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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Friday 23 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 vendredi 23 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
		Abraham
		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
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Torres Bernárdez
Gaja, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. Perhaps it will assist if I say that, having looked at the plans of Honduras for the morning, the Court is minded not to take the traditional coffee break. Mr. Colson, you have the floor.

Mr. COLSON: Thank you, Madam President. Madam President and Members of the Court, before I begin the presentation that I planned, perhaps I could just respond very quickly to the question that was raised yesterday about the satellite image that was shown in Professor Sands's presentation. This is a Landsat image; it was taken on 12 January2003. It can be obtained from the United States geological survey for a nominal fee and we will provide the technical details, including the website from which this can be given, in a letter that will be provided to the Court next week.

2. My task this morning is to address a selection of issues. I will begin by discussing relevant circumstances, as proposed by Mr. Brownlie in his discussion on 6 March, and you can find that discussion on pages 42 through 50 of that transcript. The reason we are coming back, is that he claimed earlier this week that Honduras had only addressed his presentation in a, what he said, was a "piecemeal fashion" (CR 2007/12, p. 46). So I will go at it directly one by one; and then, second, I will take up starting-point issues that remain; third, I will discuss certain geographical concepts relevant to maritime delimitation; and last I will say a few words about delimitation method, including the enclave idea that has been suggested by Nicaragua.

Relevant circumstances

3. To begin this discussion of relevant circumstances, I must say that we are not reticent to engage Mr. Brownlie in a discussion of the case law. However, since much of what he said concerning relevant circumstances has in fact been set aside in the case law, we have not felt obliged to spend the Court's time going over his arguments which really revive all concepts, some of which have disappeared, most have been set aside and at least one is totally new. Also, aside from the treatment of such arguments in the jurisprudence, Nicaragua has failed to provide factual evidence in support of the relevant circumstance arguments that he has set forth.

4. The first relevant circumstance suggested by Mr. Brownlie is what he calls the "incidence of natural resources in the disputed area". He supports this proposition by a quote from the *North Sea Continental Shelf* cases, a quote from *Tunisia/Libya*, and then he jumps right to *Cameroon* v. *Nigeria* and tries to distinguish what the Court said there, which was, of course, that oil conduct is relevant if it demonstrates a tacit agreement. He skips over all of the other cases, however. And, in particular, he skips over the *Gulf of Maine* case, which he otherwise quotes extensively. In that case, there was an abundance of evidence presented by the parties about the incidence of natural resources in the disputed area. Yet the arguments made by Nicaragua's counsel disregard totally what the Chamber of the Court said in that case, where it was confronted with that abundant evidence of the incidence of natural resources and where its task was to delimit a single maritime boundary. What the Chamber of the Court said was that in consideration of a single maritime boundary it is the geographical circumstances pertaining to the delimitation area that are the circumstances to be applied. That discussion is at paragraphs 194 and 195 of that Judgment. This Court has continued to apply that standard when it has addressed the delimitation of a single maritime boundary. So, on the law, Mr. Brownlie surely overstates his case — and besides that, one is entitled to ask where are the facts pertaining to specific natural resources that he wishes the Court to take into account?

5. The second relevant circumstance suggested by Mr. Brownlie is "the principle of equitable access to the natural resources of the disputed area". In *Gulf of Maine*, the Chamber indicated that this consideration might be a factor if a delimitation line would create "catastrophic repercussions" — "catastrophic repercussions", that is the phrase used by the Chamber — "catastrophic repercussions" for one party or the other. And it did not find them to exist in that case. In *Jan Mayen*, based on extensive evidence presented by the parties, the Court adjusted the line it proposed to adopt in a rather minor way, in one section, to ensure that both parties had access to the capelin resource that was very important to both countries. This is the only example in the cases where an adjustment has been made to a provisional line of delimitation in order to ensure equitable access to resources. Again, there are no facts presented by Nicaragua about the catastrophic repercussions that would arise for Nicaragua's economic well-being if the Honduran proposal were adopted, nor has any evidence been presented that would demonstrate a Nicaraguan

resource use, a real and present use, that might be very important and something to take into account.

6. Mr. Brownlie criticized Professor Greenwood's response on this point as not coming to grips with what he called the "legal considerations and judicial authority presented on behalf of Nicaragua" (CR 2007/12, p. 47). Yet all Mr. Brownlie referred to in the first round in support of his argument were the *Jan Mayen* and *Newfoundland and Labrador-Nova Scotia* cases. Now, I have just answered with respect to *Jan Mayen* where compelling evidence was put forward about the capelin fisheries so as to cause the Court to adjust the provisional line of delimitation.

7. What about the *Newfoundland and Labrador-Nova Scotia* arbitration? As is often the situation, courts and tribunals may review the arguments of the parties and note that they cannot rule out that a principle advanced could be applicable, but then we often find that they do not apply that principle or make use of that principle in the boundary line that is established. Counsel for Nicaragua quoted a long passage from that award that is of this character. What did the tribunal really do in that case? Mr. Brownlie showed a map from the award — it is coming up on the screen (DAC2-1 — IB37) –-- that shows the claim lines of the parties — the claim lines of the parties — and you can see the Nova Scotia claim line which wanted about half of the area that was known as the Laurentian sub-basin, which was an area that is presumed to have some petroleum potential. What he did not show you was the line that the tribunal established. Here it is. That tribunal in no way was influenced by this argument, or by the presence of the Laurentian sub-basin, which could have been, but was not, a relevant circumstance. The tribunal awarded a boundary that was solely based on the geographic circumstances of the case, attributing virtually all of the Laurentian Basin as shown here to Newfoundland and Labrador.

8. The third relevant circumstance is "the Nicaraguan Rise as a single geological and geomorphological feature". Yes, Honduras has been dismissive of this argument, just as the Court has dismissed arguments about geology and geomorphology. After the *North Sea Continental Sea* cases, counsel in later cases, the cases that followed, believed that the key to victory was to be found in the geological structures and the geomorphological characteristics of the ocean floor. And in *Tunisia/Libya*, in *Gulf of Maine*, in *Libya/Malta*, and even in *United Kingdom* v. *France*, the pleadings were full of such information and expert opinion. In *Libya/Malta*, more than two

decades ago, the Court said enough of this, noting that at least within 200 miles of the coast, the entitlement of a coastal State to maritime space was based on distance and had nothing to do with sea-floor topography and geological structures. Since then, and until now, geology and geomorphology have been removed from the case law, and Honduras believes that is where they should remain.

9. However, Nicaragua wants to repackage things. Nicaragua says that its argument about geology and geomorphology is different. It is not about the demonstration of a sea-floor or sea-bed division, but, instead, the argument goes, that where there is "unity and uniformity" — "unity and uniformity" — of the sea-bed, a phrase that is taken from the *Canada-France* arbitration, and ironically where the phrase was used in connection with the continental shelf running from the Arctic all the way to Florida, which was said to be one of unity and uniformity. But nonetheless, Nicaragua argues that in such cases of a united and uniform sea-bed they must be shared between two States. Well, first, a delimitation in law is not about sharing out the areas of the continental shelf. That being said, obviously, delimitations divide maritime space. But nowhere in the award of the *Canada-France* arbitration can you find the proposition that where you have a specific united and uniform continental shelf feature, it must be shared between the two States. The argument about the Nicaraguan Rise is that there is a geomorphological feature, and since it is uniform, it must be shared. This is an entirely new idea that has never been put to this Court or to an arbitral tribunal in a maritime boundary case. It is made up. There is no precedent for it, and it does not help. If the authority for this proposition is the *Canada-France* arbitration, it is weak authority, for that is a case where most observers would say that such principle as put forward by Mr. Brownlie was not in any event applied. This third relevant circumstance proposition is inventive, and it is without foundation in fact, the practice of States, or the law.

10. The fourth relevant circumstance is "security considerations". Let me deal with this by asking: what "security considerations"? Professor Greenwood asked the same. Mr. Brownlie responded that Professor Greenwood was taking too narrow a view. I do not know what that is supposed to mean. But further, Mr. Brownlie did not tell us still what those security considerations were. Thus, no case has been made out by Nicaragua that the Honduran line would create any security problems for Nicaragua. In the cases, this has been one of those factors that the Court and

tribunals have said they do not rule out, but even in the *United Kingdom* v. *France* case, where some very strong real security-based arguments were made, this factor was not applied by the arbitral tribunal and it has never been taken into account by the Court.

11. The fifth relevant circumstance Mr. Brownlie proposed is "access to the main navigable channel in the adjacent coastal area".

12. In response, first, as parties to the 1982 Law of the Sea Convention, the freedom of navigation beyond the territorial sea and the right of innocent passage in the territorial sea are guaranteed. So, to begin, this is a non-issue. That this was an issue in the *Beagle Channel* case only highlights that the circumstances where such a consideration has been taken into account are very different from those here. Here, the law of the sea applies to the territorial sea and the exclusive economic zones of the Parties.

13. This response on the law should be dispositive of this argument, but there are two other facts, or non-facts that we would note. Mr. Brownlie connects this argument to the port that is said to exist at the town of Puerto Cabo Gracias a Dios that is said to exist at the mouth of the river, as if ships bound to this port must be ensured that they can sail down the bisector line.

14. On Monday, the Agent of Nicaragua came back to the issue of the town of Cabo Gracias a Dios that is suggested to be a port of significance for Nicaragua at the mouth of the Rio Coco. The evidence he produced began with an enlargement of a portion of British Admiralty chart 2425, that is found in his figure CAG2-5 — and it is now shown here on the screen (DAC2-2). You can see there is a shaded area that presumably denotes a little town, and there is a notation of a hotel. The Agent then pointed out in his next graphic, which we are not going to show — it was CAG2-6 — that the information on this chart dates from perhaps the nineteenth century, and in the next graphics he provided statistics — those were his figures CAG2-7 and CAG2-8 — that date from the 1920s about economic activity. Now, before moving on and addressing the substance of the argument, I simply want to note that if the notations on this chart represent a Nicaraguan community, it is further evidence of Nicaragua's unlawful occupation on the north bank of the Rio Coco.

15. In any event, if you look closely at the 1962 Mixed Commission map that is now on the screen (DAC2-3) you see that it says that such town as might have been in this location was

destroyed in 1941. United States nautical charts, shown now (DAC2-4), indicate that ruins exist at this location. Nonetheless, the Agent referred to a website that still lists this port in a Listing of Ports of the World. However, Nicaragua has provided no current or even modern information about this port — we have no photographs of this port, we have no statistics concerning the importance of this port and if one examines the large modern fold-out map of Nicaragua that was included as map B in Volume III of Nicaragua's Memorial (DAC2-5) you will find no town of Nicaragua on that map anywhere near the mouth of the river. Instead, you will see a number of other ports along the Nicaraguan coast and here they are marked with an anchor symbol that appears on that Nicaraguan map that was put into evidence. There is no anchor symbol, there is no name of a town near the mouth of the river on Nicaragua's map.

16. As for the Main Cape Channel, the reason Mr. Brownlie wants to make it a relevant circumstance in this delimitation is so that Nicaragua can argue that the islands south of this passage are under Nicaragua's sovereignty, and that it marks the location of what Nicaragua believes would be an equitable solution. That navigators sail their ships between islands rather than through the midst of island clusters is obvious. And that these passages take on names is unremarkable.

17. On British Admiralty chart 2425 — and we are now showing the entire chart (DAC2-6) — besides the Main Cape Channel that has been listed and that we have talked about in this case, there are four other passages, or channels, shown on this chart alone. We have Mosquito Channel, we have Edinburgh Channel, we have Porgee Channel and we have Tinkham Channel.

18. These passages do not relate to territorial sovereignty. They do not allocate or attribute sovereignty on one side from that on the other. Nor do they mark international maritime boundaries. We might remind ourselves that in the *Gulf of Maine* case again, the United States tried hard to make a channel — called the Northeast Channel — a relevant circumstance, and Canada tried to make the Great South Channel a relevant circumstance — both being passageways shown on nautical charts. Suffice it to say that neither the United States nor Canada succeeded.

19. None of the relevant circumstances that have been put forward by Nicaragua's counsel are relevant here.

Starting-point issues

20. Let me turn now to some starting-point issues.

21. The Parties apparently now are in agreement that the Rio Coco forms islands in the mouth and over time those islands become attached to the mainland on one side or other of the river. The fact that the river has formed a peninsula that is in the shape of a cone is evidence of the fact that the build-up on either side of the river has been symmetrical over time.

22. The Parties however apparently disagree about the sovereignty over islands in the mouth of the river, before they become attached to the mainland. While Professor Pellet acknowledged that the King of Spain's Award provides that the islands in the river belong to Honduras, he asserted that the present island in the mouth of the river is really part of the right bank of the river and thus it belongs to Nicaragua.

23. Honduras emphatically disagrees with Nicaragua's interpretation of the 1906 Award of the King of Spain which Honduras believes is clear in this regard that the islands in the river belong to Honduras.

24. This is a critical point of difference between the Parties concerning the interpretation of the 1906 Award.

25. In this regard, I should point out that Honduras has made use of these islands which, as we know, come and go but they may be present for a few years. For example, Professor Sands has spoken of the markers that were placed on some of the islands, including Bobel Cay, in 1975 as part of a Geofix survey conducted for Union Oil Company. As part of that same project, in 1972, a marker was placed on the island that was *then* present in the mouth of the river.

26. On the screen we are putting a page from our Annexes (DAC2-7) — this is page 151 from the report of the Geofix survey that was conducted for Union Oil. The full report is found at Volume II, Annex 264, of the Rejoinder. This page is a station description of the marker placed on the island in the mouth of the river that was *then* there. Now, two things I would simply note. First, the writer of this report attributes the island to Honduras. Second, the writer of this report — and the report is dated April-May 1975 — says that the marker that was placed on the island in 1972 is in danger of disappearing due to erosion. Now there is more information on this that can be found at page 152, and there are actually photographs of this station at page 153 of Volume II of

the Rejoinder. All of this is to say that Honduras regards the islands in the mouth of the river to appertain to Honduras in accordance with the 1906 Award of the King of Spain and has acted accordingly.

27. A different question concerns the location of the thalweg at the mouth of the river. Honduras fully accepts what the King of Spain's Award says. But there is no evidence before the Court as to where that thalweg is now. This is a complex question, particularly when unstable islands and shoals form in the mouths of rivers.

28. Mr. Brownlie, in the 6th edition of his work "Principles of Public International Law", has this to say, at page 159 under the heading "Boundary Rivers" — I do not intend to read the whole thing but, after describing some of the complexities, he says in the last sentence (DAC2-8): "Judicial expertise is called for, particularly in relation to the determination of the main channel among several arms of a river." Thus, at least we can say that this authority believes that determining the main channel among several arms of a river may be complicated.

29. In the *Botswana/Namibia* case, the Court was faced with the job of trying to decide where the "main channel" was around Kasikili/Sedudu Island within the meaning of an 1890 treaty. I do not argue that this present situation is exactly the same, but the fact that the Court noted that such determinations raise complex questions is relevant. The Court said, at paragraph 30 of its Judgment:

> "The Court finds that it cannot rely on one single criterion in order to identify the main channel of the Chobe around Kasikili/Sedudu Island, because the natural features of a river may vary markedly along its course and from one case to another." (*Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1064, para. 30.)

30. The point is that the legal and factual issues at the mouth of the Rio Coco are complicated, and they have not been argued in these proceedings. Indeed, that was Nicaragua's position in the written pleadings and Honduras has followed its lead. For this reason, Honduras believes that it is not appropriate for the Court to engage in addressing any of these questions, and should leave it to the Parties to address these complexities in the area between the 1962 Mixed Commission point and the seaward fixed point that both Parties agree the Court should establish.

31. Of course the Parties remain in disagreement as to where the seaward fixed point should be. We are placing again on the screen the set of satellite images from 1979 to 2006 (DAC2-9).

We will not go through this in detail but anyone looking at these images would see that the river is running east, you can identify the latitude of 15° N. It is hard not to appreciate, in viewing these images, that if the islands that form in the mouth of the river did not exist, the mouth of the river, as marked by the headlands of the river, points basically east in each of these images.

32. That is why Honduras believes that the seaward fixed point it proposes, which lies east of the mouth of the river, as formed by the headlands of the river, is the appropriate starting-point. Now on the screen (DAC2-10) we are showing what happens if the Court applies the equidistance methodology as suggested by Nicaragua. The seaward fixed point will either be to the north-east of the river mouth if one assumes Nicaragua owns the island, and it will be to the south-east if Honduras owns the island. Instead, the seaward fixed point proposed by Honduras lies directly off the river mouth. It is for the Parties, in Honduras's submission, to decide how the boundary is to follow the thalweg from the 1962 Mixed Commission point, it is for the Parties to address the question of the unstable islands in the river mouth, and it is for the Parties then to extend the boundary to the seaward fixed point to be established by the Court. That is what both Parties requested up to the time they arrived in The Hague, and Honduras still believes that is the correct procedure.

Geographical concepts in maritime delimitation

33. Turning now to issues pertaining to geographical concepts in maritime boundary delimitation.

34. In the cases, the relevant area for consideration of a maritime boundary problem is the area in which the delimitation takes place. This delimitation must take place in the area seaward of Cabo Gracias a Dios. The relevant area does not include all of the maritime space that lies within 200 miles of the coast of both countries. Now on the screen is Nicaragua's relevant area. (DAC2-11 — IB33/JPQ4). This is an extreme suggestion, and one may ask, why does Mr. Brownlie stop here? Why not include the coasts of the two countries in the Pacific Ocean? This suggestion by Nicaragua, that the Court should evaluate a delimitation problem by trying to figure out all the maritime space that the two countries can claim, has absolutely no support in the case law.

35. I am reminded that the Agent of Nicaragua, in his first presentation on 5 March referred to the Honduran port of Puerto Lempira. And he said: "located nearly 100 km from the pertinent area". Here is the map he showed (CAG1-15), and Puerto Lempira is highlighted and he said: "Puerto Lempire is 100 km from the pertinent area". Now I have already dealt with the Puerto Gracias a Dios label that is on this figure, so I will not refer to that again. The Agent came back on 19 March in his presentation (CR 2007/11, p. 25, para. 57) and said that Puerto Lempira is again "well over 100 km distant from the area in dispute". The Agent of Nicaragua placed the pertinent area or the area in dispute about 100 km from Puerto Lempira which can only mean that he understands that the pertinent area, or the relevant area, or the area in dispute, lies off the mouth of the Rio Coco. This is a far different perspective about what is relevant or pertinent than what Professor Brownlie suggests in the map of the relevant area (return to CAG2-11).

36. The reasons for the extreme relevant area are two. First, in order to construct the bisector that leaves to Nicaragua the Honduran islands north of 15° N, Nicaragua must create a line of extraordinary length that connects the Honduras-Nicaragua land boundary terminus to the Honduras-Guatemala land boundary terminus, which just so happens to run at a bearing that then enables the construction of the bisector proposal.

37. What was said on Tuesday (CR 2007/12, p. 42, para. 18) in this regard by Mr. Brownlie is really extraordinary. He said: "Using a coastal direction supported by the entire length of the coast ensures that each and every point on the coastline . . . is allowed an equal contribution to the delimitation." I am tempted that this is nonsense but perhaps I should be softer and say this is nonsense in so far as maritime delimitation is concerned. Should the coast of Florida have been allowed to contribute equally to the delimitation in the *Gulf of Maine* case as much as the coast of Maine and Nova Scotia? Indeed, both Canada and the United States tried to argue that parts of their respective coasts that did not front on the Gulf of Maine were nonetheless relevant to the delimitation. The Chamber had none of it. Nicaragua's relevant area and relevant coasts are contrived for the sole reason of placing the bisector line so as to attribute the disputed islands to Nicaragua. It has no basis in law, no precedent, in the law and practice of maritime delimitation.

38. There is a second reason for the extreme relevant area and that is to ensure that the proportionality scheme that was set out on Tuesday (IB3-27) can be made to work.

39. Proportionality as a test of equity is not about creating artificial areas and then creating ratios using coast-line lengths. There are too many variables, too many subjective decisions, to be made in making these ratios work out right which in earlier cases opposing counsel always seemed to be able to do. That has led the Court to reject these arguments and to apply a more general evaluation of whether the line it proposes to create is an equitable line in the totality of the circumstances.

40. The fact that in the Caribbean Sea more maritime space will appertain to Honduras than to Nicaragua is simply the result of the political geography of the region — just as the reverse is true in the Pacific Ocean where more maritime space will appertain to Nicaragua than to Honduras. It is not the function of the law of maritime delimitation to make sure that each State gets the same amount, or close to the same amount. Nonetheless, this is the thrust of Nicaragua's argument and this is the reason for the extreme relevant area picture that we are now taking down off the screen.

41. If, one however, considers the coasts that face the delimitation area, and considers the area off those coasts, one gets a different perspective on proportionality and one that is more enlightening. On the screen (DAC2-13) we are bringing up the northern section of British Admiralty chart 2425. It shows the coast of both countries in the vicinity of the land boundary terminus. The land boundary reaches the sea basically in the middle of the coast shown on this chart. It is the maritime area shown on this chart, that lies off the relevant coasts of the Parties. You can see that 15° N latitude basically divides the maritime area shown on this chart roughly equally, just as the relevant coasts shown on this chart are roughly equal in length. And, besides, that latitude separates the islands that belong to Honduras from those that belong to Nicaragua.

Delimitation method

42. I shall now turn to a few considerations about delimitation method.

43. This delimitation begins at the tip of a cape or peninsula. This is an unusual geographic situation to be sure and it led Nicaragua to claim for much of its pleadings that the equidistance method could not be applied. But Nicaragua has finally come around to the view that it is not impossible to apply the equidistance method in the circumstances.

44. This is a meaningful shift in the Nicaraguan argument. Furthermore — and now returning to British Admiralty chart 2425 with lines that we have placed on this figure (DAC2-14) — as Honduras has said, since the coast of Nicaragua from Laguno Wano in Nicaragua to Cape Falso in Honduras are on the same longitude, one can consider that the coastal front of the two countries is a straight line running from south to north, and thus the common coastal front faces east. And as Honduras has said, and indeed as Nicaragua has said, a geometrical approach to delimitation in the circumstance of a straight coast shared by two States will often yield up a perpendicular to that common coastal front as an equitable delimitation. Of course, Nicaragua does not agree that there is a common straight line coastal front here, because it believes the cape causes the entire coast of Central America to turn sharply to the left.

45. However, as we have seen, the cape, which presumably has been formed over the centuries by sediment deposition of the Rio Coco, is clearly symmetrical in shape. It sits in the middle of the common eastward facing coastal front. Capes and peninsulas are often said to be special circumstances, but such statements need to be considered in light of where the land boundary is located in relation to a cape. In this case, the land boundary is not to the north of the cape, or to the south of the cape, it is in the *middle* of the cape and extends to the eastern *tip* of the cape. This presents an unusual situation but it is not one that is impossible to analyse.

46. Perhaps a few simplified illustrations would prove useful. (DAC2-15) Here we have a straight coast with a curving line illustrating the land boundary; and we see a perpendicular extending from the coast as an equitable delimitation. Next we place on the diagram (DAC2-16) a cape and show the land boundary reaching the sea to the north of the cape. As this figure says, State A will argue that the cape is a circumstance that must be discounted in order to produce an equitable delimitation. What happens if the land boundary reaches the sea to the *south* of the cape? (DAC2-17) Here we understand that State B will argue that the cape is a circumstance that must be discounted to produce an equitable delimitation. But what if the land boundary hits the coast at the *tip* of the cape? (DAC2-18) That is shown here. Is there any reason to say that this would not be an equitable solution?

47. This is a modest demonstration, but it shows the assessment of geographic circumstances that one must take into account where the land boundary is located in connection with the relevant geographic features.

48. Now I close by a short discussion of the enclave solution or enclave suggestion made by Nicaragua in response to Judge Keith's question. The essence of an enclave situation is that one finds that islands that belong to one party are on the wrong side of a line of delimitation that is being proposed. Usually that line of delimitation is the median or equidistance line. Here in Nicaragua's example the islands are on the wrong side of the bisector line.

49. A few examples from State practice may be instructive and we will turn to four of them. One is the Channel Islands between the United Kingdom and France that the Court of Arbitration addressed in its 1977 Judgment. A second relates to the treatment of certain Australian islands in the Australia-Papua New Guinea delimitation which entered into force in 1985 and the full report on that can be found in *International Maritime Boundaries*, Volume II, report 5-3. The third is the treatment given to four Italian islands in the Italy-Tunisia boundary agreement that entered into force in 1978, and the full report there can be found in *International Maritime Boundaries*, Volume II, report 8-6. And the fourth example that we shall discuss is the Saudi Arabia-Iran delimitation of 24 October 1968, and that can be found in *International Maritime Boundaries*, Volume II, report 7-7.

50. Putting now on the screen a figure (DAC2-19) showing the *United Kingdom* v. *France* situation. The Court of Arbitration found that the Channel Islands rested up against the coast of France. Obviously, the islands were on the wrong side of the median line of the English Channel between France and the English coast that was otherwise deemed to be an equitable boundary in this area. The Court of Arbitration did not have the authority to delimit the boundary between the Channel Islands and the coast of France. The Court of Arbitration *did* have the authority, however, to determine that the Channel Islands, on the side that faced England, were to be limited to a 12-nautical-mile belt that effectively when the territorial sea boundary would be ultimately established would mean that the Channel Islands would be fully enclaved by French waters. In other words the waters of France would fully surround the waters attributable to the United Kingdom's Channel Islands.

51. A more complex situation is the Australia-Papua New Guinea delimitation, and that map is now before you (DAC2-20). In the Torres Strait there are Australian islands that lie right up against Papua New Guinea. We will highlight three of these and I will no doubt say their names incorrectly — they are: Boigu, Duaun and Saibai. And there are also some others. In this agreement there are a complex set of co-operative arrangements that pertain to sea-bed and fisheries and environmental measures. So as you examine this map, the dotted lines represent these various areas in which these various arrangements take place, and they do not indicate the territorial sea boundaries of these islands. As for the territorial sea of the Australian islands that are on the wrong side of the Torres Strait and lie up against the coast of Papua New Guinea, the treaty provides in Article 3 (2) that the territorial seas of such islands shall not extend beyond 3 nautical miles from their coast.

52. Let us turn to a third example and that is the Italy-Tunisia situation. This is a demonstration of the technique of semi-enclaving (DAC2-21). The parties were in general agreement that the boundary in the channel between Sicily and Tunisia should be the median line, but there was the problem of four Italian islands that lie near the middle of the channel and on the wrong side of the median line. The solution in this case was not to enclave these islands fully, as such, surrounding them completely with Tunisian waters. Instead, Pantelleria, Lampedusa and Linosa each received an arc of jurisdiction of 13 nautical miles — meaning a 12 nautical-mile territorial sea and a 1 nautical-mile arc of continental shelf, and Lampione received just a 12 nautical-mile arc, and that was because Lampione was uninhabited. As you can see in this case, the result is a median line that connects to these arcs, or bulges of jurisdiction, so that Tunisian water does not completely surround the Italian waters.

53. The Saudi Arabia-Iran boundary in the Arabian Gulf is another example of the semi-enclaving technique (DAC2-22). In this case, the line of delimitation is a median line, but as this median line runs from south to north it first encounters a Saudi island, Al Arabiyah, and then it encounters an Iranian island, Farsi, as the median line runs up the middle of the Gulf. In this situation, when the median line encounters these two islands in the middle of the delimitation problem, the line of delimitation, from south to north, first runs east in a 12-mile arc around the

Saudi island, a line of latitude provides a transition, and then the line of delimitation runs west in a 12-mile arc around the Iranian island.

54. Is there anything to be learned from this? One thing we might conclude is that where the technique of full enclaving has been applied — such as in the *United Kingdom* v. *France* or Australia-Papua New Guinea situations — these are situations where islands lie right up against the coast of the neighbouring country. The Honduran islands are not right up against the coast of Nicaragua. Thus, the suggestion of Nicaragua in answer to Judge Keith, which proposes a full enclave of these islands, with a 3 nautical-mile breadth for the Honduran islands, has no support in the practice of States. Second, where islands appear near the middle of the delimitation problem, as they do here, the answer has been, as it was in Tunisia-Italy and as it was in Saudi Arabia-Iran, to use the semi-enclaving technique. Thus, as was done in those two cases, the primary line of delimitation is followed, when the islands that are in the middle of the problem are encountered, the line of delimitation winds around those islands in an arc, creating a semi-enclave, so as not to separate those islands and their maritime areas from that of the mainland country. Also, — and this bears on the question asked by Judge Simma — as we have seen in the two examples of the semi-enclaving technique, the practice has been to ensure that the semi-enclaved islands receive at least a full 12 nautical-mile territorial sea.

55. Madam President, that brings me to the end of my presentation on a selection of issues, and I hope that it has proved useful to the Court. I thank the Court for its attention, and I would now ask you to call upon Professor Quéneudec.

The PRESIDENT: Thank you very much, Mr. Colson. We now call Professor Quéneudec.

M. QUÉNEUDEC :

Le rôle de l'équidistance en l'espèce

1. Madame le président, Messieurs les juges, je ne sais pas si, au cours du premier tour des plaidoiries, j'ai joué au professeur de géographie, comme on l'a gentiment dit. Je sais seulement que, dans ma précédente plaidoirie, je me suis attaché à présenter à la Cour, de façon aussi

objective que possible, les données géographiques essentielles qui conditionnent le problème de délimitation maritime sur lequel la Cour doit se prononcer.

2. Les données qui ont été présentées à cette occasion n'ont pas été vraiment contestées par le Nicaragua. Ces données géographiques doivent donc être regardées comme établies et admises par les deux Parties à la présente instance. Il est dès lors inutile d'y revenir durant ce deuxième tour.

3. En me fondant sur la géographie de l'affaire telle qu'elle a été précédemment décrite, je souhaiterais aujourd'hui présenter à la Cour quelques observations relatives au rôle que peut jouer ici la méthode de l'équidistance pour tracer la ligne de délimitation.

4. Ces observations s'imposent, semble-t-il, dans la mesure où le droit de la délimitation maritime place désormais la méthode de l'équidistance au cœur de la démarche qu'il convient de suivre, et ce, aussi bien dans le cadre de la règle coutumière dite des «principes équitables et circonstances pertinentes» que dans le cadre de la règle conventionnelle combinant «équidistance et circonstances spéciales».

5. Ces observations sont, d'autre part, rendues nécessaires en raison de l'apparente évolution qu'a connue la position du Nicaragua à ce sujet.

6. Dans ses écritures[1], puis lors du premier tour de la phase orale[2], le Nicaragua avait considéré que le principe de l'équidistance était inapplicable en l'espèce pour des raisons techniques. Or, dans ses plaidoiries du deuxième tour, il a paru disposé à admettre que le tracé d'une ligne d'équidistance pouvait être envisagé, au moins à titre d'hypothèse[3].

7. Ainsi, à l'appui de sa tentative de réfutation de la présentation qui avait été faite par M. Colson lors de l'audience du 16 mars[4], le professeur Brownlie n'a pas hésité à produire, à l'audience de mardi dernier, plusieurs croquis où étaient représentées diverses lignes provisoires d'équidistance [illustrations IB3-9 à IB3-16, dans le dossier des juges].

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[1] MN, vol. I, p. 158, par. 23, et p. 159, par. 25 ; RN, vol. I, p. 10, par. 1.18.

[2] CR 2007/2, p. 16, par. 33.

[3] CR 2007/12, p. 43-46, par. 25-32.

[4] CR 2007/10, p. 24-31, par. 123-148.

8. La Partie adverse n'a toutefois pas tiré de ces illustrations, dont certaines étaient pourtant particulièrement suggestives, toutes les conséquences auxquelles on pouvait s'attendre. Bien au contraire, on a continué, de l'autre côté de la barre, à défendre l'idée de l'impossibilité pratique d'appliquer en l'espèce la méthode de l'équidistance, et ce tout en traçant des lignes provisoires d'équidistance, sans percevoir sans doute ce qu'il pouvait y avoir de contradictoire dans une telle attitude.

9. Cette idée était, par exemple, à la base de la position défendue lundi après-midi par le professeur Pellet.

10. Le conseil du Nicaragua nous a dit, en effet, que la ligne de délimitation devait remplir les conditions imposées par les dispositions pertinentes de la convention des Nations Unies sur le droit de la mer, qu'elle devait donc «dans son premier tronçon se rapprocher autant que faire se peut de la ligne d'équidistance», mais qu'il fallait tenir compte de la circonstance spéciale résultant notamment de «la limitation à pratiquement deux des points sur lesquels on peut prendre appui pour construire [cette] ligne»[5].

11. Ce qui revenait à dire que l'existence de deux points de base seulement sur la côte continentale du Honduras et du Nicaragua représentait une circonstance spéciale au sens de l'article 15 de la convention de 1982 et que, dès lors, l'équidistance ne pouvait pas être utilisée pour tracer une ligne de délimitation.

12. A n'en pas douter, il s'agit là d'une bien étrange position. Où a-t-on vu que le nombre réduit des points de base susceptibles d'être retenus comme étant des points appropriés pour le tracé d'une ligne d'équidistance, où a-t-on vu que le nombre réduit de ces points devrait être regardé comme une circonstance spéciale de nature à écarter le recours à l'équidistance ?

13. Remarquons tout d'abord que, lorsque la configuration côtière est telle que seuls deux points peuvent être déterminés sur la côte pour servir de points de base à partir desquels sera construite une ligne d'équidistance provisoire, il n'en résulte de prime abord aucune impossibilité technique pour tracer la ligne.

[5] CR 2007/11, p. 42, par. 30.

14. Surtout, le fait que deux points de base seulement commandent tout le tracé d'une ligne de délimitation au large de deux côtes adjacentes n'est pas en soi un facteur d'inéquité. C'est la simple traduction de la géographie côtière. C'est en particulier le reflet du fait que les côtes pertinentes aux fins de la délimitation ne sont pas très étendues de part et d'autre du point d'aboutissement à la mer de la frontière terrestre.

15. Une ligne d'équidistance prenant appui sur deux points de base ne pourrait à priori présenter un caractère inéquitable que si elle devait être tracée sur une grande distance au large des côtes ; ce qui ne peut certainement pas être le cas lorsque la zone concernée par la délimitation est un espace de dimension modeste dans une mer semi-fermée, comme précisément c'est le cas ici.

16. Dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant))*, deux points de base seulement ont ainsi été retenus par la Cour «comme points d'ancrage terrestre pour la construction de la ligne d'équidistance», à savoir les «points les plus méridionaux sur la laisse de basse mer du Nigéria et du Cameroun de part et d'autre de la baie formée par les estuaires de l'Akwayafé et de la rivière Cross» (*arrêt, C.I.J. Recueil 2002*, p. 443, par. 292).

17. Ces deux points sont identifiés sous les noms de West Point et East Point sur le croquis 12 joint à l'arrêt du 10 octobre 2002 [figure JPQ2 1]. Et la Cour se souviendra certainement que, dans l'arrêt qu'elle a rendu dans cette affaire, elle a ajouté la précision suivante : «Etant donné la configuration des côtes et l'espace circonscrit dans lequel la Cour a compétence pour opérer la délimitation, aucun autre point de base n'a été nécessaire à la Cour pour procéder à cette opération.» *(Ibid.)*

18. Il en était de même, dans l'arbitrage de 1977, entre la France et le Royaume-Uni. Pour l'établissement de la délimitation du plateau continental dans le secteur atlantique, le tribunal arbitral n'avait utilisé que deux points de base, l'un sur la côte anglaise, l'autre sur la côte française, pour tracer chacune des deux lignes provisoires d'équidistance [figure JPQ2 2].

19. La première était construite à partir d'un point choisi sur l'île d'Ouessant du côté français et, du côté britannique, à partir d'un point choisi sur la plus occidentale des îles Sorlingues *(Scilly Islands)*. La seconde ligne d'équidistance prenait appui sur le même point de base à Ouessant du côté français et, de l'autre côté, sur un point situé à l'extrémité de la péninsule de la Cornouaille

anglaise *(Land's End)*. Et l'on sait que la ligne retenue par le tribunal fut ensuite tracée à mi-chemin entre ces deux lignes provisoires d'équidistance.

20. Dans le cas présent, la configuration des portions de côte des deux Etats qui sont pertinentes aux fins de la délimitation conduit à sélectionner deux points de base très proches l'un de l'autre. Ces points de base sont, en effet, nécessairement situés sur la côte de chacun des deux Etats dans la région du cap Gracias a Dios. En d'autres termes, il s'agit de retenir deux points sur la côte de part et d'autre de l'embouchure du Rio Coco.

21. Il y a certes ici une difficulté, mais elle n'est cependant pas insurmontable. N'oublions pas, en effet, la sage parole de Sénèque : «Ce n'est pas parce que les choses sont difficiles que nous n'osons pas. C'est parce que nous n'osons pas que les choses paraissent difficiles.»

22. La difficulté tient ici à ce que l'identification des points les plus orientaux sur la laisse de basse mer du Honduras et du Nicaragua de part et d'autre de l'embouchure du Rio Coco, cette identification est rendue délicate par le caractère instable de la côte dans ce secteur. Cet aspect de la situation n'est pas contesté et a été souligné à diverses reprises des deux côtés de la barre.

23. Appelée à se prononcer en 2007, la Cour ne peut évidemment pas se référer à des données remontant à vingt ou trente ans et qui sont aujourd'hui dépassées. Elle ne peut pas non plus tenter de se fonder sur ce que pourrait être la situation au début du siècle prochain, en se perdant en conjectures. Il lui faut statuer en prenant la situation de fait telle qu'elle est actuellement, qui constitue pour elle «une donnée … un fait sur la base duquel elle doit opérer la délimitation» (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 443 et 445, par. 295), pour reprendre la formule utilisée en 2002.

24. Or, grâce à l'image satellite en date 29 novembre 2006 qui lui a été présentée par le Nicaragua, la Cour dispose de données tout à fait récentes sur le contour de l'extrémité des deux côtes continentales *(mainland coasts)* se trouvant de part et d'autre de l'embouchure du fleuve [figure JPQ2 3.1].

25. A partir de cette image, nos experts ont réussi à identifier un point localisé sur la laisse de basse mer à l'extrémité de chacune de ces côtes. Ces deux points de base peuvent alors servir d'ancrage terrestre au tracé d'une ligne provisoire d'équidistance, c'est-à-dire au tracé d'une ligne

dont tous les points sont équidistants de ces deux points de base. La ligne ainsi tracée suit un azimut de 78,8°.

26. Cette ligne ne tient absolument aucun compte des îles, qu'il s'agisse de celles se trouvant à l'embouchure du Rio Coco ou des îles situées plus au large [figure JPQ2 3.2]. C'est pourquoi, elle passe au milieu du groupe d'îles appartenant au Honduras et se trouvant dans la partie de la zone en litige située au nord du 15e parallèle.

27. Or, chacune des îles de ce groupe, et en particulier Bobel Cay, Port Royal Cay, Savanna Cay et South Cay (ou *Cayo Sur*), engendre une mer territoriale d'une largeur de 12 milles marins [figure JPQ2 3.3].

28. Il en résulte que ces îles peuvent exercer une incidence sur le tracé de la ligne provisoire d'équidistance tirée depuis le continent [figure JPQ2 3.4].

29. Pour tenir compte de l'existence d'une ceinture d'eaux territoriales autour de ces îles, la ligne d'équidistance est alors affectée de deux bombements vers le sud, qui ont pour résultat de placer les îles en question dans une demi-enclave, d'une manière qui n'est pas sans rappeler le tracé de la ligne de délimitation entre l'Italie et la Tunisie que M. Colson évoquait tout à l'heure.

30. On ne doit toutefois pas perdre de vue que le Nicaragua, de son côté, exerce sa souveraineté sur d'autres formations insulaires situées au sud du 15e parallèle, notamment Edinburgh Cay et Edinburgh Reef. Le 16 mars dernier, lors du premier tour, avait été présenté à la Cour le croquis DAC 21 sur lequel était tracée une ligne provisoire d'équidistance à partir des îles appartenant respectivement à chacune des Parties [figure JPQ2 3.5]. Cette ligne d'équidistance entre les îles a été reportée sur la carte qui est maintenant à l'écran.

31. Sur cette carte, on voit à présent trois indications. Il y a, d'une part, la ligne d'équidistance tirée à partir de deux points de base sur la laisse de basse mer bordant la côte continentale *(Equidistance : mainland-to-mainland)*. Il y a, d'autre part, deux bombements ou renflements provoqués par la demi-enclave de 12 milles autour des îles honduriennes *(12 miles semi-enclave of the Honduran Islands)*. Il y a enfin la ligne d'équidistance tracée entre les îles honduriennes et nicaraguayennes qui a été ajoutée *(Equidistance between the islands)*.

32. De la combinaison de ces deux dernières indications, il résulte nettement que la ligne d'équidistance entre les îles honduriennes et les îles nicaraguayennes a pour effet de limiter la

projection maritime des premières et, par voie de conséquence, de modifier le tracé de la demi-enclave autour de ces îles, comme on le voit sur cette nouvelle projection [figure JPQ2 3.6].

33. On aboutit ainsi au tracé d'une ligne d'équidistance provisoire prenant appui à la fois sur la côte continentale des deux Etats située en face de l'aire de délimitation et, prenant appui aussi sur les côtes des diverses îles qui se trouvent dans la zone pertinente.

34. Madame le président, il est bien évident qu'il s'agit là d'un exercice consistant à voir le résultat auquel on aboutit si l'on commence par tracer une ligne provisoire d'équidistance donnant effet à toutes les côtes pertinentes des Parties, que ces côtes soient continentales ou insulaires. C'est la première étape prescrite par l'application pure et simple des règles contemporaines du droit de la mer relatives aux délimitations maritimes entre Etats.

35. Il reste alors, dans une seconde étape, à évaluer le caractère plus ou moins satisfaisant ou raisonnable de ce résultat provisoire, puisque la norme fondamentale de toute délimitation maritime est qu'elle doit aboutir à une solution équitable. Cette évaluation suppose la mise en balance de l'ensemble des circonstances, qu'elles soient spéciales ou pertinentes.

36. Le poids respectif à accorder à chaque circonstance suppose que soit dressé un recensement aussi complet que possible des différents facteurs susceptibles de conduire à un ajustement, ou à un déplacement ou à une modification de la ligne provisoire d'équidistance sur tout ou partie de son tracé.

37. C'est le seul moyen d'accorder à ces éléments la place qu'ils méritent, même si le nom de l'un d'eux, «Coco Marina», évoque plutôt une danseuse de cabaret qu'une opération conjointe de prospection pétrolière.

38. C'est évidemment la terrible responsabilité du juge de procéder à cette mise en balance.

39. Pour l'assister dans sa tâche, il n'est sans doute pas inutile ni indifférent de comparer avec attention la ligne provisoire d'équidistance que nous venons de décrire avec la ligne suivant le 15^{e} parallèle que le Honduras considère comme devant constituer la frontière maritime avec le Nicaragua (figure JPQ2 3.7).

40. Dans sa duplique, le Honduras avait déjà été amené à envisager les effets d'une ligne provisoire d'équidistance afin de tester le caractère équitable de la ligne traditionnelle suivant le 15e parallèle qu'il revendique[6].

41. M. Colson a renouvelé l'expérience à la fin du premier tour des plaidoiries, lors de l'audience du 16 mars dernier, afin de démontrer que la ligne demandée par le Honduras satisfait grandement au critère du résultat équitable lorsqu'on la compare à une ligne provisoire d'équidistance[7].

42. Nous avons repris cet exercice aujourd'hui en y introduisant une nouvelle façon d'établir la ligne provisoire d'équidistance, non point pour le plaisir de montrer la relativité qui affecte inévitablement le tracé de lignes dites provisoires, mais pour aider les membres de la Cour à se forger leur propre jugement, en les priant d'excuser l'audace de cette formule.

43. Nous croyons, en effet, que le rôle d'un conseil devant la Cour ne consiste pas seulement à exposer et soutenir les thèses d'un Etat. Sa tâche est aussi celle d'un auxiliaire de justice qui se doit d'aider la Cour, dans la mesure de ses faibles moyens. Telle était en tout cas l'ambition qui m'a animé. J'espère y être parvenu.

Madame le président, Messieurs les juges, je vous remercie de l'attention que vous avez bien voulu me prêter.

Madam President, as there will be no coffee break this morning, could you please give the floor to Professor Greenwood now.

The PRESIDENT: Thank you, Professor Quéneudec. We now call Professor Greenwood.

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

1. Before the distinguished Agent of Honduras presents the formal submissions of Honduras to the Court, it falls to me briefly — and, given the hour, I promise that I will be brief, Madam President — to sum up the case of Honduras and to show what is in issue between the Parties. While the argument in two rounds of written and oral pleadings has ranged over a large number of subjects, Honduras's case can be summed up in ten propositions.

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[6] DH, vol. I, p. 130-131, par. 8.16-8.20.

[7] CR 2007/10, p. 24-31, par. 123-148.

2. *First,* Madam President, it is clear that the Court is now faced with two separate disputes — one concerning sovereignty over the islands, the other concerning the delimitation of a single maritime boundary. The first of those two disputes was not put to the Court until Nicaragua amended its case on the opening day of the oral hearings, and its closing submissions put the matter in the strangest way — asking the Court to adjudge and declare that the Court has to decide the question of sovereignty, rather than requesting, as is usual, a decision that the islands belong to the claimant State. Nevertheless, Honduras accepts that the issue of sovereignty over the islands is squarely before the Court and that the Court should decide both of those disputes.

3. *Secondly,* in addition to these two disputes, Nicaragua has changed its case again in an attempt to put before you a third issue, namely, the precise location of the last section of the land — or riverine — boundary in the mouth of the river Coco and sovereignty over an island in the mouth of the river. That issue is, of course, governed by the Award of the King of Spain of December 1906. That Award, which is binding on both Parties, determines that the boundary shall follow the thalweg of the main channel of the river. However, Madam President, because Nicaragua did not raise this matter at any time until after the opening of the oral hearings, there is no evidence before the Court as to the location of the thalweg or, indeed, as to which of the channels near the river mouth is the "main channel" identified in the King of Spain's Award.

4. Honduras therefore maintains that the result is that the Court does not have before it the evidence necessary to determine the location of this boundary and therefore the Court simply cannot resolve the question. Accordingly, Honduras maintains the submission, set out in its written pleadings, that the starting-point of the maritime boundary should be a point to seaward of the mouth of the river and that the Parties should be enjoined to agree upon the delimitation of the boundary between that point and the point fixed by the Mixed Commission in 1962.

5. *Thirdly,* the dispute regarding sovereignty over the islands has to be resolved in accordance with the law applicable to title over land territory. That is not in any way altered by the fact that this dispute co-exists with a dispute about the maritime boundary which falls to be decided by application of the Law of the Sea Convention. That Convention is irrelevant to the issue of title to land, whether the land in question is mainland or insular, and irrespective of the size of the territory in question. Moreover, because it is sovereignty over land territory which determines the

course of a maritime boundary and not the other way round, the dispute regarding sovereignty over the islands has to be resolved first. We do not understand that that proposition is seriously contested any longer by Nicaragua, as Mr. Brownlie candidly admitted last Tuesday.

6. *Fourthly*, Madam President, the evidence before the Court shows that it is Honduras which has sovereignty over the main islands — that is to say, Savanna, South Cay, Port Royal and Bobel, as well as the other islands, cays, rocks, reefs and banks which are in dispute. That title is an original title derived from the doctrine of *uti possidetis juris* and confirmed by post-colonial *effectivités.*

7. If, however, the Court is not satisfied that Honduras has such original title, then — and this is our alternative line of argument — the matter falls to be decided by examining which of the two States has made out a superior claim based upon the actual exercise or display of authority over the islands, coupled with the necessary sovereign intent. If that question arises, then the evidence is clear: Honduras, and only Honduras, has manifested an intention to act as sovereign and engaged in the actual exercise of authority over the islands. Nicaragua, by contrast, has made no claim based on *uti possidetis* other than one passing remark by one of its counsel. Instead, it asserts an original title, based on adjacency, which is without foundation in law or in fact. And it has offered *no* evidence of any *effectivités*, *no* evidence that any of its officials has ever even *visited* any of the islands in question.

8. *Fifthly*, once sovereignty over the islands has been determined, it is then for the Court to delimit the maritime boundary. And the Parties agree that this should be a single maritime boundary, and that it should be established in accordance with the provisions of Articles 15, 74 and 83 of the Law of the Sea Convention, and the corresponding principles of customary international law.

9. *The sixth point*, Madam President, is that there is no dispute that Savanna, South Cay, Port Royal and Bobel are islands, within the meaning of Article 121 (1) of the Law of the Sea Convention. They therefore generate a territorial sea in the same way as any other land territory. The same is true of all other islands, cays, rocks, reefs and banks in the area, which meet the criterion of being above water at high tide. The breadth of the territorial sea of both Parties is 12 nautical miles and there is therefore no justification, we say, for employing a different standard

with regard to the islands. Moreover, the base points from which the territorial sea around each island is measured are located on the low-water line, in accordance with Article 5 of the Convention. In addition, since some of the islands in question have fringing reefs or associated low-tide elevations located less than 12 nautical miles from the islands, Articles 6 and 13 of the Convention provide for the use of those reefs and low-tide elevations in constructing the baselines.

10. *My seventh proposition*, Madam President — and it would appear that this is now contested by Nicaragua, whatever it may have said in the past[8] — is that the main islands are not, in the words of Article 121 (3) of the Convention, "rocks which cannot sustain human habitation or economic life of their own". Members of the Court have seen the evidence of contemporary habitation of Savanna and South Cay and of recent habitation on Bobel and Port Royal. Reading the witness statements, it is plain that the inhabitants are not modern-day hermits, deliberately in search of hardship for the body the better to tend to the soul. They are working people who have gone to the islands for economic reasons. Nicaragua's change of tactic in invoking Article 121 (3) is markedly at odds with the facts and shows once again how little Nicaragua knows about the islands it now claims as its own.

11. Since the main islands do not fall within Article 121 (3), they generate an entitlement to a continental shelf and exclusive economic zone as well as a territorial sea. The maritime boundary has to take account of those entitlements and of the right of Honduras to a territorial sea around all of the islands, rocks, reefs, cays and banks under its sovereignty.

12. Turning then, Madam President, to the maritime boundary, *the eighth proposition* concerns the starting-point for that boundary. For the reasons I have already summarized, that starting-point cannot be located at the point fixed by the Mixed Commission in 1962 and will therefore have to be located seaward of the mouth of the river. Both States have offered points to serve as starting-points. The Honduran one is to be preferred because it is neutral as regards the dispute over the location of the thalweg and the impossibility of resolving that dispute in these proceedings is the reason for using a seaward starting-point in the first place. The Honduran

[8]Contrast CR 2007/11, p. 33, para. 12 (Pellet) with CR 2007/1, p. 62, para. 45 (Elferink).

starting-point, which is shown on CJG3.1, is located at 14° 59.8' N latitude, 83° 05.8' W longitude, and it is on the same line of latitude as the Mixed Commission point.

13. *Ninthly,* Madam President, once the starting-point has been determined, it is then necessary to determine the methodology to be followed. Honduras maintains that there is no reason to depart from the practice almost universally adopted in the modern jurisprudence, both of this Court and of other tribunals, that is to begin with a provisional equidistance line, and we see one shown here on CJG3.2 — that is, in fact, taken from the diagram that Professor Quéneudec has just shown you. The line shown has been presented earlier by Honduras but it is also instructive to consider the provisional equidistance line belatedly offered up by Nicaragua, which is shown on the next slide (CJG3.3). We would, of course, take issue with this line in its first section, where it has been constructed on the basis of assumptions which are unfounded and are certainly not supported by evidence regarding the location of the thalweg and the title to an island in the mouth of the river Coco.

14. The Court will, though, have noted that the Nicaraguan provisional equidistance line uses base points on both Media Luna and Logwood, which are shown as islands on the British charts officially recognized by Nicaragua. That fact will, of course, be reflected in our answer to the question asked by His Excellency Judge Gaja earlier this week.

15. Although Honduras contends that the maritime boundary follows a different course from the provisional equidistance line, it nevertheless recognizes the utility of the provisional equidistance line as a tool for determining the equitable nature of the maritime boundary proposed.

16. *Lastly,* Madam President, Honduras contends that the maritime boundary should follow the 15th parallel — or to be more precise, the line 14° 59.8' N — from the starting-point, eastwards until the jurisdiction of a third State is reached. That is depicted here on diagram No. 4 (CJG3.4) which, again, is taken from the pictures Professor Quéneudec has just shown you.

17. Honduras maintains that there are four principal reasons for the adoption of this line.

18. *First,* the evidence shows that it is the traditional boundary between the maritime spaces of the two States, rooted in *uti possidetis juris* and in the practice of the Parties over a long period.

19. *Secondly,* this line takes account of the islands falling under the sovereignty of each Party while not giving them the entirety of the maritime spaces to which they would be entitled. By

contrast, Nicaragua's line ignores the islands completely. Although Mr. Brownlie denied that earlier this week, it will not have escaped the Court's notice that he said nothing at all about how his bisector line was influenced by the islands, and that for the very good reason that they plainly had no influence upon it at all. As for Nicaragua's last-minute suggestion of a 3-mile enclave around the islands — in answer to the question by His Excellency Judge Keith — well, that was a prayer for mercy between the stirrup and the ground, if ever there was one. It is contrary to principle, it disregards the fact that both States have long claimed a territorial sea of 12 — not 3 — miles, and it has no precedent in a geographical configuration of the kind which we see here, as Mr. Colson has just demonstrated.

20. *Thirdly*, Madam President, the Honduran line takes account of all relevant circumstances, in particular, the geographical circumstances of the relevant coasts on either side of the land boundary at the mouth of the Rio Coco, the area that lies off those coasts, the islands that belong to each Party, and the conduct of the Parties that reflects agreement over a long period regarding many issues, including that of equitable access to natural resources.

21. *Lastly*, the Honduran line meets the need — identified by both Parties — for a line which is simple and clear.

22. Madam President, Honduras recognizes that its line entails a departure from the provisional equidistance line — though, it must be added, to the benefit of Nicaragua, not to Honduras. In advancing that line, Honduras has been faithful both to principle and to the *modus vivendi* followed by both States until 1979. It has done that rather than adopting the popular litigation tactic of advancing a maximalist claim in the hope that the Court will "split the difference". Nevertheless, Honduras accepts that, if the Court rejects its submission — that the 15th parallel is the existing maritime boundary between Honduras and Nicaragua — then an adjusted equidistance line provides the basis for an alternative boundary.

23. Madam President, I thank the Court for its kind attention and invite you to call upon His Excellency Ambassador Roberto Flores Bermúdez, to close the case of Honduras.

The PRESIDENT: Thank you, Professor Greenwood. I now call upon His Excellency Ambassador Flores Bermúdez.

Mr. FLORES:

Final submissions by the Agent for Honduras

1. Madam President, distinguished Members of the Court, it is my honour as Agent of Honduras to appear before you to present the final submissions of Honduras.

2. Before doing so I hope that you might permit me to make a few brief concluding remarks on three basic points which touch on themes that have recurred throughout the hearing.

3. *First*, a word about the islands of which you have heard so much. Honduras has always thought that it would be difficult to dissociate the islands from the mainland territories of each province when they became independent in 1821. That is why we have always taken the view that just as Cape Gracias a Dios has marked the boundary between the mainland territories of the two countries — as the King of Spain's Award confirmed just over 100 years ago — so the 15th parallel, which runs from Cape Gracias a Dios operates as the boundary between the island territories of the two States.

4. Madam President, you and your colleagues have heard detailed legal argumentation on that question. Let me just add a personal note. I have listened with some surprise to the speculation from the Nicaraguan team about what conditions on those islands might be like. And, I say "with surprise" — because I have no need to speculate about the islands; as Foreign Minister of my country I have been there, as have several of the Honduran counsel. I have visited the islands. I have talked with the members of the fishing communities who live there. They are few in number but that does not make them insignificant or relegate their concerns, their livelihoods and their way of life to the footnotes of legal pleadings.

5. Life on those islands may not be easy but the fisher folk have built a thriving community there. It is a community that has recognized Honduran jurisdiction for many decades. It is the Government of Honduras — the Government which I have the honour to represent and of which I was formerly a Minister — which alone has sought to fill the functions of government in those islands. Indeed, it is the only Government whose representatives have ever set foot on them in modern times.

6. You get an important taste of that community's way of life from their witness statements but going to the islands and meeting the people paints a picture which no witness statement can adequately express.

7. *The second issue*, Madam President, bears on the single maritime boundary. Nicaragua's application seeks a new maritime boundary with Honduras in the Caribbean Sea. This new maritime boundary has been designed without regard to the real geography of the area and is wholly unsuited to the facts on the ground, the practice of the Parties over many decades or the equitable circumstances which figure so large in the law of the sea.

8. Our counsel has explained why Nicaragua's far-reaching claim has no legal, geographical or historical basis. We believe it is right that the Court should first confirm Honduras's title on the islands. And only after that can it turn to the question of maritime delimitation. It should do so on the basis of the rules set forth in the 1982 Convention. As you have heard this morning, it is entirely in accordance with those rules for the Court to uphold the traditional maritime boundary along the 15th parallel, which is firmly grounded in history and in the practice of the Parties over several decades, a practice which amounts to a tacit agreement. The traditional line achieves an equitable solution. It respects both Parties' historic uses and titles. It respects many years of oil concessions and of fisheries licences. It respects the need for stability and finality in the maritime boundary, in accordance with the 1906 Arbitral Award.

9. *Lastly*, Madam President, let me say a word on the relationships between Honduras and Nicaragua. We are conscious that the resolution of this dispute will allow the Parties to continue to develop close and fraternal relations. Over the past seven years, Honduras has sought to participate in these proceedings with respect for the Court and recognition of the close and friendly relations we have with our neighbour. Although, during these oral proceedings my good friends across the room have attempted to question the integrity of our evidence, though falling short of accusing us of fabricating an ethereal presence in this courtroom to influence decisions, we remain confident that our differences on this case will come shortly to an end.

10. We look forward, working together with Nicaragua, to make the best of our commonalities, our shared destiny in the Central American integration process and in our joint

engagement in global issues that concern us both. We are sure that the judgment of the Court will be a valuable asset for that purpose.

11. Madam President, pursuant to Article 60 of the Rules of Court, I shall now read the final submission of the Government of the Republic of Honduras.

Having regard to the pleadings, written and oral, and to the evidence submitted by the Parties,

May it please the Court to adjudge and declare that:

1. The islands Bobel Cay, South Cay, Savanna Cay and Port Royal Cay, together with all other islands, cays, rocks, banks and reefs claimed by Nicaragua which lie north of the 15th parallel are under the sovereignty of the Republic of Honduras.
2. The starting-point of the maritime boundary to be delimited by the Court shall be a point located at 14° 59.8' N latitude, 83° 05.8' W longitude. The boundary from the point determined by the Mixed Commission in 1962 at 14° 59.8' N latitude, 83° 08.9' W longitude to the starting-point of the maritime boundary to be delimited by the Court shall be agreed between the Parties to this case on the basis of the Award of the King of Spain of 23 December 1906, which is binding upon the Parties, and taking into account the changing geographical characteristics of the mouth of the river Coco (also known as the river Segovia or Wanks).
3. East of the point at 14° 59.8' N latitude, 83° 05.8' W longitude, the single maritime boundary which divides the respective territorial seas, exclusive economic zones and continental shelves of Honduras and Nicaragua follows 14° 59.8' N latitude, as the existing maritime boundary, or an adjusted equidistance line, until the jurisdiction of a third State is reached.

To conclude our participation in this stage of oral proceedings, I wish to express, on behalf of the Agents and Co-Agent of Honduras and of our distinguished counsel, the skilful advisers and counsellors and of all the members of our delegation, our deepest appreciation to you Madam President, and to each of the distinguished Members of the Court, for the attention you have kindly provided to our presentations.

May I also offer our thanks, Madam President, to the Court's Registry and to the team of interpreters and translators who have not only had to listen to and read our presentations, but even

to repeat them. Our recognition is also extended to the Nicaraguan delegation and to its counsel for their contribution to these proceedings.

Thank you, Madam President.

The PRESIDENT: Thank you very much, Your Excellency. The Court takes note of the final submissions which you have read on behalf of the Republic of Honduras as it took note on Tuesday 20 March of the final submissions of the Republic of Nicaragua.

This brings us to the end of three weeks of hearings devoted to the oral arguments in this case. And I should like to thank the Agents, counsel and advocates for their statements and for the helpful folders prepared for us in accordance with Practice Direction IX*ter*. In accordance with the usual practice I shall request both Agents to remain at the Court's disposal to provide any additional information it may require.

With this proviso, I now declare closed the oral proceedings in the case concerning *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras).* The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment.

As the Court has no other business before it today, the sitting is now closed.

The Court rose at 11.55 a.m.