras finds in the quotations selected by Nicaragua no statement with which it could disagree, nor does it find in these quotations any indication that they support Nicaragua's case.

2.20. For example, it is not controversial that, in the words of the Tribunal in the *Eritrea/Yemen* case that "[e]vidence of intention to claim [islands] is an essential element of the process of consolidation of title".[23] Honduras has provided ample evidence of the basis for its title to the islands in this matter, which Nicaragua has chosen to ignore.[24] By contrast Nicaragua has not been able to provide evidence to the Court in support of its recent claim. Honduras notes, as well, that Nicaragua has failed to identify other parts of the *Eritrea/Yemen Award* which are pertinent. In particular, it makes no mention of that Tribunal's clearly stated view that where one is dealing with islands with "isolated locations and inhospitable character" then "probably little evidence [of factual or persistent activities on and around them] will suffice".[25] These words are of direct relevance to the present dispute.

2.21. Similarly, Honduras sees no reason to disagree with the view that the mere act of buoying outside the reefs of a group of islands "can hardly be considered as sufficient evidence of the intention of [a] Government to act as a sovereign over the islets".[26] Honduras has not made such a claim in this case and fails to see the pertinence of Nicaragua's reliance on the quotation given the extensive evidence of substantial and material activities which Honduras set out in its Counter Memorial. Moreover, Honduras cannot but agree that "the continuous and peaceful display of territorial sovereignty ... is as good as title".[27] This is precisely the Honduran situation in relation to Bobel Cay, Savanna Cay, Port Royal Cay and South Cay.

2.22. Honduras notes, however, Nicaragua's failure to make any meaningful reference to several recent judgments of the International Court of Justice which are directly on point and which fail to support Nicaragua's argument as to what needs to be demonstrated to establish sovereignty over small islands which are inhospitably located.

2.23. In the *Case concerning Maritime Delimitation and territorial Questions between Qatar and Bahrain* the Court affirmed the established

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23 *Eritrea/Yemen Award* (Phase I), 114 ILR 1 (at para 239-241).

24 HCM, chapters 3, 6 and 7. See also the following chapters in this Rejoinder.

25 *Supra* n. 23, at paras 523-4.

26 *Minquiers and Ecrehos* case, ICJ Reports 1953, p 71.

27 *Island of Palmas Case*, RIAA, Vol II, p 839.

principle that "an island ... should as such be taken into consideration for the drawing of the equidistance line."[28] Honduras referred to this judgment in its Counter Memorial. The Court had to decide which of the two States had title over the island in question (Qit'at Jaradah).[29] Bahrain claimed that Qit'at Jaradah came under Bahraini sovereignty, since it had displayed its authority over the island in various ways, including "the erection of a beacon, the ordering of the drilling of an artesian well, the granting of an oil concession, and the licensing of fish traps."[30] Qatar, on the other hand, contended that Qit'at Jaradah was merely a low-tide elevation which could not be appropriated and that, since it was situated in the part of the territorial sea which belonged to Qatar, Qatar had sovereign rights over it. The Court accepted Bahrain's argument:

> "Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *a titre de souverain*. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it."[31]

2.24. The "activities" to which the Court was referring – "the erection of a beacon, [...], the granting of an oil concession, and the licensing of fish traps" – are precisely the same activities which Honduras has carried out over many years on and around Bobel Cay, Savanna Cay, Port Royal Cay, South Cay and other islands. Nicaragua, on the other hand, has been unable to put any evidence before the Court to demonstrate that it has carried out any of these activities on and around these and the other islands north of 15° N latitude. This is made clear in Chapter 4 of the Rejoinder.

2.25. The second case to which Nicaragua makes no reference (perhaps because it was published too late to be included in Nicaragua's Reply) is the *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipidan*

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28 *Case concerning Maritime Delimitation and territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Reports 2001, para 195.

29 According to a Bahraini Report at high tide the length and breadth of the island were about 12 by 4 metres, whereas at low tide they were 600 and 75 metres, and at high tide its altitude was approximately 0.4 metres: *ibid*, para 197.

30 *Ibid*, para 196.

31 *Ibid*, para 197. At para 198 the Court recalled an observation of the Permanent Court of International Justice in the Legal Status of Eastern Greenland case, that: "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim." (PCIJ, Series A/B, No. 53, p 46).

(Indonesia/Malaysia), two islands described by the Court as "very small islands which are uninhabited or not permanently inhabited" and for which "*effectivités* will indeed generally be scarce".[32] In this case the Court was faced with competing claims as to *effectivités*. The principles it applied are equally applicable in the present case and strongly supportive of Honduras' claim. The Court made a number of preliminary observations.

2.26. As to the date of the acts, the Court observed that

> "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them [...]. The Court will, therefore, primarily, analyse the *effectivités* which date from the period before .. the year in which the parties asserted conflicting claims to Ligitan and Sipidan."[33]

In the present case, this observation is directly relevant to Nicaragua's assertions about the "critical date". Honduras is the Party in this case that has maintained a consistent position throughout. It is Nicaragua which has changed its position at a late date and yet seeks to introduce facts subsequent to that time in support of its arguments. The Court's approach in *Indonesia/Malaysia* means that no date bars Honduras' evidence, but facts developed by Nicaragua after its change of position are not admissible.

2.27. As to the particularity of the acts the Court observed that

> "it can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such. Regulations or administrative acts of a general nature can therefore be taken as *effectivités* with regard to Ligitan and Sipidan only if it is clear from their terms or their effects that they pertain to these two islands".[34]

It is apparent that administrative acts of a specific nature which pertain to *inter alia* Bobel Cay, Savanna Cay, Port Royal Cay and South Cay may be taken as *effectivités*, as can general acts the "effects" of which pertain to these islands.

2.28. As to the nature of the acts, the Court observed that

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32 ICJ Reports 2002, para 134.

33 *Ibid*, para 135.

34 *Ibid*, para 136.

> "activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority."[35]

Contrary to the position articulated by Nicaragua, therefore, it is plain that private fishing and other activities may be taken as *effectivités* where they take place "on the basis of official regulations or under governmental authority". It is readily apparent from Honduras' Counter Memorial and Chapter 5 of this Rejoinder that the evidence demonstrates clear governmental authority on the part of Honduras in respect of fisheries and other activities on and around the islands now claimed by Nicaragua.

2.29. As to the extent of the acts, the Court reaffirmed the position it had adopted the previous year in the *Case concerning Maritime Delimitation and territorial Questions between Qatar and Bahrain* relating to the sufficiency of activities needed to establish sovereignty.[36] The Court reaffirmed that for very small islands activities such as the erection of a beacon, the granting of an oil concession, and the licensing of fish traps can be sufficient proof of sovereignty, given the circumstances.[37]

2.30. On the basis of these considerations the Court found in favour of Malaysia's claim. The activities upon which Malaysia relied were measures to regulate and control the collecting of turtle eggs, a licence permitting the capture of turtles in the area including the islands, and the declaration of one of the islands as a "reserve for the purpose of bird sanctuaries", and the construction of a lighthouse on each of the islands. The Court noted that the activities relied upon by Malaysia were "modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts".[38] The Court also noted that Indonesia had never expressed its disagreement or protest, which it considered to be unusual.[39] As demonstrated in Chapters 4 and 5 in this Rejoinder, Nicaragua has never protested the exercise of Honduran sovereignty in the area north of the 15th parallel. To the contrary, it has expressly recognised this sovereignty, for example in recognising Honduras' right to grant the Coco Marina oil concession at a point on the 15th parallel.

2.31. A third recent case from the International Court of Justice is of particular relevance on the question of oil concessions as evidence of *effectivités* and governmental intent. In the *Case concerning the Land and*

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35 *Ibid*, para 140.

36 *Ibid*, para 147.

37 *Ibid.*

38 *Ibid*, para 148.

39 *Ibid.*

Maritime Boundary between Cameroon and Nigeria the Court reviewed its jurisprudence in the period between 1982 and 1992 and summarised its position as follows:

> "Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account."[40]

2.32. Nicaragua is notably defensive about this Judgment, asserting, without any indication of its reasoning, that Nicaraguan and Honduran practice in relation to oil concessions in the relevant area pertaining to the delimitation does not reflect any tacit agreement.[41] Honduras does not agree (see paras 4.24- 4.33, below). Honduras is content to adopt the approach taken by the International Court in these recent judgments. As the Court indicated in the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, "the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled". This is precisely what is to be checked and analysed in each case on its merits. In the present case, as will be further demonstrated (see below at para. 4.33) the existence of a "*modus* vivendi" between the two Parties is readily apparent from Nicaraguan and Honduras practice from 1965 to 1981. It reveals that the parties were in perfect agreement as to the location, respectively, of their northern and southern oil concession boundaries. This is perfectly reflected in official maps produced by Nicaragua in 1969 and 1995, which are now annexed to this Rejoinder.[42]

2.33. This pattern of conduct has to be viewed in the context of other manifestations of acquiescence by Nicaragua in the traditional line of delimitation. These manifestations of acquiescence have already been indicated in the Honduran Counter Memorial[43] and are not refuted by Nicaragua in its Reply. Indeed, it is particularly striking to note that, even at a time when Nicaragua contended that the 1906 Award of the King of Spain did not determine the exact location of the terminal point of the land boundary (Nicaragua claiming that it lay much further north of the River

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40 ICJ Reports 2002, para 304.

41 NR, paras 7.22-7.23.

42 HR, Plates 32 and 33.

43 See in particular HCM, p 37-39, para 3.15 to 3.21; p 47, para 3.36.

Coco),[44] Nicaragua did not try to display any act of sovereignty over the islands north of the 15th parallel. This is confirmed by the prudent silence observed by the Nicaraguan Reply, which is unable to cite any evidence of its purported *effectivités* in the area in dispute, in particular during this period.[45]

2.34. The position of Honduras regarding the presence of the islands north of the 15th parallel may be summarized in the following way:

- they are true "islands" in the sense of Article 121 of the 1982 Convention on the law of the sea.[46]
- these islands, which include the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay[47] are not (and, in relevant times, have never been) "*terrae nullius*". On the basis of the principle of *uti possidetis juris* as confirmed by subsequent *effectivités*, Honduras possesses a sovereign title over these islands.
- As stated by Article 121 of the 1982 Convention on the law of the sea, each of these islands is entitled to a territorial sea, a continental shelf and a exclusive economic zone.
- For achieving an equitable result, any delimitation must respect the presence of these Honduran islands north of the 15th parallel.

B. THE RELATIONSHIP BETWEEN LAW AND EQUITY TO BE APPLIED TO THE DELIMITATION

2.35. As already stated above, the Nicaraguan method of delimitation is a curious and unconventional combination of geography, geometry and geomorphology, deliberately ignoring the existence of a series of factors highly relevant to the case. It starts by challenging the existence of a boundary at the 15th parallel, north of which lies a maritime area under effective Honduran jurisdiction, as Nicaragua has long tacitly but actively recognized, in particular during the 1960's and 1970's (a boundary still considered as such by third Parties interested in the region, including the

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44 i.e. at least until 1960 if not 1963.

45 NR, p 73 at para 5.4, iii) and p 63-64, para 4.52 cited in footnote 181 at p 73.

46 HCM, p 67-68, para 4.28-4.32.

47 HCM in particular p 140-141, para 7.26 to 7.28.

United States, Colombia and Jamaica, and international organisations, like the FAO, the UNDP and the Inter-American Development Bank)[48].

2.36. Between the two countries, the emphatic difference in perception of the circumstances relevant to the case refers back, in reality, to a distinct vision of the role of equity and equitable principles in the delimitation requested from the Court.

2.37. In its Counter Memorial, Honduras has already insisted on one point. It plainly recognizes the role to be played by equity in any maritime delimitation, since the solution to be achieved must produce an equitable result.[49] Honduras has in particular referred to the famous statement of the Court in the *North Sea Continental Shelf Cases*, according to which:

> "[...] it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles".[50]

Among the circumstances to be taken into account on the basis of the equitable principles to be applied, Honduras then referred to:

- the historic root of title in the principle *uti possidetis juris;*[51]
- the Honduran *effectivités* in the islands and waters north of the 15th parallel;
- Honduran sovereignty and exercise of jurisdiction over the islands and surrounding waters north of the 15th parallel;
- the acquiescence on the part of Nicaragua in the exercise of sovereignty and jurisdiction by Honduras in the islands and maritime spaces north of the 15th parallel (14°59.8′); and
- the treaties resolving territorial questions and maritime delimitations in the region.[52]

2.38. The common denominator in the circumstances thus identified by Honduras as being relevant lies in the fact that they are essentially of a *legal* nature. They refer to the sources of the legal title possessed by Honduras and to the respective conduct of Honduras, Nicaragua and Third Parties with the legal consequences stemming from these conducts.

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48 HCM, p 126-129, para 6.68-6.76.

49 HCM, p 64-67, para 4.18-4.27.

50 ICJ Reports 1969, p 47, para 85.

51 Which is developed in Chapter 5 of its Counter-Memorial and further addressed in chapter 3 of this Rejoinder.

52 HCM, p 64-65, para 4.20.

2.39. In other words, the act of taking into account these relevant legal factors is of absolute necessity; as said by the Court already in 1969[53], equity is part of the law and cannot run *against* the law. This case is not one where the Court would be asked to render justice *ex aequo et bono*, a situation which never happened in the whole history of both the present Court and its predecessor. Being part of the law, equity cannot ignore the legal situation deriving from a long-standing "*modus vivendi*".

2.40. To allow a State to unilaterally define a new policy designed to reassess the "equitable" feature of a situation based on such long standing agreement would encourage many other States to challenge situations acquired and consolidated on the basis of legal titles. Now, what Nicaragua tries indeed to do in the present case is simply to ignore a tacit agreement on a delimitation which characterized the quiet relationship among the interested countries in the region.

2.41. Yet, as clearly demonstrated by the evolution of the Court's case law, equity cannot be considered in isolation from the law.[54] As recalled by Sir Robert Jennings, former President of the Court:

> "Equity has not come to destroy the law but to fulfil it".[55]

Sir Robert also declared, in the same spirit:

> "Equity is distinguishable from law and yet part of it".[56]

2.42. Being "not rival but complementary,"[57] equity and the law cannot be put in contradiction one with the other. As a consequence, the *legal* factors characterising the situation in the concerned region can neither be ignored nor neglected by the application of equitable principles. Equity, as conceived in the jurisprudence of the Court cannot serve for overthrowing old boundaries.

2.43. It remains the case that the end-result produced by law and equity complementarily applied must be, as such, an equitable one. In Honduras' opinion, this means at least three things:

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53 In the *North Sea Continental Shelf Case*, ICJ Reports 1969, p 47, para 85.

54 See in particular on this evolution P. Weil, L'équité dans la jurisprudence de la Cour internationale de justice, un mystère en voie de disparition ?, in Essays in honour of Sir Robert Jennings, Fifty Years of the International Court of Justice, Cambridge University Press, 1996, p 121-144, reprinted in P. Weil, Ecrits de droit international, Paris, P.U.F., p 166-195.

55 Cited by P. Weil, op cit, in Ecrits de droit international, at p 184.

56 *Ibid.*

57 Sir Robert Jenning, Equity and Equitable Principles, 1986, p 28.

- first, the application of "equitable principles" cannot justify a departure from an existing boundary recognized in practice over a period of years;
- secondly, the application of "equitable principles" never operates to validate the unilateral termination of, or departure from, an agreement regarding sovereignty over maritime spaces, even if that agreement was not put in written form.
- thirdly, equitable principles do not permit the adoption of a line of delimitation which ignores the respective physical relationship of the territory of the Parties in relation with the maritime area to be delimited.

2.44. This is precisely the reason why, as stressed by Honduras at paragraph 7.28 of its Counter Memorial, from which it has been seen above that Nicaragua drew completely erroneous conclusions, "Honduras does not use these islands as base-points, and claims neither shelf nor economic zone for the islands as such."[58]

2.45. In other words, reliance by Honduras on the sole traditional line, itself deriving from its territorial title (*uti possidetis*) and the long history of an established, accepted boundary is strengthened and consolidated by the fact that it produces an equitable result. In this regard, Honduras does not "set aside the coastal geography of the region and the principal coastal relationships",[59] as Nicaragua claims. On the contrary, as will be seen further at chapters 7 and 8, Honduras demonstrates that the traditional line is in accord with the relevant geographical circumstances, while the Nicaraguan approach does not respect the relevant coasts that face the delimitation area. Thus, in Chapter 8 it is shown that the Honduran line produces an equitable result, whereas in Chapter 7 it is shown that Nicaragua's line does not do so.

2.46. Honduras maintains that each and every one of the relevant circumstances which it stated in its Counter Memorial is determinant and should not be ignored by the Court. Indeed, and without considering the other circumstances as being less pertinent, Honduras wants to stress in this respect the importance of the conduct of the Parties as well as that of Third Parties for evidencing the validity of the traditional line of delimitation. Nicaragua's acceptance of the traditional line until the Sandinista

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58 HCM, p 141, para 7.28.

59 NR, p 15, para 2.1.

Government came to power is consequently a relevant circumstance, as is the existence of other treaties circumscribing the relevant area.[60]

2.47. Honduras agrees with Nicaragua when it says that "the role of relevant circumstances is essentially to confirm the equitable character of a line". Yet, it is the position of Honduras that the principle of respect for an existing agreed boundary is the most relevant of all circumstances. Even more so when, in a spirit of reasonableness and equity, Honduras asks only for the respect of this line, without seeking to argue for a position of maximum advantage based on the islands over which Honduras nevertheless exercises sovereignty.

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60 HCM, p 47-51, para 3.37-3.47.

CHAPTER 3:

THE *UTI POSSIDETIS JURIS*

GENERAL OBSERVATIONS

3.01. In its Reply,[1] Nicaragua attempts to minimize or even dismiss altogether the application of the principle of the *uti possidetis juris* in this case. To this end, on the one hand Nicaragua ignores or manipulates international jurisprudence in general, and particularly the jurisprudence of this Court. On the other hand, she conceals the importance of the application of this principle to this specific case.

3.02. Nicaragua's attitude is surprising, to say the least, because she has always accepted this title as the basis for her boundary delimitations in the past. As established by the Judgment of 11 September 1992, in the case *concerning the land, island and maritime frontier dispute (El Salvador/Honduras; Nicaragua intervening)*:

> "It is evident that the Mixed Commission responsible for that delimitation [of 1900] based its works on the land boundaries on 17th and 18th century titles, but simply took it as axiomatic that "there belonged to each State that part of the Gulf or Bay of Fonseca adjacent to its coasts" (*Límites Definitivos entre Honduras y Nicaragua*, Honduran Ministry of Foreign Affairs, 1938, p. 24). A joint succession of the three States to the maritime area seems in the circumstances to be the logical outcome of the principle of *uti possidetis juris* itself."[2]

3.03. Nicaragua cannot successfully argue that equitable principles preclude the application of the *uti possidetis* principle to the delimitation of the maritime areas,[3] because if the principle is accepted, so the equity of the same must be accepted. In the words of a distinguished specialist,

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1 NR, paras 4.1 to 4.68.

2 ICJ Reports 1992, pp 602, para 405.

3 NR, vol 1, pp 49, para 4.2.

"everything that has been consented to freely is equitable,"[4] which means that Nicaragua cannot both accept and reject the principle according to its interest, and that the invocation of an abstract equity cannot exclude the applicable law.[5] As this Chapter will demonstrate, the application of the principle *uti possidetis juris* has been accepted in Central America generally, and by Honduras and Nicaragua in particular, both with regard to island and maritime title. The chapter will also demonstrate that the principle is applicable to the islands now claimed by Nicaragua, and confirms that title to them is vested in Honduras. The conclusions are summarised at paragraph 3.61 below.

3.04. What Nicaragua obviously pursues is to displace the applicable law in the present case invoking reasons of equity. In this regard it is appropriate to recall the words used by the Chamber in the *Frontier Dispute (Burkina Faso/Mali)* case:

> "The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified ... the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity. These frontiers, however unsatisfactory they may be, possess the authority of the *uti possidetis* and are thus fully in conformity with contemporary international law".[6]

3.05. Nicaragua makes much of the confidence that Honduras places in the Judgment rendered by the Court on 11 September 1992.[7] That judgment is indeed of great importance for the current case, in view of the fact that it was the first judgment rendered by the Court which specifically considered the application of the *uti possidetis* to the countries of Spanish America.

3.06. As can be observed, the Court accepted, more than ten years ago, in a very straightforward manner that the application of the *uti possidetis iuris* to the maritime areas was fully compatible with the later evolution of the Law of the Sea. In the final analysis, the land dominates the sea and it has generated *ab initio* rights to the riparian State on its continental shelf,

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4 A. Remiro Brotóns, *"Problemas de fronteras en América: La delimitación de los espacios marinos,"* in A. Mangas Martín (Ed.), *La Escuela de Salamanca y el Derecho Internacional en América: Del pasado al futuro,* Salamanca, 1993, p 129.

5 ICJ Reports 1974, p 33, para 78.

6 *Case concerning the Frontier Dispute (Burkina Faso/Mali)*, ICJ Reports 1986, p 544 at p 633, para 149.

7 NR, vol 1, pp 59, para 4.39 and footnote 147.

having extended also its jurisdiction over other areas such as the exclusive economic zone.[8]

3.07. The surprising and unjustifiable scepticism towards the application of the *uti possidetis* principle in the Nicaraguan Reply necessitates further treatment of the following issues:

a) the essential characteristics of the principle in the legal framework of Spanish America (**Section A**), based on the opinions of experts presented in the Annexes to this Rejoinder (**Section B**);

b) the application of the *uti possidetis juris* to the islands and maritime areas (**Section C**);

c) the confirmation by the jurisprudence of the application of this principle to islands and maritime areas (**Section D**);

d) the acceptance by Nicaragua of the *uti possidetis juris* in her *Application* against Colombia (**Section E**); and

e) Conclusions (**Section F**).

A. THE CHARACTERISTICS OF THE *UTI POSSIDETIS JURIS* IN SPANISH AMERICA

3.08. In the *Frontier Dispute* case, a Chamber of the Court described *uti possidetis* as "a principle of a general kind which is logically connected with this form of decolonisation wherever it occurs". The Chamber noted the origins of the principle in the decolonisation of Spanish America and commented that:

> "The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term."[9]

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8 See ICJ Reports 1992.

9 ICJ Reports 1986, p 554 at p 566, para 23. See also the ample and detailed analysis of G. Nessi, *L'uti possidetis iuris nel Diritto Internazionale,* Padova, 1996.

3.09. It follows that, in each case of colonial emancipation from a single power, the presiding law of such succession on the territory will be the internal body of laws of the predecessor State in order to delimit the internal administrative circumscriptions that become States.

3.10. With regard to the Spanish *uti possidetis,* the Swiss Federal Council declared in its judgment of 1922 in the case concerning boundaries issues between Colombia and Venezuela that:

> "This general principle offered the advantage of establishing an absolute rule that there was not in the old Spanish America any *terra nullius.*"[10]

Similarly, the 1992 Judgment of the Chamber of the Court held that:

> "Thus the principle of *uti possidetis juris* is concerned as much with title to territory as with the location of boundaries; certainly a key aspect of the principle is the denial of the possibility of *terra nullius.*"[11]

3.11. Accordingly, with regard to the islands, all those adjacent to the continental territories belonged to Spain and all automatically were transferred to their Central American successors after 1821, except when they were subject to claim by a third non-Spanish State, which was not the case with any of the Honduran islands and cays. To ignore this fact is to disregard the application of the principle of *uti possidetis* as it is embodied in the Judgment of the Chamber of the Court of 11 September 1992. Recognition of the equity of this solution is implicit in the continued acceptance by Nicaragua and Honduras of the *uti possidetis juris* principle.

3.12. What has been said with regard to the islands is also applicable to the Spanish territorial sea, which is transformed *ipso facto* and *ipso jure* in the territorial sea, both continental and insular, of the new States after their colonial emancipation.

3.13. Furthermore, in light of the fact that the Chamber in the *Frontier Dispute (Burkina Faso/Mali)* case described *uti possidetis* as a principle of a general nature unavoidably linked to decolonisation wherever it occurs,[12] it is indicative of the fact that it is not a principle exclusively linked to land boundaries, but rather to decolonisation issues as a whole. The foregoing implies, with regard to Spanish America, that it is applicable to all the borders and colonial areas as they were at the time of decolonisation.

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10 *UNRIAA*, Vol I, pp 228.

11 ICJ Reports 1992, pp 387, para 42.

12 ICJ Reports 1986, pp 566, para 23.

3.14. In the same way, in the *Guinea-Bissau/Senegal* case, the arbitral tribunal declared with regard to the application of the principle in Spanish America that

> "The question of succession of States in the matter of boundaries acquired a very special importance in America during the nineteenth century, because of the accession to independence of the States born of the Spanish colonial empire. In certain cases, the new States decided by common agreement that the international limits of their respective territories would be those which already existed to mark the administrative subdivisions of the colonial period. In other cases, the States claimed as part of their national territory what had previously corresponded to a Viceroyalty, an *Audiencia* or a Captaincy-General. In all those cases, the ancient colonial law ("*derecho des Indias*") was invoked to determine the international boundaries between the new States. This method of determining international boundaries is known under the name of *uti possidetis juris*."[13]

Furthermore, it added that:

> "In the Fonseca Bay case ... the Central American Court of Justice decided that the limits with the high seas which the Crown of Castile had established in that bay had devolved in 1821 on the Federal Republic of Central America and subsequently to El Salvador, Honduras and Nicaragua (*Anales de la Corte de Justicia centroamericana*, t. VI, nº 16-18, pp. 100 et 131)."[14]

Accordingly, the arbitration award of 31 July 1989, in the *Guinea-Bissau/Sénégal* case linked the application *in genere* of the principle of *uti possidetis juris* to decolonisation:

> "From a legal point of view, there is no reason to establish different regimes dependent on which material element is being delimited."[15]

3.15. In the *El Salvador/Honduras: Nicaragua intervening* case, the 1992 Judgment of the Chamber made two important assertions regarding the application of the cited principle. First, the Chamber held that "the principle of the *uti possidetis juris* should apply to the waters of the Gulf as well as to the land."[16] Secondly, it held that:

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13 83 ILR 1 at p 35, para 61.

14 *Ibid*, pp 36-7, para 64.

15 *Ibid*, p 36, para 63.

16 ICJ Reports 1992, pp 589, para 386.

> "The Chamber has no doubt that the starting-point for the determination of sovereignty over the islands must be the *uti possidetis juris* of 1821. The islands of the Gulf of Fonseca were discovered in 1522 by Spain, and remained under the sovereignty of the Spanish Crown for three centuries. When the Central American States became independent in 1821, none of the islands were *terra nullius*; sovereignty over islands could not therefore be acquired by occupation of territory."[17]

3.16. The attempts in the Nicaraguan Reply to deny the application of the *uti possidetis juris* to maritime areas are, therefore, unfounded. International jurisprudence leaves no room for doubt with regard to the application of this principle to islands and waters adjacent to the coastline. In accordance with the colonial practice on the matter, the Spanish Crown, through a Royal Decree dated 17 December 1760, established an extension of six maritime miles (two leagues) as Spanish jurisdictional waters,[18] both continental and insular. This is for reasons of safety and defence and also in order to fight smuggling, something which was then quite common in the Caribbean coastal areas. It is obvious, therefore, that succession in respect of territory also included the islands and the jurisdictional water band that on the critical date of 1821 existed along all the American coasts and the adjacent islands of the Spanish Empire.

3.17. The approach to *uti possidetis* manifested in the case law is shared (with the slight changes required by the Spanish particularism) by all the authors who have studied the issue in the American area, who uphold the maritime application of the *uti possidetis juris*.[19] This is also the interpretation of the most prominent specialists on the law of the Indies and on the geography of the Spanish Empire in that area; opinions that will be analysed in detail *infra*.[20] It is, therefore, difficult to see the basis on which the Nicaraguan Reply can ignore the evidence and seeks to obscure these well established principles.

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17 *Ibid*, pp 558, para 333.

18 See the text in J. A. de Yturriaga (Ed.), *España y la actual revisión del Derecho del Mar. vol II, Primera Parte (Textos y Documentos)*, Madrid, 1974, pp 47.

19 *Cf.* the positions of D. Bardonnet ("Frontières terrestres et maritimes", *A.F.D.I.*, 1989, pp 59 and following), G. Nesi ("Uti possidetis juris et délimitation maritime", *R.D.I.*, 1991, pp 534 and following; *L'uti possidetis nel Diritto Internazionale*, Padova, 1996), and M.G. Kohen (*Possession contestée et souveraineté territoriale.* Genève, 1997, pp 590 and following).

20 See Annexes 266 and 267 to this Rejoinder.

B. EXPERT OPINION

3.18. An *"Opinion on Spanish Captaincies-General and Governments in the Historical Overseas Law. General Competencies. Its practice in lands and seas belonging today to the Republic of Honduras"*, prepared by a legal historian specializing in the Americas is annexed to this Rejoinder.[21] It contains a definitive analysis of this issue, which confirms the position of Honduras before the Court.

3.19. First, with regard to the military districts and their maritime areas, this opinion states that:

> "Within the reforms introduced into the 18th century to that Overseas Law and, more specifically, as a consequence of the creation in 1739 of the Viceroyalty of New Granada (also named Santa Fe de Bogotá), two successive Royal Orders were issued with the objective of improving the operation of the military circumscriptions and logically, that of its maritime areas.
>
> A Royal Order dated 23 August 1745, created two military jurisdictions, a northern one that ran from Yucatan to Cape "Gracias a Dios" and a southern one, from the same Cape up to the Chagres River. Such a decision added to the customary government practice of Spanish authorities, resulted also in a division of the competencies in the surrounding maritime area.
>
> This division gave the Government of Honduras (Court and Captaincy-General of Guatemala) jurisdiction over the Atlantic area up to Cape "Gracias a Dios" and to the General Command of Nicaragua – then a territory more oriented to the Pacific than to the Atlantic Ocean- the sea off "Costa de los Mosquitos" from Cape "Gracias a Dios" towards the south. "Command" is a generic term that means "chieftain". Applied to a territory it indicates an authority subordinated in first instance to the Captain General, [of Guatemala in this case] and in second to the Governor.
>
> Another Royal Decree dated 20 November 1803, confirmed that geographical distribution by the designation of a Governor for the southern area (including the island of San Andrés) and dependent on the Viceroyalty of New Granada. Hence, this document implicitly determined that the northern area remained within the territorial area of the Captaincy-General of Guatemala specifically within the Government of Honduras.

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[21] Its author is Prof. Dr. José Manuel Pérez-Prendes Muñoz-Arraco, and both his scientific *curriculum* and the complete text of the opinion appear as Annex 266 to this Rejoinder.

> It is clear from both texts that such provisions were developed within the framework of the military regulation in force at the time. Such decisions were commonly applied to Spain and America during that era. This matter is sufficiently explained under point 1) b) of this opinion."[22]

3.20. Secondly, concerning the competencies of the Captaincies-General, it is said that:

> "That authority was exercised over land and sea in all territories adjacent to coasts to prevent the threats and risks that the very thorough legal regulation was intended to avoid. Even in the unimaginable case (as we will see later, history showed otherwise) that such competencies were not more than a mere declaration in the text of the laws, such a declaration observed without contradiction for so long and characterized with such great internal coherence in its discourse, could be enough to transform it into a valid legal title that empowers the current State, successor of those areas, to have ample grounds to argue to its advantage the argument of "*uti possidetis juris*" over its maritime areas."[23]

3.21. Finally, after exhibiting the historical evidence on hydrographic surveys, the selection of good ports (such as Puerto Cortés and Puerto Trujillo), the construction of fortifications, repression of smuggling and miscellaneous military actions against the Englishmen and the Mosquito Indians in the coast and the sea of Honduras, to the north of Cape Gracias a Dios,[24] the *Conclusions* of the opinion establish that:

> "1) The powers granted by Overseas legislation to the Captaincies-General, included, unequivocally and at all times, the actions that were considered timely on the part of those authorities in the maritime areas, wherever those coasts and seas existed.
>
> 2) The Captaincy-General of Guatemala, to which the Government of Honduras belonged, exercised the cited powers from specifically Honduran ports.
>
> 3) Such exercise was constant from the XVI century up to the XIX century, and it was especially fulfilled through the reconnaissance,

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22 HR, vol 2, annex 266, Section 2 (where the competencies of the Governors are clarified, reflecting the faculties in a local area granted to the incumbent covering the entire Captaincy-General).

23 *Ibid*, Section 3 and 4. The Captain-Generals of the Armies were specifically empowered as Captain-Generals of the Navy and had general control and decision-making power on all military forces under their circumscription, including, among them, those related to the navy.

24 *Ibid*, Section 5.

control and defense of the area of the Atlantic Ocean that washes ashore the current Republic of Honduras and specifically also in the area of Cape Gracias a Dios.

4) The demarcations indicated for the cited exercise included both land and maritime spaces, and it was a common understanding that these border lines that separated the corresponding land surface areas, prolonged into the sea.

5) It has also been testified in this opinion how the islands included in the maritime spaces cited in the previous conclusion, fell under the authority and power of the military authorities that were quartered in the land that was considered prolonged (following its land limits) into the maritime space that washed its coasts.".[25]

3.22. Thus, the Royal Order of 20 November 1803 reveals the explicit will of the Spanish Monarch to establish the military circumscriptions corresponding to the Captaincy-General of Guatemala and to the Viceroyalty of Santa Fe in the Caribbean Sea. Accordingly, it constitutes a perfect title in the sense of the origin and the proof of *uti possidetis juris*.

3.23. Cape Gracias a Dios represented this limit and had a maritime extension eastward up to an undetermined point into the sea. Thus, all the islands and waters located to the north and to the east of this Cape corresponded to the military and maritime jurisdiction of the Captaincy-General of Guatemala in the Atlantic Ocean.[26]

3.24. Accordingly, all the misrepresentations of Nicaragua[27] with regard to the *uti possidetis*, in general, and to the Arbitral Award of 1906, in particular, are unfounded and are expressly refuted by Spanish historical law and by this State's conduct in the arbitration. The aforementioned *expert opinion* confirms the thesis maintained by Honduras with regard to the limit established in the said Arbitral Award and definitely confirms its implicit maritime extension. It is true that the King of Spain resolved the land boundary between the two States. But, in accordance with Spanish historical law, his decision also inevitably affected the sovereignty on the insular possessions and adjacent waters of the continent and of the islands. In fact, Nicaragua unsuccessfully attempted—by virtue of the *uti possidetis juris* which it now refuses to acknowledge—to have the arbitral award recognize its sovereignty to the east of meridian 85° W, identifying the said meridian as a terrestrial, insular and maritime limit with Honduras. Its

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25 *Ibid*, Section 6.

26 See *infra* n. 37 and accompanying annex 232.

27 NR, vol 1, pp 57 and following, para 4.30 and following.

conclusions before the Arbitrator on the last part of the layout of the border did not admit doubt:

> "elle [la limite] suit cette même rivière qui s'appelle ici le Patuca; elle continue par le centre du cours d'eau jusqu'à sa rencontre avec le méridien qui passe au-dessus du cap Camarón et suit ce mèridien jusqu'à la mer, laissant au Nicaragua Swan Island".[28]

3.25. Thus, Nicaragua cannot ignore the Royal Order of 1803 and maintain at the same time, without the minimum rigour, that "the only possible conclusion would be the affirmation of the sovereignty of Nicaragua"[29] (over the adjacent islands). That is an artificial assertion. History proves, in short, the extension of the Honduran government to the north and to the east of Cape Gracias a Dios.

3.26. Hence the absurdity of the Nicaraguan argument concerning the absence of effective control of the area under discussion on the part of Honduras:

> "At that time [1821] Honduras exercised no control over this area or even areas further to the north and the west. Even the names of the cays (Bobel Cay, Savanna Cay, South Cay....) do not reflect the 1821 *uti possidetis iuris*. The later Honduran claims were vague and, when they became specific, controversial."[30]

In addition to insinuating a peculiar linguistic way to prove the *uti possidetis*, Nicaragua insists in disregarding the history and the law of the colonial period, since in 1821 it would only have been possible to challenge the *uti possidetis* on the islands by another demand from a third State outside the colonial succession, that is a possibility that Nicaragua has not even dared to suggest in this case.

3.27. Equally unfounded (and ignorant of the Spanish colonial law) is the Nicaraguan assertion that "one cannot truly speak of any provincial

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28 See "Rapport de la Commission d'Examen de la question des limites entre les Républiques du Honduras et du Nicaragua, soumis à S.M. Alphonse XIII, Arbitre, le 22 juillet 1906", *C.I.J. 1960, Mémoires, plaidoiries et documents, Affaire de la sentence arbitrale rendu par le Roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua)*, vol I, *Annexe n° 11 à la Réplique du Honduras*, p 624. English translation: " it [the limit] follows this same river which is named here Patuca; it continues by the centre of the watercourse until it meets the meridian that passes above cape Camarón and follows this meridian up to the sea, leaving Swan Island to Nicaragua." This Nicaraguan intention is also textually embodied in the Opinion of the Spanish State Council, of 15 December 1906, that assumed the conclusions of the cited Commission (File N° 94,446, pp 3). See a graphic representation of the failed Nicaraguan attempt in HCM, vol 1, Plate 9.

29 NR, vol 1, pp 60, para 4.40.

30 *Ibid*, pp 60, para 4.41.

maritime limits, and therefore, of any applicable *uti possidetis iuris.*"[31] It is true that the delimitation of the insular and maritime areas of the military competencies during colonial times exclusively concerned Viceroyalties and Captaincies-General. Nevertheless, the Presidents of the Court of Guatemala, created in 1543, assumed the functions of Captains-General, and within their jurisdiction was located the Government of Honduras, which had been established in 1525. In view of the Royal Order of 20 November 1803, already cited, by which the southern coastal area was ascribed to the Viceroyalty of New Granada (the Mosquito Coast), from Cape Gracias a Dios up to the Chagres River, it is obvious that this matter concerned—in 1821, a critical date of colonial succession— the competencies of a military nature (both land and naval) of the Captaincy-General of Guatemala and of the Viceroyalty of New Granada.[32]

3.28. Equally unfounded is the Nicaraguan argument that "the Monarch's orders to his Captains General and other authorities to oppose the piracy, the corsairs and trade in contraband in a more or less defined geographical area, by no means can be confused with acts of attribution of territorial jurisdictions on the high seas"[33]. It is obvious that the King did not order an extension of the competencies of the Crown on the high seas, but the respective limits that its Captains General should respect when they acted at sea, in accordance with the International Law of the time; the Crown, then, established the internal administrative divisions in the colony, that is, the legal basis and essence of the *uti possidetis.*

3.29. Regarding the fact that Cape Gracias a Dios, as a limit of a military jurisdiction, was fundamentally identified during the colonial period with parallel 15°N,[34] the Nicaraguan Reply attempts to discredit, without any analysis, the importance of said parallel as a maritime limit.[35] What Honduras contends is that the meridians and parallels or, if preferred, the utilization of easily identifiable geographical criteria with parallels and meridians, was not only usual in colonial Spanish practice whenever it concerned dividing internal jurisdictions that also involved maritime areas (as in our case). Honduras also contends that the only valid alternative for clearly and unquestionably dividing the respective maritime areas of its military authorities.

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31 *Ibid*, pp 66, para 4.60.

32 HR, vol 2, annex 266, Section 3. It is well known that until the Royal Decree of 23 August 1745, Nicaragua did not become a coastal province of the Caribbean Sea: See the Arbitral Award of 1906 in *C.I.J. 1960, Mémoires, plaidoiries et documents, Affaire de la sentence arbitrale rendu par le Roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua)*, vol I, *Annexe n° II à la Réquête du Honduras.*

33 NR, vol 1, pp 66, para 4.61.

34 HCM, vol 1, pp 18 and 19, para 2.11.

35 NR, vol 1, pp 56 to 59, para 4.26 to 4.37.

3.30. A Spanish geographer, an expert in the physical and political geography of Spanish America, has prepared an opinion on the use of astronomical geography both in the delimitation of its respective empires by the Iberian powers (Spain and Portugal)[36] and in the colonial law of each power. This study affirms that the utilization of parallels was frequent in Spanish America to separate the competencies of the Spanish Captaincies-General and Viceroyalties in the area.[37]

3.31. In the significant case of Brazil, Portugal decided to control the most accessible area, the coast, proceeding to this end (1534-1536) to distribute it in a series of captaincies that followed the coast line, with the northern and southern limits of the land and of the sea of each captaincy being two geographical parallels and the ultimate interior limit (toward the continent) was the Tordesillas meridian.[38]

3.32. With regard to the present case, in view of the role of Cape Gracias a Dios, located at parallel 15°, as the starting point of the line that conceptually and cartographically separated the land and naval competencies between the Captain-General of Guatemala (who extended his domains northward of this parallel and whose territories included what is now the State of Honduras) and the Viceroy of Nueva Granada or Santa Fe (that extended his toward the south, including the Eastern part of the territory of the modern State of Nicaragua), it is necessary to conclude that it constituted at the same time a simple and precise reference point for these purposes. The Cape, and its corresponding parallel (15° N), delimited (in accordance with the Indies law) the waters of the Captaincy-General of

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36 HR, vol 2, annex 267 which is the opinion of Prof. Dr. Mariano Cuesta Domingo on "The question of the Honduran rights in waters of the Atlantic Ocean", in addition to his scientific *curriculum*. In particular see the heading on "Limits in the European Expansion. Meridians".

37 See the map of the Viceroyalty of New Granada, safeguarded in the Naval Museum of Madrid, which specifically illustrates the line of Cape Blanco (today Punta Pariñas), very close to parallel 5° S, as the limit with the Viceroyalty of Lima: "Geographical Plan of the Viceroyalty of Stª Fe de Bogotá, New Kingdom of Granada, that demonstrate its territorial demarcation, islands, main rivers, provinces, main squares, what is occupied by barbarian indians and foreign nations, demonstrating the two borders of Lima and Mexico and of their neighbouring Portuguese establishments: with historical notes on the annual revenue from their real income and news regarding their current civil, political, and military status. Produced at the service of the King Our Lord by Dr. D. Francisco Antonio Moreno Escandón, treasury auditor of the Royal Court of Stª Fe and income conservator judge. Governor of the Kingdom His Excellency Mr. Baylio Frey D. Pedro Messia de la Cerda, Marquis of la Vega Armijo" (Ms; col; 147x200 cm., in MN Sig. 27-C-10 [1774]). HR, vol 2, annex 232.

38 HR, vol 2, annex 267, under the "Parallels" heading; see in particular, the maps attached to the Opinion.

Guatemala, and in addition that of the government of Honduras, clearly and perfectly, and from any perspective, especially the legal perspective.[39]

C. APPLICATION OF THE *UTI POSSIDETIS* TO THE ISLANDS AND MARITIME AREAS NOW CLAIMED BY NICARAGUA

3.33. The continuous assertions in the Nicaraguan Reply of the ineffectiveness of the *uti possidetis* principle for the attribution of sovereignty over the adjacent islands, especially in view of what was decided by the King of Spain in his Arbitral Award of 1906,[40] are contradicted by the constitutional history of Nicaragua. Indeed, its successive constitutional texts emphasize the constitutionally sacrosanct nature of the *uti possidetis*, as well as the extension of the principle toward the sea.

3.34. Thus, Article 2 of the Constitution of Nicaragua of 1826, stated that the limits of the new State were:

> "On the East, the Sea of the Antilles; on the North, the State of Honduras; on the West, the Gulf of Conchagua; on the south, the Pacific Ocean; and on the southeast, the free State of Costa Rica."[41]

The interpretation of the text is irrefutable, since it positions to the east of the Republic only the Caribbean Sea, and Honduras unequivocally to the north (obviously with its Caribbean coast), which proves the acceptance on the part of Nicaragua of the colonial *uti possidetis* on the land and on the sea with neighbouring Honduras, as has been stated in the previous heading (Section B).

3.35. In this regard, Article 1 of the Political Constitution of Nicaragua of 1911 states that its "territory, that also includes the adjacent islands, is located between the Atlantic and Pacific Oceans, and the Republics of Honduras and Costa Rica," an assertion that is basically repeated in Article 3 of the Political Constitution of 1939 but adding the territorial sea to the adjacent islands. Article 2 of the Constitution of 1948 expands on this definition of national territory as one that includes "between the Atlantic and Pacific Oceans and the Republics of Honduras and Costa Rica, and also encompasses the adjacent islands, the territorial sea, the continental shelf,

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39 *Ibid*, Opinion, headings "The Central American Atlantic Coast" and "Application to Honduras," in addition to the "Conclusion".

40 NR, vol 1, pp 51 and following, para 4.12 and following.

41 *Cf.* the text of this Constitution. This and other relevant constitutional texts are at annex 233 to this Rejoinder.

and the aerial and stratospheric areas." This definition coincides substantially with the terms used in Article 4 of the Constitution of 1950. Article 3 of the Political Constitution of 1974 adds to the islands the cays, the jetty-heads and the adjacent banks, to which Article 10 of the Constitution of 1987 follows with a very similar formula, although the latter refers only to "the islands and adjacent cays."

3.36. Finally, the practice of defining the national territory (including in some cases the maritime areas) in reference to the principle of the *uti possidetis juris* of 1821, either literally or in a clearly implicit manner, has been formulated in a series of Nicaraguan Constitutions during the 19th and 20th centuries. It has also even been included in the Treaty Gámez-Bonilla of 7 October 1894 (article II, paragraph 3), that led to the royal arbitration of 1906.

3.37. Nicaraguan constitutional practice demonstrates that whenever Nicaragua declared an adjacent insular and maritime extension in the Caribbean, it was always in an eastern direction, never northward; this means that it recognized that the land boundary with Honduras had, since colonial times, a West-East maritime projection. This was also ratified by the Arbitral Award of 1906 when it states that in 1791 the province of Honduras was delimited "on the south with Nicaragua, on the south-west and west with the Pacific Ocean, San Salvador, and Guatemala; and on the north, north-east, and east with the Atlantic Ocean, with the exception of that part of the coast inhabited at the time by the Mosquito, Zambos, and Payas Indians, etc."[42]. Accordingly, the previous texts formally contradict the position of the Nicaraguan Reply on the insular vicinity and on the insular and maritime effects of the *uti possidetis.*[43]

3.38. The same pattern can be detected in the constitutional history of Honduras, as evidenced by the Constitutions of 1839, 1848, 1865, and 1873, all of them using the same phrase, as a matter of style, defining the territory of the new Republic ("and the islands adjacent to its coasts in both seas").[44]

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42 See the Arbitral Award of 1906 in *C.I.J. 1960, Mémoires, plaidoiries et documents, Affaire de la sentence arbitrale rendu par le Roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua)*, vol I, *Annexe n° II à la Requéte du Honduras*, page 20. See also the cited Examination Commission Report (*C.I.J. 1960, Mémoires, plaidoiries et documents*, vol I, *Annexe n° XI à la Réplique du Honduras*, pp 729 *in fine*-730).

43 NR, vol 1, pp 59 and following, and 65 and following, para 4.38 and following and para 4.58 and following.

44 See L. Mariñas Otero, *"Las Constituciones de Honduras"*, Madrid, Ediciones Cultura Hispánica, 1962, pp 94 (Art. 4 of the Constitution of 1839), 118 (Art. 4 of the Constitution of 1848), 146 (Art. 5 of the Constitution of 1865) and 174 (Art. 4 of the Constitution of 1873).

3.39. If "la législation est l'une des formes les plus frappantes de l'exercice du pouvoir souverain"[45], constitutional legislation implies the highest expression of this exercise in order to determine the official position of a State. Hence, the constitutional history of Nicaragua reveals, without any doubt, her acceptance and express recognition of the *uti possidetis* of 1821 in the definition of her national territory, a definition that since 1939 expressly includes the territorial sea, which has been expanded to the new maritime areas created during the second half of the last century.

3.40. Nicaragua's position, as set out in the Reply, appears to rest on the following propositions:

a) that Honduras could not prove its title derived from the *uti possidetis* over the islands, islets and cays located to the north of the 15th parallel, which are scarcely populated.[46] In fact, there is ample evidence, set out in the Counter Memorial and further discussed in the present Rejoinder which establishes the title of Honduras. By contrast, Nicaragua does not make any effort to explain and prove the title which it now claims.

b) that the concept of adjacent islands is ambiguous and, therefore, unacceptable.[47] This argument is surprising, to say the least, as one of the most eloquent defenders of Nicaraguan claims to San Andrés and Providencia strongly defends the adjacency thesis, with regard to islands south of Cape Gracias a Dios.[48] The argument is, that in view of the jurisprudential principle of the non-existence of *terra nullius* in Spanish America, the attribution of sovereignty of the Spanish islands and cays following the emancipation in 1821, should be based on application of the principle of adjacency, taking Cape Gracias a Dios as the limit of reference.[49]

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45 *C.P.J.I. série A/B n° 53*, pp 48. English text: "Legislation is one of the most obvious forms of the exercise of sovereign power".

46 NR, vol 1, pp 59-60, para 4.38 a 4.40, and pp 65, para 4.57. Nicaragua even ventures to say that "the only possible conclusion would be the affirmation of the sovereignty of Nicaragua" on the islands (pp 60, para 4.40), without submitting the slightest minimum of proof.

47 *Ibid*, pp 61, para 4.43.

48 L. Pasos Argüello, *Enclave colonialista en Nicaragua, Diferendo de Nicaragua y Colombia, Plataforma continental, Archipiélago San Andrés, Cayos*. Managua, 1978, pp 34 to 36.

49 This reference to insular adjacency, both during the colonial period and in the constitutional texts already examined, can be seen in the well-known work of A. R. Vallejo, *Historia documentada de los Límites entre la República de Honduras y la de*

c) that Honduras seeks, without any legal basis, to apply the *uti possidetis* principle directly to the continental shelf and exclusive economic zone.[50] This assertion misrepresents the Honduran argument and ignores the importance of the *uti possidetis* principle with regard to sovereignty over the six nautical mile belt of jurisdictional waters which existed (at least as between the successor States to Spain) in 1821. In this context it is noticeable that Nicaragua largely ignores the Royal Order of 1803.

3.41. With regard to land boundaries which terminate at the coast, the use of limits that coincide with meridians and parallels has been traditional between the two countries in their historical negotiations.[51] It is incomprehensible that Nicaragua now adopts a radically divergent position. Strictly speaking, the Royal Order of 20 November 1803 constitutes an example of "title" that "might be furnished by, for example, a Spanish Royal Decree attributing certain areas to one of those" countries.[52] The great importance of this royal law is based on two elements. First, it separates the territorial competencies along the Caribbean coast of two Captaincies-General, each of which, as is well known, exercised military authority both on land and at sea; in the specific case the objective of the change of military circumscription was to defend the coast and the adjacent islands from the English corsairs and pirates that prowled the area. [53] Secondly, Cape Gracias a Dios was adopted as the Spanish administrative-military limit in its land and—especially—maritime extension.[54]

Nicaragua. New York, 1938, pp 36, although a complete reading of this work is highly useful for all the aspects discussed here, that the Nicaraguan Reply insists on refuting. On this same kind of issues—amply debated and settled almost a century ago—we would like to recall the document *Límites entre Honduras y Nicaragua. Alegato presentado a Su Majestad Católica el Rey de España en calidad de Arbitro por los Representantes de la República de Honduras,* Madrid, March 1905, pp 53 and following. In both cases it concerns texts already submitted to this Court in previous proceedings of Honduras with El Salvador and Nicaragua, and the persistence in our quote is explained by Nicaraguan obstinacy in contesting concepts already known and judged. See the opinion of an expert in the matter on the islands adjacent to the Nicaraguan territory of Mangle and Mosquito in G. Ireland, *Boundaries, Possessions and Conflicts in Central and North America and the Caribbean,* Cambridge, Massachusetts, 1941, pp 329 to 331.

50 *Ibid*, pp 66-67, para 4.62 to 4.64 and 4.66.

51 See the neutral and specialized testimony of G. Ireland, *op cit.*, pp 130 to 136.

52 ICJ Reports 1992, pp 389, para 45.

53 These characteristics of the Royal Order are accepted naturally by the Nicaraguan specialized doctrine (*cf.* L. Pasos Argüello, *Enclave colonialista en Nicaragua..., supra* n 48, pp 27 to 35).

54 On this kind of issues the very detailed Colombian position with regard to the Royal Order of 1803 is also very enlightening (*cf.* D. Uribe Vargas, *Libro Blanco de la República de Colombia, 1980*, pp 17 and following; C. Moyano Bonilla, *El*

3.42. Thus, what is really relevant to Honduras is the evidence that Spanish colonial legislation considered Cape Gracias a Dios not only as a land limit between two provinces, but also as a maritime limit between two Spanish Captain-Generals and their respective fleets strictly for the Caribbean Sea, because, as is well known, the coasts of Nicaragua in the Pacific Ocean remained under the jurisdiction of the Captaincy-General of Guatemala. It should not be forgotten that the frequent Spanish naval expeditions, to and from the metropolis, required effective protection from pirates, corsairs, and fleets of enemy countries. For example, the Spanish Crown created the harbour and fortress of Omoa on the northern coast of Honduras "that could serve as a customs station as well as a coastguard base, and military bastion"[55], "to permit patrolling the adjacent coasts"[56] and "to curtail contraband by patrolling the coast with vessels based there."[57]

3.43. In short, the limit of the colonial circumscriptions that decisively affects our case is the one ordered by the King of Spain in 1803, for strictly military purposes, between two of its Captain-Generals. The provincial limits within each Captaincy-General were not important because each Captain-General had complete military powers (land and naval) within their jurisdiction; those provincial limits were relevant when the provincial and the military limits coincided, as it happened in this case.

D. JURISPRUDENCE CONFIRMS THE APPLICATION OF THE PRINCIPLE TO ISLANDS AND MARITIME AREAS

3.44. The complete Chapter IV of the Nicaraguan Reply constitutes a systematic exercise to manipulation of international jurisprudence to the present case, through silence, the use of selective quotes, omissions and totally fallacious assertions.[58]

Archipiélago de San Andrés y Providencia. Estudio histórico-jurídico a la luz del Derecho Internacional, Bogotá, 1983, pp 39 and following). Although the Nicaraguan and Colombian position is contradictory with regard to this Royal Order, neither of them doubt that Cape Gracias a Dios separated military competencies (maritime and land-based) of two Spanish Captain-Generals, something indisputable to any person well versed on Spanish colonial military law.

55 Troy S. Floyd, *The Anglo-Spanish Struggle for Mosquitia.* The University of New Mexico Press, 1967, p 105.

56 *Ibid*, p 106.

57 *Ibid*, p 107.

58 See for example the ridiculous and deformed reference of the Nicaraguan Reply to the arbitration decision of 1989 in the *Guinée-Bissau/Sénégal* case, in NR, vol 1, pp 67, para 4.63.

3.45. It is useful to begin by recalling an old arbitral award rendered by Queen Isabel II of Spain on 30 June 1865, in the case of the *Isla de Aves* (Netherlands/Venezuela), in which she decided in favour of Venezuelan sovereignty using, among others, the following argument:

> "Considérant qu'à son tour le Vénézuela fonde principalement son droit sur celui qu'avait l'Espagne avant la constitution de cette République comme Etat indépendant et qui, s'il resulte bien que l'Espagne n'a pas matériellement occupé le territoire de l'île d'Aves, il est indubitable qu'il lui appartenait comme faisant partir des Indes Occidentales qui étaient sous la domination [dominio] des rois d'Espagne, conformément à la loi I, titre V, livre I de la *Recopilación* des Indes."[59]

3.46. As has been recognized by a Spanish specialist,[60] this case did not specifically concern an island close to the coast, densely populated and with great economic activity. It concerned an island that was located five hundred kilometres to the north of Margarita, two hundred kilometres to the west of Dominica and three hundred kilometres to the southwest of Puerto Rico, and had little more than a half kilometre in length and a maximum width of 150 meters. Accordingly, since the 19th century the principle of the *uti possidetis juris* has been applied to small Spanish islands, located a great distance from the coast and with minimum economic activity. It is therefore difficult to see how Nicaragua can now assert, one hundred and thirty years later, that "no island *Uti possidetis Iuris* exists in the area in dispute"?[61]

3.47. It is noteworthy that the 1917 Judgment of the Central American Court of Justice also admitted without any difficulty that the three riparian States of the Gulf of Fonseca (El Salvador, Honduras and Nicaragua) had succeeded to the rights of the Spanish Crown over maritime areas adjacent to their territory. This judgment constitutes an explicit recognition of the maritime extension of *uti possidetis*, and its content was the subject of a

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59 The text in A. de La Pradelle and N. Politis, *Recueil des Arbitrages Internationaux*, 2e édition, tome deuxiéme (1856-1872). Paris, 1957, pp 414. The English version in Moore, *International Arbitrations*, Washington, 1898, vol V, pp 5037-5041. English translation: "Whereas Venezuela on her part, mainly bases her right on the one that Spain had before the constitution of this Republic as independent State and, though it turns out that Spain did not materially occupied the territory of the island of Aves, this undoubtedly was a part of the West Indies that were under the domain [dominio] of the Kings of Spain, in accordance with the law I, title V, book 1 of the *Recopilación* of Indies."

60 A. Remiro Brotóns, "Problemas de fronteras en América: La delimitación de espacios marinos", in A. Mangas Martín (Ed.), *La Escuela de Salamanca y el Derecho Internacional: Del pasado al futuro*, Salamanca, 1993, pp 132.

61 NR, vol 1, pp 59 and following, para 4.38 *et seq.*

thorough analysis by the Chamber of the Court in 1992.[62] It is, therefore, difficult to see how Nicaragua can now argue that "no maritime *uti possidetis juris* exists in the area in dispute",[63] when Nicaragua is a party to this decision.

3.48. In the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judge Ago had already warned, in his individual opinion, about the importance for the parties to that case of the delimitation made by the predecessor colonial powers before the date of independence.[64] In this same case, after having recalled the resolution adopted within the then Organization of African Unity in Cairo in 1964 on the principle of respect by African countries for the borders inherited from the colonial powers, Judge Jiménez de Aréchaga (who was undeniably an authority on the *uti possidetis* principle in America) declared in his individual opinion that:

> "It results from the foregoing that both principles of international law invoked by Tunisia in the above memorando, namely, the colonial *uti possidetis* agreed by the African States and the principles of State succession compel respect for the delimitation resulting from the French-Italian *modus vivendi*."[65]

3.49. It is obvious that neither of these two distinguished judges shared—in 1982—the Nicaraguan thesis that the doctrine has no application to adjacent islands and maritime areas.

3.50. In the *Guinea-Bissau/Senegal* case, the arbitration tribunal faced tenacious resistance on the part of Guinea-Bissau to the application of *uti possidetis* or of the succession of States with regard to treaties to the delimitation of maritime areas[66]. In certain aspects, this evokes the stance maintained by Nicaragua in its Reply. The arbitral award of 1989, after recalling the application of such principles to maritime areas in America, Asia, and Europe, drew attention to the invocation in the Arbitration Agreement in the case of the 1964 declaration of the O.A.U. (referred to above). It then commented that:

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62 ICJ Reports 1992, pp 590 and following, para 388 and following.

63 NR, vol 1, pp 65 and following, para 4.58 and following.

64 "The existence of a delimitation extending beyond the outer limit of the territorial waters, a delimitation which for four decades prior to the accession of the two States to independence was respected without any difficulty arising, should, I feel, have been considered as the basic fact which was also incumbent upon the Parties to observe after independence, by virtue of the same principles of general international law in the succession of States, and the same principles proclaimed by the Organization of African Unity, which the Court has evoked where the land frontier of 1910 is concerned": ICJ Reports 1982, pp 97-98, para 5.

65 *Ibid*, pp 131, para 100 and 101.

66 83 ILR 1 at 37 *et seq*.

> "Since that Arbitration Agreement concerned only the delimitation of a maritime boundary, the reference quoted means that the two Parties recognized that that principle was applicable to boundaries of that category. In oral argument also in that same arbitration, Guinea-Bissau also acknowledged that succession of States operates in respect of treaties on maritime boundaries. (Pleadings, verbatim record, nº 8, pp 76 et 77)."[67]

3.51. This arbitration award thus has the merit of placing the issue both in the area of the maritime *uti possidetis*, as well as in the dominion of the succession of States with regard to treaties, to arrive at an identical material solution: the succession in the maritime limits of colonial borders. Can Nicaragua still persist in its refusal to apply the principle of the *uti possidetis* or else the rules on succession of States with regard to territorial sovereignty to the Caribbean coasts?[68]

3.52. The most complete, systematic and clear decision with regard to the application of the *uti possidetis juris* to the insular maritime areas in the specific context of Central America is the Judgment of the Chamber of the Court of 11 September 1992. The jurisprudential application of this principle in the 1992 Judgment among Central American countries to the insular[69] and maritime[70] areas is not open to debate, despite Nicaraguan protestations to the contrary.

3.53. However, the most important contribution of the Court has been the manner in which it proceeded to harmonize the 19th century *uti possidetis* with the subsequent evolution of the Law of the Sea. Land, territorial sea, continental shelf, and other areas constitute only different aspects and extensions of territorial sovereignty. For this reason, the Court decided that:

> "...the legal situation of the waters outside the Gulf is that, the Gulf of Fonseca being an historic bay with three coastal States, the closing line of the Gulf constitutes the baseline of the territorial sea; the territorial sea, continental shelf and exclusive economic zone of El Salvador and those of Nicaragua off the coasts of those two States are also to be measured outwards from a section of the closing line extending 3 miles (1 maritime league) along that line from Punta Amapala (in El Salvador) and 3 miles (1 maritime league) from Punta Cosigüina (in Nicaragua) respectively; but

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67 *Ibid*, p 38, para 66.

68 Cf. in this regard, on these two alternative ways, the Rapport of the "Committee on Aspects of the Law of State Succession", I.L.A., *New Delhi Conference (2002)*, 574-658, pp 610-613.

69 ICJ Reports 1992, pp 558, para 333.

70 *Ibid*, pp 589, para 386.

> entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central position of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua..."[71]

3.54. The aforementioned jurisprudence, notwithstanding that it is sufficiently meaningful, coherent and coincident in the application of the *uti possidetis juris* for the determination of maritime limits and the solution of Spanish American insular disputes, is dismissed in the Nicaraguan Reply. That Reply is limited to a few selective quotations from the jurisprudence which do not take into account the essential reasoning of various courts,[72] and are no more than phrases, taken out of context, that Nicaragua thinks are favourable to its position.

3.55. The Court has emphasized, finally, the existing relations between the *uti possidetis juris* and the reciprocal conduct of the new States after their independence, as well as their ability to generate legal consequences. Both aspects are relevant in the present case.

3.56. In the first place:

> "Possession backed by the exercise of sovereignty may be taken as evidence confirming the *uti possidetis juris* title... in the case of the islands, where the historical material of colonial times is confused and contradictory, and the accession to independence was not immediately followed by unambiguous acts of sovereignty, this is practically the only way in which the *uti possidetis juris* could find formal expression so as to be judicially recognized and determined."[73]

3.57. On the other hand, the conduct of the Parties with regard to the islands, after independence, may manifest the existence of acquiescence with regard to sovereignty on the same:

> "The conduct of Honduras vis-à-vis earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation" [74].

Indeed, with regard to the dispute over Meanguera island, the Court concluded that "while the *uti possidetis juris* position in 1821 cannot be satisfactorily ascertained on the basis of colonial titles and *effectivités*, the

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71 *Ibid*, pp 617, para 432.

72 NR, Chapter IV, pp 59-60, para 4.39, footnote 147; pp 61, para 4.45, footnote 156; and pp 67, para 4.63, footnote 170.

73 ICJ Reports 1992, pp 566, para 347.

74 *Ibid*, pp 577, para 364.

fact that El Salvador asserted a claim to the island of Meanguera in 1854, and was thereafter in effective possession and control of the island, justifies the conclusion that El Salvador may be regarded as sovereign over the island. If there remained any doubt, its position in respect of Meanguera is made definitive by the acquiescence of Honduras in its exercise of sovereignty in the island since the later years of the last century."[75]

E. ACCEPTANCE BY NICARAGUA OF THE *UTI POSSIDETIS JURIS* IN ITS APPLICATION AGAINST COLOMBIA

3.58. It should be recalled, finally, that outside its position in the present case, Nicaragua has always clearly recognized and continues to accept the principle of the *uti possidetis juris*. It has consistently adopted the position that there were no territories without owner in Spanish America when the colonial emancipation occurred, with the new States having absolute legal title of sovereignty on the area in which they succeeded the colonial power, that obviously included the maritime and insular areas that had been under the authority of the old colony. This was the case on occasion of the Arbitral Award of 1906, as has already been shown, and it is also clearly demonstrated in Nicaragua's Application of 6 December 2001 against Colombia,

3.59. In that Application Nicaragua clearly accepts the insular and maritime dimension of the *uti possidetis*, interpreted as the succession on the sovereignty over the islands, cays and adjacent waters, that were under the authority of the provinces that formed the Captaincy-General of Guatemala in 1821, date of the independence and constitution of the Federation of Central American States. Following the dissolution of the Federation in 1838, Nicaragua demanded as its own the islands and cays of the archipelago of San Andrés and Providencia, extending the principle of the *uti possidetis* from the continental mass in an Eastern direction (paragraph 2 of the Application). So that there is no doubt concerning the very concrete content and scope that Nicaragua accords in that Application to the *uti possidetis* principle as granting a decisive legal title, reference can be made to paragraph 3 of the Application:

> "The question of the title indicated above [para. 2] have a particular significance in so far as the definitive settlement of such issues of title must constitute a condition precedent to the complete and definitive determination of the maritime areas appertaining to Nicaragua and for any eventual delimitation that might be necessary with those that could appertain to Colombia."

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[75] *Ibid*, pp 579, para 367.

It is seems clear that Nicaragua is asserting against Colombia the very principle whose applicability she denies in the proceedings with Honduras.

F. CONCLUSIONS

3.60. The principle of the *uti possidetis juris* provides a legal title to determine maritime (up to six nautical miles during colonial times and independence) and insular sovereignty of Honduras to the north of parallel 15° that passes through Cape Gracias a Dios as confirmed by the Royal Order of 1803. Paragraph 17 of the King of Spain Arbitral Award of 1906 was, therefore, correct when it stated that:

> "In said documents [the Royal Decrees of 1745 and 1791] Cape Gracias a Dios is fixed as the boundary point of the jurisdiction assigned to the above mentioned Governors of Honduras and Nicaragua in the respective capacities in which they were appointed".[76]

Accordingly, the islands, islets and cays located to the north of this parallel remained under Honduran sovereignty following Central American independence in 1821 as was implicitly recognized by the said Arbitral Award upon denying Nicaragua's claim to fix the land, maritime and insular limit at meridian 85° W, and deciding instead to fix it at "the mouth of the River Coco, Segovia or Wanks, where it flows out in the sea close to Cape Gracias a Dios," that is, at parallel 15° N.

3.61. Thus, the essential points are as follows:

- by virtue of the *uti possidetis juris* principle the islands north of 15° N. latitude were not *terrae nullius*;
- the Royal Order of 1803 fixed the division between Honduras and Nicaragua at Cape Gracias a Dios;
- given the propensity of the Spanish Empire to use parallels of latitude and meridians of longitude in identifying jurisdictional divisions, it is inconceivable that the 1803 would have been intended
    - i) to allocate the Spanish islands north of 15° N. latitude to Nicaragua, or
    - ii) to create a maritime division between Honduras and Nicaragua along any other line than 15° N.

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[76] *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), vol I,* page 20 (emphasis added).

latitude out to at least six nautical miles for the internal purposes of the Spanish administration of its claimed waters.

- Thus, upon independence in 1821 the islands of Spain north of 15° N. latitude became the islands of Honduras and additionally there was a maritime jurisdiction division at 15° N. latitude out to at least six nautical miles from Cape Gracias a Dios.

- Nicaragua sought to challenge the boundary relationship between itself and Honduras with the result that the 1906 Award confirmed the land boundary terminus at Cape Gracias a Dios with all its implications for the islands north of 15° N. latitude.

- While in law Honduras could have lost its *uti possidetis* title to the islands north of 15° N. latitude by acquiescing in a Nicaraguan claim, it has not done so as demonstrated conclusively in the Honduran Counter Memorial and will be further demonstrated in Chapters 4 and 5 below.

CHAPTER 4:

NICARAGUA HAS NO *EFFECTIVITÉS* OR SOVEREIGNTY OVER THE ISLANDS

INTRODUCTION

4.01. In Chapters V and VI of its Reply Nicaragua comes to the subject of conduct and *effectivités* in the area north of the 15th parallel, and the question of sovereignty and sovereign rights over the islands and maritime spaces in that same area. It does so belatedly. Having ignored these issues entirely in its Memorial, Nicaragua now addresses the subject in no less than three Chapters of its Reply. This reflects a clear and unambiguous recognition that the sovereignty over the islands is directly relevant to the placement of the boundary. It is a highly relevant factor in respect of the issues which Nicaragua has chosen to put before the Court, but one which it has previously omitted to address.

4.02. In this respect – as in many others – the approach taken by Nicaragua in its Reply contradicts the claim introduced at the outset of its pleading that these islands could have no consequence for the maritime delimitation it requests. That claim is simply not plausible, either in the light of the evidence which is now before the Court or against the background of the Court's constant jurisprudence on the interplay between governmental conduct, *effectivités*, sovereignty and maritime delimitation.

4.03. Having *de facto* abandoned its argument that sovereignty over the islands is not relevant to its case, Nicaragua now devotes considerable energy in support of her argument that "the title to the islets rests with Nicaragua".[1] This recognises that a failure on its part to establish its own title (or to undermine Honduras' title) will be fatal to the improbable line it has proposed to the Court. It therefore seeks to demonstrate that Honduras' *effectivités* are without foundation. And it seeks to persuade the Court of the merits and strength of its own *effectivités* in the area north of the 15th

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1 NR, para. 6.4.

parallel, reflecting its 21st century claim to title over the islands. In Honduras' view both efforts fail: Nicaragua has never had any *effectivités* north of the 15th parallel, and it is unable to refute Honduras' *effectivités*, in particular in relation to oil concessions (and the tacit agreement which they reflect as to the existence of a boundary at the 15th parallel), triangulation markers and fisheries licences, as well as concessions and naval patrols.

4.04. In this Chapter, Honduras considers the evidence put forward by Nicaragua in support of the claim that it has sovereignty over the islands in question. Honduras does so by reference to the applicable international legal principles and standards, as reflected and applied in recent judgments of the International Court of Justice. These are principles which Nicaragua neither refers to nor feels constrained to apply. By reference to those principles and standards it is apparent that Nicaragua falls far short of putting before the Court the evidence necessary to demonstrate its effective administration of the islands at any time. This conclusion applies to all relevant periods, but in particular for that when there was no dispute between the parties and they treated the 15th parallel as their *de facto* boundary, that is to say between 1960 (after the Court gave its judgment in the *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*) and the time when the Sandinista Government came to power in 1979.

4.05. In summary, this Chapter demonstrates the absence of evidence to support a Nicaraguan claim to title over the islands by way of *effectivités*. The Chapter demonstrates in particular that:

- the oil concessions granted and renewed by Nicaragua uniformly recognise (whether expressly or implicitly) that Nicaragua recognised the 15th parallel as the northern limit of its boundary with Honduras, and that prior to 1980 there was, between Nicaragua and Honduras, a tacit agreement as to the existence of a boundary at the 15th parallel;
- neither the Nicaraguan Constitution nor any act of legislation has ever made explicit reference to any of the islands which it now claims;
- Nicaragua has never applied its civil and criminal laws to the islands or the waters surrounding them, and has provided no evidence of any fisheries concessions or licences authorising activities north of the 15th parallel;
- Nicaragua has put no evidence before the Court indicating any governmental activity on its part on and around the islands, for example in relation to the placing of markers or other navigational aids or any other public works; and

- Nicaragua's claim to title is unsupported by its own official cartography and by its historic failure to protest or otherwise object to the Honduran *effectivités* identified in the Counter Memorial and in Chapter 5 of this Rejoinder.

A. SOVEREIGNTY AND *EFFECTIVITÉS:* THE APPLICABLE LEGAL PRINCIPLES

4.06. If Honduras and Nicaragua are now in agreement that the question of sovereignty over the islands – and *effectivités* over the area in question – is highly relevant to the dispute, they are not in agreement, however, on the standards to be applied to establish title over the islands.

4.07. As Chapter 2 points out, Nicaragua quotes from selected passages from various cases dealing with territorial sovereignty with which Honduras can only agree. But these quotations do nothing to support Nicaragua's case since the evidence presented by Nicaragua does not meet the various judicial tests for establishing territorial sovereignty. In contrast, Honduras welcomes the opportunity to present its evidence mindful of these tests, particularly as most recently addressed in the Court's judgments in the *Case concerning Maritime Delimitation and territorial Questions between Qatar and Bahrain*, the *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)* and the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, as well as the award of the Arbitral Tribunal in *Eritrea/Yemen (Phase I)*.

4.08. As described below and in the following Chapter, as well as in the Honduran Counter Memorial, it is not possible to review the practice of Honduras and Nicaragua respectively – north and south of the 15th parallel – without reaching the conclusion, bearing in mind the applicable international law, that the Parties have limited their respective jurisdictions at that parallel. As will be shown below, this assertion is supported by the practice of the Parties in all fields, but it is particularly clear in the matter of oil concessions and drilling activity where the limits of the respective concessions amply treat the 15th parallel as a *de facto* boundary based on the tacit agreement of the Parties. In this regard the practice of the Parties in relation to the Coco Marina concessions, which straddle that boundary, is clear and decisive.[2]

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[2] HCM, para 6.28; HR, *inter alia* paras 4.33 and 5.13. See also NR, para 5.20 which does not dispute this.

B. NICARAGUA'S EVIDENCE DOES NOT SUPPORT ITS CLAIM TO SOVEREIGNTY OVER THE ISLANDS

4.09. The Nicaraguan Reply – dated 13 January 2003 – is the first occasion on which Nicaragua has purported to present any evidence to support its claim to sovereignty over Bobel Cay, Savanna Cay, South Cay and Port Royal Cay and the other Honduran islands north of the 15th parallel which Nicaragua now claims. As set out below, even on it own merits the evidence is thin and insufficient to support the claim. In comparison to the evidence submitted by Honduras it appears even more implausible.

4.10. The claim to sovereignty was articulated by Nicaragua for the first time in its Memorial. In that document – and still today – Nicaragua has put no evidence before the Court to show that it claimed sovereignty over these islands at any time before it submitted its Memorial in these proceedings, in 2001. Indeed, Nicaragua has provided no evidence that it claimed sovereignty over these islands in 1903 and 1904, during its dispute with the United Kingdom concerning turtle fishing, or in 1959 and 1960 when that issue briefly resurfaced. In this matter at least Nicaragua has been consistent: throughout the entire 20th century, as well as the earlier period, no claim to sovereignty over the islands was ventured by Nicaragua. And in that same period Nicaragua never protested the numerous indicators of Honduran sovereignty over the islands, including the identification of one of the islands (Palo de Campeche/ Logwood) in the Honduran Constitutions of 1957, 1965 and 1982. Notwithstanding its own consistent practice and the paucity of its evidence, Nicaragua now claims (in 2003) that "there can be no doubt that the title to the islets in dispute rests with Nicaragua".[3]

4.11. In its Reply, and rather belatedly, Nicaragua has finally been prompted to reveal the evidence upon which it relies in support of its claim to sovereignty, as well as evidence of activities giving rise to *effectivités*. In this part of the Chapter Honduras assesses the evidence upon which Nicaragua seeks to rely. The evidence relates to the activities on the part of Nicaragua which it has grouped into five areas:

- The grant of oil and gas concessions;
- The regulation of fishing activities;
- Recognition by third States;
- Cartographic evidence; and
- The turtle fishing dispute between Nicaragua and the United Kingdom.

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[3] NR, para 6.118.

Having regard to the Court's consistent jurisprudence, the evidence falls very far short of that required to support a claim to sovereignty.

C. NICARAGUA'S SILENCE: THE MATTERS ON WHICH IT PROVIDES NO EVIDENCE OF *EFFECTIVITES*

4.12. Of equal interest, however, are the various matters upon which Nicaragua is silent or chooses not to base its claim to sovereignty. Such silence confirms the weakness of its belated claim to sovereignty.

4.13. Nicaragua does not, for example, claim that any of its legislation refers directly to any of the islands in question. Similarly, Nicaragua fails to provide any plausible explanation as to why its 1999 Report on the Situation of the Caribbean Coast of Nicaragua fails to address any insular or maritime area north of the 15th parallel, including the islands now in dispute. The argument that it would be "of little use" to include disputed areas in a document seeking to establish a policy and framework management[4] does not rest easily with its claim that it has title over the islands or that it has long held control over the area in question. The approach is also inconsistent with the Court's view that " it can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to islands in dispute as such."[5]

4.14. And Nicaragua does not – and cannot – identify any reference in its Constitution to any of the islands in question. This contrasts with the position for Honduras, whose Constitution has made reference to some of the relevant islands since 1957 (and not since 1982, as Nicaragua claims).[6]

4.15. Relatedly – and again unlike Honduras – Nicaragua has put no evidence before the Court to show that it has ever applied its criminal law to the islands or to acts or omissions in the area around the islands.[7] It has put no evidence before the Court to show that it applied its immigration laws to the islands or to the area in question.[8] Similarly, there is no evidence before the Court to show that Nicaraguan labour laws have been applied to the insular or maritime areas north of the 15th parallel, as is the case for Honduras.[9] Nor is there any evidence that search and rescue

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4 NR, para 6.99.

5 See *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)*, ICJ Reports 2002, para 136.

6 NR, paras 6.18, 6.97. See further below at para 5.42.

7 HCM, paras. 6.18-6.21; NR, paras 6.95-6.99.

8 HCM, paras. 6.51-6.59; NR, paras 6.95– 6.99.

9 HCM, paras. 6.18-6.19 and 6.22-6.23; NR, paras 6.95-6.99.

missions have been undertaken by the Nicaraguan authorities in respect of accidents or incidents occurring in that area,[10] or that rights of overflight over the area have been requested from Nicaraguan authorities.[11]

4.16. Indeed, after two rounds of written pleadings Nicaragua has not provided a single piece of evidence to establish that it has ever carried out any activity whatsoever on any of the islands. It does not claim to have placed any markers or beacons on the islands.[12] It does not claim to have carried out, or permitted, scientific investigations on the islands.[13] It does not claim to have regulated the activities of any persons living on the islands.[14]

4.17. On all of the activities in respect of which it is silent, the Court will note that Nicaragua has provided no evidence that it has ever protested against the carrying out or authorisation of these activities by Honduras, whether prior to 1979 or after that date. Having regard to its current claim of sovereignty over the insular and maritime areas north of the 15th parallel, its failure to express disagreement or protest is "unusual" (as the International Court put it in the *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipidan*).[15] The silence requires explanation, but none has been provided.

4.18. On these matters, the absence of Nicaraguan evidence is readily apparent. It cannot be reconciled with the claim that "there can be no doubt that the title to the islets in dispute rests with Nicaragua".[16]

D. NICARAGUA'S EVIDENCE AS TO *EFFECTIVITÉS*

4.19. And what of the evidence of *effectivités* that Nicaragua has put before the Court? With regard to the matters on which no evidence has been provided one might have expected Nicaragua to provide extensive evidence as to its administration *a titre de souverain* in the area north of the 15th parallel in respect of other areas of activity. But there is very little and none of consequence. Its claim to title rests solely on six witness statements and four maps. It has been unable to produce a single fishery licence or

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10 HCM, paras. 6.60-6.63; NR, paras 6.107- 6.118. In this regard the Courts dicta in Qatar/Bahrain is instructive. ICJ Reports 2001, para 101.

11 HCM, para 6.72; NR, paras 6.107- 6.118.

12 HCM, paras. 6.64-6.66; NR, *ibid.*

13 HCM, paras. 6.67 and 6.32-6.33; NR, *ibid.*

14 HCM, e.g, paras. 6.9-6.17; NR, *ibid.*

15 ICJ Reports 2002, para 148.

16 NR, para 6.118.

concession north of the 15th parallel (or even any advertisement offering such licence or concession), or a single oil or gas concession in that area.

(1) NICARAGUA'S OIL AND GAS CONCESSIONS

4.20. Nicaragua claims that her "concession practice ... indicates that she considered to have sovereignty over the islets in dispute".[17] Curiously, this claim is made notwithstanding the fact that Nicaragua has been unable to identify even a single example of the grant by it of any oil or gas concession north of the 15th parallel or in any area which is remotely proximate to the islands. And notable is the fact that the claim is contradicted by Nicaragua earlier in its Reply, when it states that "[t]here is no basis to assert the existence of *effectivités* relating to the maritime delimitation deduced from the oil and gas concessions made by the Parties."[18] But if Nicaragua is inconsistent in its legal arguments, it has been remarkably consistent in its practice in relation to oil and gas concessions, never once trespassing north of the 15th parallel.

4.21. Honduras submitted evidence on 18 Nicaraguan oil concessions in its Counter Memorial. Nicaragua has not challenged the veracity or accuracy of any of that evidence. Honduras also submitted evidence on 22 of its oil concessions. Honduras notes, as described below, that Nicaragua has not challenged Honduras' consistent practice in delimiting the southern limit of its oil concessions by reference to parallel 14°59′08″. And Nicaragua has not produced any evidence to show that it ever objected to Honduras' consistent practice.[19]

4.22. As regards the Nicaraguan oil concessions, the evidence and argument put forward by Nicaragua confirms the existence of a tacit agreement between the Parties as to the existence of a boundary at the 15th parallel, at least in the period from the mid-1960's to 1979 when Nicaragua abruptly changed its practice. Nine of Nicaragua's eighteen oil concessions explicitly referred to the 15th parallel as the northern limit of the Nicaraguan oil concessions.[20] Nicaragua has provided no explanation as to why that line has been chosen as the northern limit of each of those concessions if it was not considered to be the northern limit of its maritime boundary with Honduras. Indeed, Nicaragua has simply chosen not to address arguments on these concessions.

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17 NR, para 6.118(f).

18 NR, para 5.25.

19 See NR, para 5.14 *et seq.*

20 See, e.g., HCM, vol 2, annex 115, which refers to "parallel 14°59′," and annexes 116, 117, 202, 203 and 206 referring to "parallel 14°59′08."

4.23. The evidence before the Court on Nicaragua's practice indicates that:

- Nicaragua's practice has been consistent in that no oil concession has ever been granted north of the 15th parallel, and that there are *at least* as many concessions expressly referring to the 15th parallel as there are concessions that do not refer to it;
- all delimitations made in Nicaraguan oil concessions recognize, expressly or implicitly, the 15th parallel as the northern limit of its concessions; and
- Nicaragua never contested Honduran oil concessions and drilling activity north of the 15th parallel.

Nicaragua's Consistent Practice

4.24. Between 1967 and 1979 some 18 Nicaraguan Presidential Decrees were adopted which granted, extended or renewed oil concessions in the area in dispute. None granted any rights in any area north of the 15th parallel. Six of the Nicaraguan oil concessions which are the subject of these decrees refer explicitly to a northern limit at "parallel 14°59′08′′", (and three more are extensions or corrections of these earlier concessions).[21] As late as 1977 Nicaragua was granting new concessions delimited explicitly by reference to parallel 15th. Of the remaining nine decrees, four make reference to an "intersection with the borderline

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[21] Certification of concession granted to "Western Caribbean Petroleum Company", Official Gazette of Nicaragua No. 117 of 29 May 1967 (Block "Miskito"), HCM, annex 203 extended by Decree No. 129-DRN, Official Gazette of Nicaragua No. 72 of 4 April 1970, HCM, vol 2, annex 204 and granted to the consortium of "Western Caribbean Petroleum Company" and "Occidental of Nicaragua" by Decree No. 8 of 28 April 1973 and extended by Decree No. 132-DRN, Official Gazette of Nicaragua No. 140 of 23 June 1976, HCM, vol 2, annex 205; Resolution Concerning an Oil Concession Granted to "Mobil Exploration Corporation", Decree 38-DRN of 3 May 1966, Official Gazette of Nicaragua No. 202 of 4 September 1968, HCM, vol 2, annex 202; Certification of Decree 86-DRN Concerning an Oil Concession granted to "Western Caribbean Petroleum Company", Official Gazette of Nicaragua No. 161 of 18 July 1968, HCM, ("Block No. 1"), HCM, vol 2, annex 115, and clarification of previous Decree in Certification of Decree Concerning an Oil Concession granted to "Western Caribbean Petroleum Company" and "Occidental of Nicaragua, Inc.", Official Gazette of Nicaragua No. 206 of 9 September 1970, HCM, vol 2, annex 116; Certification of Decree Concerning an Oil Concession granted to "Western Caribbean Petroleum Company" and "Occidental of Nicaragua, Inc.", Official Gazette of Nicaragua No. 272 of 28 November 1974 ("Block No. 1"), HCM, vol 2, annex 117; Resolution concerning an oil concession granted to "Western Caribbean Petroleum Company" and "Occidental of Nicaragua, Inc.", Official Gazette of Nicaragua No. 259 of 14 November 1975 (Block "Agua Azul"), HCM, vol 2, annex 206. See references to these oil concessions in HCM, para 6.27 and notes 51 and 52.

with...Honduras, which has not been determined"(the other five being extensions or renewals of earlier concessions).[22]

4.25. One has to assume that Nicaragua's practice was not intended to be anything other than consistent. It is noteworthy that the alternative approaches to the delimitation of the northern limit of Nicaragua's oil concessions were often applied in instruments published within a matter of days of each other. For example, in 1968 – within the space of three days – the Government of Nicaragua published in its official journal (*La Gaceta*) two decisions to grant oil concessions, one to Mobil Exploration Company, and the other to Pure Oil Company of Central America, Inc.[23] The Mobil concession was published on 4 September 1968, establishing as one of its northern limits parallel 14°59′08′′. The Pure Oil concession was published two days later, on 6 September 1968, for blocks Pure II, III and IV. While that concession included a savings clause indicating that there was no formal boundary determination, it nonetheless stated that its limit was the border line with Honduras.[24]

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22 Resolution concerning an Oil Concession Granted to "Pure Oil of Central America, Inc.", Official Gazette of Nicaragua No. 204 of 6 September 1968 (Blocks "Pure II", "Pure III" and "Pure IV"), HCM, vol 2, annex 207; Resolution concerning an Oil Concession Granted to "Union Oil Company of Central America, Inc.", Official Gazette of Nicaragua No. 137 of 20 June 1972 (Blocks "Union II", "Union III" and "Union IV"), HCM, vol 2, annex 208, extended three times by Resolution concerning an Oil Concession Granted to "Union Oil Company of Central America, Inc.", Official Gazette of Nicaragua No. 190 of 22 August 1972, HCM, vol 2, annex 209; Resolution concerning an Oil Concession Granted to "Union Oil Company of Central America, Inc.", Official Gazette of Nicaragua No. 172 of 3 August 1978, HCM, vol 2, annex 215; Resolution concerning an Oil Concession Granted to "Union Oil Company of Central America, Inc.", Official Gazette of Nicaragua No. 130 of 12 June 1974 (Block "Union V"), HCM, vol 2, annex 210, extended by Resolution concerning an Oil Concession Granted to "Union Oil Company of Central America, Inc.", Official Gazette of Nicaragua No. 108 of 18 May 1977, HCM, vol 2, annex 213; Resolution concerning an Oil Concession Granted to "Union Oil Company of Central America, Inc.", Official Gazette of Nicaragua No. 22 of 17 January 1975 (Blocks "Union VI" and "Union VII"), HCM, vol 2, annex 211, extended by Resolution concerning an Oil Concession Granted to "Union Oil Company of Central America, Inc.", Official Gazette of Nicaragua No. 291 of 22 December 1977, HCM, 214.

23 As described in the NR (Annexes 14, p 71 and 16, p 85), these decisions had been adopted (although not published) years before: concession to Mobil had been approved on 3 May 1966, and concessions to Pure oil on 30 November 1965.

24 Similarly, in the period 1974-75 Nicaragua granted to Union Oil blocks Union V and VI, indicating for the purposes of their delimitation their "*intersection with the borderline with...Honduras, which has not been determined.*" But in the same period, some months after each of these concessions to Union Oil had been granted, Nicaraguan authorities granted to the consortium created by Western Caribbean and Occidental two concessions – "Block N° 1" and "Agua Azul" – which established parallel 14°59′08′′ as one of their borders, see HCM, vol 2, annex 210 and 211, and 117 and HCM, vol 2, annex 206.

4.26. The consistency of the approach is reflected in the map published in 1969 by the Director General of Natural Resources of the Nicaraguan Ministry of Economy, Industry and Commerce (See Plate 32).[25] This illustrates the Mobil concession and the Pure Oil concession, as well as all other concessions granted up to that date. None extends north of the 15th parallel. In other words, irrespective of the precise formulation used in the concession, the effect was to respect the 15th parallel as the northern limit of the concession.

4.27. As recently as 1995 the position adopted by Nicaragua had not changed. That year, and also in 1994, the Nicaraguan Institute for Energy published a map representing oil and gas prospects: this too clearly set the Nicaraguan border for the purposes of oil and gas exploration at the 15th parallel[26] (See Plate 33). This map also shows the Coco Marina oil well as straddling the Honduran-Nicaraguan border at the 15th parallel.[27] The map published in 1994 is based on an earlier map dated 1986, demonstrating the consistency of Nicaragua's approach.

4.28. It is therefore incontrovertible that Nicaragua's long-term, consistent and extensive practise in relation to oil concessions confirms the 15th parallel as the northern limit of its boundary with Honduras, and that its agencies explicitly recognised the parallel as a point beyond which concessions were not – and could not be – granted.

4.29. The fact of this overwhelming evidence – which does not support its claim to title north of the 15th parallel – against its claim to title probably explains why Nicaragua's treatment of the subject of concessions in Chapter V of its Reply is marked by varying degrees of misrepresentation, omission and unsubstantiated assertion. By way of examples (and more could be provided):

a) **Misrepresentation**: At paragraph 5.15 of its Reply Nicaragua asserts that information provided in Honduras' Counter Memorial is "incorrect" in referring to the grant of Nicaragua's first concession as occurring in 1968, when it should have been 1965. The actual date is not material. However, the suggestion that Honduras has somehow not been accurate is wrong: the first concession was officially

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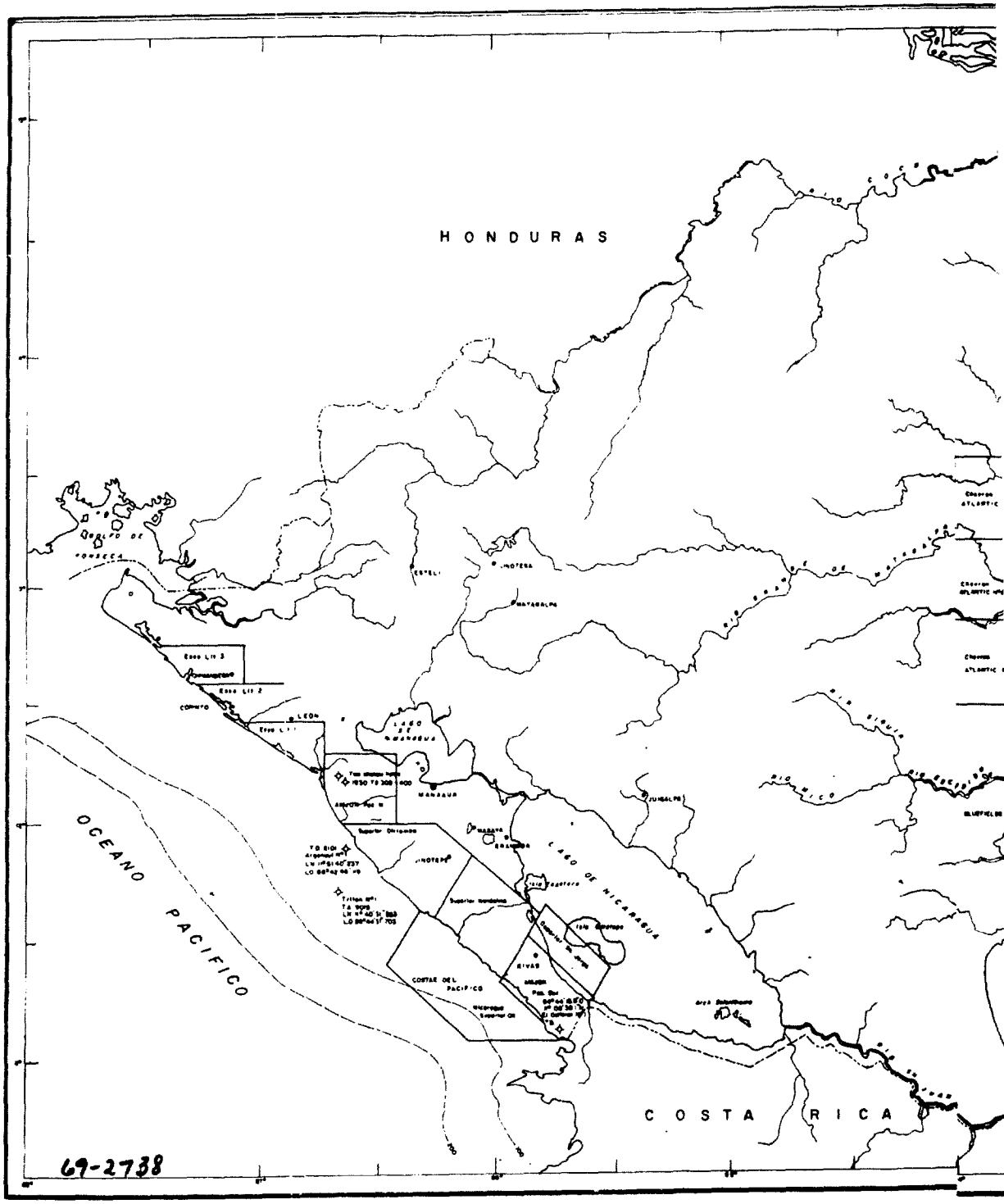
25 Map of Petroleum Concessions, General Directorate of Natural Resources, Nicaragua, 1969 at Plate 32.

26 Instituto Nicaragüense de Energía, Mapa de Perspectivas Petrolíferas y Gasíferas de Nicaragua, p 12, Exploraciones Petroleras en Nicaragua, June 1995, and Instituto Nicaragüense de Energía, Map of oil and gas prospectivity in Nicaragua, p 12, Petroleum Exploration Activities in Nicaragua, June 1994 (original in English), HR, vol 2, annex 255.

27 As explained in the HCM, para 6.28.

Plate 32: Map of Petroleum Concessions, General Directorate of Natural Resources, Nicaraguan Ministry of Economy, Industry and Commerce, March 1969



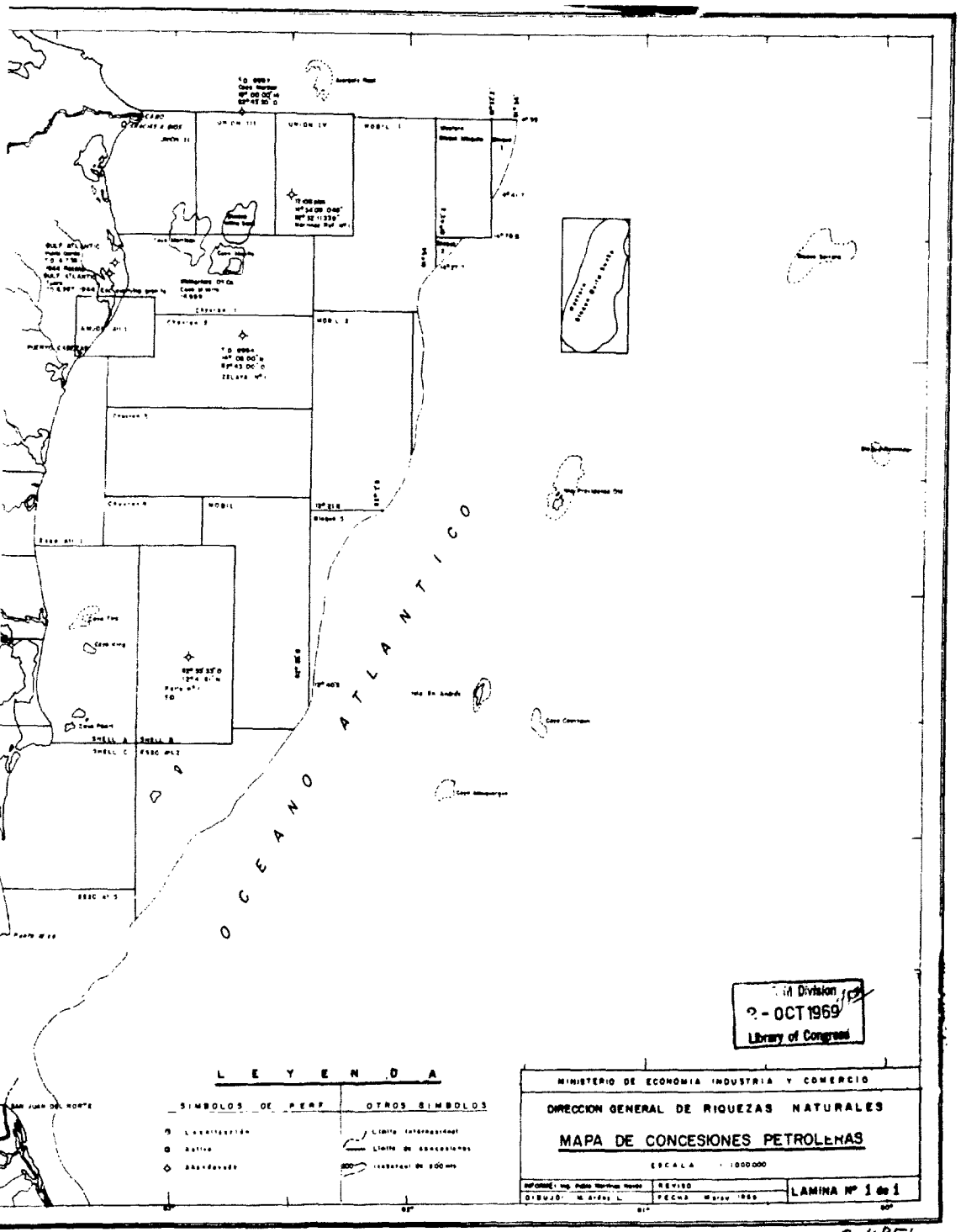


PLATE 33: EXTRACTS FROM "PETROLEUM EXPLORATION ACTIVITIES IN NICARAGUA" REPORTS, NICARAGUAN INSTITUTE OF ENERGY, JUNE 1994 AND JUNE 1995

A) JUNE 1994

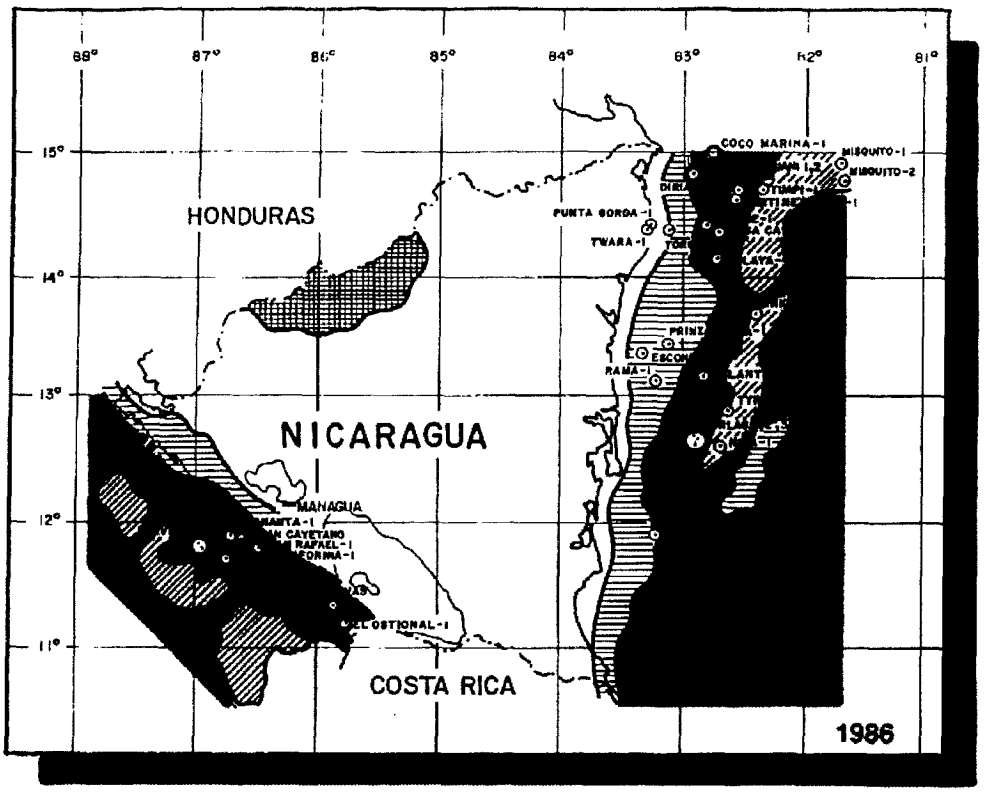
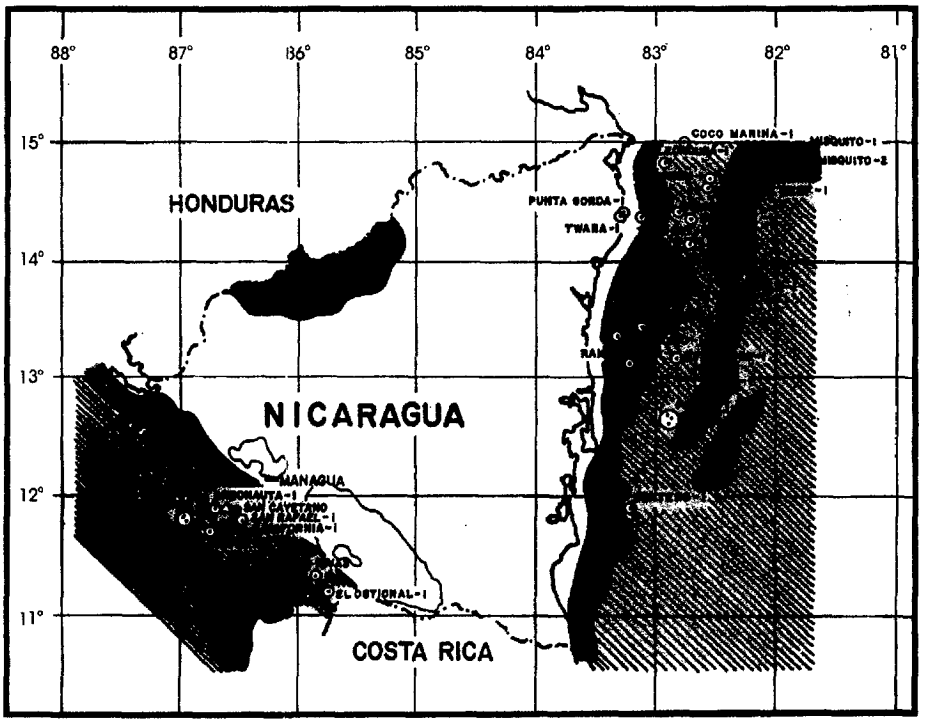


PLATE 33: EXTRACTS FROM "PETROLEUM EXPLORATION ACTIVITIES IN NICARAGUA" REPORTS, NICARAGUAN INSTITUTE OF ENERGY, JUNE 1994 AND JUNE 1995 (CONT.)

B) JUNE 1995



REF.: INFORME SOVIETICO

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published in the Nicaraguan Official Journal, *La Gaceta*, and made public, only on 6 September 1968 (a point which Nicaragua omits to mention in its argument).[28] Moreover, Honduras did provide the date of the request by Pure Oil of such concession in 1963.[29]

b) **Misrepresentation**: Also at paragraph 5.15 of its Reply, Nicaragua refers to Honduras as claiming that the Nicaraguan concessions "used the 15th Parallel as the northern boundary of Nicaraguan territory". This is a clear misrepresentation of what Honduras actually says in its Counter Memorial, namely that the Nicaraguan concessions treated "the 15th parallel as the northernmost limit of the territory of Nicaragua, *in the sense that none of the concessions reaches north of that parallel.*"[30] This statement is correct and is not refuted by any Nicaraguan evidence.

c) **Silence**: In its Reply Nicaragua remains silent as to the evidence put forward by Honduras which demonstrates Nicaragua's respect for and tacit agreement treating the 15th parallel as the maritime boundary for the purposes of granting oil concessions. It is notable that Nicaragua refers only to those documents which it considers may be favourable to its position. Nicaragua does not respond, for example, to the series of oil concessions granted to the Western Caribbean Petroleum Company and to the consortium created by Western Caribbean and Occidental (see HCM paras. 6.26 and 6.27); or to a series of diagrams published in international petroleum journals showing the exact location of Nicaraguan concessions, which were invariably south of parallel 14°59.8′.[31]

d) **Unsubstantiated assertions**: There are many examples of Nicaragua failing to provide any evidence or references in support of factual matters upon which it relies or arguments which it makes. For example, at paragraph 5.19 of its Reply Nicaragua asserts that the 1965 Pure Oil Concession was geographically defined pursuant to an alleged request made by Pure Oil (which is quoted) that there be established a "conventional area": however no evidence is introduced to

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28 NR, para 5.17.

29 HCM, Chapter 6, note 54.

30 HCM, para 6.27 (Emphasis added).

31 HCM, para 6.24.

support the quotation, and the provisions of the Special Law on Exploration and Exploitation Petroleum (on which it was [apparently] based) are not included in the annexes.[32] Regardless of whether this argument provides the justification sought by Nicaragua to explain its approach, the materials set forth in the Reply and its annexes provide no basis upon which to determine whether Nicaragua's arguments are relevant or based on accurate information.

e) **Silence and manipulation.** The existence of a tacit agreement between the Parties as to a boundary at the 15th parallel is unambiguous in the clear and compelling evidence provided by Honduras on the "Coco Marina Joint Operation", a joint venture which treated the 15th parallel as the dividing line of the two Parties' areas of respective competence. This joint operation on the 15th parallel is incontrovertible proof that Nicaragua accepted that the area north of the 15th parallel was subject to Honduran jurisdiction, otherwise it would never entered into such a joint undertaking. Instead of addressing the merits of the arguments, however, Nicaragua raises questions of minor importance about the Honduran evidence;[33] the Court will recognise Nicaragua's failure to address the merits, an approach which seems intended to divert attention from the incontestable fact that the Coco Marina oil well – which is physically located *on* the 15th parallel – required a *joint* operation of two companies licensed to operate, respectively, north and south of that parallel, that is to say, in Honduras and Nicaragua, respectively.

Nicaragua's Practice Confirms That It Has Recognised the 15th Parallel As the Northern Limit of its Oil Concessions

4.30. A small number (4) of Nicaragua's 18 oil concessions granted in the period 1965 to 1981 do not explicitly identify the 15th parallel as the northern limit, but refer to the "intersection with the borderline with...Honduras, which has not been determined; from that point, following said borderline in a generally Westerly direction, to the

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32 The same argument is made in respect of the 1973 Union Oil concession, but once again no evidence is introduced in support of the assertion.

33 Nicaragua highlights the fact that a document submitted by Honduras is undated or that the "Interstate Study Commission" is only a Honduran commission. This information had actually been provided already by Honduras in its Counter-Memorial. NR, vol 1, para 5.26 and HCM, vol 1, para 6.28.

intersection with Meridian 82°15'W and from that point following said Meridian 82°15'W directly South to the starting point, thus closing the shape, the size of which is approximately 65, 500 hectares." That does not mean, however, that any of the concessions were intended to extend north of the 15th parallel. It is plain that they did not. Those which did not explicitly refer to that limit nevertheless were prepared and adopted and offered with the result that they nonetheless recognised and gave effect to a northern limit which fell on or about the 15th parallel.

4.31. The decrees establishing each of those oil concessions which do not refer to the 15th parallel provide for a series of other coordinates and a total surface area for each concession block (expressed in hectares). From this information it is possible to calculate and graphically describe the area for each of these concessions, including the northern limits. This exercise has now been carried out by Honduras (see Plates 34a, b and c). It shows that:

- For no concession does the northern limit extend north of parallel 14°59′8″; and
- For each of these concessions the northern limit is consistent with Nicaragua's tacit agreement that the 15th parallel reflects the northern limit of its maritime boundary with Honduras.

The cartographic exercise carried out by Honduras is consistent with the maps published in 1969 by the Director General of Natural Resources of the Nicaraguan Ministry of Economy, Industry and Commerce, and in 1995 and 1994 by the Nicaraguan Institute for Energy.[34] It is also consistent with maps published in specialised journals at the time,[35] and with Plates 11, 12, 13 and 22 of the Honduran Counter Memorial, which were considered in the Nicaraguan Reply to "not correctly reflect reality" (although Nicaragua does not explain why this is the case).[36] Nicaragua provides no evidence of its own to counter these clear facts. It cannot do so: another independent and authoritative publication dating to 1970 – *Petroleum Legislation* – includes maps of Honduras and Nicaragua based on information from 1968 which also locates the boundary limit between Nicaraguan and Honduran oil concessions at the 15th parallel.[37]

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34 See *supra* at paras 4.26- 4.27.

35 HCM, para 6.24 and note 44.

36 NR, para 5.25.

37 Petroleum Legislation, New York 1970, HR, vol 2, annex 261.

Conclusions on Nicaragua's Oil Concessions

4.32. On the basis of the evidence before the Court it is clear that no Nicaraguan Presidential decree or other act granting or extending an oil concession has ever authorised any oil exploration activity to take place north of the 15th parallel. This is the case also for the period between 1960 and 1979, of central importance to this case. Some Nicaraguan oil concessions were expressly subject to a northern limit at 14°59′08″. The others which did not refer expressly to a precise northern limit nonetheless also respect this parallel. Such recognition was not only *de facto*, as Nicaragua seems to suggest in its paras 5.19, 5.23 and note 208 when referring to the establishment of a "conventional area", but also contained in Nicaragua's administrative acts, through the delimitations of oil concessions provided in the various Presidential Decrees and published in official publications. Nicaragua's practice, together with that of Honduras described in the Counter Memorial and Chapter 5 of this Rejoinder, confirms the "common understanding" of the Parties which is reflected in "the geographic pattern of the oil concessions granted by the two Parties", as found by the Court in the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*.[38]

4.33. Taken together with the consistent practice of Honduras, Nicaragua's consistent practice, and its own maps, amply demonstrate the existence of a tacit agreement between the Parties as to the existence of a boundary at the 15th parallel, which was referred to as 14°59′08″, or more generally as the boundary with Honduras. Nowhere is this better illustrated than in respect of the joint project known as Coco Marina, on which Nicaragua has nothing substantive to say.[39]

(2) NICARAGUA'S PRACTICE IN RELATION TO FISHERIES

4.34. In its Memorial Nicaragua provided no evidence to the Court to show that it had ever applied or enforced – or even sought to apply and enforce – its fisheries laws north of the 15th parallel, or that it had granted any licences or concessions for fisheries activities in the area.[40]

4.35. Ten months after the filing of Honduras' Counter Memorial, what has Nicaragua been able to obtain? Recognising the paucity of its own evidence Nicaragua claims that "the issue of fishing licenses or adoption of fisheries legislation is not directly relevant for the issue of title to

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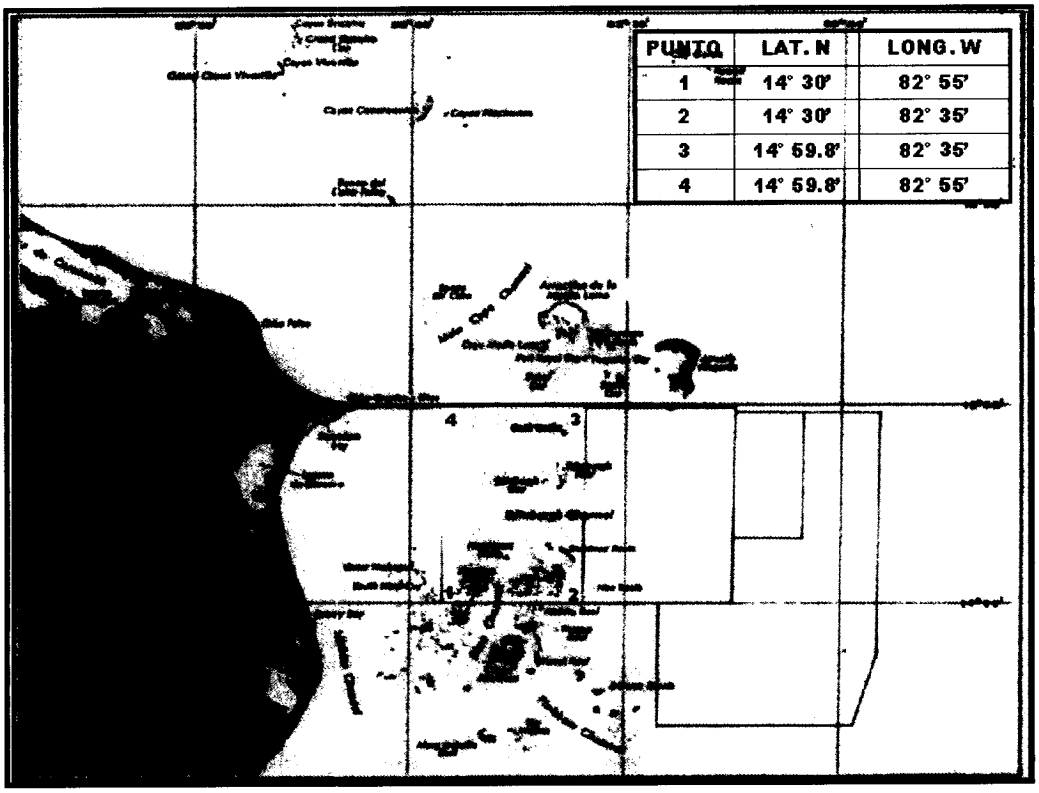
38 ICJ Reports 2002, para 215.

39 NR, para 5.26.

40 HCM, para 6.47.

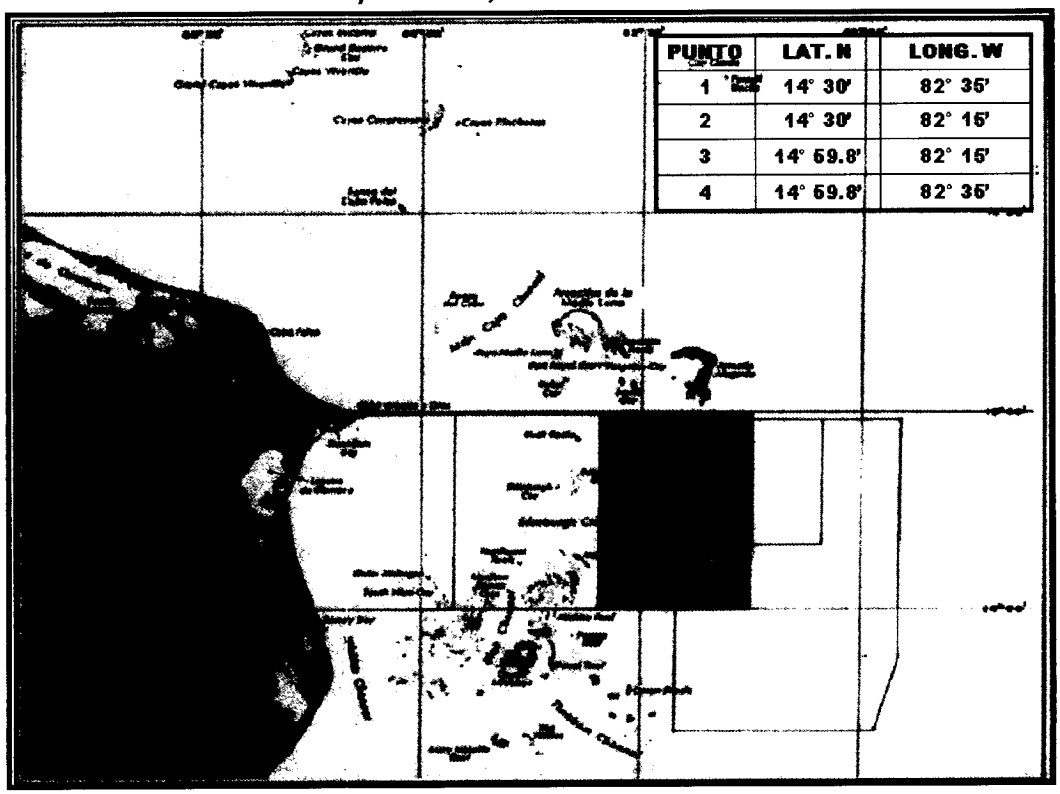
PLATE 34: HONDURAN GRAPHIC REPRESENTATION OF LIMITS OF OIL CONCESSIONS GRANTED BY NICARAGUA, 1968-1975

A) PURE III, LATER UNION III



Source: Official Gazette of Nicaragua No. 204 of 6 September 1968
(See Nicaraguan Reply, Annexes 14 and 15)

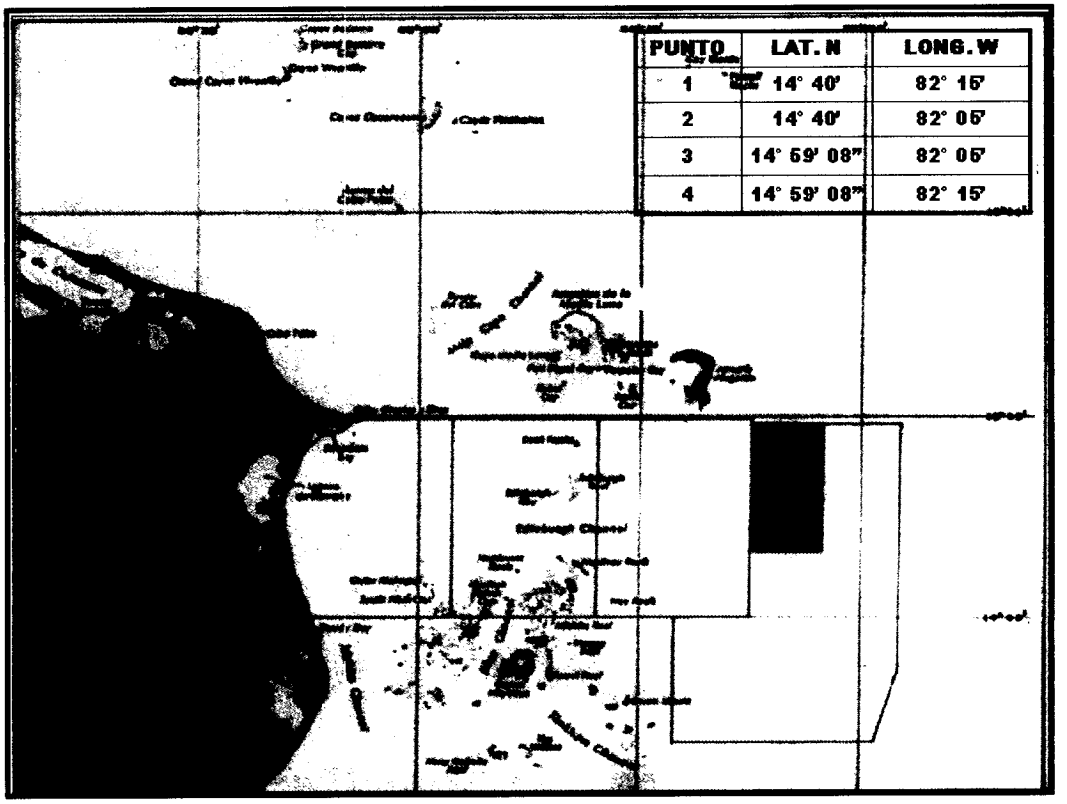
B) PURE IV, LATER UNION IV



Source: Official Gazette of Nicaragua No. 137 of 20 June 19
(See Nicaraguan Reply, Annexes 14 and 15)

PLATE 34: HONDURAN GRAPHIC REPRESENTATION OF LIMITS OF OIL CONCESSIONS GRANTED BY NICARAGUA, 1968-1975 (CONT.)

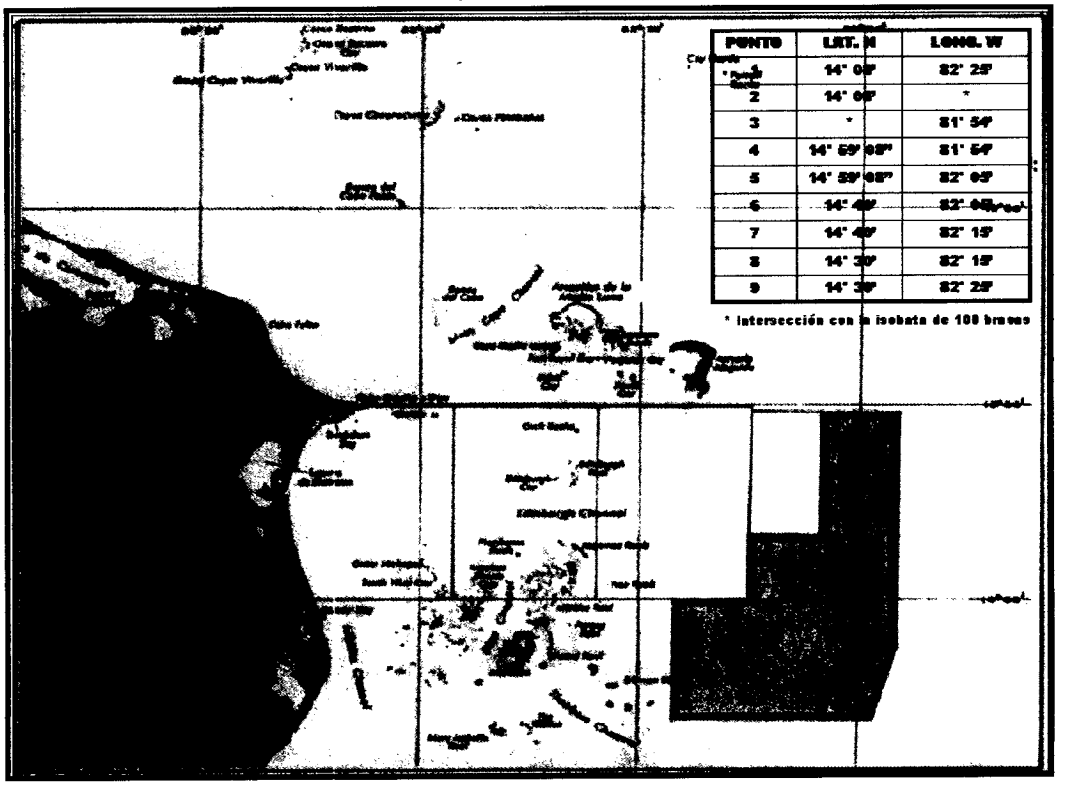
C) UNION V



PUNTO	LAT. N	LONG. W
1	14° 40'	82° 15'
2	14° 40'	82° 05'
3	14° 59' 08"	82° 05'
4	14° 59' 08"	82° 15'

Source: Official Gazette of Nicaragua No. 130 of 12 June 1974
(See Nicaraguan Reply, Annex 17)

D) UNION VI



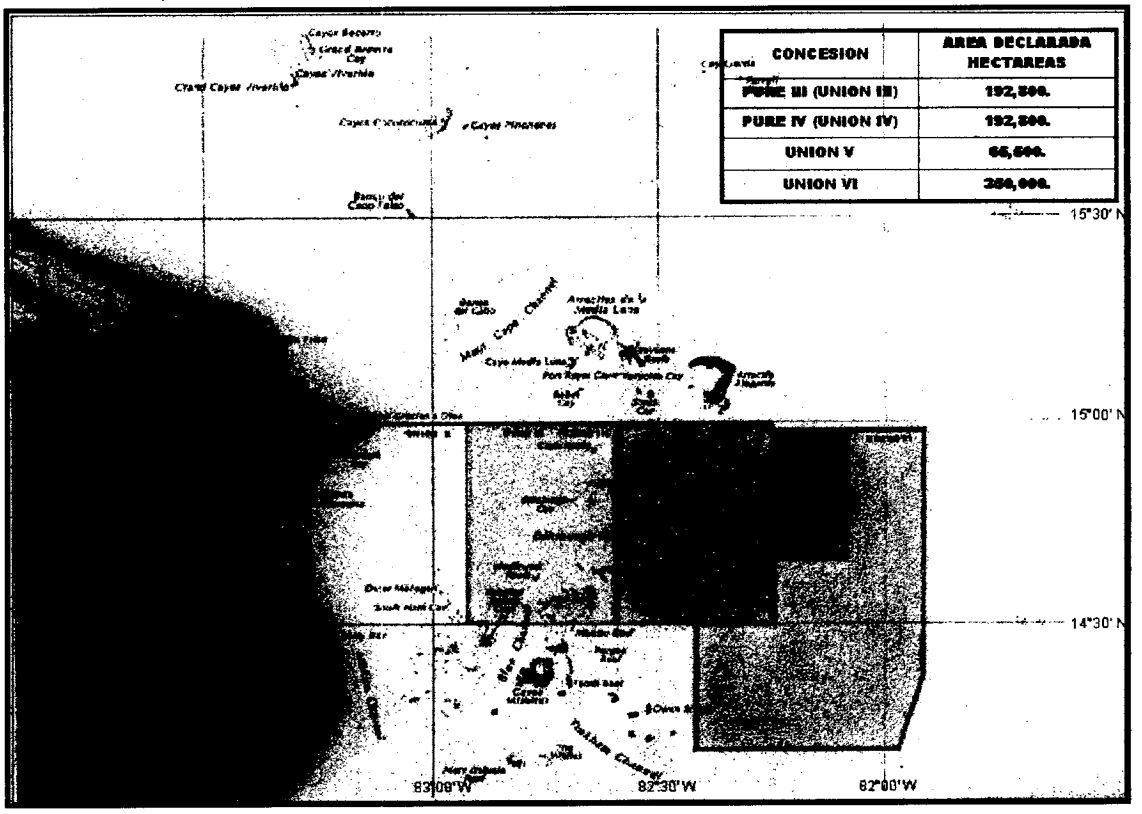
PUNTO	LAT. N	LONG. W
1	14° 05'	82° 25'
2	14° 05'	*
3	*	81° 54'
4	14° 59' 08"	81° 54'
5	14° 59' 08"	82° 05'
6	14° 40'	82° 05'
7	14° 40'	82° 15'
8	14° 30'	82° 15'
9	14° 30'	82° 25'

* Intersección con la isobata de 100 brazas

Official Gazette of Nicaragua No. 22 of 17 January 1975
(See Nicaraguan Reply, Annex 18)

PLATE 34: HONDURAN GRAPHIC REPRESENTATION OF LIMITS OF OIL CONCESSIONS GRANTED BY NICARAGUA, 1968-1975 (CONT.)

E) COMBINED GRAPHIC SHOWING AREA GRANTED IN HECTARES



CONCESION	AREA DECLARADA HECTAREAS
PURE III (UNION III)	192,500.
PURE IV (UNION IV)	192,500.
UNION V	66,500.
UNION VI	266,000.

Source: Official Gazette of Nicaragua No. 204 of 6 September 1968, No. 137 of 20 June 1972, No. 130 of 12 June 1974 and No. 22 of 17 January 1975

territory".[41] It is unclear what is meant by the word "directly". But whatever is intended is wrong as a matter of international law: in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* the Court expressly referred to the licensing of fish traps as one of the activities carried out by Bahrain in support of its claim to sovereignty.[42] And in the *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipidan* the Court made it clear that private fishing activities may be taken as *effectivités* where they take place "on the basis of official regulations or under governmental authority", i.e. under governmental licence or pursuant to a governmental concession.[43] The International Court has spoken clearly on the issue: the grant of governmental fishing licences and concessions may support a claim to sovereignty and is, in this way, directly relevant for the issue of sovereignty and title to insular territory.

4.36. What has Nicaragua come up with by way of governmental fishing licences and concessions to support its claim it has "regulated fishing activities in the area including the islets for a long time, at least since the end of the 19th century"?[44] Nothing. There is not a single piece of contemporaneous documentary evidence before the Court that proves the grant by Nicaragua of such licences or concessions. There is not even any evidence before the Court that Nicaragua ever advertised the availability of such licenses and concessions in any waters north of the 15th parallel, whether in connection with the islands or otherwise. Unlike Honduras (whose evidence it unsuccessfully seeks to discredit),[45] Nicaragua has not provided any logbooks or *bitácoras* which would provide contemporaneous evidence proving or confirming that it granted fishing licences or concessions at any time, either before or after 1979. Nor has Nicaragua provided any evidence in the form of concessions (or licences) or public notices calling for concession applications (in the Official Gazette) in any area north of the mouth of the River Coco Segovia (at the 15th parallel). Given its claim that it has long regulated fisheries activities in the area one would have expected at least some contemporaneous documentary evidence to be tendered in support of its claim, as Honduras has done.[46] But there is none.

4.37. All Nicaragua has to offer is five witness statements in support of this part of its claim purporting to provide evidence of longstanding activity. None is from a government official. Three make no reference to

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41 NR, para 6.107.

42 ICJ Reports 2001, paras 195-196.

43 *Supra*, para 2.28.

44 NR, para 6.118(e).

45 See below at para 5.20.

46 See HCM, para 6.43 and note 75.

any licences granted by Nicaragua, and the other two are unsupported by any documentary evidence as to licences or concessions granted by Nicaragua. They merit careful reading.

4.38. Annex 21 of the Nicaraguan Reply is a witness statement by Mr. Hermann Emmanuel Presida. It provides no indication that the fishing activity he describes was anything other than private in character, since no reference is made to the grant of any licence or other authorisation by Nicaragua. The Court will note also that it is not possible to establish from the statement the date upon which the purported activities took place. The statement thus provides no support for Nicaragua.

4.39. Annex 22 of the Nicaraguan Reply is a witness statement by Mr. Hayword Clark McLean. It too provides no indication that the fishing activity he describes was anything other than private in character, since no reference is made to the grant of any licence or other authorisation by Nicaragua for fishing in the waters north of the 15th parallel. But Mr. McLean does say:

> "They sent us to Nicaragua to fish [in the area north of Parallel 15], and we had to be on the watch for Nicaraguan patrols because the Colombians knew that they were fishing in Nicaraguan waters. [...] When I was fishing for Colombia they provided me with a nautical chart – COL 008 from the MERCATOR Projection, which I still have today."

Aside from the fact that he does not say he actually saw any Nicaraguan patrols, the chart to which he refers – COL 008 – does not indicate that the waters north of the 15th parallel are part of Nicaragua. If anything, it shows that the area north of the 15th parallel is part of Honduras. A copy of that Chart is at Annex 260.

4.40. Annex 23 of the Nicaraguan Reply is a witness statement by Mr. Arturo Möhrke Vega. He provides no material first-hand evidence, referring only to patrols (on an unstated date) "in areas around parallel 17" but without stating that he himself actually participated in such patrols or referring to any documentary evidence in support of such patrols. The other information provided is hearsay. Nicaragua has provided no documentary evidence to support anything he says.

4.41. Annexes 24 and 25 of the Nicaraguan Reply are witness statements by Mr. Jorge Morgan Britton and Mr. Leonel Aguirre Sevilla. Their evidence on fishing activity licensed by Nicaragua up to the 17th parallel is uncorroborated by any documentary evidence provided by Nicaragua (unlike that of the Honduran statements).

(3) RECOGNITION BY THIRD STATES OF NICARAGUAN SOVEREIGNTY

4.42. In response to the evidence tendered by Honduras as to the recognition by third states of Honduran sovereignty over the islands and related areas,[47] Nicaragua claims that "there are a number of instances in which [Nicaraguan] sovereignty was recognized and it was explicitly or implicitly acknowledged that the parallel of 15th N did not constitute a line of allocation of territory or a maritime boundary".[48] In fact, Nicaragua is only able to provide two examples over a period of more than 100 years that it says supports its position: the United Kingdom (in relation to the turtle fishery dispute at the end of the 19th century and the beginning of the 20th century) and Jamaica (in relation to maritime boundary delimitations conducted in 1996 and 1997).

4.43. As to the first, there is no evidence before the Court to indicate that the United Kingdom recognised Nicaraguan sovereignty over any island north of the 15th parallel. In its Reply Nicaragua does not identify such evidence. At some stage in that dispute Nicaragua did identify one island north of the 15th parallel as falling within its sovereignty (not an island related to the present dispute), but that claim was not put to the United Kingdom.[49] In the proceedings before the Mixed Commission which was established to resolve the dispute Nicaragua did not claim sovereignty over any of the islands or banks claimed by Nicaragua in its Memorial in these proceedings, and the Commission did not identify any of them as being under Nicaragua's jurisdiction.[50]

4.44. As to the second, negotiations conducted by Jamaica and Nicaragua took place in 1996 and 1997. However, Jamaica has been involved in negotiations with Honduras for the delimitation of that same maritime area, which it considers to be "under the jurisdiction" of Honduras and Jamaica.[51] Those negotiations are subsequent to any negotiation it may have had with Nicaragua: see the *Aide Memoire* of 15 April 1999.[52] Moreover, Jamaica has provided to Honduras an *Aide Memoire* dated 15 June 2003 which states, having reviewed the documents introduced by Nicaragua in its Reply, that:

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47 HCM, paras. 6.68-6.75; and *infra* at paras 5.62 *et seq.*

48 NR, para 6.115.

49 HCM, para 3.10 and annex 173.

50 HCM, para 3.12.

51 See letter from Minister of Foreign Affairs of Jamaica to Minister of External Relations of Honduras, 25 February 2002, HR, vol 2, annex 235. See also the Statement of Mr Ramón Valladares Soto, HR, vol 2, annex 250.

52 HR, vol 2, annex 234.

> "The Government of Jamaica has examined its records of the above-mentioned documents, and can confirm that these documents do not in any way indicate that Jamaica has ever expressed support for Nicaraguan maritime claims against Honduras."[53]

4.45. The Nicaraguan evidence as to recognition by third states therefore rests on a single set of negotiations between Jamaica and Nicaragua, which are said by Jamaica not to provide support for the proposition put forward by Nicaragua, and which are inconsistent with the position adopted by Jamaica in other contexts, including in its negotiations with Honduras. In contrast with Honduras, Nicaragua appears to have been unable to identify or produce any evidence of recognition by third states in relation to matters such as the installation of triangulation markers, or drug enforcement operations, or gazetteers, or requests for overflight, or in the work of international organisations.

(4) NICARAGUA'S CARTOGRAPHIC EVIDENCE

4.46. Nicaragua chose not to include any of its own historical maps in its Memorial, relying instead on recent maps produced principally for the purpose of these legal proceedings. In its Counter Memorial Honduras explained the reason for Nicaragua's omission on the following basis:

> "Nicaragua's treatment of its own cartographical history is easily explained: its own maps do not support its claim to the islands and the area north of the 15th parallel."[54]

Honduras introduced into the proceedings a number of Nicaraguan maps, from 1898, 1965, 1966, 1982 and 1993.[55] None included any of the islands and cays which Nicaragua claimed in its Memorial as falling within its sovereignty.

4.47. The situation after Nicaragua's Reply is unchanged. Nicaragua has introduced three maps.

- The first is undated but was prepared by the Mixed Boundary Commission charged with establishing a boundary in the terms agreed upon in the 1894 Treaty between Nicaragua and

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53 HR, vol 2, annex 238.

54 HCM, para 3.59.

55 HCM, vol 3, Plates 28 and 29. Also annexes 177, 178, and 179.

Honduras.[56] It does not show any of the islands now claimed by Nicaragua.

- The second is a School Map of Nicaragua prepared in 1982.[57] It does not show any of the islands now claimed by Nicaragua.
- The third is a Map of Nicaragua published by the Government showing political and administrative regions, and dates to 1997.[58] The main map does not show any of the islands now claimed by Nicaragua. An inset showing an area partly outside the main map[59] shows a large number of cays on the Miskito Coast, including some north of the 15th parallel. It does not however indicate where the maritime boundary is to be drawn, it expressly states that maritime boundaries in the Caribbean sea have not been "juridically delimited", and it does not indicate in which political or administrative region any of the cays falls. In sum, the map does not demonstrate that the islands now claimed by Nicaragua fall within any government region of Nicaragua.

4.48. After two rounds of written pleadings all Nicaragua has to offer by way of maps is a solitary 1997 map that does not purport to show sovereignty over the islands. The cartography is scarcely consistent with the claim that "there can be no doubt that the title to the islets in dispute rests with Nicaragua".[60] As compared with the maps demonstrating Honduran sovereignty[61] Nicaragua's claim is untenable.

(5) NICARAGUA'S ARGUMENTS AS TO THE TURTLE FISHERIES DISPUTE

4.49. After not mentioning the turtle fishing dispute between the United Kingdom and Nicaragua around the islands and cays off the Mosquito Coast in its Memorial, in its Reply Nicaragua is defensive and claims that the turtle fishing dispute "between Nicaragua and the United Kingdom

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56 NR, Annexes, vol II, Map 1.

57 NR, Annexes, vol II, Map IV.

58 NR, Annexes, vol II, Map V.

59 Honduras notes that elsewhere in its Reply Nicaragua seeks to dismiss the relevance of a 1933 Official Map of Honduras on the grounds that "although the inset shows the areas in which the islets are located .. the main map does not show any of the islets, as the area concerned is not included in it": NR, para 6.23.

60 NR, para 6.118.

61 See *infra*, paras 5.38 *et seq.*

confirms this title of Nicaragua over the islets".[62] That claim rests entirely on the identification of the False Cape Cays as having been claimed by Nicaragua in 1904, in the context of that dispute.[63]

4.50. But as described in the Counter Memorial and further below, Nicaragua did not persist with its claim to False Cape Cays, and it has long abandoned its claim to sovereignty over the False Cape Cays. Nicaragua accepts that those Cays are subject to the sovereignty of Honduras. The islands which Nicaragua does now claim – including Bobel Cay, South Cay, Port Royal Cay and Savanna Cay – were not claimed by Nicaragua in 1904, and were not claimed by Nicaragua until it filed its Memorial in 2001. It is ironic indeed that Nicaragua should now seek to claim sovereignty over these islands by reference to a solitary document in 1904 which makes no claim (or even reference) to the islands in question. The logic of Nicaragua's argument is not immediately apparent.

4.51. In putting forward (belatedly) its version of events, Nicaragua attempts to challenge the events set out in Honduras' Counter Memorial.[64] It does so as follows:

1. Nicaragua claims sovereignty over the islands and cays in question by stating that "in 1869 Nicaragua had already issued legislation on turtle fishing in an island "jurisdictional district" in the Caribbean, subjecting the fisherman to payment of duty which she attempted to collect in or before 1896 [and]Nicaragua went so far, in 1904, as seizing several Cayman schooners."[65]

2. Contrary to the record that demonstrates that Nicaragua made no claims regarding the islands north of the 15th parallel, Nicaragua states that "[t]his is not true."[66] In support it cites a 1904 concession for the exploitation of coconut palms located "on the Atlantic coast and adjacent islands" and a letter listing islands and cays that included False Cape cays located north of the 15th parallel.

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62 NR, para 6.118(b). Nicaragua refers to the dispute with the United Kingdom in Chapter 4 (paras 4.46 to 4.53), and Chapter 6 (paras 6.91, 6.93, 6.108 and 6.115), and it is also the subject of the Addendum (page 211) to the Reply; the relevant annexes are NR, Annexes 28 and 39.

63 NR, para 4.48.

64 HCM, paras 3.9-3.13. See also HCM, Additional Annexes, annexes 171-176.

65 NR, para 4.47.

66 NR, para 4.48.

3. Nicaragua claims it was not "discussing any boundary or maritime jurisdiction with Great Britain," with regard to the turtle fishing dispute and therefore did not have an opportunity to present claims.[67] While challenging Honduras' title Nicaragua argues that besides the Cayman fishermen, it was the Miskito Indians *south of the Coco River* who were involved in turtling off the coast of Nicaragua and in the Caribbean.[68]

4.52. Nicaragua's position is at variance with the facts, and the evidence. As Honduras indicated in the Counter Memorial, a number of species of turtles migrate northwards up the coasts of Nicaragua and Honduras and have been identified in Nicaragua's Mosquito cays, in the cays and islands *north of the 15th parallel*, and in Honduras' Bay Islands of Roatán and Guanaja.[69] According to the Governor of Jamaica the dispute could be defined as 'embracing all the sea, and unoccupied sand banks and reefs, outside the 3 mile limit from the Mosquito Coast ... beginning ...in latitude 13' north to ...latitude 16' north..." Similarly a Memorandum prepared for the British Foreign Office, by the commissioner of the Cayman Islands in 1957 states *inter alia* that "the turtle are taken on the banks, shoals and cays that lie off the Honduran and Nicaraguan coasts."[70]

4.53. In response to (1) above, two points maybe made. Firstly while Nicaragua may have issued legislation on turtle fishing in an island "jurisdictional district" in the Caribbean, it did not identify or demarcate any of the cays and islands now claimed by Nicaragua. As the Counter Memorial makes clear, the decrees in question refer to fishing in the "waters of the republic," in "Nicaraguan territorial waters," "the turtle fisheries of the Caribbean Sea belonging to Nicaragua," " on the Atlantic Coast and adjacent islands" or those "within 3 nautical miles of Nicaraguan territorial waters and the cays, islands or land."[71] Secondly, the seizure of Caymanian vessels by Nicaragua in 1904 was very controversial. While the Nicaraguan government maintained that the schooners were seized within Nicaraguan territorial waters the United Kingdom did not recognize Nicaraguan sovereignty over the area in question. The United Kingdom was able to provide evidence to support its view.[72]

4.54. With regard to (2), there appear to have been two decrees approving contracts between the government and Mr. Gross. The one relied upon by

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67 NR, para 4.49.

68 NR, para 4.51 (emphasis added).

69 HCM, para 3.9 (emphasis added).

70 Memo from The Public Records Office, FO 371/126556.

71 HCM, para 3.11 and note 16. See also HCM, Additional Annexes, annex 172.

72 HCM, Additional Annexes, annex 171.

Nicaragua relating to coconut palms only refers to the False Cape cay, an island not claimed by Nicaragua in this dispute.[73] Another decree set out in the Honduras Counter Memorial relates to turtle fisheries and this pertained to "*the Atlantic coast and adjacent islands.*"[74] There was no exact definition of what amounted to Nicaragua's coast and which adjacent islands were being claimed.[75]

4.55. With regard to (3), Nicaragua argues that it was not "discussing any boundary or maritime jurisdiction with Great Britain," and therefore did not have an opportunity to present claims. This is far from the case. The circumstances leading up to the setting up of the Nicaragua and United Kingdom Mixed Commission are set out in Honduras' Counter Memorial.[76] As stated in the Counter Memorial, while the negotiations were pending, the United Kingdom obtained evidence of the long standing and uninterrupted use of these islands and cays by Caymanian fishermen, which demonstrated that there were no marks of Nicaraguan sovereignty over the cays around the 14th parallel i.e. Sucra cay (Old Mahegan), let alone any north of the 15th parallel.[77]

4.56. The Mixed Commission agreed upon in 1905 by Nicaragua and the United Kingdom was charged with the task of determining which cays and banks were subject to Nicaragua's jurisdiction.[78] As stated in the Counter Memorial, the instructions issued to the Mixed Commission were based on the premise that Nicaragua claimed only the cays in and around the Mosquito cays and Morrison cays, all of which are south of the 15th parallel.[79]

4.57. The resultant bilateral treaty addressing turtle fishing rights of the Cayman Islanders only referred to 'turtle fishing in the territorial waters of Nicaragua' and 'waters and cays in the jurisdiction of Nicaragua', and not purport to extend – and was not in practice applied – to turtle fishing north of parallel 15. This treaty formed the basis for turtle fishing by the Cayman Islanders in Nicaragua until 1960, when the Nicaraguan government

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73 HCM, Additional Annexes, annex 173.

74 HCM, Additional Annexes, annex 172. See also HCM, para 3.11.

75 HCM, Additional Annexes, annex 173.

76 HCM, paras 3.19-3.12 with the relevant additional annexes.

77 HCM, Additional Annexes, annex 171.

78 *Ibid.*

79 The Report of the Commission, identified 11 islands or banks over which Nicaragua had jurisdiction, and none of the islands claimed by Nicaragua in its Memorial in these proceedings was claimed by it in submissions to the Mixed Commission. The northernmost Nicaraguan island mentioned is Edinburgh Cay, at 14' 48 N latitude. HCM, Additional Annexes, annex 175.

decided not to renew the islanders' fishing privileges. Even in the 1950's, at the time of the last extension of the bilateral treaty, Nicaragua had still not defined its territorial jurisdiction or sovereignty over any of the islands it now claims.

4.58. Contrary to Nicaragua's present position that this was not a clear and formal opportunity to present its maritime and boundary claims, the contemporaneous record reflects otherwise. Nicaragua did not claim – and was not recognised by the Mixed Commission as being entitled to claim – jurisdiction over any of the islands, reefs, cays and banks north of parallel 15 which it has claimed for the first time in its Memorial of April 2000.

4.59. A Foreign Office Memorandum states that in 1904 the Nicaraguan government promised to provide an 'exact list of all cays and islands over which jurisdiction was claimed,' but it failed to do so. The British Foreign Office was convinced that the Nicaraguan government would be unable to provide such a list as the Nicaraguan authorities had no reliable chart or information of the area and 'navigation of that coast was performed by the Caribs (*natives of the coast of Honduras*) and Cayman Islanders."[80]

4.60. In Chapter 6 of its Reply, Nicaragua again refers to the turtle fishing dispute in the mistaken belief that it supports the Nicaraguan case. Here it admits that the dispute related to the determination of "title to small islets of the mainland coast of Nicaragua."[81] In an effort to demonstrate that third parties recognise Nicaragua's sovereignty over the islands in question, Nicaragua refers to the turtle fishing dispute and the negotiations with Great Britain as indicative of Great Britain's recognition of Nicaragua's sovereignty over these islands.[82] This questionable assertion is reiterated in the Addendum. The documents annexed to the Reply do not indicate any such recognition. Assuming *arguendo* that Great Britain did recognise Nicaragua's sovereignty over certain islands in the region, this recognition could only have been limited to the Mosquito and Man of War Cays, which were the only cays claimed by Nicaragua.[83]

4.61. The Addendum sets out selective and self-serving quotations from certain documents in the Public Records Office, London. Taken as a whole, these documents in no way support the claim that Nicaragua now seeks to make. The Reply's Annex 39, (a compilation of Foreign Office

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80 HCM, para 3.11 and accompanying notes. Another Memorandum from 1953 states that "the Nicaraguans ...have virtually no interest in the capture of turtle" and Nicaraguan Indians "fished inside the three mile limit, and the Caymanian techniques of capturing the turtle alive was a closed book to them." FO 371/103436.

81 NR, para 6.91. This claim is reiterated in paras 6.93 and 6.108.

82 NR, para 6.115.

83 HCM, paras 3.9-3.13.

Memoranda) in an *Extract from letter from Mr R.H Kennedy dated 27th November 1958* notes with regard to the cays *inter alia*

> "Half Moon Reefs: On the west side there is Logwood Cay and on the south side Burn cay .....These reefs lie east-north-eastward of the mouth of the Rio Wanks which forms the boundary between Nicaragua and Honduras. *They might therefore be claimed to be on the continental shelf of Honduras, depending on how the boundary across the shelf be finally agreed.*" (emphasis added)

4.62. This clearly indicates that Nicaragua is wrong when it asserts that it has for a long period exercised sovereignty over the islands and cays in question and the fact that Third Parties have recognised this sovereignty. It makes clear that the United Kingdom was not aware as at 1958 of any claim by Nicaragua to the islands north of the 15th parallel. Indeed, Nicaragua puts no evidence before the Court to show that it made such a claim. The fact that certain British officials speculated as to what Nicaragua's claim might be is immaterial. The United Kingdom Memorandum also expressly raises the possibility that the cays in question could be part of Honduras. Another Memorandum dated 7 April 1959 states *inter alia* that that in 1959 the British Colonial Office was "still considering with the Foreign Office and the Admiralty the question of the extent of Nicaraguan territorial waters."[84]

4.63. Nicaragua's Addendum states that "in order to fish in Nicaraguan waters [the Caymanian fishermen] are first obliged to go to Cape Gracias in order to formally enter Nicaraguan territorial waters." This clearly implies that none of the area between the Cayman Islands and Cape Gracias (including waters north of the 15th parallel) were considered to be "Nicaraguan territorial waters".

E. CONCLUSIONS

4.64. In summary, the evidence which has been tendered by Nicaragua is insufficient to establish a claim to title over the islands north of the 15th parallel. Nicaragua's practice in respect of oil concessions has been consistent in recognising the 15th parallel as the northern limit of such concessions, and it has never granted any concession north of that parallel or over any of the islands. It has been unable to produce a single fisheries license or concession to establish regulation of fisheries activity north of the 15th parallel. It has produced no evidence of any third party recognition of its sovereignty over any of the islands. It has not demonstrated that it has conducted any public works on or around the islands, or that it has placed

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84 NR, annex 39.

any navigational markers on or around the islands. It has introduced no evidence to prove that it has ever applied or enforced any of its laws (administrative, criminal, civil) in or around the islands or at any place north of the 15th parallel, or that it has ever regulated immigration or labour in any are north of the 15th parallel. Its own cartographic evidence is flatly inconsistent with a claim to sovereignty over the islands. And it has provided no evidence that it has ever protested Honduran *effectivités* over the islands that it now claims.

4.65. In these circumstances and on its own merits Nicaragua's claim to sovereignty over islands north of the 15th parallel is implausible and unsupported by Nicaragua's evidence. As compared with the evidence of Honduran *effectivités* there is no basis for any such claim.

CHAPTER 5:

HONDURAN *EFFECTIVITÉS* AND SOVEREIGNTY OVER THE ISLANDS

5.01. Chapter 4 of this Rejoinder demonstrated the paucity of evidence upon which Nicaragua has relied to support its claim to sovereignty over the insular and maritime areas north of the 15th parallel. In Honduras' submission that claim is implausible on its own merits. It becomes completely untenable as compared with the substantial evidence on *effectivités* put forward by Honduras in its Counter Memorial. This Chapter addresses Nicaragua's failed effort to pick at the compelling evidence put forward by Honduras in its Counter Memorial demonstrating its longstanding exercise of sovereign authority.

5.02. In its Counter Memorial, Honduras set forth facts in reliance upon the principles and standards applied by the International Court of Justice. The Counter Memorial confirmed Honduras' effective administration over the insular and maritime areas north of the 15th parallel. This is particularly clear in respect of three matters which the Court has treated as being especially relevant: the grant of oil concessions, the grant of fisheries licences and concessions, and the construction by public authorities of markers and other navigational aids. These were not the only indicators of sovereign authority, however. The Counter Memorial demonstrated Honduras' longstanding application and enforcement of laws and regulation and the public administration of private economic activities in that area.[1] Honduras demonstrated that its nationals live and work on the islands north of the 15th parallel, and that foreign nationals (including Nicaraguans) live and work on the islands only where duly authorised by the Honduran authorities. In sum, the Counter Memorial demonstrated that the 15th parallel was long treated as the traditional boundary[2] as well as Honduras' effective administration, relying in particular on evidence that Honduras, within the insular and maritime area north of the 15th parallel:

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1 HCM, Chapter 6.

2 See also Statement of Mr Arnulfo Pineda Lopez and Luis Andres Torres Rosales, HR, annex 249.

- Exercises administrative control over, and applies Honduran public and administrative legislation and laws;[3]
- Applies and enforces its criminal and civil laws in the area;[4]
- Regulates the exploration and exploitation of oil and gas activities;[5]
- Regulates fisheries activities;[6]
- Regulates immigration;[7]
- Carries out military and naval patrols and search and rescue operations;[8] and
- Engages in public works and scientific surveys.[9]

5.03. In its reply Nicaragua has attempted to respond to this clear and compelling evidence of longstanding Honduran *effectivités*. The following section responds to these Nicaraguan arguments. It does so by reference to the material which Nicaragua addressed, as well as that which it ignored, and the absence of any evidence of Nicaraguan protest at Honduran *effectivités*.[10] And it does so by reference to additional materials (included in the annexes to this Rejoinder) which support and strengthen Honduras' case. That new material includes:

- Honduran legislation dating back to 1936 which expressly mentions one of the islands now claimed by Nicaragua;[11]
- Fisheries concessions dating back to the 1970's which refer expressly to the 15th parallel as the southern limit of the concessions;[12]

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3 HCM, paras. 6.9-6.17.

4 HCM, paras. 6.18-6.23.

5 HCM, paras. 6.24-6.28.

6 HCM, paras. 6.29-6.50.

7 HCM, paras. 6.51-6.59.

8 HCM, paras. 6.60-6.63.

9 HCM, paras. 6.64-6.67.

10 See also in this regard the Note of Ministry of Foreign Relations of Colombia, 28 February 2003, HR, annex 236, confirming the absence of protest by Nicaragua in respect of Colombian activities relating to areas north of the 15th parallel.

11 The Agrarian Law of 1936, HR, vol 2, annex, 242. See also the 1950 Agrarian Law, HR, annex 243.

12 HR, Plates 38, 39 and 40.

- Further material relating to oil concessions which demonstrates the 15th parallel was treated by both Parties as the limit of their respective concessions;[13] and
- Further witness statements which confirm *inter alia* longstanding naval patrols by Honduras around the islands.[14]

A. HONDURAN OIL AND GAS CONCESSIONS

5.04. In its Counter Memorial Honduras provided incontrovertible evidence as to its longstanding practice (dating back to the 1960's) of granting oil and gas concessions in the maritime and insular areas north of the 15th parallel, and establishing the southernmost limits of its oil and gas concessions at parallel 14°59.8′.[15] The oil concessions encompassed not only the maritime areas but also the islands, and were based on the mutual understanding of Honduras and Nicaragua that the 15th parallel was the location of the maritime boundary between the two States, as the witness statements of the President of Honduras and relevant officials at the time make clear.[16] The connection between the oil concessions and activities on the islands is demonstrated by the work carried out by an oil company (pursuant to Honduran government approval) on Bobel Cay in the 1960's and 1970's.[17]

5.05. In its Reply Nicaragua has not challenged this evidence of Honduran practice granting oil concessions.

5.06. Moreover, Nicaragua has provided no evidence that it has ever protested Honduras' practice of granting concessions in the area now claimed by Nicaragua, or of authorizing oil and gas related activity in these concession areas. Nicaragua does not explain how its failure to protest at any time in the 1960's and 1970's, or at any time subsequently, can be consistent with its claim "there can be no doubt that the title to the islets in dispute rests with Nicaragua".[18]

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13 HR, annex 252.

14 HR, see for example, annex, 251.

15 HCM, para 6.26 and 6.28.

16 See Statement of Mr Oswaldo Lopez Arellano (President of Honduras, 1965-1971 and 1972-1975), HR, annex 246; Statement of Mr Rafael Leonardo Callejas Romero who served as Under Secretary of State and Secretary of State in the Honduran Ministry of Natural Resources from 1972-1980, HR, annex 247; and Statement of Mr Reniery Elvir Aceituno, Director General of the Office of the Bureau of Mines and Hydrocarbons at the Honduran Ministry of Natural Resources (1968-1974), HR, annex 248.

17 See below at para 5.14; and HR Annex 264.

18 NR, para 6.118.

5.07. Faced with such overwhelming evidence, Nicaragua chooses instead to focus on a small number of its own concessions that do not refer expressly to the 15th parallel but do refer to the boundary with Honduras as not having been determined. In fact, and as explained above, none of these concessions in actual practice extends beyond the 15th parallel.[19] Nevertheless, to make its case, Nicaragua argues that "[e]ven a minimal extension of one of the Nicaraguan concession areas northward of this parallel would have placed the islets in dispute inside the concession areas concerned".[20] That may be theoretically true. But it has never happened: the evidence before the Court shows that Nicaragua has never extended any of its concessions to any point or location north of the 15th parallel. And the record shows that the islands fall within the area of Honduran oil concessions: see for example, Plate 11 of the Honduras Counter Memorial.

5.08. Nicaragua also seeks to challenge Honduras' claim by relying on selected extracts of the *Eritrea/Yemen* arbitration. In particular, it relies on paragraph 423 of the Award of 9 October 1998.[21] This is said to support the proposition that Nicaragua's failure to grant concessions north of the 15th parallel and "stopping short of certain islands" should not "carry any implication for the entitlement to the islands in dispute".[22] Nicaragua's approach is misconceived. The *Eritrea/Yemen* Award strongly supports Honduras' approach, and its claim, for three reasons.

5.09. First, Nicaragua's argument ignores the fact that Honduras' concessions do extend to and encompass the islands in question, and have never been the subject of protest by Nicaragua.[23]

5.10. Second, in the paragraph in question, the Arbitration Tribunal noted the existence of a disclaimer in the relevant Ethiopian concessions. The disclaimer stated:

> "nothing said herein above is to be deemed to affect or prejudice in any way whatsoever the rights of the Government in respect of its sovereign rights over any of the islands or the seabed and subsoil of the submarine area beneath the high seas contiguous to its territorial waters or areas within its economic zone".

The Nicaraguan concessions contain no such clause. They limit themselves, when establishing the northern border of some of their oil concessions, to referring to the "intersection with the border line with the Republic of

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19 *Supra*, para 4.20 *et seq.*

20 NR, para 6.38.

21 *Eritrea/Yemen (Phase I)*, Award, 114 ILR 1.

22 NR, para 6.39.

23 HCM, Plates 11 and 13.

Honduras, which has not been determined."[24] There is no mention of any islands, or any reservation in respect of sovereignty or sovereign rights north of the 15th parallel.

5.11. Third, and most significantly, the Arbitration Tribunal in *Eritrea/Yemen* proceeded on the basis that the Ethiopian concessions merely reflected "technological and commercial realities", namely the inability to exploit oil in a "deep trough that runs through the middle of the Red Sea". Nicaragua has adduced no evidence to show that any equivalent technological or commercial reality prevented it from granting concessions north of the 15th parallel. Indeed, on its own argument as to the so-called "Nicaraguan Rise",[25] the area north of the 15th parallel constitutes an unbroken continuation of the relevant continental shelf, and can have posed no impediment to exploration or exploitation north of the 15th parallel. This is confirmed by Honduras' concessions in the area in question. It is confirmed by the three Honduran wells drilled without Nicaraguan protest in the area now claimed by Nicaragua. It is also confirmed by the joint Coco Marina project which straddles the 15th parallel and which necessarily required the authorisation of both States. This is readily apparent from Plates 35 and 36. There are no "technological and commercial realities" which have prevented Nicaragua from offering concessions north of the 15th parallel.

5.12. There is a further point. Nicaragua has failed to refer the Court to the entirety of paragraph 423 of the Arbitration Tribunal's Award. In particular, it omits the concluding sentence of that paragraph, in which the Tribunal states: "But Ethiopia's contract with International Petroleum is important." The Arbitration Tribunal explains the importance of this contract in the following terms:

> "If Yemen had secured and read Amoco's Annual Reports ... and if Yemen had evinced the alertness it did in respect of Eritrea's contracts of 1995 and 1996, it would have seen that Ethiopia claimed the right to contract for the exploration, development and production of oil in an area claimed as its territory that included some or virtually all of Greater Hanish islands. [...]
>
> [I]t has been demonstrated that ... Ethiopia did grant a concession including much or virtually all of the Hanish Islands, and that Yemen failed to protest that agreement. It is of further interest that the map attached to the Production Sharing Agreement speaks of drawing the

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24 See, e.g., NR, vol 2, annex 18a.

25 NM, p 161.

boundary along the international median line between Yemen and Ethiopia."[26]

This conclusion applies equally in the present case. Honduras has long claimed the right to contract for the exploration, development and production of oil in the area north of the 15th parallel which is now claimed by Nicaragua as its territory (including all of the islands which Nicaragua has put into dispute). Honduras has granted concessions and conducted drilling and other activities in the area, encompassing all of these islands.[27] These Hondurans acts are public and Nicaragua has been aware of them for decades. Yet Nicaragua has never protested any of these activities or agreements, including those which expressly recognised a boundary along the 15th parallel.

5.13. In addition to the evidence included in its Counter Memorial, Honduras here refers to further evidence which confirms its exercise of sovereignty over the area north of the 15th parallel, including the islands, in the context of the grant of oil concessions. The evidence is conclusive in relation to the joint operation of the Coco Marina well, located on the 15th parallel. Pursuant to the Petroleum Law of 1962 and other Honduran legislation, the Union Oil Company of Honduras submitted periodical reports to the Ministry of Natural Resources of Honduras in relation to the Coco Marina well. In these reports Union Oil explains that the joint operation took place "in the area of the maritime boundary in the Caribbean Sea between Honduras and Nicaragua" (i.e. respectively on the Honduran and Nicaraguan sides of the 15th parallel).[28] The reports also confirm that the joint operations had been approved by the Governments of Honduras and Nicaragua with the understanding that expenses incurred in such operation would be covered in equal terms by Union Honduras and Union Nicaragua.[29] In these circumstances there can be no doubt that Nicaragua had knowledge of the Honduran authorisation of the operations on the northern side of the 15th parallel, and recognised Honduras' sovereign rights in that area.

5.14. The activities associated with oil exploration on the Honduran side were also closely connected with activities on the islands. For example, in respect of Honduran authorised exploration activities carried out for Union

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26 *Supra* n. 21, Award, para 433-4.

27 Oil concession granted to Pure Oil Company of Honduras in 1967 (later on extended to its successor Union Oil Company of Honduras) comprised, in lot No. 8, cays Bobel, Savanna, South and Port Royal. HCM, vol 2, annex 192 and HCM, vol 1, Plates 11 and 13.

28 Report from Union Oil Company of Honduras to the Minister of Natural Resources of Honduras, 6 June 1969, HR, annex 252.

29 *Ibid.*

Plate 35: Location of Coco Marina within Honduran Oil Concession Area

DURAN OIL CONCESSION AREA

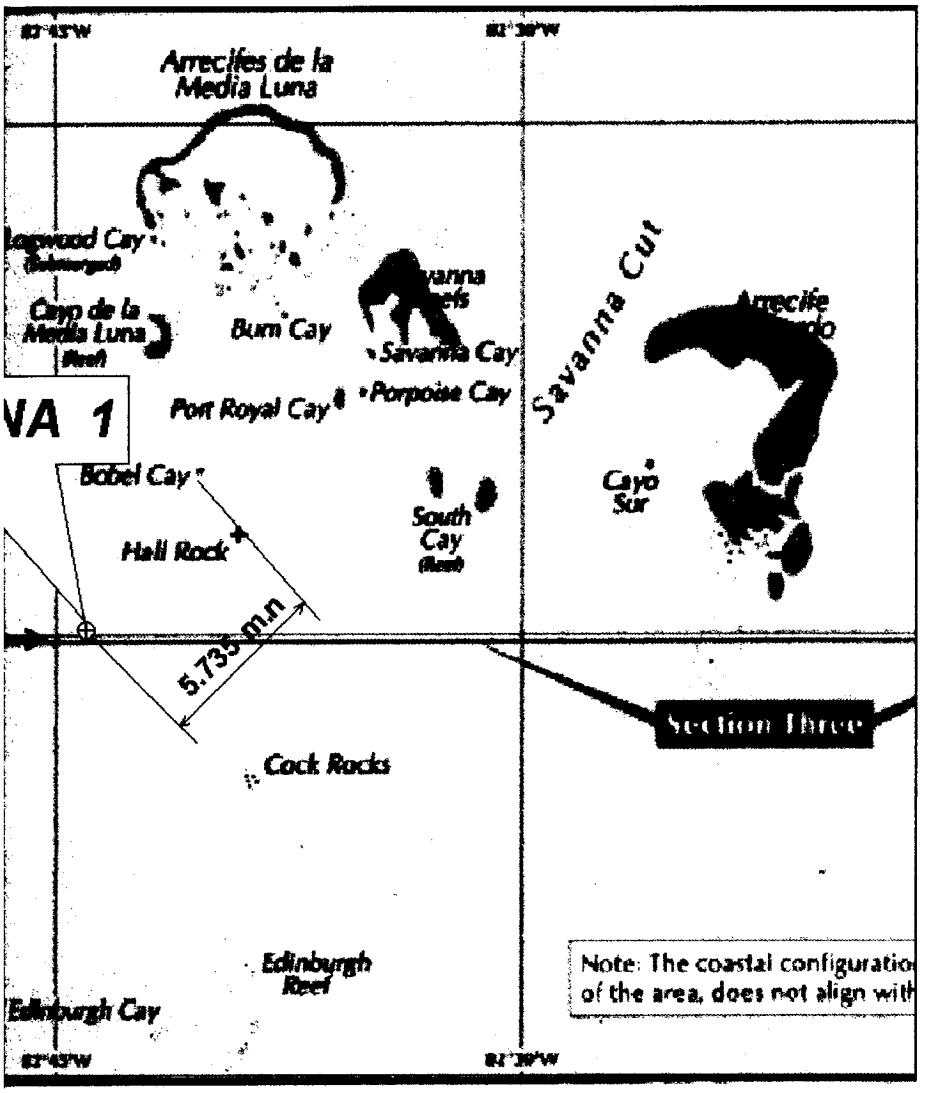
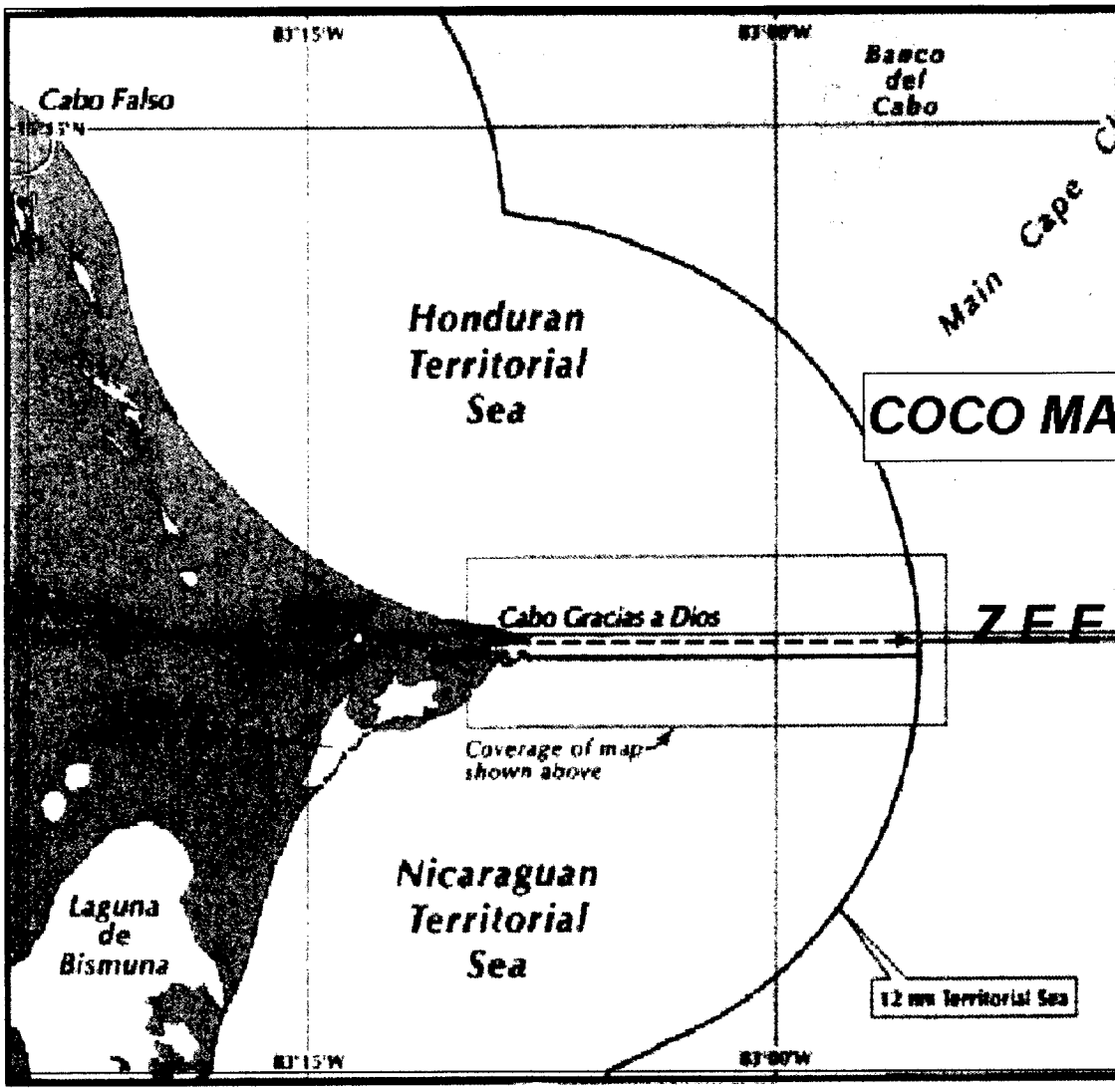


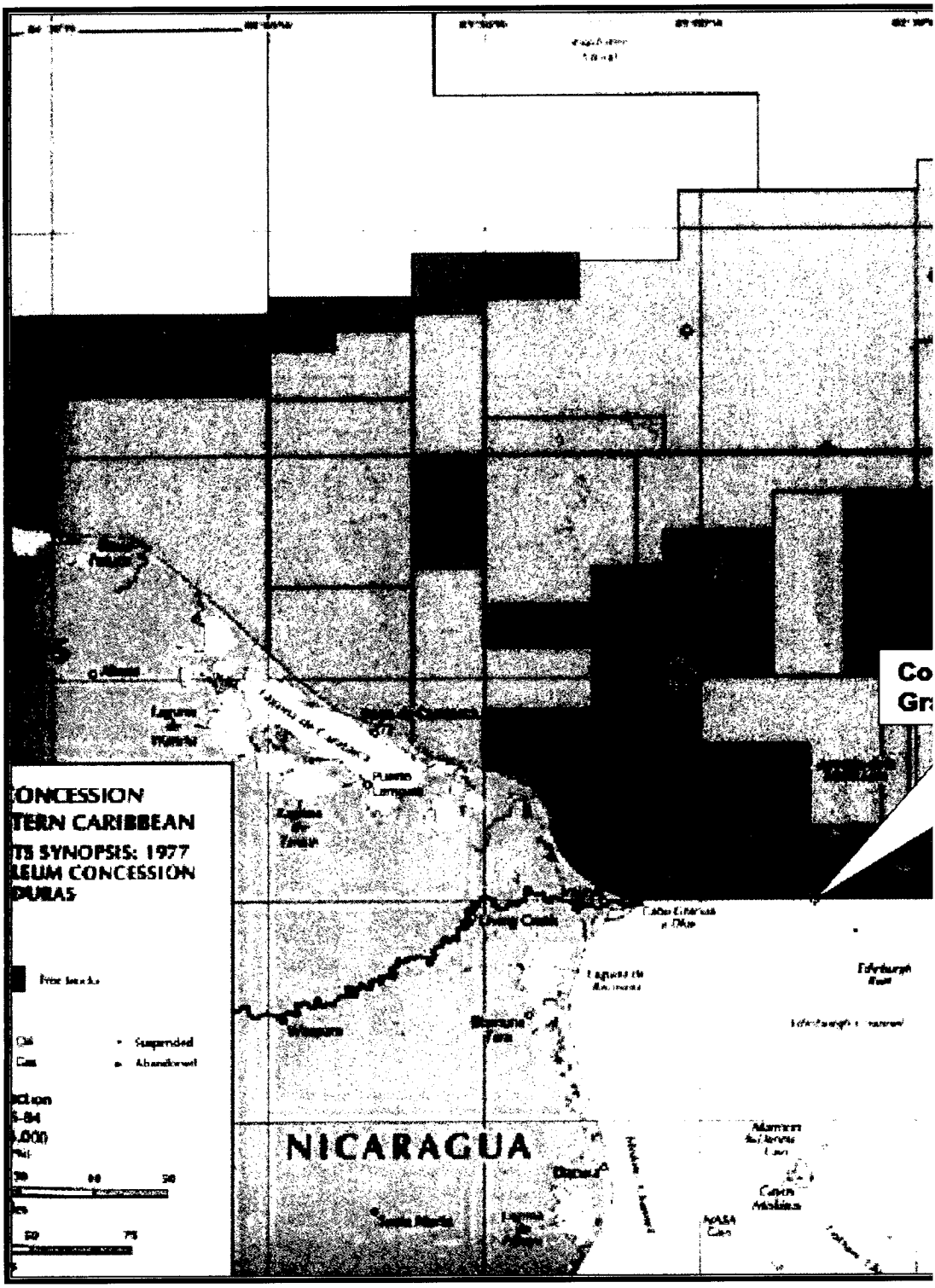
PLATE 35: LOCATION OF COCO MARINA WITHIN



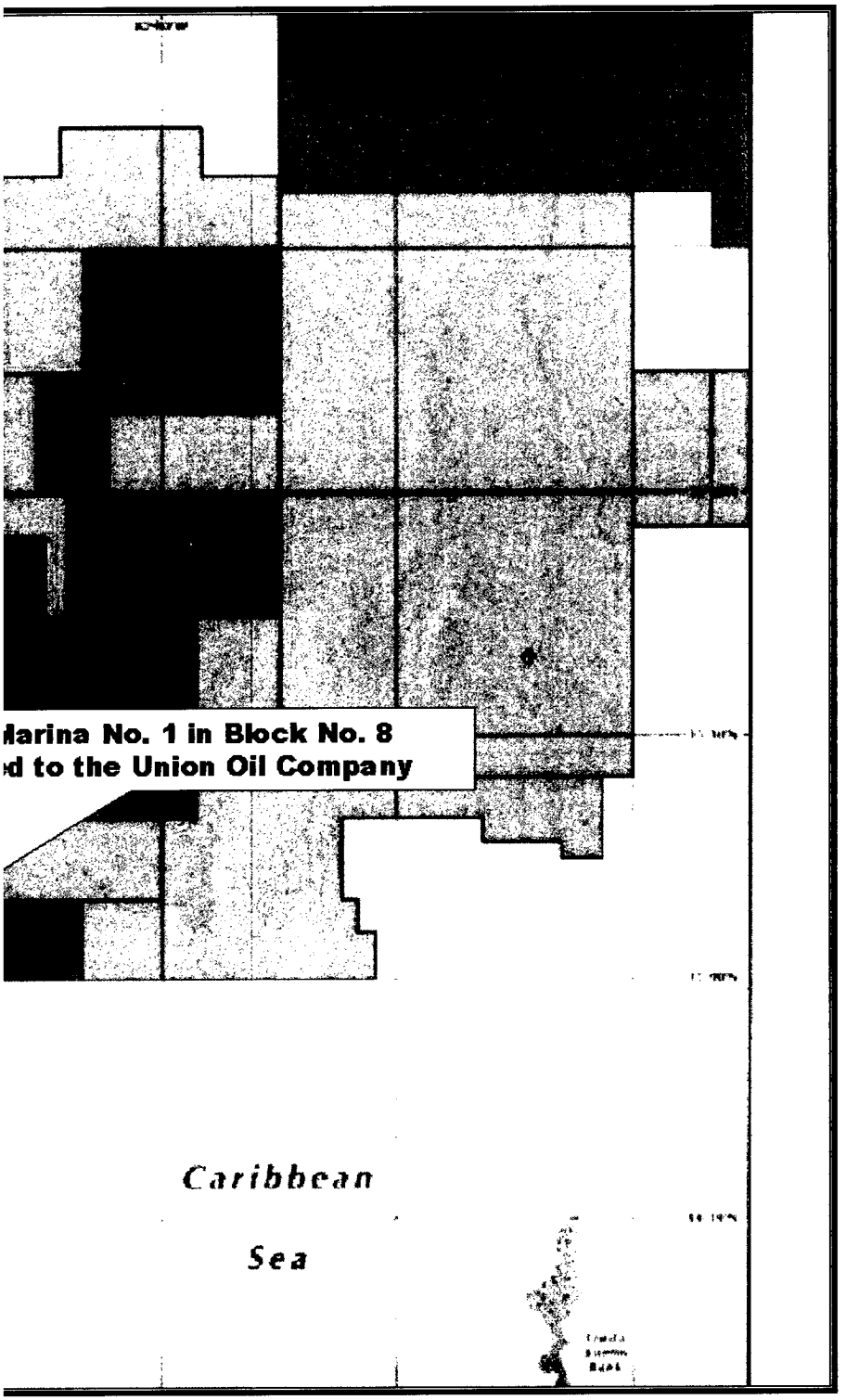
Coco Marina	**Lat. 15°00´00˝N**
	Long. 82°43´29˝W
Bobel Cay	**Lat. 15°04´54.˝420**
	Long. 82°40´30.˝9

Plate 36: Location of Coco Marina Oil Concession Granted by Honduras (within Territorial Waters of Bobel Cay)

PLATE 36: LOCATION OF COCO MARINA OIL CONCESSION GRANTED B



NDURAS (WITHIN TERRITORIAL WATERS OF BOBEL CAY)



Oil Company in a concession north of the 15th parallel, that company retained the services of Geophysical Service Inc. to place antennae on certain islands.[30] The antennae were placed on base stations as part of a local geodetic network in that part of Honduras, to assist in drilling activity pursuant to the concessions. These activities began around 1969 and involved the placement of antennae in 1972 (River Coco island) and 1975 (Bobel Cay). The antenna on Bobel Cay was ten metres high. Periodical reports submitted by Union Oil to Honduran authorities twice a year also referred to these activities, indicating also the payment of taxes to Honduras in respect of these activities.[31] A photograph is available at Annex 264. This provides a further example of the public works carried out pursuant to Honduran authorisations, on the islands now claimed by Nicaragua.

5.15. Against this background it is clear that Nicaragua is not in a position to challenge Honduras' arguments that the oil concessions represent a tacit agreement on the part of both States as to the existence of a boundary along the 15th parallel. The practice under the oil concessions – including Nicaragua's failure to protest – points decisively in favour of Honduras' claim that a traditional line exists and is tacitly agreed to in the practice of the Parties.

B. HONDURAS REGULATES FISHERIES ACTIVITIES NORTH OF THE 15TH PARALLEL

5.16. In its Counter Memorial Honduras provided extensive evidence demonstrating its long-standing regulation of fisheries activities in the maritime and insular area north of the 15th parallel. This material indicates fisheries activities which have taken place "on the basis of official regulations or under governmental authority".[32] The Court has affirmed that such activity is of a nature as to give rise to *effectivités*. The contrary position articulated by Nicaragua is not tenable.[33]

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30 Geophysical Service Inc., Final Report of GEOFIX Survey Honduras conducted for Union Oil Company, April-May 1975. HR, vol 2, annex 264.

31 See, e.g., Report from Union Oil Company of Honduras to the Minister of Natural Resources of Honduras of 26 November 1975, HR, annex 254. See also Report from Union Oil Corporation of Honduras to the Minister of Natural Resources of Honduras of 6 June 1969, HR annex 252, and Report from Union Oil Company of Honduras to the Minister of Natural Resources of Honduras of 19 March 1979, HR annex 253, for another example.

32 Supra, para 2.28.

33 NR, paras 6.49, 6.52 and 6.107.

5.17. Nicaragua devotes considerable effort to attacking this evidence. This amounts to a recognition of the extent to which Honduras' evidence of long-standing regulatory activity in and around the islands undermines Nicaragua's recently discovered claim that "title to the islets in dispute rests with Nicaragua".[34] Indeed, the fact that Nicaragua has gone to such lengths to respond to the Honduran evidence is incompatible with that claim. This is all the more so having regard to the fact that Nicaragua has not been able to provide any fisheries licences or concessions of its own. Honduras has taken the opportunity to introduce further materials confirming the merits of its arguments: see below at paras 5.22 *et seq*.

5.18. Honduras will not respond at this stage to each of the claims raised by Nicaragua, a great number of which raise "smokescreens" intended to cloud the substantive arguments (for example, Nicaragua's failure to engage substantively with the evidence is reflected in the comments concerning the two *bitácoras*, which are not substantive in character).[35] Nevertheless certain responses are called for.

5.19. Three preliminary points may be made. The first is that Nicaragua challenges the sufficiency of the evidence to support Honduras' claim to *effectivités*, not its authenticity. Second, Nicaragua provides no evidence whatsoever to indicate that it has ever protested any of the fisheries activity described in the Counter Memorial. And third, there are several matters on which Nicaragua remains silent: for example, Nicaragua is silent about evidence provided in the Honduran Counter Memorial referring to fishing licences having been obtained from Honduran authorities as early as the 1950s.[36]

5.20. As regards the grant by Honduras of fisheries concessions (to companies) and licenses (to individuals), it is plain that they relate to the area directly north of the 15th parallel, including that around the islands in question. This is clear from the text of the documents and the various witness statements.[37] It is simply wrong for Nicaragua to assert that the regulation of fishing activity is not relevant to title to the islands.[38] And it

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34 NR, para 6.118.

35 Nicaragua points out a typing mistake, and criticises the fact that not all *bitácoras* represent the same area nor the same geographic features, NR, vol 1, para 5.39 and 6.50. Precisely, different *bitácoras* are issued to fish in different areas, and only need to reflect most relevant geographical features. It should be noted that in Honduran *bitácoras* while latitude differs, parallel 15th is always the southernmost limit represented. See HCM, vol 3, Plate 31.

36 Statement of Daniel Santos Solabarrieta Armayo, HCM, vol 2, annex 82.

37 HCM, vol 1, paras. 6.34-6.36, 6.43-6.44, 6.50, and, e.g., HCM, vol 2, annexes 66, 67, 74, 77, 80, 84, 87, 88, 89, 90, 91, 92, and 93.

38 NR, para 6.49.

misses the point for Nicaragua to assert that Honduras has not produced any fisheries legislation or licenses "making reference to the islets".[39] By focusing on individual instruments or statements Nicaragua loses sight of the overall picture, which describes a longstanding fishery activity in the area in question regulated by the public authorities of Honduras. In respect of the evidence included in the Counter Memorial, Nicaragua states that Honduran fishing concessions did not state that the 15th parallel was the boundary with Nicaragua. However, Nicaragua does not dispute that (1) the southernmost limit mentioned in these concessions was the Coco River, or (2) that fisheries activities were to occur in the seas and not in mainland, or (3) that the direction to be followed was "northbound" (and not, for example, "southeast"). It follows that the only possible conclusion to be drawn from these concessions and licenses is that the southernmost boundary of the concessions must be the 15th parallel from the mouth of the Coco River.

5.21. Having challenged Honduras' fishing licenses and concessions, one would have expected Nicaragua to provide evidence of its own, in the area north of the 15th parallel, or to provide copies of its own *bitácoras* in that area. But it has not done so. As indicated above, there is no evidence before the Court of Nicaraguan licenses or concessions which refer to the islands or which explicitly or implicitly encompass waters north of the 15th parallel.

5.22. Against the paucity of Nicaraguan material, the examples of Honduran evidence set forth in the Counter Memorial plainly meet the criteria set by the International Court. Honduras does not consider it necessary to overwhelm the Court with concessions, licenses and witness statements. But lest it be said that what has already been provided is not sufficient, it is appropriate here to provide a few more examples of concessions granting rights specifically over the area now claimed by Nicaragua. In no case has Nicaragua protested the publication of these authorizations or any activities carried out pursuant to them.

5.23. Three Honduran fisheries concessions granted between 1975 and 1979 are annexed. Plates 38 to 40 represent the areas covered by these three fishing concessions. The first one was published in August 1975. It grants fishing rights over an area expressly delimited to include a southernmost limit at the 15th parallel.[40] The second authorization was published in January 1977. It includes express reference to a southern limit of the fishing concession along the 15th parallel.[41] A third concession dates back to July

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39 *Ibid.*

40 HR, vol 2, annex 256.

41 Resolution of the Ministry of Natural Resources of Honduras of 7 January 1977 concerning an application for extension of a provisional fishing permit submitted by

1976 and was published in March 1979. It too authorizes fisheries activities in an area north of the 15th parallel which Nicaragua now claims.[42] These concessions encompass Bobel Cay, South Cay, Port Royal and Savanna Cay.

5.24. In its Counter Memorial, Honduras introduced numerous witness statements which attest to fisheries activities authorised by Honduras. In response, Nicaragua invokes the *Eritrea/Yemen* arbitration, where both sides in the dispute had submitted "numerous witness statements" and "interesting evidence".[43] Once again Nicaragua cites an authority which does not assist its case. As the Arbitration Tribunal put it:

> "For State activity capable of establishing a claim for sovereignty, the Tribunal must look to the State licensing and enforcement activities concerning fishing described above".[44]

Beyond the licenses and concessions which have been produced (see above), this is precisely the evidence introduced by the twenty eight Honduran witness statements. These do not provide evidence of private activity: they attest to the fact that the fisheries activities which were carried out in the area north of the 15th parallel were licensed by Honduras, and also that they have been the subject of enforcement by the Honduran authorities. These statements are to be taken with the other evidence on fishing concessions, registration of vessels, operation of naval patrols, and other related activities – all of them the kind of "licensing and enforcement activities" considered acceptable by the Arbitral Tribunal in *Eritrea/Yemen*.

5.25. Nicaragua chooses to ignore this aspect of the witness statements. The point may be illustrated by the following examples:

- Maurice Loy Gowe, a Jamaican fisherman who has been fishing around Savanna Cay for more than thirty years, states:

> "I fish here because I have been provided with a licence by the Honduran fishing authorities. I always go to Puerto Lempira to renewal my licence. [...] The exporting of fish to Jamaica is allowed through a licence issued by the Honduran Government. [...] These houses [on Savanna Cay]

"Pescados y Mariscos de Honduras, S.A. de C.V." (PYMHSA). HR, vol 2, annex 258. See also Request by PYMHSA, Official Gazette of Honduras No. 21.626 of 1 July 1975, HR, vol 2, annex 257.

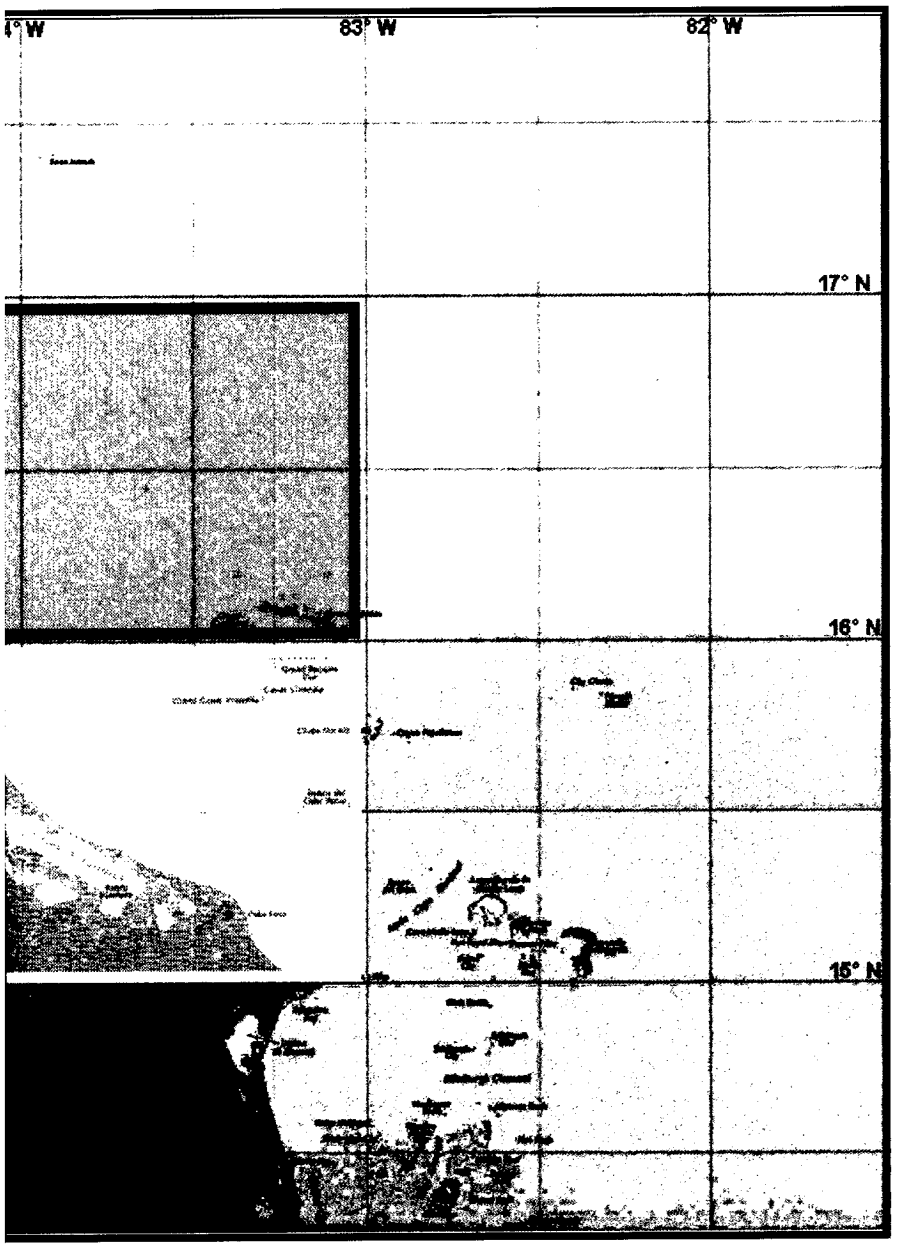
42 Agreement No. 469 of 12 July 1976, Official Gazette of Honduras No. 22.763 of 28 March 1979. HR, vol 2, annex 259.

43 NR, para 6.52. The six witness statements submitted by Nicaragua can hardly be described as "numerous".

44 *Eritrea/Yemen (Phase I)*, Award, 114 ILR 1, para 315.

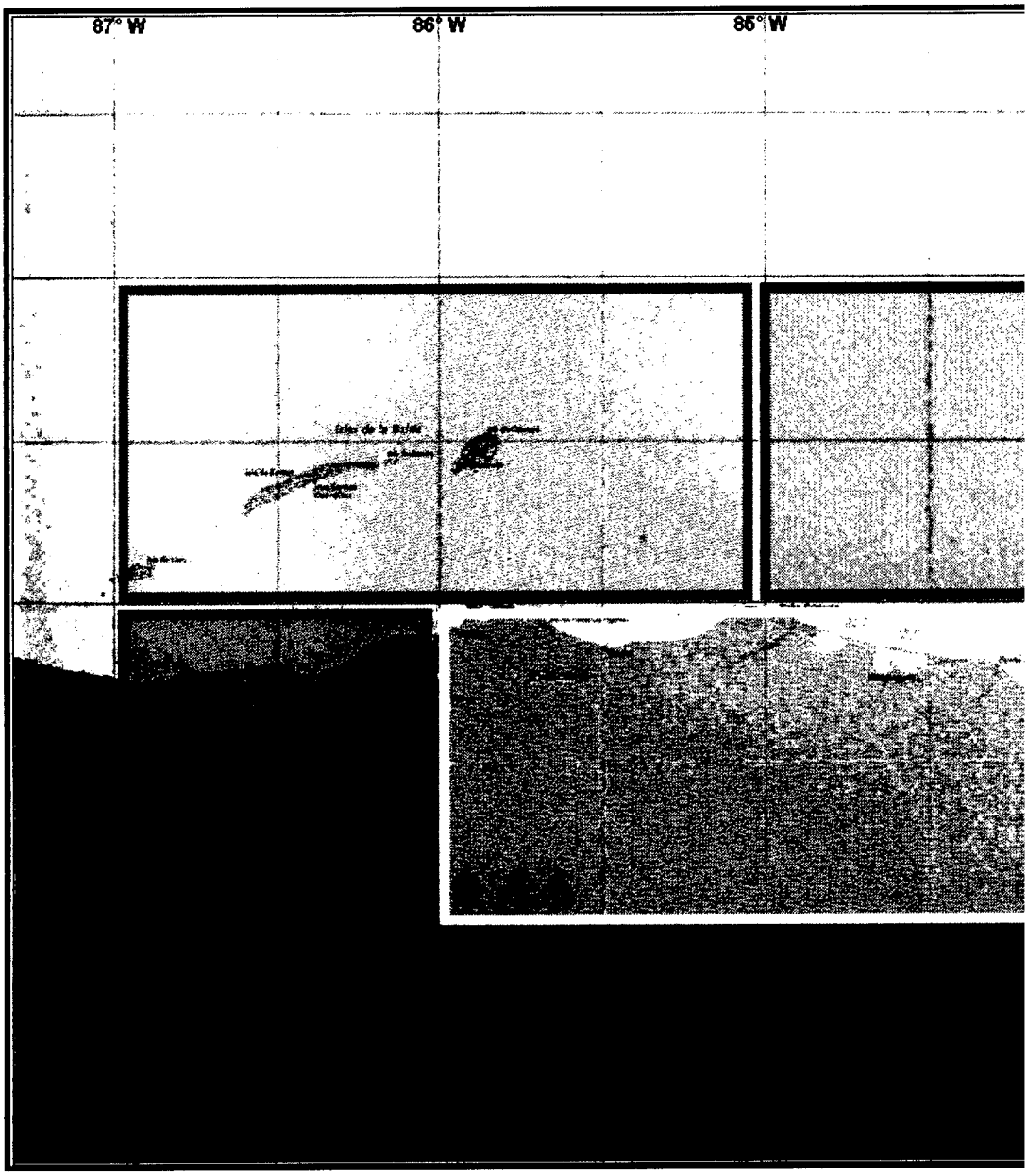
Plate 38: Limits of Fishing Areas Covered by Concession Granted by Honduras to Empresa del Mar, S.A. de C.V., 1975

NCESSION GRANTED BY HONDURAS
: C.V., 1975



tte of Honduras of 1 August 1975

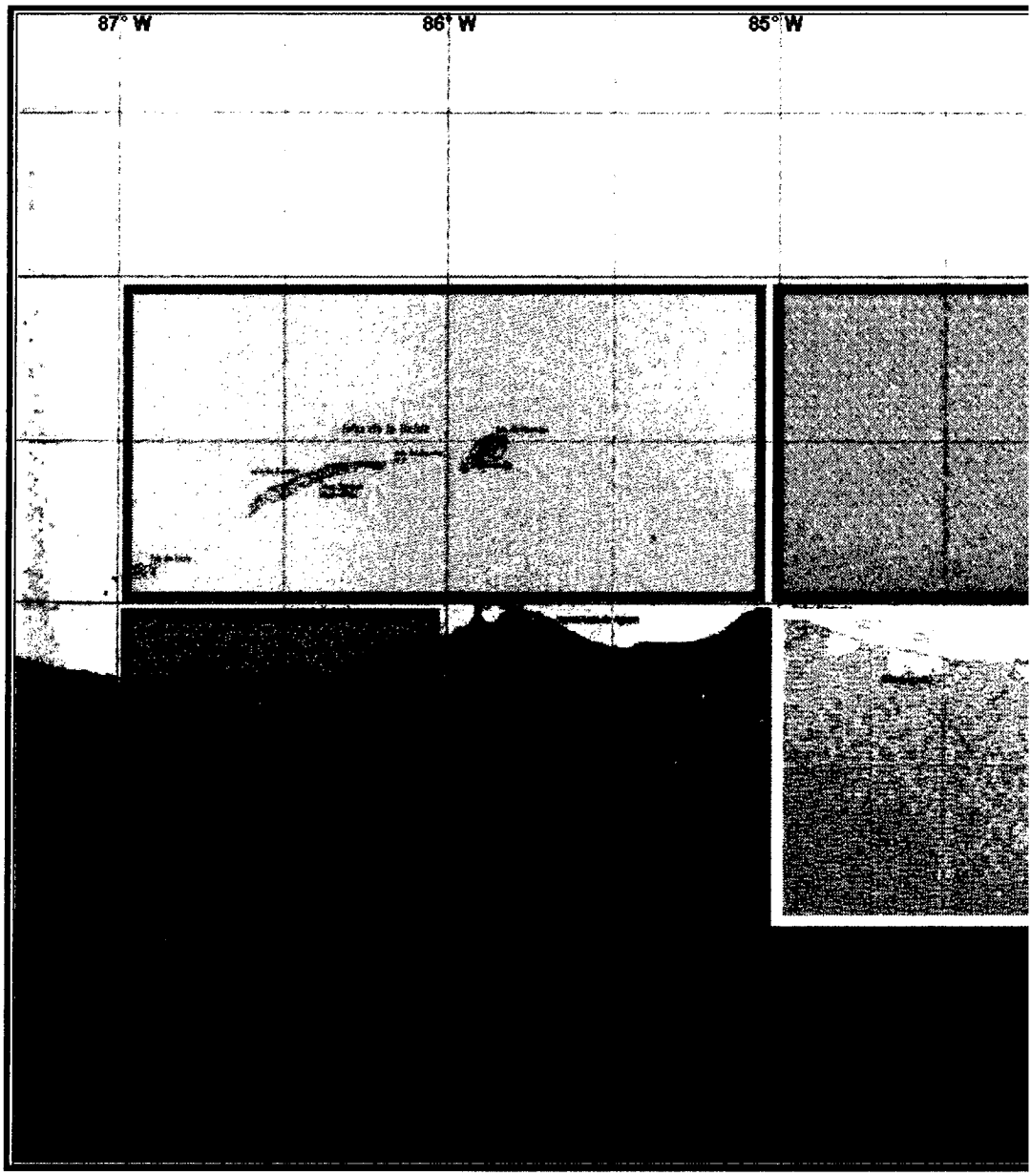
PLATE 38: LIMITS OF FISHING AREAS COVERED BY
TO EMPRESA DEL MAR, S.A



Source: Agreement No. 287 of 2 June 1975, Official

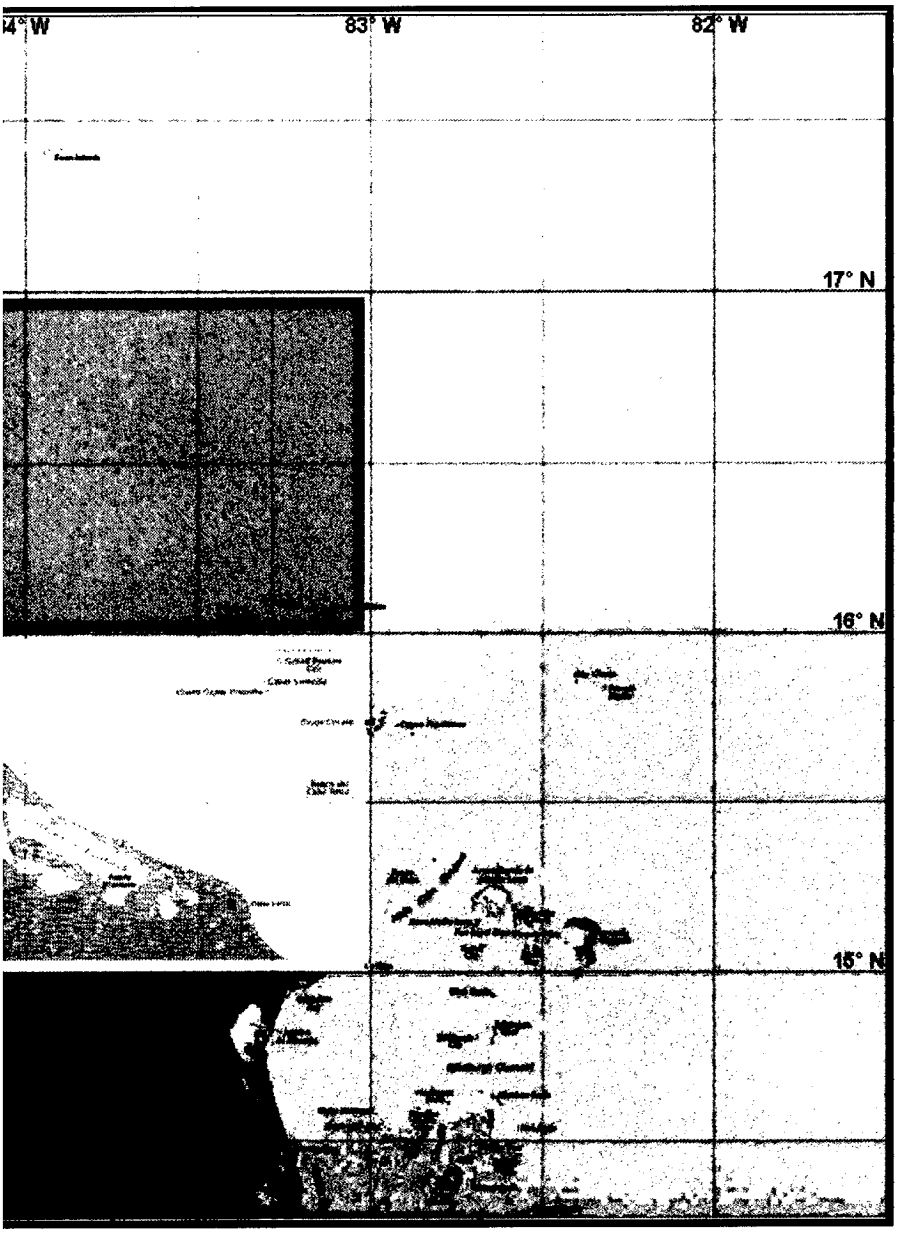
Plate 39: Limits of Fishing Areas Covered by Concession Granted by Honduras to La Sociedad Mariscos de Bahia S.A. de C.V., 1976

PLATE 39: LIMITS OF FISHING AREA COVERED BY
TO LA SOCIEDAD MARISCOS DE B



Source: Agreement No. 469 of 12 July 1976, Official

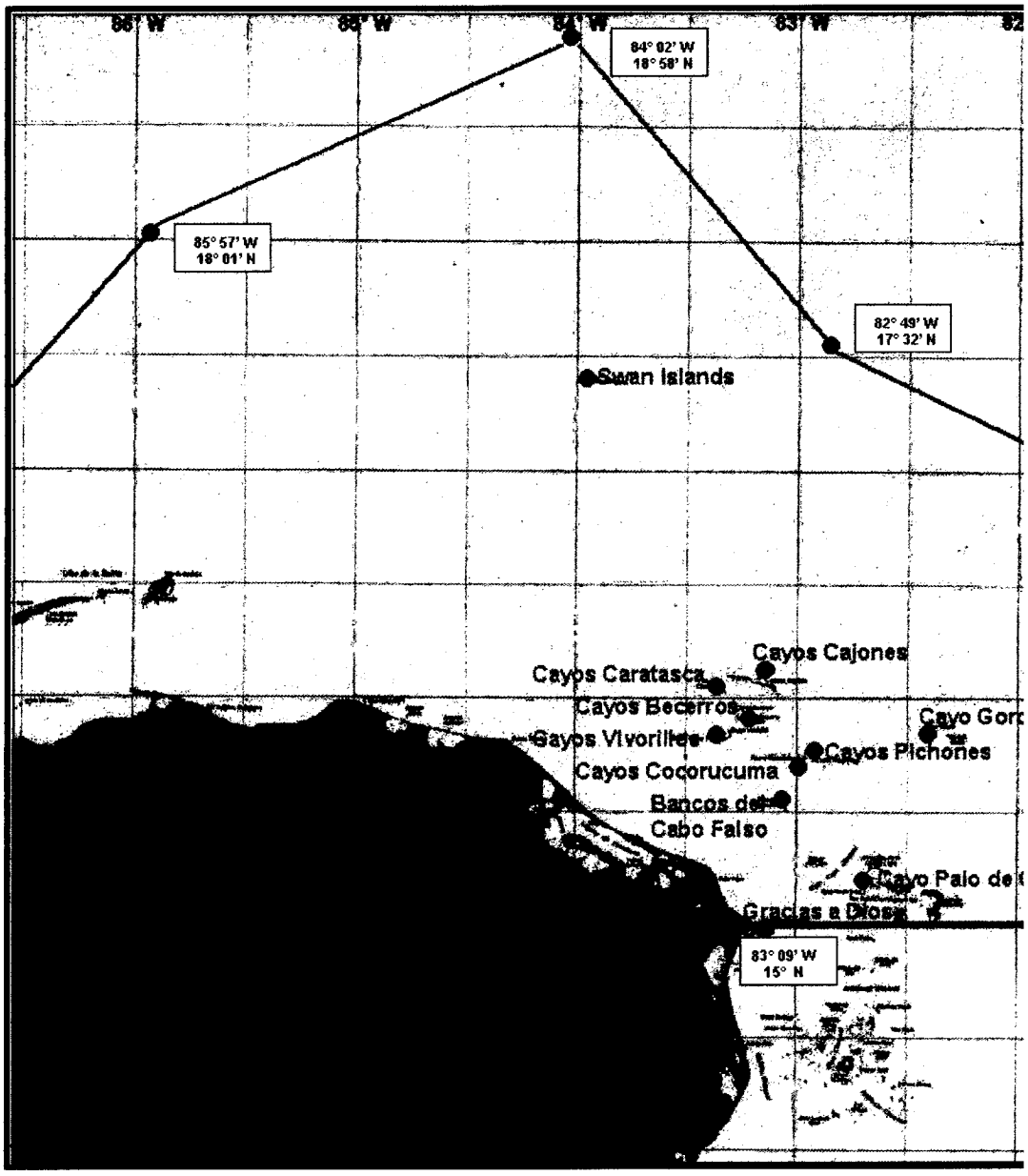
NCESSION GRANTED BY HONDURAS
, S.A. DE C.V., 1976



tte of Honduras of 28 March 1979

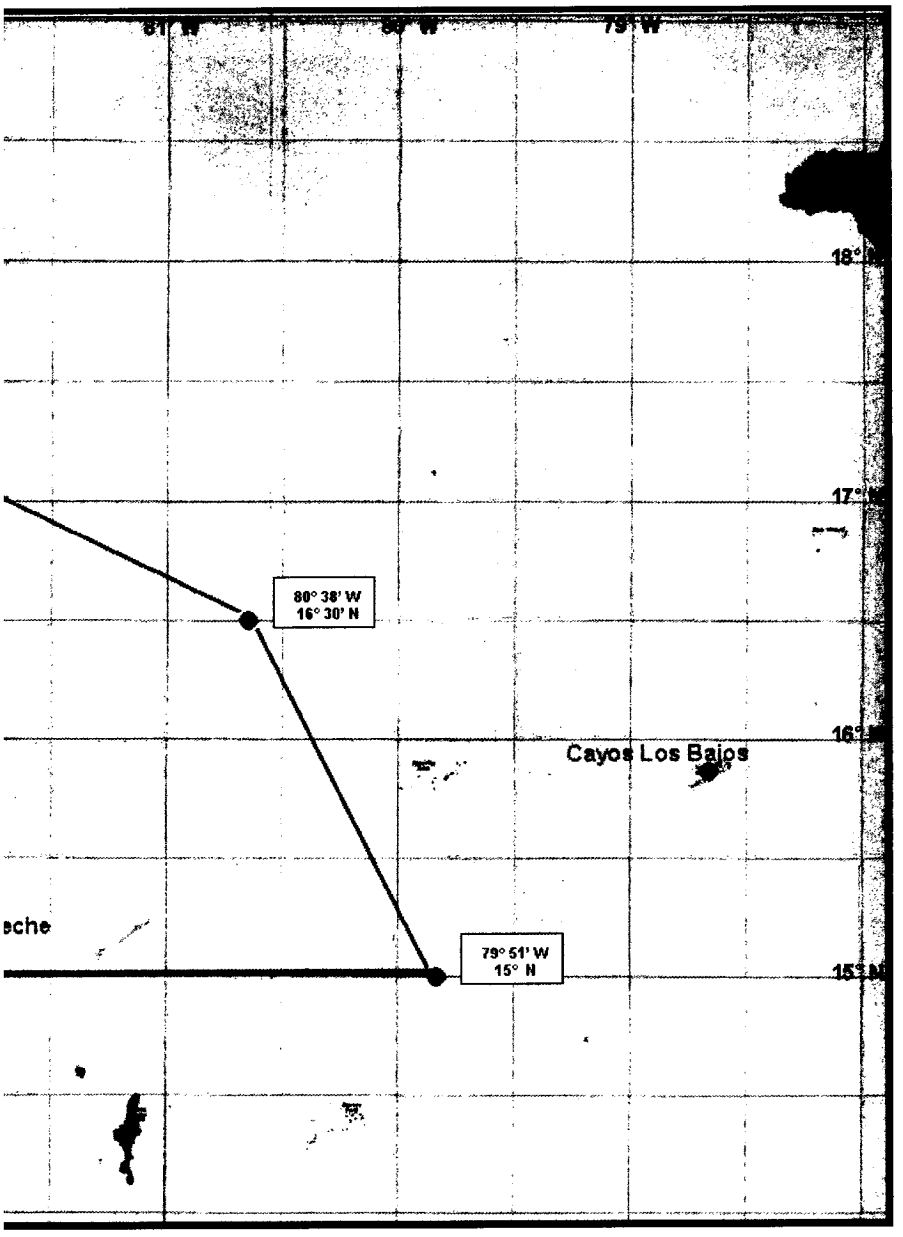
Plate 40: Limits of Fishing Area Covered by Provisional Permit Granted by Honduras to Mariscos de Bahia S.A. de C.V., 1977

PLATE 40: LIMITS OF FISHING AREA COV
GRANTED BY HONDURAS TO MARISCOS



Source: Resolution of the Ministry of Natural Res

D BY PROVISIONAL PERMIT
BAHIA S.A. DE C.V., 1977



s of Honduras of 7 January 1977

> have been legally constructed with the consent of the Honduran authorities. All these houses are enumerated and registered in the municipality of Puerto Lempira."[45]

- The Migration Delegated Officer in Puerto Lempira explains, about the Jamaican and Nicaraguan citizens living on the cays:

> "[i]n order to work in the cays, the Town Hall of Puerto Lempira issues a provisional work permit to the Jamaicans and Nicaraguans as at present there is no employment office open in Puerto Lempira."[46]

- Mr. Fabián Flores Ramírez, current Port Supervisor in Puerto Lempira and former Master's Assistant at the Port states:

> "in the course of his duties he has patrolled with the Migration authorities and other authorities from Puerto Lempira and has visited all the cays, in particular, South Cay, Savanna Cay, Bobel, Gorda Cay."[47]

- Mr. Mario Ricardo Domínguez, Honduran fisherman who stored his fishing equipment in South Cay, explains:

> "in order to conduct his fishing equipment he applies for a fishing permit each year from the Fishing Inspector in Puerto Lempira and satisfies the appropriate tax thereon; [...] the Jamaican boat which acquires their product obtains its export permit from the Customs Authorities in Puerto Lempira where they pay their taxes; he as a fisherman pays his taxes in Puerto Lempira."[48]

5.26. Nicaragua asserts that the Honduran statements "make only a general reference to cays or mention specific activities in respect of one of the islets in dispute and then continue with a general statement about 'cays'".[49] To support this assertion Nicaragua refers to some witness statements in the Honduran Counter Memorial. Nicaragua quotes selectively from these depositions, citing to only a paragraph or a page of each. A reading of the whole text shows that most statements make explicit

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45 HCM, vol 2, annex 67.

46 HCM, vol 2, annex 71.

47 HCM, vol 2, annex 73.

48 HCM, vol 2, annex 80.

49 NR, para 6.56.

references to the specific islands and all of them clearly illustrate Honduran presence in and around those islands over an extended period. Nicaragua states that "more than 10 of the depositions" provided by Honduras make general references to "cays". In fact Honduras can only count four statements referring to the cays which do not mention at least one of the islands in question, namely South Cay, Bobel Cay, Port Royal Cay or Savanna Cay.[50]

5.27. Most of the statements chosen by Nicaragua to illustrate the alleged generality of the Honduran evidence are very specific when not taken out of context: for example, Nicaragua asserts that the deposition in Annex 71, at page 199 of the Honduran Counter Memorial "refers to activities that take place 'at the cays'."[51] If one turns to the beginning of this deposition, at page 198, the following statement appears: "he [the deponent] has visited South Cay and Savanna cay; in *these* visits he has verified that most of the people that live in the cays are Jamaican..." The deponent then refers to these Jamaican citizens and to the cays previously mentioned. The evidence cannot be said to be general: it refers specifically by name to two islands which Nicaragua now claims.

`5.28. As another example, Nicaragua states that "none the [sic] depositions in Annex 89 to 94 specify which islets were concerned in response to a question which makes also reference to islets that are outside the area in dispute in the present proceedings".[52] Again, Nicaragua misreads the statement, and relies on this inaccurate reading. The question to which the Honduran witnesses respond is the following: "Did the fishing vessels use, at any time, the cays of Media Luna, South cay, Bobel and others, how were said cays used?" There is no reference to any cays which are "outside the area in dispute". Similarly, in Annexes 93 and 94 the witnesses refer expressly to South Cay and Savanna Cay. Nicaragua has simply misread and then misrepresented the witness statements.

5.29. In para 6.58 of its Reply Nicaragua criticises Honduras on the grounds that the witness statements "in general do not link specific events to specific dates," that a number of them "give 'hearsay' evidence" and that "some of the persons concerned have never been in the islets at all or not in the period of relevance for the present dispute." To sustain this Nicaragua chooses to refer to only three Honduran witness statements: in the first one, at Annex 70, the deponent, a Honduran citizen, had himself worked in Bobel cay when he was twelve years of age (which was in the 1920s); the second witness, at Annex 78, deposes on the basis of his direct experience

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50 HCM, vol 2, annexes 72, 76, 78 and 81.

51 NR, note 334.

52 NR, note 334.

as a primary school teacher and as Mayor of his Municipality. He testifies about the linkages between local communities in the area and the fishermen living in the cays, as well as about administrative matters such as payment of taxes or work permits, all of which occur on mainland; the fact that he has not actually visited the cays is irrelevant to the value of his statement. Similar conclusions may be made in respect of the third statement referred to by Nicaragua, namely Annex 81, which is a short statement provided by the head of the Moravian Church in Honduras.

5.30. Nicaragua also makes other, more specific assertions. Nicaragua states that two witness statements submitted by Honduras contradict Honduras' "assertion that the islets in dispute have been inhabited for a long time".[53] Aside from the fact that Honduras has not made an assertion in the terms indicated by Nicaragua, a reading of the two witness statements shows that it does not contradict Honduras' claim that the islands "have long served – and continue to serve today—as bases used by the fishing community to carry out their activities."[54] The first statement does not contradict Honduras' assertion[55] and the second witness statement refers only to non-habitation by "foreign persons" (i.e. Nicaraguans).[56]

5.31. As regards Honduran title and jurisdiction as reflected in various international fisheries reports dating back to 1943,[57] there is no evidence before the Court to indicate that Nicaragua has ever protested (or otherwise challenged) their veracity. These consistently show fishing banks and other geographical points located north of the 15th parallel as being treated by relevant organisations as falling within the territory or jurisdiction of Honduras. Nicaragua has not introduced any equivalent reports which demonstrate any international recognition that fisheries activities within that area lie within the territory or jurisdiction of Nicaragua.

5.32. Nicaragua claims that this material does not amount to third party recognition of Honduran sovereignty or jurisdiction.[58] The argument is without merit. Nicaragua does not dispute the relevance of the 1943 Report of the United States Fish and Wildlife Service. Instead it makes the rather

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53 NR, para 6.59.

54 HCM, para 6.29.

55 HCM, vol 2, annex 82.

56 HCM, vol 2, annex 83.

57 Honduras had referred to the 1943 United States Fish and Wildlife Service Report; the FAO Regional Project of Fishing Development in Central America carried out mainly in the early 1970s; the FAO Program on "Investigation and Commercial Evaluation of the Main Maritime Fishing Capacities of Honduras in the Northern Zone" carried out in collaboration with the United Nations Development Program (UNDP) and the Inter-American Development Bank (IDB): HCM, paras 6.31-6.33.

58 NR, vol 1, paras 6.81 and 6.46.

weak point that the Report's silence as to certain cays amounts to them not being Honduran.[59] Admittedly, not each and every feature is named in this report, but it is readily apparent that islands and cays referred to in the report include all of those which are now the subject of Nicaragua's claim.

5.33. It is notable that Nicaragua does not address the substance of the FAO reports and ignores the point that the FAO reports make explicit references to Cay Media Luna and to Thunder Knoll, Rosalinda and Del Medio fishing banks, and treats them all as being located in Honduras. Nicaragua seeks to undermine the FAO reports on the Regional Project of Fishing Development in Central America (FAO Project) introduced by Honduras and carried out mainly in the early 1970s by referring to a different document – the Final Report on the Regional Project of Fishing Development in Central America – which includes a note stating that names employed in the Report do not imply any judgment on the legal or constitutional situation of any territories or maritime areas.[60] The document does not assist Nicaragua. First, the relationship of this disclaimer to the FAO reports introduced by Honduras is unclear. Second, the extracts of this Final Report (which are reproduced in Annex 19 of the Nicaraguan Reply) do not make reference to any geographic locations, including within the area north of the 15th parallel, so it is difficult to assess to what territories or boundaries the report might have been referring. Third, the reports introduced by Honduras and produced in the context of the same FAO project refer explicitly to the relevant cays and maritime areas north of the 15th parallel, and they treat them unequivocally as falling within the territory of Honduras. These documents include no disclaimers as to the legal value of their use of geographical names.[61] The reports relied upon by Honduras from the two other projects cited in the Counter Memorial similarly do not include disclaimers of the kind relied upon by Nicaragua.[62]

5.34. Nicaragua also seeks to undermine the reports of the FAO Project in other ways. It refers intermittently to different reports, (some recently introduced by Nicaragua itself) as though they were one.[63] Moreover, on one of these reports, which relates to research in the Pacific, Nicaragua misleadingly suggests that this report (dating back to 1970) fails to indicate that Honduras has rights over the continental shelf in the Gulf of Fonseca, whilst omitting to mention that it was only in 1992 that the Court recognised Honduras historical rights in the Pacific. Nicaragua's approach

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59 "As these latter islets are mentioned nowhere in the Report, the inevitable conclusion is that they were not considered to be part of the territory of Honduras." NR, para 6.45.

60 NR,paras 6.46 and 6.81.

61 HCM, para 6.32 and HCM, vol 2, annex 163.

62 HCM, vol 2, annexes 158-162.

63 NR, para 6.46; see also NR, vol 1, note 323.

is apparent. It seeks to introduce confusion. It does so because it cannot counter the central thrust of these FAO reports: the organizers and participants of the Project entertained no doubts that the area north of the 15th parallel, including the islands, fell under the sovereignty of Honduras. See for example maps from the report on operations from 1968 to 1970,[64] and the 1971 Report referred to in the Honduran Counter Memorial[65] at Annexes 262 and 263.

5.35. Nicaragua did not object to these Reports when they were produced between 1968 and 1971. As a country participant in the Project, Nicaragua had direct knowledge of their existence and their contents. Its failure to protest the contents – or even to enter a reservation of rights – is incompatible with the argument it now makes.

5.36. Nicaragua also seeks to challenge the relevance of the fact that some of the islands are inhabited. It states that "the habitation of an island by a group of people does not constitute an act *a titre de souverain*".[66] That claim relies on dicta from the Court in the *Kasikili/Sedudu Island case* (Botswana/Namibia).[67] But it is quite clear from the passage cited that in that case the habitation was not on the basis of any administrative or governmental authority or license. In the present case it is clear that habitation (and related activities) are pursuant to licenses granted by the Honduran authorities. For example, boats of fishermen working around the cays are registered in Puerto Lempira,[68] buildings constructed on Savanna cay have been authorised and licensed by the same municipality,[69] and fishing equipment is stored on South cay on the basis of a fishing permit obtained from the local authorities.[70]

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64 See the maps which are appended to the Report: Summary of exploratory fishing operations of the R/V "Canopus" in the Western Caribbean Sea from December 1968 to June 1970, pp 84-85, San Salvador, 1971, HR, vol 2, annex 262. See also Annex 263.

65 Exploratory and simulated commercial fishing operations in the Western Caribbean Sea. R/V "Canopus", May to November 1970, San Salvador 1971, HCM, vol 2, annex 163.

66 NR, para 6.60.

67 ICJ Reports 1999, 1105-6, para 98.

68 See e.g., HCM, vol 2, annexes 71 ("the Jamaican residents own motorboats registered in Honduras"), and 78 ("... the Jamaicans register their vessels in Puerto Lempira;").

69 HCM, vol 2, annexes 66 ("We have constructed all the buildings existing in the cay. These are registered in the municipality of Puerto Lempira.") and 67 ("These houses [on Savanna Cay] have been legally constructed with the consent of the Honduran authorities. All these houses are enumerated and registered in the municipality of Puerto Lempira.").

70 HCM, vol 2, annex 80 ("he makes use of the installations located in South Cay as from the year [1992]; the installations in question include a wooden house where he stores fishing equipment, such as fishing nets, diving equipment, a freezer and an electricity plant; [. . .] in order to conduct his fishing equipment he applies for a fishing permit

5.37. Finally, Nicaragua seeks to respond to the evidence establishing that its own INPESCA in 1987 amended a fishing concession (following a protest by Honduras) to limit its geographic scope of application to "areas south of parallel 15".[71] Nicaragua does not go so far as to deny that such a change took place, although it raises the suggestion that there is something "suspicious" about the manner in which the change occurred[72] and introduces a statement from the then Director General of INPESCA to the effect that he did not make the change and he "never authorized any modifications to that contract".[73] It is noteworthy that he does not deny that the change was in fact made. Even more noteworthy, perhaps, is his statement that "in no cases were these (areas for fishing exploitation) limited to spaces south of Parallel 15".[74] It might therefore be expected that Nicaragua would put before the Court examples of concessions and contracts which might confirm that fact, in particular that areas north of the 15th parallel were authorised by INPESCA or other Nicaraguan authorities for fishing activities. No such evidence is before the Court.

C. HONDURAN CARTOGRAPHY

5.38. In its Counter Memorial Honduras introduced a number of official maps of Honduras showing, amongst others, Bobel Cay and Savanna Cay as being part of Honduras. These maps date back as far as 1886 and 1888 (HCM, paras. 3.58 and 3.59). Nicaragua now seeks to challenge the conclusions which Honduras has drawn from these maps.

5.39. As regards the map of 1886, Nicaragua observes that this also shows cays to the south of the 15th parallel.[75] At that time Honduras may indeed have claimed title over those islands, as it appeared to do by reference to an official map produced in 1933, which defined the area over which Honduras had an extended maritime claim.[76] But that claim has not been maintained, and a historical claim dating to those islands cannot undermine the map's evidence of Honduras' continuing claim to islands north of the 15th parallel. As to the 1933 map, it plainly identifies the islands now claimed by Nicaragua as falling within a 'jurisdictional maritime line of Honduras'. Nicaragua suggests that that fact does not

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each year from the Fishing Inspector of Puerto Lempira and satisfies the appropriate tax thereon.").

71 HCM, para 6.50.

72 NR, paras 7.64 –7.65.

73 NR, para 7.68.

74 *Ibid.*

75 HCM, vol 3, part 1, Plate 8 and NR, para 6.27.

76 HCM, vol 3, part 2, Plate 23.

necessarily mean that Honduras claims title to those insular territories.[77] A similar argument is made in respect of the 1954 map, notwithstanding the fact that this map includes Media Luna Cay, as Nicaragua is forced to recognise.[78] Nicaragua provides no further explanation of its reasoning. The maps speak for themselves. They do not present any inconsistency with Honduras' view that after the Court gave its judgment in the 1960 case both Parties treated the 15th parallel as their *de facto* boundary.

5.40. As regards the 1933 map of Honduras published by the Pan-American Institute of History and Geography, which clearly shows the islands now claimed by Nicaragua as being part of Honduras,[79] Nicaragua claims that the evidentiary value of the map is "dubious", because it may differ from an official Honduran map of the same year.[80] But Nicaragua fails to notice the express statement that this map was prepared on the basis of the official map of Honduras. Neither this map, nor the maps referred to above, were the subject of protests by Nicaragua.

5.41. Nicaragua also refers to three maps of Honduras which do not include the islands. None is an official map of Honduras. The first was prepared in 1894 by the Mixed Boundary Commission, and it generally shows the successive claims made by Nicaragua (not including the islands).[81] The second dates back to 1899, and was published privately in the United States.[82] The third is a school map published in 1984, but it too is prepared by a private company and has no official status.[83]

D. HONDURAN ADMINISTRATION AND LEGISLATION IN THE MARITIME AND INSULAR AREAS NORTH OF THE 15TH PARALLEL

5.42. In its Counter Memorial Honduras provided extensive evidence demonstrating that the insular and maritime areas north of the 15th parallel have long been treated as being subject to Honduras' legislative, regulatory and administrative control. Honduran administration and the application of its legislation has not been protested by Nicaragua. It flows directly from authority vested in the Honduran authorities by the country's Constitution.

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77 NR, para 6.23.

78 HCM, vol 3, part 2, Plate 25.

79 HCM, vol 3, part 2, Plate 24.

80 NR, para 6.26.

81 NR, vol II, map I.

82 NR, vol II, map II.

83 NR, vol II, map III.

The Honduran Constitution of 1957 (and of 1965) makes express reference to the cays of Los Bajos and Palo de Campeche: Article 6 of the 1957 Constitution sets out the following islands as belonging to Honduras:

> "[...] 2. The Bay Islands, the Swan Islands, Santanilla or Santillana, Viciosas, Misteriosas and the following cays: Gorda, Vivorillos, Cajones, Becerro, Cocorucuma, Caratasca, Falso, Gracias a Dios, Los Bajos, Pichones, Palo de Campeche and all others located in the Atlantic, which historically and juridically belong to Honduras."[84]

The Constitution of 1982 refers to Palo de Campeche, los Bajos and Media Luna cays.[85] These islands fall within the area now claimed by Nicaragua in the present proceedings, and some of them fall within the area of oil concessions granted by Honduras since the 1960's. Palo de Campeche, now submerged, is now known as Logwood Cay.[86] Los Bajos were implicitly recognised as falling within the jurisdiction of Colombia as a result of the Maritime Delimitation Treaty Lopez-Ramirez of 1986 between Honduras and Colombia. For a graphic representation of the location of these cays referred to in Honduran Constitutions, see Plate 37.

5.43. It is not only Honduras' Constitution which refers to islands now claimed by Nicaragua. Honduras' Agrarian Law of 1936 makes express reference to the islands of Palo de Campeche and Los Bajos (as does the 1950 Agrarian Law).[87] More generally, Decree No. 25 of 1951, approving Decree No. 96 of 28 January 1950, declares the sovereign rights of Honduras over its continental shelf and the natural resources thereof, and

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84 HR, vol 2, annex 239. Art. 5 of the Constitution of 1965 recognises as belonging to Honduras: ". . . The Bay Islands, the Swan Islands, also known as Santanilla or Santillana, Viciosas, Misteriosas and the cays: Gorda, Vivorillos, Cajones, Cocorucuma, Caratasca, Falso, Gracias a Dios, Los Bajos, Pichones, Palo de Campeche and all others located in the Atlantic that historically, geographically and judicially belong to it." HR, vol 2, annex 240.

85 Art. 10 recognises as belonging to Honduras: ". . . The Bay Islands, the Swan Islands, also known as Santanilla or Santillana, Viciosas, Misteriosas and the cays: Zapotillas, Cochinos, Vivorillos, Seal or Foca (or Becerro), Caratasca, Cajones or Hobbies, Mayores de Cabo Falso, Cocorocuma, Palo de Campeche, Los Bajos, Pichones, Media Luna, Gorda and Los Bancos Salmedina, Providencia, De Coral, Cabo Falso, Rosalinda and Serranilla and all others located in the Atlantic that historically, geographically and juridically belong to it." HR, vol 2, annex 241.

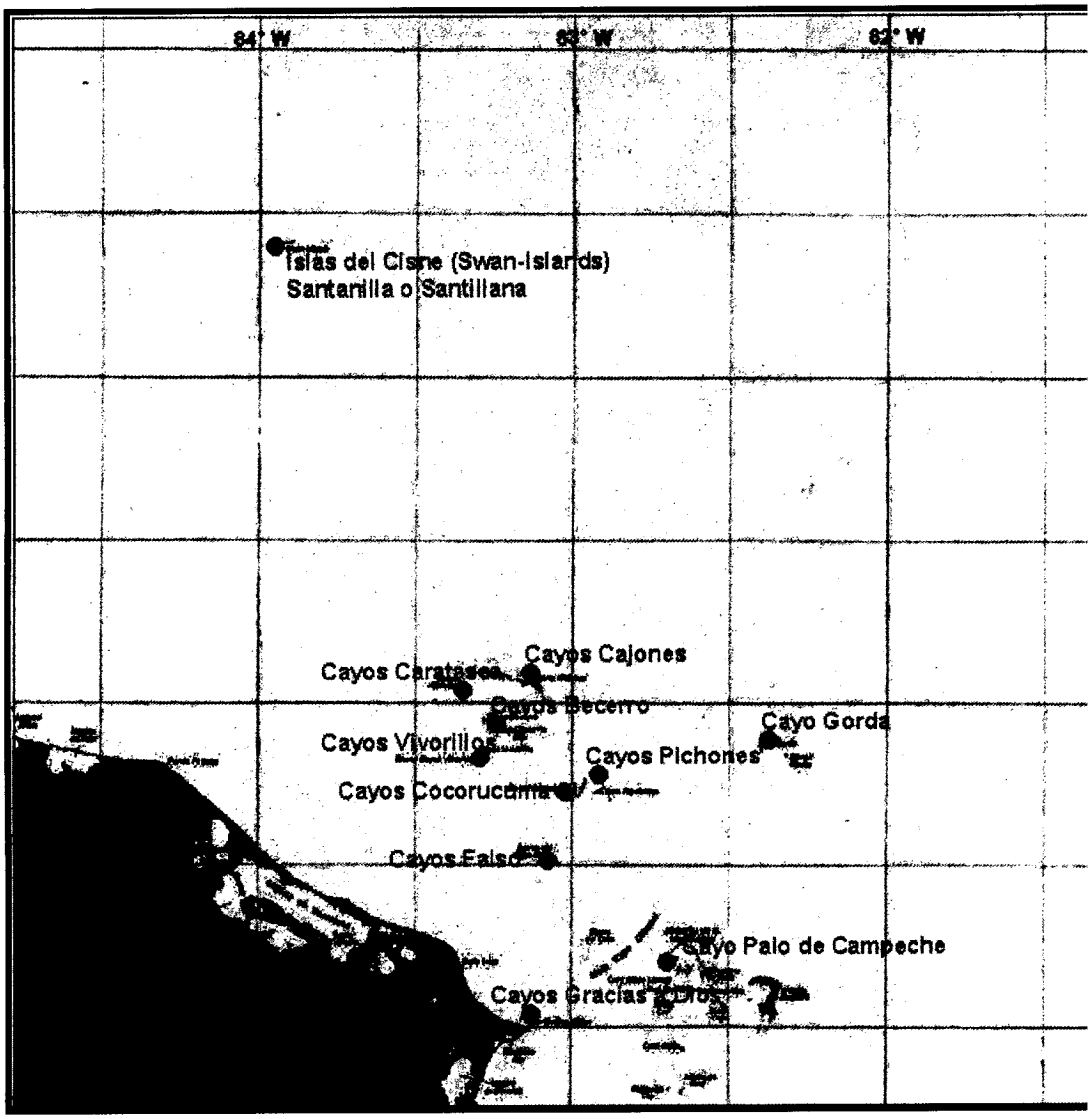
86 "Palo de Campeche" or "Logwood" are common names of a tree whose scientific name is *Haematoxylon campechianum*, a species obtained from Honduras and other Central American countries. Tropical Plant Database, Raintree Nutrition Inc. in http://www.rain.tree.com/campeche.htm and The Physiomedical Dispensatory by William Cook, M.D., 1869 in Medical Herbalism Journal (http://medherb.com).

87 Art. 1 of 1936 Agrarian Law, Official Gazette of Honduras of 20 April 1936, NR, vol 2, annex 242, and Art. 1 of Decree 103 of 7 March 1950, Official Gazette of Honduras No.14.055 of 16 March 1950, HR, vol 2, annex 243.

Plate 37a: Geographical Features in the Maritime Area Northeast of Honduras Referred to in the Honduran Constitution of 1957

PLATE 37: GEOGRAPHICAL FEATURES IN THE MAR
REFERRED TO IN THE HONDURAN CONSTITU

A) CONSTITUTION C



E AREA NORTHEAST OF HONDURAS
NS OF 1957, 1965 AND 1982

957

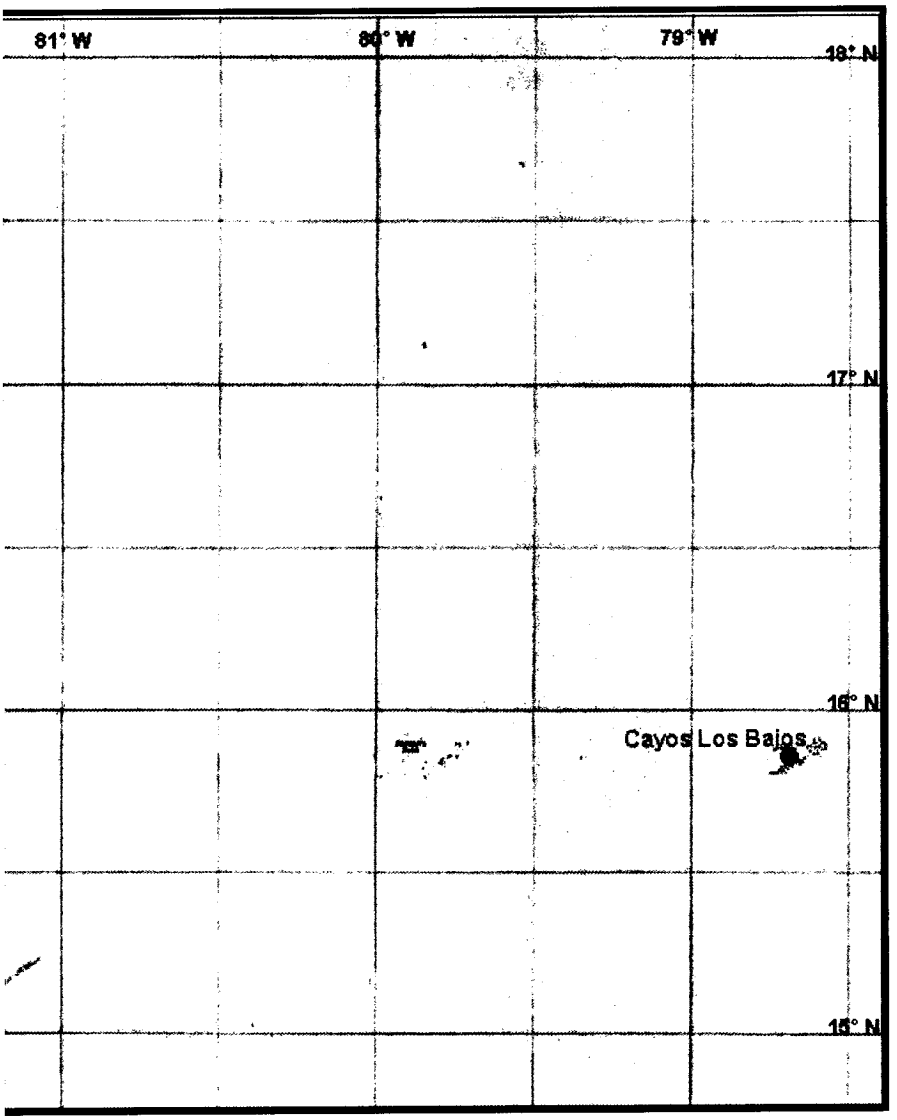
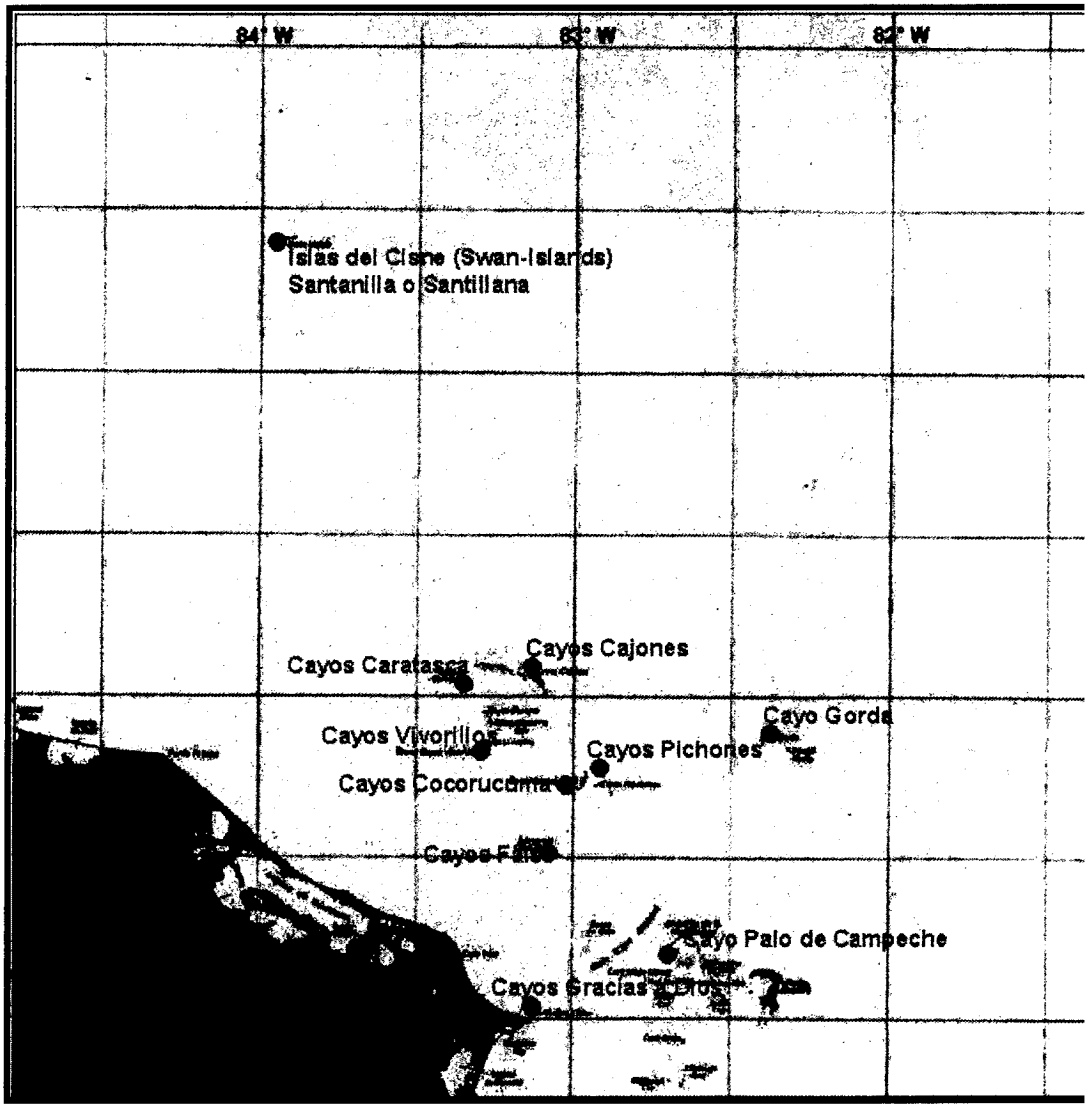


Plate 37b: Geographical Features in the Maritime Area Northeast of Honduras Referred to in the Honduran Constitution of 1965

PLATE 37: GEOGRAPHICAL FEATURES IN THE MAP REFERRED TO IN THE HONDURAN CONSTITUTION

B) CONSTITUTION



E AREA NORTHEAST OF HONDURAS
F 1957, 1965 AND 1982 (CONT.)

965

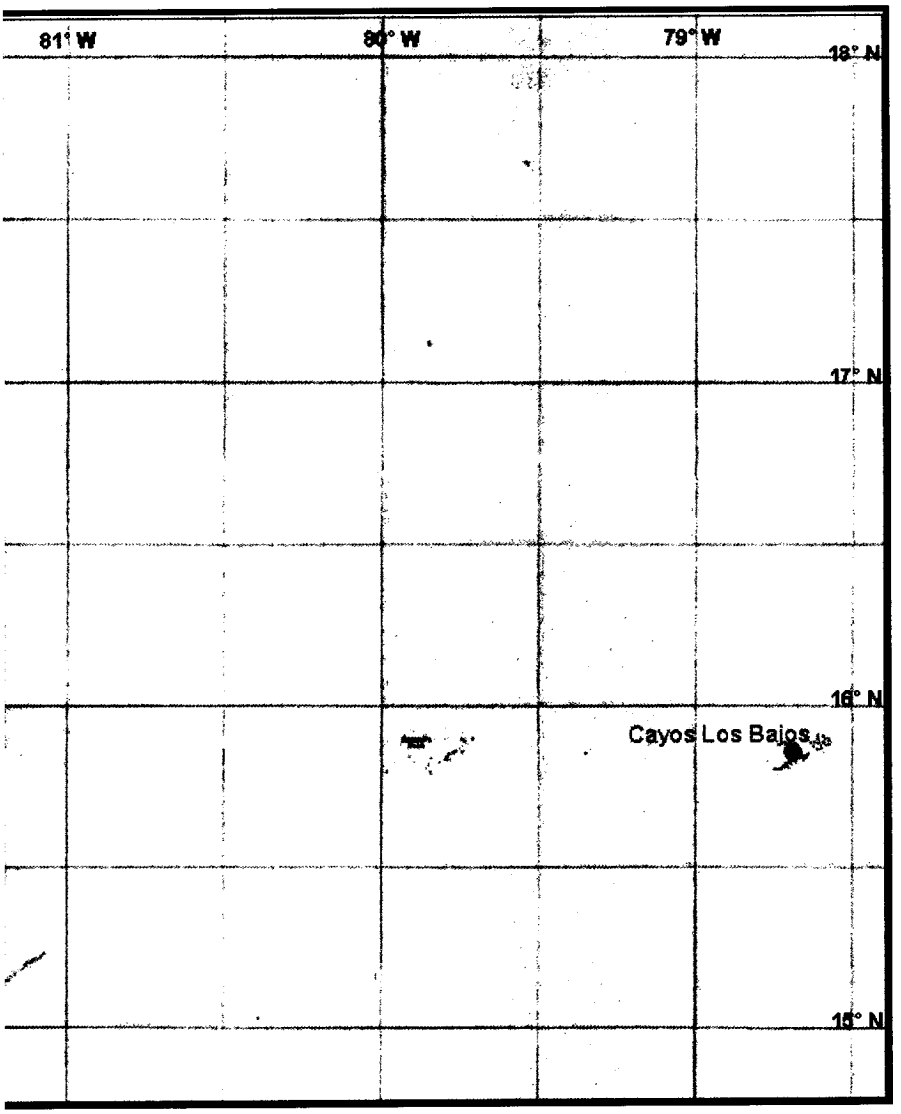


Plate 37c: Geographical Features in the Maritime Area Northeast of Honduras Referred to in the Honduran Constitution of 1982

982

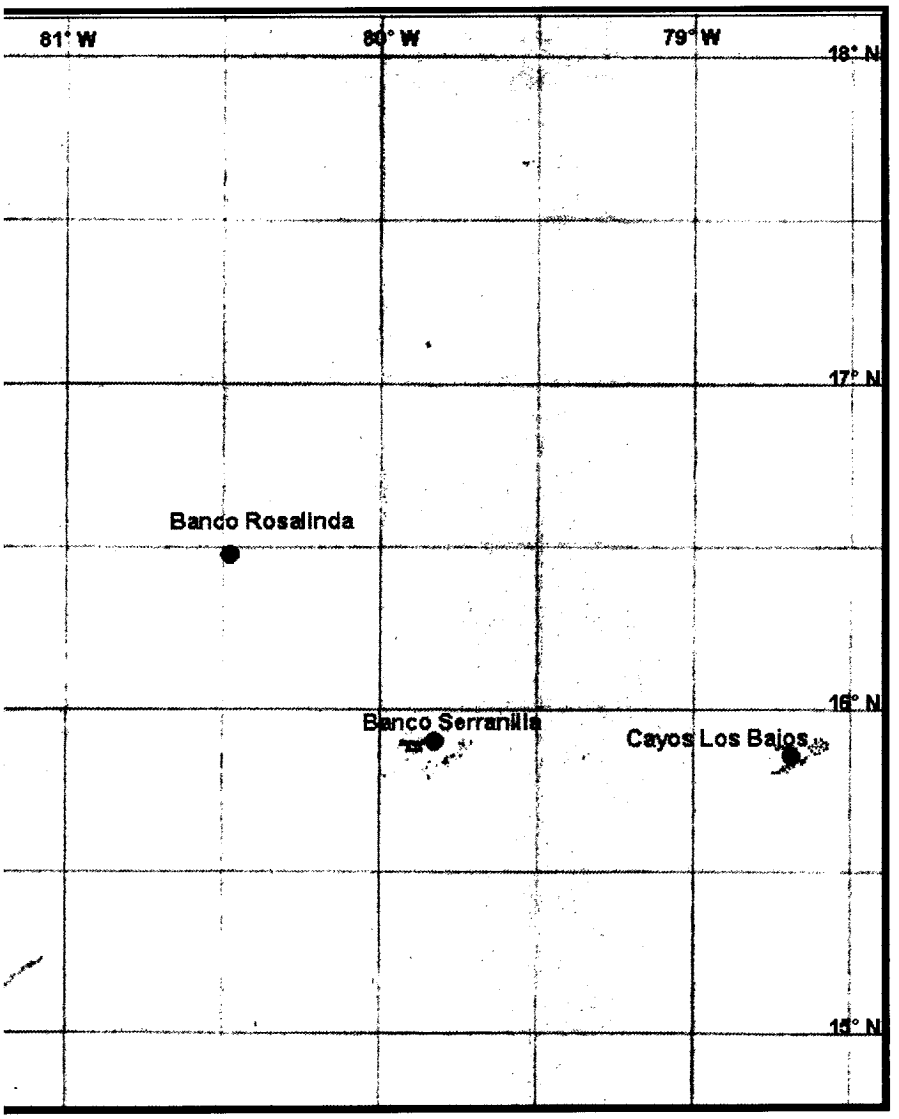
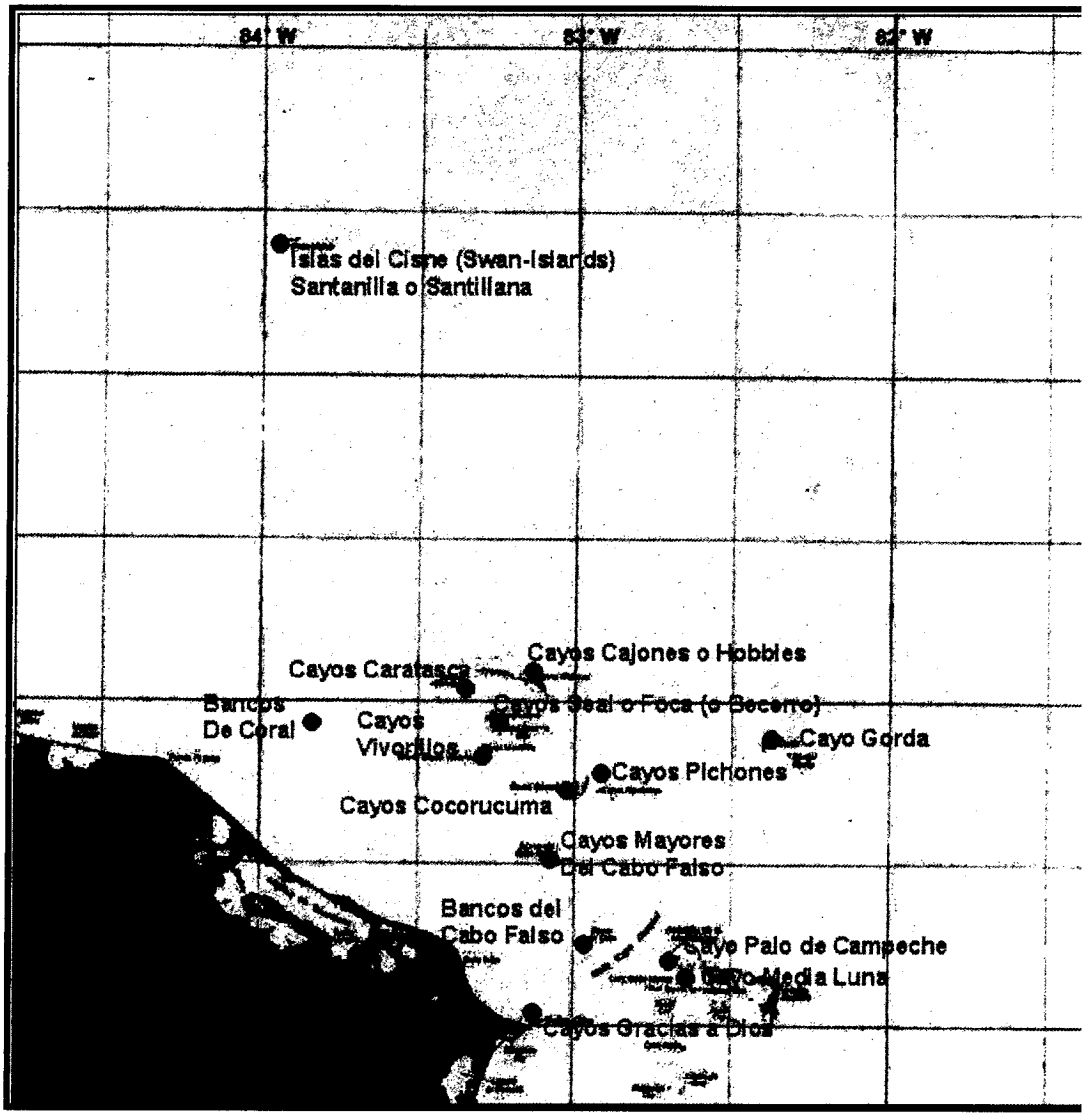


PLATE 37: GEOGRAPHICAL FEATURES IN THE MA
REFERRED TO IN THE HONDURAN CONSTITUTIO

C) CONSTITUTION



declares the protection and control by the State of an extension of sea in the Atlantic ocean of 200 miles from the Honduran coast.[88] This includes the whole of the area north of the 15th parallel now claimed by Nicaragua.

5.44. Nicaragua criticises Honduras for listing legislation of this kind as being applicable to the islands and related maritime areas, but then proceeds occasionally to adopt the same approach.[89] However, what Nicaragua has not sought to establish by way of evidence is that it has actually applied its legislation and regulations in these areas, including the islands. In its Counter Memorial Honduras provided ample proof of its application of a wide range of legislation: for example, it applied the Petroleum Law of 1962 when granting its oil concessions,[90] and the Fishing Law of 1959 when issuing its fishing authorisations.[91] Honduran courts have applied criminal law regarding facts which occurred in the islands, and civil law when resolving labour disputes as a result of diving accidents which occurred in the area of reference.[92] Naval patrols have enforced Honduran legislation in its maritime jurisdiction, whether it be for purposes of conservation of marine natural resources, immigration control, or the prevention of illegal trade.[93]

5.45. Nicaragua does not challenge any of Honduras' evidence on administrative acts in the area. It introduces no evidence to establish that it has ever protested any of these acts. Instead, it attempts a general dismissal of Honduras' evidence by asserting that "most of the practice invoked by Honduras stems from the 1990s".[94] The approach is factually incorrect: it ignores many administrative acts dating back to the 1960's and 1970's, including in relation to oil and fisheries concessions, the placing of markers in the cays, and naval patrols.[95]

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88 Articles 1 and 3, Official Gazette of Honduras No. 14.306 of 22 January 1951, HR, vol 2, annex 244.

89 NR, vol 2, annex 13.

90 HCM, para 6.10 and note 14.

91 HCM, para 6.10 and note 18.

92 HCM, paras 6.18-6.23. See also HCM, vol 2, annexes 73, 74 and 103 to 106 (criminal law); annexes 100, 101, and Additional Annexes, annexes 180, 181, 183 to 186 (civil law).

93 HCM, paras 6.60- 6.63. See also the witness statements at annexes 123, 73, 68, and 72. Reports regarding Nicaraguan incursions are at annexes 139,140 and Additional Annexes, annexes 216 and 217.

94 NR, para 6.33.

95 Honduras' practice has been longstanding. HCM, paras 6.8 *et seq.*

E. THE APPLICATION AND ENFORCEMENT OF HONDURAN CIVIL AND CRIMINAL LAWS IN THE AREA NORTH OF THE 15TH PARALLEL

5.46. In its Counter Memorial Honduras provided extensive evidence as to the application of its criminal and civil laws to acts and activities occurring in the area north of the 15th parallel. That evidence stands in stark contrast to the total absence of such evidence provided by Nicaragua, in its Memorial and now in its Reply.

5.47. As regards the application by Honduras of its civil laws, Nicaragua states only that they took place "after the critical date" and that they are "in no way related to the islets in dispute".[96] As to the first point, irrespective of the date on which the laws were applied, the fact is that their application was on no occasion protested by Nicaragua. Moreover, Nicaragua is not able to provide even a single example showing that it has applied its civil laws to the area in question – on any date.

5.48. As to the second point, the laws were applied in respect of incidents occurring *inter alia* on or around Middle Bank, Rosalind Bank and Tres Nueve fishing banks. Each of these banks is treated by the Honduran courts as falling within their territorial jurisdiction.[97] All are located in close proximity to the islands.

5.49. As regards the application by Honduras of its criminal laws, Nicaragua's principal response is that the criminal law cases referred to may have been brought in a Honduran court because they "concerned Honduras nationals and not necessarily because the alleged facts took place in Honduran territory."[98] Nicaragua ignores the general rule applicable in Honduras to the effect that the exercise of criminal jurisdiction in Honduras is, subject to exceptions which do not here apply, limited to acts occurring within the territory of Honduras.[99]

F. HONDURAN REGULATION OF IMMIGRATION

5.50. In its Counter Memorial Honduras introduced extensive evidence on the habitation of the islands now claimed by Nicaragua, including the basis upon which immigration (principally of Jamaicans) has been regulated. Formal immigration controls go back to 1997 (not 1999 as

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96 NR, para 6.35.

97 See HCM, para 6.22.

98 NR, para 6.35.

99 Art. 3 of the Criminal Code of Honduras 1983, HR, vol 2, annex 245.

Nicaragua states).[100] Moreover, the Jamaican fishermen working on Savanna Cay make it clear in their statements that they have been fishing around those cays since the 1960's and 1970's, and their depositions invariably assert that those cays and all waters north of the 15th parallel have always been considered by them to be a part of Honduras.[101] Some of the witness statements are even more explicit. One states that:

> "she is aware the Jamaicans have been in those cays since the year one thousand nine hundred and seventy two and have been granted work permits by the Honduran authorities."[102]

5.51. By contrast, Nicaragua provides no evidence that it has ever regulated immigration into the maritime and insular areas north of the 15th parallel.

5.52. Nicaragua also takes liberties with the evidence (and the law). In referring to the deposition of Mr. Daniel Bordas Nixon, who travelled with his father to Bobel Cay in the 1920s to extract guano, Nicaragua makes selective use of the information provided in the statement to suggest that the fact that Mr. Bordas lived in Cape Gracias a Dios amounted to establishing that he was based in Nicaragua and that therefore "historically there are links between Nicaragua and the islets in question".[103]

5.53. The assertion cannot be sustained on the basis of the information provided in the witness statement, which provides that although Mr. Bordas was born on the right side of the river Coco his birth was registered in Puerto Lempira, Honduras, and that he holds Honduran nationality. Mr. Bordas explains in his statement that Cape Gracias a Dios was considered "a territory in dispute" between the neighbouring countries, and that after the Award of the International Court of Justice the Cape's community became abandoned and he moved to his farm in Tusidacsa, Honduras.[104]

G. HONDURAN MILITARY AND NAVAL PATROLS AND SEARCH AND RESCUE

5.54. In its Counter Memorial Honduras provided extensive evidence to demonstrate that it had long conducted naval patrols and search and rescue

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100 See registrations of boats from 1997 indicating residence of Jamaican nationals in the cays, HCM, vol 2, annexes 127 and 128; or visit to the cays by the current Immigration Officer during years 1997, 1998 and 1999, HCM, vol 2, annex 71.

101 HCM, vol 2, annexes 66, 67, and 68.

102 HCM, vol 2, annex 77.

103 NR, para 6.63.

104 HCM, vol 2, annex 70.

activities in the area north of the 15th parallel. Honduras relied on no less than seventeen annexes of official military records[105] and six witness statements.[106] In addition there are numerous diplomatic notes.

5.55. By contrast, Nicaragua relies on just two witness statements to challenge this material. And even this limited testimony is flawed. On the basis of the first witness statement, Nicaragua refers to Honduran patrols not being present in the area before Nicaragua's "critical date" of 1977.[107] But in his statement Mr. Arturo Möhrke Vega, the deponent, does not mention any date. And if there were to be any, it would have to be prior to 1975, the date upon which he retired from his job as ship's captain.[108]

5.56. As regards the second statement, the witness states that "[i]n recent years ... there have been some problems with Honduran authorities in the area from parallel [17] to [15] which has [sic] affected fishing operations of Nicaraguan vessels."[109] Notwithstanding the flexibility of the phrase "in recent years", it is noteworthy that Nicaragua has re-interpreted the statement to support its claim that "Honduran authorities only have started *to pose a problem* to Nicaraguan fishing vessels to the north of the parallel of 15th in recent years."[110] That is not what the witness said.

5.57. Honduras now puts before the Court further statements providing evidence of military patrols in the area, which support Mr. Möhrke's statement that Honduras' presence in the area pre-dates 1976, the date upon which the Honduran Navy was established.[111] Mr. Cristobal Cano is a Retired Naval Officer who served at the Naval Base in Puerto Cortes from 1967 until 1991. His statement attests that:[112]

- In his first assignment he learnt that "the border with Nicaragua was an extension from Cape Gracias a Dios along the parallel set at 14 Degrees 59.8 Minutes North", and that this was referred to as "the border of the 15th Parallel";
- As early as 1968 he was involved in patrols in "the fishing areas northeast and east of Gracias a Dios Department

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105 HCM, vol 2, annexes 129-145.

106 HCM, vol 2, annexes 68, 71, 72, 73, 75 and 78.

107 NR, para 5.4 (iv), and para 6.65.

108 NR, vol 2, annex 23.

109 NR, vol 2, annex 24.

110 NR, para 6.65 (Emphasis added).

111 The first naval detachment, as part of the Army, was established in Puerto Cortes in 1946 when routine patrolling began.

112 HR, vol 2, annex 251. See also a report on exploration of Serranilla's Area of 7 December 1978 signed by Mr. Cristobal Cano in vol 2, annex 265 of this Rejoinder.

(Province) and immediately north of the [15th] Parallel" (during that patrol he learnt that this area had been considered by the natives of the Bay Islands as their traditional fishing grounds many years before, perhaps as early as the 1930's);

- Such patrols continued in subsequent years;
- in 1974, in cooperation with the Commander of the Military Unit in the Department (Province) of Gracias a Dios, two new boats (the "Cabañas" and "Morazán") began patrolling the Maritime frontier and the fishing banks of Honduras, North of the 14°59.8′ N. Parallel;
- In August 1976 the Honduran Navy was established, and with the assistance of a new 105 foot patrol boat the Navy was able to extend its patrol capabilities to all of the maritime possessions of Honduras, including in the Atlantic North of 14°59.8′ N and to the 200 miles of Economic Zone;
- Patrols were made to Half Moon and Savanna Reefs and to the islands now claimed by Nicaragua, and some of these islands indicated "remnants of recent habitation and hurried departure by almost certain Jamaican fishermen", whose presence "invariably was on the little islands or cays that were permanently above water, that had marginal vegetation, minimal access from the sea and proximity to the big fishing banks", and "little islands or cays where we always found signs of human presence were Bobel Cay, South Cay, two cays in the Half Moon Reefs area, and in lesser amount Cay Gorda."

H. HONDURAN PUBLIC WORKS AND SCIENTIFIC SURVEYS

5.58. In its Counter Memorial Honduras provided numerous examples of public works and scientific surveys which it had carried out in the maritime and insular areas north of the 15th parallel, including triangulation markers (used for navigational purposes), as well as other navigational aids and demarcation devices.[113] These kinds of activities are recognised by the Court to be of particular importance in establishing *effectivités* in relation to small islands. As the Court put it in *Qatar/Bahrain*:

> "The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities

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[113] HCM, paras 6.64-6.67.

carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it."[114]

5.59. In the face of such compelling evidence Nicaragua adopts an entirely artificial approach. It argues (1) that the 1976 Arrangement between Honduras and the United States (pursuant to which the markers were constructed on the islands) does not actually mention the islands, and (2) the markers were only placed on Savanna Cay, South Cay and Bobel Cay "after the critical date".[115] The reality – as Nicaragua no doubt appreciates – is that the project for the placing for the markers commenced in 1976 with the adoption of the Agreement (at a time when the Government of Nicaragua had excellent relations with the United States), and was concluded in 1980 and 1981 with the placing of the triangulation markers. Nicaragua has never protested the 1976 Agreement, or the project it established, or the placing of the markers. It has never sought to remove the markers, in the more than 20 years since they were placed. The markers constitute both a public act of sovereignty by Honduras and an act of recognition by the United States. Nicaragua cannot get round those facts by artificial legal arguments.

5.60. As regards, the placement of beacons and buoys, Nicaragua points to a lack of reference to the relevant cays in the document submitted by Honduras.[116] Again Nicaragua misses the point. As Annex 145 makes clear, the installation of the navigational aids by the armed Forces of Honduras occurred both on land and at sea (buoys), and the commitment of the Naval Base of Puerto Cortés was that the buoys should be placed at latitude 15°00' and longitude 81°33', and at latitude 15°00' and longitude 82°20'. Both points are treated by Honduras as being within areas located within its sovereignty or jurisdiction.[117]

5.61. Further evidence of works carried out on Bobel Cay by Union Oil – pursuant to Honduran authorisations – includes the 10 metre antenna constructed on Bobel Cay in 1975.[118]

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[114] ICJ Reports 2001, para 197. At para 198 the Court recalled an observation of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case, that: "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim." (PCIJ, Series A/B, No. 53, p 46).

[115] NR, para 6.68.

[116] See HCM, vol 2, annex 145 and 155; NR, para 6.69.

[117] The reference made by Nicaragua to the *Eritrea/Yemen Award* (para 283) refers to the publication of notices and pilotage instructions, not to the placement of beacons and buoys.

[118] *Supra*, para 5.14.

I. RECOGNITION BY THIRD STATES AND OTHER ENTITIES

5.62. In its Counter Memorial Honduras provided extensive evidence of third State recognition of Honduras' sovereignty over the islands, including on the part of the United States and Jamaica.

5.63. Nicaragua's response is weak. For example, in relation to the act of recognition reflected in Jamaica's request to have access to Honduran waters around the islands, Nicaragua asserts that "[t]he request shows uncertainty over the name of the islet concerned and does not indicate the coordinates at which it is located."[119] In fact the note reproduced at Annex 19 of the Counter Memorial indicates that the shipwrecked sailors to be rescued were at "Savanna or Savanilla Cay". It is clear that a second, alternative name is provided for the same cay and that no coordinates were necessary given that the cay of reference was well known to all parties involved, including Jamaica.

5.64. Similarly implausible is Nicaragua's effort to discredit the recognition of the United States reflected in the placing of markers in a joint project carried out on behalf of Honduras by the National Port Authority on Bobel, Savanna and South Cays. Nicaragua asserts that "the markers concerned are just a metal disc in a concrete base, making them only detectable at a close distance".[120] The size and detectability of the markers is not the point. As indicated above, the triangulation markers were placed with the assistance of the United States pursuant to a 1976 Agreement. Indeed, the marker on Bobel Cay is engraved with '*Instituto Nacional Geografico, Honduras, C.A.*' The Nicaraguan authorities were aware of the placing of the markers. As a joint operation by Honduras with the United States, they have never protested to the United States or to Honduras the plain recognition of title, which is reflected also in the relevant gazetteers of the two countries (see below).

5.65. Nor did Nicaragua protest the placing of a 10 metre antenna on Bobel Cay, in 1975.[121]

5.66. Another example of Nicaragua's inability to accept the plain meaning of text is reflected in its argument that the 1943 Report of the United States Fish and Wildlife Service, referred to above, "only refers to cays to the north of the area in dispute in the present proceedings

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[119] NR, para 6.72.

[120] NR, para 6.73.

[121] *Supra*, para 5.14.

(Caratasca cays)".[122] The relevant paragraph of the 1943 report is worth reproducing:

> "There are a number of islands and cays lying off the coast. The most important are the Bay Islands: Roatan, Bonacca, Utila, and the Caratasca Cays. The Bay Islands are populated and they offer shelter for boats".

Nicaragua displays considerable imagination in its efforts to divine from this paragraph the conclusion that the 1943 Report refers only to cays north of Caratasca.

5.67. Relatedly, Nicaragua accuses Honduras of being misleading when stating that United States Gazetteers on Honduras and Nicaragua "are partially based on Honduran and Nicaraguan official information". To make its case, Nicaragua quotes a paragraph from this publication which states that "[w]herever possible, gazetteer production is carried out with the cooperation of the country concerned".[123] But it puts no evidence before the Court to support any claim that it did not provide information to those in the United States who prepared the Gazetteer.

5.68. Moreover, Nicaragua ignores the following paragraph of its own Nicaraguan Gazetteer, which confirms that Honduras' allegedly "misleading" sentence is accurate:

> "[m]ost of the names that were re-examined for this edition can be identified and located by the approved name or a recognizable variant of the approved name on one or more of the following sources:
>
> a) *República de Nicaragua* 1:1,000,000, Instituto Geográfico Nacional, 1981
>
> b) *República de Nicaragua*1:2,000,000, Instituto Geográfico Nacional, 1980
>
> c) Joint Operations Graphic 1:250,000 (Series 1501), Department of Defense, U.S. Army Topography Command or Defense Mapping Agency Hydrographic/Topographic Center, 1971-1981
>
> d) Nicaragua 1:50,000 (Series E751 and E752), Army map Service/Dirección General de Cartografía or Instituto Geográfico Nacional/Inter-American Geodetic Survey (IAGS), 1956-1972."[124]

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[122] NR, para 6.76.

[123] NR, para 6.77.

[124] Gazetteer of Nicaragua, 1985, HR, vol 2, annex 268.

5.69. This Nicaraguan Gazetteer is dated November 1985, being a revision of its 1976 second edition. It makes it clear that the names of locations (including cays) were re-examined and some new locations were added. None of the cays north of the 15th parallel are referred to in this edition or, apparently, in any of the earlier editions.

5.70. Nicaragua also seeks to derive assistance from the 1995 "Sailing Directions" issued by the US Defense Mapping Agency, which divides maritime areas into particular sectors.[125] Sector 5 includes Nicaragua, and Sector 6 includes Honduras, the relevant dividing line being in relevant part the 15th parallel. Honduras sees nothing in the material tendered by Nicaragua which enables it to avoid that fact. Nor has Nicaragua raised any material which enables it to challenge the fact that the 1993 Charts published by the British Hydrographer of the Navy treat the islands now claimed by Nicaragua as being located in Northern Honduras.[126]

J. CONCLUSIONS

5.71. In summary, the evidence which has been tendered by Honduras provides compelling evidence of title over the islands north of the 15th parallel. Honduras' practice in respect of oil concessions has been consistent in recognising the 15th parallel as the southern limit of such concessions, and some of these concessions encompass the islands which have been put in dispute by Nicaragua. Honduras has demonstrated that its own Constitution has made reference to some of the cays since 1957, and it has provided further examples of fisheries licenses and concessions to establish its regulation of fisheries activity north of the 15th parallel. It has introduced examples of agricultural laws dating back to 1936 which make express reference to one of the cays, and it has produced clear and incontrovertible evidence of third party recognition of its sovereignty over the islands. It has demonstrated that it has conducted significant public works on or around the islands, including the placement of navigational markers on or around the islands. It has introduced clear evidence establishing its application and enforcement of its laws (administrative, criminal, civil) in or around the islands and in areas north of the 15th parallel, and its regulation of immigration and labour. Its cartographic evidence is unchallenged by Nicaragua.

5.72. One aspect of Nicaragua's Reply is of great significance: Nicaragua introduces no evidence that any of the acts referred to in Honduras' Counter Memorial and this Reply have ever been the subject of a protest by

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125 NR, para 6.78 and HCM, Additional Annexes, annex 230.

126 HCM, para 6.71.

Nicaragua. By contrast the evidence of diplomatic notes demonstrates that on each and every occasion that Nicaragua has sought to make incursions north of the 15th parallel such act has been protested by Honduras.[127]

5.73. In these circumstances and on its own merits Honduras' claim to sovereignty over the islands is compelling, in accordance with the principles applied by the International Court and by other international tribunals. The *de facto* boundary at the 15th parallel reflects Honduras' title over those islands.

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[127] HCM, paras 3.22-3.24. See also para 6.76. See also Honduran diplomatic notes of protest, vol 2, annexes 25,30, 33 and 40.

CHAPTER 6:

GEOGRAPHIC FACTORS

6.01. The geographic setting of this and any other maritime boundary case concerns the coasts of the Parties that face the area to be delimited and the maritime area itself. Chapter 2 of the Honduran Counter Memorial addressed this subject.

6.02. However, if Nicaragua's Reply is to be believed, Honduras inadequately presented the relevant geographic circumstances. Nicaragua says that Honduras has an "Aversion to Coastal Relationships,"[1] an "unconventional approach to geography,"[2] an argument that has "No Relation to the Geographical Context,"[3] *etc.* Nicaragua concludes "that the Honduran conception of the geographical context is artificial, legally inadequate and unhelpful to the Court...".[4] Honduras submits that this is not true. The traditional line which has been used by the Parties is fully in accord with the geographic circumstances.

6.03. The criticism levied at Honduras by Nicaragua comes from the Party in this case that has a truly unique approach to the geographic factors that bear on maritime delimitation. Nicaragua mischaracterizes and overstates the geographic relevance of Cabo Gracias a Dios where the land boundary meets the sea. Nicaragua argues that the entire coastline of both countries is relevant to the delimitation rather than the coasts that face the maritime area to be delimited. Nicaragua ignores without any evaluation the islands of both Parties and the effect they have on the delimitation. Yet, Nicaragua harkens to the geomorphological factors of the seabed as if the Court had not firmly dismissed their relevance in the *Libya-Malta* case.[5]

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1 NR, p 15, Chapter II, Section I.

2 NR, p 15, para 2.3.

3 NR, p 16, Chapter II, Section III.

4 NR, p 16, para 2.7.

5 ICJ Reports 1985, p 13, paras 35-41.

6.04. To ensure that there is no doubt about the relevant geographical circumstances in this case, Honduras now undertakes an additional examination of this subject, which demonstrates that the traditional line is fully in accord with the geographical circumstances. This chapter addresses four issues.

- the unique geographical feature of Cabo Gracias a Dios where the land boundary meets the sea;
- the coasts of the Parties that face the delimitation area;
- the islands and rocks of importance to this case which lie in front of the land boundary terminus; and
- the non-relevance of shallow geomorphological sea floor features.

A. CABO GRACIAS A DIOS: WHERE THE LAND BOUNDARY MEETS THE SEA

6.05. An analysis of the geographical circumstances pertinent to a maritime boundary delimitation question between neighbouring States sharing the same mainland coast begins with an examination of the place where the land boundary meets the sea. In this case the land boundary follows the River Coco, which runs east as it nears the coast, and meets the sea at the eastern tip of Cabo Gracias a Dios. As the Parties have pointed out, the mouth of the River Coco is subject to considerable accretion and erosion. Thus, while the legal position of the land boundary terminus is known, its geographical position is subject to change and always will be. There is no difference between the Parties on this question.

6.06. The fact that a land boundary between two States follows a river to the sea is common. Furthermore, it is not unusual for such river mouths to be subject to natural forces so that their shape and position change with time. In constructing maritime boundaries, States have dealt with such situations. These characteristics do not pose insurmountable problems that stand in the way of establishing equitable maritime boundaries between neighbouring States. In Chapter 8 on the Honduran line, the particular character of the mouth of the River Coco will be examined closely in connection with Honduras' suggestion for the first segment of the single maritime boundary between Honduras and Nicaragua.

6.07. The River Coco reaches the sea at the eastern tip of Cabo Gracias a Dios. Honduras agrees with Nicaragua that Cabo Gracias a Dios continues

to accrete seaward.[6] The result is that by accretion the symmetrical cone-like protrusion of Cabo Gracias a Dios continues to be enhanced eastward into the Caribbean Sea.

6.08. Cabo Gracias a Dios is a cape. A cape is defined as an extension of land jutting out into the water.[7] A cape often marks an exceptional geographical coastal configuration in the circumstances. Cabo Gracias a Dios is such a feature. Its almost perfect cone-like symmetry, with the land boundary entering the sea at the eastern tip of the cone, is clearly an unusual coastal configuration and will be particularly noticeable to mariners.

6.09. In some situations, a feature such as Cabo Gracias a Dios might distort the geographical relationship between two countries insofar as maritime delimitation is concerned. But here it does not. The reason it does not is the position of the land boundary terminus at the eastern tip of the cape. Furthermore, the eastern protrusion of the coast of Central America that is produced by Cabo Gracias a Dios is symmetrical. The northern Honduran coast of the cape is mirrored by the southern Nicaraguan coast of the cape. On the coast, Cabo Gracias a Dios is almost perfectly divided between the neighbouring States at the land boundary terminus at the eastern tip of the cape. Because the land boundary enters the sea at the very eastern tip of Cabo Gracias a Dios, the Honduran and Nicaraguan coasts of the cape neither have the effect of "pulling" nor "pushing" the maritime boundary one way or the other as it begins its seaward reach eastward from Cabo Gracias a Dios. Thus, the traditional line has always run due east from the cape. In summary, because of the shape of the cape and the position of the land boundary terminus at its eastern tip, Cabo Gracias a Dios is a geographic feature that does not advantage one side or the other.

6.10. There is another geographical characteristic of Cabo Gracias a Dios that should be noted. When considered in terms of local coastal geography, a cape will reflect a departure from the direction of the coast from which the cape projects outward. Whether a cape does more and also marks a major change in coastal direction when viewed in broad terms is a question to be decided in each individual case.

6.11. The central thesis of Nicaragua's case is that there is a major change in the direction of the coast of Central America at Cabo Gracias a Dios.[8] That simply is not true. Nicaragua argues repeatedly that the coasts

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6 NR, p 11, para 19; NR, p 29, para 3.10.

7 *Merriam Webster's Collegiate Dictionary*, 10th edition, p 168.

8 NM, p 14, paras 31-32; NR, p 29, para 3.9.

of the Parties "roughly constitute the two sides of an inverted right angle,"[9] but Nicaragua's argument disregards the placement of the land boundary terminus.

6.12. This core geographic fact may be illustrated by reference to British Admiralty nautical chart 2425. This is a large scale chart that Nicaragua relies upon.[10] It is an "old-style" Admiralty chart which is nonetheless maintained up-to-date. This chart is reproduced here as Plate 41, however with several place names highlighted for ease of reference.

6.13. As can be seen, Nicaraguan and Honduran land territory cover the left side of this chart. The River Coco (Wanks) land boundary runs east to the eastern tip of Cabo Gracias a Dios. It may be noted that Cabo Gracias a Dios extends east only slightly further than the longitude of Nicaragua's coast at Punta Gordo. The Honduran coast leaves the chart in its upper left hand corner just north of Cape Falso; the Nicaraguan coast leaves the chart in its lower left hand corner at about 14° 05′ N. latitude just north of the Nicaraguan town of Puerto Cabezas, which is not shown on the chart.

6.14. It should be clear from an examination of this chart (i) that Cabo Gracias a Dios is a cape on the eastward facing coast of Central America, (ii) that Cabo Gracias a Dios is almost a perfect symmetrical cone-like feature divided at its eastern tip by the Honduras-Nicaragua land boundary terminus, and (iii) that from the top to the bottom of this chart there is no major change in the direction of the coast of Central America: thus, there is no major change in the direction of the coast at Cabo Gracias a Dios. This latter point should be manifestly obvious. If Cape Falso and Puerto Cabezas are on basically the same longitude, there is no major change in the direction of the Central American coast that runs between them. Of course, there are eastward protrusions, such as at Cabo Gracias a Dios and Punta Gordo, but that does not detract from the fact that the coast of Central America runs basically in a north to south direction from Cape Falso in Honduras along the entire Nicaraguan coast as shown on this chart and further south to Nicaragua's land boundary with Costa Rica.

6.15. The land boundary thus reaches the sea along this linear eastward facing coastal front of Central America albeit in the middle of the protruding symmetrical cone-like cape-like geographic feature of Cabo Gracias a Dios that is shared between the Parties. Cabo Gracias a Dios is a protrusion in the eastward facing coastal front of Central America, just as is Nicaragua's Punta Gordo to the south, but neither of these eastward bulges

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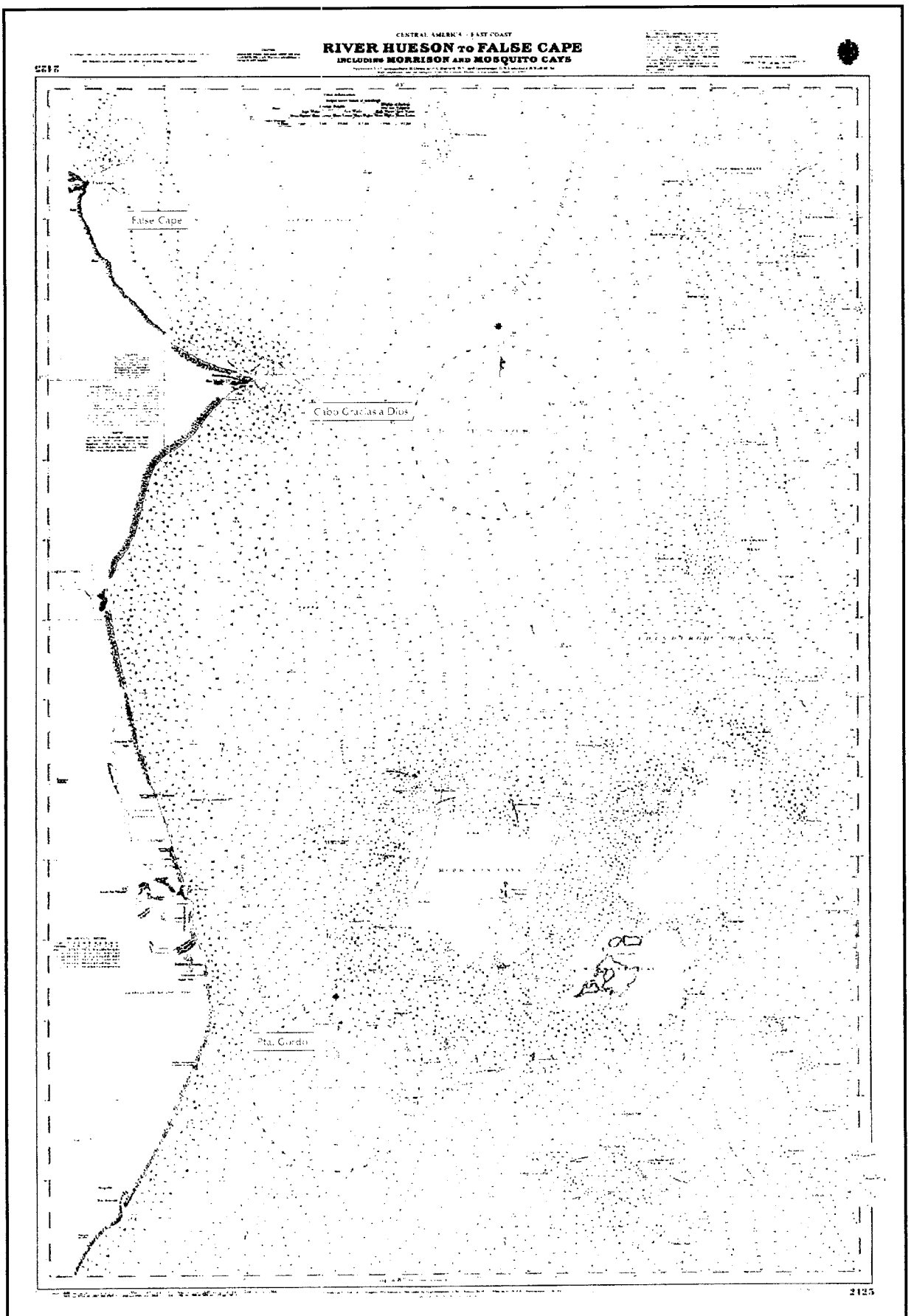
9 NM, p 14, para 31.

10 Nicaragua's Map A in vol III of its Memorial is a composite of various British Admiralty charts. Admiralty chart 2425 is one of the large scale charts that the smaller scale Map A is built upon.

Plate 41: British Admiralty Chart 2425



in Central America's coast marks a major change in the direction of the coast of Central America.

B. THE COASTS OF THE PARTIES THAT FACE THE MARITIME AREA TO BE DELIMITED

6.16. The relevant coast for maritime boundary analysis is the coast that faces the maritime area to be delimited.[11] This includes the coasts of the Parties on either side of the land boundary terminus to a distance appropriate to the circumstances.[12] The relevant coast will not extend beyond where it ceases to face the maritime area to be delimited.[13] If the coast turns away from the area to be delimited, it will no longer be deemed to be relevant; however, if the coast turns so as to continue to face the area to be delimited, it then may continue to be a relevant factor in the delimitation.

6.17. In this case, the Nicaraguan coast extends slightly west of south after Cabo Gracias a Dios all the way to the Nicaraguan border with Costa Rica. That does not mean however that this entire eastward facing Nicaraguan coast is relevant. Where the shared coast of the Parties is nearly linear, and where the respective neighbouring coasts of the Parties do not swing inward to face the area of delimitation from another direction, the length of the relevant coast of one Party should not be substantially greater than that of the other. This is so because there is no advantage to a relatively longer coast in such circumstances where the coasts do not turn inward on the area to be delimited. Thus, it is only the projection of the neighbouring coasts in the vicinity of the land boundary terminus that may be said to converge and overlap.

6.18. In this case, the Honduran segment of the coast of Central America continues its northward extension beyond Cabo Gracias a Dios to about Cape Falso (approximately 15°15′ N. latitude) where it begins to swing toward the west. At about 16° N. latitude the coast turns more sharply so that it runs almost due west. The coastal direction turn at Cape Falso marks the beginning of a major change in direction of the Central American coast which is completed at about 16° N. latitude. However, it must be

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11 Nicaragua, at pages 114-115 of its Memorial, reproduces the Court's teaching in this regard from the *Libya-Tunisia* judgment but fails to heed the Court's words. "The area in dispute, where one claim encroaches on the other, is that part of this whole area which can be considered as lying both off the Libyan coast and off the Tunisian coast." (ICJ Reports 1982, p 18, 61, para 74, emphasis added.)

12 ICJ Reports 1982, p 18, 85, para 120.

13 A coast that does not face the area to be delimited can no longer be said to be a coast whose projection converges and overlaps with that of the coast of a neighbouring State.

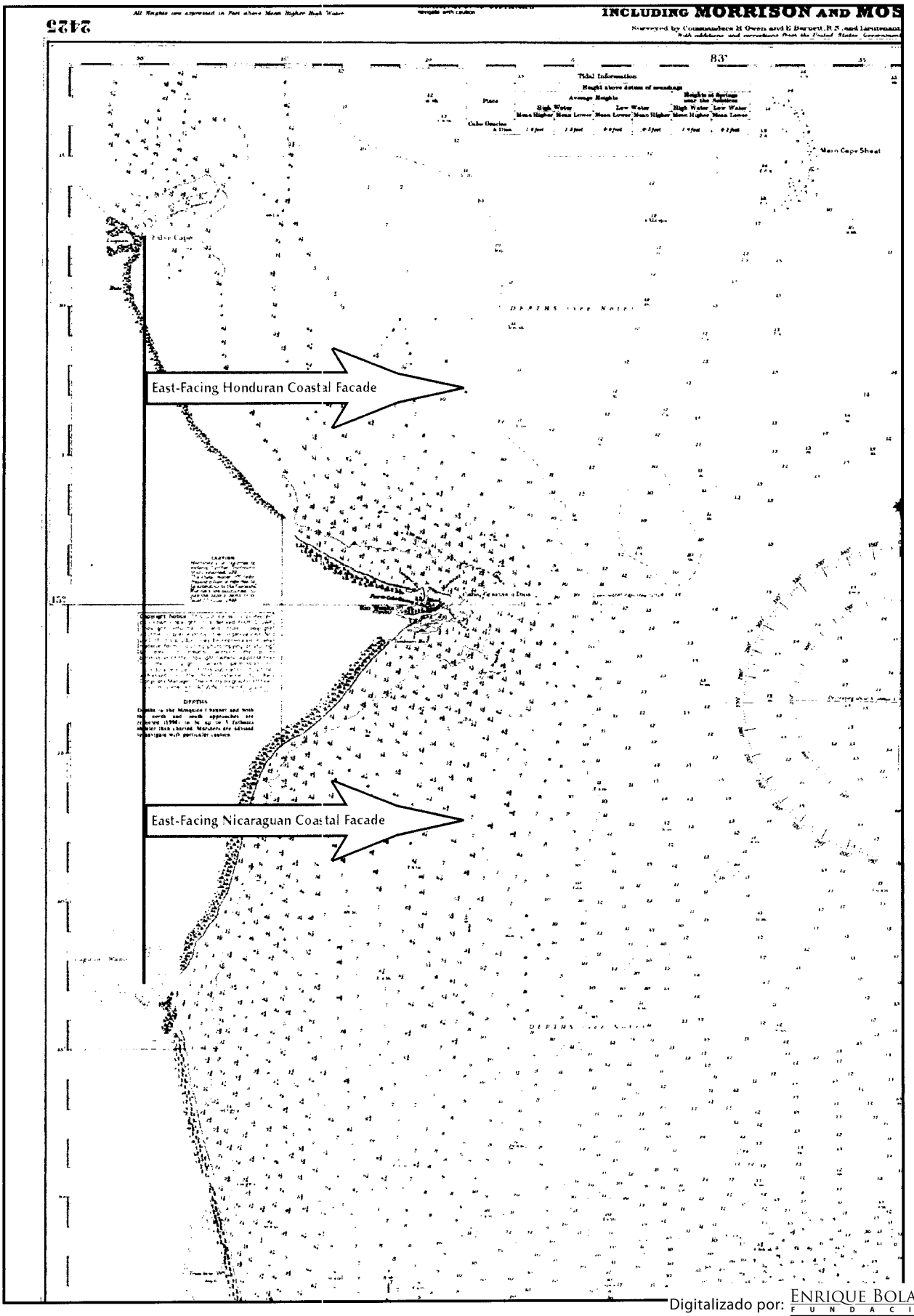
emphasized that beginning at Cape Falso the Honduran coast is swinging away from the area to be delimited not toward it. Thus, the northward facing coast of Honduras west of Cape Falso has no relevance in the maritime boundary analysis between Honduras and Nicaragua.

6.19. Since the land boundary meets the sea along a portion of the Central American coast that faces east, only such eastward facing coasts are relevant, unless there is a southward facing coast of Honduras, or a northward facing coast of Nicaragua, that face the area to be delimited which there are not, but for the presence of islands. As for the length of the eastward facing coasts of Honduras and Nicaragua that may be regarded as relevant, it is suggested that they are the Honduran coast from Cabo Gracias a Dios to Cape Falso and the Nicaraguan coast from Cabo Gracias a Dios to about Laguna Wano (also known as Laguna de Bismuna).

6.20. These separate Honduran and Nicaraguan coasts are aligned from north to south as demonstrated by a line connecting Cape Falso with Laguna Wano, as may be discerned by examining a portion of British Admiralty chart 2425 reproduced at Plate 42. They both span about 15 minutes of latitude. They are separated by the symmetrical cone-like protrusion of Cabo Gracias a Dios. While the local Honduran coast between Cabo Gracias a Dios to Cape Falso runs northwest, and the local Nicaraguan coast between Cabo Gracias a Dios to Laguna Wano runs southwest, these localized coastal directions do not deny the fact that the Central American coast south of Cape Falso to Nicaragua's border with Costa Rica faces east. Also, these Honduran and Nicaraguan coasts face, respectively, the islands in the vicinity of the land boundary terminus: on the one hand, the Honduran islands north of 15° N. latitude to 15°15′ N. latitude; and, on the other hand, the Nicaraguan features in the vicinity of the land boundary terminus to the south.

6.21. The overall length of these respective relevant coasts of the Parties is therefore relatively short, but this is dictated by the geographical circumstances. These circumstances include the change in coastal direction away from the area to be delimited which begins at Cape Falso, the placement of the land boundary terminus at the eastern tip of a coastal protrusion, and the fact that the maritime boundary cannot extend very far to the east from the mainland before it must respect the islands of one Party or the other Party as the boundary makes it way between them and extends further to the east.

Plate 42: British Admiralty Chart 2425 showing the east facing coastal features of Honduras and Nicaragua



C. THE ISLANDS AND ROCKS OF IMPORTANCE TO THIS CASE WHICH LIE IN FRONT OF THE LAND BOUNDARY TERMINUS

6.22. Nicaragua mischaracterizes the Honduran position when it says that "Nicaragua and Honduras agree that the delimitation has to be effected on the basis of the mainland coasts."[14] It is true that the Honduran line is the traditional line which adopts a delimitation method that follows a parallel of latitude for all the reasons given. Thus, it is not a line constructed by measurement from various points on the coast or islands. This does not mean that Honduras believes that the islands and rocks[15] of the Parties can be disregarded. Indeed, they must be respected.

6.23. It is one thing for a maritime boundary to respect the islands and rocks of the Parties, and quite another for the maritime boundary to be constructed using a delimitation method that is based on measurements of distance from certain geographic points, including points on islands or rocks as appropriate. In the former case, a boundary that respects islands and rocks will ensure that those belonging to one Party are not placed on the other Party's side of the boundary. In the latter case, a delimitation method such as equidistance may or may not be applied so as to construct the boundary based on measurements from points on islands or rocks as the circumstances require.

6.24. The Honduran line respects the island and rock features of both Parties. It separates them so that the Honduran islands and rocks are on the Honduran side of the maritime boundary and the Nicaraguan islands and rocks are on the Nicaraguan side of the boundary line. In contrast, the Nicaraguan line does not respect the Honduran islands and rocks because it places them on the Nicaraguan side of the line. Thus, even though Nicaragua has not requested the Court to engage in a determination of territorial sovereignty, it sets forth a line that not only would be a maritime boundary, but a line attributing sovereignty to islands and rocks and attempting to overturn long-established Honduran sovereignty.

6.25. Chapters 3, 4 and 5 of the Rejoinder have restated the basis for the Honduran position that the islands and rocks lying north of 15° N. latitude are Honduran, and has provided the factual and legal basis on which Honduras relies. Those representations will not be repeated here. However,

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14 NR, p 32, para 3.18.

15 In terms of Article 121 of the 1982 United Nations Convention on the Law of the Sea, features that are above water at hide-tide are either a rock or an island. An island is such a feature if it is capable of sustaining human habitation or having an economic life of its own, while a rock does not have those characteristics. A rock nonetheless is entitled to a 12-nautical mile territorial sea, while an island is also entitled to an exclusive economic zone and continental shelf of its own.

five additional points about the islands and rocks must be addressed. Plate 43 identifies the location of various offshore features.

6.26. First, the islands and rocks that lie north of 15° N. latitude are more proximate to the mainland coast of Honduras at Cabo Gracias a Dios than to the coast of Nicaragua. Likewise, the islands and rocks that lie south of 15° N. latitude are more proximate to the mainland of Nicaragua at Cabo Gracias a Dios than to the coast of Honduras. While proximity normally is not regarded as a basis of title to territory, it remains for Nicaragua to prove its sovereignty over islands and rocks that are more proximate to Honduras.

6.27. Second, at a minimum, geographical features that dry at high-tide are entitled to generate a 12-nautical-mile territorial sea of their own as a matter of law. Nicaragua tries to confuse this point with a discussion of the geographical term "islet," which is not a legal term in the law of the sea sense.[16] Therefore, without addressing the question of whether a particular feature that is above water at high-tide can or cannot sustain human habitation or have an economic life of its own, in which case it may generate an exclusive economic zone and continental shelf, the geographical features offshore the land boundary terminus that are entitled to generate at least a 12-nautical-mile territorial sea include: on the Honduran side of 15° N. latitude, Savanna Cay, Bobel Cay, Port Royal Cay, and South Cay among others; on the Nicaraguan side of 15° N. latitude, south to 14°45′ N. latitude there appear to be none, although Edinburgh Cay and Edinburgh Reef, which lie within the band between 15° N. latitude and 14°45′ N. latitude, may qualify and, absent evidence to the contrary, are presumed to do so. So far as is known to Honduras the feature named Cock Rocks does not dry at high tide and thus does not qualify even as a legal rock from which the territorial sea may be measured. This is confirmed by British Admiralty chart 2425 which indicates that Cock Rocks "covers." While British Admiralty chart 2425 treats Honduras' Hall Rock as a legal rock, it is Honduras' view that this feature also does not qualify to be used as a base point for measuring the breadth of the territorial sea.

6.28. Third, and furthermore, the Honduran Counter Memorial has pointed out that Savanna Cay, Bobel Cay, Port Royal Cay and South Cay, are islands in a legal sense because they sustain or have sustained human habitation.[17] Therefore, each is properly an island within the meaning of Article 121 of the 1982 United Nations Convention on the Law of the Sea. Nicaragua does not contest the Honduran point that these islands sustain or have sustained human habitation. Instead, Nicaragua holds forth that these

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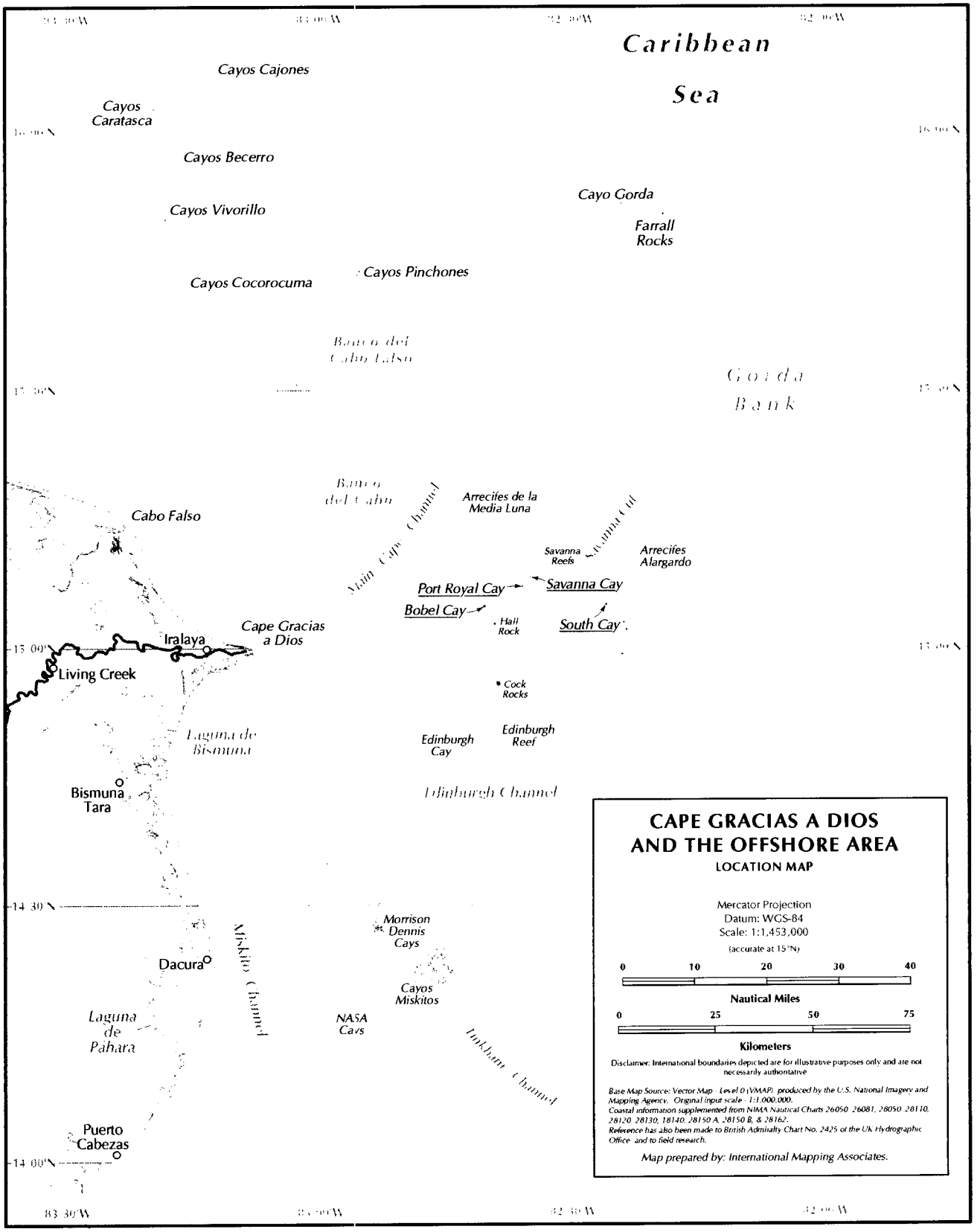
16 NR, p 30-32, paras 3.13-3.19.

17 HCM, p 14, para 2.3.

Plate 43: Cape Gracias a Dios and the Offshore Area. Location Map



CAPE GRACIAS A DIOS AND THE OFFSHORE AREA

LOCATION MAP

Mercator Projection
Datum: WGS-84
Scale: 1:1,453,000
(accurate at 15°N)

0 10 20 30 40

Nautical Miles

0 25 50 75

Kilometers

Disclaimer: International boundaries depicted are for illustrative purposes only and are not necessarily authoritative

Base Map Source: Vector Map - Level 0 (VMAP) produced by the U.S. National Imagery and Mapping Agency. Original input scale - 1:1,000,000.
Coastal information supplemented from NIMA Nautical Charts 26050, 26081, 28050, 28110, 28120, 28130, 18140, 28150 A, 28150 B, & 28162.
Reference has also been made to British Admiralty Chart No. 2425 of the UK Hydrographic Office and to field research.

Map prepared by: International Mapping Associates.

islands should be described as islets since they are small[18] (a point of perhaps geographical but not legal importance), that they are unsuitable for habitation because they are in the path of hurricanes[19] (true, but so is the entire region), and in keeping with Nicaragua's false premise that the Parties agree that the islands are not relevant to the delimitation, that in all events the legal character of the islands does not need to be established.[20] Although Nicaragua promises to discuss the matter further in Chapter VI of its Reply which seeks to rebut Honduras' evidence of title to these islands, all of which is responded to Chapters 4 and 5 of this Rejoinder, Nicaragua does not again contest that these four named features are properly islands in the law of the sea sense.

6.29. This is in contrast to the features on the Nicaraguan side of 15° N. latitude. British Admiralty chart 2425, which was introduced by Nicaragua, is evidence that Cock Rocks is not entitled to be used as a base point from which the territorial sea is measured. Edinburgh Cay and Edinburgh Reef may be more than submerged features, but they do not appear to be islands in the law of the sea sense. Nicaragua does not argue to the contrary.[21]

6.30. Fourth, the juridical status of the islands and rocks being as established in the Honduran pleadings, 12-nautical-mile arcs drawn from the low-water line of the high-water features on the Honduran side will be truncated by the single maritime boundary Honduras proposes for much of its length. Also, there is an area where 12-nautical-mile arcs drawn from Edinburgh Cay and Edinburgh Reef also reach the traditional boundary thus creating a delimitation between territorial seas. East of this area, however, the single maritime boundary will in fact be a delimitation between the territorial sea of Honduras on the one hand, and the exclusive economic zone of Nicaragua on the other hand. Thus, as shown on Plate 44 moving from west to east along 14°59.8′ N. latitude, the single maritime boundary will first be a territorial sea boundary out to 12-nautical miles from the mainland. Next, for a short distance of about 3.6 nautical miles the boundary will not be within 12-nautical miles of any coast and thus it will constitute an exclusive economic zone boundary. Next, the area of Honduran and Nicaraguan territorial seas that abut the traditional line will be encountered. This area extends east to about 82°31′ W. longitude. Thereafter, the single maritime boundary will divide the territorial sea of Honduras from the exclusive economic zone of Nicaragua, before it again

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18 NR, p 30-31, paras 3.13-3.15.

19 NR, p 32, para 3.17.

20 NR, p 32, para 3.18.

21 Nicaragua appears quite disinterested in the subject. "Nicaragua does not consider that it is necessary to establish if there are any islands in the area of relevance for the delimitation that fall under the definition of rocks...." NR, p 32, para 3.18.

divides the exclusive economic zones of Honduras and Nicaragua until the jurisdiction of a third State is reached.

6.31. Fifth, to conclude this discussion about the islands relevant in this case, it should be mentioned that neither Party has claimed a straight baseline system in the relevant vicinity so as to claim the waters landward of such islands and rocks in question as internal waters. In the Caribbean Sea, the Honduran straight baseline system[22] runs from west to east terminating at Cabo Gracias a Dios. The Honduran baseline system is established from the low-water line along the coast of Honduran islands and rocks in this vicinity.[23] Honduras does not use the Honduran islands and rocks between 15°15′ N. latitude and 15° N. latitude in the straight baseline system because the essential criteria of Article 7 of the 1982 Law of the Sea Convention could not be met. As for Nicaragua, it has not claimed a straight baseline system, and it is clear that there is no Nicaraguan feature off the relevant coast between 14°45′ N. latitude and 15° N. latitude that would meet Article 7 criteria for inclusion in a straight baseline system.

D. THE NON-RELEVANCE OF SHALLOW GEOMORPHOLOGICAL SEA-FLOOR FEATURES

6.32. In its Memorial, Nicaragua asserted that the area in dispute included the Nicaraguan Rise[24] and that it should be divided equally between the Parties.[25] Thus, even at this time in the consolidation of the law and practice of maritime delimitation at the beginning of the twenty-first century, Nicaragua requests the Court to reinstate the relevance of geological and geomorphological factors to maritime boundary delimitation which the Court completely set aside in the *Libya-Malta* case insofar as the area within 200-nautical miles of the coast is concerned,[26] and to revisit the failed argument of the "just and equitable share," which the Court dismissed in the *North Sea Continental Shelf* cases.[27]

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22 The Law on Maritime Areas of Honduras of 30 October 1999, HCM, vol 2, annex 65, p 167-173.

23 Article 4 of the Executive Decree of 21 March 2000 states: "As to the islands under Honduran sovereignty situated in the Caribbean Sea ... the corresponding national maritime areas shall have as their baseline the low-water line along the coast...".

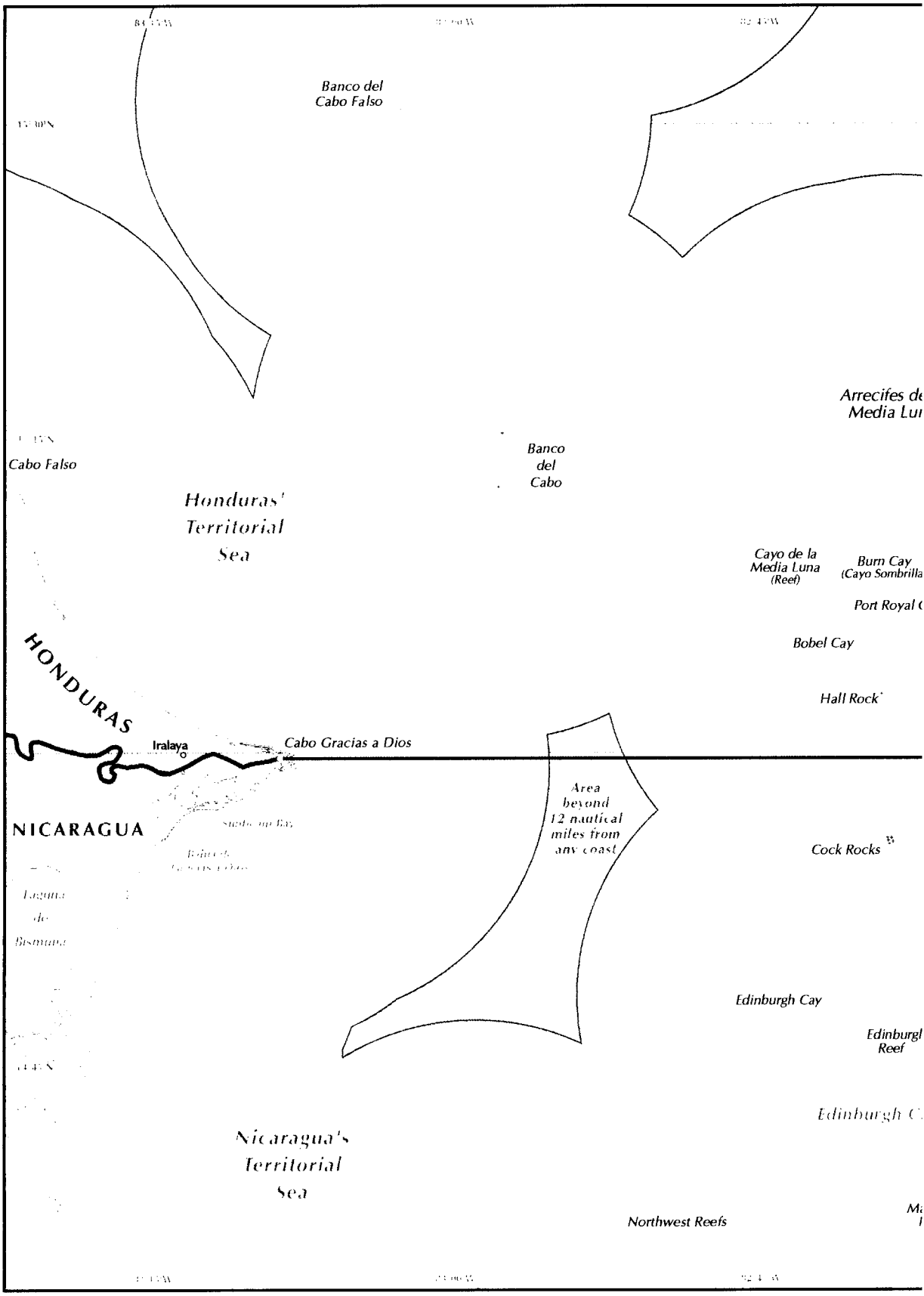
24 NM, p 161, para 2.

25 NM, p 163, para 20.

26 ICJ Reports 1985, p 13, paras 35-41.

27 "Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal state and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share..." ICJ Reports 1969, p 3, para 18.

Plate 44: Territorial Sea and 200 Nautical Mile Zone Limits along the Honduras/Nicaragua Traditional Boundary



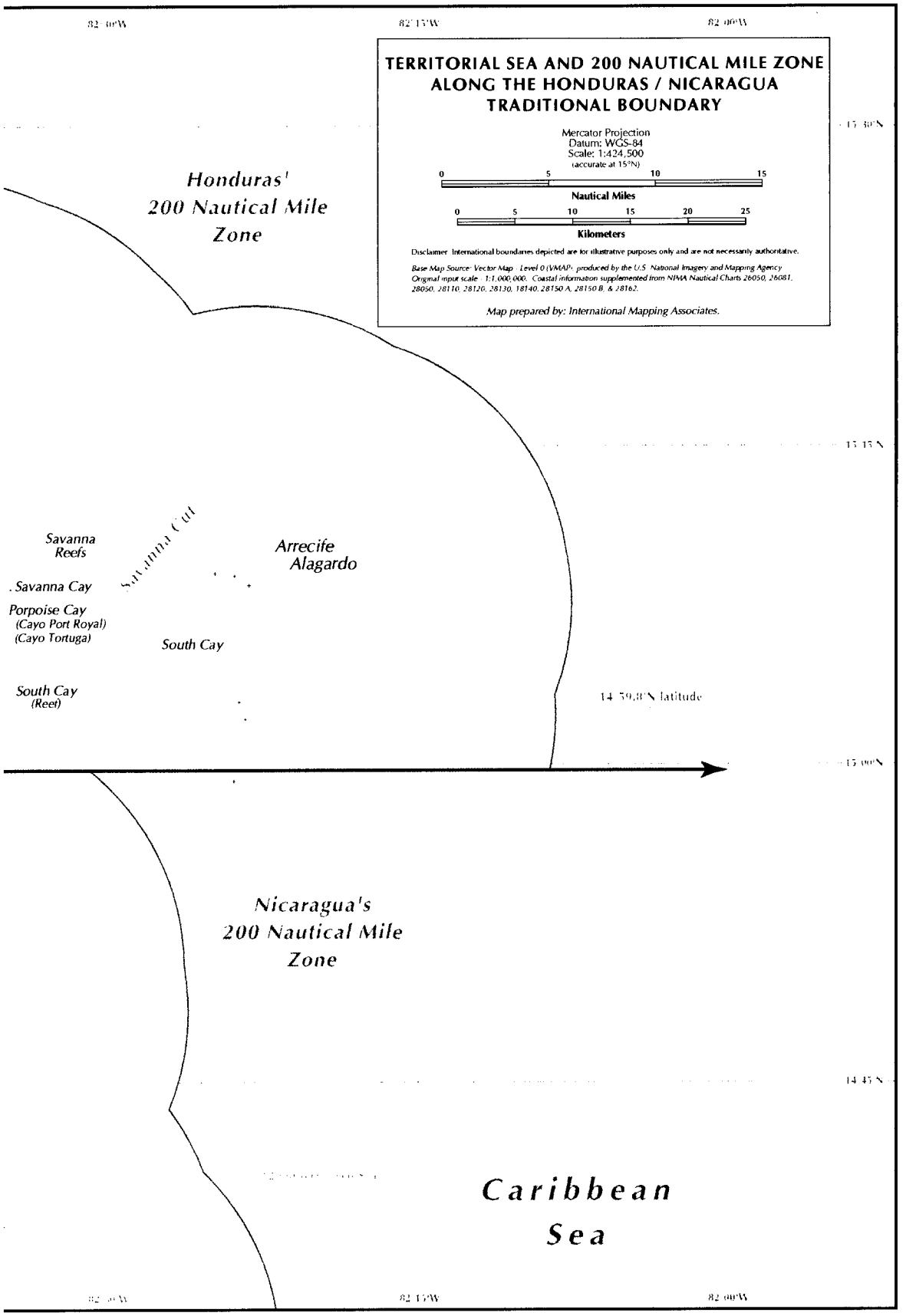


Plate 44

6.33. The Counter Memorial of Honduras succinctly pointed out that the "Rise" is of dubious geomorphological authenticity,[28] and that Nicaragua's reliance on geology and geomorphology is unfounded as a matter of law.[29] Yet Nicaragua returns to this argument in its Reply saying, "Nicaragua and Honduras agree on the geophysical description of the Nicaraguan Rise. However, they differ over the relevance of this feature...".[30] While Honduras and Nicaragua surely differ over the matter of legal relevance, Nicaragua is invited to show the Court where Honduras agreed on a geophysical description of this feature.

6.34. The Nicaraguan Reply softens the Nicaraguan argument to say that "Nicaragua is simply pointing out the relevance of geomorphology in a situation in which there is an absence of a natural dividing line."[31] The argument still cannot stand. The Court said:

> "The Court however considers that since the development of the law enables a State to claim that the continental shelf as pertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geomorphological factors within that distance either in verifying the legal title of States concerned or in proceeding to a delimitation as between their claims."[32]

Nicaragua asks the Court to stand its jurisprudence on its head. Honduras has full confidence that the Court will not do so. It is the geography of the mainland coasts and islands and rocks of the Parties, together with the conduct of the Parties, that are relevant to the delimitation, not the geology and geomorphology of the seabed and subsoil.

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28 HCM, p 24, para 2.22.

29 HCM, p 24, para 2.23; p 68-69, paras 4.33-35; p 134, para 7.4.

30 NR, p 30, para 3.11.

31 NR, p 184, para 9.23.

32 ICJ Reports 1985, p 13, para 39.

CHAPTER 7:

OBSERVATIONS ON THE NICARAGUAN LINE

7.01. This chapter sets forth Honduras' specific observations on the line proposed by Nicaragua in this case. Of course, the primary observation is that the Nicaraguan line does not conform to the traditional line which served as the maritime boundary between the Parties until Nicaragua changed its position. With that point stated, this Chapter begins by addressing the technical characteristics of the Nicaraguan line, and then the following additional observations will be made:

- The Nicaraguan line runs on the wrong side of the Honduran islands situated between 15° N. latitude and 15°15′ N. latitude;
- The Nicaraguan line gives no weight to Honduran islands north of 15°15′ N. latitude; and
- The bisector of coastal fronts presented by Nicaragua is based on a flawed assessment of coastal fronts and delimitation methods.

A. THE TECHNICAL CHARACTERISTICS OF THE NICARAGUAN LINE

7.02. Before further discussion of the Nicaraguan line, it is important to discern its genesis. The Nicaraguan line arises out of the discussion in Chapter VIII of Nicaragua's Memorial. While the line itself is shown on maps in the Memorial, one has to dig through the box of Nicaraguan maps in Volume III of the Memorial to find Map A to see how the Nicaraguan line is, in fact, constructed. When one finds it, one understands that the Nicaraguan line is the bisector of two coastal front lines. Those coastal front lines mark the whole of the coasts of the Parties: on the Nicaraguan side, from Cabo Gracias a Dios in a straight line to the border with Costa Rica; and on the Honduran side, in a straight line from Cabo Gracias a Dios to the land boundary terminus with Guatemala. Nicaragua's objective is clear. Nicaragua seeks a maritime boundary that would extend from Cabo Gracias a Dios in a north-easterly direction through what is called the "Main Cape Channel," presumably leaving everything to the south of that

line to Nicaragua. Plate 45 depicts the Nicaraguan line on British Admiralty chart 2425.

7.03. To produce the Nicaraguan line, Nicaragua creates two extreme coastal front lines that extend far beyond the relevant area. When one examines the Nicaraguan coastal front line, however, one must admit that the eastward facing coast of Nicaragua is relative linear and that it runs slightly west of south all the way to Costa Rica from Cabo Gracias a Dios. This can be seen by an examination of the actual Nicaraguan coastline on Plate 45. Thus, the Nicaraguan coast overall faces east. Nicaragua's own method admits that fact. Indeed, the Nicaraguan coast faces slightly south of east. One may ask: if the Nicaraguan coast faces east, why is it that the traditional boundary that runs due east from the land boundary terminus is not a correct and equitable maritime boundary? How is it that Nicaragua is entitled to a maritime boundary that runs northeast when no coast of Nicaragua faces that direction?

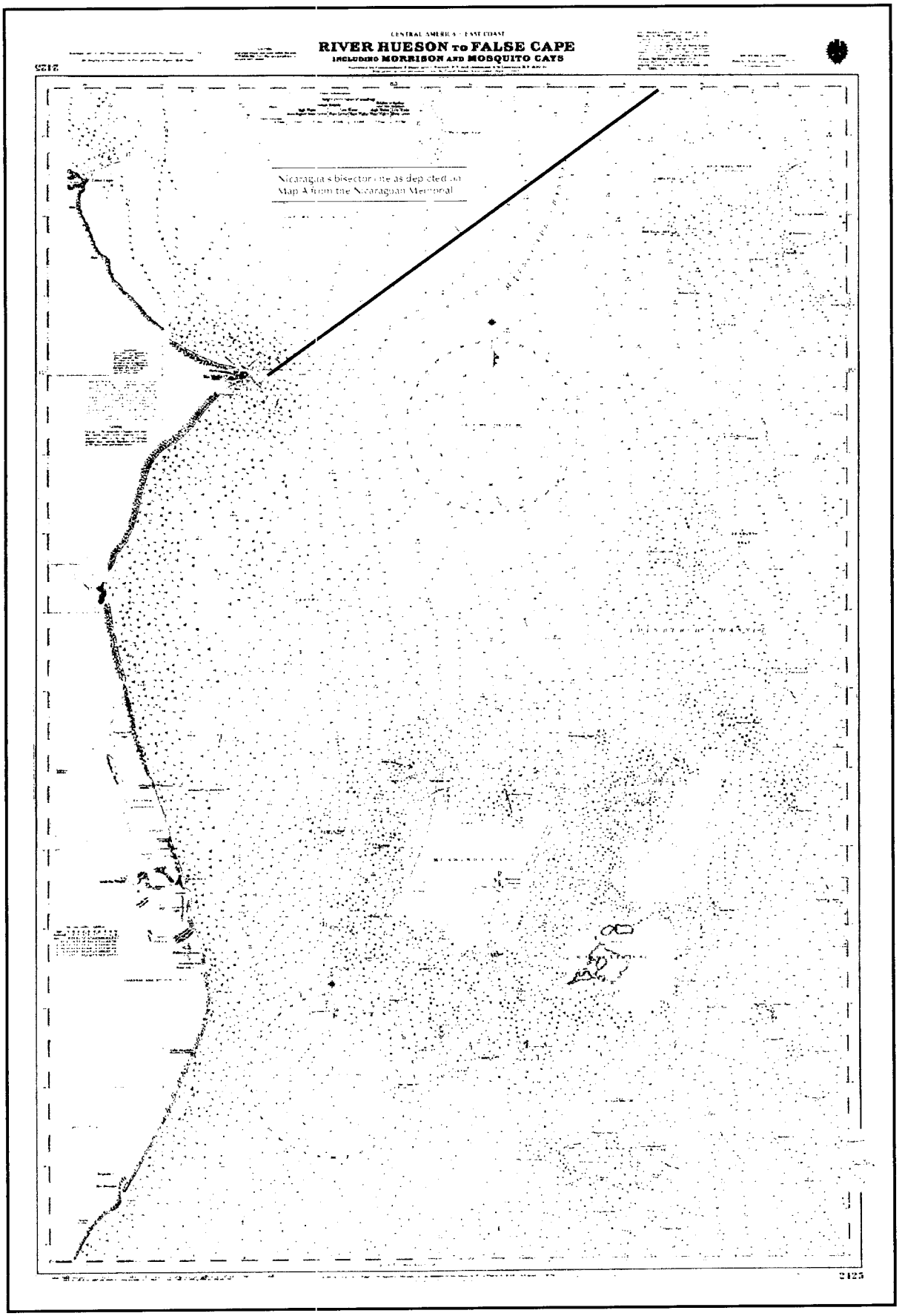
7.04. Of course, the technical reason the Nicaraguan line is possible is due to the obviously distorted coastal front line that Nicaragua chooses for Honduras. Exactly 20 percent (22,394 square kilometres) of Honduran territory lies north of the line that Nicaragua represents as the Honduran coastal front. This distorted and self-serving depiction of the Honduran coast is designed to make it appear that there is a major change in the direction of the coast of Central America at Cabo Gracias a Dios which there is not.

7.05. Thus, the Nicaraguan line is a conjurer's trick. No mainland coast of Nicaragua supports the Nicaraguan line. A distorted rendition of the coast of Honduras is its only technical basis. Nicaragua brings a maritime boundary case to the Court that it portrays as justified by the coastal relationships it presents and further asserts that the islands between 15° N. latitude and 15°15′ N. latitude are irrelevant to the maritime boundary issue. Yet the only way the Nicaraguan line could ever be justified is not on a basis of an analysis of coastal fronts but if Nicaragua were sovereign over those islands which it is not.

B. THE NICARAGUAN LINE RUNS ON THE WRONG SIDE OF THE HONDURAN ISLANDS SITUATED BETWEEN 15° N. LATITUDE AND 15°15′ N. LATITUDE

7.06. The Nicaraguan line claims the islands between 15° N. latitude and 15°15′ N. latitude. These islands have always belonged to Honduras, and Honduran sovereignty over them is unquestionable in spite of Nicaragua's recent pretensions. In its Application, Nicaragua requested the Court to determine the maritime boundary between the Parties. It did not request a

Plate 45: Nicaraguan Line on British. Admiralty Chart 2425



determination of territorial sovereignty, notwithstanding that it knew the longstanding Honduran position and of its own recent claim.

7.07. Thus, without saying so, Nicaragua seeks a line to reattribute sovereignty over the islands as well as one to serve as a maritime boundary. As a matter of procedure, Nicaragua's approach to the case is open to doubt. How Nicaragua explains itself to the Court is Nicaragua's problem, and, indeed, obligation. For Honduras the case proceeds without Honduran sovereignty over the islands between 15° N. latitude and 15° 15′ N. latitude being subject to doubt.

7.08. Accordingly, Honduras is justified in rejecting the Nicaraguan line simply because it places Honduran islands on the wrong side of the line.[1] In certain circumstances the island of one party may find itself on the wrong side of a maritime boundary when it is enclaved. But that is not Nicaragua's argument. Honduras needs to say no more than that the Nicaraguan line is without foundation since it places Honduran islands on the wrong side of that line.

C. THE NICARAGUAN LINE GIVES NO WEIGHT TO HONDURAN ISLANDS NORTH OF 15°15′ N. LATITUDE

7.09. While Nicaragua has made clear in its pleadings that it now claims the islands and rocks between 15° N. latitude and 15°15′N. latitude, and that in its view those islands and rocks should be disregarded for maritime delimitation purposes, it also disregards the numerous Honduran islands and rocks north of 15°15′ latitude that Nicaragua does not claim and that normally would have some weight in a maritime boundary delimitation in their vicinity. These islands and rocks stretch north from Cape Falso to beyond 16° N. latitude and indeed east to Cayo Gorda, which is situated well to the east of the longitude of Cabo Gracias a Dios to about the same longitude as South Cay.

7.10. While Nicaragua leaves no doubt as to its ambitions, it nonetheless veils its methods. Lest there be any doubt about these methods, Nicaragua's approach is to bring a maritime boundary case which turns out instead to be a claim of a line of attribution transferring sovereignty over all islands and rocks between 15° N. latitude and 15°15′N. latitude. It bases its line on an unsupportable coastal-front analysis that is also dependent upon the proposition that the islands and rocks between 15° N. latitude and 15°15′N.

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[1] In its Reply, Nicaragua criticizes Honduras for the "territorial" and "sovereignty-related" character of its position. (NR, p 20, paras 2.20-2.26). It is hard to see what is wrong with a maritime boundary position that ensures that the islands of the Parties are separated by the boundary line.

latitude are unimportant to the delimitation. The line Nicaragua therefore creates disregards those islands and rocks to be sure, but that line also disregards all the other Honduran islands and rocks north of 15°15′ N. latitude. The result is a line that is far more favourable to Nicaragua than an equidistance line would be even if Nicaragua were entitled to the islands and rocks between 15° N. latitude and 15°15′ N. latitude which it is not. The Nicaraguan position is extreme, expansionistic and perverse.

D. THE BISECTOR OF COASTAL FRONTS PRESENTED BY NICARAGUA IS BASED UPON A FLAWED ASSESSMENT OF COASTAL FRONTS AND DELIMITATION METHODS

7.11. Chapter 6 above addresses the fact that the land boundary between Honduras and Nicaragua meets the Central American coast where that coast faces east. As discussed in Chapter 6, Nicaragua's Puerto Cabezas, which is at approximately 14° N. latitude, and Honduras' Cape Falso, at approximately 15°15′ N. latitude, are on virtually the same longitude. This is so in spite of the eastern bulge in the Nicaraguan coast at Punta Gordo, and the shared eastern protrusion in the eastward facing Central American coast at Cabo Gracias a Dios. Both of these coastal sinuosities at Punta Gordo and Cabo Gracias a Dios, reach eastward to about the same distance in longitude. Thus, between Puerto Cabezas in Nicaragua and Cape Falso in Honduras the coast of Central America runs essentially from south to north in spite of the coastal sinuosities. Since these two places, which are some 75 minutes apart in latitude (or 75-nautical miles), are on the same longitude, the general direction of the coast of Central America which runs between them, and in the midst of which lies the land boundary terminus, can hardly be said to have changed.

7.12. Thus, Nicaragua's portrayal of a right-angle coastal relationship between itself and Honduras at the land boundary terminus at Cabo Gracias a Dios is plainly and simply wrong. If Puerto Cabezas in Nicaragua and Cape Falso in Honduras lie on the same longitude, the general direction of the coast between those Nicaraguan and Honduran points is south to north. Thus, the coast of Central America between those points faces east. And, if the coast of Central America faces east at the land boundary terminus at Cabo Gracias a Dios, it is hard to see what is inequitable about the traditional line that runs due east from this eastward facing coast.

7.13. Because there is no angular directional change of the coast of Central America of any significance at the land boundary terminus, it is inappropriate to use a bisector of coastal fronts as the delimitation method in this case. Nicaragua attempts to justify the bisector of coastal fronts method by reference to judicial authority and State practice. The principal judicial authority cited is the *Gulf of Maine* case where the Chamber used a

bisector of coastal fronts in the first segment of its boundary.[2] Of course, there the Chamber did so where the Canadian and United States coasts faced inward on the area to be delimited, and where the Chamber also determined not to use the equidistance method. The eight State practice agreements cited by Nicaragua[3] in this regard are hardly convincing support for Nicaragua's propositions. A review of Nicaragua's discussion discloses that most of them, in fact, are boundaries that are perpendicular to the general direction of the coast.

7.14. Honduras does not deny that in certain situations judicial authority and State practice have adopted a geometrical method of delimitation such as angle bisectors and perpendiculars to the general direction of the coast. It is important to appreciate on the one hand that both methods are dependent upon an accurate rendering of the neighbouring coastal relationships, and on the other hand that there is a difference between the two methods. A bisector may be of use in a situation, such as the *Gulf of Maine* case, where there is a major change in direction of the neighbouring coasts at the land boundary terminus. A perpendicular may be of use where the coast on either side of the land boundary terminus follows the same direction such as it does in this case.

7.15. Of course, if Nicaragua insists, and wishes to impose the bisector method on the local change in coastal direction at Cabo Gracias a Dios, using only the Honduran and Nicaraguan coasts that face the area to be delimited in this case, the result is instructive. For this purpose Plate 42 in Chapter 6 may be recalled. As is clearly shown by reference to that Figure, the bisector of the angle created by the Honduras' coastal front from Cape Falso to Cabo Gracias a Dios and Nicaragua's coastal front from Laguna Wano (de Bismuna) to Cabo Gracias a Dios will closely approximate a parallel of latitude.

7.16. This is not surprising. Since Nicaragua's Laguna Wano (de Bismuna) and Honduras' Cape Falso are roughly the same distance from Cabo Gracias a Dios, and since they lie on approximately the same longitude, the exercise set forth in paragraph 7.15 above is the same as establishing the line that runs through Cabo Gracias a Dios that is perpendicular to the general direction of the coast connecting Cape Falso with Laguna Wano (de Bismuna), or for that matter between Cape Falso and Puerto Cabezas, or even between Cape Falso and Nicaragua's border with Costa Rica. Thus, the bisector of the angle of the Honduran and Nicaraguan coasts in the vicinity of Cabo Gracias a Dios, is basically the same as the perpendicular to the general direction of the eastward facing

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2 NM, p 100, para 35.

3 NM, p 111, paras 50-50.

coast of Central America: in other words, a parallel of latitude extending from Cabo Gracias a Dios.

7.17. The foregoing assessment demonstrates that the construction of Nicaragua's line is arbitrary and without foundation. It "cuts off" the projection of the eastward facing coastal front of Honduras that is south of Cape Falso, as is clearly shown in Plate 45. It is an after thought designed to achieve a desired result. It has no basis in law, international practice, the relevant coastal geography, or the practice of the Parties in this case. It is an illusion that is intended to convince that Nicaragua is a State on the Caribbean Sea with a coast that faces northward. But Nicaragua has no coast that faces northward. Nicaragua lost the King of Spain case 100 years ago when it argued that it did so. That Award rejected the Nicaragua argument that it had a Caribbean coast that faced north and northeast and established clearly that the Honduras-Nicaragua land boundary enters the sea along the eastward facing coast of Central America at Cabo Gracias a Dios. Nicaragua's Caribbean coast thus faces east; it has no basis for a maritime boundary line that runs in a north-easterly direction.

CHAPTER 8:

THE HONDURAN LINE

8.01. This chapter sets forth the Honduran line and tests its equitable character. Chapters 2and 3 of this Rejoinder set forth the legal basis for the Honduran line. Chapters 4 and 5 reconfirms the relevant facts concerning the traditional use of this line by both Parties and emphasizes the relevant facts concerning the Honduran title to the islands and rocks north of 15° N. latitude. Chapter 6 assesses the geographic factors in this case. It remains for this Chapter 8 to address the following:

- the question of how the boundary should account for the accretion and erosion at the mouth of the River Coco once the boundary leaves the point identified by the Honduras/Nicaragua Mixed Commission at 14°59.8′ N. latitude, 83°08.9′ W. longitude;
- the technical characteristics of the boundary that Honduras proposes;
- consideration of a relevant case precedent;
- the test of the equitableness of the Honduran line against the equidistance line; and
- the question whether the Honduran line "cuts off" the projection of the coastal front of Nicaragua.

A. THE QUESTION OF HOW THE BOUNDARY SHOULD ACCOUNT FOR THE ACCRETION AND EROSION AT THE MOUTH OF THE RIVER COCO

8.02. Plate 46 appeared as Plate 19 in the Honduran Counter Memorial. It is a series of photos of the mouth of the River Coco every four years from 1979 to 2001. It is obvious that the nature of the river mouth shifts considerably, even from year to year. Sometimes the opening into the sea is more northerly, sometimes it opens almost due east, and in other years the

mouth faces more to the south.[1] The orientation of the mouth of the River Coco, combined with the general eastward accretion of Cabo Gracias a Dios, makes it necessary to adopt a technique so that the maritime boundary need not change as the mouth of the river changes.

8.03. Such a technique is available in the practice of States in such situations. For instance, the Mexico-United States maritime boundary in the Gulf of Mexico begins at the mouth of the River Grande which is also subject to considerable hydrological change.[2] The Parties in that situation identified a fixed point a short distance seaward of the mouth of the river that will remain constant no matter how the mouth of the river may change. Thus, the Mexico-United States maritime boundary leaves the mouth of the River Grande, wherever it may be, and connects directly to the seaward fixed point. From there the maritime boundary proceeds further seaward following the equidistance methodology employed in that case.[3]

8.04. There is no reason that this technique cannot be employed in this case. Indeed, Nicaragua has itself accepted this approach in suggesting "that the line of delimitation should start on a fixed point located three nautical miles from the mouth of the River Coco."[4] Nicaragua has suggested the geographic coordinates of such a fixed point,[5] but they are not acceptable because they are not based in law, nor in the practice of the Parties, and the seaward fixed point suggested is itself based on the shifting location of the river mouth.

8.05. Accordingly, Honduras believes that such seaward fixed point itself should be measured from another point, which is established in this case, the point identified by the Honduras/Nicaragua Mixed Commission in 1962 at 14°59.8′ N. latitude, 83°08.9′ W. longitude. Thus, in the view of Honduras, the seaward fixed point should be established precisely three-nautical miles due east of 14°59.8′ N. latitude, 83°08.9′ W. longitude. The

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1 Nicaragua argues that the Nicaraguan bank of the River Coco always extends further seaward than the Honduran side of the river at the tip of the cape. Honduras disagrees. As can be seen on Plate 46, the characteristics of the mouth of the river are always shifting.

2 *See International Maritime Boundaries*, Charney & Alexander, vol I, Report 1-5.

3 At Chapter VIII, paragraph 55 of its Memorial Nicaragua refers to the Mexico-United States maritime boundary as a perpendicular to the general direction of the coast and even goes so far as to depict the boundary on Map XIII of the Memorial. This reference is not correct. The Mexico-United States maritime boundary is a simplified equidistance line in some areas and a strict equidistance line in other areas which uses even the smallest island features as basepoints in constructing the equidistance line. See, International Maritime Boundaries, Charney & Alexander, vol I, Report 1-5; Charney & Smith, vol IV, Report 1-5.

4 NM, p 4, para 10.

5 NM, p 83, para 23.

Plate 46: Satellite Analysis of Coastal Changes at Cape Gracias a Dios (1979-2001) [Reproduction of Plate 19 from the Honduras Counter-Memorial]

SATELLITE ANALYSIS OF COASTAL CHANGES AT CAPE GRACIAS A DIOS

(1979 - 2001)

Images acquired from:

1979 - 1981.....Landsat 1, 2 & 3, Multi-Spectral Scanner (MSS)

1985 - 1997.....Landsat 4 & 5, Thematic Mapper (TM)

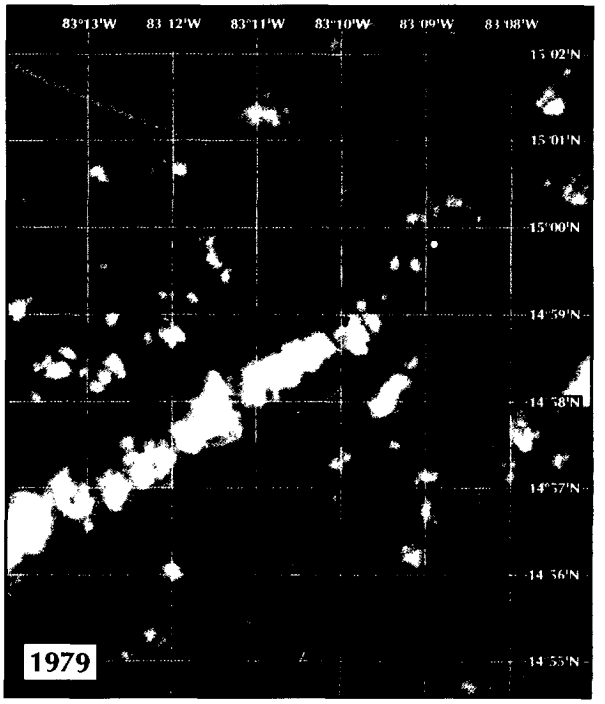
2001.....Landsat 7, Thematic Mapper (TM)

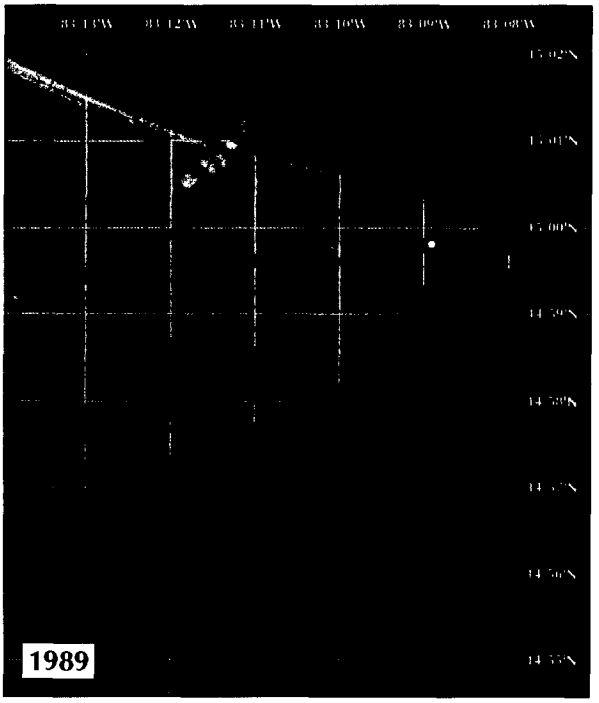
Scale: 1:138,000

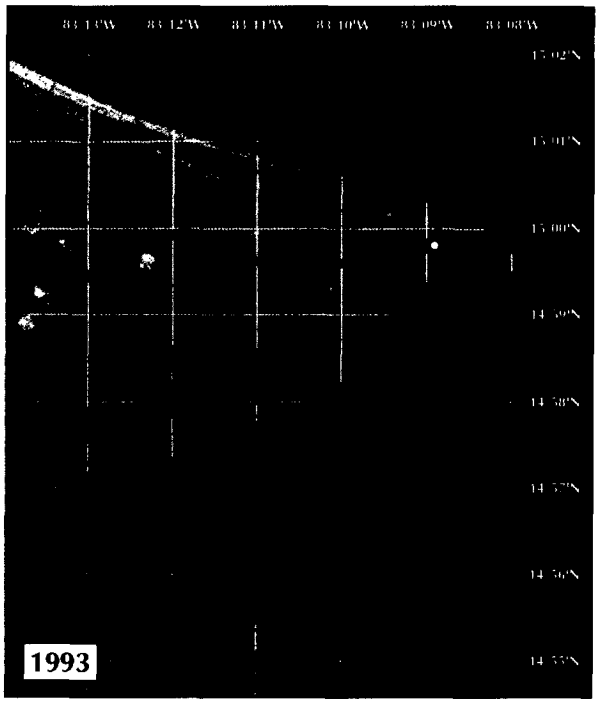
Projection: Universal Transverse Mercator (UTM)

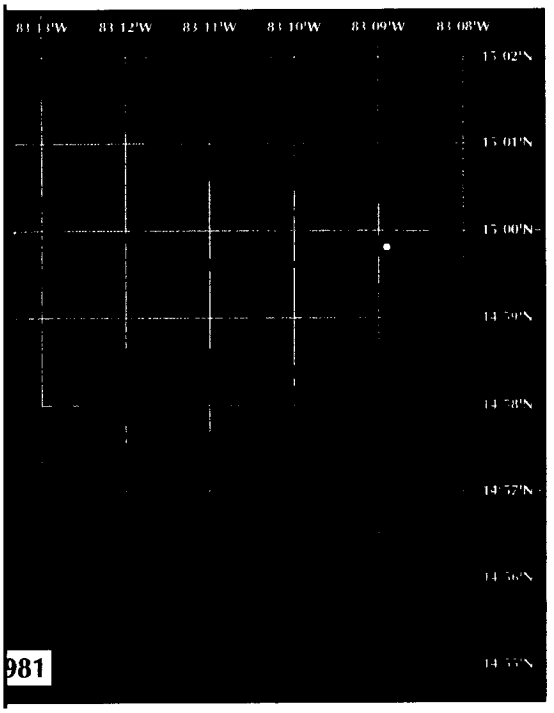
Datum: WGS-84

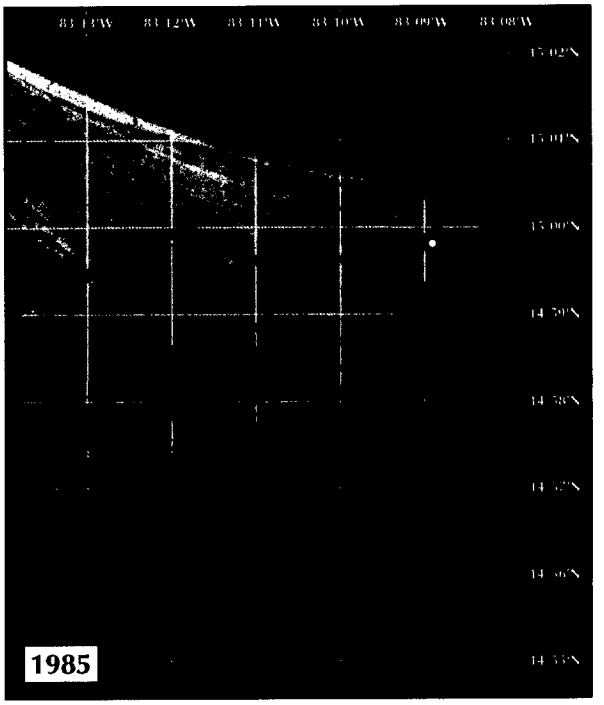
Prepared by: International Mapping Associates

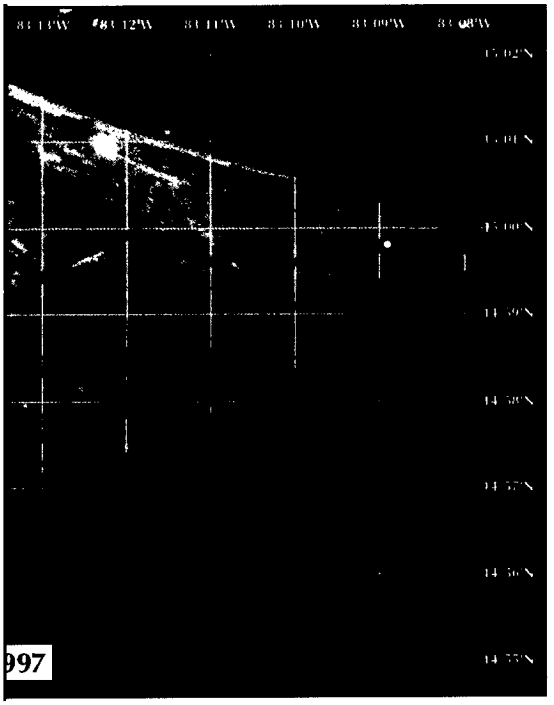












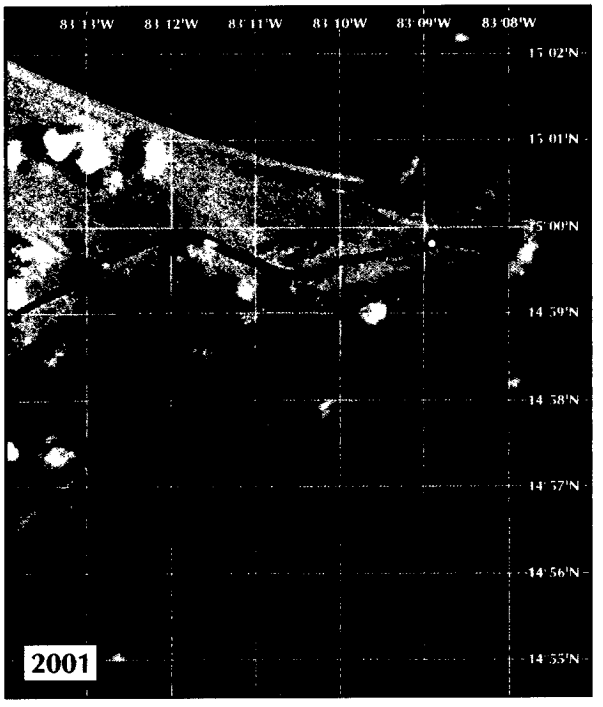


Plate 46

geographic coordinates of that point are: 14°59.8′ N. latitude, 83°05.8′ W. longitude.

8.06. This seaward fixed point is sufficiently far removed from the coast so that it will not be affected by the accretion of Cabo Gracias a Dios eastward, nor the changes in the characteristics of the mouth of the River Coco. Honduras agrees with the general suggestion of Nicaragua that from the point established in 1962 up to the seaward fixed point offshore the Parties should negotiate an agreement that would take into consideration the constant changes in the river mouth.[6]

B. THE TECHNICAL CHARACTERISTICS OF THE BOUNDARY THAT HONDURAS PROPOSES

8.07. From the seaward fixed point suggested in paragraph 7.5 above, the Honduran line follows 14°59.8′ N. latitude eastward until the jurisdiction of a third State is reached. As the Honduran line follows 14°59.8′ N. latitude eastward, it traverses first the territorial sea out to a distance of 12-nautical miles from the mainland at Cabo Gracias a Dios, then for a short distance the waters are beyond 12-nautical miles from the coast and thus the delimitation is of the exclusive economic zone, then further to the east is an area of territorial sea delimitation where Honduran and Nicaraguan islands/rocks lie within 12-nautical miles of the traditional boundary. Further east the 12-nautical-mile territorial sea of Honduras is cut short by the single maritime boundary creating an area where the delimitation is within 12-nautical miles of Honduran island territory but not of Nicaraguan territory,[7] and thereafter the Honduran line again delimits exclusive economic zone on both sides.

8.08. Plate 47 depicts the Honduran line as it is now proposed, taking into account the adaptation for the changing character of the mouth of the River Coco set forth in Section I above, and the juridical character of the waters delimited by the single maritime boundary.[8]

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6 NM, p 83, para 24.

7 This situation is not unusual where a boundary does not follow precisely the equidistance line. For instance, in the *Yemen-Eritrea* case the tribunal's judgment cut short the 12 nautical-mile territorial sea to the west of Yemen's Jabal Zuqar creating a boundary line between Yemeni territorial sea and Eritrean exclusive economic zone. Delimitation Award, para 162.

8 In its Counter Memorial Honduras suggested a single maritime boundary in three sections extending from the point established in 1962 by the Mixed Commission. Bearing in mind the advisability of a negotiated arrangement between the Parties in an initial area between the 1962 Mixed Commission point and a seaward fixed point, and the changing juridical character of the waters as the single maritime boundary moves

8.09. It may be noted that this is not the only place where a maritime boundary between two States alternates between a territorial sea boundary and an exclusive economic zone boundary. Indeed, this situation is quite common. Examples include the Eritrea-Yemen delimitation,[9] the Russia-United States maritime boundary,[10] and the Venezuela-Trinidad and Tobago maritime boundary.[11]

C. CONSIDERATION OF RELEVANT CASE PRECEDENT

8.10. It goes too far for either Party to argue that there are delimitation agreements in the practice of States that deal with geographic circumstances identical to those present here, or that the Court or arbitral tribunals have done so. However, there is one case that Honduras believes is particularly instructive and should be recalled because of certain characteristics it shares with this case. That is the *Tunisia-Libya* case.[12]

8.11. In *Tunisia-Libya*, the Court faced a geographical situation in which the land boundary met the coast at Ras Adjir. Ras Adjir is a cape on the coast of the southern Mediterranean Sea. The coasts of Tunisia and Libya on either side of Ras Adjir face northeast into the Mediterranean Sea. Further west along the Tunisian coast, after the island of Jerba, the North African coastline makes a major directional change to the north. Besides this geographical setting, the Court also faced a set of facts the essence of which being that for many years the Parties in that case, and the colonial powers before them, had followed a traditional line of delimitation approximating a perpendicular to the general direction of the coast, at least in so far as the area nearer to shore was concerned. This included substantial oil concession practice which abutted along the traditional line.

8.12. As for the geographical situation, the Court was not convinced by the perspective that Tunisia tried to present of a Tunisian coast that faced east and a Libyan coast that faced north resulting in a bisector boundary extending at approximately 45° from Ras Adjir. While Tunisia made geomorphological, geological and historical arguments consistent with this theme, it held forth in its submission that the delimitation could "be constituted by a line drawn at the Tuniso-Libyan Frontier parallel to the bisector of the angle formed by the Tuniso-Libyan littoral in the Gulf of

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seaward along a parallel of latitude, Honduras no longer sees need for the three section approach suggested in the Counter-Memorial.

9 *International Maritime Boundaries*. vol IV, Charney & Smith, eds., Report 6-14.

10 *International Maritime Boundaries*. vol I, Charney & Alexander, eds., Report 1-6.

11 *International Maritime Boundaries*. vol I, Charney & Alexander, eds., Report 2-13.

12 ICJ Reports 1982, p 18.

Gabes."[13] Thus, like Nicaragua in this case, Tunisia built its argument on a major change in the direction of the coast of North Africa, but one that takes place actually a considerable distance from where the Tunisia-Libya land boundary meets the sea.

8.13. The Court rejected Tunisia's argument. In determining the course of the Tunisia-Libya maritime boundary in its initial extension from land, the Court noted the perpendicular to the general direction of the coast and that it also corresponded to the practice of the Parties. In considering this perpendicular, the Court examined a relatively short shared coast of the Parties. The Court said:

> "in assessing the direction of the coastline it is legitimate to disregard for the present coastal configurations found at more than a comparatively short distance from [the land boundary terminus], for example the island of Jerba."[14]

8.14. The Court's line in *Tunisia-Libya* therefore adopted the perpendicular to the general direction of the coast in the vicinity of the land boundary terminus, a line that was also based in the practice of the Parties. The Court followed that line until there was reason to deviate from that perpendicular. In *Tunisia-Libya*, there were two reasons to do so. First, while the corresponding practice of the Parties was evident in the area nearer to the coast, including the oil concession practice, this was not so clear north of 34° N. latitude. Second, because of the major change in direction in the North African coast in the Gulf of Gabes (not at the land boundary terminus at Ras Adjir) the Tunisian coast turned inward to again face the maritime area to be delimited. Thus, the Court abandoned the perpendicular where there was no corresponding practice of the Parties for the boundary to follow, and where the eastward facing Tunisian coast, after the major change in coastal direction at the Gulf of Gabes, faced the area to be delimited. For these reasons the Court adjusted the perpendicular line to the east away from the Tunisian eastward facing coast.

8.15. In the Honduras-Nicaragua case, the land boundary meets the sea at the eastern tip of a cape that protrudes from the midst of the eastward facing coast of Central America. A perpendicular projected from this eastward facing coastal front approximates a parallel of latitude. The eastward facing coastal front of Central America does not make a major change in direction until it begins to do so at Cape Falso. When it does so, the coast of Central America turns away from the area to be delimited. Thus, from a geographical perspective and analysis of coastal fronts, there is no reason why a boundary that begins as a perpendicular to the general

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13 ICJ Reports 1982, 18, para 15, (emphasis added).

14 ICJ Reports 1982, 18, para 120.

direction of the eastward facing coast of Central America should turn. Furthermore, in the Honduras-Nicaragua case there is also no reason to turn the line based in the practice of the Parties or other geographical features such as islands and rocks. The Honduran line leaves to both sides the islands and rocks belonging to each and it reflects the practice of the Parties eastward to 82° W. longitude undertaken for many years until Nicaragua at a late date changed its position.

D. THE TEST OF THE EQUITABLENESS OF THE HONDURAN LINE AGAINST THE EQUIDISTANCE LINE

8.16. The Court's recent jurisprudence indicates it will often adopt a provisional equidistance line in its assessment of a maritime boundary situation and then consider whether that line must be adjusted in the light of the existence of special circumstances.[15] In this case Honduras has sought to demonstrate that there is a traditional line which governs. Honduras has no difficulty in subjecting its line to a comparison with the equidistance line to demonstrate the equitable character of the traditional boundary line proposed by Honduras in this case.

8.17. Plate 48 shows the Honduran line together with the equidistance line.[16] Due to the unstable character of the mouth of the River Coco, the initial segment is a simplified equidistance line that runs from the point established by the 1962 Mixed Commission to the tripoint with Honduras' Bobel Cay and Nicaragua's Edinburgh Cay. Thereafter the equidistance line is constructed using standard methods.

8.18. As can be seen, the equidistance line will leave the mainland and trend in an east-southeast direction south of 14° 59.8′ N. latitude to a point that is approximately 14.8 nautical miles off the mainland coast. At this point, Nicaragua's rocks begin to turn the equidistance line back to the north and east. However, it never goes north of 14° 59.8′ N. latitude. Further east, the eastward position of Honduras' South Cay takes over and pushes the equidistance line further south-eastward. One would expect that if Honduras were to advance the strict equidistance line as its preferred boundary method, Nicaragua would object and say that the equidistance

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15 *Qatar-Bahrain*, ICJ Reports 2001, para 176.

16 Nicaragua asserts that "the technical method of equidistance is not feasible." NM, p 121, para 82. Honduras disagrees with the observation. The method may easily be applied as in all other circumstances. However, the geographical circumstances are such to justify a different method, such as the parallel of latitude that forms the traditional line in this case.

Plate 48: The Honduran Line and the Provisional Equidistance Line

line developed from Honduran islands north of 15° N. latitude cuts off the projection of the eastward facing coastal front of Nicaragua.[17]

8.19. Be that as it may, the equidistance line is shown to be substantially more to Honduras' advantage than the traditional line. Indeed, as shown on Plate 48, Honduras would gain 1,784 km^2 over the Honduran line were it to achieve an equidistance line in this case.

8.20. Honduras submits that this is a convincing demonstration of the equitable character of the Honduran line. The Honduran line can be seen as both an adjustment and simplification of the equidistance line. By the Honduran line, which is the traditional line between the Parties, Nicaragua gains more than it would achieve by strict application of the equidistance method in this case.

E. THE QUESTION WHETHER THE HONDURAN LINE "CUTS-OFF" THE PROJECTION OF THE COASTAL FRONT OF NICARAGUA

8.21. By its own arguments, Nicaragua admits that it has a linear coastal front that stretches from its land boundary terminus with Honduras at Cabo Gracias a Dios in the north to the Nicaragua-Costa Rica land boundary terminus in the south. This coastal front, when measured as one single line, runs slightly west of south.[18] There is no Nicaraguan coast that faces north or even northeast.

8.22. The Honduran line does not run in front of the Nicaraguan coast. It runs due east; perpendicular to the general direction of the coast; and particularly perpendicular to the general direction of the coast of Nicaragua. If a coast only faces east, the projection of that coast is not "cut off" by a boundary that runs east. The Honduran line produces no "cut-off" effect in this case further demonstrating its equitable character. Plate 49 demonstrates this point clearly.

8.23. Thus, the Honduran line respects the principle of non-encroachment. The Honduran line does not pass too close to the

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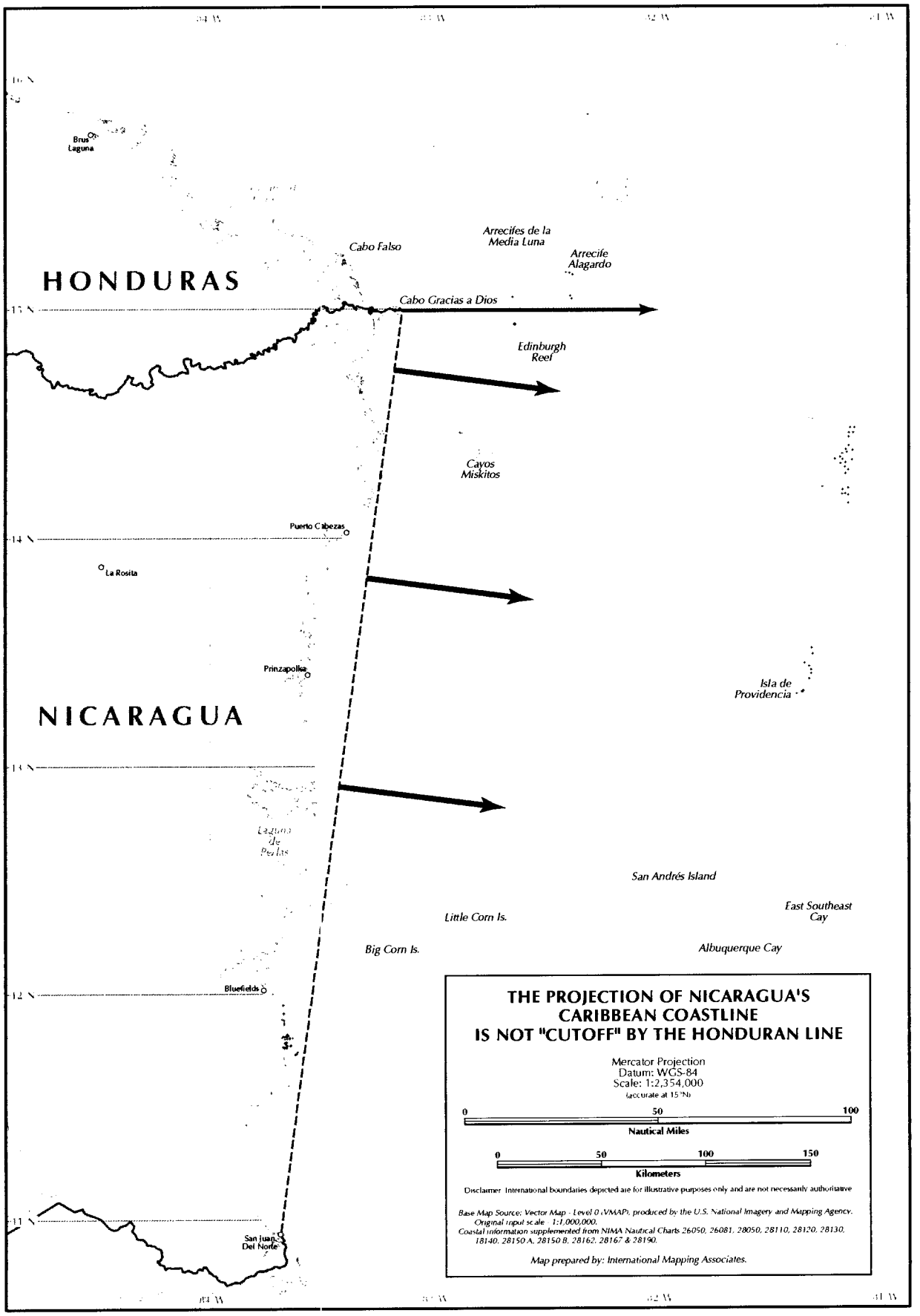
17 In its Reply, Nicaragua asserts that "the dispute is confined to the area north of the 15th parallel." (NR, p 6, para 1.5) This is a self-serving overstatement. If the Court was not convinced of the Honduran traditional line position, there is no reason why the Court could not establish the Honduran-Nicaraguan single maritime boundary as the equidistance line as shown in Plate 48.

18 "The direction of the Nicaraguan coasts basically follows a meridian of longitude." NM, p 17, para 39.

Plate 49: The Projection of Nicaragua's Caribbean Coastline Is Not "Cut-off" by the Hondura Line



CHAPTER 9:

SUMMARY AND CONCLUSIONS

9.01. Nicaragua's Application requested the Court to establish the single maritime boundary between Honduras and Nicaragua in the Caribbean Sea. In Honduras' view the answer to Nicaragua's request is straightforward: there is a traditional boundary which respected Honduras' sovereignty over the islands and maritime areas north of the 15th parallel and which served both countries well from their early history up to about 1980 when a new Nicaraguan government rejected the established practice. Thus, Honduras believes the Court should affirm the established traditional line and deny Nicaragua a benefit for changing its position to gain further advantage.

9.02. Honduras has provided the Court with (i) evidence of its *uti possidetis* title over its islands and maritime areas, (ii) evidence of its *effectivités* that demonstrate its sovereignty over the islands north of 15° N latitude, and its sovereignty, sovereign rights and jurisdiction over the waters north of this parallel, and (iii) evidence of the *de facto* boundary that has existed in the practice of the Parties up to recent years. Nicaragua's approach has been to criticize this evidence without offering concrete evidence of its own in support of the title it claims to the islands and maritime area north of 15° N latitude.

9.03. Instead, Nicaragua argues that the single maritime boundary should be constructed without reference to which country is sovereign over the islands north of 15° North latitude and without taking those islands into account in the method of delimitation it proposes. Nicaragua obviously adopts this approach because it cannot demonstrate the sovereignty it now claims, or provide the justification for the transfer of sovereignty from Honduras to Nicaragua over the islands. Moreover, the Nicaraguan line proposed is one that is based on a geographical analysis that does not withstand scrutiny. Nicaragua would have the Court believe that the Honduran and Nicaraguan coasts lie at a right angle to one another, but that assessment denies the important fact that the land boundary meets the sea on the Central American coast where that shared Honduran and Nicaraguan coast faces east. This is not just a geographical fact of great importance, but one that has a rich and difficult history between the two countries which

was finally settled in 1906 by the Award of the King of Spain and confirmed by the Court in 1960.

9.04. Thus, it is perfectly natural that the traditional line, which was founded in colonial times and has remained unchallenged until recent years, creates a jurisdictional division between Honduras and Nicaragua that runs due east from Cabo Gracias a Dios.

9.05. As a traditional line, it derives from the practice of the Parties. However, when measured against the jurisprudence of the Court, including in its recent decisions, Honduran title to the islands and maritime area north of 15° N latitude, and the traditional line, meet the relevant juridical tests as shown in Chapter 2 of this Rejoinder. Chapters 3 to 5 supplement presentations in the Honduran Counter Memorial which further demonstrate the historic basis of the traditional line and provide further evidence of Honduras' title north of 15° N latitude and the weakness of Nicaragua's arguments (based on a total absence of evidence) in this regard. Chapters 6 to 8 consider the relevant geographic circumstances and demonstrate the unsupportable and inequitable character of the Nicaraguan line which stands in contrast to the traditional line which is in accord with the relevant geographic circumstances and produces an equitable result.

9.06. To conclude, Honduras reaffirms its basic submission that the single maritime boundary is long established in the practice of the Parties and that it extends east from Cabo Gracias a Dios along 14°59.8′ N latitude. To narrow the differences between the parties and to ensure no charge can be made by Nicaragua that Honduras claims Nicaraguan territory at the mouth of the River Coco, Honduras herein adjusts its approach to accord with the view that the Parties should negotiate an agreement covering the distance from the point laid down by the 1962 Mixed Commission to a fixed point seaward of the mouth of the River Coco. East of that fixed point, the Honduran line follows 14°59.8′ N latitude as the single maritime boundary taking into consideration the juridical character of the waters so delimited.

SUBMISSIONS

Having regard to the considerations set forth in the Honduran Counter Memorial and this Rejoinder,

May it please the Court to adjudge and declare that:

1. From the point decided by the Honduras / Nicaragua Mixed Commission in 1962 at 14° 59.8 N. latitude, 83° 08.9 W. longitude to 14° 59.8 N. latitude, 83° 05.8 W. longitude, the demarcation of the fluvial boundary line and the delimitation of the maritime boundary line which divide the jurisdictions of Honduras and Nicaragua shall be the subject of negotiation between the Parties to this case which shall take into account the changing geographical characteristics of the mouth of the River Coco; and
2. East of 14°59.8′ N. latitude, 83°05.8′ W. longitude, the single maritime boundary which divides the maritime jurisdictions of Honduras and Nicaragua follows 14°59.8′ N. latitude until the jurisdiction of a third State is reached.

Carlos López Contreras
Agent of the Republic of Honduras

13 August 2003

LIST OF ANNEXES
IN VOLUME II