

CR 2007/1

**International Court
of Justice**

THE HAGUE

**Cour internationale
de Justice**

LA HAYE

YEAR 2007

Public sitting

held on Monday 5 March 2007, at 10 a.m., at the Peace Palace,

President Higgins presiding,

*in the case concerning Maritime Delimitation between Nicaragua and Honduras in the
Caribbean Sea (Nicaragua v. Honduras)*

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le lundi 5 mars 2007, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

*en l'affaire de la Délimitation maritime entre le Nicaragua et le Honduras dans
la mer des Caraïbes (Nicaragua c. Honduras)*

COMPTE RENDU

Present: President Higgins
Vice-President Al-Khasawneh
Judges Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
Owada
Simma
Tomka
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Judges *ad hoc* Torres Bernárdez
Gaja

Registrar Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
Owada
Simma
Tomka
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Torres Bernárdez
Gaja, juges *ad hoc*

M. Couvreur, greffier

The Government of the Republic of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent, Counsel and Advocate;

H.E. Mr. Samuel Santos, Minister for Foreign Affairs of the Republic of Nicaragua,

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, Member of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, Distinguished Fellow, All Souls College, Oxford,

Mr. Alex Oude Elferink, Research Associate, Netherlands Institute for the Law of the Sea, Utrecht University,

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Antonio Remiro Brotons, Professor of International Law, Universidad Autónoma, Madrid,

as Counsel and Advocates;

Mr. Robin Cleverly, M.A., DPhil, CGeol, F.G.S., Law of the Sea Consultant, Admiralty Consultancy Services,

Mr. Dick Gent, Law of the Sea Consultant, Admiralty Consultancy Services,

as Scientific and Technical Advisers;

Ms Tania Elena Pacheco Blandino, First Secretary, Embassy of the Republic of Nicaragua in the Kingdom of the Netherlands,

Ms Nadine Susani, Doctor of Public Law, Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,

as Assistant Advisers;

Ms Gina Hodgson, Ministry of Foreign Affairs,

Ms Ana Mogorrón Huerta,

as Assistants.

The Government of the Republic of Honduras is represented by:

H.E. Mr. Max Velásquez Díaz, Ambassador of the Republic of Honduras to the French Republic,

H.E. Mr. Roberto Flores Bermúdez, Ambassador of the Republic of Honduras to the United States of America,

as Agents;

Le Gouvernement de la République du Nicaragua est représenté par :

S. Exc. M. Carlos José Arguëllo Gómez, ambassadeur de la République du Nicaragua auprès du Royaume des Pays-Bas,

comme agent, conseil et avocat ;

S. Exc. M. Samuel Santos, ministre des affaires étrangères de la République du Nicaragua,

M. Ian Brownlie, C.B.E., Q.C., F.B.A., membre du barreau d'Angleterre, membre de la Commission du droit international, professeur émérite de droit international public (chaire Chichele) à l'Université d'Oxford, membre de l'Institut de droit international, *Distinguished fellow* au All Souls College d'Oxford,

M. Alex Oude Elferink, *research associate* à l'Institut néerlandais du droit de la mer de l'Université d'Utrecht,

M. Alain Pellet, professeur à l'Université Paris X-Nanterre, membre et ancien président de la Commission du droit international,

M. Antonio Remiro Brotons, professeur de droit international à l'Universidad autónoma de Madrid,

comme conseils et avocats ;

M. Robin Cleverly, M.A., DPhil, CGeol, F.G.S., consultant en droit de la mer, Admiralty Consultancy Services,

M. Dick Gent, consultant en droit de la mer, Admiralty Consultancy Services,

comme conseillers scientifiques et techniques ;

Mme Tania Elena Pacheco Blandino, premier secrétaire de l'ambassade de la République du Nicaragua au Royaume des Pays-Bas,

Mme Nadine Susani, docteur en droit public, Centre de droit international de Nanterre (CEDIN), Université de Paris X-Nanterre,

comme conseillers adjoints ;

Mme Gina Hodgson, ministère des affaires étrangères,

Mme Ana Mogorrón Huerta,

comme assistantes.

Le Gouvernement de la République du Honduras est représenté par :

S. Exc. M. Max Velásquez Díaz, ambassadeur de la République du Honduras auprès de la République française,

S. Exc. M. Roberto Flores Bermúdez, ambassadeur de la République du Honduras auprès des Etats-Unis d'Amérique,

comme agents ;

H.E. Mr. Julio Rendón Barnica, Ambassador of the Republic of Honduras to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Pierre-Marie Dupuy, Professor of Public International Law, University of Paris (Panthéon-Assas), and the European University Institute in Florence,

Mr. Luis Ignacio Sánchez Rodríguez, Professor of International Law, Universidad Complutense de Madrid,

Mr. Christopher Greenwood, C.M.G., Q.C., Professor of International Law, London School of Economics and Political Science,

Mr. Philippe Sands, Q.C., Professor of Law, University College London,

Mr. Jean-Pierre Quéneudec, professeur émérite de droit international à l'Université de Paris I Panthéon-Sorbonne,

Mr. David A. Colson, LeBoeuf, Lamb, Green & MacRae, LL.P., Washington, D.C., member of the California State Bar and District of Columbia Bar,

Mr. Carlos Jiménez Piernas, Professor of International Law, Universidad de Alcalá, Madrid,

Mr. Richard Meese, avocat à la Cour d'appel de Paris,

as Counsel and Advocates;

H.E. Mr. Milton Jiménez Puerto, Minister for Foreign Affairs of the Republic of Honduras,

H.E. Mr. Eduardo Enrique Reina García, Deputy Minister for Foreign Affairs of the Republic of Honduras,

H.E. Mr. Carlos López Contreras, Ambassador, National Counsellor, Ministry of Foreign Affairs,

H.E. Mr. Roberto Arita Quiñónez, Ambassador, Director of the Special Bureau on Sovereignty Affairs, Ministry of Foreign Affairs,

H.E. Mr. José Eduardo Martell Mejía, Ambassador of the Republic of Honduras to the Kingdom of Spain,

H.E. Mr. Miguel Tosta Appel, Ambassador, Chairman of the Honduran Demarcation Commission, Ministry of Foreign Affairs,

H.E. Ms Patricia Licon Cubero, Ambassador, Adviser for Central American Integration Affairs, Ministry of Foreign Affairs,

as Advisers;

Ms Anjolie Singh, Assistant, University College London, member of the Indian Bar,

Ms Adriana Fabra, Associate Professor of International Law, Universitat Autònoma de Barcelona,

S. Exc. M. Julio Rendón Barnica, ambassadeur de la République du Honduras auprès du Royaume des Pays-Bas,

comme coagent ;

M. Pierre-Marie Dupuy, professeur de droit international public à l'Université de Paris (Panthéon-Assas) et à l'Institut universitaire européen de Florence,

M. Luis Ignacio Sánchez Rodríguez, professeur de droit international à l'Université Complutense de Madrid,

M. Christopher Greenwood, C.M.G., Q.C., professeur de droit international à la London School of Economics and Political Sciences,

M. Philippe Sands, Q.C., professeur de droit au University College de Londres,

M. Jean-Pierre Quéneudec, professeur émérite de droit international à l'Université Paris I (Panthéon-Sorbonne),

M. David A. Colson, LeBoeuf, Lamb, Greene & MacRae, L.L.P., Washington, D.C., membre du barreau de l'Etat de Californie et du barreau du district de Columbia,

M. Carlos Jiménez Piernas, professeur de droit international à l'Université de Alcalá (Madrid),

M. Richard Meese, avocat à la cour d'appel de Paris,

comme conseils et avocats ;

S. Exc. M. Milton Jiménez Puerto, ministre des affaires étrangères de la République du Honduras,

S. Exc. M. Eduardo Enrique Reina García, vice-ministre des affaires étrangères de la République du Honduras,

S. Exc. M. Carlos López Contreras, ambassadeur, conseiller national au ministère des affaires étrangères,

S. Exc. M. Roberto Arita Quiñónez, ambassadeur, directeur du bureau spécial pour les affaires de souveraineté du ministère des affaires étrangères,

S. Exc. M. José Eduardo Martell Mejía, ambassadeur de la République du Honduras auprès du Royaume d'Espagne,

S. Exc. M. Miguel Tosta Appel, ambassadeur, président de la commission hondurienne de démarcation du ministère des affaires étrangères,

S. Exc. Mme Patricia Licona Cubero, ambassadeur, conseiller pour les affaires d'intégration d'Amérique Centrale du ministère des affaires étrangères,

comme conseillers ;

Mme Anjolie Singh, assistante au University College de Londres, membre du barreau indien,

Mme Adriana Fabra, professeur associé de droit international à l'Université autonome de Barcelone,

Mr. Javier Quel López, Professor of International Law, Universidad del País Vasco,

Ms Gabriela Membreño, Assistant Adviser to the Minister for Foreign Affairs,

Mr. Sergio Acosta, Minister Counsellor, Embassy of the Republic of Honduras in the Kingdom of the Netherlands,

as Assistant Advisers;

Mr. Scott Edmonds, Cartographer, International Mapping,

Mr. Thomas D. Frogh, Cartographer, International Mapping,

as Technical Advisers.

M. Javier Quel López, professeur de droit international à l'Université du Pays basque,

Mme Gabriela Membreño, conseiller adjoint du ministre des affaires étrangères,

M. Sergio Acosta, ministre conseiller à l'ambassade de la République du Honduras au Royaume des Pays-Bas,

comme conseillers adjoints ;

M. Scott Edmonds, cartographe, International Mapping,

M. Thomas D. Frogh, cartographe, International Mapping,

comme conseillers techniques.

The PRESIDENT: Please be seated. The sitting is now open.

The Court meets to hear the oral arguments of the Parties in the case concerning the *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*.

I note initially that Judge Abraham, for reasons made known to me, is unable to take his seat on the Bench today.

I further note that, since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both Parties have availed themselves of the right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*. Nicaragua chose Mr. Giorgio Gaja. Honduras originally nominated Mr. Julio González Campos. Following the resignation of Mr. González Campos, Honduras chose Mr. Santiago Torres Bernárdez.

Article 20 of the Statute provides that “[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”. Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Notwithstanding that Mr. Torres Bernárdez has been a judge *ad hoc* and made a solemn declaration in different previous cases and Mr. Gaja in one previous case, Article 8, paragraph 3, of the Rules of Court provides that they must each make a further solemn declaration in the present case.

In accordance with custom, I shall first say a few words about the career and qualifications of each judge *ad hoc* before inviting him to make his solemn declaration.

Mr. Santiago Torres Bernárdez, of Spanish nationality, is very well known to the Court. Following a long tenure at the Codification Division of the United Nations Office of Legal Affairs, Mr. Torres Bernárdez served as Registrar of this Court from 1980 to 1986. He has been chosen as judge *ad hoc* on numerous occasions, in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case, the *Fisheries Jurisdiction (Spain v. Canada)* case, the *Legality of Use of Force (Yugoslavia v. Spain)* case, the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* case and most recently the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Mr. Torres Bernárdez is a member, *inter alia*,

of the Permanent Court of Arbitration and of the Institut de droit international. In addition, Mr. Torres Bernárdez is the author of many publications on questions of international law and international organizations. He has held various teaching positions and, in particular, has taught a course concerning intervention before the Court at the Hague Academy of International Law.

Mr. Giorgio Gaja, of Italian nationality, is Professor at the Faculty of Law of the University of Florence and a former Dean of that Faculty. He has held numerous other teaching posts around the world including at the European University Institute, the University of Paris I and the Graduate Institute of International Studies in Geneva, and has also taught at the Hague Academy of International Law. Mr. Gaja has been a Member of the International Law Commission since 1999 and is a member of the Institut de droit international. He has represented his Government on a number of occasions including as delegate to the Vienna Conference on the Law of Treaties between States and International Organizations and between International Organizations. Mr. Gaja has appeared before this Court as counsel to the Italian Government in the *Elettronica Sicula S.p.A. (ELSI)* case. He was also chosen as judge *ad hoc* in one of the cases concerning *Legality of Use of Force*, namely in the *Serbia and Montenegro v. Italy* case. Mr. Gaja has published numerous works and articles in diverse fields of international law, from European human rights law to international criminal law.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Torres Bernárdez to make the solemn declaration prescribed by the Statute, and I would request all those present to rise.

Mr. TORRES BERNÁRDEZ :

“I solemnly declare that I will perform my duties and exercise my power as a Judge, honourably, faithfully, impartially and conscientiously.”

The PRESIDENT: Thank you. I shall now invite Mr. Gaja to make the solemn declaration prescribed by the Statute.

Mr. GAJA :

“I solemnly declare that I will perform my duties and exercise my powers as Judge honourably, faithfully, impartially and conscientiously.”

The PRESIDENT: Thank you. Please be seated.

I take note of the solemn declarations made by Mr. Torres Bernárdez and Mr. Gaja and declare them duly installed as judges *ad hoc* in the case concerning *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*.

I shall now recall the principal steps of the procedure so far followed in this case.

On 8 December 1999 the Republic of Nicaragua filed in the Registry of the Court an Application dated the same day, instituting proceedings against the Republic of Honduras in respect of a dispute relating to the delimitation of the maritime areas appertaining to each of those States in the Caribbean Sea.

In this Application, Nicaragua contended that the Court had jurisdiction to entertain the dispute by virtue of Article XXXI of the American Treaty on Pacific Settlement, officially known, according to Article LX thereof, as the “Pact of Bogotá”, and by virtue of the declarations made by the two Parties accepting the jurisdiction of the Court, as provided for in Article 36, paragraph 2, of the Statute of the Court.

Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar also addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute. The Registrar subsequently transmitted to the Organization of American States copies of all of the written pleadings filed in the case and asked the Secretary-General of that Organization to inform him whether or not it intended to present observations in writing as provided for in Article 69, paragraph 3, of the Rules of Court. In response, the Registrar was informed that the Organization of American States did not intend to submit any such observations.

Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the United Nations Convention on the Law of the Sea of 10 December 1982 the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In addition, the Registrar addressed to the European Union, which is also party to that Convention, the notification provided for in Article 43, paragraph 2, of the Rules of Court, as

adopted on 29 September 2005, and asked the Secretary-General of the Council whether or not the European Union intended to furnish observations under that provision. In response, the Registrar was informed that the European Union did not intend to submit observations in the case.

By an Order dated 21 March 2000, the President of the Court fixed 21 March 2001 and 21 March 2002, respectively, as the time-limits for the filing of the Memorial of Nicaragua and the Counter-Memorial of Honduras; those pleadings were duly filed within the time-limits so prescribed.

At the time of the filing of the Counter-Memorial, Honduras also filed two sets of additional documents which were not produced as annexes thereto, but were, according to Honduras, provided only for informational purposes. At a meeting held by the President of the Court with the Agents of the Parties on 5 June 2002 both Parties agreed on the procedure to be followed with regard to these additional documents. In accordance with that procedure, by a letter of 25 June 2002, the Co-Agent of Honduras provided the Registry with a list indicating which of the additional documents were to be produced as annexes. Those additional annexes to the Counter-Memorial of Honduras were subsequently duly filed in the Registry.

By an Order of 13 June 2002, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Honduras, and fixed 13 January 2003 and 13 August 2003 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Honduras were filed within the time-limits thus fixed.

The Governments of Colombia and Jamaica, by letters dated 22 May 2001 and 6 May 2003, respectively, requested to be furnished with copies of the pleadings and documents annexed thereto. Having ascertained the views of the Parties pursuant to Article 53, paragraph 1, of the Rules of Court, the Court decided to grant each of those requests. The Government of El Salvador, by letter of 31 August 2004 and later on by letter of 8 September 2006, requested to be furnished with copies of the pleadings and annexed documents in the case. Having ascertained the views of the Parties pursuant to Article 53, paragraph 1, of the Rules of Court, the Court decided that it was not appropriate to grant those requests.

In a letter dated 2 February 2007, the Agent of Nicaragua informed the Court that his Government wished to produce new documents pursuant to Article 56 of the Rules of Court,

namely 11 documents and one satellite image. By a letter dated 15 February 2007, the Co-Agent of Honduras informed the Court that his Government “is entitled to oppose the production of documents 2 to 11. However, Honduras will leave it to the Court to decide.” The Co-Agent of Honduras further informed the Court that during the oral proceedings the Government of Honduras intends to use updated satellite imagery of the area and to present a brief video.

By letters dated 26 February 2007, the Registrar informed the Parties that on 23 February 2007, the Court decided that the first document omitting only two paragraphs had already been included in the case file as an annex to the Reply of Nicaragua and was not therefore a new document. The Registrar further informed the Parties that the Court considered that the satellite imagery was “part of a publication readily available” within the meaning of Article 56, paragraph 4, of the Rules of Court, and as such could be referred to during the oral proceedings. Finally, he informed them that the Court had decided, after considering the views of the Parties and in light of Practice Direction IX, not to authorize the production of documents 2 to 11 inclusive.

By letter dated 23 February 2007 and received on 26 February 2007, the Agent of Nicaragua provided the Court with his Government’s comments on the letter from the Co-Agent of Honduras dated 15 February 2007. The Agent of Nicaragua also stated that his Government “cannot agree to give carte blanche to Honduras for presenting ‘material’ during the oral pleadings which Nicaragua has not had adequate opportunity of reviewing or even of being informed of its content at this late stage in the proceedings”.

By letter dated 26 February 2007 the Co-Agent of Honduras transmitted to the Court the video which his Government intended to present during the oral proceedings. Copies of the video material were transmitted to the other Party which was asked to inform the Court of any observations it might wish to make in this regard. By letter of 27 February 2007, the Agent of Nicaragua informed the Court of the views of his Government on the matter. Nicaragua does not oppose the presentation of the video material as such, but it does not agree to it either; Nicaragua leaves it to the Court to decide and the Court will shortly announce its decision.

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Having ascertained the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings without their annexes will be put on the Court's website from today.

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I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements on the organization of the procedure which have been decided by the Court, the hearings will comprise a first and a second round of oral argument.

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The first round of the oral argument will begin today and will close on Friday 16 March 2007. The second round of oral argument will begin on Monday 19 March 2007 and will close on Friday 23 March 2007.

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Nicaragua, which is the Applicant in the case, will be heard first and I now give the floor to His Excellency Mr. Carlos Argüello Gómez, Agent of Nicaragua.

Mr. ARGÜELLO: Thank you, Madam President, distinguished Members of the Court.

Before beginning my address, permit me to mention two short points on our presentation. In the first place, the appropriate references to all the documents cited in the presentation of the Nicaraguan team are included in the text directly given to the Registry for facilitating the translation. Secondly, the copies of the illustrations used in the presentation and which have been included in the folders prepared for ease of use by the Members of the Court are identified by the initial of the names of the speakers in the corresponding number of each graphic. Each speaker will refer only to the number of the graphics.

1. Madam President, distinguished Members of the Court, the Republic of Nicaragua has been before this Court more often than any other country of Latin America and even yet of most other countries in the world. This record of itself is the highest tribute that any country can pay to the outstanding work this Court has accomplished as the principal judicial organ of the United Nations in bringing about the peaceful settlement of international disputes.

2. I draw attention to the fact that the Foreign Minister of Nicaragua, Mr. Samuel Santos López, is present here with us as further testimony of the highest respect of the Nicaraguan Government for this Court.

3. Madam President, Members of the Court, it has been my honour to appear before the Court as Agent of the Republic of Nicaragua in all the cases it has had before the Court since 1984 and therefore it is a renewed honour for me to be again before this highest world tribunal.

4. My presentation will include argument that would normally have been delivered independently of the traditional statement by the Agent. On consideration, it seemed artificial to close one statement and start another when the one could easily segue into the other. Thus, this presentation will address such issues as the history of the dispute, the critical date and the evidence.

Issues before the Court

5. The basic issue before the Court is that whilst Honduras “maintains that there is a boundary between the maritime spaces of the two States which has its origins in the principle of *uti possidetis iuris* and which is firmly rooted in the practice of both Honduras and Nicaragua and confirmed by the practice of third States”¹, Nicaragua for her part “has consistently maintained the position that its maritime Caribbean boundary with Honduras has not been delimited”².

6. In its submissions, Nicaragua asked the Court to adjudge and declare that:

“The bisector of the lines representing the coastal fronts of the two parties, as applied and described in paragraphs 22 and 29 [of our Memorial] and illustrated on the graphic [now on the screen, graphic 1], constitutes the boundary for the purposes of the delimitation of the disputed areas of the continental shelf and exclusive economic zone in the region of the Nicaraguan Rise.

The approximate median line, as described in paragraphs 27 and 29, Chapter X [of the Nicaraguan Memorial and illustrated in the graphic before us], constitutes the

¹Counter-Memorial of Honduras, Vol. 1, Chap. I, para. 1.4.

²Memorial of Nicaragua, Vol. I, Chap. I, para. 1.6.

boundary for the purpose of the delimitation of the disputed areas of the territorial sea, extending to the outer limit of the territorial sea, but in the absence of a sector coterminous with the mouth of the River Coco and with the terminus of the land boundary.” (MN, Vol. I, p. 167.)

7. In its written pleadings Nicaragua further explained that there were certain minor features in the area in dispute such as islets, cays and rocks and that the sovereignty over these also “disputed areas” — in the words of Nicaragua’s submissions — should devolve on the Party on whose side of the line of maritime delimitation they were located. Honduras has questioned whether the issue of sovereignty over these small features is really before the Court. I hasten to reply that this issue is certainly before the Court, as Honduras well knows since it devoted nearly 40 per cent of its written pleadings to alleging sovereignty over these features. On this question of the islets and cays I will add some comments further on, but the question will be addressed *in extenso* by my colleague Dr. Alex Oude Elferink.

8. The position of Nicaragua, as indicated before, is that there is no delimitation in place and, therefore, that in order to effect a delimitation that will achieve an equitable result, this line has to be based first of all on the geography of the area in question. In the *Gulf of Maine* case, the Chamber of the Court indicated the criteria that should be applied for reaching an equitable result:

“international law . . . lay(s) down in general that equitable criteria are to be applied, criteria . . . which are essentially to be determined in relation to what may be properly called the geographical features of the area” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 246, para. 176).

9. Therefore, even in this general introduction to the Nicaraguan pleadings, a summary overview of the physical aspects of the coasts facing the area in dispute is useful for focusing on the questions in issue.

10. As can be appreciated in the illustration of the regional geography, now on the screen as graphic 2, the coasts of Nicaragua and Honduras meet at the mouth of the River Coco where the departing point for the delimitation is located. At this meeting point at the mouth of the Coco, the coasts turn very sharply with the result that the Nicaraguan Caribbean coast basically faces east and that the Honduran Caribbean coast basically faces north. Any general description of the two countries highlights the different compass points faced by their coasts. For example, the following description taken from the *Encyclopedia Britannica* is representative:

“*Republic of Nicaragua*, Spanish *República de Nicaragua* country of Central America, bounded by Honduras on the north, *the Caribbean Sea on the east*, Costa Rica on the south, and the Pacific Ocean on the west.” (*Encyclopedia Britannica*, 2006 ed.)

Then:

“*Republic of Honduras*, Spanish *República de Honduras* country of Central America situated between Guatemala and El Salvador to the west and Nicaragua to the south and east. *The Caribbean Sea washes its northern coast*, the Pacific Ocean its narrow coast to the south.” (*Encyclopedia Britannica*, 2006 ed.)

11. This elementary description of the location of each of the Parties with respect to their surroundings clearly indicates that Nicaragua is bounded on the north by Honduras and on the east by the Caribbean Sea, whilst Honduras is bounded by Nicaragua to the east and by the Caribbean on the north. But, as Dr. Oude Elferink will explain and rebut, Honduras claims that it has an eastern coastal front on the Caribbean and not only that it has this imaginary eastern coastal front but that this front is the only relevant coast to be taken into consideration in any delimitation with Nicaragua. The *Britannica* apparently missed this important Honduras coastline facing east towards the Caribbean!

12. Any delimitation in an area in which the coasts of the riparian States constantly turn and change compass directions until finally forming an enclosed oval-shaped sea, such as the Caribbean, can hardly be delimited in any equitable fashion by drawing a line from the land boundary out to the sea that follows lines of latitude or of longitude. After all, these geographical lines of latitude and longitude are simply conventional lines, imaginary lines or circles around the earth, used to form grids on a map in order to identify more easily the location of places on earth.

13. Nonetheless, Honduras claims that there is a traditional line of delimitation in place between Nicaragua and Honduras that follows a parallel of latitude from a point in the mainland out east to the Caribbean Sea. Honduras also claims that this so-called “traditional line of delimitation” is supposedly rooted in the *uti possidetis juris* stemming from the colonial period in the early nineteenth century, and that it took care of all the maritime spaces that Nicaragua could possibly claim based on the recent advances of the law of the sea. This line apparently brought about with incredible foresight the delimitation, not of the 3- or 6-mile maritime limits recognized by international law in that age, but also of the continental shelf, the exclusive economic zone and the 12-mile territorial sea which are the areas that Nicaragua is requesting the Court to delimit.

14. In front of us is graphic 3 representing figure VIII of the Nicaraguan Memorial. This figure illustrates what would be the result of dividing the maritime areas between the Parties on the basis of the imaginary lines used in cartography to divide the spaces on heavenly bodies. As can be appreciated in the illustration, the use of a meridian of longitude running north would deprive Honduras of substantial maritime areas in the same way as the use of a parallel of latitude running east would also deprive Nicaragua of similarly substantial maritime areas.

15. The inequitable results that the use of parallels or meridians may bring in certain situations are a well-known question. As indicated in the Memorial of Nicaragua (Chap. II, para. 36) experienced legal advisers have pointed out that:

“[T]he use of parallels or meridians is effectively limited to situations where the general direction of the coasts in question is roughly north-south or east-west. In other situations this method will produce precisely the result it is meant to avoid: the inequitable cut-off of the maritime extensions of one or more of the parties.” (Legault, L. and Blair Hankey, *International Maritime Boundaries*, Vol. I, 1993, p. 212.)

16. When dealing with situations where the general direction of the coasts of the parties involved follows a generally straight line, it occasionally is feasible that the use of perpendicular lines to the coast could bring satisfactory and equitable results. With the help of the illustration before us in graphic 4, representing the maritime delimitation between Brazil and Uruguay, we can appreciate that in these circumstances the perpendicular leaves to each side around 50 per cent of the extensive areas involved — which is in fact what a perpendicular should accomplish since by definition it has an angle of 90° on each of its sides.

17. But as can be appreciated in graphic 5 on the screen, the coastlines of Nicaragua and Honduras are in no way like the coast of Brazil and Uruguay. The only way a similar result could be brought about is if the whole of the Honduran coast is rotated — as is now happening on the screen [graphic 1; graphic 2] — in order that it also faces east as does the Nicaraguan coastline. Since this imaginary rotation cannot come about, then the inequitable effects of a delimitation that follows a parallel of latitude from the mouth of the Coco River — like the one proposed by Honduras — can be seen in the illustration before us in graphic 6. The distribution of maritime spaces that the use of this method would produce can be appreciated by observing that the angle

formed by this line to the south — that is, the portion of Nicaragua — would in effect be approximately that of a 98° angle, but on the Honduran side it would be of 146°.

18. The geography of the area, including the configuration of the coast, creates another problem that must be taken into account in order to find an equitable solution for the delimitation between the Parties. This problem is that the exact location of the land boundary that would serve as the starting-point for the maritime delimitation has the configuration of two protruding needles into the sea. This can be clearly appreciated in any of the satellite images of the mouth of the Coco River filed in this case, for example graphic 7 on the screen. The consequence of this special configuration with the coastline is that the only two points that would dominate any delimitation based on a median line or a line of equidistance would be the two margins of the mouth of the Coco River. These few points, as can be seen in graphic 8 before us, would exclusively dominate any delimitation even at a distance of 200 nautical miles out to sea if only the mainland coasts were to be used. And there are no other features outside the mainland that could in law have any bearing on tracing a line of delimitation. There are certain cays in the area but even if these cays were all bunched together, their added area would not reach the size of certain other islets that have been ignored by the Court in other maritime delimitations. For example, the Islet of Filfla was not taken into consideration by the Court in the delimitation of the maritime spaces in the *Malta/Libya* case, even though this islet is larger than all the cays presently in dispute put together. This point will be amply addressed by Dr. Oude Elferink.

19. There is also one other important feature of the mouth of the Coco River that has a bearing on the delimitation, especially of the territorial sea. This is that the delta of the Coco River where the land boundary ends as it enters the sea has been permanently increasing and projecting the mouth of the river towards the sea in a north and east direction. Thus, as will be explained later by Professor Alain Pellet, and may be appreciated in the Memorial of Nicaragua (Chap. III, Sect. B), a Mixed Nicaragua-Honduras Commission under the auspices of the Organization of American States (OAS), on November 1962 fixed the point at the thalweg at the mouth of the Coco River that would serve as the initial point of the land boundary. This point is presently located more than a mile inland or up river and is no longer located at the mouth of the Coco River (Chap. II, para. 30).

20. So, after careful study of the geography and other physical realities of the area to be delimited, and which we have briefly indicated above, Nicaragua came to the conclusion that a bisector of the lines representing the coastal fronts of the two Parties, as presently indicated on the screen in figure 9, was the appropriate method of determining a line of delimitation that would produce an equitable result by dividing equally the maritime spaces shared by both Parties outside of the territorial sea. There might be other methods of arriving at an equitable result but Nicaragua has found that the line resulting from the use of the bisector method to be quite simple and straightforward. Any other method that could possibly be used and that would effect an equitable result would be quite similar to that resulting from the use of the bisector. The detailed description of this method of delimitation will be explained amply by Mr. Brownlie.

21. In view of the problems raised by the unstable mouth of the Coco River, Nicaragua proposed a method for the initial point of departure of the delimitation of the territorial sea that would avoid starting from the thalweg at the mouth of the Coco River. This method involves the selection of a fixed point located 3 miles from the present day mouth of the Coco River. The reasoning behind this position will be explained in detail by Professor Pellet.

22. Honduras, on the other hand, faced with the inevitable results of a delimitation based on geography and equity, decided to try to sidestep the issue of proposing a method of delimitation that would effect an equitable result, by claiming that there was already a traditional line of delimitation in place that followed a parallel of latitude from the mainland out to sea. Thus, Honduras maintains that since it 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” (RH, para. 1.08). The fact is that Honduras has fabricated a non-existent “traditional” line in order to try to avoid the possibility that the Court might fix a line based on equity. A simple look at any map or graphic like No. 10 before us, would show a layman that a line following such a parallel of latitude from the coast, the so-called “traditional” line by Honduras, would result in giving the lion’s share of the maritime areas to Honduras as we can again appreciate in graphic 6 which we have shown before. At this point I will give some basic historical background.

Basic historical background

23. In this sense, the question I now propose to address is: when did this so-called traditional line begin to develop? According to Honduras it dates from the colonial period. The problem with this theory is that it flies in the face of history.

1492-1821

24. After the discovery and initial conquest of America, the Spanish territories were governed by Viceroyalties. Initially there were only two viceroyalties: that of New Spain with its capital in Mexico City and that of Peru with its capital in Lima. These viceroyalties were divided into smaller administrative and military units called Audiencias and Captaincies General. The area of Central America, which comprised present day Guatemala, Honduras, El Salvador, Nicaragua and Costa Rica, and parts of present day Mexico and Belize, was known as the Kingdom of Guatemala and formed the Captaincy General of Guatemala. This Kingdom of Guatemala was headed by a Captain General directly under the orders of the Spanish Crown in Madrid and the sub-divisions of the Captaincy General were under local governors also appointed by the Crown. During the Spanish Colonial era, and up to the date of independence of Central America from Spain on 15 September 1821, the political, administrative, military, judicial and religious division of the territories was put in place by the Spanish Crown. At independence, it was decided that the boundaries of the disintegrating territorial entities would be those in place at the moment of independence. This decision taken on the question of boundaries at the time of independence is now simply referred to in legal shorthand as the principle or doctrine of *uti possidetis juris*.

25. According to the eccentric claim of Honduras, the so-called “traditional” line of maritime delimitation it claims has its roots in this period. The result of this pretension would be that in the colonial era, the Spanish Crown would presumably have laid claims to extensive maritime territories that included not only for that period an exaggerated claim to a 12-mile territorial sea but also the even more incredible claim to a continental shelf. And that Spain not only laid claims to these areas but also exercised jurisdiction over these maritime territories, a jurisdiction that, according to the Honduran claim, carried over to the moment of independence. It is audacious of Honduras to assert that Spain in 1820 claimed and exercised sovereignty over maritime areas that have only been recently recognized by international law, such as the exclusive economic zone and

the continental shelf. As Professor Antonio Remiro will demonstrate later on, during the Colonial Era, the local authorities did not even have jurisdiction over the restricted area of territorial sea recognized in that era. Jurisdiction over the territorial sea depended directly not from the local governor of each of the provinces of Central America, not even from the Captain General in Guatemala but directly from the authorities in Madrid.

The period after independence from 1821-1840

26. At the time of independence and after a short spell as part of the short-lived Mexican Empire, the Central American provinces that had formed part of the Captaincy General of Guatemala, entered in 1823 into a federation known as the Federal Republic of Central America or the United Provinces of Central America. This Federation was short lived and it disintegrated in a civil war between 1838 and 1840.

History of the dispute

27. Nicaragua had territorial disputes with Honduras dating from the mid-nineteenth century, that is, shortly after the disintegration of the Federation of which both States had formed part. These disputes did not involve maritime areas in the Caribbean Sea but only the continental land mass and a part of the waters of the Gulf of Fonseca.

28. After the break up of the Central American Federation, Nicaragua in fact was in effective control and possession of the mainland further to the north than the present boundary at the river Coco. This reality was recognized by Honduras 30 years after the disappearance of the Federation, as is attested by two treaties that were signed by Nicaragua and Honduras respectively in 1869 and 1870. Although these treaties were not ratified they do serve to confirm a factual situation: that is, that the only reality up to that time, as for example as attested to by the 1869 Treaty, was that Nicaragua had been “in exclusive possession of this river (the Coco River) and the port of the same name” and for this reason the boundary was settled by this treaty further north of that river. (1869 Treaty indicated in MN, Chap. III, Sec. A, 1). The 1870 Treaty fixed an even more specific boundary that ended at the Atlantic Ocean exactly at parallel 15° 10' of north latitude (*ibid.*, MN, Sect. A, 2).

29. Since these treaties were not ratified the dispute continued and some years later was referred to arbitration by the King of Spain. The Award of the King of Spain in 1906 fixed the boundary at the Coco River and decided that the sea port of that river was Nicaraguan, just as the 1869 Treaty cited above had specifically recognized. The Award stated that,

“The extreme common boundary point on the coast of the Atlantic will be the mouth of the River Coco, Segovia or Wanks, where it flows out in the sea close to Cape Gracias a Dios, taking as the mouth of the river that of its principal arm . . . and retaining for Nicaragua . . . the bay and town of Cape Gracias a Dios . . .

Starting from the mouth of the Segovia or Coco, the frontier line will follow the *vaguada* or thalweg of this river upstream without interruption . . .” (MN, Chap. III, p. 24, para. 9).

30. Nicaragua contested the validity of the Award of the King of Spain and continued occupying the territory over which it considered to have sovereignty which, as indicated above, comprised areas located even further to the north of the present day boundary located at the main mouth of the Coco River.

31. To put an end to the dispute, the question of the validity of the Award of the King of Spain was submitted to this Court. During the pleadings in that case, Nicaragua filed a map indicating the areas under its effective control at the time, that is, 1960. The pertinent portion of this map is here reproduced as graphic 11 on the screen and it can be clearly appreciated that up to the Judgment of this Court Nicaragua was in effective control — and had been in control of those areas since the time of independence — of areas located at the mouth of the River Cruta at approximately 15° 15' N. It should be emphasized that these facts were not contested by Honduras during the proceedings before this Court.

32. The exercise of sovereignty by Nicaragua, not only over the mainland, but also over the maritime area in dispute including the cays, is attested to by the question of the turtle fisheries negotiations and agreements with Great Britain that began in the nineteenth century and were still ongoing in the 1960s. The history of this relationship is amply explained and documented in the Nicaraguan Reply (RN, paras. 4.46-4.53). Dr. Oude Elferink will further develop this question. For the moment, let me bring to the Court’s attention that whilst these negotiations were in progress, the well-known authority of that period, the United Kingdom hydrographer, Commander Kennedy, was consulted on the question: in his opinion the area involved in the

negotiations with Nicaragua included the areas contained in a sketch he drew for the benefit of the United Kingdom Foreign Office. This sketch on which is highlighted the location of parallel 15 is now before us on the screen as graphic 12. It is clearly evident from this sketch that the maritime areas considered by Commander Kennedy to be involved in the negotiations with Nicaragua, including the cays, correspond precisely with the areas presently in dispute and claimed by Nicaragua: that is, the areas north of parallel 15. This Turtle Agreement with Great Britain and the negotiations centred around it, simply confirm that Nicaragua had exercised sovereignty not only in the mainland up to 15° 15' N, but also in the maritime spaces in the vicinity including all the areas presently in dispute.

33. Since the 1960 Judgment of this Court was limited to the declaration on the validity of the 1906 Award of the King of Spain and no interpretation of it was made by the Court, there still remained at issue the question of the location of the principal mouth of the Coco River that was to be the boundary. In order to find a solution to this question, Nicaragua requested the intervention of the Organization of American States. Under the aegis of this Organization a Mixed Commission was constituted with the purpose of “verify[ing] the starting-point of the natural boundary between the two countries at the mouth of the Coco River . . . under the terms of the Arbitral Award of December 23, 1906”.

34. This “starting-point” was determined by the Mixed Commission on 15 December 1962 and identified by the appropriate geographical co-ordinates. (See MN, Chap. III, Sect. B.)

35. It was only after this Commission made its determination that Honduras proceeded south to occupy, for the first time in its history, the land border as defined by the Arbitral Award and located at the thalweg of the mouth of the Coco River.

36. The 1906 Award of the King of Spain was limited to an indication that “the extreme common boundary point on the coast of the Atlantic will be the mouth of the River Coco” (*Award of King of Spain* quoted in MN, Chap. III, Sec. A, 9). The 1960 Judgment of the Court for its part was limited to confirming the validity of the Award and added no indication of its own on the boundary; and the mandate given to the Mixed Commission of the Organization of American States in 1962 was limited to identifying the point of the boundary on the River Coco indicated in the Arbitral Award. None of these decisions had any indication or reference to a maritime

boundary or to any islands located in the maritime area. It should also be pointed out that the treaties signed in the nineteenth century mentioned above also had no indication of any limits in the sea or sovereignty over any islets in the area. Honduras never claimed during the pleadings before the King of Spain that led to the Arbitral Award of 1906 or during the pleadings before this Court that led to the Judgment in 1960 that there was a maritime line of delimitation in place or that it had sovereignty over any islets or cays presently in dispute. This absence is quite significant because if there had been such a traditional line in place, it would presumably have been an important element that would have been taken into consideration by any arbitrator.

37. But in spite of the fact that the Award was limited only to determining the land boundary, there was one reference in it, which had also been in the 1869 Treaty and that was to indicate that the port of Cabo Gracias a Dios — the only maritime port in the area — appertained to Nicaragua.

38. Graphic 13 indicates the location of the port of Cabo Gracias a Dios at the mouth of the Coco River. The adjudication of this port — the only port in the area — to Nicaragua is very significant. Local fishermen from the mainland did not have the capacity in their small boats for fishing beyond a few miles from the coast, and the cays in question were well over 20 miles distant from the nearest mainland coast. The only commerce or interaction with areas further than a few miles off the coast had to be through the Nicaraguan port on the mouth of the Coco River. Foreigners who came to those waters had to report to this port and they came through the main navigation channel in the area in dispute, which basically coincides with the direction followed by the line of delimitation proposed by Nicaragua. The location of the main navigation channel can be appreciated in figure 14 before us on the screen. The maritime commerce with the outside world was through this port and this navigation channel. The only effective connection with the islets in the area was with this port. Honduras for its part had no maritime port within 100 miles of this area. It was well into the twentieth century that Port Lempira was established by Honduras. But even this port is inside a lagoon and located nearly 100 km. from the pertinent area as we can appreciate in graphic 15 before us. If we add to this fact that the Honduran navy was only established in 1976, it seems preposterous that Honduras could claim any traditional sovereignty, possession or use of the maritime areas — including the islets.

39. After 1963 and until the late 1970s, there were no further negotiations between the Parties with relation to boundaries. It was not until the late 1970s that the question of a maritime delimitation in the Caribbean first came up. Between November 1976 and March 1977 the Foreign Minister of Nicaragua made a series of declarations that were edited and published by the Foreign Ministry in which it was announced that Nicaragua would begin conversation with neighbouring countries in order to delimit the maritime boundaries. The Foreign Minister explained that there had been no previous negotiations because “[n]obody had any interest in discussing a few meters when the subject-matter was a territorial sea of 3 or 12 miles. However, with the development of the Law of the Sea there are enormous interests linked to delimitation.” (See MN, Chap. IV, Sect. D, 15.)

40. It was in this context that Nicaragua proposed to Honduras through a diplomatic Note (Note G -286) of 11 May 1977 to initiate conversations for the delimitation in the Atlantic zone (see MN, Ann. 4). Honduras responded to this with a diplomatic Note (Note No. 1025) of 20 May 1977 accepting the “opening of negotiations”. The acceptance was without any reservation or any indication that there was already a traditional line of delimitation (see MN, Ann. 5).

41. After this exchange of Notes, there were no further negotiations until the 1990s because the Government of Nicaragua was ousted in 1979. This change of government changed the attitude of the Parties towards each other. Up to this point there had been no official position on either side as to their respective maritime territorial claims. It was not until 21 March 1982, after Nicaraguan coastguards captured four Honduran fishing vessels in the vicinity of the Nicaraguan cays of Bobel and Media Luna located some 16 miles to the north of parallel 15 — as can be appreciated in graphic 16 — that Honduras reacted and for the first time in a diplomatic Note on 23 March of that year, officially identified parallel 15° as a line “traditionally recognized by both countries” in the Atlantic ocean (MH, Ann. 8). This Honduran Note was answered by Nicaragua with a Note on 14 April of that year in which it manifested its surprise “since Nicaragua has not recognized any maritime frontier with Honduras in the Caribbean Sea” (MN, Ann. 9).

42. After this incident and exchange of Notes there have been countless occasions when Nicaragua has reaffirmed that there is no maritime boundary in the Caribbean Sea that is based on

tradition or on any tacit acceptance by Nicaragua — see generally on this question Chapter V of the Memorial of Nicaragua.

43. At best — and there is not even an at best on this point — this would be a tradition that began in 1963, a tradition younger than practically all of us present here! And it would be a tradition that would have ceased developing when Nicaragua suggested negotiations on a maritime boundary in 1977 and Honduras accepted to negotiate without conditions or any indication that a tradition was in place and that there was nothing further to negotiate. If this so-called tradition started its gestation in 1963 it would have ended quite abruptly in 1977 before it reached the age of consent!

44. During the 1990s there were several attempts to find a negotiated solution to the problem of the delimitation of the Caribbean Sea. A description of these failed negotiations between the Parties is provided in the Nicaraguan Memorial, in Chapter V (Sect. C).

45. Perhaps the best example of these failed negotiations are those that took place between 22 January 1996 and 31 January of that year, with the object of agreeing on a special régime “in order to avoid the arrest of fishermen from either country” in the Caribbean. With this purpose, the *Ad Hoc* Commission of the delegations of both parties recommended “the establishment of a common fishing zone for fishing vessels of both countries”. The minutes of the two meetings held can be read in Annexes 93 and 94 of the Nicaraguan Memorial. No agreement was reached during these meetings and they ended with both parties reiterating their original positions; that is, Nicaragua maintained its claim to maritime areas up to the 17°N parallel and Honduras up to the 15°N parallel.

46. What finally provoked the end of any further attempts at finding a negotiated solution was the ratification of a maritime delimitation treaty Honduras had signed with Colombia on 2 August 1986. It was a treaty that met the most extreme aspirations of Honduras and Colombia in relation to Nicaragua. In this treaty both countries attempted to boost their position by reciprocally recognizing each others most radical claims vis-à-vis Nicaragua. This treaty had been signed by Honduras with Colombia in a period of maximum political and military tension between Nicaragua and Honduras. On 28 July 1986, a few days before this treaty was signed, Nicaragua had brought a

case before this Court against Honduras for the armed activities against Nicaraguan territory, the case concerning *Border and Transborder Armed Actions*.

47. The treaty with Colombia was ratified by Honduras on 2 December 1999. By it, Colombia recognized and accepted the maximalist claim of Honduras to a line of delimitation with Nicaragua running on a parallel close to 15° north latitude. Its ratification put an end to any possibility of a negotiated solution to the dispute on the delimitation of the Caribbean Sea. The only possibility left open for Nicaragua was to have recourse to other means of peaceful settlement of this intractable question. This Nicaragua did a few days after the treaty was ratified by introducing an application before this Court that initiated the present proceedings on 8 December 1999.

The invariable position of Nicaragua

48. Honduras has attempted to portray Nicaragua's impugnation of the Honduran claim to a traditional line of delimitation following the parallel of latitude, as some form of new fangled political reaction by the Government of Nicaragua that came into power in 1979. Thus, in its Counter-Memorial, Honduras states that, "[t]he Sandinista Revolution that overthrew the Government of Nicaragua on 19 July 1979 brought a radical change in Nicaraguan policy towards Honduras and other Central American countries" (para. 3.25). In its Rejoinder Honduras further claims that "Nicaragua's acceptance of the traditional line until the Sandinista Government came to power is consequently a relevant circumstance . . ." (RH, para. 2.46).

49. These repeated statements by Honduras are a blatant misrepresentation of the facts. Honduras is perfectly aware that the Nicaraguan position that there is no line of delimitation in the Caribbean Sea between Nicaragua and Honduras has been the official position of *all* the Nicaraguan governments that have been faced with the question of delimitation in the Caribbean Sea.

50. The invariable position of Nicaragua before bringing this case to court was that there was no maritime delimitation with Honduras. Nicaragua further claimed that any delimitation based on equity would result in a delimitation line that would start from a point originating on the thalweg of the mouth of the Coco River and then would run in a north-easterly direction until it reached the

17th degree N parallel. This position of Nicaragua can be seen for example in the two Notes sent by Nicaragua to Honduras on 12 December 1994 (MH, Notes Nos. 940507 and 940508 in Anns. 49 and 50) where, in response to Honduran protests for the capture of fishing vessels in the area in dispute, Nicaragua reminded the Honduran Minister for Foreign Affairs that Nicaragua “has always extended its jurisdiction up to parallel 17° latitude north” (MN, p. 118). This same position was reaffirmed in the negotiations held between the Parties in January 1996 in the attempt, mentioned before, of establishing a zone of tolerance for fisherman of both countries in the Caribbean. This maximalist claim, now not insisted upon by Nicaragua, implied, for example, that the important fishing bank of Rosalinda located roughly between parallels 16° and 17° north would, on its western side, appertain exclusively to Nicaragua and no part of it to Honduras.

51. When Nicaragua brought this case to court, it consulted international experts on several technical fields and requested from them, not a justification of the traditional position or perhaps maximalist ambition of Nicaragua but, on the contrary, consistent with its position that there was no line of delimitation in place, Nicaragua requested from the experts an indication of what Nicaragua could reasonably claim as a delimitation line in the area. The result was the suggestion of the bisector line that Nicaragua is requesting the Court to adjudge and declare as the equitable delimitation line between the Parties.

52. Honduras, on the other hand, has not modified the claim it first made to Nicaragua in 1982, alleging that there was a line of delimitation in place that, starting from the point determined by the Mixed Commission in December 1962, ran in an easterly direction following a parallel of latitude. This maximalist claim by Honduras, shown on the screen as graphic 17, has not varied since it was first officially formulated to Nicaragua in 1982, presumably because any relaxation on this point would set Honduras face to face with the realities of geography that could lead to no results resembling their most ambitious claim.

53. In view of the attempts by Honduras to characterize the dispute as something originating in the conflicts of the 1980s in the Central American area, it is necessary to set the record straight. The claims by Nicaragua in these proceedings reflect the invariable position of *all* the governments of Nicaragua that have been faced with the problem of the maritime delimitation in the Caribbean Sea.

54. (A). From 1936 to 1979 the Somoza Government was in power in Nicaragua. The relations between the Governments of Nicaragua and Honduras, especially from 1963 to 1979, were very friendly (MN, p. 33). There is no communication between the Honduran Governments of that period with the Nicaraguan Governments suggesting even by the most remote indication that there was a line of delimitation in place in the maritime spaces in the Caribbean. If there is any note or other official communication even hinting at this to the Nicaraguan Government during that period, the Nicaraguan team has not seen it among the records in Nicaragua or among the numerous documents filed, either regularly or in a *sui generis* fashion, by Honduras in these proceedings. I would go even further, if there is any document that proves the contrary and that Honduras by some mistake has not been able to produce so far, Nicaragua would not oppose the presentation of such a document even at this late stage of the proceedings.

55. But the simple truth is that the only official reference during all that period of the Somoza Government up to 1979 was the Nicaraguan diplomatic note dated 11 May 1977, sent to the Foreign Minister of Honduras, indicating that the Government of Nicaragua “wishes to initiate conversations leading to the determination of the definitive marine and sub-marine delimitation in the Atlantic and Caribbean Sea zone” (MN, Ann. 4). This Nicaraguan Note could not possibly be clearer or lend itself to misinterpretations: it clearly asks to “initiate conversations”, not continue or follow up on any pre-existing situation.

56. The Honduran reply was with a diplomatic Note from the Foreign Minister in which he unambiguously states that Honduras “accepts with pleasure the opening of negotiations and in this respect, instructions have been given to His Excellency Ambassador Jimenez Castro for the initiation of the preliminary stages of the conversation as soon as he takes possession of his post”. The Honduran official reply to the request from the Nicaraguan Government of that period prior to 1979 was an unequivocal acceptance of negotiations without the remotest indication of any preconditions. The reply that speaks of “opening negotiations” and of the “initiation of the preliminary stages of the conversations” cannot be construed to mean what Honduras now alleges, that is, that there was nothing to negotiate because there was already a so-called “traditional” line of delimitation. Where in this exchange of Notes — the only diplomatic correspondence filed in

this case and dating from before the 1980s — are the Honduran claims of a traditional line and of its alleged sovereignty over the cays presently in dispute?

57. (B). From 1979 to 1990 the Sandinista Government was in office in Nicaragua. During this period the relations between the Governments of both Parties were very rocky and confrontational. In any case, it was during this period that Honduras for the first time officially claimed that there was a line of delimitation that followed a parallel of latitude eastwards from the main mouth of the river Coco. As indicated above, this Note was sent after the Nicaraguan coastguard captured Honduran fishing boats in the area of some of the cays presently in dispute. During the whole of this 1980s decade there were constant incidents both on land and at sea. Many diplomatic Notes were sent to each other by the Parties. In all of them, Nicaragua maintained the position that there was no line of delimitation in the Caribbean and that any equitable line to be established would reach parallel 17 of north latitude. The relations between the Parties at the time can be appreciated in the Application filed by Nicaragua against Honduras in this Court on 28 July 1986, and the Memorial on the merits it filed on 8 December 1989, all in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*.

58. (C). From 1990 to 1997 the Government of Mrs. Chamorro was in office in Nicaragua. During this time the relations between the Parties were generally friendly. Nonetheless, there were continuous confrontations in the maritime area in dispute. The diplomatic correspondence generated by this dispute on the ground can be appreciated in the Memorial of Nicaragua (e.g., Anns. 48-56, 62-66, 71-73 and 76-88). The problems were so acute that the Presidents of Nicaragua and Honduras, meeting at the presidential inauguration of the latter in December 1995, decided to set up the *Ad hoc* Committee referred to above with the purpose of studying the possibility of establishing a zone of tolerance in the area in dispute for fisherman of both Parties. The result of these meetings, as already indicated, was not an agreement but rather that both Parties retreated to their original positions. Thus, this new Government of Nicaragua also maintained the only real tradition on this issue: that there was no line of delimitation and that such a line had to be negotiated.

59. (D). From 1997 to 2002 the Government of Dr. Aleman was in office. The relations between the Parties were in appearance very friendly. Nonetheless, on the issue before the Court

the position of Nicaragua suffered no variance: there was no line of delimitation in the Caribbean. And also, during this Government incidents occurred in the area in dispute as may be appreciated in the diplomatic notes sent by Nicaragua to Honduras and reproduced in the Memorial of Nicaragua (e.g., Anns. 67-69). During this Government the relations between the Parties reached the critical point where it was decided to bring this case to the Court on 8 December 1999.

60. (E). From 2002 to 2007 another Government was in place in Nicaragua, that of Mr. Bolaños. This Government also had friendly relations with Honduras but also clearly maintained the consistent position of Nicaragua since the period of the Government of Mr. Somoza.

61. (F). At present the Government of Mr. Ortega is now in office since last January and we are here before the Court again maintaining the traditional and invariable position of all the Governments of Nicaragua since the question of delimitation in the Caribbean first became an issue between the Parties.

Critical date

62. At this point, I will address some initial comments on the question of the critical date. In its Rejoinder, Honduras claims that the critical date of 1977 selected by Nicaragua is of an “arbitrary nature” (RH, para. 1.17) and was asserted for the first time by Nicaragua in its Reply (RH, para. 1.15). Further, Honduras states that “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 goes back a long way and is based on a pattern of practice manifesting a tacit agreement between the parties” (RH, para. 1.15).

63. On the first assertion by Honduras — that is, that the critical date of 11 May 1977 selected by Nicaragua is arbitrary — it should be recalled that 1977 is the year in which it first became apparent that it was necessary to negotiate a maritime delimitation. Before that time neither Nicaragua nor Honduras had claimed the existence of a tacit or traditional line of delimitation. In fact, even after Honduras received the invitation to start negotiations on 11 May 1977 it did not point out that this delimitation already was in place. Quite the contrary, it agreed to negotiate without any preconditions. If Honduras is not comfortable with calling this the

critical date, then let us refer to it as the moment when any possible diplomatic uncertainty over the question of maritime limits was ended.

64. Honduras also points out that Nicaragua only brought up the question of a “critical date” in its Reply (RH, para. 1.15). It is true that Nicaragua did not use the phrase “critical date” in its Memorial. But the existence of a critical date is normally of the essence in boundary disputes whether it is referred to by that name or not. So, whether Nicaragua referred to 1977 as the “critical date” or not in its Memorial is irrelevant. What is relevant is that it did clearly describe what transpired in 1977; namely, that for the first time the question of the maritime delimitation in the Caribbean came out in the open with the offer by Nicaragua to start negotiations on that issue. In Nicaragua’s view, the effect of the interchange of notes by the Parties in 1977 on the commencement of negotiations without preconditions on the delimitation of the Caribbean Sea was that it put the Parties on notice on this issue and any subsequent activity by either of them had to be coloured by the fact of this notification. The best characterization for this effect is that of “critical date” but the use of the name does not change the nature or the consequences of the act that gave rise to it.

65. The reference to a critical date is not to ask the Court to exclude from consideration all documents dating from after 1977, but simply to point out to the Court that the activities these documents might reflect were taken with the intention of trying to improve the legal position of Honduras. By referring to the year 1977 as the critical date, Nicaragua is not attempting to put limits on the material that the Court may take into consideration. Quite the contrary, we welcome the Court to go through all the material produced by Honduras in order to verify that most of the so-called “evidence” filed by Honduras refers to very recent occurrences, some of it even dates from after the filing of this case in 1999. With the exception of some oil exploration concessions that were granted between 1963 and 1975, all the other material filed as evidence by Honduras refers to activities occurring for the first time after that date of 1977. All the other material that has been presented by Honduras and dated before that period has no clear reference to any specifically identifiable maritime area.

66. The Honduran Rejoinder has two long chapters devoted to Nicaraguan and Honduran *effectivités* or sovereignty over islands. All this evidence will be analysed minutely by

Dr. Oude Elferink later in these pleadings. For the moment let me point out that Chapter 5 of the Honduran Rejoinder refers to supposed Honduran activities in the area in dispute. All of the activities that refer to the area in dispute, as an identifiable area, occur after 1977. I will address some of these issues in a general way at the end of this presentation but they will be analysed extensively by my colleagues Professor Remiro and Dr. Oude Elferink.

67. Finally, Honduras attempts to undermine the consequences of the critical date or, if it is preferred, the consequences of the interchange of notes agreeing to start negotiations of the maritime limits in the Caribbean. Honduras does this by casting doubt on the importance of these events in 1977 because, according to Honduras, “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”.

68. At this point, it must again be reiterated that any conduct that could be relevant to the arguments of Honduras could only have occurred after 1963. This would be, to use the Honduran phrase, the start of the “long way” that the conduct of the States could possibly go back to! Up to the year 1963 there is no possibility that Honduras could claim any conduct or tacit acceptance by Nicaragua in any part of the area in dispute since Nicaragua had been physically and legally controlling it at least since the break up of the Central American Federation in 1838-1840, more than a century before. This occupation by Nicaragua of the areas in question up to 1963 is a matter of public record. So if there are any actions by the Parties that could have any bearing on the Honduran allegation of a tradition, it would have to refer to acts occurring after this date. And when would the importance of any self-serving actions by the Parties cease? Naturally, when the existing situation was first questioned and these acts lost any innocence they might have had. This occurred when Nicaragua on 11 May 1977 sent the diplomatic Note to Honduras requesting the start of negotiations. It is also useful to recall that this note was not sent during the “Sandinista régime” as referred to by Honduras, but rather it was sent during the “Somoza régime” that had very friendly relations with the “Lopez Arellano régime” in Honduras. If it were true that before that date Honduras had been contemplating a claim of a maritime delimitation running through the 15th parallel North, then this remained an idea in their mind only and they never dared to communicate it to the Nicaraguan Government of that time, that is, to the Somoza Régime.

Islands

69. Honduras alleges in its Rejoinder (para. 10) that it was not until its Memorial that Nicaragua “made for the first time a claim to named islands north of the 15th parallel”. On the general question of the subject of the dispute before the Court, the Rejoinder of Honduras alleges that

“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' and that prior to the filing of its Memorial, Nicaragua had not protested any activities authorized by Honduras on these islands, rocks and cays.” (Para. 1.03.)

70. To begin with this last assertion of Honduras, it must be clear that there were no activities of any consequence taken by Honduras in the area in dispute prior to the 1980s that would have justified souring the friendly relations existing up to that moment. Prior to the 1980s, there was no public knowledge of the use of any of these islets, rocks and cays by the Honduran authorities or by private parties with Honduran authority. The Honduran navy only came into existence in mid-1976 and there could hardly have been any patrols or acts of authority by Honduras before that period. These islets, cays and rocks were not and are not fit for permanent human habitation, even for persons willing or having to live under the most extreme conditions. The largest of these features is hardly equivalent to the area occupied by the Peace Palace. They are at best 1 m above water and are located in an area of a rainy hurricane season that lasts six months out of every year. That is why the only certified and verified use of these cays before the critical date was by the Cayman fisherman who used these cays as temporary housing for the turtles they caught in the area. Of course, they were fit habitation for turtles and that is why the British subjects used them as “crawls” or enclosed “pastures”, but they were hardly fit for human beings!

71. What is true is that the control of fisheries was not very strict, particularly before the critical date in the year 1977. Perhaps that is why the first documented conflict over fishing in the area in dispute occurred only on 21 March 1982 when Nicaraguan coastguards captured four Honduran fishing boats in the vicinities of the Nicaraguan cays of Bobel and Media Luna, cays that according to Honduras, Nicaragua had never claimed before or protested Honduran activities supposedly exercised on them. But this is typically putting the facts on their head. There is *no* documented occurrence of Honduras capturing boats in the area in dispute before this date of 1982. It was Nicaragua capturing Honduran boats, and that is why the protest came from Honduras who

used the occasion to claim for the first time in all its historical relations with Nicaragua that parallel 15 was a line “traditionally recognized by both countries” as a delimitation in the Atlantic. Nicaragua, as usual, reacted immediately to this Honduran protest by denying the existence of any line of delimitation with Honduras.

72. At least two relevant conclusions may be drawn from this initial episode of open hostilities on the question of a line of delimitation.

73. (A). Nicaragua did not wait until the presentation of its Memorial to claim sovereignty over these cays, as Honduras alleges in its Rejoinder (para. 1.10). This incident involving two of the most important features in question proves that Nicaragua claimed and exercised sovereignty over these islands and cays long before this case came to Court. Furthermore, there is no evidence at all that prior to this incident Honduras had claimed or exercised sovereignty over these features. I ask the Court to review the evidence and no mention of any capture by Honduran patrols of Nicaraguan boats fishing in that area occurred before that incident of 1982. Why were there no captures? Was it because the Nicaraguan fishermen up to the 1980s were so obedient of these alleged Honduran regulations that were not even in the public domain at that period in question? This would certainly be quite amazing especially since there was no Honduran navy before 1976 to enforce this compliance! Besides, the Nicaraguan Government had quite openly published in 1971 a geographical index of Nicaragua that Nicaraguan fisherman would not have ignored and that listed all the islets and cays in dispute and in particular Bobel and Media Luna as being under the sovereignty of Nicaragua (MN, Chap. IV, para. 12).

74. (B). The Honduran protest note after the incident in 1982 claimed that “two coastguard launches of the Sandinista Navy penetrated as far as Bobel and Media Luna Cay, 16 miles to the North of parallel 15. This has been traditionally recognized by both countries to be the dividing line in the Atlantic.” Honduras, therefore, at that late stage was not claiming sovereignty over the cays and islets based on purported acts of sovereignty exercised independently of their location, but only that these areas were located north of the 15th parallel, and presumably, by implication, they were under Honduran sovereignty. At this point in time Honduras did not invoke any direct acts of sovereignty over these uninhabited and uninhabitable features, that is, that it had sovereignty over

the islands and cays involved in the incident independently of their location on the alleged line of delimitation, but only that they were located north of the 15th parallel.

75. The Rejoinder of Honduras (para. 2.17) calls the Nicaraguan claim to sovereignty over the islands “ambiguous and equivocal”. Even granting this were so, which is not the case, then this alleged ambiguity and equivocation has not caused any misunderstandings or inconvenience to Honduras, since it has devoted the greater part of its arguments and pleadings to this point!

76. The other question raised by Honduras in its Rejoinder and quoted before is that “Nicaragua has not requested the Court to determine which State has sovereignty of the islands, rocks and cays . . .” (RH, para. 1.03.) As we shall see, this is simply not true.

77. Nicaragua’s position on the question of the cays and rocks located in or around the area in dispute is that these features have never been susceptible of effective occupation by any sovereign. As indicated before, these minor incidents located barely above water in an area of very heavy seas and rains and yearly hurricane threats have never been the object of permanent use by anybody. That is why Nicaragua considered that by using a bisector as a method of delimitation, sovereignty over these features could be attributed to either Party depending on the position of the feature involved with respect to the bisector line. It was clearly pointed out in the Memorial of Nicaragua (Chap. IX, para. 42) that, with the bisector line proposed by Nicaragua, the result was that “all islets and rocks under the sovereignty of Nicaragua are situated to the south of this line and those under the sovereignty of Honduras to the north of the line”. Furthermore, as a subsidiary point Nicaragua indicated in its Memorial (p. 166) that “in the absence of the adoption of a bisector delimitation by the Court, Nicaragua reserves the sovereign rights appurtenant to all the islets and rocks claimed by Nicaragua in the disputed area”, and went on to name — in the Memorial — each one of these islets and cays.

78. So the question is: what are the Parties requesting the Court to decide on the issue of sovereignty over the islands, cays and rocks located in the area in dispute? The short answer is that the position of Nicaragua is as follows:

79. (A). Nicaragua indicated in its Memorial that all the islands, cays and rocks located in the area in dispute, that is, north of parallel 15 and south of the bisector proposed by Nicaragua or south of any other equitable line decided by the Court, appertain to Nicaragua.

80. (B). Nicaragua further indicated that in the event that the Court determines that the method of delimitation to be used cannot decide the issue of sovereignty over these features then Nicaragua claims that the factual evidence points to Nicaraguan sovereignty over them.

81. On the other hand, the position of Honduras parallels that of Nicaragua and would seem to be:

82. (A). That all islands, cays and rocks located north of the 15th parallel appertain to Honduras.

83. (B). That in the event that the Court decides that the sovereignty over these features has to be decided on their own merits and not on their location, then Honduras claims that the factual evidence points to its sovereignty.

84. At this point of the Agent's presentation, it is not the appropriate moment to analyse *in extenso* the bases of sovereignty alleged by both Parties over these cays. This question will be addressed later in our presentation by Professor Remiro and Dr. Oude Elferink. Their extensive analysis of this question might present some overlap but this is inevitable because Honduras in general does not specify whether an argument it uses concerns the maritime delimitation or the cays or both.

Madam President, I have about 20 minutes more to go. I do not know if you wish me to stop at this moment, or . . ?

The PRESIDENT: Yes, we are clearly going to have to sit late today because you have lost time at the beginning of your presentation. It will be perhaps convenient for the Court to take a short break now and we'll resume very shortly. Thank you.

Mr. ARGÜELLO: Thank you.

The Court adjourned from 11.35 to 11.50 a.m.

The PRESIDENT: Please be seated. You have the floor, Your Excellency.

Mr. ARGÜELLO: Thank you, Madam President.

The question of evidence

85. The claim by Honduras of the existence of a traditional line of delimitation that was in place since time immemorial cannot be seriously opposed to the Nicaraguan request for the determination of a line of delimitation of maritime spaces whose existence was not even dreamt of before the mid-twentieth century.

86. The Nicaraguan request is not for a delimitation of a 3-mile or at best a 6-mile territorial sea, that were the only maritime areas considered susceptible to State sovereignty in the nineteenth century at the time of independence, but rather it is a request for the delimitation of the extensive maritime areas that were beginning to be discussed in the mid-twentieth century and were finally admitted by international law with the entry into force of the United Nations Convention on the Law of the Sea.

87. As Professor Remiro will point out, the concept of *uti possidetis* that was used to determine the boundaries of the administrative divisions of the colonial Power that were considered to be frozen in place at the moment of independence had nothing to do with maritime matters. The concept of *uti possidetis* did not even apply within the 3- or some say 6-mile limit in colonial Spanish America up to the date of independence, because these areas were not under the control of the local authorities but directly under the control of the Royal Navy in Madrid and its representatives in other parts of the Caribbean, even at one point, as Professor Remiro will point out, as distant as the island of Cuba.

88. Apart from these observations that are based on elementary legal and historical considerations, it is an indisputable fact that up until the Judgment of this Court in 1960 confirming the validity of the Arbitral Award of the King of Spain of 1906, and even until the end of 1962, when the Commission of the Organization of American States finally determined the main mouth of the Rio Coco whose thalweg would fix the continental limits of the Parties, Nicaragua continued effectively to control areas located substantially to the north of the present border.

89. Furthermore, that up until that same period Nicaragua had been dealing with Great Britain in relation to turtle fisheries in the area in dispute that included the use of the islands, cays and rocks in that area — a use, it should be emphasized, consistent with the nature of these

features since it involved not the use for human habitation but for pens where the captured turtles could crawl about until they were shipped to their final destination, usually in Cayman.

90. There is not the least shred of evidence that Honduras exercised any authority over these islands during all this period or even up to the early 1980s. Chapter 5 of the Honduran Rejoinder has an extensive list of alleged exercise of sovereignty by Honduras over the area in dispute, including the islands and cays. All of these points will be addressed *in extenso* by my colleagues Professor Remiro and Dr. Oude Elferink. At present, only a bird's eye view of this so-called "evidence" and some short comments on the most salient of them.

- (i) Fisheries: Practically all of the highly selected testimony by fishermen filed by Honduras refers to situations dating from after 1977. On the other hand, none of the evidence referring to situations before 1977 is clearly centred on the area in dispute. If the Court peruses these transcripts it will find that these testimonies would be equally valid for any delimitation with Guatemala and Belize, far to the north of the area in dispute. The same applies to any fishing regulations before the 1980s. There is no area identified that could even vaguely be considered as referring to the area in dispute.
- (ii) Honduran administration and legislation, application and enforcement of Honduran civil and criminal laws, regulation of immigration and public works and scientific surveys, all cited in the Honduran written pleadings, are all related to facts occurring after the 1980s and some even after this case came before the Court. Any references prior to that period are vague and could refer to any area in the Caribbean under Honduran sovereignty.
- (iii) The first Honduran Constitution to include some of the islands and cays in dispute dates from 1982.
- (iv) The Honduran military and naval patrols could not possibly have antedated the creation of the Honduran navy in 1976.
- (v) The only evidence filed by Honduras that has some reference to the area in dispute is to certain oil concessions that were granted by Honduras between 1963 and 1975.

Oil concessions

91. To begin with, it is abundantly clear that the granting of oil concessions by a State is not a method of acquiring sovereignty over territory. The distinguished Tribunal in the Eritrea/Yemen Arbitration considered that offshore oil concessions had no implications on the sovereignty of the territories involved. Thus, it indicated that,

“Ethiopia in the 1970s entered into a number of offshore concession agreements . . . in the view of the Tribunal these agreements simply reflect technological and commercial realities and carry no implication for the rights of the parties at issue in these proceedings.” (*Eritrea/Yemen* (Phase I) Award, *ILR*, Vol. 114, p. 1, para. 423.)

92. It is clear that Honduras cannot establish sovereignty or sovereign rights over areas based on the granting of concessions. But since the question of the oil concessions are the only documented activities of Honduras that might have some relation to the area in dispute before the critical date, I have selected this issue for some preliminary comments but anticipate that this point will be analysed minutely by Professor Remiro in a later presentation.

93. (A). Honduras attempts to blow up in time and in space the concessions granted in the area in dispute. Thus in the Counter-Memorial of Honduras (para. 6.26), it claims that the first concession was granted in 1955 and the last one in 1983. The concession granted in 1955 did not refer to the area in dispute. It was a general concession over the territory of the Mosquitia, including territorial seas. In fact, it applied to a very large and undefined area. The 1983 concession was granted in an area located to the north of the area in dispute. The only concessions granted in the area in dispute occurred between 1963 and 1975 and were granted to two companies: Pure Oil Company Honduras Inc. (later Union Oil Company), and Lloyd Honduras Inc. (CMH, Anns. 192, 194).

94 (B). The concessions granted by Nicaragua in the same period and located near the area in dispute expressly stated that the closing boundary to the north of such concessions was left undetermined because there was no line of delimitation with Honduras — thus, for example, the oil concession granted to the Pure Oil Company of Central America in September 1968 (RN, Vol. II, Ann. 14) and the oil concession granted to the Union Oil Company of Central America in June 1972 (RN, Vol. II, Ann. 15). The Honduran concessions, on the other hand, had no indication

that their southern limit coincided with the maritime limit with Nicaragua; they simply indicated the geographical co-ordinates without any reference to boundaries.

95. (C). The Honduran concessions in the area in dispute had no reference to the islands in the area. No exploratory activities relating to the oil concessions were expressly authorized on these islands and, to the knowledge of Nicaragua, none took place. This lack of mention of the islands in the area is the more telling if we consider that other concessions by Honduras further north, outside the area in dispute, specifically mentioned the islands in the area. For example, in the box of documents that were introduced by Honduras at the moment of filing its Counter-Memorial on 21 March 2002, we find the document identified with the number 6-10 which was not translated by Honduras but is part of the record it filed in the Court. This document refers to oil concessions granted by Honduras to Honduran corporations that indicate the area of the grant with specific mention of the islands and cays in that area: graphic 18 on the screen shows the location of two of these concessions. The translation of the description of the area granted in these concessions is as follows — and I will make this short translation because, as I have indicated, these documents were not translated by Honduras:

“The oil exploration granted to Compañía Petrolera Hondureña

In Vivorillos No. 1 zone, located in the Cayitos zone, in front of the Caratasca Lagoon sandbank, La Mosquitia, Gracias a Dios District, and it will have the following limits: to the north, the sea, Becerros Cays and reefs, to the south, the sea, to the east, Vivorillos cays and reefs and to the west, Vivorillos zone No. 2.

Oil exploration zone granted to Compañía Petrolera Hondureña

In Caratasca No. 1 located in the Cayitos zone, in front of the Caratasca Lagoon sandbank, La Mosquitia, Gracias a Dios District, and it will have the following limits: to the north, Cajones Cays or Hobbies and reefs, to the east, Caratasca Cays and reefs, to the south, Becerro Zone No. 1, and to the west, Carratasca Zone No. 2. (Document filed by Honduras as additional Annexes to the Counter-Memorial, No. 6-10.)

96. During the period in question, that is at least up to the 1980s, neither Nicaraguan legislation nor Honduran legislation prescribed that a public offer of specific and determined areas for oil concessions should be made. No grid was published on any map indicating which areas could be offered to the public. Therefore there are no maps — and Honduras cannot produce any before that period — in which the Honduran authorities made a general offer to the public of concessions in any specific areas and much less that had as limit the 15th parallel to the south.

Article 4 of the Nicaraguan Law on the Exploration and Exploitation of Petroleum of 3 December 1958 (RN, Ann, 13 (b), Decree No. 372) divided in very general terms the national territory into

“four large zones, to wit:

- (a) Pacific zone, including the departments of Chinandega, León, Managua, Masaya, Carazo, Granada and Rivas, including lakes Managua and Nicaragua;
- (b) central zone, including the departments of Nueva Segovia, Madriz, Estelí, Jinotega, Matagalpa, Boaco and Chontales;
- (c) Atlantic zone, including the rest of the national territory on mainland; and,
- (d) zones of the Continental Shelf on both oceans.”

97. The law did not provide any more detailed description or geographical co-ordinates of the areas that could be offered. The only spatial limitation imposed on the concession by this legislation referred to the size of the area that could be offered. Thus in the Atlantic Ocean it could not exceed 400,000 hectares (Art. 9).

98. Based on this law, Nicaragua granted concessions wherever the oil companies requested them. There were no specially identified blocks on offer. The whole Atlantic areas appertaining to Nicaragua were on offer without any indication of what were the limits of these Atlantic areas. When the northern border of the Nicaraguan concessions was located near the area of any possible maritime boundary with Honduras, then the decree issued by the Nicaraguan authorities indicated expressly in the concession grant that this northern limit was left open, that is, no geographical co-ordinates were indicated for the northern limit of the concession because, as each decree would *expressly* state, there was no delimitation with Honduras.

99. Honduras makes much of the lack of Nicaraguan protest in view of the concessions it granted between 1963 and 1975 in the area in dispute. The inference of acquiescence that Honduras tries to elicit from this lack of formal protest by Nicaragua during this period should be dismissed in the same way that the Court dismissed the Canadian argument against the United States of America in the *Gulf of Maine* case on a similar issue. Thus Canada argued that it had issued regulations and concessions in the area in dispute without eliciting any protests from the United States of America. The Chamber’s opinion was that the period from 1965 to 1972, which

according to Canada was “at least” the period in which the conduct took place, was “too brief to have produced a legal effect of this kind, even supposing that the facts are as claimed” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Judgment*, *I.C.J. Reports 1984*, p. 246, para. 151).

Further points on Nicaragua’s submissions

Starting-point of the maritime delimitation

100. In Nicaragua’s written pleadings it did not request any pronouncement by the Court on the question of the location of the endpoint of the land boundary and hence of the starting-point of the maritime delimitation. The reason for this was that if a point was fixed at the mouth of the Coco River as the starting-point of the maritime delimitation, and the river mouth continued to change position as has happened in the past, then this fluctuating starting-point would be the source of uncertainty and possible disputes in the future. Therefore, in its Memorial (Chap. VII, para. 29) Nicaragua indicated that it considered more appropriate that the situation of the short strip of boundary located between the point determined in November 1962 by the Mixed Commission, and the 3-mile outer limit it proposed as a starting-point should be left to the determination of the Parties.

101. In its written pleadings, Honduras has come up with an extraordinary claim for the location of the starting-point for the delimitation and the direction or route it should follow out to sea. In plate 20 of its Counter-Memorial, now before us in graphic 19, we can appreciate this claim. According to this Honduran position, the fact that the mouth of the river Coco has moved some distance east and north from the point determined by the Mixed Commission in 1962 does not change the fact that that 1962 point is the starting-point for the maritime delimitation. And thus, with Olympic disdain of reality, Honduras offers a line that cuts through the mainland of Nicaragua to connect to a point located on the mainland coast of Nicaragua from which point the maritime delimitation would commence. It is true that, in its Reply, Honduras indicates that it would accept the starting-point suggested by Nicaragua located 3 miles from the mainland coast, but this in no way represents a change of position as to the starting-point of the delimitation being located on the — according to Honduras — invariable point determined by the Mixed Commission

in 1962. From Nicaragua's point of view, the task of the Commission in 1962 was to determine the position of the thalweg of the main mouth of the Coco River *as it was at that moment in time and not to fix it for all time*. Its object was not to change the Arbitral Award of the King of Spain that clearly fixed the thalweg as the starting-point and not any specific geographical co-ordinates. These co-ordinates were indicated by the Commission in order to identify the location of the thalweg at that point in time.

102. The bizarre position of Honduras on the question of the endpoint of the land boundary and starting-point of the maritime delimitation was not known by Nicaragua before Honduras filed its Counter-Memorial. Since the Honduran reply does not alter this position, Nicaragua has come to the conclusion that, if the determination of the first segment of delimitation from the endpoint of the land boundary to the 3-mile suggested starting-point out at sea is left to negotiations between the Parties, these negotiations may become a point of friction and irresoluble conflicts. Therefore, as from this point Nicaragua wishes to anticipate that in its final submissions it will add a request that the Court confirm and declare that the starting-point of any delimitation as determined by the Award of the King of Spain is the thalweg of the main mouth of the river Coco such as it may be at any given moment. This is what the Arbitral Award decided in 1906 and it has come as a surprise to Nicaragua that this Award, accepted by both Parties and so particularly cherished by Honduras, is now being attempted to be set aside.

Islets, cays and rocks

103. In view of the allegations made by Honduras on the question of sovereignty over these features, Nicaragua considers that it should emphasize that its request for a line of delimitation based on the bisector also entails a decision on the question of sovereignty over these features in the area in dispute. Therefore, so that there is no possible misunderstanding on this point — that is, whether the issue of sovereignty over these features is in question — then as of this moment Nicaragua wishes to anticipate that in its final submissions at the end of these oral pleadings it will specifically request a decision on the question of sovereignty over these features. This more explicit request that will be made in the final submissions will not change the main position of

Nicaragua that the location of the islands and cays north or south of the line of delimitation decided by the Court should also decide the question of sovereignty.

104. Madam President, Members of the Court, the subsequent presentation of the Nicaraguan oral pleadings will be as follows:

105. Dr. Alex Oude Elferink will provide the geographical framework of the dispute.

106. Mr. Ian Brownlie will address the question of the appropriate method for effecting an equitable delimitation of the areas in dispute and, in doing so, will explain why the bisector line requested by Nicaragua achieves an equitable result.

107. Professor Antonio Remiro Brotons will next rebut the Honduran argument based on the *uti possedetis juris*.

108. Dr. Alex Oude Elferink will again then address the issue of the cays in the area of overlapping claims.

109. Dr. Antonio Remiro Brotons will rebut the Honduran argument based on the alleged tacit agreement or the acquiescence by Nicaragua to the so-called traditional line of delimitation.

110. Professor Alain Pellet will address the point of departure and terminus of the maritime boundary — the territorial sea.

111. And finally, Mr. Ian Brownlie will end the Nicaraguan first round of pleadings by explaining the equitable character of the Nicaraguan claim compared with the inequitable character of the Honduran claim.

112. Madam President, Members of the Court, with this I end my presentation and I would respectfully request, Madam President, if my colleague, Dr. Alex Oude Elferink, could be called to the podium. Thank you for your attention.

The PRESIDENT: Thank you, Your Excellency. I now call Dr. Oude Elferink to address the Court.

Mr. ELFERINK:

The geographical framework of the dispute

1. Thank you, Madam President. Madam President, Members of the Court, it is a great honour for me to appear before you on behalf of the Government of Nicaragua today.

Introduction

2. I will be addressing the geography relevant to the delimitation between Nicaragua and Honduras. Geography is no doubt the major factor in any maritime delimitation.

The PRESIDENT: Dr. Elferink, could you lift your microphones a little? That's splendid. That will help us. Thank you.

Mr. ELFERINK: Geography is no doubt the major factor in any maritime delimitation. In the present case, the Parties have thus far presented widely diverging views on the relevant geography and this matter deserves careful consideration. The first part of my presentation is concerned with the regional geographical setting of the dispute. Next, I will turn my attention to the mainland coasts of the Parties and the islands located in the area to be delimited. The geography of the mainland coasts and the islands in front of those coasts will be set out, which will be followed by a discussion of the significance the Parties have attached to that geography. The final part of my presentation concerns the argument of Honduras that the maritime delimitation practice of Honduras and third States is relevant for the delimitation of the maritime boundary between itself and Nicaragua. During my presentation I will show a number of figures on screen. These are also included in the judges' folders. The figures are all numbered AE1, followed by a unique number to which I will refer during my presentation.

The regional geography

3. Madam President, what does the relevant geography look like? As can be seen on figure 1, Nicaragua and Honduras are situated in the south-western part of the Caribbean Sea. Their mainland coasts face in sharply diverging directions. The mainland coast of Nicaragua runs approximately in a north/south direction. The mainland coast of Honduras runs approximately in

an east/west direction. To the south, the neighbouring States of Nicaragua are Costa Rica and Panama and to the east it faces the opposite mainland coast of Colombia. To the north-west of Honduras are Guatemala, Belize and Mexico and to the north Honduras faces Cuba and the Cayman Islands. Finally, Jamaica is situated to the north-east of Nicaragua and Honduras. The south-western tip of the island of Jamaica is about 340 nautical miles distant from the mouth of the Rio Coco where the land boundary between Nicaragua and Honduras terminates on the Caribbean coast.

4. The mainland coasts of Nicaragua and Honduras abut on the Nicaraguan Rise as is shown on figure 2. The Nicaraguan Rise is one of the submerged ridges and rises that divide the main basins of the Caribbean Sea. The Nicaraguan Rise is a wide triangular ridge that extends from the continental landmass of Nicaragua and Honduras, via the island of Jamaica, to the island of Hispaniola on which the Dominican Republic and Haiti lie. The Nicaraguan Rise separates the Cayman Basin from the Colombian Basin.

5. The Nicaraguan Rise is also easily recognized on figure 3, which indicates water depth contours. The water depth over a large part of the Nicaraguan Rise is 200 m or less. After the 200 m isobath water depth drops rapidly to 1,000 m and more. A number of banks can be distinguished on the Nicaraguan Rise. The most southern of these is Miskito Bank. To the north-east of the mainland coasts of Nicaragua and Honduras, at a distance of some 60 nautical miles from the terminus of their land boundary in the Rio Coco is Gorda Bank. At about three times that distance lies Rosalind Bank. Rosalind Bank is at a distance of about 170 nautical miles from the mouth of the Rio Coco and lies approximately midway between Jamaica and the coast of Nicaragua and Honduras.

6. Madam President, why specifically note that location of Rosalind Bank in relation to Nicaragua, Honduras and Jamaica? It is of course not Nicaragua's intention to invite the Court to pronounce itself in any way on the maritime delimitation of Jamaica. However, what is relevant for the present proceedings is that Nicaragua and Honduras both are neighbouring States of Jamaica that have an opposite coastal relationship with Jamaica as can be ascertained from figure 4. Their maritime zones meet and overlap with those of Jamaica in the area of Rosalind Bank. This geographical relationship of Nicaragua and Honduras to Jamaica provides a telling illustration of

the inequity of the parallel of 14° 59' 48" N proposed by Honduras as its maritime boundary with Nicaragua. That line would exclude a maritime boundary between Jamaica in the area of Rosalind Bank, or for that matter anywhere else. The maritime boundary between Nicaragua and Honduras proposed by Honduras is more than 100 nautical miles to the south-west of Rosalind Bank.

The cays in the area to be delimited

7. On the banks in front of the mainland coasts of Nicaragua and Honduras there is a considerable number of reef areas. On most of those reefs there are small islands. These are generally referred to as cays or, in Spanish, *cayos*. Cays consist mostly of sand or coral. They are formed when the action of waves and wind deposits sand and coral debris onto reef flats. Weather conditions affect the formation of cays. The direction of winds and tidal currents influences the amount of sand and coral that is deposited and where it will be deposited. Cays in general will only be a couple of feet above water. Hurricanes can easily disperse this material, which may lead to changes in the shape and size of cays or even their disappearance. The hurricane season in the south-western part of the Caribbean Sea lasts from June to November.

8. The most extensive group of cays off the mainland coast of Nicaragua extends northwards from Punta Gorda. This is indicated on figure 5. Punta Gorda is some 75 km south of the mouth of the Rio Coco. Due east of Punta Gorda are the Morrison Denis Cays and the Miskito Cays. The main cay of this latter group is also called Miskito. Miskito Cay is by far the largest island in the area. It measures approximately 21.6 km². Almost all other cays in the area measure much less than 1 km². North of Martinez Reef and the Edinburgh Channel is Edinburgh Reef on which Edinburgh Cay is located. To the north of Edinburgh Cay are Media Luna Reef, Savanna Reef and Alargardo Reef. There are a number of cays on these reefs, including Media Luna Cay, Bobel Cay, Savanna Cay, Port Royal Cay and Alargardo Cay — also referred to as South Cay. These cays are indicated in figure 6. According to Honduras, these cays to the north of Edinburgh Cay fall under the sovereignty of Honduras, because they are located to the north of the alleged traditional boundary of 14° 59' 48" N that is claimed by Honduras. Nicaragua rejects this claim because it already had a title to these cays long before Honduras started to claim them. That issue of title to the cays will be addressed later this week. As far as the geography is concerned, it can be noted

that these cays are closer to Edinburgh Cay of Nicaragua than any territory of Honduras to the west or north of them. This is explained by presence of the Main Cape Channel to the north-west of Media Luna Reef.

9. A description of the Main Cape Channel can be found in the *East Coast of Central America and Gulf of Mexico Pilot* published by the United Kingdom Hydrographer of the navy, which can be found at Annex 231 of the Counter-Memorial. The *Pilot* observes that the Main Cape Channel is one of the main channels crossing the Miskito Bank. The Main Cape Channel leads from the vicinity of Cape Gracias a Dios — and the Rio Coco — to deep water north-north-east. The fairway in the channel is at least 5 miles wide. The boundary along the parallel proposed by Honduras would place the Main Cape Channel wholly in the territorial sea of Honduras. The bisector proposed by Nicaragua gives the Parties joint control over this access to the Rio Coco.

10. To the north of the Main Cape Channel there are further reef areas and cays as is shown on figure 7. Those reefs and cays are a larger distance from the mainland coast and further apart. They include the False Cape Banks, Cinco Palos Cays, the Cayos Cajones or Hobbies, Cayo Caratasca and Gorda Cay, which is located on the northern extremity of Gorda Bank.

11. In the Reply, Nicaragua argued that the contiguity of all of the islands to the south of the Main Cape Channel was a relevant consideration to determine the title to the cays that are in dispute. As will be set out by Professor Remiro Brotóns this Wednesday, it is impossible to establish the situation of the *uti possidetis juris* of 1821 in respect of the cays in dispute. As a consequence, contiguity is a relevant consideration to establish the title to the cays at that date. Figure 8 on the screen, which is based on figure VIII annexed to the Reply shows the territorial sea of Nicaragua and Honduras in 1821, the date of relevance for the *uti possidetis juris*, as is discussed in the Reply (RN, pp. 127-128, paras. 6.90-6.92). A 6-nautical-mile territorial sea from the Nicaraguan mainland coast and Miskito Cay forms an almost uninterrupted chain up to the Main Cape Channel. That chain includes the cays that are now in dispute between the Parties. It should moreover not be excluded that there may have been times during which all cays south of the Main Cape Channel lay in one belt of territorial sea. As I will set out later in my presentation, the surveys on which the charts of this area are based stem mostly from the period 1830-1843 and are

incomplete. In the area south to the Main Cape Channel there are reef areas on which more cays or low-tide elevations may have been present. This especially concerns the reef area on which Cock Rocks are located. As a matter of fact, the publication *Índice Geográfico de Nicaragua* from 1971, published by the Nicaraguan Ministry of Public Works, observes that there is a cay called Cock Rock (reproduced in RN, Ann. 31). A territorial sea around that cay results in a belt of territorial sea of 6 nautical miles from the Nicaraguan mainland coast and Miskito Cay all the way north to the southern edge of the Main Cape Channel. On the other hand, the cays to the north of the Main Cape Channel have always been separated from the cays to the south by the deeper waters of the Channel.

12. This contiguity of the cays to the south of the Main Cape Channel is not some recent invention. It was also observed by Commander Kennedy of the United Kingdom Hydrographic Office in the 1950s. Commander Kennedy, on more than one occasion, commented on the geography relevant to the present proceedings. As was observed in the Memorial a description of the Rio Coco was included in a document prepared by Commander Kennedy at the request of the Secretariat of the United Nations in connection with the 1958 Geneva Conference on the Law of the Sea (MN, pp. 10-11, para. 18).

13. In 1958 Commander Kennedy reviewed the potential straight baselines along Nicaragua's Caribbean coast. That review concerned all of the cays to the south of the Main Cape Channel. In a letter to Mr. E. C. Burr of the Colonial Office of 27 November 1958, Commander Kennedy indicated that it should be noted that an increase in breadth of the territorial sea to 6 miles — the United Kingdom at that time rejected any claim to a territorial sea beyond 3 nautical miles — would turn nearly the whole area of the waters between the cays and reefs to the south of the Main Cape Channel into territorial sea. Annex 39 to the Reply also contains a figure — figure 9 of the judges' folder — the Commander Kennedy prepared in connection with assessing the potential straight baselines of Nicaragua. That figure indicates that Commander Kennedy in that assessment took into account all of the cays to the south of the Main Cape Channel.

14. In the Rejoinder, Honduras responded — albeit indirectly — to the argument that the contiguity of the disputed cays and undisputed Nicaraguan territory is relevant to establishing title

to them at the time Nicaragua and Honduras attained their independence from Spain in 1821. In the Rejoinder Honduras has included a number of plates indicating a 12-nautical-mile territorial sea (RH, Vol. I, plates 44, 47 and 48). Under the current law of the sea, the 12-nautical-mile territorial sea of the cays in dispute overlaps with the 12-nautical-mile territorial sea of the undisputed territory of both States. However, the current 12-nautical-mile limit is not relevant to establish the situation in 1821 and does not negate the fact that the cays in dispute are closer to undisputed Nicaraguan territory than any territory of Honduras.

15. Honduras also has made an explicit argument concerning the contiguity of the cays south of the Main Cape Channel to other territory. The Rejoinder argues that the islands and rocks that lie north of the parallel of 14° 59' 48" N are more proximate to the mainland coast of Honduras than to the coast of Nicaragua (RH, p. 114, para. 6.26). Honduras submits that “it remains for Nicaragua to prove its sovereignty over the islands and rocks that are more proximate to Honduras” (RH, p. 114, para. 6.26). It is true that the cays to the *north* of the Main Cape Channel are closer to Honduras than to Nicaragua. But *those* cays are not in dispute between the Parties. The cays to the south of the Main Cape Channel which are in dispute between the Parties are closer to the Nicaraguan mainland coast. The southern, Nicaraguan, bank of the Rio Coco extends further seaward than the northern, Honduran bank of that river.

16. In any case, the relation between the mainland coasts and the cays in dispute that Honduras seeks to establish without success is not decisive for the contiguity argument. The cays are closer to the undisputed insular territory of Nicaragua to the south of the parallel of 14° 59' 48" N than either mainland coast by a fairly big margin.

17. As I mentioned before when I discussed the nature of cays, new cays may build up on reefs and existing cays may also disappear. That is also the case for the area to the east and north of the Rio Coco. This uncertainty about the geography of the area is compounded by the inadequacy of the hydrographic surveys of the area.

18. The first hydrographic surveys along the Atlantic coast of Nicaragua and Honduras were carried out by the United Kingdom in the first half of the nineteenth century. Those surveys still provide the basis of two charts of the United Kingdom Hydrographic Office covering the area. Those charts have been used by the Parties to these proceedings. That concerns chart 1218 “Cuba

to Miskito Bank” and the larger scale chart 2425 “River Hueson to False Cape”. Chart 1218 was for instance used to compile figure A to the Memorial and a section of chart 2425 was reproduced as plate 3 in the Counter-Memorial.

19. Chart 2425 indicates that surveys for it were carried out between 1830 and 1843 and that uncharted shoals may exist within the area covered by the chart. Chart 1218 registers the uncertainty concerning the information contained in it in the following terms in a note on Incomplete Surveys:

“Depths over Miskito Bank and adjoining reefs south of 17° N are derived from various nineteenth century Admiralty surveys, supplemented by some recent open surveys. Uncharted shoals may exist in these areas.”

That area south of 17°N mentioned in the note covers all of the banks that were described before. A survey that would allow establishing the presence and location of all cays and low-tide elevations on those banks would be very expensive. It would cost some €5 million. Such a survey would moreover only provide information of a transient situation due to the instability of offshore features, making it of limited use.

20. The latest edition of chart 1218 indicates some of the uncertainties and changes that have taken place in the offshore geography. In respect of Alargardo Reef, which lies almost due east of the mouth the Rio Coco, the chart observes that it is reported to be 2 nautical miles east. The Pichones Cays, located to the north of the Main Cape Channel, according to the chart are awash. That means that they are also under water at low-water.

21. There are other sources of information that confirm that the cays in the area to be delimited are not stable. As Honduras has indicated in its Counter-Memorial — footnote 2 of Chapter 2 — the cays that were originally referred to as Logwood Cay and Media Luna Cay are now both submerged. A further case in point is the Constitution of Honduras. The Constitutions of Honduras of 1957, 1965 and 1982 all make reference to Cayos Gracias a Dios. The location of these cays is indicated on plates 37 A to C of the Rejoinder. At that same location on charts 1218 and 2425 of the United Kingdom Hydrographic Office no cays are present. The same is the case for an official map of Honduras that was published in 1954 just three years before the adoption of the 1957 Constitution. That official map of Honduras can be found at plate 25 of the Counter-Memorial.

22. It is beyond doubt that there is a large deal of uncertainty in respect of the geography of the cays in the area to be delimited. Cays that are mentioned in three successive Constitutions of Honduras are inexistent. Cays that did exist have become submerged and there is uncertainty about the location of reef areas and the depth of the water overlaying them.

23. Madam President, in the face of the uncertainties related to the cays, the relevance of the mainland coasts of Nicaragua and Honduras for the maritime delimitation is all the more obvious. The general direction of those coasts can be ascertained without difficulty. Those general directions are not subject to significant changes as they do not vary as a result of minor shifts of individual points along the coast. At this point however, it is worthwhile to stress that the uncertainty concerning the location or existence of cays is not the main reason to accord them no weight in the maritime delimitation. Even if no such uncertainty existed, a treatment of the cays on their merits should not accord them any weight in the maritime delimitation between Nicaragua and Honduras. I will return to that question later.

The views of the Parties on the geography — the relevant coasts

24. Madam President, I will now turn to the views of the Parties on the geography. First of all, allow me to say something more about the mainland coasts of Nicaragua and Honduras and their relevance for the maritime delimitation. These coasts meet at the mouth of the Rio Coco. The land boundary between the Parties through much of the central and eastern land territory follows the thalweg of the Rio Coco. The endpoint of the thalweg at the mouth of the river forms the starting-point of the maritime boundary between Nicaragua and Honduras (MN, p. 24, para. 9; RN, p. 29, para. 3.10 and pp. 197-203, paras. 10.7-10.22). This Friday, Professor Pellet will have to say more about the starting-point of the maritime delimitation.

25. The most significant feature of the mainland coasts is the radical change in direction at the land boundary terminus. In the Memorial (MN, p. 14, paras. 32-33), Nicaragua described the coastal relationship between Nicaragua and Honduras as an elbow formation. As figure 10 shows, the mainland coast of Nicaragua from the terminus of the land boundary with Honduras generally runs south. The mainland coast of Honduras starting from that same point generally runs west. At

the terminus of their common land boundary these coasts form an acute angle, or if you like, a bent elbow.

26. What did Honduras have to say about this marked coastal geography thus far? In its Counter-Memorial very little; just one paragraph. At the very end of the last chapter before the submissions, Honduras argues that, based upon a bisector of the two coastal fronts, Nicaragua invokes in respect of Honduras a coastline which bears no relation to the actual configuration of the coastline (CMH, p. 149, para. 8.11). No explanation for this statement was offered. It also remained unclear how Honduras viewed its relevant coastline. As I will explain subsequently, Honduras in the Rejoinder has presented a view of its coast that is very similar to the configuration of that coast identified by Nicaragua. The Counter-Memorial did not offer any criticism of the relevant coast of Nicaragua as defined in the Memorial.

27. In the Rejoinder, Honduras does present its views on the configuration of the relevant coasts. The Rejoinder reveals that Nicaragua and Honduras differ on three points of fundamental importance: the definition of the relevant coasts in their relation to the area to be delimited; the point at which the direction of the coasts of Nicaragua and Honduras changes; and the length of the relevant coasts.

28. Honduras submits that the relevant coast will not extend beyond where it ceases to face the maritime area to be delimited (RH, p. 111, para. 6.16). According to Honduras, since the land boundary between Nicaragua and Honduras meets the sea along a portion of the coast of Central America that faces east, only such eastward-facing coasts are relevant (RH, p. 112, para. 6.19). Honduras for its own coast distinguishes two sectors. Honduras holds that a first sector between the land boundary terminus and False Cape faces eastwards (RH, p. 112, para. 6.19). That sector is indicated now on figure 11. Actually, that part of the coast of Honduras does not face east. I will return to that point in just a minute. Let me first finish with Honduras's view on the relevant coasts. The Rejoinder submits that the second sector of Honduras's coast faces north. According to the Rejoinder "the northward facing coast of Honduras west of Cape Falso has no relevance in the maritime boundary analysis between Honduras and Nicaragua" (RH, p. 112, para. 6.18). Honduras submits that the entire Atlantic coast of Nicaragua faces east, but that only a very small sector of that coast is Nicaragua's relevant coast (RH, p. 112, paras. 6.19-6.20).

29. Figure 12 on the screen illustrates the projections of the coasts as defined by Honduras. What is immediately apparent is that a large part of the maritime area on which the coasts of Nicaragua and Honduras abut is not included in the projections of the coasts of the Parties. This concerns an area that is, however, part of the overlapping entitlements of the Parties. All of this area is within 200 nautical miles of the coasts of the Parties and is directly in front of their coasts. The fact that the approach to the maritime delimitation proposed by Honduras completely disregards a large part of the area to be delimited proves that it is an artificial construction to boost Honduras's claim line allegedly based on the conduct of the Parties.

30. If the area of overlapping entitlements of the Parties is taken into consideration it becomes obvious that the bisector proposed by Nicaragua *is* based on the coastal geography and its relation to the maritime area on which it abuts. As figure 13 shows, Nicaragua's approach takes into account the overlapping entitlements of the Parties and proposes to divide them equally between the Parties.

31. The second point in respect of the relevant coasts on which the Parties differ is the point at which the direction of the coasts of Nicaragua and Honduras changes direction. That disagreement should, however, not hide from view that there also is a large measure of agreement between the Parties on the general direction of the coasts. Nicaragua considers that the general direction of the coast of Honduras is almost due east-west and faces almost due north. Honduras agrees that its coast west of False Cape faces northward (RH, p. 112, para. 6.18). The Parties also agree that all of the Atlantic mainland coast of Nicaragua faces east. The admission of Honduras that the mainland coasts change direction near the land boundary is of great significance. It implies that the method of delimitation that will be adopted by the Court should reflect that change in direction. That method should result in a delimitation line that has an equal relationship to these two general directions.

32. Where the Parties differ in respect of the general direction of the mainland coasts of Nicaragua and Honduras is whether that change takes place at False Cape, as Honduras maintains, or at Cape Gracias a Dios, which is the position of Nicaragua.

33. Honduras's choice for False Cape as the point at which the mainland coasts change direction is explained as follows in the Rejoinder. First, Honduras submits that since the land

boundary between Nicaragua and Honduras meets the sea along a portion of the Central American coast that faces east, only such eastward-facing coasts are relevant (RH, p. 112, para. 6.19). Next, Honduras argues that although the local Honduran coast between Cape Gracias a Dios and False Cape runs north-west, that does not deny the fact that the Central American coast of False Cape to Nicaragua's border with Costa Rica runs south (RH, p. 112, para. 6.20). In other words, Honduras, although it has to recognize that no part of its coast faces east, is using the general direction of the coast of Nicaragua to accord itself a coast that fits its purposes of creating the impression that only east-facing coasts are relevant and only areas to the east of those east-facing coasts need to be delimited. As I observed before and as was indicated on the figure showing the Honduran view on coastal projections, Honduras ignores that the area to be delimited does not only lie due east of Cape Gracias a Dios, but also encompasses the much larger area to the north of it.

34. A closer look at the geography shows that the point at which the northward-facing coast changes in an eastward-facing coast is not at False Cape. On the screen we now have figure 14 showing the general direction of the coast between Punta Patuca and False Cape and the general direction of the coast between False Cape and Cape Gracias a Dios. The change of direction at False Cape is hardly discernable. It would seem that it is not without reason that False Cape got its name.

35. To the contrary, a marked change in the direction of the mainland coast takes place at Cape Gracias a Dios. This is apparent if the general direction of the coast between Cape Gracias a Dios and Punta Gorda is added to the figure on the screen.

36. Apart from the physical geography, there is the political geography. The land boundary between Nicaragua and Honduras terminates in the thalweg of the Rio Coco at Cape Gracias a Dios. In the present case, the political and the physical geography both point towards Cape Gracias a Dios as the hinge upon which the maritime delimitation turns. This coincidence facilitates the task of the Court. The relationship of the mainland coasts to the north and the south of the land boundary terminus indicates the direction of the maritime boundary. The land boundary terminus at the same time provides the point of departure for the maritime delimitation.

37. A third point in respect of the relevant coasts on which the Parties differ is their length. As Nicaragua set out in the Memorial and the Reply (MN, pp. 95-114, paras. 20-61; RN, pp. 27-28, paras. 3.3-3.5 and pp. 180-182, paras. 9.6-9.15) the relevant coasts of Nicaragua and Honduras are formed by their mainland coasts abutting on the maritime area to be delimited. The Nicaraguan coast has, measured along a straight line as indicated in figure 15, a length of approximately 453 km. The mainland coast of Honduras has, measured in the same way, a total length of approximately 559 km. The mainland coasts stand in a ratio of 1 to 1.2. Those coastal lengths are such that the bisector method proposed by Nicaragua satisfies the criterion of proportionality (RN, p. 193, para. 9.53).

38. In the Rejoinder, Honduras takes a radically different view. Honduras submits that its relevant coast is the coast from False Cape in Honduras to the land boundary with Nicaragua. Honduras holds that for Nicaragua the coast from Laguna Wano to the land boundary is the relevant coast (RH, p. 112, para. 6.19). Honduras included these relevant coasts in a large-scale figure in the Rejoinder at plate 42, on the screen as figure 16. To give a better impression of the location of these relevant coasts as proposed by Honduras, they have been included on a map of the coasts of Nicaragua and Honduras. As can be seen, the relevant coast proposed by Honduras is an insignificant part of the coasts of Honduras and Nicaragua.

39. How does Honduras reach the conclusion that the relevant coasts are only such a minute part of the coasts of Nicaragua and Honduras that face the delimitation area? As was mentioned before according to Honduras, since the land boundary between Nicaragua and Honduras meets the sea along a portion of the Central American coast that faces east, only such eastward facing coasts are relevant (RH, p. 112, para. 6.19). As I just set out, Honduras is mistaken in its belief that there is a part of its coast that faces east. The general direction of the coasts changes at the land boundary terminus at Cape Gracias a Dios. The only part of the Central American coast that faces east is the mainland coast of Nicaragua from its land boundary with Honduras up to its land boundary with Costa Rica. The coast of Honduras generally faces in a northern direction and that north-facing coast is the relevant coast for the maritime delimitation with Nicaragua.

40. Now what about the Nicaraguan relevant coast? As was just mentioned, according to Honduras only east-facing coasts are relevant for the delimitation between Nicaragua and

Honduras. However, as can be seen on the map of the region included in figure 17, all of the coast of Nicaragua is east facing. Still, Honduras maintains that only the coast of Nicaragua between the Rio Coco and the Laguna Wano is the relevant coast of Nicaragua. How does Honduras succeed in cutting off almost all of the eastward-facing coast of Nicaragua? Honduras offers two reasons. First, according to Honduras where the shared coast of the Parties is nearly linear “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.” (RH, p. 111, para. 6.17.)

41. What Honduras is saying is that Nicaragua should not have the advantage of a much longer east-facing coast because Honduras does not have such an east-facing coast. As a matter of fact Honduras has *no* east-facing coast and there is no linear relationship between the coast of Nicaragua and Honduras. That is not a justification for disregarding most of Nicaragua’s east-facing coast. Honduras does not mention any authority to support its position.

42. The second justification Honduras gives for attributing Nicaragua an insignificant part of its east-facing coast as its relevant coast can be found at paragraphs 6.20 and 6.21 of the Rejoinder. Honduras submits that the maritime boundary “must respect the islands of one Party or the other Party as the boundary makes its way between them and extends further to the east”. That is an absolutely novel view on the role of islands in maritime delimitation. Honduras’s thesis implies that in any case involving islands in front of a mainland coast, that mainland coast would not qualify as a part of the relevant coast of the State concerned. Let me illustrate this with two examples. In the *Gulf of Maine* case, a Chamber of this Court had been requested to delimit a maritime boundary off the mainland coasts of Canada and the United States. The area concerned is strewn with small islands and rocks. These have been indicated in green on figure 18. If the view of Honduras were to be accepted only those islands and rocks would qualify as the relevant coasts of Canada and the United States. That is not the methodology the Chamber adopted. The Chamber took into account the mainland coasts of Canada and the United States behind these minor features to establish the relevant coasts for the delimitation (*I.C.J. Reports 1984*, pp. 332-333, paras. 210-213).

43. In the *Libya/Malta* case the Court considered the delimitation of the continental shelf between Libya and Malta. The Court gave a decision that was limited to the area lying between the meridians of 13° 50' E and 15° 10' E (*I.C.J. Reports 1985*, pp. 26-28, para. 22). A hypothetical equidistance line between Libya and Malta — shown on figure 19 — is controlled by basepoints on the Libyan mainland coast and the Maltese islet of Filfla. Figure 20 shows a large-scale map of Malta identifying the location of Filfla. If one were to accept the Honduran thesis concerning the definition of the relevant coasts set out in the Rejoinder, the Court should not have looked at any other coast of Malta, apart from Filfla. That is not what happened. The Court found it equitable not to take into account Filfla in the calculation of the provisional equidistance line between Malta and Libya (*ibid.*, p. 48, para. 64). That line was calculated from the coast of the island of Malta, lying to the north of Filfla. To establish the relevant coast of Malta the Court not only looked at the island of Malta, but also took into account the island of Gozo (*ibid.*, p. 20, paras. 15-16 and p. 50, para. 68). That definition of the relevant coast of Malta by the Court, just as the Court's treatment of Filfla, contradicts the thesis of Honduras concerning the definition of the relevant coast of Nicaragua in the present case. The Court's approach confirms Nicaragua's position that very small islands should not be given any weight even at the initial stage of a maritime delimitation that consists of the drawing of a provisional line.

44. Honduras's definition of the mainland coasts is clearly an *ex post facto* attempt to provide a geographical justification for a maritime boundary along the parallel of 14° 59' 48" N. That parallel runs due east. Honduras has conjured up an east-facing coast for itself to support the parallel. The parallel results in an unequal division of the area to be delimited, leaving all of the maritime area to the north of it to Honduras. Honduras invites the Court to look due east standing at Cape Gracias a Dios and ignore the maritime areas to the north-east of Cape Gracias a Dios. In Honduras's views those maritime areas are a no-man's-land that is beyond Honduras's north-facing coast and Nicaragua's east-facing coast. This maritime area is not a no-man's-land. It is an area of overlapping entitlements of the Parties. Nonetheless, Honduras does not have any problem with attributing all of that area to itself. In that process Honduras completely ignores the presence of Nicaragua. Honduras's arguments concerning the mainland coasts of the Parties only confirm

Nicaragua's view that Honduras's preferred method of delimitation has no relation to the geography of those mainland coasts.

45. Madam President, let me now return to the cays in the area between the maritime boundary claims of the Parties. Much of the argument of Honduras in this case is devoted to those cays. In what seems to be an attempt to confuse matters, Honduras has repeatedly argued that Nicaragua, by using the terms "islets" and "rocks" to refer to certain islands in the area to be delimited, attempts to diminish their legal significance (e.g., CMH, p. 16, para. 2.6; RH, pp. 114-115, para. 6.28). Honduras has explained that it understands that the reference to islets and rocks is intended to denude the features concerned of the legal status accorded to islands under Article 121 of the Law of the Sea Convention (CMH, p. 16, para. 2.6). Nicaragua has never made such a suggestion concerning Article 121. What is at issue is the weight to be attributed to islands in the maritime delimitation before the Court. In that respect, three issues are particularly relevant: title to islands, their size and their location. The issue of sovereignty will be addressed later this week. As was said earlier, Nicaragua holds that it has title to all of the cays to the south of the Main Cape Channel.

46. Honduras considers that the cays located between the maritime boundary claims of the Parties are important islands. The implication apparently is that the cays, because of their importance, should receive full weight in the maritime delimitation between Nicaragua and Honduras. Madam President, are those cays really important islands? In the Counter-Memorial, at paragraph 2.3, Honduras identified four important islands, Savanna Cay, South Cay, Bobel Cay and Port Royal Cay. These cays are identified in figure 21. The largest of those cays is Bobel Cay. Bobel Cay measures 0.029 km². That surface area represents a square of about 170 m. The smallest of the cays, Port Royal Cay, is just 0.0028 km², the same surface area as a square of just over 50 by 50 m.

47. To give a better impression of the size of the cays allow me to compare them to two other features of some notoriety. The first is Rockall. This rock, which is part of the United Kingdom, is located some 380 km west of Scotland. Rockall may be considered a typical example of an island that falls under Article 121 (3) of the United Nations Convention on the Law of the Sea, which provides that rocks which cannot sustain human habitation or economic life of their

own shall have no exclusive economic zone or continental shelf. Rockall is about 30 by 25 m, not that much smaller than Port Royal Cay. As I just mentioned, that cay has the same size as an area with sides of 50 m. I already referred to the role of Filfla in the *Libya/Malta* case. The Court disregarded Filfla in the delimitation it effected between Libya and Malta. Filfla is approximately 500 m by 250 m. Savanna Cay, South Cay, Bobel Cay and Port Royal Cay would easily fit within the area occupied by Filfla.

48. Another consideration to establish the weight of islands is their location in relation to their relevant mainland coasts. The location of the cays off the mainland coasts of Nicaragua and Honduras implies that they have a disproportionate effect on the course of an equidistance line. An equidistance line starting from the mouth of the Rio Coco extends in a north-easterly direction for about 8 nautical miles without being affected by the presence of the cays located in the delimitation area. After that distance the equidistance line is completely controlled by basepoints on the cays. That line completely disregards the mainland coasts of the Parties.

49. In the Reply, Nicaragua submitted that the Parties agreed that the islets in the area have no effect on the delimitation (RN, p. 10, para. 1.19). In this connection, the Reply referred to paragraph 7.28 of the Counter-Memorial. That paragraph concludes that Honduras does not use these islands — that is, the disputed cays — as basepoints, and claims neither shelf nor economic zone for the islands as such. Honduras's claim, the Counter-Memorial observes, is based on its mainland and the long history of an established and accepted boundary. In the Rejoinder, Honduras on more than one occasion takes issue with Nicaragua's reference to paragraph 7.28 of the Counter-Memorial (RH, pp. 5-6, paras. 1.13-1.14; p. 16, para. 2.15; p. 26, para. 2.44). However, the Rejoinder does not explain why Nicaragua is wrong in considering that the cays should get no weight in the delimitation to be effected by the Court. All Honduras does is to refer to the alleged acceptance of the parallel of 14° 59' 48" N as a maritime boundary (RH, p. 16, para. 2.15). At the end of paragraph 2.15 of the Rejoinder Honduras suggests that it has argued that the cays are significant in establishing a maritime boundary that is not along its parallel. However, in that context Honduras only refers to the fact that the cays demonstrate the *practicality* of a boundary along the parallel of 14° 59' 48" N. The alleged practicality of that line does not mean that it treats the cays on their merits or that it provides an equitable solution.

50. To conclude on the geography of the cays. Whether the cays in the area to be delimited are indicated by the term “island”, “islet”, “rock” or yet another term is not an issue. What is important — and that has been stressed by Nicaragua throughout its pleading — is that they be treated on their merits (MN, pp. 138-144, paras. 31-43; RN, pp. 30-34, paras. 3.12-3.21 and pp. 181-182, paras. 9.12-9.15). The bisector method proposed by Nicaragua achieves such a result (MN, p. 144, paras. 42-43; RN pp. 181-182, paras. 9.12-9.15). That method ensures that due weight is accorded to the mainland coasts of the Parties and that no disproportionate weight is accorded to the cays to the north and the south of the bisector.

51. Honduras’s 15° N line does not achieve an equitable result. The 15° N line bears no relation to the mainland coasts of the Parties and places the Nicaraguan cays to the south of the Main Cape Channel on the wrong side of the maritime boundary. Honduras has presented a provisional equidistance line to justify its parallel. That line was depicted on plate 48 of the Reply now reproduced on figure 22. That provisional equidistance line — based on the assumption that the disputed cays are part of the territory of Honduras — leads to an even larger cut-off of the maritime zones of Nicaragua than the parallel. To argue, as Honduras does (RH, pp. 130-131, paras. 8.16-8.20), that this provisional equidistance line shows that its parallel is equitable is not credible. Two inequitable lines do not make an equitable boundary.

Madam President, I still have some 15 minutes more. Would you like me to finish or would you like me to pause now?

The PRESIDENT: We would like you to finish. Please do proceed.

Mr. ELFERINK: Thank you.

The geography at the mouth of the Rio Coco

52. The maritime boundary between Nicaragua and Honduras has to start from the terminus of the land boundary between both States in the Rio Coco. The Parties agree that the land boundary is the thalweg of the Rio Coco. They disagree about the implications of the continuous accretion at the mouth of the river for the maritime delimitation. That matter will be addressed on

Friday by my colleague Professor Alain Pellet. I would like to point out some aspects of the changing geography at the mouth of the river.

53. In 1962 a Mixed Nicaraguan-Honduran Boundary Commission established the endpoint of the thalweg as it existed at that time. Figure 23 contains a recent image of the mouth of the Coco River that shows the extent of the seaward shift of the endpoint of the thalweg since 1962. This is a SPOT image that was submitted to the Court last month. This is the most recent image that was available. It is from November 2006. The red dot in the river shows the endpoint of the thalweg in 1962. In November 2006 the endpoint of the thalweg had moved more than 2 km to the north and the east. Honduras apparently has difficulties in dealing with this geographical reality. As Nicaragua explained in the Reply, the maritime boundary proposed by Honduras in the Counter-Memorial cut across Nicaraguan territory. In the Rejoinder, Honduras recognized that effect of its proposed maritime boundary and now requests the Court to establish the maritime boundary from a point seaward of the mouth of the Rio Coco (RH, pp. 125-127, paras. 8.02-8.06; and submission 2).

54. Honduras in the Rejoinder still has not come to grips with the geography at the mouth of the Rio Coco. That is apparent from the provisional equidistance line it presents in the Rejoinder. Honduras observes in respect of that line: “[d]ue 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’s Bobel Cay and Nicaragua’s Edinburgh Cay” (RH, p. 130, para. 8.17).

55. Part of that segment of Honduras’s provisional equidistance line in the Rio Coco has been included in the satellite image of the mouth of the River from November 2006. This equidistance line, if one may call it that, starts landward of the terminus of the land boundary and cuts across the land territory of Nicaragua. There is no justification for such an approach.

The general direction of the land boundary

56. The Parties continue to disagree about the general direction of their mutual land boundary. Nicaragua considers that the general direction of the land boundary in the Rio Coco is approximately north-east. That general direction is indicated on figure II of the Reply and on

figure 24 on the screen. That general direction is about the same as the general direction of the Main Cape Channel that gives access to the river from the sea.

57. In the Rejoinder, Honduras maintains that the Rio Coco runs east as it nears the coast (RH, p. 108, para. 6.05). Again, this is an instance in which Honduras focuses on micro-geography to argue its case. As was set out earlier, this is also the case for Honduras's view on the relevant coasts — Honduras focuses on a short stretch of the mainland coasts in the vicinity of the land boundary terminus — and the weight it attributes to the cays in the area to be delimited. As far as the general direction of the Rio Coco is concerned, Honduras looks at a small section of the river as it nears the coast to determine its general direction. This micro-geographical approach is then used to justify a maritime boundary that extends seawards for a distance that is much longer than the small section of the river Honduras uses to determine the general direction of the land boundary. The section of the land boundary Nicaragua takes into account to establish its general direction is comparable in length to the maritime boundary between Nicaragua and Honduras.

The Nicaraguan Rise

58. Yet another point on which the Parties now differ is the significance of the Nicaraguan Rise. The geography of the Nicaraguan Rise was set out in detail in the Memorial (MN, p. 18, paras. 42-45). The Nicaraguan Rise is the natural prolongation of the land territory of Nicaragua and Honduras. Nicaragua has argued that the Nicaraguan Rise is a relevant circumstance for the delimitation between the Parties (MN, pp. 131-133, paras. 14-21; RN, pp. 183-184, paras. 9.20-9.25). On the screen we have again the figure that shows the contours of the Nicaraguan Rise as represented by water depth lines — now numbered 25. The Nicaraguan Rise runs in a north-easterly direction. That north-eastward trend of the Nicaraguan Rise is aligned with the bisector Nicaragua considers to be an equitable boundary.

59. Honduras does not agree with Nicaragua's views concerning the Nicaraguan Rise. Honduras's legal argument to reject the Nicaraguan Rise as a relevant circumstance for the maritime delimitation will be addressed tomorrow by my distinguished colleague, Mr. Ian Brownlie. As far as the geography of the Nicaraguan Rise is concerned, the only criticism of Honduras is that the Nicaraguan Rise is of dubious geomorphologic authenticity, with a

nomenclature which is largely new (CMH, p. 24, para. 2.22; RH, p. 117, para. 6.33). Apart from that uncorroborated statement, Honduras does not offer any argument refuting Nicaragua's detailed argument concerning the geography of the Nicaraguan Rise set out in the Memorial.

60. Before these proceedings, Honduras had no difficulty in recognizing the existence of the Nicaraguan Rise and the fact that it was relevant for the maritime delimitation between Nicaragua and Honduras. In a diplomatic Note from the Minister for Foreign Affairs of Honduras to the Minister for Foreign Affairs of Nicaragua of 11 July 1995 (CMH, Vol. II, Ann. 54) a number of paragraphs address the Nicaraguan Rise. Far from refuting its authenticity, the Note asserts the relevance of the Rise in no unclear terms (CMH, Vol. II, Ann. 54, at p. 140). The diplomatic Note only reveals a difference of opinion with Nicaragua as far as the attachment of the Rise to the mainland coasts of the Parties is concerned, but no difference about its existence or relevance to maritime delimitation. Among others, the Honduran Note refers to an "unquestionable geomorphic reality". The Note also observes that the continental territory of Honduras dominates the Nicaraguan Rise to the east and the north of the parallel that Honduras claims as a maritime boundary. As the figure depicting the Nicaraguan Rise shows, that assertion, is not borne out by geography. The Nicaraguan Rise has an equal relationship to both mainland coasts. That equal relationship is not reflected in the 15° N line of Honduras, which attributes most of the Nicaraguan Rise to Honduras.

The delimitation practice of Honduras and third States

61. The final topic I will address today is the reliance of Honduras on bilateral delimitation treaties. I will not address the issue of the interests of third parties that might be affected by the delimitation line the Court has been requested to establish. As will be argued later in this first round of pleadings of Nicaragua by my distinguished colleague Professor Alain Pellet, the delimitation line that Nicaragua proposes does not affect the rights of third States.

62. In the Counter-Memorial, Honduras relied on the delimitation practice in the Western Caribbean to bolster its 15° N line (CMH, pp. 20-23, paras. 2.13-2.20). In the Reply, Nicaragua made a detailed analysis of the Honduran argument (RN, pp. 34-48, paras. 3.22-3.54). It was concluded that none of the treaties invoked by Honduras supports the thesis that Nicaragua has

accepted the parallel of 14° 59' 48" N as a maritime boundary with Honduras (RN, pp. 34-40, paras. 3.22-3.37). Bilateral delimitation treaties also do not provide support for the Honduran thesis that the use of a parallel results in an equitable delimitation in the case of Nicaragua and Honduras (RN, pp. 40-44, paras. 3.38-3.44). The Reply also concluded that the analysis of regional practice showed that examples invoked by Honduras rather supported the method of delimitation proposed by Nicaragua (RN, p. 44, para. 3.44).

63. The Counter-Memorial also suggested that the approach of this Court and other tribunals in respect of bilateral treaties of third States implied that those treaties could have consequences for a State that is not a party to them (CMH, p. 23, para. 2.20). The Reply addressed this point (RN, pp. 45-48, paras. 3.45-3.54) and concluded that agreements involving third States or one of the parties in a litigation cannot lead to ignoring the geography of a case to the detriment of the other party to that litigation (RN, pp. 47-48, para. 3.54). As was also noted, the Court in the *North Sea Continental Shelf* cases took exactly the opposite approach than the one proposed by Honduras (RN, p. 46, paras. 3.48-3.49).

64. The Rejoinder does not revisit the Counter-Memorial's argument on the relevance of the delimitation agreements in the region or elsewhere. There is no need to address that issue further for the moment. The only point for me to note is the recent *Barbados v. Trinidad and Tobago* arbitration. The tribunal in that arbitration considered an argument made by Trinidad and Tobago that it was required to take into account other delimitations in the region. The tribunal rejected that view, except in so far as another delimitation might identify the limit of the area claimed by one of the parties to the proceedings (in the *Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados/Trinidad and Tobago)*, Award of the Tribunal (11 April 2006), pp. 104-105, paras. 344-349). That conclusion reaffirms the position of Nicaragua that bilateral treaties of third States or of Honduras and third States are *res inter alias acta* for Nicaragua. Moreover, in the context of the present case the conclusion of the Award also implies that the parallel of 14° 59' 48" N identifies the limit of the area claimed by Honduras. Honduras has concluded a delimitation treaty with Colombia that employs that parallel as a boundary.

Conclusions

65. Having come to the end of my presentation on the geography of the maritime delimitation, one thing should have become clear: there is a striking difference in the geographical perspectives presented by the Parties. Honduras seeks to focus the attention of the Court exclusively on the mainland coasts of the Parties in the direct vicinity of the Coco River and the cays off the mouth of the river. Honduras discards all of the geography that is not in the direct vicinity of the mouth of the river.

66. Geography obviously does not help the Honduran case. A map that shows the mainland coasts of Nicaragua and Honduras immediately points out two things. All of the islands in the area to be delimited are insignificant in comparison to these mainland coasts. Equally important, the mainland coast of Honduras faces almost due north and the mainland coast of Nicaragua faces east. As a result, the mainland coasts of Nicaragua and Honduras form an acute angle. An equitable maritime boundary between Nicaragua and Honduras has to reflect those geographical realities. Nicaragua submits that the bisector method achieves such a result. Madam President, this concludes my statement. I thank you and the other Members of the Court for your kind invitation.

The PRESIDENT: Thank you very much, Dr. Oude Elferink.

This brings to an end today's sitting. The Court will meet again at 10 a.m. tomorrow to continue the pleadings of Nicaragua. The Court now rises.

The Court rose at 1.30 p.m.
