

CR 2007/11

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2007

Public sitting

held on Monday 19 March 2007, at 3 p.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 19 mars 2007, à 15 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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M. Scott Edmonds, cartographe, International Mapping,

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comme conseillers techniques.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of the Republic of Nicaragua. Nicaragua has this afternoon until 6 o'clock and tomorrow from 10 a.m. until 1 p.m. for this purpose. So I now give the floor to His Excellency, Dr. Argüello Gómez.

Mr. ARGÜELLO: Thank you, Madam President.

1. Madam President, Members of the Court, at the start of the second round of oral pleadings, it is necessary to set the record straight on certain assertions made by the Honduran Government during the first round of pleadings.

Free trade treaty of 1998

2. Honduran counsel assured the Court repeatedly last week that the Government of Nicaragua had signed a treaty, a free trade agreement, in the Dominican Republic on 16 April 1998 called in Spanish the “Tratado de Libre Comercio Centroamerica-Republica Dominicana”, which defined the territory of Honduras as including the cays presently in dispute. Furthermore, Honduran counsel fearlessly attested that this treaty was “approved by Nicaragua’s own National Assembly on 23 November 2000, by Decree No. 119-2000” (CR 2007/7, pp. 46-47, paras. 60-62).

3. Madam President, Members of the Court, this statement by Honduras is simply not true. A free trade treaty was signed in Santo Domingo on the dates indicated but this treaty had no such description of the Honduran territory. Honduras has not provided a text of this treaty or the appropriate references as to where the authoritative text might be located, but simply provided in the judges’ folders a highlighted excerpt of what was alleged to be the relevant text. This morning, Nicaragua deposited with the Registry two copies of the full text of this treaty in its original and only official language — Spanish — with a translation of the pertinent text. The full text of this treaty can also be read and verified in the web page of the Nicaraguan Assembly and the web page of the SIECA, Secretaria de Integracion Centroamericana (Secretariat for Central American Integration) (<http://www.sieca.org.gt/op3-2.htm>). We have also included in the judges’ folders a copy of the relevant article of the treaty taken from the publication of the Nicaraguan *Gazette* of 7 March 2002, No. 46 (judges’ folders, doc. No. 1) and, as an added example, the same relevant

passage in the *Gazette* of El Salvador of 27 May 1999, No. 98 (judges' folders, doc. No. 2). (CAG2-1) The relevant article is Article 2.01 in Chapter II titled "General Definitions" (CAG2-2). Article 2.01 reads: "Definitions of general application. Unless otherwise stated, for the purposes of this law, it will be understood that: . . . (CAG2-3) Territory: refers to the territory of each of the Parties." No annexes were tied to this Article. No other definition was given of the territory of each Party.

4. Therefore,

(a) I categorically attest and declare that the so-called excerpt from "Annex to Article 2.01" to the 1998 free trade agreement reproduced in the graphic identified as PS1-23-2 is not a true and valid annex to the said treaty.

(b) The Decree of the Nicaraguan National Assembly, approved on 23 November 2000 and published in *La Gaceta* No. 226 of 28 November 2000, sanctioned the treaty of 1998 as it reads in the copy deposited in the Registry by Nicaragua. This can be confirmed in the web pages indicated above. This treaty had no annex with the description of the Honduran territory put forward by Honduras's counsel last week. The excerpt from this Decree reproduced in graphic PS1-24 of the judges' folders which purports to have ratified the treaty with the non-existent annex is therefore, to say the least, misleading.

5. Honduran counsel concluded his remarks on the consequences of the alleged text of this treaty as follows:

"This treaty of free trade explicitly recognizes Honduran sovereignty over the islands. It makes a nonsense of the argument as to the critical date. There was no dispute over sovereignty of the islands in 1998 when the treaty was signed in April of that year, there was no dispute over sovereignty in the islands when that treaty was approved by Nicaragua's National Assembly in November 2000. There was no dispute over sovereignty in the islands when Nicaragua's instrument of ratification was deposited in 2000. Quite simply, this treaty demolishes Nicaragua's claim to sovereignty over the islands. It is totally unarguable." (CR 2007/7, p. 47, para. 62.)

6. I will not say more on this issue that has been brought before the Court until the last moment, but request that the Court draw the obvious consequences from this incident. These consequences are totally unarguable.

INPESCA fishing contract

7. The second assertion by Honduras that must be set straight was made by Professor Sands while attempting to set aside any Nicaraguan *effectivités* in relation to fishing activities north of the 15th parallel. He referred to a lobster fishing permit that extended to the north of the 15th parallel, that was granted to a Mr. Ramon Sánchez Borba on 17 November 1986 by the Nicaraguan fisheries authorities (INPESCA). Allegedly this was protested by the Honduran authorities at the highest level. According to Honduran counsel the Nicaraguan reaction was to amend the contract limiting the fishing permit to areas south of parallel 15 (CR 2007/7, p. 35, para. 35).

8. This assertion had first been made in the Honduran Counter-Memorial (para. 6.50) and Nicaragua pointed out in its Reply that Honduras did not produce “the note with which the Nicaraguan Foreign Minister would have responded to the missive from his Honduran counterpart, had the latter been received”. Furthermore, Nicaragua indicated that the purported modification of Clause 6 of the concession “appears in a certification signed not by Luis Adrián Pichardo Chávez, who signed the [original] INPESCA concession, but rather by an unnamed legal adviser, who in any case lacked the power to make such a modification”. And that “according to Article 6 of the Organic Law of INPESCA the General Director — and Assistant Director if invested with this responsibility — was the only person authorized to sign and modify contracts with persons to whom fishing licenses were granted”. Nicaragua provided a sworn statement from the then General Director of INPESCA, Dr. Pichardo Chávez. Dr. Chávez stated that he did in fact sign the contract with Mr. Sánchez Borba and that he was the only person authorized to modify said contract. He further stated “during the entire time that he worked at INPESCA [he was General Director until 1988] he never authorized any modifications to that contract”. And Dr. Pichardo Chávez adds, “in no case were these [areas for fishing exploitation] limited to spaces south of Parallel fifteen (15)”. INPESCA, he concludes, “had several Legal Advisors, but their responsibilities did not include the power to sign or modify fishing concession contracts, therefore, any such actions by any of those Advisors would have been in violation of the Statutes of the institution and without any legal value” (see RN, Vol. II, Ann. 38, p. 174).

9. At the time Nicaragua was preparing the Reply to the Honduran Counter-Memorial it was under the constraint that the pleadings before the Court were subject to limitations on the

publication of their content. Therefore, although it was obvious to Nicaragua that the facts put forth by Honduras could not have any basis on reality, the liberty for investigating the matter was limited. The relations between Nicaragua and Honduras in 1986 and 1987 were very tense. In fact, Nicaragua had filed a case against Honduras before this Court in July 1986, the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*. Furthermore, Honduras had a few days later signed a treaty with Colombia whereby each party recognized all the territorial claims they had against Nicaragua, including the Honduran allegation that the 15° N parallel was the delimitation line in the Caribbean. The signing of this treaty was protested by Nicaragua in no uncertain terms, reminding Honduras in a Note of 8 September 1986 that the treaty “pretends to divide between Honduras and Colombia extensive zones that include insular territories, adjacent seas and continental shelf that historically, geographically and legally correspond to the sovereignty of Nicaragua” (MN, Vol. II, Ann. 70, p. 162).

10. In any case, the Nicaraguan Reply as already indicated made clear what must seem obvious under any legal system, that one of the legal advisers of the Nicaraguan fishing institute, INPESCA, was not authorized to negotiate or alter contracts of that institute. Furthermore, that the Nicaraguan Foreign Ministry had no records of the Note purported to have been sent by the Honduran Foreign Ministry with respect to this fishing contract.

11. Since the pleadings of this case have now been made available to the public, we have with less constraints been able to investigate this matter further. This very superficial investigation now that the present proceedings have been made public has brought to light — or at least to our attention — the following quite pertinent facts necessary to properly evaluate this issue.

12. The “legal adviser” that signed the document annexed to the Honduran Counter-Memorial as Annex 124 and of which an excerpt is reproduced in the graphics attached to the judges’ folders by Honduras — graphic PS2-24 — accompanying the presentation of Professor Sands, is Mr. Octaviano Ocon Lacayo. This person has the following record that we have found in a preliminary search:

- (i) he was suspended for a period of two years as a Notary and Attorney by the Nicaraguan Supreme Court in 1992, by judgment of 4 December 1992, for irregularities in the exercise of his duties;

(ii) he was again suspended in the exercise of his duties for a period of five years for further irregularities by judgment No. 129 of the Supreme Court of 3 September 1996. The pertinent passages of this judgment might be illustrative. The Supreme Court said:

“Whereas:

the Supreme Court of Justice has the faculty to pursue information on all cases reported to it or of which it otherwise has cognizance and in which an official crime has been committed by a lawyer and notary public . . . In the present case, the Court gave ample opportunity to Dr. Octaviano Ocon Lacayo, to inform whatever he wished with respect to the complaints filed against him . . . but Dr. Ocon Lacayo ignored the issue . . . Furthermore, the recidivism of this professional is fully proved, since in spite of being under the prior sanction of the suspension of his professional duties, he continued acting as such . . .

Therefore [the Supreme Court] resolves:

I. To admit the complaints filed by Mr. Victor Manuel Mayorga Sanchez, Mr. Edgard Jose Zamora Peralta and Mrs. Maria Esther Gomez Castillo against Doctor Octaviano Ocon Lacayo.

II. In consequence, to suspend Doctor Octaviano Ocon Lacayo, for the term of five years in the exercise of his profession as an attorney and notary public . . .”

13. A certification of the record of Mr. Ocon given by the Supreme Court of Nicaragua has been filed with the Registry and is now also on the screen (CAG2-4). The two decisions cited in the certification may also be perused in the web page of the Nicaraguan Supreme Court, (http://www.poderjudicial.gob.ni/bijun/2002/Sente_fmto_web/1990_1997/1996/BJ018129.htm).

14. It should be pointed out that the suspension by the Supreme Court is independent of any criminal or civil charges that may be brought against the lawyer or notary who is being sanctioned. The constraints of time since the oral pleadings of last week have not made it possible to obtain further information on Mr. Ocon with the exception of the information published in the Nicaraguan newspapers that he is currently being accused for falsifying a public deed. (<http://legislacion.asamblea.gob.ni/NoticiasWebs.nsf/0/0cdb4989ec2ea07e06256ff8006416bd?OpenDocument&Click=>)

15. It should also be added, that independently of the proceedings before this Court, now that the information of Mr. Ocon’s actions have come under public knowledge, the Nicaraguan authorities are under the constraints of Nicaraguan law and will have to investigate and ultimately

prosecute Mr. Ocon for falsification of public documents and/or usurpation of public functions or whatever other criminal category his behaviour might fall under.

16. Professor Sands's summary of his version of this incident was to apologize to the Court "for descending into such mind-numbing detail, but we are really concerned that the Court should be directed to specific evidence so that it can see for itself what the evidence actually says, not what Nicaragua claims that it says" (CR 2007/9, p. 29, para. 36).

17. I certainly agree with the distinguished Honduran counsel that apologies are in order and that the Court should "see for itself what the evidence actually says".

Conduct of Nicaragua since 1979

18. The claim of change of conduct by Nicaragua since 1979 was made on several occasions in the written pleadings. During my first pleading, I stated that,

"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" (CR 2007/1, p. 30, para. 53).

19. This statement was followed by a tour of the position of the Governments of Nicaragua since the 1970s to the present on the issue presently in dispute before the Court; that is, an overview of the position on the maritime issues between Nicaragua and Honduras from the period of the Somoza Governments dating from 1936 to 1979, to the present-day Government in office since January of this year (CR 2007/1, pp. 31-33, paras. 54-61).

20. I presumed that prudence would dictate to Honduras to let this issue be. But it has been directly and indirectly played up during these oral pleadings. Thus, Professor Piernas said:

"Je me propose également de prouver, ensuite, que la position et la conduite du Nicaragua, par rapport à la fixation du 15^e parallèle comme limite maritime entre les deux Etats, ont radicalement changé en 1979, avec le triomphe de la révolution sandiniste." (CR 2007/7, p. 48, para. 6.)

21. Professor Sands took the question for granted and stated that,

"Nicaragua's oil concessions confirm tacit agreement between the Parties, peacefully applied as such for approaching two decades, until 1979 when Nicaragua saw fit to unilaterally change its practice." (CR 2007/9, p. 21, para. 20.)

22. And, in the final pleading, Mr. Colson apparently considered closing the issue by saying that: “Before the change in government in Nicaragua in 1979, Nicaragua made no claim to jurisdiction north of the latitude of Cabo Gracias a Dios.” (CR 2007/10, p. 19, para. 103.) And added: “But Nicaragua has chosen to disavow what has gone before. As a political matter that may be its right, but international law transcends such political changes.” (CR 2007/10, p. 36, para. 166.)

23. The conclusion should thus apparently be that since Honduras has now “said it thrice” what it tells us three times is true, as the Bellman cried in the poem of the “Hunting of the Snark” by Lewis Carrol¹.

24. So, unfortunately I will be constrained to bring the snark out into broad daylight.

25. The attempt by Honduras to portray before this Court the events after 1979 as being caused by a change by the Nicaraguan Government of its previous territorial policy is frankly beyond words. It was this same Court to which Nicaragua had recourse in March 1984 when it filed an Application that initiated the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. It was this same Court to which Nicaragua had recourse in July 1986 when after the Judgment in the previous case it filed a parallel Application against the Government of Honduras that is known as the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*. Both of these cases involved *inter alia* armed actions against Nicaragua from Honduran territory. Most of these were land incursions but there were also numerous encounters at sea both in the Caribbean — including the areas presently in dispute and further south — and in the Gulf of Fonseca on the Pacific side.

26. To come now before this Court and attempt to portray Nicaragua as the aggressor against Honduran territory is again, I repeat, beyond words. The change of policy that occurred was on the part of the Honduran authorities who considered that the difficult international situation Nicaragua

¹“The Hunting of the Snark”, by Lewis Carrol

“Just the place for a Snark! the Bellman cried,
As he landed his crew with care;
Supporting each man on the top of the tide
By a finger entwined in his hair.

Just the place for a Snark! I have said it twice:
That alone should encourage the crew.
Just the place for a Snark! I have said it thrice:
What I tell you three times is true.”

was going through, lent itself to pushing forward its most aggressive and maximalist territorial policies. With this statement I am not attempting to turn the issue on its head. This was exactly the position that Nicaragua asserted before this Court in June 1991 during the oral pleadings in the case between Honduras and El Salvador in which Nicaragua was granted a limited right of intervention; I refer to the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*. In this case, the position of Honduras in its dispute with El Salvador involving the Gulf of Fonseca had been, as late as 1978, that no agreement could be reached if Nicaragua was also not a party. When that case came before the Court in 1986, the position of Honduras had changed and it was more than willing to divide up the waters in that area without the intervention of Nicaragua. In view of this volte-face of Honduras, the Agent of Nicaragua in that case stated — and the Court will excuse me for quoting myself since I was that Agent:

“It would be quite surprising if Honduras — as late as 1978 — had believed the situation in the Gulf gave it rights outside the Gulf, to have omitted any reference to this important consideration . . . Perhaps the difference was that in 1978 Nicaragua was not in the same international situation as in 1986 when the *compromis* was signed: in troubled waters abound fishermen.” (CR 91/43, pp. 25-26.)

27. It should be noted that these pleadings were taking place just over one year after the Sandinista Government was out of power in Nicaragua and a new Government was in place.

28. But going back to what had been happening in the 1980s, it is illustrative to recall some of the early events and incidents relating to the maritime spaces presently in dispute.

29. In 1982 Nicaraguan coastguards captured some Honduran fishing boats in the area that is presently in dispute before the Court. This incident originated the first official claim by Honduras that the 15th parallel was the line of maritime delimitation. Honduras sent a Note of protest to Nicaragua dated 23 March 1982 stating that,

“On Sunday the 21st of this month, two coastguard launches of the Sandinista Navy penetrated as far as Bobel and Media Luna Cays, 16 miles to the North of Parallel 15. This has been traditionally recognised by both countries to be the dividing line in the Atlantic.” (MN, Vol. II, p. 44.)

30. The Reply of the Foreign Minister for Nicaragua dated 14 April 1982 is most illustrative:

“Your Excellency refers in your Note that on Sunday, March 21st, two of our Coastguard ships ‘penetrated as far as Bobel and Media Luna Cays, 16 miles to the North of Parallel 15. This has been traditionally recognized by both countries to be the dividing line in the Atlantic.’ This affirmation, to the least, surprises us, since Nicaragua has not recognized any maritime frontier with Honduras in the Caribbean

Sea, being undefined until today the maritime boundary between Honduras and Nicaragua in said sea.”

It must be recalled that this is the year 1982 and that these territorial claims referred to the 15th parallel and Bobel and Media Luna Cays . . . and so the Note I am quoting went on to point out that:

“Nicaragua observes with profound surprise and concern that the Enlightened Government of Honduras, is recently referring to certain territorial matters in a somewhat hasty manner, under difficult circumstances, as if these sudden and excessive territorial aspirations were destined to devise the pretexts to justify a major scale of aggressions against Nicaragua.” (MN, Vol. II, pp. 44-45.)

31. A year later, on the occasion of replying to other incidents, the Nicaraguan Foreign Minister addressed a Note to his Honduran counterpart on 19 April 1983, stating that:

“Nicaragua cannot accept the considerations you state in your Diplomatic Note when you say that the Bobel and Media Luna Cays are located in jurisdictional waters of Honduras. As the same Government of Honduras has admitted on different occasions, those territories are not Honduran territories. It is opportune to recall that Nicaragua has not delimited its jurisdictional waters in the Caribbean Sea, this being the only zone that is pending delimitation between our two countries.

Finally, it is convenient to clarify that the meetings between our respective Naval Chiefs did not succeed nor could they continue, not because of Nicaragua, but rather due to *the attitude assumed by the Armed Forces of Honduras in increased support to Somocista mercenaries who attack our country*, and also to the attacks upon our territory by that same army.” (MN, Vol. II, pp. 48-49; emphasis added.)

32. This correspondence from the early 1980s highlights what was really happening. Honduras was attacking, among several other places, the Nicaraguan positions in the area in dispute and not the other way around. If there is any doubt on this point, it might be well to consult the cases brought by Nicaragua before this Court when it was under attack by Honduran forces and forces operating out of Honduras. In passing it might be recalled that both the United States and Honduras contested the jurisdiction of the Court and tried to avoid by all means having those cases come before it. If it had been a question of Nicaragua attacking Honduran territory the jurisdiction of this Court would have been courted and not avoided. But, 20 years later Honduras now comes spinning the story around and it turns out that Nicaragua was attacking Honduras!

33. Mr. Colson ended his reference to the issue of the presumed change of position of the Nicaraguan Government in 1979 in relation to its purported previous agreements on boundaries by declaring that “international law transcends such political changes”. Nicaragua certainly agrees with Mr. Colson and has been proving it with deeds since at least the 1980s.

Colombia

34. Parallel to the allegations of Nicaraguan change of conduct, Honduras claims that this change that purportedly occurred in 1979 can also be seen with respect to Nicaragua's relations with Colombia.

35. In spite of the impression an outsider to this case might receive after listening to the pleadings and the repeated mentions of Colombia, the dispute of Nicaragua with that State is another issue that is independently before the Court. Therefore, I will limit my comments to the bare minimum.

36. The dispute with Colombia did not begin in 1979. It began many years before that date. Colombia claimed for the first time in the 1960s that a treaty it had signed with Nicaragua in 1928 had delimited the maritime areas between both States even though this limit according to Colombia ran along the 82nd meridian of longitude which is located more than 90 miles from the coast of Nicaragua. Nicaragua protested this claim immediately it was made, that is, in the 1960s. Furthermore, Nicaragua claimed sovereignty over some cays that are still presently under dispute with Colombia. Thus Nicaragua protested a 1972 treaty of Colombia with the United States of America whereby the latter apparently seemed to disregard the Nicaraguan claim to these cays. All this information may be found in the appropriate place: the Application and Memorial filed by Nicaragua against Colombia in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.

Legislation

37. Honduras has tried to make an issue of its legislative references to the cays located in the area in dispute. Particular emphasis has been placed on the Honduran Constitutions of 1957, 1965 and 1982 that purportedly include certain of these maritime features in their description of Honduran territory.

38. Conversely, the fact that the Nicaraguan Constitutions have no mention of these features is attempted to be portrayed as signifying that Nicaragua did not consider these features to be part of its territory. The pertinent Articles referring to national territory in the Nicaraguan Constitutions from 1948, 1950 and 1974 are reproduced in the Nicaraguan Reply (Vol. II, Ann. 34, p. 163). In

effect, the Nicaraguan Constitutions only describe the national territory in the most general terms.

Thus Article 5 of the 1950 Constitution is typical:

“The national territory extends between the Atlantic and Pacific Oceans and the Republics of Honduras and Costa Rica. It also includes the adjacent islands, the subsoil, the territorial sea, the continental shelf, the continental slopes and the air space and the stratosphere.”

The 1987 Constitution approved during the Sandinista Government has no flights of fancy like its Honduran counterparts — in spite of the Honduran claims of a Sandinista policy of territorial aggression — and this Constitution simply reiterates the basic content of the 1950 Constitution cited above.

39. No special reference is made to the insular territories apart from stating that the national territory “also includes the adjacent islands”. This is not because Nicaragua attaches no importance to its insular territories since it has significant islands in the Caribbean, such as Corn Island and Miskito Cay. These two islands, respectively, are over 10.5 and 21.6 km² in size and are permanently and considerably inhabited. These islands are over 420 and 1,000 times larger than the largest cay presently in dispute, and are not singled out by name in the Nicaraguan Constitutions. Therefore, no inference must be made or can be made from the absence of any mention by Nicaragua to the insignificant features involved in this case.

40. Nicaragua does not believe that by listing territories in its Constitutions it would acquire or establish sovereignty over them. Honduras on the other hand has had a different approach to the definition of its territory in its Constitutions. Generally, mention is made in these Constitutions of specific features of the national territory claimed by Honduras even if it is under contention with third parties.

41. Thus, for example, Article 10 of the Honduran Constitution of 1982 for the first time — and I repeat, for the first time — listed in its national territories certain cays over which it claimed sovereignty:

“The following belong to Honduras: the . . . cays: Zapotillos, Cochinos, Vivorillos, Seal or Foca (or Becerro), Caratasca, Cajones or Hobbies, Mayores de Cabo Falso, Cocorocuma, Palo de Campeche, Los Bajos, Pichones, Media Luna, Gorda and Los Bancos, Salmedina, Providencia, De Coral, Cabo Falso, Rosalinda and Serranilla and all others located in the Atlantic which historically, geographically and juridically correspond to it.”

42. This list included for the first time Media Luna, which is presently in dispute with Nicaragua; Rosalinda, which has several claimants including Nicaragua and Honduras; and also Los Bajos and Serranilla. The inclusion of these latter two will serve to amply illustrate the irrelevance of any mention of territory in the Honduran Constitutions.

43. To begin with Serranilla cays. These cays claimed by Honduras in its Constitution for the first time in 1982, were recognized as Colombian territory in the treaty Honduras signed with that country four years later, on 2 August 1986. Is this to be taken as a sign of the importance that States have to give to the wishful thinking expressions contained in the territorial definition of the Honduran Constitutions? Does this imply that States must be attentive to protest any of these wishful thinking manifestations in the Honduran Constitutions?

44. Since Nicaragua claims the cays Honduras graciously recognized as Colombian, with the generosity of one who gives away what does not belong to him, Nicaragua sent a protest Note to Honduras reaffirming its sovereign rights over the cays recognized as Colombian in that treaty and to all the other cays in the area presently in dispute. The pertinent part of the protest Note of 8 September 1986 reads as follows:

“The referred instrument pretends to divide between Honduras and Colombia extensive zones that *include insular territories*, adjacent seas and continental shelf that historically, geographically and legally correspond to the sovereignty of Nicaragua.

.....

On the basis of the inalienable rights of Nicaragua to protect and defend the territorial integrity of the nation, the Republic of Nicaragua rejects the treaty subscribed between Honduras and Colombia on August 2, 1986; it manifests that it does not recognize nor admits any effect whatsoever of the referred instrument, and *reaffirms its sovereign rights over the Cays, sandbars and islands that constitute the maritime and insular territory of Nicaragua* to which the treaty in question pretends to apply.” (MN, Vol. II, Ann. 70, p. 162; emphasis added.)

45. It must be emphasized that up until this moment— 1986— Honduras had never officially claimed sovereignty over the cays presently in dispute. The only prior references to the cays in dispute were in the context of claiming that these features were located north of the 15th parallel. But even up to the moment of signing the treaty with Colombia in 1986, Honduras had made no official claim to sovereignty over these cays independently of their location.

Therefore, it is the more telling that Nicaragua was the first to officially lay claim to those cays in the Note above cited.

46. Up to the present I have been referring to the Honduran Constitution of 1982 which is the first one to refer to the cays just mentioned of Serranilla and also to Media Luna. The Constitutions prior to this date do not mention Media Luna. The only cay mentioned in those Constitutions which Honduras claims is located in the area in dispute is the Cay Palo de Campeche.

47. Honduras claims that the reference to Palo de Campeche is a reference to a cay in the area in dispute that was always known as Logwood Cay. But Honduras has not proved that Palo de Campeche is one and the same as the Logwood Cay located in the area in dispute in international charts that date from the earliest times. There are no official Honduran maps referring to Palo de Campeche in that area. The only map Professor Sands was able to conjure up with the name Palo de Campeche is an unofficial map dating from 1933. The Honduran official map from that same year has no mention of Palo de Campeche, as is the case with all Honduran official maps.

48. It is true that Campeche can be translated as "Logwood" but this does not mean automatically that the names are interchangeable. For example, the 1971 *Indice Geografico of Nicaragua*, which is in Spanish, lists the following islets as pertaining to Nicaragua under the following names: Media Luna: Logwood, Bobel, Savanna, South, Half Rock, Alargado Reef and Cock Rock. Some of the names are given in Spanish, if they are known under that name, such as Media Luna and Alargado, and the others under their English appellation. This same practice is reflected in the names given to these features in the graphics specially prepared for this case and that have been presented by Honduras. For example, graphic PMD-1 refers to Cayo de la Media Luna and Arrecife Alargado, but to Savanna Reefs and Port Royal Cay.

49. But the important question is not whether this Palo de Campeche is or is not one and the same as the Logwood Cay in the area in dispute. The whole Caribbean area was used for the exploitation of trees and it is not unusual for cays to have been accorded this name. The names of cays are recurrent. Thus, we have a Media Luna cay that is part of the very important island chain of Honduras further north, the Bay Islands.

50. The more important question is why this Palo de Campeche Cay, even if it is the original Logwood Cay, should be singled out in the Honduran Constitution and should have provoked a

reaction from Nicaragua? The Counter-Memorial of Honduras clearly states that: “The original Logwood Cay and Media Luna Cay are both now submerged.” (CMH, Vol. 1, p. 14, para. 2.3, footnote 2.)

51. This provokes two further remarks: if Palo de Campeche is really Logwood Cay as Honduras would have, then why did the Honduran Constitution single out a feature that is permanently submerged to grace its listing of national territories? And even more to the point, why list Palo de Campeche that, if it is located in the area in dispute, is permanently under water and not mention the cays that Honduras is presently singling out as being part of their national territory, that is, Bobel, Savanna, Port Royal and South Cays? Is it not rather strange that the Honduran Constitutions do not list as part of the national territory any of the cays presently claimed by Honduras that lie to the south of the Main Cape Channel and to the direction of the bisector claimed by Nicaragua?

52. One important fact to be considered is that the cays listed in the Honduran Constitutions put forth in these oral pleadings, that is, Gorda, Vivorillos, Cajones, Cocorocuma, Caratasca, Falso, Cabo Gracias a Dios and Pichones, are cays of equivalent size as those of Bobel, Savanna, Port Royal and South Cays which are presently under dispute. If those cays located to the north of the Main Cape Channel and the proposed Nicaraguan bisector have been blessed with mention in the Constitution, why were the cays located to the south of the Main Cape Channel not so blessed?

53. Honduras purports to find significance in the fact that the Nicaraguan Constitutions do not list the cays in dispute in spite of the fact that the Nicaraguan Constitutions have never included lists of islands, even of very important islands and not the minor features presently in question. Yet Honduras without a blush passes over the fact that its Constitutions, in spite of having an extensive shopping list of properties, have never listed the cays in dispute. It should not be lost to sight that this absence is the only significant feature in all this argument. And it only points to the fact that the Honduran claim of sovereignty over these features is of very recent date. At best, it dates from 1982 when the first mention of Media Luna Cay was made in a Honduran Constitution. In spite of the fact that according to the Counter-Memorial of Honduras Media Luna Cay is also permanently submerged, it is nonetheless a cay that, contrariwise to Campeche Cay, is unmistakably located in the area in dispute.

Honduran written statements

54. Honduras has taken issue with some of the comments made by Nicaraguan counsel with respect to certain assertions in the written statements it filed as evidence (see CR 2007/6, p. 31, paras. 63-64). The distinguished counsel of Honduras, Mr. Greenwood, considered that these comments by Nicaraguan counsel might be “wholly improper”. I must confess to being a bit surprised by this call of attention. In the first place, what appears to be emphasized by the distinguished counsel is the apparent superior quality of these witness statements because they were “the product of a visit to the islands by one of my colleagues — a member of the English Bar” (p. 31, para. 65). But if the comments by Nicaraguan counsel were improper, which I consider not to be the case, they would be improper irrespective of whether it was a member of the Bar of Honduras or of the English Bar who prepared the evidence.

55. But, perhaps more to the point, the fact is that I do not know what written statements Honduran counsel is referring to. The statements commented on by Nicaraguan counsel were rendered before a Honduran notary public upon the request of a Honduran political authority — usually a mayor or governor of the area or city where the statement was being taken. The notary, as is the normal case, simply recorded what the witness wished to state without any examination on his part. None of the testimonies indicates that any member of the English Bar was present during the statements or was in any way involved. Presumably, if a member of the English Bar had been present or had prepared this evidence, this fact would have been placed on record as, for example, the presence of translators when this was the case was put on record in these same written statements.

Port of Cabo Gracias a Dios

56. During my first pleading on 5 March, I emphasized the importance of the Nicaraguan Port of Cabo Gracias a Dios as the only port historically located in the area in dispute (CR 2007/1, p. 26, paras. 37-38). The reason for this importance was that the cays claimed by the Parties are located roughly 50 km away from Cabo Gracias a Dios and well beyond the fishing grounds of the population centred around Cape Gracias a Dios. These cays were thus visited either by foreign sailing vessels hailing, for example, from Cayman on their turtle fisheries routes, or by the population located further south in indisputable Nicaraguan territory that could easily navigate a

continuous succession of cays separated by only a few miles distance one from another up to the Main Cape Channel that basically divides the maritime areas of each Party.

57. The importance of this port in establishing the *effectivités* in the area in dispute is also paramount since it was naturally the centre of maritime activity in the area. The nearest Honduran port was established well into the twentieth century and it was not located on the Caribbean coastline but inside the Caratasca Lagoon and well over 100 km distant from the area in dispute.

58. Presumably the importance of this port and its connection to the main navigation channel — which, I must point out, has been significantly ignored in all the Honduran pleadings — is the reason why the existence itself of this port was quite curiously questioned by Honduras (CR 2007/10 (Colson)).

59. The Port of Cabo Gracias a Dios was recognized as Nicaraguan in the treaty signed with Honduras in 1869, referred to in the Memorial of Nicaragua (p. 21), and in my previous pleading of 5 March (CR 2007/1, p. 23, para. 28). The Arbitral Award of the King of Spain attributed the sovereignty of the town of Cape Gracias a Dios to Nicaragua as is again explained in the previous pleading of 5 March (CR 2007/1, p. 24, para. 29). This port figures (CAG2-5) in the British Admiralty chart No. 2425 that was elaborated from surveys dating (CAG2-6) from the period 1830 to 1843, as we can see on the screen. During the first half of the twentieth century spanning from approximately 1910 to 1930, the Nicaraguan tax collection, including import and export duties, was under the control of United States government officials. The information culled from this was published periodically by the United States State Department. (CAG2-7) On the screen are pages taken from a publication titled *Nicaragua, an economic and financial survey* by Mr. W.W. Cumberland. This illustration is taken from a copy of this book located in the library of the Peace Palace. (CAG2-8) On page 48 on the screen we can see table No. 10 on the Value of Imports and Exports by ports of Entry and Embarcation (1922-1926). The first on the list is the Port of Cabo Gracias a Dios. Apparently the State Department had no doubts on the existence, location and business transactions of this Nicaraguan port. (CAG2-9) More current information may be located on the web page titled “Ports of the World” (<http://www.navis.gr/portswld/>) now on the screen.

ANSWERS TO THE QUESTIONS FORMULATED BY THE JUDGES TO THE PARTIES

60. Madam President, Members of the Court, I will now address the questions formulated by the judges to the Parties. The issues given formal response here will be further addressed by my colleagues in the course of today's and tomorrow's pleadings.

61. Judge *ad hoc* Gaja formulated the following question to both Parties: "May Logwood Cay and Media Luna Cay be currently regarded as islands within the meaning of Article 121, paragraph 1, of the United Nations Convention on the Law of the Sea?"

62. Nicaragua's answer to this question is as follows:

63. In accordance with information presently available to the Government of Nicaragua, the cays of Logwood and Media Luna are now submerged and cannot be regarded as islands within the meaning of Article 121, paragraph 1, of the United Nations Convention on the Law of the Sea.

64. This information coincides with the statement made by the Government of Honduras in its Counter-Memorial. In it Honduras stated that "the original Logwood Cay and Media Luna Cay are both now submerged"(CMH, Vol. 1, p. 14, para. 2.3, footnote 2).

65. Judge Keith formulated the following question to the Republic of Nicaragua:

"What consequences for the location of a single maritime boundary would Nicaragua draw were Honduras to have sovereignty over some or all of the islands and maritime features which are located north of the parallel of latitude 15' North?"

66. The position of Nicaragua is that the location of the single maritime boundary is not dependent on or affected by the attribution of sovereignty of any of the islands and maritime features to either Party. The construction of the line of delimitation put forth by Nicaragua is not based on the minor features in question but rather on the coastal fronts of the Parties, as stated in the Nicaraguan Memorial (Vol. I, Chap. IX, para. 31):

"The direction of the bisector proposed by Nicaragua is calculated by taking into account the general direction of the mainland coasts of Nicaragua and Honduras. The islets and rocks off the mainland coasts have not been taken into consideration in this exercise."

67. The Honduran Counter-Memorial is in agreement on this point. It states that: "Honduras does not use these islands as basepoints, and claims neither shelf nor economic zone for the islands as such." (Vol. 1, p. 141, para. 7.28.)

68. The position of Nicaragua is that sovereignty over these islets and cays should devolve on the Party on whose side of the line of delimitation they are finally located.

69. If the islets and cays specifically identified and claimed by Honduras — that is, Bobel, Savanna, Port Royal and South Cay — were to be attributed to Honduras and were thus to be located within Nicaraguan territory (CAG2-10), then the position of Nicaragua is that these small features should be enclaved within a territorial sea of 3 miles. In this respect there would be no impingement on the line of delimitation that would be drawn based on the coastal fronts of the Parties or on any similarly equitable line that the Court may determine. This enclavement would be within the spirit of the Honduran claim that would limit the extent of the territorial sea to the most southerly islands it claims, so that it would not cross the line claimed by Honduras. A graphic of this enclavement is provided as an illustration of the effects of this exercise.

70. If all of the islands and maritime features, which are located north of the parallel of latitude 15° N, were to be under Honduran sovereignty, then Nicaragua cannot give a clear answer to the question of Judge Keith. Nicaragua does not know how many islands and features are involved or their locations since the basic surveys of this area date from the first half of the nineteenth century and this is an area where these features emerge and disappear periodically and often.

71. Madam President, Members of the Court, the continuation of the pleadings during this second round will be in the following order. During the course of this afternoon's pleadings, and immediately after this Agent's presentation, Professor Alain Pellet will generally address the issues before the Court, including the question of cays and other maritime issues as well as the applicable law and the issue of the critical date. Next, Dr. Alex Oude Elferink will address basically the question of the maritime features in the area in dispute.

72. During tomorrow's pleadings, Professor Antonio Remiro Brotóns will address the issues of the conduct of the Parties and the question of *uti possidetis iuris*.

73. Following that, Professor Pellet will address basically the issue of the starting-point of the delimitation.

74. Next, Mr. Ian Brownlie will address the question of the maritime line put forth by Nicaragua, as well as some comments on certain points of the law of the sea pertinent to these proceedings.

75. Finally, the Agent will return with a short statement and the presentation of Nicaragua's final submissions.

Thank you, Madam President and Members of the Court, for your kind attention. And now, Madam President, may I ask you to call Professor Pellet.

The PRESIDENT : Thank you very much, Your Excellency. I now call Professor Pellet.

M. PELLET: Thank you very much, Madam President.

LA NATURE ET L'OBJET DE L'AFFAIRE, LE DROIT APPLICABLE ET LA DATE CRITIQUE

1. Madame le président, Messieurs les juges, durant ses plaidoiries de la semaine dernière, le Honduras a déformé, avec persévérance, les thèses nicaraguayennes — sur beaucoup de sujets (et l'ambassadeur Argüello vient d'en relever un certain nombre), mais, tout spécialement et d'abord, sur la nature et l'objet mêmes de l'affaire que le Nicaragua vous a soumise. Bien qu'elles soient un peu caricaturales, ces déformations systématiques nous ont paru mériter une brève mise au point au moment où nous entamons nos plaidoiries du second tour — d'autant plus qu'elles ont une incidence sur des aspects importants et récurrents de l'argumentation respective des Parties, en ce qui concerne, notamment, le droit applicable ou la date critique. Tel est l'objet de mon intervention, cet après-midi.

I. L'objet du différend

2. Madame le président, dans sa présentation initiale, M. l'agent du Honduras a formulé cinq observations générales dont la deuxième nous intéresse plus spécialement pour l'instant. Elle portait sur ce que l'ambassadeur Velásquez a qualifié de «sudden and dramatic change of direction that was taken last week [i.e., during its first round of pleadings] by Nicaragua»². lis en entier ce qu'il a dit à cet égard, car c'est ensuite devenu un leitmotiv pour les conseils du Honduras :

² CR 2007/6, 12 mars 2007, p. 11, par. 7.

«The Court will have noted that Nicaragua's Application brought only a maritime delimitation dispute to the Court. This led the Court to identify this case as the case concerning *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*. There was no reference to any dispute regarding sovereignty over islands in the Application. On the contrary, Nicaragua chose not to address the islands that lie most closely to Honduras's coast, islands that have long been treated as being subject to the sovereignty of Honduras. Now Nicaragua has come belatedly to recognize the fact that the islands are a central part of the geography.»³

3. And the distinguished Agent of Honduras added: «Sovereignty over the islands has a decisive impact on the maritime delimitation. The fact that Nicaragua had nothing to say about the islands in its Application speaks loudly about the merits of the new claim it has chosen to make, at this unprecedentedly late stage.»⁴

4. Et, en conseils disciplinés qu'ils sont, nos collègues de l'autre côté de la barre de renchérir, non sans dramatiser :

— le professeur Greenwood : «Then, Madam President, we had the extraordinary spectacle of the claimant telling the Court on the first day of the oral hearings that it wanted to turn the case about a maritime boundary, which it had chosen to put to the Court, into a case about title to land as well.»⁵;

— Professor Sands : «since last Monday, things have changed ; Nicaragua has changed its position. It has now put the issue of sovereignty over the islands squarely before the Court for the first time, and apparently it intends to change its submissions to that end.»⁶ ;

— et pour sa part, le professeur Dupuy a insisté sur la prétendue «exhumation tardive de [l'intérêt du Nicaragua] pour les cayes»⁷ et est allé jusqu'à prétendre «que la Cour, comme le défendeur, peuvent s'estimer aujourd'hui trompés sur la nature véritable et le contenu réel de cette affaire»⁸.

5. Je crois sincèrement, Madame le président, que les indications données au début de nos plaidoiries du premier tour par l'agent du Nicaragua⁹, ne méritaient pas un tel tir nourri — qui se

³ *Ibid.*

⁴ *Ibid.*, par. 8.

⁵ *Ibid.*, p. 15, par. 6 ; voir aussi p. 17, par. 14 ; CR 2007/6, p. 47, par. 14 (Sánchez).

⁶ CR 2007/7, p. 19-20, par. 2 ; voir aussi : p. 21, par. 6 ; p. 22, par. 8 ; p. 24, par. 11 ; p. 45-46, par. 58-59 (Sands) ou CR 2007/8, p. 11, par. 4 (Jiménez Piernas).

⁷ CR 2007/8, p. 37, par. 7.

⁸ *Ibid.*, p. 37-38, par. 8.

⁹ CR 2007/1, p. 46, par. 103.

révèle, en réalité être un pétard mouillé ! Et je me permets de rappeler à nos amis de l'autre côté de la barre que, pour déterminer «le but et ... l'objet véritable de la demande», la Cour

«ne saurait ... s'en tenir au sens ordinaire des termes utilisés ; elle doit considérer l'ensemble de la requête, les arguments développés devant la Cour par le demandeur, les échanges diplomatiques qui ont été portés à son attention et les déclarations publiques faites au nom du gouvernement demandeur.» (*Essais nucléaires (Australie c. France)*, C.I.J. Recueil 1974, p. 263, par. 30 ; (*Nouvelle-Zélande c. France*), p. 467, par. 31 ; *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt*, C.I.J. Recueil 1998, p. 448-449, par. 30-33.)

6. Il est exact que le Nicaragua n'a pas formellement demandé, dans les conclusions de son mémoire et de sa réplique, que les îlots, cayes (grâce au professeur Quéneudec — professeur de géographie, dit-on — je sais maintenant que l'on doit prononcer «cailles») — les cayes donc, bancs et autres formations marines se trouvant au sud de la ligne bissectrice qui devrait séparer les espaces marins relevant respectivement des deux pays — contrairement à ce que le Nicaragua se propose de faire dans les conclusions définitives qu'il déposera demain. Mais il n'y a rien d'extraordinaire à ceci :

- 1) cette conséquence découle des conclusions des écritures du Nicaragua ;
- 2) ce n'est que suite à l'insistance de la Partie hondurienne sur «les îles» que le Nicaragua a jugé utile — pas indispensable, simplement utile, Madame le président — et plus clair, de préciser expressément ce qui n'était auparavant qu'implicite ; mais,
- 3) il n'en résultera nulle modification de la nature même de l'affaire et le Honduras ne le prétend d'ailleurs pas.

Voyons ceci un peu plus en détail.

7. Le Honduras part d'un postulat qu'une lecture objective des écritures du Nicaragua dément : même si la souveraineté sur les formations marines se trouvant au sud de la frontière maritime entre les deux pays n'a pas fait l'objet de conclusions formelles (*Submissions*), le Nicaragua a constamment indiqué, dans ses écritures, qu'il devait en aller ainsi. Selon le professeur Greenwood, par exemple, le mémoire aurait été «largement» silencieux sur le sujet («[T]he Memorial was ... largely silent on this subject.»)¹⁰ Je ne sais pas ce que mon contradicteur et ami entend par «largement» ; mais ce que je sais c'est qu'à la page 144 de son mémoire, le

¹⁰ CR 2007/6, p. 15, par. 5.

Nicaragua souligne sans la moindre ambiguïté, que «all islets and rocks under the sovereignty of Nicaragua are situated to the south of the [bisector line] and those under the sovereignty of Honduras to the north of the line»¹¹ ; et que, à la page 166, celle qui précède immédiatement les conclusions, le Nicaragua — dont le souci premier est d'obtenir une délimitation sûre et définitive, énumère, de façon non limitative, les îlots et rochers qu'il revendique comme siens et réserve expressément ses droits à leur égard — droits préservés par la ligne bissectrice qui, selon lui, doit former la frontière maritime entre les deux pays, si bien qu'il n'y avait aucune raison d'aller plus loin à ce stade. En tout cas, le professeur Jiménez Piernas ne s'y est pas trompé, puisque, mercredi dernier, il a dénoncé — avec une véhémence peut-être excessive — «l'escalade des prétentions erratiques et invraisemblables du Nicaragua contre le Honduras dans la mer des Caraïbes, *avec la présentation de son mémoire à la Cour réclamant sa souveraineté, pour la première fois, sur toutes les îles au nord du 15^e parallèle...*»¹².

8. Il est du reste à la fois révélateur et assez extraordinaire que, dans son contre-mémoire, le Honduras, ait accusé le Nicaragua (si c'est une accusation ?) d'avoir essayé «surreptitiously ... to transform a delimitation case into a litigation on the attribution of sovereignty over insular territories»¹³. Voilà, Madame le président, qui ne cadre guère avec la soi-disant «volte-face», le «sudden and dramatic change of direction» qu'aurait, selon l'agent et les avocats du Honduras, subi la thèse du Nicaragua à la faveur des plaidoiries orales : puisque celui-ci avait déjà «subrepticement» modifié la nature de l'affaire dès son mémoire, cette soi-disant nouvelle position nicaraguayenne n'a pas dû surprendre nos amis honduriens autant qu'ils le prétendent avec une ingénuité douteuse, que l'on a du mal à prendre très au sérieux.

9. Du reste, le moins que l'on puisse dire, c'est que le Honduras ne s'est pas laissé abuser par le caractère prétendument «subreptice» de cette soi-disant réorientation de l'affaire : il ne consacre pas moins de quarante-sept pages de son contre-mémoire à tenter d'établir sa souveraineté sur les îles et les eaux environnant le «15^e parallèle»¹⁴ (cette cinquantaine de pages s'ajoutant d'ailleurs à

¹¹ MN, p. 144, par. 42.

¹² CR 2007/8, p. 11, par. 5 ; les italiques sont de nous.

¹³ CMH, p. 68, par. 4.32 ; voir aussi CR 2007/8, p. 37, par. 6 (Dupuy).

¹⁴ CMH, chap. 6, p. 87-132.

de nombreuses autres mentions éparses portant sur le statut juridique des îles en question) ; et le Honduras conclut à ce que la Cour donne dûment effet aux îles relevant de sa souveraineté — ce qui implique évidemment que la haute juridiction se prononce sur la souveraineté en question.

10. En réponse aux longs développements du contre-mémoire hondurien, le Nicaragua a abordé successivement la question de la pertinence des effectivités en matière de délimitation maritime, qui fait l'objet du chapitre V de sa réplique¹⁵, et celle du titre sur les îlots et rochers, traitée dans le chapitre VI¹⁶, dans lequel le Nicaragua revendique clairement la souveraineté sur les îles en litige en précisant que le contre-mémoire ne lui laisse «no other choice but to deal with the issue of sovereignty over the islets in much more detail in this Reply»¹⁷. Et le Honduras aurait été surpris, il y a quinze jours, de la position prise par le Nicaragua lors des plaidoiries orales — alors qu'elle reflétait strictement celle déjà prise dans les écritures ? Alors que c'est lui, Honduras, qui a voulu réduire l'affaire à cette question en se déroband à toute discussion sérieuse sur la délimitation maritime proprement dite ? Allons donc !

11. D'ailleurs, la duplique hondurienne est plus révélatrice encore. Le Honduras y décerne un *satisfecit* au Nicaragua : «Nicaragua now ... recognizes the central importance of the islands»¹⁸ et il affirme dans des termes étrangement semblables à ceux utilisés la semaine dernière et dont j'ai cité des extraits tout à l'heure : «In its Reply, Nicaragua now advances an entirely different line of argument...»¹⁹. Je puis accepter, Madame le président, que l'on fasse une fois «le coup» de l'ébahissement — mais deux stupéfactions feintes successivement, c'est tout de même beaucoup ! Quoi qu'il en soit, bien que toute allusion aux îles eût disparu des conclusions (*Submissions*) de la duplique, cette fois, la question de la souveraineté du Honduras sur les îles occupe près de la moitié du texte²⁰. Et ce pays voudrait que la Partie nicaraguayenne ne s'y intéressât point, Madame le président ? C'est, de la part des conseils du Honduras, faire peu de cas de leurs propres écritures ou d'un certain masochisme ! Cela revient à dire : «Nous avons écrit des pages et des pages sur la

¹⁵ RN, p. 71-89.

¹⁶ RN, p. 91-139.

¹⁷ RN, p. 93, par. 6.5.

¹⁸ DH, p. 15, par. 2.11.

¹⁹ *Ibid.*, par. 2.12.

²⁰ DH, voir notamment p. 41-50, 53-77, 79-106 ou 119-122.

souveraineté sur les îles ; mais surtout n'en tenez pas compte, ceci est sans rapport avec la délimitation maritime, seul objet de la requête nicaraguayenne...»

12. Au demeurant, cette posture, curieuse, reflète assez bien la position du Honduras sur le fond : celui-ci donne en effet l'impression d'être passablement embarrassé par sa propre démonstration — dont il ne se décide pas à tirer les conséquences. En substance, Madame le président, le problème se pose ainsi :

- la Partie hondurienne consacre une énergie énorme à tenter d'établir sa souveraineté sur l'ensemble des petits îlots et cayes se trouvant au nord de ce qu'elle persiste à appeler «le 15^e parallèle» ;
- mais ensuite (et je ne me prononce pas, pour l'instant, sur le caractère probant de cette démonstration — ce sera fait par Alex Oude Elferink), le Honduras se garde bien d'en tirer les conséquences qui, en bonne logique, devraient s'imposer.

13. Prenons les trois questions qu'a posées le professeur Dupuy durant sa plaidoirie du 14 mars²¹ :

- Première question : Les formations marines revendiquées par le Honduras sont-elles des îles au sens de l'article 121 de la convention des Nations Unies sur le droit de la mer ? Réponse de notre contradicteur : «Oui»²². Nous sommes d'accord (au moins pour certaines d'entre elles — comme vient de le dire l'ambassadeur Argüello en réponse à la question posée par M. le juge Gaja, ce n'est pas le cas, par exemple, pour des «cayes» (qui n'en sont pas à strictement parler) Logwood et Media Luna) ; il en va de même pour de nombreux rochers ou hauts-fonds découvrants se trouvant dans la zone litigieuse.

[Projection 1 : *Qatar c. Bahreïn* (AP 2-1)]

- Deuxième question : «Si oui, ces îles ont-elles droit à leur propres zones maritimes ?» Réponse de M. Dupuy : «Oui» encore²³. La nôtre serait plutôt : «Oui, en principe.» Pour deux raisons : d'une part, certaines de ces îles (sans doute toutes, à vrai dire) relèvent du paragraphe 3 de l'article 121 ; elles «ne se prêtent pas à l'habitation humaine ou à une vie économique propre

²¹ CR 2007/8, p. 42, par. 20.

²² Cf. *ibid.*, p. 43, par. 22.

²³ Cf. *ibid.*, p. 43, par. 24.

[et] n'ont [donc] pas de zone économique exclusive ni de plateau continental» ; d'autre part, ces formations, fort bien décrites par notre contradicteur comme des «îles confettis»²⁴, sont si minuscules, si instables, si insignifiantes, si inhospitalières que, dans les circonstances de l'espèce, il n'est pas envisageable de leur donner, concrètement, un effet quelconque sur la délimitation — exactement d'ailleurs de la même façon que la Cour a reconnu, dans *Qatar c. Bahreïn*, que Qit'at Jaradah (que l'on peut voir sur la carte projetée à l'écran) était «une île [se trouvant sous la souveraineté de Bahreïn]» (*Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn)*, arrêt, *C.I.J. Recueil 2001*, p. 100, par. 197) «qui doit comme telle être prise en considération aux fins du tracé de la ligne d'équidistance» (*Ibid.*, p. 99, par. 195), mais, aussitôt après, la Cour lui dénie tout effet sur la délimitation maritime entre les Parties (*Ibid.*, p. 104 et 109, par. 219-220). Il doit en aller de même de nos cayes. M. Oude Elferink y reviendra. En tout cas, ceci dispense de s'interroger plus avant sur la question de savoir s'il s'agit d'îles du paragraphe 2 ou du paragraphe 3 de l'article 121 de la convention de Montego Bay.

— Et, du même coup, ceci répond à la troisième question posée par notre contradicteur, celle qui est relative à l'incidence des îles dont le Honduras fait un si grand cas, sur la délimitation : elles n'en ont aucune.

[Fin de la projection 1 ; projection 2 : Absence d'effet des cayes sur la ligne hondurienne (AP 2-2)]

14. Il est d'ailleurs intéressant que, pour sa part, M. Dupuy se garde bien de répondre à sa propre question ; ou plutôt, il nous assure que les îles sont pertinentes aux fins de la délimitation à laquelle le Nicaragua a prié la Cour de bien vouloir procéder²⁵ — mais il se garde bien de préciser dans quelle mesure, et comment cette pertinence se traduirait concrètement. Et je le comprends, Madame le président, car, en réalité, après s'être donné toutes les peines du monde pour affirmer sa souveraineté sur ces îlots, le Honduras ne leur donne pas non plus le moindre effet sur le tracé de la ligne qu'il propose : celui-ci suit le parallèle 14° 59' 48", un point c'est tout. Comme le montre le croquis n° 2 projeté mercredi dernier par M. Dupuy puis par M. Colson vendredi, et qui est à

²⁴ *Ibid.*, p. 48, par. 38.

²⁵ CR 2007/8, p. 44, par. 26.

l'origine de celui que vous pouvez voir en ce moment, cette ligne ne doit rien aux cayes : c'est une ligne droite, artificielle, qui n'accorde — à juste titre, du reste — aucun effet aux îlots en question. Dès lors, au risque de peiner nos amis de l'autre côté de la barre²⁶, nous maintenons que, sur ce point au moins, les deux Parties sont d'accord : «the islands and islets in the area have no [effects/] consequences on the delimitation»²⁷.

[Fin de la projection 2]

15. On en revient donc à l'essentiel, Madame le président : comme ceci a été dit excellemment et sobrement par le professeur Quéneudec au début de sa présentation de mercredi dernier : «[L]’objet de la présente instance» est «une affaire de délimitation maritime où, ce qui est en cause, c'est le tracé d'une ligne unique de délimitation»²⁸. Le fait que l'une des Parties ait annoncé son intention de demander que la Cour constate que les formations marines se trouvant d'un certain côté de cette ligne relèvent de sa souveraineté, ne change certainement pas la nature de l'affaire. Du reste, comme je l'ai déjà relevé, la Partie hondurienne se garde bien de le prétendre et de soulever l'irrecevabilité de cette conclusion annoncée²⁹ : il est vrai qu'en procédant ainsi, elle se tirerait une balle dans le pied ; c'est le Honduras, pas le Nicaragua, qui s'efforce de mettre les îlots au centre de notre affaire.

16. Est-ce à dire que ceux-ci n'y ont aucune place ? Certainement pas : pour minuscules et inhospitaliers qu'ils soient, ce sont des îles susceptibles d'appropriation (je précise d'ailleurs que le fait de les qualifier d'îlots ne change rien à leur nature juridique, nous en sommes d'accord, mais ceci a le mérite de mettre en évidence leur extrême petitesse). S'ils ne peuvent, raisonnablement, produire aucun effet sur le tracé de la frontière maritime entre les deux Etats, à l'inverse, la délimitation que la Cour retiendra ne saurait déplacer le titre territorial dont l'un ou l'autre des deux Etats en litige pourrait se prévaloir à leur égard (sans qu'ils doivent d'ailleurs nécessairement suivre tous le même sort). Encore faut-il, pour l'établir, déterminer quel est le droit applicable au

²⁶ Cf. DH, p. 5, par. 1.13, ou p. 15, par. 2.13 ; CR 2007/8, p. 37, par. 7 (Dupuy).

²⁷ RN, p. 10, par. 1.17 et 1.19.

²⁸ CR 2007/8, p. 15, par. 2.

²⁹ Voir plus haut, par. 6.

présent litige et en faire une application correcte. Ce sera mon deuxième point, Madame le président.

II. Le droit applicable

17. Dès lors que le différend soumis à la Cour concerne une affaire de délimitation maritime, il va de soi que les règles applicables pour son règlement sont, prioritairement, celles qui figurent dans la convention de 1982 (à laquelle, je le rappelle, les deux Etats sont parties), et plus précisément celle qui figure dans ses articles 15, pour ce qui est de la délimitation de la mer territoriale, et 74 et 83 en ce qui concerne respectivement la zone économique exclusive et le plateau continental. Certes, nous disent nos contradicteurs, qui reconnaissent tout de même l'applicabilité du droit de la mer, du bout des lèvres souvent³⁰, avec un peu plus d'allant s'agissant de mon ami Pierre-Marie Dupuy, qui s'aventure à proclamer (à juste titre d'ailleurs) que

«le Nicaragua n'a pas désavoué l'affirmation faite par le Honduras dès son contre-mémoire lorsqu'il avait affirmé que «le droit applicable dans cette affaire est constitué par le droit international général de la mer tel qu'exprimé par la pratique des Etats, les articles pertinents de la convention de 1982 sur le droit de la mer et la jurisprudence internationale, dont en premier lieu celle de la Cour internationale de Justice»³¹.

Mais... «la terre domine la mer» — et voilà lâchée la seconde formule magique dont se délectent les professeurs Greenwood³², Sánchez³³, Sands³⁴ ou Dupuy³⁵.

18. Je ne reviens pas, Madame le président, sur l'incongruité qu'il y a, de la part de nos amis de l'autre côté de la barre, à nous reprocher d'avoir répondu à leurs arguments concernant, précisément, les questions de souveraineté sur les îlots, alors même que toute leur stratégie judiciaire est fondée sur leurs revendications territoriales à l'égard de ces mêmes îlots. Il n'y a pas de mystère : nous sommes partis de l'idée — qui nous paraît toujours difficilement contestable — selon laquelle ces cayes et autres formations marines relèvent — et ont toujours relevé — de la

³⁰ Cf. CR 2007/6, p. 12, par. 14 (Velázquez) ou CR 2007/9, p. 39, par. 2 (Colson). Voir aussi CMH, p. 59-61, par. 4.5-4.9 ; RH, p. 11, par. 2.1.

³¹ CR 2007/8, p. 39, par. 12.

³² CR 2007/6, p. 15, par. 8 ; voir aussi p. 17, par. 12 et 14.

³³ *Ibid.*, p. 58, par. 41 ou p. 60, par. 45.

³⁴ CR 2007/7, p. 20, par. 5.

³⁵ CR 2007/8, p. 38, par. 10 et p. 51, par. 52.

souveraineté du Nicaragua ; MM. Oude Elferink et Remiro Brotóns y reviendront tout à l'heure et demain. Dès lors, que le Honduras le conteste, il était normal et nécessaire que nous répondions à ses prétentions en nous plaçant sur son terrain, celui du «droit de la terre» et, plus précisément, du droit applicable à l'acquisition de la souveraineté territoriale.

19. Mais une remarque préliminaire, Madame le président, avant de m'interroger sur la consistance de ce droit et de ses effets dans notre affaire : il faut relever que les revendications du Honduras sur les cayes situées au sud de la ligne bissectrice sont, quoi qu'il en dise, extrêmement récentes. Pour ne prendre que deux exemples — mais ils sont assez frappants :

- il n'en a pas fait état lorsqu'il a accepté le principe de négociations en vue de la fixation de la frontière maritime entre les deux Etats en 1977³⁶ ;
- pas davantage qu'il n'a, à ma connaissance, protesté contre la conclusion de la convention du 12 novembre 1993 entre la Colombie et la Jamaïque³⁷ qui, pourtant, le «prive» de la souveraineté qu'il prétend revendiquer sur Serranilla et Rosalinda — et ceci jusque dans sa Constitution (depuis 1982 seulement — date suspecte, il est vrai) ; bien au contraire, il se prévaut de ce traité de 1933 — bien à tort, pour contester les droits du Nicaragua³⁸ ! Il est vrai que par le traité qu'il a lui-même conclu avec la Colombie en 1986, le Honduras a reconnu la souveraineté de celle-ci sur Serranilla.

20. En s'abstenant d'affirmer sa souveraineté sur les îlots qu'il revendique aujourd'hui devant la Cour en des circonstances dans lesquelles, à l'évidence, il l'aurait dû, le Honduras fait, pour le moins, planer un doute considérable sur le sérieux de ses revendications³⁹.

Madame le président, si vous souhaitez faire une pause, ce que je suppose, ceci est peut-être le bon moment car ensuite je vais me lancer dans une longue démonstration.

³⁶ Note n° 1025 du 20 mai 1977, CMH, vol. 2, p. 69, annexe 20.

³⁷ CMH, vol. 2, annexe 11, p. 41.

³⁸ Voir CMH, p. 143, par. 7.37 ; CR 2007/7, 13 mars 2007, p. 56, par. 23 e) (Jiménez Piernas), CR 2007/8, p. 46, par. 35 (Dupuy).

³⁹ Parmi une jurisprudence très abondante, voir notamment : *Pêcheries norvégiennes*, C.I.J. Recueil 1951, p. 139 ; *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906*, C.I.J. Recueil 1960, p. 213 ; *Temple de Préah Vihear*, C.I.J. Recueil 1962, p. 31 ; *Différend frontalier terrestre, insulaire et maritime*, C.I.J. Recueil 1992, p. 408-409, par. 80 ; *Différend territorial*, C.I.J. Recueil 1994, p. 36, par. 68. Voir aussi SA, Conseil fédéral suisse, 24 mars 1922, *Validité de la sentence arbitrale de la régente María Cristina*, RSA I, p. 223 ou *RGDIP*, 1922, p. 462 ; CPA, 23 octobre 1909, *Grisbadarna Banks*, *AJIL*, n° 4, 1910, p. 226-227 et 233-235 ou 4 avril 1928, *Ile de Palmas*, RSA II, p. 839 ; SA, 28 décembre 1993, *Rann de Kutch*, RSA XVII ; 9 octobre 1998, *Questions de souveraineté territoriale sur un groupe d'îles dans la mer Rouge, première phase (souveraineté et délimitation maritime)*, *Erythrée/Yémen*, par. 307.

The PRESIDENT: Then we will take this perfect time. Thank you. The Court rises briefly.

The Court adjourned from 4.25 to 4.40 p.m.

The PRESIDENT: Please be seated. Professor Pellet.

M. PELLET : Thank you very much.

21. Madame le président, Messieurs les juges, la riche jurisprudence de votre Cour constitue un florilège irremplaçable des règles applicables en matière de preuve de la souveraineté territoriale — à la fois en général et sur de très petits territoires. On peut y ajouter quelques grands arbitrages, au premier rang desquels la célèbre sentence de Max Huber dans l'affaire de l'*Ile des Palmes*⁴⁰. Il ne me paraît pas utile de vous infliger un cours de droit international sur ces règles : vous les connaissez mieux que moi. Nous sommes largement suffisants d'en rappeler les bases telles qu'elles ont été succinctement et clairement exposées par la Chambre de la Cour dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali, arrêt, C.I.J. Recueil 1986*, voir notamment p. 587, par. 63) et constamment réaffirmées depuis lors, à peu près sous la même forme, souvent par simple renvoi. (Voir notamment, *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant))*, arrêt, C.I.J. Recueil 1992, p. 398, par. 61 ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant))*, arrêt, C.I.J. Recueil 2002, p. 353, par. 68, p. 354, par. 70 ou p. 415, par. 223 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*, arrêt, C.I.J. Recueil 2002, p. 678, par. 126 ; *Différend frontalier (Bénin/Niger)*, arrêt, C.I.J. Recueil 2005, p. 120-121, par. 47 ou p. 127, par. 77. On peut les résumer ainsi :

- lorsqu'un Etat peut se prévaloir d'un titre juridique sur un territoire, celui-ci prévaut sur toute autre prétention ;
- dans ce cas, «il y a lieu de préférer le titulaire du titre» et les effectivités ne sont d'aucun secours et ne peuvent déplacer le titre ; tout au plus peuvent-elles le confirmer ;

⁴⁰ SA, 4 avril 1928, *Ile de Palmas* (Etats-Unis c. Pays-Bas), *RSANU* II, p. 842.

— ce n'est que «[d]ans l'éventualité où l'«effectivité» ne coexiste avec aucun titre juridique [qu']elle doit inévitablement être prise en considération» (*Différend frontalier (Burkina Faso/République du Mali)*, arrêt, C.I.J. Recueil 1986, p. 586-587, par. 63).

22. On pourrait penser, Madame le président, que, dans notre affaire, le Honduras se prévaut d'un titre juridique qu'il aimerait trouver dans le principe *uti possidetis juris*. Mais il est tellement peu confiant dans ce fondement improbable, qu'après avoir consacré de longs développements à la question de l'*uti possidetis* maritime, tout à fait fascinante intellectuellement en effet — mais peu concluante en l'espèce, il abandonne cette impasse pour se caler sur la jurisprudence relative à l'occupation de territoires sur lesquels aucun titre territorial clair n'est établi : et d'abord sur les affaires relatives au *Groënland oriental* et à *Ligitan et Sipadan*⁴¹, qui concernent des «prétention[s] de souveraineté fondée[s], non pas sur quelque acte ou titre en particulier, tel qu'un traité de cession, mais simplement sur un exercice continu d'autorité» (*Statut juridique du Groënland oriental*, arrêt, 1933, C.P.J.I. Recueil série A/B, n° 53, p. 45 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan*, C.I.J. Recueil 2002, p. 682, par. 134 ; les italiques sont de nous).

23. On ne saurait faire aveu plus franc de l'inexistence de tout titre originaire sérieux... Et, ici encore, on comprend l'embarras de nos contradicteurs : comment pourrait-on prétendre à la continuation d'une «possession» coloniale espagnole sur des espaces marins comme le plateau continental ou la zone économique exclusive, dont nul ne pouvait évidemment envisager l'existence en 1821 ? Comment le Honduras aurait-il pu succéder à la capitainerie générale du Guatemala ou à l'intendance de Comayagua qui n'avaient aucune compétence en matière maritime, celle-ci étant centralisée aux mains de la Couronne d'Espagne et de l'*Apostadero* de Cuba, en contraste avec ce qui se passait pour le territoire terrestre ? S'il pouvait y avoir un *uti possidetis* sur le continent, c'est parce que celui-ci était divisé en circonscriptions territoriales délimitées de manière raisonnablement précise (et pas toujours, loin de là, en suivant des parallèles ou des méridiens). Mais, sur la mer, rien de tel : point de circonscriptions maritimes ; point de vice-rois ; une gestion centralisée à l'extrême considérant les mers «espagnoles» comme un tout, comme l'a

⁴¹ CR 2007/6, p. 29, par. 57 (Greenwood) ou CR 2007/7, p. 21-22, par. 7 ou p. 32, note 25 (Sands - qui affectionne de rajouter dans des notes de bas de page des éléments qui auraient dû figurer au texte).

montré Antonio Remiro Brotóns lors du premier tour de plaidoiries⁴²—et il y reviendra brièvement demain quoique nos contradicteurs supposés ne l'aient, à vrai dire, pas vraiment contredit sur ce point.

24. Point de titre territorial hondurien sur les îlots fondé sur l'*uti possidetis* donc. Et le Honduras en est bien conscient qui passe directement à l'autre fondement possible de la souveraineté territoriale — possible *en l'absence de titre seulement* : les effectivités. Mais c'est faire preuve de beaucoup de précipitation : faute de titre hondurien, il n'est pas malséant, Madame le président, de s'interroger sur le titre que peut faire valoir le Nicaragua sur les îlots en question puisque, les Parties en sont d'accord⁴³, pour négligées, mal connues et, parfois, intermittentes, qu'aient été les îles en question, elles ne sont pas *terrae nullius*.

[Projection 3 : L'adjacence des îles (AP 2-3)]

25. Le titre dont se prévaut le Nicaragua n'est autre que le titre alternatif que le Honduras n'hésite pas à revendiquer également : celui de l'adjacence⁴⁴. M. Colson⁴⁵ invoque à cet égard les traités conclus par l'Espagne, respectivement avec le Nicaragua le 25 juillet 1850⁴⁶ et avec le Honduras le 15 mars 1866⁴⁷ ; aux termes des articles premiers de ces deux traités, la reine d'Espagne renonce à toute prétention sur les anciennes provinces du Nicaragua et du Honduras «avec [leurs] îles adjacentes». Mais, Madame le président, ceci conforte la position du Nicaragua, et nullement celle du Honduras !

26. L'adjacence n'est pas une notion susceptible de manipulation : ce qui est adjacent, c'est ce qui est près — et lorsque plusieurs choses, ou îles, ou côtes sont plus ou moins proches les unes des autres, ce qui est *le plus près*. Or, l'adjacence parle en faveur du Nicaragua, pas du Honduras — quoique celui-ci s'efforce de laisser croire.

⁴² CR 2007/3, p. 18 à 25, par. 11 à 41 (Remiro Brótons).

⁴³ Voir par exemple : CMH, p. 82, par. 5.27 et 5.88, p. 82 ; DH, p. 51, par. 3.61 ; CR, 2007/3, p. 36, par. 86 (Remiro Brótons) ; CR 2007/6, p. 26, par. 46 et p. 28, par. 51 (Greenwood) ; CR 2007/6, p. 46, par. 12 ; p. 54, par. 32 ; p. 58, par. 41, p. 59 (Sánchez) ; CR 2007/7, p. 21, par. 6 (Sands) ; p. 50, par. 10 (Jiménez Piernas) ; CR 2007/8, p. 45, par. 31 (Dupuy), CR 2007/9, p. 42, par. 16 (Colson).

⁴⁴ Voir RN, p. 127-128, par. 6.90-6.92 et p. 138-139, par. 6.118 *a*) et *b*).

⁴⁵ CR 2007/10, p. 14, par. 38 (Colson) ; voir aussi p. 30, par. 148 ou CR 2007/6, p. 26-27, par. 47 ou p. 28, par. 52-53 (Sands) ; CR 2007/7, p. 10, par. 52 ou p. 17-18, par. 73 (Sánchez) ; p. 49, par. 10 (Jiménez Piernas) ; CR 2007/9, p. 42, par. 16 (Colson).

⁴⁶ RN, annexe 11.

⁴⁷ CMH, vol. 2, annexe 8.

27. On retrouve ici la tendance de la Partie hondurienne à convertir (de force !) la proximité en un faisceau de parallèles et de méridiens en faisant faire «le signe de la croix» pour reprendre la jolie expression de Pierre-Marie Dupuy⁴⁸, à toutes les limites territoriales et maritimes de la région. Mais ces lignes géodésiques sont de pures conventions à usage géographique ou cartographique et sans connotation juridique particulière en l'absence d'instrument le prévoyant expressément. [Rotation de l'image selon un angle de 37°] Il suffit de faire subir une rotation de 37° à l'image que vous voyez à l'écran pour faire apparaître le caractère totalement artificiel du quadrillage auquel nous soumettons notre planète — la ligne horizontale que vous voyez maintenant à l'écran, n'est autre que la bissectrice ; l'autre ligne, celle qui a un air penché, c'est la ligne hondurienne.

28. Il résulte tant du simple bon sens que de la jurisprudence (et je pense en particulier à l'arrêt de la Chambre de 1992 dans l'affaire du *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant))*, arrêt, *C.I.J. Recueil 1992*, p. 579, par. 367-368 ou encore la sentence rendue dans la première phase de l'affaire *Erythrée/Yémen*⁴⁹) et, surtout, des traités par lesquels l'Espagne reconnaissait l'indépendance des Etats parties au présent différend, que la souveraineté sur les îlots adjacents à ses côtes appartient au Nicaragua en vertu d'un titre traditionnel. Il faudrait, pour le déplacer, un accord exprès des Parties. Un tel document n'existe pas et les quelques effectivités dont se prévaut le Honduras sont, moins encore, à même d'effectuer une translation — et je dis «quelques effectivités», Madame le président, car, malgré les talents d'illusionniste du professeur Sands (qui, je le dis en passant à titre de droit de réponse, me prête un goût pervers pour les vampires, avinés de surcroît⁵⁰, que je n'ai nullement !), ces effectivités sont peu nombreuses et incertaines et, surtout, doivent être mises en parallèle avec celles que peut aligner le Nicaragua. Ceci étant, je le répète, ce concours d'effectivités n'a pas grand sens dès lors que l'un des Etats en cause peut se prévaloir d'un titre (l'adjacence), et l'autre, le Honduras, pas.

[Fin de la projection 3]

29. Au demeurant, comme l'a dit l'agent du Nicaragua il y a quelques instants, ceci ne nous conduit pas à esquiver la question qu'a posée M. le juge Keith à l'issue de l'audience de

⁴⁸ CR 2007/8, p. 45, par. 29 (Dupuy).

⁴⁹ Sentence arbitrale, 9 octobre 1998, *ILR*, vol. 114, par. 474.

⁵⁰ CR 2007/7, p. 25, par. 12.

mercredi dernier et que l'agent du Honduras a relu tout à l'heure ce qui me dispense de le refaire⁵¹. Il s'agit, avec tout le respect dû au juge Keith, d'une question hautement hypothétique, bien sûr — ce que son libellé au conditionnel établit d'ailleurs très clairement.

30. L'hypothèse est donc que le Honduras serait souverain sur certaines îles situées au nord du 15^e parallèle. Nous n'avons d'ailleurs aucun doute sur le fait qu'il l'est — mais uniquement sur celles qui se trouvent également au nord de la bissectrice, au nord du Main Cape Channel. Mais admettons qu'il le soit aussi sur les quelques îlots sur lesquels le professeur Sands a, lors de sa première plaidoirie de la semaine dernière, fait porter l'essentiel de ses efforts pour tenter de persuader la Cour : les cayes Bobel, Savanna, et Sud (South Cay) dont le Honduras a montré à plusieurs reprises des images⁵² (à l'exclusion de tout autre). Il résulte de ce que j'ai dit que la ligne de délimitation maritime entre les deux Etats devrait répondre aux exigences suivantes :

- partir de l'extrémité du thalweg du Coco à l'embouchure du fleuve ;
- remplir les conditions imposées par les articles 15, 74 et 83 de la convention sur le droit de la mer — c'est-à-dire, dans son premier tronçon se rapprocher autant que faire se peut de la ligne d'équidistance tout en tenant compte des circonstances spéciales pouvant exister (en l'espèce l'alluvionnement rapide du fleuve et la limitation à pratiquement deux des points sur lesquels on peut prendre appui pour construire la ligne) ; dans le second secteur, «aboutir à une solution équitable» — ce que la bissectrice permet de réaliser mieux que toute autre solution (M^e Brownlie y insistera à nouveau demain) ; et puis, troisième exigence, la ligne devrait, dans l'hypothèse retenue par le juge Keith, [Projection 4 : L'enclavement des cayes revendiquées par le Honduras (AP2-4)], laisser les cayes (sur lesquelles sa souveraineté est hypothétiquement établie) à ce pays — étant entendu cependant que, vu leurs caractéristiques, ces cayes ne sont susceptibles de produire aucun effet sur la ligne autre que celui induit par leur seule existence — et c'est déjà beaucoup, vu ce qu'ils représentent. Sur le croquis qui est projeté en ce moment et que vous avez déjà vu, Madame et Messieurs les juges, lors de la

⁵¹ CR 2007/10, p. 37.

⁵² Voir les cartes PS 1.11, P.S. 1.11-1, PS 1.11-2 et PS 1.11-3, dans le dossier des juges du Honduras du 13 mars 2007.

présentation de l'ambassadeur Argüello, elles sont dotées d'une mer territoriale de 3 milles marins.

31. Il en résulterait une enclave, au profit du Honduras, dans la zone maritime sur laquelle le Nicaragua a des droits souverains. Et ceci n'aurait rien d'une solution extravagante. Est-il besoin de rappeler que dans l'affaire de la *Délimitation du plateau continental de la mer d'Iroise, entre la France et la Grande-Bretagne*, le tribunal arbitral a refusé d'attribuer aux îles Anglo-Normandes (peuplées de plus de cent trente mille habitants de façon permanente — un petit peu plus que Bobel assurément, qui n'a aucune population stable) le plein effet demandé par la Grande-Bretagne, et a décidé de les enclaver dans le plateau continental français⁵³. De même, le traité du 18 décembre 1978 entre l'Australie et la Papouasie-Nouvelle-Guinée reconnaît l'existence de petites enclaves australiennes, dotées d'une mer territoriale de 3 milles marins, près des côtes de la Papouasie⁵⁴.

32. J'ajoute que, bien entendu, la solution à retenir est susceptible de plus ou de moins, selon que la Cour serait convaincue que le Honduras a établi l'existence d'un titre sur quelques-unes des cayes en question, ou sur une seule, ou sur d'autres, le problème étant qu'en tout état de cause, comme l'a souligné l'agent du Nicaragua tout à l'heure, personne n'est en mesure d'indiquer précisément le nombre des îlots en question, et que le Honduras lui-même s'en est bien gardé⁵⁵.

[Projection 5 : Ligne proposée par le Nicaragua (AP2-5)]

33. Ceci étant, Madame le président, nous avons présenté cette ligne par déférence pour M. le juge Keith. Mais le Nicaragua maintient intégralement ses prétentions : la souveraineté sur les îlots situés au nord du parallèle 14° 59' 48" nord et au sud du «Main Cape Channel» lui appartient et une application convenable des règles applicables à une affaire de délimitation maritime devrait conduire la Cour à retenir la ligne bissectrice proposée par le Nicaragua, seule susceptible en l'espèce d'aboutir à un résultat équitable pour chacune des Parties.

[Fin de la projection 5]

⁵³ Sentence arbitrale du 30 juin 1977, *RSANU XVIII*, p. 226-227, par. 189-192 et p. 229, par. 193.

⁵⁴ *ILM* 1979, p. 291.

⁵⁵ Voir sentence arbitrale, 9 octobre 1998, *Questions de souveraineté territoriale sur un groupe d'îles dans la mer Rouge, première phase (souveraineté et délimitation maritime)*, *Erythrée/Yémen*, par. 241.

34. Madame le président, avant d'en terminer pour aujourd'hui, je souhaiterais, avec votre permission, dire quelques mots de la question de la date critique sur laquelle les Parties sont en profond désaccord et qui a des conséquences, peut-être pas décisives, mais certainement non négligeables, au moins sur l'argumentation respective du Nicaragua et du Honduras.

III. La date critique

35. Madame le président, la question de «la date critique» est souvent l'objet de joutes délicieuses entre les juristes des deux Parties lors de l'examen par la Cour de litiges territoriaux. La présente affaire ne manque pas à la tradition. Les deux Etats en présence ont recours à la notion de date critique et semblent être à peu près d'accord sur sa fonction essentielle qui est de

- neutraliser les actes postérieurs à sa survenance ;
- sauf si ceux-ci sont la pure continuation d'une pratique antérieure⁵⁶.

Les Parties s'opposent en revanche, je le crains, sur la notion même de date critique.

36. Nos amis honduriens en ont une conception un peu floue. Ils l'invoquent à des fins très variées et multiples. Ainsi : «To the extent that the issue of title turns on the application of *uti possidetis*, the critical date is 1821» selon le professeur Greenwood⁵⁷, qui invoque l'arrêt de la Chambre constituée dans l'affaire du *Différend terrestre frontalier, insulaire et maritime*, mais en oubliant de relever que le passage auquel il se réfère précise que «dans le cas des précédents arbitrages latino-américains relatifs à des frontières, c'est maintenant la sentence arbitrale qui est déterminante» (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant))*, arrêt, C.I.J. Recueil 1992, p. 401, par. 67) — pour nous, donc, 1906 — ou, peut-être plus exactement : 1906, à la lumière de 1960, date de votre arrêt dans l'affaire relative à la *Sentence du roi d'Espagne*. Pour leur part, bien que M. Greenwood ait limité l'effet de cette date critique à la souveraineté sur les îles⁵⁸, les professeurs Sánchez et Jiménez Piernas la transforment en date à tout faire ; à les en croire, tout est joué en 1821, qu'il s'agisse du territoire terrestre des parties, des îles ou de la mer⁵⁹.

⁵⁶ Voir par exemple CR 2007/3, p. 38-39, par. 4-5 (Elferink) ou CR 2007/6, p. 26, par. 42 (Greenwood).

⁵⁷ CR 2007/6, p. 25, par. 43.

⁵⁸ CR 2007/6, p. 25, par. 43.

⁵⁹ Voir notamment CR 2007/6, p. 57, [par. 16] ; p. 57, par. 38 (Sánchez) ; 2007/7, p. 47, par. 4 (Jiménez Piernas)

37. A vrai dire, 1821, 1906 et 1960 sont des dates importantes dans le déroulement du litige territorial entre les deux Etats mais, d'une part, il s'agissait (au moins dans les deux derniers cas) exclusivement du différend relatif aux frontières terrestres et, d'autre part, avec tout le respect dû à l'arrêt de la Chambre de la Cour de 1992, il ne s'agit pas à proprement parler de «dates critiques» au sens strict (et simple) qu'il convient sans doute de réserver à l'expression dans une procédure judiciaire ; comme l'a dit la Cour dans l'affaire de *Ligitan et Sipadan*, dans un passage du reste cité par le professeur Greenwood la semaine dernière⁶⁰, il s'agit de «la date à laquelle le différend entre les Parties s'est cristallisé» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*, arrêt, *C.I.J. Recueil 2002*, p. 678, par. 135).

38. Dans ce sens technique, il est assez facile de déterminer la date critique dans la présente instance : c'est celle à laquelle les deux Parties se sont entendues sur la nécessité de régler leurs divergences sur le tracé de leur frontière maritime ; et cette date, n'en déplaise à la Partie hondurienne, remonte au mois de mai 1977.

39. Je rappelle les faits : par une note du 11 mai 1977, l'ambassadeur du Nicaragua à Tegucigalpa informe «l'honorable Gouvernement du Honduras que [son] gouvernement propose d'engager des pourparlers en vue de la délimitation définitive de la zone marine et sous-marine dans l'océan Atlantique et la mer des Caraïbes»⁶¹ ; dès le 20 mai, le ministre hondurien des affaires étrangères répond que son «gouvernement accepte avec plaisir l'ouverture de négociations»⁶².

40. Qu'ont dit les avocats du Honduras à ce propos ? Essentiellement deux choses :

- En premier lieu, ils ont beaucoup glosé sur le mot «définitive». Selon Christopher Greenwood : «The language used — far from crystallizing a dispute — does not even suggest the existence of one. On the contrary, it suggests that the Parties are largely in agreement and all that is called for is the establishment of a definitive boundary line.»⁶³
- En second lieu, ils ont souligné que le Nicaragua proposait une négociation sur la délimitation, non sur les îles.

⁶⁰ CR 2007/6, 12 mars 2007, p. 24, par. 37.

⁶¹ MN, vol. 2, annexe 4.

⁶² *Ibid.*, annexe 5 ; voir aussi CMH, annexe 20.

⁶³ CR 2007/6, p. 25, par. 41 ; voir aussi CR 2007/7, p. 57, par. 26 (Jiménez Piernas).

41. Madame le président, le texte même de cet échange de notes est clair : les deux gouvernements reconnaissent qu'ils ne sont pas d'accord sur la délimitation de leurs zones marines respectives — or tel est, très précisément l'objet même de l'affaire que le Nicaragua a soumise à la Cour. Et, comme je l'ai montré tout à l'heure, il est évidemment absurde de dissocier la question de la souveraineté sur les îlots — si elle se pose — de celle de la délimitation maritime : quand bien même ils n'ont pas d'effet sur la ligne qu'il vous est demandé de déterminer, celle-ci doit laisser au Nicaragua les îlots sur lesquels il est souverain, et au Honduras ceux qui lui reviennent. Si je ne m'abuse, le Honduras reconnaît ceci ? Mais je mets un point d'interrogation ici car l'on finit par se perdre dans les subtilités de l'argumentation de nos contradicteurs... Si tel est bien leur point de vue — en tout cas, c'est le nôtre — on ne peut dissocier les deux questions : la délimitation maritime — qui est l'*objet* même du différend soumis à la Cour — implique inévitablement que l'on se prononce aussi sur la souveraineté sur les îlots, que ce soit au cours de négociations ou par la voie judiciaire. La seconde objection de M. Greenwood n'a donc pas lieu d'être.

42. *Quid* de la première ? Il est certainement vrai que les circonstances dans lesquelles ces pourparlers ont été proposés sont assez pauvrement documentées : les deux Parties sont des Etats en développement, pauvres, et leurs archives ne sont pas toujours aussi complètes et ordonnées que ce serait souhaitable⁶⁴. Il reste tout de même que,

— je viens de le relever, le texte même de l'échange de notes est clair : les deux gouvernements reconnaissent qu'il sont en désaccord sur l'existence d'une ligne définitive séparant les zones maritimes relevant respectivement du Honduras et du Nicaragua ; et

— le délai entre l'offre de négociations et son acceptation est inhabituellement rapide : dix jours seulement, ce qui montre qu'il y avait une certaine urgence ; et

— en effet, cette offre n'a pas été faite «en l'air», par hasard ; elle intervient à la suite de graves incidents qui sont survenus peu de temps auparavant et qui ont opposé les deux Etats.

43. C'est en effet peu auparavant qu'a eu lieu au moins un incident lié à l'interception de pêcheurs honduriens par des gardes-côtes nicaraguayens. Cet incident a été, par la suite, monté en

⁶⁴ Voir CR 2007/7, p. 60, par. 33 (Jiménez Piernas).

épinglé par le Gouvernement hondurien qui a établi un rapport (malheureusement non produit par le Honduras) se plaignant du non-respect par le Nicaragua de la frontière avec le Honduras, fixée au 15^e parallèle. A quoi le ministre nicaraguayen des affaires étrangères a fermement répondu, en tout cas dans une interview du 7 mars 1977 : « Cette affirmation est absolument fausse. La frontière maritime entre le Nicaragua et le Honduras n'a pas été définie. »⁶⁵ Tous les ingrédients du présent litige sont là ; et c'est effectivement après ces incidents qu'il s'est « cristallisé » par la proposition de négociations de mai 1977 et son acceptation quelques jours plus tard.

44. Il me semble en outre que le contexte plus général dans lequel les incidents qui sont à l'origine de l'offre nicaraguayenne se sont produits a sans doute joué un rôle dans cette proposition. Certes, le dossier ne contient aucune preuve que le Nicaragua ait eu connaissance des concessions pétrolières accordées par le Honduras au nord du 15^e parallèle (ni d'ailleurs, à l'inverse, qu'il ait ou qu'il n'ait pas protesté : tout ce que nous savons — c'est peut-être le début de la sagesse socratique — c'est que nous n'en savons rien). En revanche, il est certain que c'est à partir de 1975 que le dossier s'est, si je puis dire, « réveillé ».

45. Auparavant, rien. Jusqu'en 1963, date à laquelle le Nicaragua se retire de toutes ses positions côtières au nord du cap Gracias a Dios, ceci relève presque de l'évidence. Et l'on ne pouvait guère s'attendre à ce que le Honduras se montre très actif au large de ses côtes avant la création de sa marine, en 1976. Mais, à partir de ce moment, sa politique se fait plus active, voire carrément agressive : plusieurs des quelques « effectivités » dont il se prévaut datent de cette période de deux ans (1975-1977) ; sans doute ne s'agit-il là que de manifestations sporadiques et ambiguës de revendications sur des espaces maritimes ou des îlots appartenant au Nicaragua et qui ne sont pas de nature à modifier le titre lui appartenant. Alex Oude Elferink va y revenir dans quelques instants et Antonio Remiro Brotóns, sous un autre angle, demain matin. Il n'en reste pas moins que cette agitation a très probablement suscité l'inquiétude à Managua, qui a considéré que le temps était venu de délimiter définitivement sa frontière avec un Honduras devenu passablement activiste.

46. Quelles qu'aient été les raisons de cette initiative, il paraît en tout cas indiscutable

1) qu'il existait bien un différend entre le Honduras et le Nicaragua au début de l'année 1977 ;

⁶⁵ MN, annexe 3, p. 27-28 (A. Montiel Argüello, *Dialogos con el Canciller, Ministerio de Relaciones exteriores*, Managua, 1977, p. 28-29).

- 2) que celui-ci portait sur la délimitation maritime entre les deux Etats, délimitation qui est indissociable du problème de la souveraineté sur les îlots, soulevé ultérieurement par le Honduras ; et enfin,
- 3) que ce différend, dont la Cour a été saisie par le Nicaragua, s'est bien «cristallisé» avec l'échange de notes de 1977.

47. D'ailleurs, Madame le président, malgré le rideau de fumée constitué par l'invocation par le Honduras de «dates critiques» aussi variées que fantaisistes (1979⁶⁶, 1994⁶⁷, 1999⁶⁸, 2001⁶⁹ — c'est celle qui a la cote, semble-t-il — ou même le 5 mars 2007⁷⁰ !), le Honduras ne nie pas vraiment qu'il en soit ainsi. Ses conseils s'efforcent bien plutôt de circonscrire le différend en question à la seule délimitation maritime à l'exclusion de la souveraineté sur les îlots et de déplacer la «vraie» date critique de 1977 à 1979.

48. Inutile de revenir sur le premier point : la distinction que font nos contradicteurs entre un différend maritime, d'une part, et un différend insulaire, d'autre part, est totalement artificielle. Et sur le second, je ne suis pas sûr que le recul de la date critique de deux ans soit d'un grand secours au Honduras.

49. Ce que je sais en revanche, c'est que le professeur Jiménez Piernas a «tout faux» lorsqu'il essaie — en utilisant un vocabulaire presque injurieux pour le Nicaragua et, en tout cas, pour son gouvernement de l'époque — d'opposer un «gentil» gouvernement somoziste, respectueux des «droits» du Honduras et d'une ligne de délimitation traditionnelle à un «méchant» gouvernement sandiniste qui les aurait soudainement et brutalement remis en question. L'agent du Nicaragua a excellemment montré, à la fois en introduisant nos plaidoiries et tout à l'heure, qu'il n'en était rien. La position que nous exprimons devant vous, Madame et Messieurs les juges, est celle du Nicaragua ; elle a été celle de tous ses gouvernements successifs.

⁶⁶ CR 2007/7, p. 48, par. 6 et p. 61-62, par. 36-37 (Jiménez Piernas) ; CR 2007/10, p. 19-20, par. 103-104 (Colson).

⁶⁷ CR 2007/8, p. 11, par. 4 (Jiménez Piernas).

⁶⁸ CR 2007/8, p. 11, par. 5 (Jiménez Piernas).

⁶⁹ CR 2007/7, p. 21, par. 6 (Sands) ; CR 2007/8, p. 14, par. 13 (Jiménez Piernas).

⁷⁰ CR 2007/6, p. 26, par. 44 (Greenwood).

50. Il n'en reste pas moins que lorsque M. Jiménez Piernas affirme que «la position et la conduite du Nicaragua, par rapport à la fixation du 15^e parallèle comme limite maritime entre les deux Etats, ont radicalement changé en 1979, avec le triomphe de la révolution sandiniste»⁷¹, il remet complètement en cause la thèse fondamentale de la Partie hondurienne et admet que, depuis 1979 en tout cas, le différend qui a été soumis à la Cour en 1999 était bel et bien né et cristallisé. Il a raison, Madame le président, sauf sur la date précise de cette cristallisation qui, je l'ai rappelé, remonte à deux ans plus tôt. Tocqueville a montré la continuité qui existait entre *L'ancien régime et la révolution*⁷² française, cette même continuité a marqué la politique du Nicaragua en ce qui concerne la protection de ses frontières, avant et après la révolution sandiniste.

51. Madame le président, il est plus que temps de conclure. Il me semble qu'il résulte de ce que j'ai dit cet après-midi que :

- 1) le Honduras a inventé de toutes pièces une distinction artificielle et illogique entre un litige portant sur la souveraineté sur certains îlots situés au nord du parallèle 14° 59' 48" nord d'une part, et un différend relatif au tracé de la frontière maritime entre les deux pays, d'autre part ;
- 2) le différend dont le Nicaragua a saisi la Cour est relatif à la délimitation maritime ;
- 3) pour le trancher, la Cour doit recourir aux règles applicables en la matière, qui sont exprimées dans les articles 15, 74 et 83 de la convention des Nations Unies sur le droit de la mer ; étant entendu
- 4) que le tracé de cette ligne doit respecter la souveraineté territoriale appartenant respectivement à chacune des Parties sur les petits îlots se trouvant au nord du parallèle 14° 59' 48" ; mais que
- 5) ceux-ci ne doivent avoir aucun effet sur le tracé de la ligne ainsi conçue ;
- 6) pour établir la souveraineté respective de chacun des deux Etats sur les îlots contestés, il convient de se fonder sur les règles traditionnelles applicables en matière de titre territorial ;
- 7) celui qui appartient au Nicaragua du fait de l'adjacence des îlots en question par rapport à ses côtes, adjacence reconnue par les traités conclus avec l'Espagne en 1850 par le Nicaragua et en 1866 par le Honduras, ne peut être remis en cause sur la base des effectivités incertaines invoquées par le Honduras ;

⁷¹ CR 2007/7, p. 48, par. 6.

⁷² A. de Tocqueville, *L'ancien régime et la révolution* (1856), Paris, Gallimard, 1952, 378 p.

- 8) en tout état de cause, celui-ci ne saurait se prévaloir de manifestations d'autorité sur les îlots et les espaces marins contestés intervenues après la date critique ;
- 9) et enfin, celle-ci remonte à mai 1977 lorsque, à la suite de divers incidents, le Honduras a accepté d'entamer avec le Nicaragua des négociations en vue de fixer définitivement la limite maritime entre les deux pays — ceci est précisément ce qui vous est demandé, Madame et Messieurs les juges.

Je vous remercie vivement de votre écoute. Et je vous prie, Madame le président, de bien vouloir donner la parole à M. Oude Elferink.

The PRESIDENT: Thank you very much, Professor Pellet. Dr. Oude Elferink has the floor.

Mr. ELFERINK:

The cays in dispute and some questions related to the geography

Introduction

1. Thank you Madam President. Madam President, Members of the Court, today I will be addressing certain questions relating to the cays in dispute and geography.

Cartographic evidence and the cays in dispute and the alleged traditional line

2. In its first round of pleading counsel for Honduras showed a number of charts and maps. It was argued that those charts and maps support Honduras's claim in respect of the traditional boundary and the cays in dispute. That simply is not the case. Please allow me to again review the map evidence and other relevant evidence that has been presented by the Parties.

3. On Tuesday Professor Sands showed you a number of figures. One of them was a close-up of a part of a chart from 1801⁷³. It was remarked that the chart shows the location of the reefs and islands north-east of Cape Gracias a Dios⁷⁴. Two other points were neglected. The chart does not show a boundary line along the parallel starting from Cape Gracias a Dios (figure AE3-1). Secondly, the chart clearly shows that the Nicaraguan bank of the Rio Coco is closer to the cays in dispute than the Honduran bank. Counsel for Honduras suggested that at present the Honduran

⁷³CMH, Vol. III, plate 27.

⁷⁴CR 2007/7, p. 25, para. 12.

bank of the Rio Coco is closer to the cays in dispute⁷⁵. That assertion is based on a Honduran claim to the Nicaraguan island in the mouth of the Rio Coco that was first advanced during oral argument last week. That claim is unfounded, as will be set out by my colleague Professor Pellet. The Nicaraguan bank of the Coco at present extends further seawards than the Honduran bank. The Nicaraguan coast certainly extended further seawards in 1801, just 20 years before 1821, the date of relevance for the *uti possidetis juris*.

4. Moreover, the Honduran argument that the present-day geography of the mouth of the Rio Coco should be decisive to establish the title to the cays in dispute on the basis of adjacency was utterly destroyed by counsel for Honduras. The Court will recall Mr. Colson's detailed presentation of satellite images of the mouth of the Rio Coco⁷⁶. I do not think it is necessary to repeat that exercise. What it showed was that, according to Mr. Colson, the mouth of the river is highly unstable. Sometimes the Honduran bank extends further seaward, to be overtaken by the Nicaraguan bank, and so on. In fact the natural sedimentary processes at the mouth of the river, as will be reviewed by my colleague Professor Pellet, mean that the Nicaraguan mainland nearly always extends further east than that of Honduras. Honduras's view of things is hardly a basis for deciding a title to the cays on the basis of adjacency. Of course, Nicaragua considers that what is relevant in this respect is the adjacency of the Nicaraguan mainland south of the Rio Coco to all the cays to the south of the Main Cape Channel. I will return to that argument later.

5. Counsel for Honduras on more than one occasion commented on an 1886 map of Honduras⁷⁷. Professor Sánchez Rodríguez observed that this map

“montre la limite entre les deux pays qui se situe au cap de Gracias a Dios et sur le parallèle 15°. Elle a comme particularité de localiser avec précision toutes les îles, îlots et cayes appartenant au Honduras (au nord du parallèle 15°) et ceux appartenant au Nicaragua, au sud.”⁷⁸

On the screen is a part of the 1886 map (figure AE3-2). The map only shows lines of longitude and latitude, but no boundary along any of those lines. The map does not make a distinction between

⁷⁵CR 2007/6, p. 28, paras. 52-53.

⁷⁶CR 2007/9, pp. 48-50, paras. 36-46.

⁷⁷CMH, Vol. III, plate 8.

⁷⁸CR 2007/7, p. 10, para. 53.

the cays to the north and the south of the parallel of 15° N. There is no basis to conclude that this map lends any support for a boundary along the parallel of 14° 59' 48" N.

6. The 1886 map was also used by Professor Sands to propound that the reference to Cayo Palo de Campeche in Honduran legislation has to be read as a reference to Logwood Cay. He showed you a part of British Admiralty chart 2425, identifying Logwood Cay, Half Moon Cay and Bobel Cay⁷⁹.

The PRESIDENT: Dr. Oude Elferink, could you take it a little more slowly for the interpreters?

Mr. ELFERINK: Yes, of course. He also showed you a close-up of the 1886 map. As he pointed out, the three cays on that map are identified as Cayo Mora, Cayo Media Luna and Cayo de Babalonia⁸⁰. On a 1933 map of Honduras, Logwood Cay finally made its appearance as Cayo Palo de Campeche⁸¹. What significance should we attach to that fact? To start, that solitary reference to Cayo Palo de Campeche is somewhat disappointing, as counsel for Honduras had suggested that on older maps Logwood Cay is frequently referred to by the name Palo de Campeche⁸². Maybe Honduras will come up with more maps showing Palo de Campeche, Cayo Mora or a cay with still some other name. This confusion about the names of cays, if anything, suggests a limited knowledge of the area.

7. But let us suppose for a moment that Cayo Palo de Campeche that is mentioned in Honduran legislation is really Logwood Cay. If that is the case, it just as much shows that it concerned a paper claim made without any knowledge of the region. First of all, it is important to clarify one important point that will be illustrated on figure 3. The cay that is *now* referred to as Logwood Cay is not the same cay that Professor Sands showed to you in his presentation last Tuesday. In the Counter-Memorial, Honduras noted that the original Logwood Cay and Media Luna Cay are now submerged⁸³. The Counter-Memorial also indicates that Logwood Cay

⁷⁹CR 2007/7, p. 27, para. 16.

⁸⁰*Ibid.*

⁸¹CMH, Vol. III, plate 24; fig. PS1 5.

⁸²CR 2007/6, p. 22, para. 31.

⁸³CMH, p. 14, footnote 2.

now is used as another name for Savanna Cay⁸⁴. In respect of the original Logwood Cay, which according to Professor Sands is Cayo Palo de Campeche, the Counter-Memorial notes two things, apart from the fact that it is now submerged. It is mentioned that it is small and without vegetation, and uninhabited⁸⁵. Why refer to that feature to allegedly claim all the cays in dispute when there are so many supposedly important islands in the same area, as Honduras submits? Or, why not just refer to Media Luna? As counsel for Honduras observed last Monday, Media Luna is used to refer to the whole area of cays and reefs to the south of the Main Cape Channel⁸⁶.

8. Counsel for Honduras submitted that Nicaragua's lack of protest against Honduran legislation that mentions Cayo Palo de Campeche has legal significance⁸⁷. That is not the case. Let me turn to the maps for a moment. Counsel for Honduras showed you a part of a map from 1933 that was identified as the "General Chart of Honduras 1933"⁸⁸, on the figure. What he did not tell you is that this is not an official map of Honduras. What he also did not tell you is that there also exists [a map from 1933 that is an official map of Honduras.] That map was introduced by Honduras in the Counter-Memorial⁸⁹. Why not show that official map? The answer is simple. The 1933 official map, like the 1954 official map of Honduras — I discussed both two weeks ago⁹⁰ — only shows the cays to the north of the Main Cape Channel as part of the territory of Honduras. In view of that official position of Honduras, one fails to see why Nicaragua should have protested Honduran legislation that made reference to Cayo Palo de Campeche, a name that was, as far as we know, only used to refer to Logwood Cay on one map without any specific status.

9. Counsel for Honduras also suggested that Logwood Cay under the name Cayo Palo de Campeche was the subject of some of the earlier *effectivités* on the part of Honduras⁹¹. However, there is no evidence of any *effectivités* on the part of Honduras on Logwood Cay. That should not

⁸⁴CMH, p. 18, para. 2.3.

⁸⁵CMH, p. 18, para. 2.10; p. 18, footnote 19.

⁸⁶CR 2007/6, p. 22, para. 30.

⁸⁷CR 2007/7, p. 27, para. 16.

⁸⁸See fig. PS1 5.

⁸⁹CMH, p. 47, para. 3.36 and plate 24.

⁹⁰CR.2007/3, pp. 51-53, paras. 41-42.

⁹¹CR 2007/6, p. 22, para. 31.

come as a surprise. Logwood Cay was uninhabited and without vegetation and has disappeared under the waves.

10. It should be noted that counsel for Honduras last week tried to raise Palo de Campeche from the waves. For instance, it was noted that “there is no dispute between the Parties that Cayo Palo de Campeche, Bobel Cay, South Cay, Savanna Cay, Media Luna Cay and Port Royal Cay are islands”⁹². Nicaragua accepts that the present day Logwood Cay, referred to in the quotation as Savanna Cay, is an island. Nicaragua rejects that the original Logwood Cay, that allegedly is Cayo Palo de Campeche, is an island, as it is submerged. The same consideration also applies to the original Media Luna Cay that is also submerged.

11. Apparently, the fact that Palo de Campeche is now submerged did not deter counsel for Honduras from visiting that cay. Professor Sands showed a figure and observed: “You can see them highlighted here: Bobel Cay, Port Royal Cay, Savanna Cay, South Cay, Logwood Cay — which used to be known as Palo de Campeche — as well as Half Moon Cay, otherwise known as Media Luna Cay. We have spent time on these islands.”⁹³ You may note that he mentions both Savanna Cay — the present-day Logwood Cay — and Palo de Campeche — allegedly the original Logwood Cay that is submerged⁹⁴. He even went further. He said that, having set foot on the islands, he could assure me that they are *terra firma* and that they are populated⁹⁵. As I mentioned before, apart from the original Logwood Cay — allegedly Palo de Campeche — the original Media Luna Cay is also submerged. According to Honduras, Media Luna Cay is now used to refer to Savanna Cay⁹⁶. The statement of counsel for Honduras indicates that he visited two distinct cays: Savanna Cay and Half Moon Cay. But maybe I misunderstood counsel for Honduras and he just intended to say that he used his trip to visit other cays in the Caribbean. There is, indeed, a Logwood Cay in Belize and I would not be surprised if there would turn out to be still others. To prevent that, counsel for Honduras will have to give us another geography lesson. Let me clarify that Logwood Cay in Belize apparently lies in the interior.

⁹²CR 2007/7, p. 20, para. 6.

⁹³CR 2007/7, p. 24, para. 11.

⁹⁴CR 2007/7, p. 24, para. 11.

⁹⁵CR 2007/7, p. 24, para. 11.

⁹⁶CMH, p. 14, para. 2.3.

12. We do not know when the original Logwood Cay and Media Luna Cay became submerged. However, we may readily assume that for Logwood Cay this already was the case in 1980 or 1981. As Honduras has indicated, in 1980 and 1981 triangulation markers were placed on Savanna Cay, South Cay and Bobel Cay⁹⁷. The marker on Savanna Cay bears the name Logwood on it⁹⁸. We do not have similar information for the original Media Luna Cay. However, the fact that according to the Counter-Memorial the name Media Luna Cay was used for Savanna Cay⁹⁹ suggests that the original Media Luna Cay may have disappeared a considerable time before the Counter-Memorial was written, possibly already before 1980.

13. At this point it may be appropriate to recall that Honduras argues that the reference to two cays in the area of overlapping maritime claims in its 1982 Constitution is evidence of its title to the cays in dispute. One of those is Palo de Campeche — according to Honduras the original Logwood Cay that in 1982 was already submerged. The other is Media Luna Cay. According to the information that Honduras has provided, this is the original Media Luna Cay. Plate 37C of the Rejoinder — showing the cays mentioned in the 1982 Constitution — places Media Luna Cay at the position of the original Media Luna Cay. Not at the position of Savanna Cay that is now also referred to as Media Luna Cay. That can be seen on figure 4 that is on the screen. The only two cays to the south of the Main Cape Channel that allegedly are included in the 1982 Constitution of Honduras are both submerged. Probably already before the 1982 Constitution was enacted.

14. Counsel for Honduras also referred to a Note of 25 February 1977 in which the Government of Jamaica requested permission for its coastguard vessel *Fort Charles* to enter territorial waters of Honduras of Savanna or Savanilla Cay¹⁰⁰. Counsel concluded that this contemporaneous document corroborates a witness statement, which among others refers to Savanna Cay as Jamaica Cay¹⁰¹. So now we have five names for Savanna Cay. Not only Savanna Cay but also Logwood Cay, Media Luna Cay, Savanilla Cay and Jamaica Cay. But why should we accept that the Savanna or Savanilla Cay mentioned in the Jamaican Note is the same as

⁹⁷CMH, p. 125, para. 6.65.

⁹⁸CMH, p. 125, para. 6.65.

⁹⁹CMH, p. 14, para. 2.3.

¹⁰⁰See Note of 25 February 1977, CMH, Ann. 19; CR 2007/7 pp. 39-40, para. 46.

¹⁰¹CR 2007/7 pp. 39, para. 46.

the Savanna Cay at issue in these proceedings? The Note does not provide geographical co-ordinates. Savanilla Cay might be in the Cayos Cajones to the north of the Main Cape Channel. It might be in the Bays Islands to the north of the Honduran mainland, where Jamaicans also fish. Now, with the knowledge that there are numerous cays off the coast of Honduras and with all the names they seem to have, are we really to believe counsel for Honduras that he has correctly identified Cayo Palo de Campeche mentioned in Honduran legislation as being Logwood Cay?

15. Counsel for Honduras also insists on the fact that as Cape Gracias a Dios is at the parallel of 15° N that of necessity implies a traditional boundary along that same parallel. In view of that insistence, I feel obliged to draw the attention of the Court once more to the 1933 official map of Honduras. On the screen is an inset included in that map (figure AE3-5). The inset contains a red dotted line that is identified as the “linea marítima jurisdiccional de Honduras” translated as “jurisdictional maritime line of Honduras” by Honduras¹⁰². For the sake of clarity that line has been enhanced on the figure on the screen. The line runs in a south-easterly direction from the mouth of the Rio Coco. That is well to the south of Honduras’s alleged traditional boundary dating from the colonial era. In response to the Reply¹⁰³, in the Rejoinder Honduras had this to say about the inclusion of that line: “[a]t that time Honduras may indeed have claimed title over those islands, as it appeared to do by reference to an official map produced in 1933, which defined the area over which Honduras had an extended maritime claim”¹⁰⁴. Had Honduras in 1933 forgotten about its long-standing traditional boundary line along the parallel of 15° N? Or did that boundary perhaps never exist? The first question can only be answered in the negative. The parallel of 15° N is a fiction. It did not exist either in 1933 or in 1821.

The adjacency of the cays to Nicaragua

16. The adjacency of the cays in dispute to the cays and the mainland coast of Nicaragua provided the basis of the Nicaraguan title to the cays south of the Main Cape Channel in 1821¹⁰⁵. It will not have gone unnoticed that counsel for Honduras has spent a great deal of time to undermine

¹⁰²CMH, p. 47, para. 3.36.

¹⁰³RN, p.101, para. 6.23.

¹⁰⁴RH, p. 94, para. 5.39.

¹⁰⁵RN, pp. 127-128, paras. 6.90-6.92 and pp. 138-139, para. 6.118; CR 2007/3, pp. 36-37, para. 89.

the existence of that adjacency. For instance, Professor Greenwood in his overview of the case last Monday suggested that “Nicaragua’s attempt to build a proximity argument on the basis of the distance between these islands — that is the cays in dispute — and Edinburgh Cay, just south of the 15th parallel, is really clutching at straws”¹⁰⁶. That misrepresents the Nicaraguan position. Nicaragua has submitted that the contiguity of *all* the islands to the south of the Main Cape Channel is relevant to determine the title to those cays in 1821¹⁰⁷. As Nicaragua also has pointed out that chain of islands starts from the Nicaraguan mainland coast at Punta Gorda¹⁰⁸.

17. Last Friday, counsel for Honduras tried to raise doubts about the status of Edinburgh Cay and the cays on Edinburgh Reef. Let me read paragraph 134 of his statement in full:

“On the Nicaraguan side the controlling base points for the provisional equidistance line are on Edinburgh Cay and Edinburgh Reef, which, relatively speaking, are somewhat isolated from other Nicaraguan islands. This selection of the Nicaraguan base points may be generous, particularly in so far as drying features shown on the reef are concerned. Nicaragua has made no effort to explain these features to the Court, and Honduras has no independent evidence of their characteristics. Thus, we are left with only the appearance of these features on modern nautical charts. In all events, these features on the Nicaraguan side are smaller than those on the Honduran side and whether they are islands in a legal sense is an open question. However, since again this is an exercise — an hypothesis — we will give Nicaragua the benefit of the doubt and use them as Nicaraguan base points to construct the provisional equidistance line.”¹⁰⁹

18. That seems to be an awful lot of words to justify the selection of a couple of base points for a provisional equidistance line. A provisional line that would be to the south of the parallel of 15° N in any case, whether or not those specific base points would be selected.

19. The reason for belittling the cays just south of the parallel of 15° N obviously is intended to convince the Court that there is no adjacency between the mainland coast of Nicaragua and the cays stretching north. Let us suppose for a moment that counsel for Honduras is right. What if Edinburgh Cay and the cays on Edinburgh Reef were found to be nonexistent? That would not be relevant to establish the situation in 1821. What can be established about the cays for that date? Chart 2425 of the United Kingdom Hydrographic Office, originally compiled on the basis of surveys from 1830 to 1843, shows six cays on Edinburgh Reef (figure AE3-6). Those are the small

¹⁰⁶CR 2007/6, p. 28, para. 28 (footnote omitted).

¹⁰⁷CR 2007/1, p. 51, para. 11.

¹⁰⁸*Ibid.*

¹⁰⁹CR 2007/10, p. 27, para. 134.

dots indicated by the red arrows. Probably not important islands, like the cays visited by counsel for Honduras, but they are clearly indicated as features that are permanently above water. I should however also point out that chart 2425 also contains data from 1927, not only from the nineteenth century survey. However, there is the Honduran map of 1886. On the screen is the close-up of that map (figure AE3-7) that was shown last week by counsel for Honduras. To the south of the features to which he directed your attention you can see Recife Edinburgh, very similar in shape to Edinburgh Reef on the close-up we just saw. It can be excluded that the 1886 map was based on a contemporary survey carried out by Honduras. It is probably sufficient to observe that only in 1976 Honduras established a navy. The only available explanation would seem to be that the information was taken from chart 2425 that was based on the surveys carried out by Great Britain between 1830 and 1843, shortly after 1821.

20. That the cays south of the Main Cape Channel are not neatly divided into two groups by the parallel of 15° N was confirmed — perhaps inadvertently — by counsel for Honduras. It was pointed out that Media Luna is not only used to refer to Media Luna Cay but also to define the cays and reefs in a larger area¹¹⁰. Counsel for Honduras then gave a definition of the group¹¹¹. The definition he provided not only includes cays and reefs to the north of Honduras's supposed traditional boundary, but also Cock Rock to the south of that line. Figure 8 on the screen identifies the features that are included in the definition.

The basepoints of Honduras provisional equidistance line

21. Counsel for Honduras insists that all of the features in front of the mainland coasts of the Parties must be taken into account in the construction of a provisional equidistance line¹¹². It was observed that “the provisional baseline is to be developed from the baselines of the two coastal States”¹¹³. Counsel for Honduras does not cite any authority for this proposition. How could he? There is no such obligation in respect of the development of the provisional equidistance line. Two

¹¹⁰CR 2007/6, p. 22, para. 30.

¹¹¹CR 2007/6, p. 22, para. 30.

¹¹²CR 2007/6, p. 34, para. 78; CR 2007/10, p. 26, para. 129.

¹¹³CR 2007/10, p. 26, para. 129.

weeks ago I recalled the treatment of Filfla by the Court in the *Libya/Malta* case¹¹⁴. That island, which is much bigger than Honduras's four important islands taken together¹¹⁵, was not taken into account by the Court to establish the provisional equidistance line.

22. There is another, even more important point. Last week counsel for Honduras submitted that the treatment of Qit'at Jaradah in *Qatar v. Bahrain* was in conformity with the position of Honduras in respect of the treatment of the cays to the north of Honduras's parallel¹¹⁶. That conclusion is questionable. Qit'at Jaradah was taken into account in the establishment of a provisional equidistance line. The Court found that there was a special circumstance in that case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah¹¹⁷. That adjustment of the equidistance line shows that it makes little sense to assess the equitable nature of a maritime boundary proposed by a State by comparing it to a provisional equidistance line. The real test is how Honduras's parallel compares to a boundary line that gives the cays their proper weight. As the example of Qit'at Jaradah shows the adjustment of the provisional equidistance line may result in a boundary that passes in the immediate vicinity of a small island. That solution was the result of the particular circumstances of that case. Other solutions are available. For instance, in the *United Kingdom-France Continental Shelf* the Court of Arbitration in the Channel established an equidistance boundary between the opposite mainland coasts of France and the United Kingdom. The Channel Islands, not altogether comparable to the cays that play a role in the present case, were attributed a continental shelf of 12 nautical miles¹¹⁸.

The turtle fishery dispute

23. The Parties remain divided on a number of points concerning the turtle fishery dispute that involved Nicaragua and the United Kingdom. This especially concerns the significance of the work of Commander Kennedy at the British Admiralty concerning the cays off the mainland coast

¹¹⁴CR 2007/1, p. 61, para. 43.

¹¹⁵CR 2007/1, p. 63, para. 47.

¹¹⁶CR 2007/8, p. 58, paras. 75-76.

¹¹⁷*I.C.J. Reports 2001*, p. 104, para. 219

¹¹⁸Arbitral Award, 30 June 1977 (*54 ILR*), paras. 201-203.

of Nicaragua as confirming a Nicaraguan title to the cays. Counsel for Honduras raised four criticisms in that respect.

24. First, it was suggested that Commander Kennedy may not have been aware of the Honduran Constitution of 1957 which claimed Cayo Palo de Campeche¹¹⁹. We do not have the answer to that supposition. Neither do we know if Commander Kennedy was aware of Honduras's official map of 1954 that showed that Honduras did not claim any of the cays to the south of the Main Cape Channel. So let us stick to the facts and let me continue my review of the criticism of Honduras on the basis of the documents that have been placed before the Court.

25. A second criticism of counsel for Honduras. Again a speculation. Counsel for Honduras ventures that Commander Kennedy may have been aware of the occupation of Nicaragua of the territory north of the Rio Coco¹²⁰. This time we do not need to speculate. We have documentary evidence. Counsel for Honduras quoted from a letter of Commander Kennedy which notes that the Rio Wanks — one of the other names of the Rio Coco — is the boundary between Nicaragua and Honduras¹²¹. In addition, not one of the British documents related to the turtle fishery dispute in Annex 39 to the Reply refers to this occupation by Nicaragua¹²².

26. A third criticism of Nicaragua's reliance on Commander Kennedy's work is that he was "not expressing any view on behalf of the United Kingdom and there is no evidence before the Court that his ideas were shared by the Government of the United Kingdom or ever communicated to Nicaragua"¹²³. The suggestion that the work of Commander Kennedy was not related to the ongoing negotiations between Nicaragua and the United Kingdom is incorrect. The documents in Annex 39 to the Reply indicate that there were communications between the Foreign Office, the Colonial Office, the Admiralty and officials in Jamaica and the Cayman Islands. Those documents also provide evidence of another point of critical importance. There is no reference to Honduras. Honduras itself has also failed to place any evidence before the Court that it ever took any interest in the negotiations between Nicaragua and the United Kingdom.

¹¹⁹CR 2007/7, p. 42, para. 49.

¹²⁰CR 2007/7, p. 42, para. 49.

¹²¹CR 2007/7, p. 42, para. 49.

¹²²CR 2007/7, p. 42, para. 49.

¹²³CR 2007/7, p. 41, para. 49.

27. A final point of Honduras concerns the fact that Commander Kennedy made it clear that certain islands might be claimed to be on the continental shelf of Honduras depending on how the continental shelf boundary would be agreed¹²⁴. Counsel for Honduras failed to notice that this observation only concerned Logwood Cay and Burn Cay. Commander Kennedy's observation did not concern any of the other cays he mentioned, which also include Bobel Cay, Savanah Cay and South Cay¹²⁵. In conclusion, Honduras fails to refute that the turtle fishery dispute, in which it was never involved, confirms Nicaragua's title to the cays.

The geographical relationship of Nicaragua and Honduras with Jamaica

28. Madam President, allow me to say something more about the Nicaraguan Rise. When Professor Greenwood compared the Nicaraguan Rise to the horn of an "orange rhinoceros" last Monday¹²⁶, I was sure that we were not going to hear anything more from counsel for Honduras about that feature. I was wrong. The Nicaraguan Rise was revisited at great length¹²⁷. However, counsel for Honduras skirted the points that had been made by Nicaragua in respect of the significance of the Rise and a diplomatic Note of Honduras of 1995 addressing the significance of the Rise for the maritime delimitation with Nicaragua¹²⁸. There is no need to repeat our argument. There is however one thing I would like to point out. Counsel for Honduras submitted that Nicaragua uses the Nicaraguan Rise to define the area in dispute¹²⁹. That is no the case. It is evident that Nicaragua's analysis is based on the relationship of the coasts of the Parties. Perhaps the severe criticism of Nicaragua's argument is caused by the fact that the Nicaraguan Rise points north-east in the direction of Jamaica and not east along a parallel. That concern of Honduras is unfounded. The coastal relationship of Nicaragua and Honduras with Jamaica (figure AE3-9) does not depend on the presence of the Nicaraguan Rise, but on coastal geography¹³⁰.

¹²⁴CR 2007/7, p. 41, para. 49.

¹²⁵Extract from Letter from Commander Kennedy, Admiralty to E.C. Burr, Colonial Office, 27 November 1958 (RN, Ann. 39).

¹²⁶CR 2007/6, p. 38, para. 94.

¹²⁷CR 2007/8, pp. 17-19, paras. 8-13; pp. 54-55, paras. 61-65.

¹²⁸CR 2007/1, pp. 66-67, paras. 58-60; CR 2007/2, p. 46, paras. 159-162.

¹²⁹CR 2007/8, p. 18, para. 9.

¹³⁰CR 2007/1, pp. 49-50, para. 6.

The oil concession practice of the Parties

29. The oil concession practice of the Parties will be mainly addressed by my colleague Professor Remiro Brotóns. As far as the cays in dispute are concerned his analysis confirms what was said in the first round of oral pleadings of Nicaragua¹³¹. There is just one other point to make in respect of the cays in dispute. Listening to counsel for Honduras last week the Court may have gotten the impression that the cays on the Miskito Bank are forested with 30 ft antennae. I noted at least six instances counsel for Honduras mentioned that 30 ft antenna. It all the time concerned the same temporary antenna that was placed on Bobel Cay in 1975. Counsel for Honduras also submitted that the placement of that antenna on Bobel Cay was authorized by Honduras¹³². The report to which reference is made in that connection¹³³ does not contain any suggestion that specific authorization for the placement of the antenna on Bobel Cay was sought from the Honduran authorities. The report also indicates that it was submitted to the Union Oil Company, not the Honduran authorities. For the legal implications of this private activity I respectfully refer the Court to my earlier presentation¹³⁴. Regrettably, counsel for Honduras did not comment on that argument at all.

30. Counsel for Honduras insists that the four cays it has identified as important islands are stable features¹³⁵. The fact that counsel for Honduras was able to identify two submerged cays as *terra firma* should make one wary. There is information on one of the cays in dispute which indicates that it is far from stable. On the screen is a figure (figure AE3-10) comparing a photograph of Bobel Cay¹³⁶ from 2000 with a figure of Bobel Cay contained in the report of 1975 I just discussed. The elongated shape of the Bobel Cay on the figure is completely different from the square shape of the Bobel Cay on the aerial photograph. Unfortunately, there is no information that would allow a similar assessment of any of the other cays Honduras has identified as important islands.

¹³¹CR 2007/3, pp. 61-62, para. 67. .

¹³²CR 2007/7, p. 30, para. 21.

¹³³Final Report of GEOFIX Survey Honduras conducted for the Union Oil Company, April-May 1975 (RH, Ann. 264).

¹³⁴CR 2007/3, pp. 60-61, paras. 62-64.

¹³⁵See, e.g., CR 2007/6, p. 23, para. 33.

¹³⁶CMH, plate 17.

The significance of evidence presented by the Parties

31. I will not again treat the Court to a review of the evidence that has been put before it. It will have become abundantly clear that the Parties remain divided on the significance of that evidence. Honduras considers that it establishes its title to the cays. Nicaragua is convinced that the evidence clearly demonstrates that Honduras started to take an interest in the cays themselves in the latter half of the 1990s. I respectfully refer the Court to the pleadings of both Parties. For the moment, I will limit myself to giving you a number of examples of the way counsel for Honduras dealt with the evidence last week to show that argument made by counsel for Honduras should be very carefully scrutinized and be compared with the evidence that is in the record.

32. Counsel for Honduras at times was economical with the facts to fit argument to Honduras's case. The Agent for Nicaragua already set the record straight as far as the 1998 trade agreement between the Dominican Republic and the Central American Republics is concerned. That was certainly not the only example. I already noted the silence of counsel for Honduras on the 1933 official map of Honduras. Let me give you another example. Counsel for Honduras noted that "in 1975 Argentina requested the right for one of its aircraft to overfly [Honduras] by a route of 15° 17' N, 82° W, on a journey between Argentina and the United States. That passes directly over the area around the islands."¹³⁷ The point 15° 17' N, 82° W has been plotted on the figure on the screen (figure AE3-11). The point is located beyond any area of territorial sea. The cays in dispute are to the west of the point. There is no reason to conclude that this event pertains to the cays in dispute.

33. Another example of selectivity. Counsel for Honduras referred to the position of Jamaica in delimitation negotiations with Nicaragua. It was observed that "[t]hose negotiations did not concern sovereignty over the islands"¹³⁸. That is true. But counsel for Honduras ignores the fact that Jamaica indicated to Nicaragua that it was prepared to accept Media Luna as a base point¹³⁹ — the same Media Luna group that Jamaica allegedly has recognized as being Honduran for decades.

¹³⁷CR 2007/7, p. 40, para. 47. Transcription of diplomatic Note of 30 Oct. 1975, CMH, Vol. 2, Ann. 143.

¹³⁸CR 2007/7, p. 39, para. 46.

¹³⁹RN, Ann. 33, CR 2007/3, p. 47, para. 28.

34. Another example. Counsel for Honduras referred to the *Indice Geografica de Nicaragua* as a “privately published geographical index of 1971”¹⁴⁰. On the screen we have the title page of that publication (figure AE3-12). At the top of the page it reads “Ministerio de Obras Publicas” — Ministry of Public Works — and “Instituto Geográfico Nacional” — National Geographic Institute. That Honduras seeks to characterize this as a privately published work clearly shows that it understands the implication of the publication. It is one of the elements, not of establishing the title to the cays in dispute, but confirming the existence of that long-standing title of Nicaragua.

35. The alleged relevance of the regulation of fishing activities will be dealt with by my colleague Professor Remiro Brotóns as it mainly concerns maritime areas, not the cays in dispute. Last Tuesday counsel for Honduras suggested otherwise. He observed:

“[b]ut fishing activity is also relevant to sovereignty because it shows *effectivités* in relation to the islands. Many of the fishermen who work these areas and do so pursuant to Honduran-granted licences make use of the islands. Some of them live on the islands and others just visit, and I will come back to this in more detail in my second presentation.”¹⁴¹

And indeed, on Thursday counsel for Honduras took you through a number of fishing licences that had been issued by Honduras¹⁴². However, there is one thing that counsel for Honduras failed to point out. Honduras has submitted documents concerning a number of fishing licences¹⁴³. A review of those documents shows that all the licences were issued to commercial fishing companies. Honduras has submitted no evidence that those companies had any link to the artisanal fishermen that use the cays. The suggestion that the fishing licences that Honduras has introduced pertain to the cays in dispute is thus without basis.

36. Counsel for Honduras insisted that for over 60 years third States and international organizations have recognized the fishing area immediately to the north of the 15° parallel and around the cays as falling within the jurisdiction of Honduras¹⁴⁴. Reference was again made to the 1943 report by the Fish and Wildlife Service of the United States Department of the Interior¹⁴⁵. As

¹⁴⁰CR 2007/7, p. 44, para. 55.

¹⁴¹CR 2007/7, p. 33, para. 29.

¹⁴²CR 2007/9, p. 27, para. 32 and pp. 32-33.

¹⁴³CHM, Anns. 119 and 120 and RH, Anns. 256-259.

¹⁴⁴CR 2007/9, pp. 25-26, paras. 29-30.

¹⁴⁵CR 2007/9, pp. 25-26, para. 29; CMH, Vol. 2, Ann. 162.

was pointed out by me, all cays and islands mentioned in the report are to the north of the mainland of Honduras¹⁴⁶. Counsel for Honduras countered as follows. He noted that the report mentions fishing banks: “[a]nd this is what it says: ‘They include Gorda Bank, Rosalind Bank, Serranilla Bank, Thunder Knoll and others.’ . . . That is a 1943 document, treating the area in question as part of Honduras.”¹⁴⁷ Two points. None of the cays in dispute is located on those banks mentioned in the report. Secondly, should the Court give any credence to the assertion of counsel for Honduras that a United States government agency in 1943 considered those banks on the high seas as part of Honduras?

37. In think the Court should by now have a clear picture of the way counsel for Honduras dealt with the evidence last week.

Conclusions

38. Madam President, I can be short as far as my conclusions are concerned. As far as the title to the cays in dispute is concerned, I can refer you to my conclusions during the first round of pleadings¹⁴⁸. Nicaragua’s title to the cays dates from 1821. There is no indication that Nicaragua ever relinquished this claim. The *effectivités* that Honduras has sought to create in respect of the cays in the second half of the 1990s cannot replace the Nicaraguan title to the cays.

39. As far as the geography of relevance to the maritime delimitation is concerned it is especially noticeable that neither Honduras nor counsel for Honduras actually have the intimate knowledge of the cays in dispute that is claimed.

40. Madam President, I have come to the end of my presentation. I thank you and the other Members of the Court for your close attention.

I note that we are close to 6 o’clock, Madam President. Maybe you would care to give the floor to Professor Remiro Brotóns tomorrow morning? Thank you.

¹⁴⁶CR 2007/3, pp. 46-47, para. 26.

¹⁴⁷CR 2007/9, p. 26, para. 29.

¹⁴⁸CR 2007/4, pp. 13-14, paras. 78-80.

The PRESIDENT: Thank you very much, Dr. Oude Elferink. The Court rises and the sitting will be resumed at 10 o'clock tomorrow morning.

The Court rose at 6 p.m.
