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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Wednesday 7 March 2007, at 10 a.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le mercredi 7 mars 2007, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

M. Couvreur, greffier

The Government of the Republic of Nicaragua is represented by:

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

as Agent, Counsel and Advocate;

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

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

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

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

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

as Counsel and Advocates;

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

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

as Scientific and Technical Advisers;

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

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

as Assistant Advisers;

Ms Gina Hodgson, Ministry of Foreign Affairs,

Ms Ana Mogorrón Huerta,

as Assistants.

The Government of the Republic of Honduras is represented by:

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

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

as Agents;

Le Gouvernement de la République du Nicaragua est représenté par :

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

comme agent, conseil et avocat ;

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

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

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

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

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

comme conseils et avocats ;

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

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

comme conseillers scientifiques et techniques ;

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

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

comme conseillers adjoints ;

Mme Gina Hodgson, ministère des affaires étrangères,

Mme Ana Mogorrón Huerta,

comme assistantes.

Le Gouvernement de la République du Honduras est représenté par :

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

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

comme agents ;

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

as Co-Agent;

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

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

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

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

as Advisers;

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

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

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

comme coagent ;

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

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

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

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

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

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

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

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

comme conseils et avocats ;

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

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

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

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

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

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

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

comme conseillers ;

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

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

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

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

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

as Assistant Advisers;

Mr. Scott Edmonds, Cartographer, International Mapping,

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

as Technical Advisers.

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

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

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

comme conseillers adjoints ;

M. Scott Edmonds, cartographe, International Mapping,

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

comme conseillers techniques.

The PRESIDENT: Please be seated. The session is open. The Court meets again for the continuation of the case of Nicaragua. You have the floor, Mr. Brownlie.

Mr. BROWNLIE: Thank you, Madam President. Madam President, Members of the Court, yesterday I had completed the question of relevant circumstances and I move on now to the proposal of a median line by Honduras.

The equidistance line proposed by Honduras in the Rejoinder

190. In the Rejoinder, Honduras proposes an equidistance line or, what purports to be an equidistance line. The purpose is stated to be that this line is substantially more to the advantage of Honduras than the "traditional line" claimed in her Counter-Memorial (RH, para. 8.19).

191. This "equidistance line" is described as follows:

> "Plate 48 [which is reproduced here as graphic IB40] shows the Honduran line together with the equidistance line. Due to the unstable character of the mouth of the River Coco, the initial segment is a simplified equidistance line that runs from the point established by the 1962 Mixed Commission to the tripoint with Honduras' Bobel Cay and Nicaragua's Edinburgh Cay. Thereafter the equidistance line is constructed using standard methods."

And the Rejoinder continues,

> "As can be seen, the equidistance line will leave the mainland and trend in an east-southeast direction south of 14° 59.8' N latitude to a point that is approximately 14.8 nautical miles off the mainland coast. At this point, Nicaragua's rocks begin to turn the equidistance line back to the north and east. However, it never goes north of 14° 59.8' N latitude. Further east, the eastward position of Honduras' South Cay takes over and pushes the equidistance line further south-eastward. One would expect that if Honduras were to advance the strict equidistance line as its preferred boundary method, Nicaragua would object and say that the equidistance line developed from Honduran islands north of 15° N latitude cuts off the projection of the eastward facing coastal front of Nicaragua." (RH, pp. 130-131, paras. 8.17-8.18.)

192. This line is introduced by Honduras as "a provisional equidistance" line (para. 8.16). For Honduras to describe the line as a provisional median line between the States of Nicaragua and Honduras is totally misleading; the construction of the line totally ignores the entire mainland coasts of both States. The line, so far as it is calculated, is a median line between a subjective choice of minute cays lying in excess of 25 miles to seaward of the mainland coast. The positions of these cays are dubious, being almost entirely based on nineteenth century surveys and, indeed, the status of these cays as rock or island features is by no means certain. The choice of cays does

not appear to include all the available structures and the base points used are picked on the high waterline of the cays, not the charted low waterline of the surrounding reefs. In all respects, the Honduran line fails the criteria needed to describe it as a median line.

193. At a rather arbitrary point in this construction between cays of dubious position and disputed sovereignty, where the entrance to the river Coco is at the same distance as the high-water line of the nearest cays, the constructed median line has been abandoned and the line is simply joined to the 1962 Mixed Commission point in the river mouth. Thus the construction is misleading, based solely on the dubious selection of minute cays, ignoring the low waterline and bearing no relationship at all to the actual coasts of either State.

194. The median line, whether provisional or not, must be a rigorous calculation based on valid base points from either side, even where the coast is potentially unstable. By any standards, an examination of the mainland coasts clearly indicates that a line equidistant from both baselines will depart from the mouth of the river in a north-easterly direction and continue in such a direction if only the mainland base points are considered. It is only under the influence of questionable, minute cays some 25 to 42 miles off the coast that this north-easterly direction can be deflected to the east and further out, to the south-east.

195. In conclusion, the line introduced by Honduras does not satisfy the legal and hydrographic criteria of validity of a line described as an "equidistance line".

Some incidental questions

196. Before setting out my conclusions, there are some incidental questions to be dealt with.

(a) ***The median line as a provisional line***

197. The first such question concerns the standard methodology adopted by the Court in the delimitation of a single maritime boundary. The method was described in the Judgment in the *Cameroon* v. *Nigeria* case. In the words of the Court:

> "The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering

> whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Judgment, I.C.J. Reports 2002*, p. 441, para. 288.)

The Court then reviews the relevant passages in the Judgments in the *Jan Mayen* and *Qatar/Bahrain* cases.

> "Thus, in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, the Court, which had been asked to draw a single maritime boundary, took the view, with regard to delimitation of the continental shelf, that
>
> > 'even if it were appropriate to apply . . . customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line' (*I.C.J. Reports 1993*, *Judgment*, p. 61, para. 51).
>
> In seeking to ascertain whether there were in that case factors which should cause it to adjust or shift the median line in order to achieve an "equitable result", the Court stated:
>
> > '[i]t is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of "relevant circumstances". This concept can be described as a fact necessary to be taken into account in the delimitation process.' (*Ibid*, p. 62, para. 55.)
>
> In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* the Court further stated that:
>
> > '[f]or the delimitation of the maritime zones beyond the 12-mile zone it [would] first provisionally draw an equidistance line and then consider whether there [were] circumstances which must lead to an adjustment of that line' (*I.C.J. Reports 2001*, para. 230).
>
> The Court will apply the same method in the present case." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Judgment, I.C.J. Reports 2002*, pp. 441-442, paras. 289-290.)

198. This methodology confirmed in the *Cameroon* v. *Nigeria* case is the standard approach but, in parenthesis, it should be recalled that the provisional drawing of a median line is not a necessary or obligatory step in every case (see the Judgment in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), I.C.J. Reports 1993*, p. 103, para. 51).

199. In any event, there is no obvious reason why the standard judicial procedure should not be applied *mutatis mutandis* in the present case. After all the bisector of angles is the *alter ego* of equidistance, when the physical and political geography dictates a modified approach. Accordingly, like the provisional equidistance line, the bisector is a provisional alignment which may require adjustment in the light of the relevant circumstances.

(b) ***The perpendicular invoked by Honduras***

200. There is a second incidental question which is raised by *the Honduran thesis that the parallel of latitude claim can be reproduced as a perpendicular to the general direction of the coast.*

201. In her Rejoinder Honduras plays with the coastal geography in order to reproduce her claim to a parallel as a perpendicular to the general direction of the eastward facing coast. The precise argument is as follows:

> "Of course, if Nicaragua insists, and wishes to impose the bisector method on the local change in coastal direction at Cabo Gracias a Dios, using only the Honduran and Nicaraguan coasts that face the area to be delimited in this case, the result is instructive. For this purpose Plate 42 in Chapter 6 may be recalled. As is clearly shown by reference to that Figure, the bisector of the angle created by the Honduras' coastal front from Cape Falso to Cabo Gracias a Dios and Nicaragua's coastal front from Laguna Wano (de Bismuna) to Cabo Gracias a Dios will closely approximate a parallel of latitude." (RH, para. 7.15.)

The Rejoinder continues:

> "This is not surprising. Since Nicaragua's Laguna Wano (de Bismuna) and Honduras' Cape Falso are roughly the same distance from Cabo Gracias a Dios, and since they lie on approximately the same longitude, the exercise set forth in paragraph 7.15 above is the same as establishing the line that runs through Cabo Gracias a Dios that is perpendicular to the general direction of the coast connecting Cape Falso with Laguna Wano (de Bismuna), or for that matter between Cape Falso and Puerto Cabezas, or even between Cape Falso and Nicaragua's border with Costa Rica. Thus, the bisector of the angle of the Honduran and Nicaraguan coasts in the vicinity of Cabo Gracias a Dios, is basically the same as the perpendicular to the general direction of the eastward facing coast of Central America; in other words a parallel of latitude extending from Cabo Gracias a Dios." (RH, p. 123, para. 7.16.)

202. This thesis encounters a multiplicity of difficulties. In the first place, if it is based upon the conduct of the Parties, why is it at all relevant to assert that it coincides with the alleged outcome of a method of delimitation completely unrelated to the conduct of the Parties? Such a coincidence would be cogent only if the two quantities coinciding have a shared rationality. But

they do not, and a coincidence in these circumstances cannot provide a confirmation. The geometrical method does not confirm the conduct of the Parties, and the conduct of the Parties equally does not confirm the authenticity of the perpendicular.

203. If the perpendicular is examined on its own terms, it can be seen that it falls well outside the parameters of validity set by the applicable law. In this context Honduras subjects the perpendicular to a series of inappropriate conditions.

First: The geography on which the perpendicular is based is confined to a small sector of the coasts abutting upon the areas in dispute.

Secondly: The geography is based exclusively upon the eastward facing coast of Central America.

Thirdly: The identification of the sector of the coast alleged to be the evidence of its general direction lacks credibility.

204. First of all, the segment, being relatively short, is not representative of the general direction of the relevant coastlines abutting upon the areas in dispute.

And, furthermore, the coast connecting Cape Falso and Laguna Wano (de Bismuna) *within this sector* can be seen to lack a general direction.

And, finally, the fact that Cabo Falso and the Laguna de Wano (de Bismuna) "lie on approximately the same longitude" is legally irrelevant. In any case the suggested longitude lies substantially to the east of both Cabo Gracias a Dios and ignores the markedly convex features of the coast within the sector selected by Honduras.

205. In consequence, the proposed perpendicular has no foundation either in the actual coastal configurations or in the applicable law. I shall now move to my conclusions.

Conclusions

206. First, the sources of the principles of maritime delimitation recognize geometrical methods as applicable in appropriate circumstances. The bisector method is well established as a member of the family of geometrical methods.

207. Second, the location and mode of construction of the bisector line constitute a careful reflection of the coastal configurations in the disputed area. It also reflects the overall relationship of the coasts of the Parties.

208. Third, the bisector method produces results which involve the fulfilment of the equitable principle of equal division.

209. And lastly, in any event, in the absence of a stable terminus of the land boundary and in face of the lack of appropriate base points, the bisector method constitutes a necessary vehicle of delimitation.

210. The bisector method can be used without difficulty to deal with cases of long distance delimitation, that is to say, situations which have the following characteristics.

First: The areas to be delimited lie off, rather than between, the coasts of the Parties.

Second: The coastlines have the relation of being lateral rather than opposite.

Third: The bisector method, like equidistance, is also a function of the geography of the coastline and the area to be divided consists of the areas which either lie off the coast of Honduras or the coast of Nicaragua.

211. In contrast to the line produced by the bisector method, the Honduran "traditional line" has no relation to the legal parameters of maritime delimitation.

In coming to the end of my presentation, I want to acknowledge the assistance of colleagues in the Nicaraguan delegation and particularly the assistance of Dick Gent and Robin Cleverly. And finally I would like to thank the Court for its consideration and close attention. Madam President, I would ask you to give the podium to my colleague Professor Remiro. Thank you.

The PRESIDENT: Thank you very much, Mr. Brownlie. We do now call Professor Remiro Brotóns to address the Court.

M. BROTÓNS :

L'*«uti possidetis iuris»*

A. Présentation

1. Madame le président, Messieurs les juges, je suis très honoré de me présenter ici à nouveau pour m'adresser à vous, mais vous auriez sans doute pu éviter l'ennuyeuse tâche d'écouter cette intervention sans l'invocation répétée du principe de l'*uti possidetis iuris* par la République du Honduras, qui prétend en faire application à la délimitation des espaces maritimes entre elle et le Nicaragua. De cette application elle déduit le titre du Honduras à une ligne de partage suivant le prolongement du parallèle sur lequel est situé le point d'aboutissement de la frontière terrestre, c'est-à-dire le parallèle 14° 59,8' N[1].

2. C'est donc le Honduras qui a soulevé le débat sur l'*uti possidetis iuris*, non le Nicaragua. Et il l'a fait dans le dessein que la Cour ne fasse pas droit à la demande que le Nicaragua lui a adressée dans sa requête du 9 décembre 1999, à savoir, «de déterminer le tracé d'une frontière maritime unique» entre les espaces maritimes relevant respectivement du Nicaragua et du Honduras, «conformément aux principes équitables et aux circonstances pertinentes que le droit international général reconnaît comme s'appliquant à une délimitation de cet ordre».

3. Comme vous le savez le principe de l'*uti possidetis iuris* vise, avant tout, à assurer le respect des limites territoriales au moment de l'accession à l'indépendance ; du même coup, il transforme des limites administratives en frontières internationales (*Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 566, par. 23). Dans le cas des républiques de l'Amérique centrale, l'indépendance eut lieu en 1821. A cette date fut figée, comme en un *instantané*, la situation qui a entraîné la transformation des limites administratives des entités territoriales qui faisaient partie de la Couronne espagnole en frontières internationales.

4. Cette simple constatation devrait suffire pour constater qu'il est impossible d'appliquer l'*uti possidetis* à la délimitation d'espaces maritimes, comme le plateau continental et la zone économique exclusive qui prirent naissance à une date très, très postérieure à celle de

[1] CMH, chap. 5 ; DH, chap. 3.

l'émancipation des provinces américaines de la Couronne d'Espagne. Même avec beaucoup d'imagination, on ne peut commettre un tel anachronisme. L'invocation de l'*uti possidetis* ne serait conceptuellement admissible qu'en ce qui concerne les espaces maritimes relevant de la souveraineté du riverain en 1821, à savoir, une étroite bande d'eaux maritimes adjacentes à la côte que nous appelons aujourd'hui mer territoriale. Mais naturellement, l'application de *l'uti possidetis* dans un cas concret part de la prémisse que le souverain a projeté sur la mer les limites administratives de ses différentes divisions territoriales. De cette prémisse on ne peut tirer aucune conclusion, comme nous le verrons, pour l'Amérique hispanique.

5. Le Honduras est parfaitement conscient que ses ambitions démesurées sur la mer, le sol et le sous-sol des Caraïbes ne pourront être satisfaites par une Cour appelée à tracer une ligne qui soit équitable, celle qu'il propose ne l'étant pas. Dans cette logique, le Honduras prétend préjuger l'objet de la demande en déplaçant le différend à une question préliminaire, que le Nicaragua considère forcée et artificielle, et dont le Honduras espère tirer parti en élevant au maximum le niveau de confusion. S'il y avait déjà une ligne imposée par l'histoire, ou consentie tout au long de l'histoire, la seule tâche de la Cour serait de confirmer cette ligne. C'est ce que propose le Honduras. L'invocation de l'*uti possidetis iuris* est le premier pas dans cette volonté d'introduire le trouble.

6. Le Nicaragua réaffirme l'argumentation et les conclusions qu'il a présentées sur ce point mises par écrit dans sa réplique[2] au contre-mémoire du Honduras dans lequel l'invocation de l'*uti possidetis iuris* est apparue pour la première fois. Face aux raisonnements du Nicaragua, le Honduras a répondu dans sa duplique avec une certaine grandiloquence et des tentatives de disqualification de l'adversaire qui n'apportent rien au débat juridique.

7. En outre, dans sa duplique, le Honduras a prétendu fonder son argumentation sur des rapports d'experts qu'il suit substantiellement et qu'il incorpore par la suite dans des annexes[3].

8. Néanmoins, ce n'est pas le *curriculum* de l'auteur mais l'argumentation précise et rigoureuse qui rend un rapport solide. Du coup, l'on ne peut attendre grand-chose des rapports des

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[2] RN, chap. IV.

[3] DH, vol. II, annexes 266 et 267.

experts du Honduras, dont les sources d'information sont incomplètes et inappropriées, ce qui les conduit à un raisonnement défectueux et, fatalement, à des conclusions erronées.

9. Le Honduras et ses experts simplifient, jusqu'à la caricature, l'ordre juridique et institutionnel complexe des territoires américains de la monarchie espagnole durant le XVIII^{e} siècle et le début du XIX^{e} siècle afin de maintenir des positions dénuées de tout fondement. C'est ce que, comptant sur la bienveillante patience de la Cour, je me propose de démontrer.

10. Face aux conclusions du Honduras nous pouvons affirmer que, en 1821, date de l'indépendance de l'Amérique centrale, et donc date critique pour apprécier l'*uti possidetis iuris* (et même bien avant d'ailleurs) :

1) les espaces maritimes de la monarchie espagnole ou, si l'on veut, les mers adjacentes aux côtes de la monarchie espagnole en Amérique, n'étaient pas attribuées aux différentes entités territoriales de la Couronne, ni même délimitées entre elles ;
2) les autorités de ces entités territoriales étaient dépourvues de compétences sur la mer et sur les gens de mer ; et que
3) les compétences sur les côtes — et non sur les eaux — de l'Amérique centrale dans la mer des Caraïbes revenaient de droit et étaient exercées directement par le capitaine général du Guatemala, dont la capitainerie, à cette époque, englobait, entre autres, les intendances ou provinces de Comayagua (Honduras) et du Nicaragua.

B. La mer, un espace unitaire sous juridiction unique dans la monarchie espagnole

11. Assurément, le titulaire de la souveraineté sur la mer adjacente à la côte peut répartir l'exercice de la juridiction entre les autorités des différentes entités territoriales qui composent l'Etat souverain. Mais ce n'était pas le cas de la monarchie espagnole, pour laquelle la mer était une compétence régalienne, un droit inhérent du roi, qui y exerçait une juridiction exclusive.

12. Dans la monarchie espagnole toute la mer constitue un espace unitaire sur lequel, surtout à partir des réformes de Charles III et Charles IV dans la seconde moitié du XVIII^{e} siècle et le début du XIX^{e} siècle, une juridiction spéciale et centralisée, celle de la marine, s'applique à titre exclusif. En aucun cas celle-ci n'est attribuée aux autorités des différentes entités territoriales terrestres représentant la monarchie espagnole dans le Nouveau Monde.

The PRESIDENT: Professor Remiro, could I ask you to speak a little more slowly so that the interpreters can keep pace. Thank you.

M. BROTÓNS: Thank you.

13. La création en 1714 d'un ministère de la marine et des Indes fut suivie d'une série de réformes capitales qui conduisirent à l'unification de l'Armada et au renforcement progressif de la juridiction de la marine, à travers ses propres ordonnances.

14. Aux termes du fameux décret royal du 8 juillet 1787[4], il devait y avoir une marine royale dirigée d'une seule main dans tous les territoires de la Couronne : la main du secrétaire (le ministre) de la marine.

15. C'est à lui qu'incombait la responsabilité des établissements maritimes et des vaisseaux de l'Armada (la marine royale), des garde-côtes et des corsaires, où que ce soit dans les Indes. La marine commerciale recevait aussi ses lettres patentes et licences de ce ministère et elle était soumise aux ordonnances de la marine. Les immatriculations des marins, les chantiers navals et les travaux des ports, ainsi que les dépêches de toutes les consultations du Conseil des Indes sur les questions maritimes, étaient aussi de sa compétence.

16. Un ordre royal du 22 mai 1802 décida que tous les garde-côtes des domaines de Sa Majesté seraient affectés à l'Armada, à la marine royale ; un an plus tard, une Instruction pour la gouverne des garde-côtes aux Indes fut publiée, fort éclairante sur la situation juridique de la mer et des côtes américaines[5]. Cette Instruction a été récemment rééditée en 1982.

17. L'article premier de cette Instruction précise : «La marine royale sera chargée de la défense de toutes les côtes des domaines de Sa Majesté aux Indes.» A ce propos, elle devait établir les croisières permises par le nombre des vaisseaux disponibles dans les points les plus exposés aux fraudes.

18. Le Trésor royal, dont les intendants étaient responsables dans leurs districts, était obligé en vertu de l'article 3 de l'Instruction de remettre à la marine royale tous les vaisseaux dont il

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[4] *Decretos del Rey creando dos Secretarías de Estado y del Despacho de Indias, una de Gracia y Justicia y materias eclesiásticas, y otra de Guerra, Hacienda, Comercio y navegación, en lugar de la única que ha habido hasta ahora para todos estos negocios,* Imprenta de Lorenzo de San Martín, 1787.

[5] *Instrucción para gobierno de los baxeles de S.M. Guardacostas de Indias, publicada en 1º de octubre de 1803,* Madrid en la Imprenta Real, 1803. (Voir dossier des juges, document n° 1.)

disposait pour combattre la contrebande et il en allait de même des vaisseaux dépendant d'autres autorités et de toutes les infrastructures et moyens nécessaires à leur entretien, «à l'exception seulement des felouques ou des petites embarcations destinées à des guets et des reconnaissances à l'intérieur des ports».

19. Dans les Indes, donc, tous les bateaux, excepté les modestes felouques et les petites embarcations destinées aux rondes dans les strictes limites des ports, demeurèrent sous le commandement et le gouvernement supérieur des commandants de la marine des *apostaderos* (nom des départements maritimes et des ports militaires en Amérique)[6]. Ceux-ci (les commandants de la marine) décidaient par eux-mêmes «et sans que l'ordre des vice-rois soit nécessaire» de la sortie des vaisseaux, «que ce soit lorsqu'on les destine à des croisières ou bien lorsqu'on les emploie dans une commission déterminée», ce qui pouvait arriver lorsque les commandants de marine ou les chefs de la défense terrestre étaient informés de quelque fraude que l'on tentait de commettre[7].

20. A partir de 1767, La Havane fut l'*apostadero* principal des vaisseaux de la marine royale qui contrôlaient les eaux des Caraïbes et protégeaient les côtes de la vice-royauté de la Nouvelle Espagne (Mexique actuel) et de la capitainerie générale du Guatemala (Amérique centrale). En cas de nécessité, ils étaient assistés par les vaisseaux de l'*apostadero de* Carthagène des Indes. En aucun cas les autorités terrestres ne pouvaient prétendre exercer leur juridiction sur ceux-ci quel que soit le lieu où ils se trouvaient ou quelle que soit la mission de protection qui leur avait été confiée. Leurs prises devaient être conduites au port de l'*apostadero* à moins que «les circonstances du temps ne les obligent» à se diriger vers le port le plus proche»[8]. Toutes leurs activités «dans les mers, destinations ou circonstances quelles qu'elles fussent» devaient être gouvernées conformément aux ordonnances de la marine royale[9].

21. Ce qui a été dit au sujet des garde-côtes est valable aussi pour les corsaires, indispensables dans les Caraïbes étant donné le manque de vaisseaux de l'Armada de la marine

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[6] Instruction, art. 4.

[7] Instruction, art. 5.

[8] Instruction, art. 19.

[9] Instruction, art. 49.

royale. La dernière ordonnance pertinente est celle de 1796[10], revisée par celle du 20 juin 1801. Les vaisseaux armés en course furent assimilés à la marine royale et, en tant que tels, étaient sujets à ses ordonnances et à sa juridiction, de même que les prises qui seraient réalisées.

22. Par ailleurs, toutes les activités maritimes imaginables et les métiers ayant un rapport avec la mer requéraient une inscription, une immatriculation *(matrícula de mar)* et seuls les commandants de la marine étaient compétents pour y procéder. Leur dernière réglementation fut le fait d'une ordonnance de 1802[11] recueillie dans la *la Novísima recopilación* (*Recueil de lois* de 1805) maintes fois rééditée, la dernière en 1992.

23. Selon l'article 3 du titre VI de l'ordonnance, toutes les activités suivantes relevaient de la juridiction militaire de la marine :

> «pêche, navigation, prises, arrivages et naufrages ; soin, développement et conservation des bois de marine …, tout ce qui a trait à la sécurité et au nettoiement des ports, balises et lanternes et à la construction de quais, ainsi qu'à la fabrication d'armes, de cordages, de toiles, de bitumes ou d'autres effets pour le service de la marine…»[12].

24. Ainsi, non seulement la défense militaire dans la mer océane et dans la mer adjacente aux côtes relevait de la juridiction unique de la marine, mais il en allait de même de la lutte contre la piraterie et la contrebande, de l'adjudication de prises, et de tout autre type de navigation et d'activités en mer. Même les activités à terre, lorsqu'elles avaient un rapport avec les activités marines, tombaient sous sa juridiction.

25. En conséquence, il n'y a pas d'espace maritime déterminé par la projection de lignes imaginaires qui prolongeraient dans la mer les circonscriptions terrestres, mais une mer de la monarchie qui est protégée et peut être exploitée par des bateaux et des hommes d'une condition déterminée sous une juridiction spéciale, centralisée, unique, privative, exclusive : celle de la marine.

26. Le Honduras passe sous silence toutes les ordonnances, ordres et instructions que nous avons mentionnés, lesquels sont pourtant tout à fait pertinents dans le cas qui nous occupe. Et si

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[10] *Ordenanza de S.M. que prescribe las reglas con que se ha de hacer el Corso de particulares contra los enemigos de la Corona,* Madrid en la Imprenta Real, 1796.

[11] *Ordenanza de S.M. para el régimen y gobierno militar de las Matrículas de Mar,* Madrid en la Imprenta Real, 1802.

[12] *Novísima Recopilación* de 1805, livre VI, titre VII, loi IX. (Voir dossier des juges, document n° 2.)

nous examinons le rapport de M. Pérez-Prendes, la masse législative *(legislative mass)* qu'il considère pertinente ne témoigne ni d'une recherche sérieuse de documents pertinents ni d'une réflexion approfondie sur leur portée.

27. Le Honduras et ses experts non seulement limitent leur recherche à la législation générale de la monarchie mais, de surcroît, ils s'arrêtent en 1793, soit trente ans avant l'indépendance. D'après M. Perez-Prendes, la «pièce centrale» de cette «masse législative» serait constituée par les ordonnances de Sa Majesté de 1768 pour le régime, la discipline, la subordination et le service de ses armées, partiellement complétées par les ordonnances des ingénieurs, promulguées en 1718, et par les ordonnances générales de la marine de 1748 et 1751, revisées en 1793, dit-il, pour leur harmonisation avec celles de l'armée et des ingénieurs[13].

28. De fait, la seule ordonnance générale postérieure que le Honduras et son expert mentionnent est l'ordonnance générale des intendants de 1803[14]. Mais, comme tout l'historiographe juridique sur les Indes devrait le savoir, cette ordonnance fut retirée par un ordre royal du 11 janvier 1804.

29. Si nous nous penchons sur la masse législative sélectionnée par le Honduras, on s'aperçoit que M. Perez-Prendes ignore les ordonnances des ingénieurs de 1803. En conséquence, il ignore aussi le règlement additionnel de 1805 pour le service des ingénieurs aux Indes[15]. A vrai dire, les ordonnances des ingénieurs n'apportent aucune lumière particulière sur la question qui nous occupe ; mais, puisque l'expert du Honduras les mentionne, on peut au moins lui demander de connaître les textes en vigueur à la date de l'indépendance.

30. Les lacunes de l'information sur laquelle se fonde le Honduras concernant l'organisation, l'activité et la juridiction de la marine royale sont plus frappantes et plus graves. Il ne faut pas être grand clerc pour supposer que, si l'on parle de la mer et des espaces maritimes, la marine avait quelque chose à voir avec ceux-ci, surtout si nous essayons de traduire juridiction par souveraineté pour déterminer la projection de l'*uti possidetis iuris.*

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[13] DH, vol. II, annexe 266, p. 98-99.

[14] *Ibid.*, p. 99.

[15] *Reglamento adicional a la Ordenanza del real Cuerpo de Ingenieros que S.M. ha resuelto se observe para el servicio de este cuerpo en Indias*, Madrid en la Imprenta Real, 1805.

31. Il semblerait que l'expert commis par le Honduras considère qu'un renvoi générique aux ordonnances de 1748 et 1793 est suffisant, comme si ces dernières n'avaient pas subi d'importantes modifications et additions dans les années postérieures, obligeant ainsi à une mise à jour continue qui se matérialisa dans des collections successives des textes pertinents[16]. L'expert hondurien oublie ainsi la réforme bien connue des ordonnances de la marine royale précisément — réforme qui date de 1802[17].

32. Qui plus est, l'expert renvoie à peine aux ordonnances de la marine, les remplaçant, dans son discours, par celles de l'armée, qui constituent pratiquement l'unique matériel normatif qu'il utilise. Il tente de se justifier en présentant les ordonnances de la marine comme un ensemble législatif subordonné qui n'apporte rien. Cette présentation n'est pas correcte. Dans l'ancien régime, il n'y avait pas de hiérarchie normative. Les ordonnances de la marine étaient pour la marine ce que les ordonnances de l'armée étaient pour l'armée. Il pouvait y avoir des conflits de juridiction, mais pas de subordination législative.

33. Pour corroborer un tel raisonnement, il suffit de rappeler l'ordre royal du 14 février 1769 et la circulaire du Conseil d'Etat du 8 août 1800 (facilement accessibles sur le web), tous deux démonstratifs du renforcement progressif de la juridiction de la marine sur les espaces, non seulement maritimes mais aussi côtiers[18].

34. La circulaire du Conseil d'Etat fait allusion au grand nombre de recours générés par l'application erronée de l'ordre royal de 1769, lequel avait été interprété dans le sens qu'il aurait uniformisé la marine avec l'armée selon l'ordonnance applicable, à cette dernière.

> «Le roi ayant été informé de tout ceci — dit le Conseil d'Etat — a déterminé de faire circuler un ordre royal dans tous les corps, tribunaux et justices à l'intérieur et hors du Royaume, afin que soient observées inviolablement et sans interprétation aucune les ordonnances générales de la marine aussi bien pour le gouvernement intérieur de ce corps que pour sa correspondance avec les autres juridictions…»

35. Il y a lieu de s'interroger sur la raison pour laquelle l'expert du Honduras considère que les ordonnances de l'armée peuvent s'appliquer au cas qui nous occupe, confondant au surplus les

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[16] Voir par exemple J. J. Matraya y Ricci, *Catálogo cronológico de las pragmáticas, cédulas, decretos, órdenes y resoluciones reales generales emanados después de la Recopilación de las Leyes de Indias*, Instituto de Investigaciones Históricas, Buenos Aires, 1978.

[17] *Real Ordenanza Naval para el servicio de los baxeles de S.M.*, Madrid en la Imprenta Real, 1802.

[18] Ministerio de Asuntos Exteriores, 4988 (92) et 5112 (36). Accessible sur www.cultura.mecd.es/archivos/lhe/index.html. (Voir dossier des juges, document n° 3.)

rôles des vice-rois et de capitaines généraux, de ceux-ci avec le capitaine général de la marine ou les capitaines généraux du département maritime, des gouverneurs provinciaux avec les gouverneurs militaires, sans citer le texte sur lequel il se base pour réaliser cette curieuse série d'«assimilations» effectuées dans son rapport.

36. Par ailleurs, l'expert du Honduras force la lecture des articles mêmes des ordonnances de l'armée identifiant, sans justification aucune, les compétences que l'on concède aux capitaines généraux avec celles qui sont réglementées par les ordonnances de la marine, comme si les forteresses étaient la même chose que les arsenaux, l'infanterie que l'équipage de la marine, les chevaux que les bateaux, etc. Il n'y a pas lieu de présupposer. Il faudrait démontrer que les ordonnances de l'armée sont la source fondamentale qui doit être utilisée dans le cas qui nous occupe. Le Honduras ne le fait pas. C'est d'ailleurs une mission impossible.

37. Si les références législatives générales dont il prétend tirer ses conclusions présentent ces graves lacunes, il en va à fortiori de même de l'ignorance dans laquelle le Honduras et ses experts tiennent les lois particulières applicables. Et en effet, ceux-ci passent totalement sous silence aussi bien l'ordre royal sur les garde-côtes du 22 mai 1802, que l'Instruction pour la gouverne des garde-côtes aux Indes, de 1803, l'ordonnance sur les navires corsaires de 1796, revisée en 1801, et l'ordonnance relative au régime et au gouvernement militaire des immatriculations des marins *(matrícula de mar)* de 1802, qui sont tous des instruments normatifs pertinents en l'espèce.

38. Il s'agit de textes, comme je l'ai déjà dit, facilement accessibles. Les ordonnances sur la course maritime et sur l'immatriculation des marins ont été recueillies dans *la Novísima Recopilación* (le *Recueil de lois*) de 1805 promulgué par Charles IV (livre 6, titres 7 et 8)[19]. Ce recueil a été maintes fois réédité. Il l'a été en 1975 et, à nouveau, en 1992 par le *Boletín Oficial del Estado* (la maison éditrice du Journal officiel de l'Etat). L'Instruction pour la gouverne des garde-côtes aux Indes de 1803 est apparue, par exemple, dans les *Annales de l'Université de Murcie*[20].

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[19] *Novísima Recopilación…de 1805,* libro VI, tit. VII *(«Del servicio de la Marina, fuero y privilegios de sus matriculados»)* ; t. VIII *(«Del corso contra enemigos de la Corona»).*

[20] Vol. XXXIX, n° 2-4, faculté de lettres, cours 1980-1981, éd. 1982, 303 et suiv.

39. L'utilisation des instruments *(working means)* proposés par les experts du Honduras pour compléter l'étude des instruments normatifs ne conduit pas à une meilleure appréciation de leur travail. Pour commencer, le *Cedulario Indico* de Ayala (dont, par la suite dans le rapport, il n'y a pas une seule citation) n'est pas comme on affirme, un ouvrage «comprenant vingt-six volumes dont il existe une autre copie connue comme *Miscelánea*»[21], mais une série de quarante-deux volumes qui fait partie d'une série plus vaste, la *Miscelánea* de Ayala, cette dernière comprenant quatre-vingt-quatre volumes[22]. L'ouvrage qui comporte vingt-six volumes c'est le *Dictionnaire du gouvernement et de législation des Indes* élaboré par Ayala lui-même pour faciliter l'utilisation du *Cedulario*[23]. C'est cet instrument dont se sert, en réalité, M. Pérez-Prendes.

40. Quant à l'autre ouvrage proposé, *Les tribunaux militaires d'Espagne et ses Indes*, de Félix Colón de Larriátegui, il est très révélateur des sources limitées auxquelles l'expert a recours. Il utilise la seconde édition, de 1797, et non la troisième «corrigée et augmentée», qui inclut toutes les résolutions royales jusqu'en 1817[24]. On peut retrouver facilement celle-ci dans un CD-ROM édité en 1999 par la Fondation Historique Tavera[25].

41. La fiabilité des conclusions d'une étude historique dépend essentiellement de la sélection correcte et de la vérification des sources documentaires sur lesquelles elles se fondent, ainsi que de l'analyse qui en est faite dans leur contexte. Cette considération est fatale pour le Honduras et ses experts. La masse législative critique dont ils se servent est très déficiente, fruit d'un traitement capricieux des sources et, par conséquent, elle mène à des conclusions infondées.

C. Le régime de la mer adjacente aux côtes de la capitainerie générale du Guatemala

42. Il ne fait aucun doute que le régime juridique de la mer qui baigne les côtes des territoires sous la juridiction de la capitainerie générale du Guatemala, c'est-à-dire la mer du nord bordant la

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[21] DH, vol. II, annexe 266, p. 99.

[22] M. Gómez Gómez, *Actores del Documento. Oficiales, archiveros y escribientes de la Secretaría de Estado y del Despacho Universal de Indias durante el siglo XVIII*, Centro de Estudios Políticos y Constitucionales, Madrid, 2003, p. 330-336.

[23] *Diccionario de Gobierno y Legislación de Indias*, Edición y estudios: Marta Milagros de Vas Mingo, Ediciones de Cultura Hispánica, Madrid, 1988-1996.

[24] F. Colón de Larriátegui, *Juzgados militares de España y sus Indias* , 4 vol. Madrid, 1817.

[25] Fundación Histórica Tavera, *Textos Clásicos de Literatura Jurídica Indiana (I)*, I. Sánchez Bella (comp.), serie II, vol. 15, Temáticas para la historia de Iberoamérica, Madrid, 1999.

côte de Mosquitos, se basait en 1821, non pas sur la masse législative présentée par le Honduras, mais fondamentalement sur les sources auxquelles j'ai déjà fait allusion dans mon intervention, à savoir, les ordonnances de la marine de 1802, l'ordre royal sur les garde-côtes de la même année et l'Instruction pour leur gouverne aux Indes de 1803, l'ordonnance sur les vaisseaux corsaires de 1796, revisée en 1801, et l'ordonnance sur l'immatriculation des marins *(la matricula de mar)* de 1802.

43. S'approchant de la zone en litige, le Honduras et ses experts invoquent les ordres royaux du 23 août 1745 et du 20 novembre 1803[26]. Le premier ordre, motivé exclusivement par le désir de contrôler dans la guerre avec les Anglais des terres non encore explorées et non dominées par la Couronne, se servit du cap Gracias a Dios pour diviser le territoire depuis la péninsule du Yucatán jusqu'au fleuve Chagres, établissant ainsi une juridiction militaire privative dont il recommanda l'exercice aux gouverneurs du Honduras et du Nicaragua. Il n'est pas nécessaire de se prononcer pour l'instant sur la question de savoir si cet ordre altéra ou non le statut territorial des deux provinces. Ce qui est clair c'est que l'on ne déclara nulle part que ce cap déterminerait la juridiction de l'un ou de l'autre gouverneur sur la mer[27].

44. En ce qui concerne l'ordre royal du 20 novembre 1803, que le Honduras interprète en se prenant pour la Colombie, mieux vaut se reporter à ce que le Nicaragua a dit à ce sujet, là où il devait le faire, à savoir, dans le mémoire présenté le 28 avril 2003 dans l'affaire du *Différend territorial et maritime* avec la Colombie, actuellement soumise à la Cour[28].

45. Partant des sources utilisées, on ne voit pas comment la Partie adverse peut arriver à la conclusion que l'extension à la mer adjacente de la juridiction des provinces qui composaient la capitainerie générale du Guatemala serait une conséquence «logique». Et l'on ne sait pas à quoi se réfère l'expert du Honduras lorsqu'il mentionne les «pratiques gouvernementales coutumières des autorités espagnoles» pour affirmer que celles-ci ont entraîné «une division des compétences dans la zone maritime avoisinante»[29].

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[26] CMH, vol. I, par. 5.14 et suiv ; DH, vol. I, par. 3.18 et suiv ; vol. II, annexe 266, p. 101.

[27] RN, p. 66, n° 169.

[28] MN, 1.45 et suiv

[29] DH, vol. II, annexe 266, p. 101.

46. Il est scientifiquement et juridiquement inadmissible d'affirmer dans un rapport présenté à la Cour, sans apport de preuves quelles qu'elles soient, qu'«une pratique constante étendait à la mer les compétences des autorités terrestres avoisinantes»[30].

47. L'expert du Honduras soutient que la navigation militaire autour du cap Gracias a Dios était dirigée par ou sous le contrôle des autorités du Honduras. Il affirme que les exemples sont très abondants[31], mais, malgré cette prétendue abondance, le seul exemple qu'il offre de cette navigation remonte au dernier tiers du XVII[e] siècle, plus précisément à 1672, sous le règne du dernier roi de la Maison d'Autriche, Charles II. En outre, il n'y a rien dans cet épisode qui témoigne du contrôle des autorités provinciales du Honduras sur cette navigation[32]. En fait, ce dont il s'agit c'est que, à cette époque-là, le capitaine général du Guatemala exerçait quelques-unes de ses compétences depuis des ports situés dans ce qui est aujourd'hui le Honduras. Comment peut-on alors affirmer que ce document illustre «l'efficacité historique des compétences dans le domaine étudié» et, surtout, que ces compétences relevaient de la province du Honduras[33] ?

48. Cette manière de procéder est, pour le moins, cavalière. Mais c'est bien plus que cela, si l'on tient compte du fait que l'histoire de la côte de Mosquitos, à partir de 1783, est bien connue à travers des sources documentaires directes, facilement accessibles aujourd'hui. En effet, le fonds documentaire essentiel concernant l'histoire de la côte de Mosquitos provenant du secrétariat de la guerre et déposé dans les archives générales de Simancas, a été numérisé et peut être consulté à l'adresse électronique des archives espagnoles, ministère de la culture (que vous pouvez lire sur l'écran diaporama ARB1) : http ://aer.mcu.es/sgae/index_aer.jsp.

49. Il est surprenant que les experts du Honduras ne l'aient pas fait, parce que n'importe qui, où qu'il se trouve, peut obtenir de façon immédiate et gratuite le mot de passe *(password)* qui en permet l'accès (diaporama ARB2). Concrètement le code de référence est ES 47161.AGS/19.7 ; sous le titre *Guatemala,* il se compose de dix-neuf dossiers qui embrassent la période allant de 1783 à 1802. Une recherche plus générale à la même adresse électronique révélerait

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[30] *Ibid.* p. 100.

[31] *Ibid.*, p. 107.

[32] *Ibid.*, p. 108, 112-114.

[33] *Ibid.*, p. 107.

six mille quatre cent quatre-vingt neuf entrées qui répondent à l'appellation géographique *Costa de Mosquitos*, réparties dans différentes archives espagnoles.

50. Les conclusions qui peuvent s'obtenir à partir des documents qui composent ce fonds démolissent les prétentions du Honduras et discréditent définitivement le travail de ses experts. Les sources historiques auxquelles se réfère M. Pérez-Prendes ne sont pas pertinentes ici, du fait qu'elles ne mentionnent rien sur le point — essentiel — de savoir qui avait juridiction sur la mer adjacente aux côtes de la capitainerie générale du Guatemala et comment s'exerçait cette juridiction. Ces sources sont loin de confirmer ses dires selon lesquels il a préparé son opinion avec «des sources scientifiques les plus fiables» et que «seules des sources de première main ont été utilisées»[34].

51. La pratique démontre justement le contraire de ce que cet expert a soutenu. Les exemples sont, en effet, «très abondants» mais pour le démentir.

52. Pensons, par exemple, au mémoire sur l'«envoi de vaisseaux à la côte de Mosquitos depuis La Havane» de 1788[35], au mémoire sur le «refus du commandant général de La Havane d'envoyer à la côte de Mosquitos la corvette San Pío» de 1789[36], au rapport sur les «navires pour la défense de la côte de Mosquitos»[37] de 1790, au rapport sur «la reconnaissance géométrique et politique de la côte de Mosquitos» de Porta et Costas, daté de 1791[38], ou à la «dissertation du voyage fait par ordre du roi par le lieutenant de navire … Don José del Río aux îles de San Andrés, Providencia et Mangles et à la côte de Mosquitos», datée à La Havane en 1793[39], etc. Si nous nous laissions emporter par la simplification de l'expert du Honduras, il pourrait très bien en résulter que, conformément à l'*uti possidetis iuris*, la côte de Mosquitos appartiendrait à Cuba.

53. L'absence de tout effort de recherche documentaire s'étend à l'autre expert du Honduras, l'historien M. Mariano Cuesta, lequel s'est contenté d'inclure, dans l'«annexe documentaire» de

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[34] *Ibid.*, p. 97, n° 3.

[35] AGS, Guerra, 6947, exp. 10.

[36] AGS, Guerra, 6948, exp.1.

[37] AGS, Guerra, 6949, exp. 2.

[38] AGS, Guerra, 6949, exp.14

[39] MN *(Différend territorial et maritime, (Nicaragua c. Colombie))*, vol. II, annexe 3.

son mini-rapport spéculatif, une série de diagrammes qui ne concernent pas spécifiquement la zone pertinente ni les problèmes dont il était censé s'occuper[40].

54. S'il avait pris en considération ces ouvrages, il aurait pris connaissance de données intéressantes comme par exemple la question de savoir *qui* décidait de l'envoi d'une expédition pour le levé cartographique, *à quelle flotte* appartenait le bateau qui le réalisait, *devant qui* en répondaient les commandants du navire, etc. Mais l'historien Cuesta préfère tirer des conclusions même «juridiques» à partir d'une série d'inférences qui n'ont rien à voir avec le cas.

D. Les établissements de la côte de Mosquitos ne furent jamais sous la juridiction de l'intendance de Comayagua (Honduras)

55. L'oubli remarquable par le Honduras et ses experts de la législation portant sur la mer, l'oubli des armadas successives et des flottes, l'oubli des *apostaderos*, l'oubli des garde-côtes, l'oubli de l'identité des corsaires de la zone, l'oubli de l'immatriculation des marins, l'oubli de l'histoire réelle de la mer des Caraïbes, etc., tous ces oublis ont pour corollaire une très regrettable confusion sur la fondation et la gestion des établissements de la côte de Mosquitos menées à bien directement par le capitaine général du Guatemala et non par les gouverneurs ou intendants de ses provinces.

56. Une fois de plus, pourquoi les experts du Honduras n'ont-ils pas eu recours aux instruments de travail que l'Etat espagnol mettait à leur disposition pour le maniement de la masse législative pertinente, à savoir, les registres centraux des dispositions maintenus par les organes expéditeurs (le Conseil des Indes, les secrétariats d'Etat, de la guerre, de la marine), officiels et exhaustifs, conservés aujourd'hui dans les différentes archives espagnoles, notamment dans les archives générales des Indes et de Simancas qui sont aisément accessibles ? Pourquoi ne pas recourir à l'adresse électronique (diaporama ARB1) déjà mentionnée qui leur aurait permis, sans les forcer à se déplacer, un accès direct (diaporama ARB2) aux fonds qui documentent l'histoire de la côte de Mosquitos ?

57. La date, 1783, à laquelle commence le dossier de la côte de Mosquitos n'est pas fortuite. Elle correspond à l'année où, en vertu de l'article 6 du traité de paix entre les Couronnes d'Espagne

[40] DH, vol. II, annexe 267, p. 141-164.

et d'Angleterre, signé à Versailles le 3 septembre, les Anglais acceptèrent de se retirer du dénommé *continent espagnol* et des îles dépendant de celui-ci, exception faite du territoire du Belize dans lequel il leur fut permis de s'établir pour l'exploitation du bois, concrètement, pour la coupe du bois de teinture dit *campêche*, toujours dans le cadre de la souveraineté de Sa Majesté catholique (S. M. C.)[41].

58. Une convention pour expliquer, amplifier et exécuter l'article 6 en question fut signée à Londres le 14 juillet 1786. En ce qui nous concerne, son article premier confirme expressément l'évacuation des «pays de Mosquitos, de même que du *continent* en général et des îles adjacentes sans exception», des sujets de Sa Majesté britannique (S. M. B.) et autres colons qui jusqu'alors avaient joui de la protection de l'Angleterre[42].

59. L'opération d'évacuation des colons anglais et assimilés fut compliquée et de multiples autorités, responsables conjointement de la défense des intérêts de la monarchie, y participèrent. Pour ce qui nous intéresse ici, il faut souligner que ce fut seulement lorsque l'Espagne essaya de coloniser *la Mosquitia*, c'est-à-dire la façade atlantique des actuels Honduras et Nicaragua. Cette colonisation se solda par un échec car, à l'exception de l'établissement de Trujillo, l'une des bases les plus importantes de contrebande dans toute l'Amérique centrale, tous les autres établissements durent être abandonnés. Ainsi, en 1794, un ordre royal ordonna au capitaine général du Guatemala l'évacuation de l'établissement de Gracias a Dios, considéré indéfendable[43].

60. Ces établissements, dont la composante militaire était très importante, furent directement, dès le début et jusqu'à la date de l'indépendance, soumis à l'autorité du capitaine général du Guatemala, tandis que leur défense maritime fut confiée à l'*apostadero* de La Havane et, dans une moindre mesure, à celui de Carthagène des Indes.

61. C'est le monarque, à travers son secrétaire (son ministre) de la marine, qui émettait les ordres qu'il considérait convenables pour la surveillance de la côte de Mosquitos depuis la mer, ordres qui étaient directement transmis aux commandants des *apostaderos*, sans l'intermédiaire du capitaine général du Guatemala. Ainsi, ce fut le monarque qui demanda au commandant général de

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[41] C. Parry, *The Consolidated Treaty Series*, vol. 48, 481-486.

[42] *Ibid.*, vol. 50, 47-51.

[43] ES.47161.AGS/19.7//SGU,6951,1.

La Havane, Pedro Obregón, un rapport, daté du 2 février 1790, sur les vaisseaux nécessaires pour la défense et la sécurité de la côte de Mosquitos et des stations, îles et hauts-fonds qui entourent ce continent[44].

62. Le capitaine général du Guatemala n'a pu jamais disposer directement de ces effectifs navals. Il dépendit toujours des ordres royaux ordonnant les autorités de la marine de lui prêter l'aide par lui sollicitée.

63. Ce n'est que sur la base de ces ordres que le capitaine général du Guatemala pouvait réclamer les embarcations qui relevaient toujours de l'autorité de la marine. Cette dernière, le cas échéant, pouvait opposer des bonnes raisons au monarque pour s'exonérer de la prestation de l'aide sollicitée, en invoquant une meilleure organisation de la défense générale de la zone.

64. En tout cas, tous les établissements de la côte de Mosquitos étant, en date de 1821, sous la dépendance directe du capitaine général du Guatemala, toute prétention de projection de juridiction sur la mer adjacente sur la base de l'*uti possidetis iuris* serait liée à la capitainerie générale du Guatemala en tant que telle et non à l'une ou l'autre de ses provinces.

65. Les établissements de la côte de Mosquitos n'ont jamais été sous la juridiction des gouverneurs ou intendants et ils n'ont pas non plus fait partie des provinces ou intendances où ils étaient géographiquement situés. Ce fait a été reconnu par le gouverneur de Comayagua (Honduras) lorsque, faisant allusion dans un rapport daté du 20 octobre 1791 à la situation de ces établissements, il déclara être «sans moyens, dépendant en tout de la capitainerie du Guatemala»[45].

66. Lorsque quelques années plus tard le gouverneur de Comayagua, invoquant l'application de l'Instruction relative aux intendants de 1786, voulut contester au capitaine général du Guatemala ses compétences, le roi décida par ordre royal du 13 novembre 1806 que c'était au capitaine général de s'occuper seul et à titre exclusif de toutes les affaires qui pouvaient survenir dans la colonie de Trujillo et dans les autres ports militaires de la côte de Mosquitos, conformément aux ordres royaux qui, depuis l'année 1782, l'autorisaient à occuper, défendre et peupler cette côte jusqu'à ce que Sa Majesté convienne de modifier le système existant[46].

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[44] ES.47161.AGS/19.7//SGU,6951, 2 et 3.

[45] ES47161.AGS/19.7//SGU, 6950, 9.

[46] M. Peralta, *Costa Rica y Costa de Mosquitos. Documentos para la Historia de la jurisdicción territorial de Costa Rica y Colombia*, Paris, 1898, p. 496-498. (Voir dossier des juges, document n° 4.)

67. Les pétitions de la province de Comayagua à l'Assemblée constituante *(Cortes)* réunie en Espagne en 1812, puis en 1820, demandant que les ports de Trujillo et Omoa soient affectés à une province du Honduras, séparée de celle du Guatemala, démontrent que le système n'avait subi aucun changement à ces dates[47]. En résumé, il ne fait aucun doute que les établissements de la côte ne firent jamais partie de Comayagua, leur garde et surveillance étant sous la responsabilité directe du capitaine général du Guatemala jusqu'à la date de l'indépendance.

68. Dès lors, comment l'intendant de Comayagua pouvait-il avoir juridiction sur la mer adjacente à des établissements terrestres, les seuls sur la côte, sur lesquels il ne pouvait revendiquer aucune sorte de compétence ? Comment soutenir que l'intendant de Comayagua, sans juridiction sur la côte et sans bateaux, pouvait exercer une compétence quelconque dans les espaces maritimes au-delà du cap Gracias a Dios ? Comment, de surcroît, prétendre qu'il existait une ligne de partage précise qui n'apparaît nulle part dans l'abondante législation émanant de la Couronne tout au long des siècles ?

69. Le Honduras procède à une identification trompeuse entre le cap Gracias a Dios et le 15e parallèle. Si la délimitation des espaces maritimes entre le Nicaragua et le Honduras prend bien pour point de départ le cap, à l'embouchure du fleuve Coco, où se trouvent les fondements juridiques de sa prolongation tout au long du parallèle 14º 59.8' N ? Selon un témoignage de pêcheur apporté par le Honduras, le 15e parallèle fut «le legs de Christophe Colomb»[48], mais nous sommes en droit de supposer ici encore qu'il s'agit, comme ailleurs dans d'autres témoignages, d'une licence littéraire.

70. Soyons sérieux. L'invocation de l'*uti possidetis iuris* dans les réclamations territoriales oblige à traduire en termes actuels des situations juridiques historiques ; mais le sérieux et la rigueur dont on doit faire preuve dans la lecture de textes historiques ne s'accommode pas de l'esprit d'invention dont fait preuve le Honduras. Il ne faut pas prétendre trouver dans le passé des réponses à des questions qui, si elles furent formulées, elles le furent en des termes complètement différents de ceux d'aujourd'hui.

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[47] M. Lorente Sariñena, «*El fracaso de la Intendencia en Honduras: La Alcaldía Mayor de Tegucigalpa (1799-1819)*», Pacis Artes, Obra Homenaje al Prof. Julio D. González Campos, Madrid, 2005, t. II, 2017-2044 (en 2018-2019). (Voir dossier des juges, document nº 5).

[48] CMH, vol. II, annexe 68.

71. Madame le président, Messieurs les juges, accepter le fait que l'intendant de Comayagua, bien qu'il n'ait pas eu de juridiction sur les établissements de la côte de Mosquitos, ni même d'effectifs maritimes à sa disposition, exerçait en 1821, et auparavant, juridiction sur la mer adjacente au nord du 15e parallèle est, pour le dire brièvement, une pure invention.

E. L'*uti possidetis iuris* des espaces maritimes

72. Depuis quand parle-t-on d'un *uti possidetis iuris* des espaces maritimes ? Pendant plus de cent ans on a beaucoup écrit sur l'*uti possidetis* par rapport aux espaces terrestres et rien par rapport à la mer car, tout simplement, il n'y avait pas de base pour cela.

73. Sous une dénomination ou une autre il y a eu une *mer territoriale* depuis des siècles, mais le *plateau continental* et la *zone économique exclusive* sont des institutions récentes en tant que concepts juridiques attributifs de droits souverains aux Etats riverains ; elles remontent à peine à quelques décennies.

74. Il faut mentionner à cet égard la conscience que la monarchie espagnole avait de la haute mer, malgré ses efforts persévérants pour maintenir le monopole commercial entre l'Europe et ses possessions américaines. «L'immunité des côtes de la Couronne» disait le roi dans la cédule royale du 14 juin 1797 sur les règles à suivre dans les jugements de prises, «ne doit pas être déterminée comme jusqu'à présent par la portée douteuse et incertaine du canon, mais par la distance de 2950 toises chacune… Les prises qui seront faites hors de la distance en question devront être considérées comme étant faites en haute mer…»[49] (Une toise est égale à un 1,946 mètre.)

75. Les trois auteurs que le Honduras cite dans une note en pied de page pour avaliser l'affirmation que tous ceux qui ont étudié la question dans l'aire américaine soutiennent l'application maritime de l'*uti possidetis iuris*[50], ont tous écrit après 1989[51]. L'un d'entre eux, pour sûr, ne put pas le faire dans les pages 590 et suivantes de sa monographie de 579 pages. Ce dernier, qui traite la question dans les pages 461 à 464 de son ouvrage affirme qu'«en Amérique

[49] *Novísima Recopilación de 1805*, 6.8.5. (Voir dossier des juges, document n° 5.)

[50] DH, par. 3.17

[51] *Ibid.*, p. 34, par. l9.

latine la situation ne s'est guère présentée et ce pour des raisons évidentes. Au XIX[e] siècle des notions telles que le plateau continental et la zone économique exclusive étaient inconnues.»[52]

76. Cette affirmation avait déjà été faite par le Tribunal arbitral qui décida la ligne de partage des espaces maritimes entre la Guinée-Bissau et le Sénégal en 1989. Considérant l'évolution récente du droit de la mer, le Tribunal déclare : «on ne peut prétendre trouver des précédents [de l'application de l'*uti possidetis*] au siècle dernier, époque où les Etats de l'Amérique latine accédèrent à l'indépendance»[53].

77. Dans un empire comme l'Empire espagnol, dieu nourricier de l'application de l'*uti possidetis iuris*, le territoire était seulement l'un des éléments pertinents de l'attribution aux institutions de l'exercice d'une juridiction dont le roi restait le titulaire, et le territoire l'était, en outre, sous différentes configurations de géométrie variable. Sur la mer, ainsi que nous l'avons déjà observé, le territoire était *un*, surtout à partir du XVIII[e] siècle, et *une* était la juridiction, centralisée, privative, exclusive, celle de la marine.

78. Le Honduras invoque l'arrêt de cette Cour du 11 septembre 1992 dans l'affaire du *Différend frontalier terrestre, insulaire et maritime* entre les Républiques d'El Salvador et du Honduras comme preuve d'un *uti possidetis iuris* maritime, dans le golfe de Fonseca[54]. Mais le Honduras a tronqué sans vergogne la motivation de la Cour et fait dire aux juges bien davantage que ce qui se déduit de la lecture intégrale de leur raisonnement.

79. Cette invocation de l'arrêt de 1992 par le Honduras a, en outre, des effets contre-productifs pour sa propre thèse. Le Nicaragua ne discute pas la possibilité théorique d'un *uti possidetis iuris* maritime et son application lorsque les conditions requises sont remplies, mais il conteste sa pertinence dans notre cas. Dans l'affaire du *Différend frontalier terrestre, insulaire et maritime* entre les Républiques d'El Salvador et du Honduras, la Chambre explique qu'elle «a été très frappée par la différence fondamentale qui existe [à l'égard de l'*uti possidetis iuris*] entre les zones terrestres qu'elle a eu à examiner et cette zone maritime» (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992,*

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[52] M. Kohen, *Possession contestée et souveraineté territoriale,* Genève, 1997, p. 461.

[53] Sentence arbitrale du 31 juillet 1989, par. 63 et 64, *RSA*, vol. XX, p. 119 et suiv.

[54] DH, par. 3.52 et suiv.

p. 601, par. 405). Et la Chambre nous dit encore : «Aucun des éléments présentés à la Chambre ne suggère qu'il ait existé pour ces eaux, avant 1821 ou en 1821, quoi que ce soit d'analogue aux limites dont … il a été si abondamment question ici au sujet des terres.» (*Ibid.*, p. 601, par. 386.)

80. Les juges peuvent parler et, d'ailleurs, parlent d'*eaux historiques*, de *baie historique*, mais ils ne peuvent appliquer l'*uti possidetis iuris* parce que le souverain, le roi d'Espagne, ne précisa jamais les compétences sur le golfe de Fonseca, de provinces, intendances, mairies ou quelques autres entités territoriales.

81. Dans sa longue et bien documentée opinion individuelle accompagnant cet arrêt le juge Torres Bernárdez constate que,

> «au moment où la succession a eu lieu, l'Etat prédécesseur n'avait pas — administrativement parlant — divisé les eaux de la baie historique de Fonseca entre les juridictions territoriales des provinces coloniales, ou de leurs subdivisions, qui constituaient en 1821 le territoire de l'un ou l'autre des trois Etats du golfe. Il s'ensuit que les eaux historiques qui n'ont pas été divisées par le Honduras, El Salvador et le Nicaragua après 1821 continuent de relever de la souveraineté des trois Républiques conjointement, tant qu'elles ne font pas l'objet d'une délimitation.» (*Ibid.*, p. 712, par. 178.)

82. Si, comme c'est notre cas, l'on examine à fond l'argument, la seule chose que l'on puisse dire est que, à la date de l'indépendance, une souveraineté conjointe des républiques riveraines se produisit sur les eaux de la Couronne d'Espagne en mer du nord, mer des Caraïbes, et perdure tant que l'on ne procédera pas à une délimitation des espaces correspondant à chacune d'elles. C'est justement ce que le Nicaragua sollicite de la Cour conformément aux règles de la convention des Nations Unies sur le droit de la mer, auxquelles sont parties aussi bien le Nicaragua que le Honduras.

83. Rien de plus naturel. Le fait que l'immense majorité des républiques latino-américaines aient mené une politique de délimitation conventionnelle de leurs espaces maritimes ne pourrait s'expliquer si elles avaient l'*uti possidetis iuris* à portée de la main.

F. Le *uti possidetis iuris* et les îles

84. Le Honduras mélange, à notre avis intentionnellement, l'*uti possidetis iuris* sur les îles avec l'*uti possidetis iuris* sur les espaces maritimes. Ils doivent être distingués. S'agissant d'îles,

le Nicaragua soutient non seulement la possibilité théorique de l'*uti possidetis* mais aussi son application pratique en Amérique latine.

85. Il n'y a aucun doute que le roi d'Espagne, comme l'indique une disposition qui remonte à 1519 et qui est incluse dans le *Recueil de lois des Indes* de 1680, se considérait lui-même «maître des Indes occidentales, îles, terre ferme de la mer océane, découvertes et à découvrir»[55].

86. Etant donné qu'il n'y avait pas de *terrae insulares nullius*, si le monarque ne réalisa pas l'assignation d'une île ou d'un archipel à une entité territoriale déterminée, dans notre cas une province, et si les recherches ultérieures des parties n'ont pas permis d'éclaircir rétrospectivement l'*uti possidetis iuris*, il faudra alors avoir recours à d'autres titres ou appliquer le principe de la proximité, ainsi que le fit la Cour au sujet de Meanguera et Meanguerita (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992,* p. 570-579, par. 356-368), dans l'arrêt qui a donné tant de satisfaction au Honduras.

87. Il convient de rappeler que la Chambre considéra que Meanguerita, exiguë et non habitée, était par sa proximité de Meanguera une *«dépendance»* de celle-ci (*ibid.*, p. 570, par. 356 ; p. 579, par. 368), mais que l'adjudication de Meanguera se basa sur une longue série d'actes de souveraineté du Salvador, sans jamais se heurter à aucune objection de la part du Honduras, étant donné «l'impossibilité d'établir de façon satisfaisante la situation de l'*uti possidetis juris* en 1821 sur la base des titres coloniaux et des effectivités» (*ibid.*, p. 579, par. 367).

88. Si telle fut la situation de Meanguera, une petite île habitée, et de Meanguerita, il faut écarter la possibilité que l'on puisse établir un *uti possidetis iuris* des récifs et îlots situés dans la zone en litige qui serait favorable à l'une ou l'autre des provinces qui formaient la capitainerie générale du Guatemala. Les 26 hectares de l'exiguë et inhabitée Meanguerita sont *l'Australie* en comparaison avec les récifs et îlots infinitésimaux des Caraïbes dont nous parlons.

89. Le Nicaragua a offert dans sa réplique des données suffisantes pour affirmer sa plus grande présence et activité dans la zone où se trouvent les récifs et les îlots tout au long

[55] Liv. III, Tit. I, loi 1 de la *Recopilación de Leyes de los Reynos de las Indias, mandadas a imprimir y publicar por la Majestad Católica del Rey Don Carlos II, Nuestro Señor* (éd. facs, 3 vols, Madrid, 1998).

du XIX[e] siècle[56]. En tout cas, le principe de proximité opérerait à la date de l'indépendance, 1821, au bénéfice de la capitainerie générale du Guatemala, qui exerçait directement juridiction, comme nous l'avons vu, sur les établissements de la côte de Mosquitos, et non au bénéfice du Honduras ou du Nicaragua. C'est pourquoi, selon l'avis de cette dernière république, le titre de l'une ou l'autre partie sur les récifs ou îlots dans la zone disputée ne peut remonter à l'*uti possidetis iuris* de 1821 ; il devra, s'il existe, avoir une autre base.

90. Madame le président, Messieurs les juges, je n'abuserai pas plus de votre temps, en démentant ou nuançant les considérations de la duplique du Honduras sur des questions comme les relations entre le constitutionnalisme historique des Parties et l'*uti possidetis iuris*, ou la reconsidération de la jurisprudence qui avale l'application de ce principe, ou les contradictions dans lesquelles, selon le Honduras, le Nicaragua tomberait en contestant face à lui ce qu'il soutient face à la Colombie[57]. Il suffit de se reporter aux développements sur ces différents points de la réplique du Nicaragua[58] pour se rendre compte de leur insignifiance, de leur inconsistance et de leur absence de pertinence.

91. Madame le président, Messieurs les juges, je vous remercie de votre courtoise attention et, ayant achevé mon exposé, Madame le président, peut-être avez-vous considéré l'opportunité d'une pause avant de bien vouloir appeler à cette barre M. Oude Elferink.

The PRESIDENT: Thank you very much, Professor Brotóns. There will now be a short break and the Court will then resume.

The Court adjourned from 11.25 to 11.40 a.m.

The PRESIDENT: Please be seated. Dr. Oude Elferink, you have the floor.

[56] RN, par. 6.93 et 4.46 et suiv.

[57] DH, par. 3.33 et suiv.

[58] RN, par. 4.7 et suiv.

Mr. ELFERINK:

THE CAYS IN THE AREA OF OVERLAPPING CLAIMS

Introduction

1. Thank you Madam President. Madam President, Members of the Court, today I will be addressing certain questions concerning the sovereignty of the cays contained between the maritime boundary lines claimed by the Parties to the present proceedings. This concerns the cays located just to the south of the Main Cape Channel. Figure 1, that is now on the screen, shows the maritime boundaries claimed by respectively Nicaragua and Honduras and the reef areas in which the cays are located. On this scale the cays themselves are not visible.

2. My presentation today is structured as follows. First, I will say something about the critical date of the dispute between the Parties and its relevance for the questions concerning the cays. Next, I will address the arguments that have been made by Nicaragua and Honduras to support their respective positions. The focus of that analysis will be on the Rejoinder of Honduras, which is the last written pleading in these proceedings. Following that analysis, I will deal with Honduras's allegation that Nicaragua has sought to widen the subject of the dispute before the Court.

The critical date for the proceedings

3. As the Reply indicated, in the present case the critical date can be established as 1977, that is, the year in which Nicaragua proposed Honduras to open negotiations in order to delimit their maritime areas in the Caribbean Sea. That argument can be found in paragraph 5.4 (iv) of the Reply. In that same paragraph, it was observed that "Honduras's supposed *effectivités* in the area in dispute are dated after 1980, that is, beginning with the civil conflict in Nicaragua supported and financed by the United States in cooperation with Nicaragua's neighbours, particularly Honduras".

4. In the Rejoinder, Honduras tries to rehabilitate its reliance on practice subsequent to the critical date. First of all, it is suggested that Nicaragua's claim is of recent origin (RH, p. 18, para. 2.20). As will become apparent from my presentation, that epithet does not do justice to the origin of the Nicaraguan claim, to say the least. Let me give one example already — Nicaragua has regulated a turtle fishery of the Cayman Island fishermen along Nicaragua's Caribbean coast. That

fishery started in the nineteenth century and came to an end in 1960, when the Treaty granting the Cayman islanders access to the fishery was not renewed by Nicaragua (RN, Addendum).

5. Honduras also seeks to rehabilitate its reliance upon practice that has taken place after the critical date by arguing that it has maintained a consistent position throughout (RH, p. 20, para. 2.26). That is demonstrably not the case. All of Honduras's evidence points to the fact that Honduras started to take an interest in the cays after Nicaragua proposed to start talks on the delimitation of a maritime boundary in the Caribbean Sea in 1977. Honduras has tried to create the impression of a consistent practice before and after the critical date. In my presentation I will refer to several instances of attempts of Honduras to suggest a consistent practice before and after the critical date. They show that to create the impression of a consistent position throughout Honduras as far as the period before the critical date is concerned draws on acts which do not pertain to the cays in dispute or which do not involve Honduras.

6. To support its argument concerning the relevance of acts having taken place after the critical date, Honduras cites from paragraph 135 of the Judgment on the merits in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*. The Court in that case observed that "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them" (*Judgment, I.C.J. Reports 2002*, p. 682, para. 135). The Court then concluded that "[t]he Court will, therefore, primarily, analyse the *effectivités* which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan" *(ibid.)*.

7. In the present case, this statement implies that the analysis should primarily concern *effectivités* from the period before 1977. Acts having taken place after 1977 are only relevant if they are a normal continuation of acts prior to 1977. There are no such acts of Honduras. Let me now turn to a review of the acts of both Parties before and after 1977.

The arguments of the Parties in relation to the Cays

(a) ***Introduction***

8. Honduras, in Chapter 6 of the Counter-Memorial, discussed what it termed the indicia that supported a Honduran title to the cays in dispute in the present proceedings. Nicaragua discussed these acts and activities in paragraphs 6.30 to 6.87 of the Reply. The conclusion of that discussion can be found at paragraphs 6.86 and 6.87 of the Reply. Next, the Reply discusses the bases of the Nicaraguan claim at paragraphs 6.88 to 6.117 with conclusions contained in paragraph 6.118. The evidence presented in Chapter 6 of the Reply led to the conclusion that the title to the cays in dispute rests with Nicaragua. I will not repeat the analysis contained in the Reply. Instead, as I said before, I will focus on the further argument that Honduras has presented in the Rejoinder.

(b) ***Fisheries***

9. Honduras submits that its regulation of fishing activities is one of the elements establishing its title to the cays in dispute. The Counter-Memorial devoted 16 pages to that matter (CMH, pp. 102-117). Nicaragua refuted the relevance of the Honduran argument in the Reply (RN, pp. 81-84, paras. 5.28-5.39; pp. 109-116, paras. 6.42-6.61).

10. The Rejoinder dismisses Nicaragua's arguments rather cursorily. According to the Rejoinder a great number of Nicaragua's arguments raise "smokescreens" and it is indicated that the Rejoinder will not respond to Nicaragua's claim (RH, p. 86, para. 5.18). Luckily, Honduras does provide an example of one of the alleged smokescreens that according to Honduras are intended to cloud substantive arguments. According to Honduras the comments of Nicaragua on two *bitácoras* introduced by Honduras were not substantive in character (RH, p. 86, para. 5.17). The *bitácora* is a document issued by Honduras on which fishermen are to indicate their catches.

11. What did Nicaragua have to say about those documents? In the Rejoinder Honduras argued that its regulation of fishing activities is relevant to the title of the cays in dispute. For instance, reference can be made to paragraph 5.20 of the Rejoinder. In the light of that position, Nicaragua in the Reply made a number of points in respect of the two *bitácoras* that Honduras produced as plate 31 to the Counter-Memorial (RN, p. 84, para. 5.39; pp. 112-113, para. 6.50). Plate 31 is included in figure 2 on the screen. One of the *bitácoras* extends to the east and north of the point with the geographical co-ordinates 18° N 80° W — including an area beyond 200 nautical

miles of Honduras. Thus, the *bitácora* does not indicate the extent of the 200 nautical mile zone of Honduras or its maritime boundaries with neighbouring States. The other *bitácora* includes an area to the south of parallel of 15° N, indicating the mainland coast of Nicaragua — the curved line south of Cape Gracias a Dios. There is no indication of a boundary between Nicaragua and Honduras. Moreover, neither *bitácora* indicates any of the cays in dispute, even though they show other islands and submarine banks. These arguments from the Reply are not smokescreens — as Honduras is suggesting — they directly address the fact that the evidence related to fisheries that Honduras has produced does not prove the existence of a maritime boundary along the parallel of 14° 59' 48" N or a Honduran title to the cays to the south of the Main Cape Channel.

12. In the Rejoinder, Honduras also presents some additional argument on fisheries activities (RH, pp. 86-94, paras. 5.20-5.37). Three additional fisheries concessions are presented. These are depicted at plates 38 to 40 in the Rejoinder, which have been included in figure 3. These concessions date from 9 June 1975, July 1976 and January 1977. Honduras argues that "these concessions encompass Bobel Cay, South Cay, Port Royal Cay and Savannah Cay" (RH, p. 88, para. 5.23). Actually, only one of the concessions — a provisional permit from 1977: as will be recalled 1977 is the critical date — is applicable to the maritime area in which those cays are located; but the provisional permit does not refer to the cays themselves. The earlier concessions are well to the east of the cays in dispute. Again, this is an example of Honduras's reliance on administrative acts to support its claim to the cays although they are not relevant. None of the concessions pertains to the cays in dispute.

13. In the Counter-Memorial Honduras introduced a large number of witness statements that, according to Honduras, support its title to the cays in dispute. Nicaragua dealt with those witness statements in paragraphs 6.51 to 6.61 of the Reply. The Reply concluded that the witness statements are general in nature and do not provide any evidence about specific events in the cays in dispute (RN, pp. 114-115, paras. 6.53-6.56). Secondly, the Reply concluded that the statements and other evidence introduced by Honduras show that Honduras only started to regulate activities of fishermen staying on the cays some two decades after the critical date of 1977 (RN, p. 116, para. 6.60).

14. In the Reply, Nicaragua introduced a number of witness statements that testified that in the 1970s only Nicaragua was policing fishing activities in the area around the cays south of the Main Cape Channel and further to the east and north-east (RN, Anns. 21-25). The Rejoinder contests the relevance of two statements — of Mr. Presida contained in Annex 21 of the Reply and Mr. Clark McLean in Annex 22 of the Reply — because the activities they describe are of a private character. As Honduras points out these fishermen do not refer to the fact that they got licences or any authorization from Nicaragua (RH, p. 68, paras. 4.38 and 4.39). That criticism, however, is completely off target. Both witnesses indicate that they fished around the reefs and cays to the south of the Main Cape Channel and that this area was patrolled by Nicaragua to protect fishery resources. No better proof of government acts is possible. As Mr. Clark McLean indicates, his statement is concerned with the period from 1975, when he started working on a fishing boat. The only Honduran criticism of Nicaragua's other witness statements concerning fisheries is that they are not corroborated by documentary evidence (RH, p. 68, paras. 4.40-4.41). This concerns the statements of Mr. Möhrke Vega, Mr. Morgan Britton and Mr. Aguirre Sevilla contained in Annexes 23 to 25 of the Reply. Honduras has nothing to say about the veracity of those other documents. Those witness statements attest that Nicaragua was present in the area surrounding the cays in dispute before and after the critical date.

(c) ***The significance of Honduras's witness statements***

15. Honduras criticizes the Reply's review of Honduras's witness statements. The Rejoinder submits that Nicaragua chooses to ignore that the witness statements that Honduras introduces in the Counter-Memorial have to be taken together with the other evidence on fishing concessions, registration of vessels, operation of naval patrols, and other related activities (RH, p. 88, paras. 5.24-5.25). In paragraph 5.25 of the Rejoinder Honduras illustrates this point by short extracts from four of its witness statements. I would like to give you the context of those short extracts.

16. The first example in paragraph 5.25 of the Rejoinder concerns a witness statement of Mr. Maurice Loy Gowe, a Jamaican fisherman, who according to his statement has been fishing around Savanna Cay for more than 30 years — the statement is included as Annex 67 to the

Counter-Memorial. In his statement Mr. Gowe also testified that he fishes there because he has been provided with a licence by Honduras. He does not mention when he first obtained a licence from Honduras and no other evidence to that effect has been presented by Honduras. To the contrary, Mr. Gowe's statement does provide a specific date concerning one of the other Honduran acts he mentions. As Mr. Gowe indicates, the municipality of Puerto Lempira enumerated the houses in Savanna Cay two years prior to Mr. Gowe's witness statement, recorded in September 2001: *two years*.

17. The second example provided in paragraph 5.25 of the Rejoinder concerns a witness statement by the migration delegated officer in Puerto Lempira, Honduras, a Mr. Seision — the statement is included in Annex 71 of the Counter-Memorial. Mr. Seision talks about the issuance of work permits to Jamaicans and Nicaraguans working in the cays. Mr. Seision states that he started to work in Puerto Lempira in 1989 and that his own visits to the islands stem from 1997 to 1999. This reference to 1997 for his first visit to the cays, although he worked in Puerto Lempira since 1989, is in accord with other evidence of Honduras that it started to build up a presence in the cays in the latter half of the 1990s. That is also confirmed by the date of the work permits to which Honduras refers in the Counter-Memorial. The permits all are from January 2000 (see CMH, Ann. 125).

18. Mr. Seision also makes some observations on the period before taking up his position in Puerto Lempira. These observations are not only concerned with the cays but also refer to Puerto Castilla and the Bay Islands in the north of Honduras, which are a couple of hundred kilometres distant from the cays. Mr. Seision mentions two specific dates. He mentions that he is aware that in 1975 Jamaican fishermen were hired by a businessman of Puerto Castilla, in the north of Honduras. which is distant some hundred kilometres from the cays. Where those fishermen were employed is not clear. Mr. Seision further observes that Nicaraguans have been living on the cays since 1982 — that is, five years after the critical date. These observations indicate that Jamaican fishermen only started to come to Honduras in the second half of the 1970s and that the arrival of Nicaraguans is linked to the armed conflict in Central America in the 1980s. These observations do not assist Honduras in establishing its presence on the cays before the critical date.

19. The third example contained in paragraph 5.25 of the Rejoinder is the witness statement of Mr. Flores Ramírez, port supervisor of Puerto Lempira at the time of his deposition. All of Mr. Flores's testimony only refers to events of 1988 or a more recent date. Finally, there is the statement of Mr. Ricardo Domínguez, a Honduran fisherman — contained in Annex 80 of the Counter-Memorial. Mr. Domínguez declares that he has been fishing in South Cay for the last nine years. His statement was recorded in 2001. Accordingly, Mr. Domínguez started fishing in the area in 1992, 15 years after the critical date.

20. Madam President, one has to assume that Honduras picked these four examples carefully, to present the Court with the most convincing witness statements it has to offer. However, the four witness statements do not provide anything tangible as far as activities prior to the critical date are concerned. To the contrary, they rather deal with events after the critical date and they confirm that Honduras only became interested in the cays in the area in dispute after the critical date — *well* after the critical date. Honduras tries to build up that practice although it was perfectly aware of Nicaragua's position. Such practice cannot contribute to establishing a title to the cays.

21. Honduras also takes issue with Nicaragua for quoting selectively from the witness statements in discussing them in the Reply (RH, pp. 89-90, para. 5.26). This is not the case. Madam President, I will not repeat the review that was carried out by Nicaragua in the Reply (RN, pp. 113-116, paras. 6.51-6.61). Nicaragua invites the Court to carefully read the references of the Parties to the statements and compare them to the statements themselves. Let me however make one point here. This concerns the four witness statements I just discussed. The only reference Honduras makes to a year or time period in the paragraph of the Rejoinder in which it quotes from them concerns the fact that one fisherman had been fishing for 30 years in the area around Savanna Cay. You will not find any reference to any of the other dates I mentioned to you just now in paragraph 5.25 of the Rejoinder. That makes Honduras's accusation of selectivity sound rather hollow.

22. There is one affidavit introduced by Honduras that deserves closer consideration as it contains specific information on a period well before the critical date in this dispute. This is the deposition of Mr. Daniel Bordas Nixon, who travelled with his father to Bobel Cay in the 1920s.

That deposition can be found at Annex 70 of the Counter-Memorial. In the Reply, Nicaragua concluded that the deposition rather confirmed the historical links between Nicaragua and the cays that are now in dispute (RN, p. 117, para. 6.63). The Rejoinder seeks to refute this conclusion by accusing Nicaragua of taking liberties with the evidence. Honduras recognizes that Mr. Bordas was born on the right bank of the Rio Coco — that is in Nicaragua — and that he lived in Cape Gracias a Dios. However, Honduras points out, Mr. Bordas's birth was registered in Puerto Lempira, Honduras, he holds Honduran nationality and he moved to Honduras after the Judgment of the Court of 1960 in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)* (RH, p. 99, para. 5.53).

23. Mr. Bordas Nixon's links to Nicaragua are much more substantive than Honduras suggests. His deposition indicates that he lived for 65 years in Cape Gracias a Dios before moving to Honduras. As Mr. Bordas was probably born somewhere between 1910 and 1920 — his deposition does not provide his date of birth, but indicates that Mr. Bordas visited Bobel Cay with his father in the 1920s at the age of 12 — he only moved to Honduras between 1970 and 1980, well after the Judgment of the Court in the *Arbitral Award Made by the King of Spain*. Mr. Bordas in his deposition also indicates that he conducted his commercial transactions at Puerto Cabezas, Nicaragua. In conclusion, it is fully justified to accept Mr. Bordas's deposition as evidence of the links between Nicaragua and the cays in dispute.

(d) ***The views of third parties***

24. Honduras has argued that the views of third parties are relevant to establishing the title to the cays in dispute. In the Counter-Memorial, Honduras referred to the views of third States and other third parties (CMH, pp. 126-129, paras. 6.68-6.75). In the Reply, Nicaragua concluded that the views of third parties did not contribute to establishing a title of Honduras to the cays in dispute (RN, pp. 119-123, paras. 6.71-6.82). Honduras revisited this matter in the Rejoinder. This requires some further comments.

25. The Rejoinder insists on the relevance of various fisheries reports produced by third parties (RH, pp. 91-94, paras. 5.31-5.37). First, there is a report of the United States Fish and Wildlife Service of 1943 (CMH, Ann. 162). The Rejoinder submits that it is readily apparent that

this report's reference to islands and cays includes the cays that are now in dispute (RH, p. 92, para. 5.32). As Nicaragua pointed out in the Reply the report only makes specific mention of the Bay Islands and the Caratasca Cays (RN, p. 110, para. 6.45). As can be appreciated from figure 4 all of these islands and cays are well to the west and north of the cays located between the maritime boundary claims of the Parties. If anything, this report proves that in 1943, Honduras considered that it had a title to the cays to the north of its mainland coast. The cays in dispute are *not* to the north of the Honduran mainland coast and are well to the east of the islands and cays that are mentioned in the 1943 report.

26. That conclusion concerning the 1943 report is confirmed by a notification of a fishing licence from 1962 that was introduced by Honduras in the Counter-Memorial (CMH, Ann. 119). In the Reply, Nicaragua pointed out that this document refers to an area in a northbound direction from the mainland coast between the Bay of Puerto Cortes and the Rio Coco (RN, p. 112, para. 6.49). That northbound area as shown on figure 5 includes the Caratasca Cays and the Bay Islands mentioned in the 1943 report. It does not include any of the cays that are located in the area of overlapping maritime claims.

27. The Rejoinder also discusses a number of reports published by the Food and Agriculture Organization (FAO) that originated from a project on fisheries off the Central American coasts in the Caribbean and the Pacific from the end of the 1960s and early 1970s (RH, pp. 92-93, paras. 5.33-5.35). The gist of the Rejoinder's argument is that Nicaragua has not addressed the substance of the FAO reports. Nicaragua did address the substance of the reports. That analysis is contained in paragraphs 6.46 to 6.48 of the Reply and does not need repeating for the moment. My colleague Professor Remiro Brotóns will say something more about the FAO project on Thursday. However, one point is worth mentioning in respect of the Rejoinder's critique. At paragraph 5.34 of the Rejoinder, Nicaragua is accused of trying to mislead the Court. This concerns the following. In the Reply, Nicaragua drew attention to the fact that off the Gulf of Fonseca one of the FAO reports indicates a line that would seem to contradict Honduras's position in respect of its maritime boundary in that area (RN, p. 111, para. 6.46). The alleged misrepresentation of the Reply consists of the absence of a reference to the 1992 Judgment of the Court dealing with the régime of the Gulf of Fonseca. Nicaragua did of course implicitly refer to Honduras's interpretation of that Judgment.

The bottom line of Nicaragua's argument is that lines included in the FAO reports do not represent lines dividing territory or maritime zones — be it in the Caribbean Sea or the Pacific Ocean. Honduras's claim that the reports prove the existence of a traditional boundary line along the parallel of 14° 59' 48" N is unfounded.

28. Honduras has also argued that its sovereignty over the cays has been recognized by third States. In this connection, Honduras makes reference to Jamaica and the United States. In the Reply, Nicaragua set out that the arguments of Honduras to prove Jamaican recognition were not convincing (RN, p. 119, paras. 6.71-6.72). In addition, Nicaragua pointed out that Nicaragua had held negotiations with Jamaica concerning the delimitation of a bilateral maritime boundary in the area to the north of the maritime boundary claim of Honduras along the parallel of 14° 59' 48" N. Nicaragua submitted that those negotiations proved that Jamaica did not consider that the parallel claimed by Honduras served to limit the maritime areas or sovereignty over islands of Nicaragua (RN, p. 138, paras. 6.116-6.117). A proposal of Jamaica to Nicaragua specifically mentioned Media Luna, located to the north of the parallel, as a base point (RN, Ann. 33).

29. The Rejoinder submits that the negotiations between Jamaica and Nicaragua do not support the proposition put forward by Nicaragua concerning the position of Jamaica (RH, pp. 69-70, paras. 4.44-4.45). In this connection, Honduras points out that its negotiations with Jamaica were subsequent to those of Nicaragua and Jamaica. Honduras also quotes a Jamaican aide-mémoire of 15 June 2003; unfortunately, a rather selective quotation. The aide-mémoire is on the screen in figure 6. Paragraph 2 of the aide-mémoire is quoted in paragraph 4.44 of the Rejoinder; paragraph 3 of the aide-mémoire is not quoted. Paragraph 3 contradicts Honduras's claim that Jamaica has expressed support for the position of Honduras. The paragraph reads "[t]he Government of Jamaica has not in any way expressed support for either party in this dispute".

30. A comparison of the bilateral negotiations of Jamaica with respectively Nicaragua and Honduras is revealing. Jamaica submitted a proposal for a maritime boundary to Nicaragua and to Honduras (RN, Ann. 331; RH, Ann. 234, p. 15). Those proposals are indicated in figure 7 that is now on the screen. Honduras suggests that its subsequent negotiations took place in the same area (RH, p. 69, para. 4.44). Apparently, Honduras considers that its negotiations with Jamaica cancelled out the prior negotiations between Jamaica and Nicaragua. As can be appreciated, no

such thing happened. The two proposals of Jamaica did not concern the *same* area, as the Rejoinder submits. The delimitation line Jamaica proposed to Honduras starts to the north of the delimitation line Jamaica proposed to Nicaragua. These two proposals from Jamaica imply that Jamaica had in mind a putative tripoint somewhere between the proposals. If Jamaica had supported or believed Honduras's 15° N claim against Nicaragua, the Jamaican proposals would have reflected that.

The PRESIDENT: Dr. Oude Elferink, could I ask you to speak a little more slowly, which will help the interpreters.

Mr. ELFERINK: Yes, of course.

The PRESIDENT: Thank you.

Mr. ELFERINK:

31. Honduras has relied on a 1976 arrangement between itself and the United States to argue that the United States has supported the position of Honduras concerning the parallel of 14° 59' 48" N (CMH, Ann. 152). In the Reply, Nicaragua pointed out that the 1976 arrangement is not relevant to the dispute over the cays (RN, p. 119, para. 6.73). The arrangement does not make any reference to the parallel of 14° 59' 48" N, or the cays in dispute. As was also pointed out in that paragraph of the Reply only in 1981, at which time Nicaragua was involved in an armed conflict with *inter alia* Honduras and the United States, markers were placed on the cays. In the Rejoinder (para. 5.64) Honduras is silent on this latter point and again only suggests that 1976 — the date of the bilateral agreement that does not mention the cays at all — is the relevant date for the placement of the markers and not 1981, when they were actually placed.

32. The Rejoinder also insists on the relevance of United States Gazetteers, US Defense Mapping Agency Sailing Directions and Charts published by the British Hydrographer of the navy to establish title to the cays (RH, pp. 104-105, paras. 5.67-5.70). The Reply already set out the irrelevance of those materials at paragraphs 6.77 to 6.79, and I refrain from repeating that argument. The Rejoinder has certainly not addressed that argument. On the other hand, the Rejoinder does seek to distort what was said in the Reply. According to the Rejoinder, Nicaragua

has not raised any material which enables it to challenge the fact that the 1993 charts published by the British Hydrographer treat the islands as being located in Honduras (RH, p. 105, para. 5.70). Honduras is turning things on their head. Honduras itself has not introduced any material to prove that British charts treat the cays as being located in Honduras. The charts that are before the Court disprove Honduras's assertion. Two charts of the United Kingdom Hydrographic Office covering the Atlantic coasts of Nicaragua and Honduras have been used by the Parties in these proceedings. Chart 1218 "Cuba to Miskito Bank" and the larger scale chart 2425 "River Hueson to False Cape". These charts do neither indicate that the cays to the south of the Main Cape Channel are Honduran nor that there exists a maritime boundary between Nicaragua and Honduras. What Nicaragua actually did say in the Reply in respect of a Pilot prepared by the United Kingdom Hydrographic Office was that "[i]f it were to be accepted that the geographical descriptions contained in the Pilot contribute to establishing a title to the disputed cays, they would form part of Nicaragua, as they are located in the Miskito Bank off the east coast of Nicaragua" (RN, p. 122, para. 6.79). The Rejoinder is silent on that reference of the Pilot to cays on the Miskito Bank off the east coast of Nicaragua.

33. Madam President, let me conclude this review concerning the views of third States. What first of all counts to decide this dispute is the practice of the Parties. Honduras apparently has to rely to such an extent on third parties because it considers that its own practice falls short of proving its case. The review of Honduras's arguments show that the views of third parties do not support its case. Honduras has placed particular reliance on the views of Jamaica. If Jamaica's proposals on maritime delimitation to Nicaragua and Honduras were to be given any weight, they contribute to confirming the position of Nicaragua in respect of the cays in dispute.

(e) ***The application of civil and criminal law by Honduras***

34. In the Reply, Nicaragua had argued that the evidence that Honduras had presented concerning the application and enforcement of its civil and criminal laws in the Counter-Memorial concerned cases long after the critical date (RN, p. 105, para. 6.35). The Reply also observed that all of the cases involving the applications of Honduras's civil law were in no way related to the cays in dispute in the present proceedings (RN, p. 105, para. 6.35). The Rejoinder does not contest

that these cases concerned events after the critical date (RH, p. 98, para. 5.47). Interestingly, the Rejoinder tries to suggest that incidents that occurred on fishing banks have some relevance for the question concerning the cays. The Rejoinder submits that those banks are in close proximity to the disputed cays (RH, p. 98, para. 5.48). Apparently, Honduras uses the term "proximity" rather loosely. None of these banks is close to the cays. For example, Middle Bank, one of the banks concerned, is over 100 nautical miles distant from the disputed cays.

35. In the Counter-Memorial, Honduras argued that it had long regulated the access of Jamaican fishermen to the cays in dispute. In the Reply Nicaragua pointed out that Honduras only provides evidence of its regulatory activity in 1999 and beyond (RN, p. 116, para. 6.62). The Reply observes that the Counter-Memorial then refers to the presence of persons in the cays for a much longer period, without submitting any proof that such presence was regulated by Honduras before 1999 (RN, pp. 116-117, para. 6.62). In the Rejoinder Honduras points out that it has actually regulated immigration, mostly of Jamaicans, since 1997, not 1999 (RH, pp. 98-99, para. 5.50). That two-year time difference is not really significant. It is still 20 years after the critical date and further confirms that Honduras only tried to create the impression of a presence in cays in the second half of the1990s.

36. Paragraph 5.50 of the Rejoinder insists that the nondescript statements Honduras has provided the Court with are proof of the fact that Honduras regulated immigration before 1997. The witness statement of the migration delegated officer in Puerto Lempira, Mr. Seision — to which I referred before — indicates the contrary. This migration officer assumed office in Puerto Lempira in 1989 but only first visited the cays in 1997.

(f) ***Naval patrols of Nicaragua and Honduras***

37. In the Counter-Memorial, Honduras introduced a large number of documents related to naval patrols to support its claims concerning the cays (CMH, pp. 121-124, paras. 6.60-6.63). Nicaragua responded to this by pointing out that those patrols were not of direct relevance to establish a title to the cays (RN, p. 117, para. 6.64). In addition, Nicaragua pointed out that Honduras had not introduced any evidence of such activities in the cays before the critical date of 1977 (RN, p. 117, para. 6.65). Nicaragua then referred to two of its witness statements —

contained in Annexes 23 and 24 of the Reply — that confirmed that point (RN, p. 117, para. 6.65). The two witness statements also indicate that Nicaragua did patrol the area to the north-east of Cape Gracias a Dios up to the parallel of 17° N. In the Rejoinder, Honduras takes issue with those witness statements (RH, p. 100, paras. 5.55-5.56). Honduras criticizes Nicaragua for relying on the witness statement of Mr. Möhrke Vega — contained in Annex 23 of the Reply — to argue that Honduras did not patrol the area before the critical date of 1977. Honduras argues that Mr. Möhrke Vega's statement can only concern the period before 1975, because at that time he retired from his job as a ship's captain (RH, p. 100, para. 5.55). That criticism in itself is surprising as it implies an admission on the part of Honduras that Nicaragua regulated activities in the area concerned before 1975 and that Honduras up to 1975 was not present in the same area. Moreover, the witness statement also indicates that Mr. Möhrke's next assignment was with the Nicaraguan navy on the Atlantic coast. From his statement it is clear that he remained involved in the operations of the navy in the maritime area up to the parallel of 17° N. Honduras's criticism of the other witness statement seems to boil down to its use of the term "in recent years" as not being sufficiently precise (RH, p. 100, para. 5.56). This is the witness statement of Mr. Morgan Britton in Annex 24 of the Reply. Mr. Morgan is very specific in noting that as a captain up to the end of 1974, he never noted any presence of Honduran authorities in the area north of the parallel of 15° N.

38. The Rejoinder does not respond directly to the Reply's criticism that no evidence on Honduran naval patrols before 1977 was offered. The Counter-Memorial contains a large number of documents on Honduran naval patrols (CMH, Anns. 129-142). The earliest of these documents is only from 1982. What is particularly interesting about the first of these documents — contained in Annex 129 of the Counter-Memorial — is that it concerns an incident involving a patrol vessel of Honduras and a patrol vessel of Nicaragua near Bobel Cay. The first documented presence of a Honduran naval patrol in the area south of the Main Cape Channel led immediately to an incident with the Nicaraguan navy. That fact is difficult to reconcile with Honduras's assertion that Nicaragua first made a claim to the cays in the Memorial in these proceedings (RH, p. 3, para. 1.10).

39. The Counter-Memorial also includes one document on Honduran naval activities in respect of cays from before 1982. That report — contained in Annex 145 of the Counter-Memorial — refers to the placing of beacons and buoys in Vivorillo Cays and Pichon Cay. However, those cays are to the north of the Main Cape Channel and not in dispute.

40. The Rejoinder seeks to make up for the absence of any material from before the critical date of 1977 in the Counter-Memorial by introducing a witness statement of a retired officer of the Honduran navy, Mr. Cristobal Cano (RH, p. 100, para. 5.57). Tellingly, no document is offered to back up any of his statements. As I mentioned before Honduras takes issue with Nicaragua for not providing any documentary evidence accompanying certain witness statements (RH, p. 68, para. 4.41). It adopts the same approach itself.

(g) ***The maps introduced by the Parties***

41. Madam President, some commentary is also required on the cartographic evidence of the Parties. In the Counter-Memorial Honduras introduced a number of maps of Honduras. According to Honduras, these maps confirmed its title to the cays (CMH, p. 47, para. 3.36; and p. 56, para. 3.58). In the Reply Nicaragua discussed those maps included in the Counter-Memorial. That analysis led to two conclusions. First, the maps produced by Honduras do not show the cays that are now in dispute as being part of the territory of Honduras. Second, one of the maps, a general map of Honduras of 1933 — that is reproduced as plate 23 in the Counter-Memorial — shows a "jurisdictional maritime line of Honduras" to the south of the parallel of 14° 59' 48" N. Honduras has not given an explanation of what that line represents. However, the inclusion of that line in an official map of Honduras belies the present position of Honduras that the parallel of 14° 59' 48" N has been used since the colonial period to attribute islands and maritime zones to Honduras and Nicaragua.

42. A couple of additional remarks are in place in respect of the Rejoinder's comments on the Reply's analysis of the map evidence. The Rejoinder states that Nicaragua is forced to recognize that an official map of Honduras of 1954 includes Media Luna Cay (RH, p. 95, para. 5.39). That assertion deserves some explanation. The 1954 map can be found at plate 25 of the Counter-Memorial. As Nicaragua pointed out at paragraphs 6.24 and 6.25 of the Reply, the

main map of the 1954 official map does not include any of the cays that are now in dispute. A continuation of the main map in an inset — shown on figure 8 — does indicate a number of cays and banks to the north-east of Cape Gracias a Dios. The inclusion of that inset to show cays that were located beyond the area covered by the main map indicates that Honduras on its official map intended to show all of its territory. All of the features included in the inset are to the north of the Main Cape Channel and are not in dispute between the Parties. But, what about Media Luna Cay? On the 1954 official map Cayo Media Luna is included in a small-scale map of Central America at the right hand bottom of the main map. That small-scale map — included as figure 9 in the judges' folder — not only includes Media Luna Cay, but also includes islands that are hundreds of kilometres to the south of the parallel of 14° 59' 48" N, such as Isla Maiz, Isla Maiz Grande and Cayo Perlas. The small-scale map does not make any distinction between Media Luna Cay and those other islands. What does that imply? First, this official map is evidence of the fact that Honduras in 1954 was aware of the location of Media Luna Cay. Second, notwithstanding this knowledge, the map does not indicate Media Luna Cay as part of the territory of Honduras. To the contrary, similar cays to the north of the Main Cape Channel are indicated as territory of Honduras in a continuation of the main map contained in an inset.

43. In the Reply, Nicaragua introduced additional maps of Honduras that did not depict the cays in dispute (RN, para. 6.28). The comment of the Rejoinder on the third of those maps is of particular interest. Honduras observes that it is a school map that is prepared by a private company and has no official status (RH, p. 95, para. 5.41). The fact that Honduras rejects the significance of this map on the basis of its status and refrains from discussing its content warrants having a look at what it actually shows. The map is annexed to the Reply as map III. A comparison of the map to the official map of Honduras of 1954, which I just discussed, shows that both maps depict the territory of Honduras in exactly the same way. None of the cays to the south of the Main Cape Channel are depicted as part of the territory of Honduras on either the 1954 or 1984 map. The relevant part of the maps is compared on figure 10 in your folder, and which is now also on the screen. The 1984 map contains the same inset that continues the main map, which shows the cays to the north of the Main Cape Channel. Although the 1984 map according to Honduras has no official status, its envisaged use — as its legend indicates it is a school map showing the physical

and political geography of the Republic of Honduras — suggests that this assertion should not be accepted out of hand.

44. The Rejoinder suggests that Honduran maps provide more convincing support for the claim of Honduras to the cays in dispute than the maps of Nicaragua for its claim to the cays (RH, pp. 70-71, paras. 4.46-4.48). That suggestion ignores a number of points. First, as was set out in the Reply, and was further confirmed just now, the Honduran maps go a long way to proving that Honduras did not consider that the cays in dispute formed part of its territory. That makes the Honduran assertion that its map evidence is more convincing rather implausible to begin with. Secondly, the Rejoinder almost completely ignores the argument on Nicaraguan maps set out in the Reply (paras. 6.100-6.104). For instance, no mention is made of the fact that the Reply indicates that an official map of Nicaragua of 1898 includes cays to the north and the south of the cays that are now in dispute. Honduras also ignores that official maps of Nicaragua of 1982 and 1993 indicate the reef areas to the north of the parallel of 14° 59' 48" N. Finally, Nicaragua pointed out that no map of Nicaragua shows a boundary along the parallel of 14° 59' 48" N. To the contrary, the boundary between Nicaragua and Honduras in the Gulf of Fonseca is indicated. The latter point indicates that the map-makers were not unfamiliar with the concept of maritime boundaries. On the screen is figure 11 showing the official map of Nicaragua of 1982 to illustrate these points. This is a better quality copy of the copy of the map reproduced as map IV contained in Volume II of the Reply. The map includes a boundary in the Gulf of Fonseca. As an enlargement of a part of the map of the mouth of the Rio Coco shows, no maritime boundary is indicated in the Caribbean Sea. The official map also contains an inset showing Rosalind Bank and Serranilla Bank. Their inclusion in the inset provides further evidence that Nicaragua held that its maritime zones extended to the area of Rosalind Bank, well to the north of the parallel of 15° N.

45. The following conclusions can be drawn from the map evidence presented by the Parties. Nicaragua is not arguing that official maps of Nicaragua provide conclusive evidence of its title to the cays to the south of the Main Cape Channel. However, what the maps do show is that Nicaragua has never recognized the parallel of 14° 59' 48" N as any kind of boundary. No map of Nicaragua indicates a boundary along that parallel. Some of the Nicaraguan maps include cays, reef areas or banks to the north of the parallel of 14° 59' 48" N.

46. The maps of Honduras that have been introduced also do not show a boundary along the parallel of 14° 59' 48" N. What is more, one map indicates that this parallel was not considered to be a boundary between Nicaragua and Honduras. Moreover, maps of Honduras giving a detailed picture of the Honduran territory do not include the cays that are now claimed by Honduras. This includes the official map of Honduras from 1954. This map evidence should be taken into account in evaluating the claim of Honduras that the parallel of 14° 59' 48" N is a boundary and that Honduras has a title to the cays to the north of the parallel. These maps may be viewed as an admission against interest from official Honduran sources. That conclusion is confirmed by the *Beagle Channel* arbitration (para. 142 of the Award) and the first phase of the *Eritrea/Yemen* arbitration (para. 374 of the Award).

(h) ***The relevance of national legislation allegedly referring to the cays***

47. Another argument of Honduras to support its claim to the cays in dispute is the fact that the Constitution of Honduras and Honduran legislation refer to some of those cays. This argument was first made in the Counter-Memorial (CMH, pp. 43-45, para. 3.29). In the Reply (paras. 6.17-6.19) Nicaragua analysed that argument of Honduras and concluded that only in 1982 — five years after the dispute over maritime delimitation became apparent — Honduras included a reference to one cay in the area of overlapping maritime claims in its Constitution — Media Luna Cay (RN, p. 98, para. 6.18). The 1982 Constitution does not mention the four cays which Honduras in these proceedings has identified as being important islands.

48. In the Rejoinder, Honduras returns to its argument concerning its Constitution. Three fold out plates (plates 37 *(a)*-37 *(c)*) are used in connection with the elaboration of its point concerning its Constitution. These plates, especially plate 37 *(c)* depicting the claim under the Constitution of Honduras of 1982, indeed show an impressive array of cays. However, what is the relevance of this for the cays in dispute? If one were to draw the maritime boundaries claimed by the Parties on plates 37 *(a)* and 37 *(b)* of the Rejoinder — the plates that depict the cays mentioned in the Constitutions of Honduras of 1957 and 1965 — only one cay is included between those claim lines — namely Cayo Palo de Campeche. On the screen is figure 12 *(a)* reproducing plate 37 *(b)* of the Rejoinder to illustrate this point. As I just mentioned, Nicaragua in the Reply

concluded that the Constitutions of Honduras before 1982 did not refer to any of the cays in the area of overlapping claims with Nicaragua. What explains the difference between the Reply's conclusion and the Rejoinder's plates 37 *(a)* and 37 *(b)*?

49. In paragraph 5.42 of the Rejoinder, Honduras observes "Palo de Campeche, now submerged, is now known as Logwood Cay". In a footnote to this quotation, footnote 86, it is observed that "palo de campeche" or "logwood" are common names of a tree called *Haemotoxylon campechianum*. This latter correspondence of terms is not denied by Nicaragua. However, Nicaragua rejects the conclusion Honduras seems to draw from this correspondence of terms. There is no recent change in terminology as Honduras suggests. Logwood Cay has always been known as Logwood Cay. For instance, the Counter-Memorial makes reference to a British naval journal of 1841 that mentions Logwood Cay (CMH, p. 18, para. 2.10). The Counter-Memorial also contradicts the Rejoinder's identification of Cayo Palo de Campeche as Logwood Cay. The text of the Counter-Memorial refers 15 times to Logwood Cay. In none of these instances is it indicated that Logwood Cay is also known as Cayo Palo de Campeche. The Counter-Memorial does suggest that Logwood Cay is also known as Savanna Cay or Media Luna Cay (CMH, p. 14, para. 2.3): two other names, but not Cayo Palo de Campeche. The only reference to Cayo Palo de Campeche in the Counter-Memorial is contained in a reference to the provisions of the Constitution of Honduras (Chap. 3, footnote 46). That reference does not make any mention of Logwood Cay. The Rejoinder's belated identification of Cayo Palo de Campeche with Logwood Cay is contradicted by Honduras's own pleading. Nicaragua stands firm by its conclusion that only in 1982 — five years after the dispute over maritime delimitation became apparent — Honduras included a reference to one cay in the area of overlapping maritime claims in its Constitution. The Constitutions of 1957 and 1965, which include a reference to many features outside the area of overlapping maritime claims, do not refer to any cay included in the disputed area.

50. The treatment of the cays to the north and the south of the Main Cape Channel in the Constitutions of Honduras is revealing. All three Constitutions refer to all the cays immediately to the north of the Main Cape Channel by name. That can be appreciated from figure 12 *(b)* for the 1982 Constitution. The 1982 Constitution also refers to False Cape Banks and the Coral Banks located in that same area. To the contrary, only the 1982 Constitution makes reference to one cay

south of the Main Cape Channel, Cayo Media Luna. None of the other cays or reefs in this area, which include Bobel Cay, South Cay, Savanna Cay, Burn Cay and Savanna Reef and Alargardo Reef, are mentioned in the Constitutions of Honduras. If Honduras is taken at its word as regards the importance of its Constitutions, the difference in treatment of the cays to the north and the south of the Main Cape Channel should be taken as one of the indicia confirming Honduras's sovereignty over the former and Nicaragua's sovereignty over the latter.

51. There is one further point in relation to the 1982 Constitution of Honduras that needs to be noted. The Constitutions of 1957, 1965 and 1982 refer to Cayos Los Bajos. The 1982 Constitution also included a reference to Banco Serranilla, on which Serranilla Cay is located (figure 12 *(b)*). Only four years later, in 1986, Honduras concluded a maritime delimitation agreement with Colombia that recognized the sovereignty of Colombia over Cayos Los Bajos and Banco Serranilla and Serranilla Cay. That sequence of events makes one wonder if the inclusion of a reference to Media Luna Cay in the 1982 Constitution was intended as an opening gambit for maritime delimitation talks with Nicaragua.

52. The Rejoinder also introduces further legislation that supposedly proves Honduras's claim to the cays in dispute (RH, p. 80, para. 5.03). However, that legislation — like the 1957 and 1965 Constitutions of Honduras — refers to Cayo Palo de Campeche and not to any of the cays in the area of overlapping maritime claims (RH, Anns. 242 and 243).

53. In view of Honduras's insistence on the relevance of the definition of its territory in its national legislation to establish a title to the cays south of the Main Cape Channel it is worth recalling that Honduras in the Counter-Memorial introduced two decrees, from 1868 and 1957. The 1868 Decree defines the extent of the Department of Mosquitia and the 1957 Decree the extent of the Department of Gracias a Dios (CMH, Anns. 62 and 63). As Nicaragua already pointed out in the Reply both these decrees refer to Cape Gracias a Dios as the eastern limit of the Department (RN, p. 61, para. 4.44; and p. 98, para. 6.17). No reference to the cays to the east of Cape Gracias a Dios is included. The 1868 Decree does refer to the islands to the north of the Atlantic coast. This once more confirms that Honduras traditionally was looking north, not east, in defining the extent of its territory.

(i) ***Oil and gas licensing***

54. Honduras has paid considerable attention to oil exploration licensing of Nicaragua and Honduras in their maritime areas off the Caribbean coast. This practice has to be considered both in connection with the maritime delimitation and the sovereignty over the cays to the north of the parallel of 14° 59' 48" N. I will focus on the significance of the concession practice for the cays. On Thursday, Professor Remiro Brotóns will deal with the maritime dimension of that practice.

55. As far as the cays are concerned, a significant shift in the Honduran position can be discerned between the Counter-Memorial and the Rejoinder. The Counter-Memorial that discusses oil and gas licensing practice in paragraphs 6.24 to 6.28 did not explicitly explain the significance of that practice for the question of sovereignty over the cays. Instead, the Counter-Memorial only submitted that the oil and gas practice supposedly showed that Honduras and Nicaragua have treated the parallel of 14° 59' 48" N as respectively the southern and northern boundaries of their national territory — that submission can be found at paragraph 6.24 of the Counter-Memorial.

56. The Reply discussed the Honduran arguments concerning licensing practice in Chapters 5 and 6. Chapter 5, Section D.1, observed that the Counter-Memorial overlooked the fact that Nicaraguan concessions indicate that the maritime boundary with Honduras remained to be established.

57. Chapter 6 of the Reply considered the implications of the licensing practice of Nicaragua and Honduras for the cays located between their maritime boundary claims (RN, pp. 105-109, paras. 6.36-6.41). It was pointed out that certain Nicaraguan concessions had an open-ended northern limit in view of the absence of a maritime boundary with Honduras. The existence of a Honduran title to the cays just north of the parallel of 14° 59' 48" N would have prevented the approach Nicaragua took in its concession practice. Even a minimal extension of one of the Nicaraguan concession areas to the north of the parallel places the cays inside the concession area concerned (RN, p. 106, paras. 6.37-6.38).

58. Chapter 6 of the Reply quoted extensively from the *Eritrea/Yemen* arbitration in support of Nicaragua's conclusions concerning the licensing practice of Nicaragua and Honduras. I will refrain from reading out the relevant paragraphs but respectfully refer the Court to paragraphs 6.39

and 6.41 of the Reply. Some words, however, are necessary on the Rejoinder's reaction to that part of the Reply.

59. The Rejoinder suggests that in *Eritrea/Yemen* there were circumstances that explained why Ethiopia did not issue licences beyond a certain line and that similar conditions were not present in the area seaward of the Rio Coco (RH, p. 83, para. 5.11). However, the open-ended character of the northern limit of many of the Nicaraguan concessions makes the comparison with the Ethiopian concessions in *Eritrea/Yemen* — that did not have that same open-ended character — unwarranted.

60. The Rejoinder also criticizes Nicaragua for omitting the concluding sentence of paragraph 423 of the Arbitral Tribunal's Award from the quotation in paragraph 6.39 of the Reply (RH, p. 83, para. 5.12). That concluding sentence refers to a contract of Ethiopia with International Petroleum/Amoco. That contract is then further discussed in paragraphs 424 to 434 of the Award. The Rejoinder quotes with approval from paragraphs 433 and 434 of the Award, including the conclusion of the Tribunal that Ethiopia did grant a concession, including much of the Hanish Islands, and that Yemen did not protest that concession (RH, pp. 83-84, para. 5.12). Honduras submits that, like Yemen, Nicaragua has never protested any of the activities of Honduras (RH, p. 84, para. 5.12). That absence of protest is beside the point. Nicaragua in its own licences provided for an open-ended northern limit because the maritime boundary with Honduras remained to be settled. Honduras submits that Nicaragua had been well aware of the Honduran oil and gas practice. As was already pointed out by the Agent of Nicaragua, Ambassador Argüello, on Monday, there is no evidence of any official communication between Nicaragua and Honduras concerning the Honduran practice. However, if it were to be accepted that Nicaragua should have been aware of this practice, by the same token, Honduras should have been aware of the Nicaraguan practice that made it clear that Nicaragua considered that the maritime boundary with Honduras had not been established and was to the north of the parallel of 14° 59' 48" N.

61. The Rejoinder also fails to mention how the Tribunal in *Eritrea/Yemen* dealt with the concession practice of the parties. The Ethiopian licence that was not protested by Yemen was not conclusive as to the sovereignty over the Hanish Islands. Those islands were awarded to Yemen not Eritrea. Indeed, the Tribunal's conclusion in respect of the offshore petroleum contracts

entered into by Yemen, and by Ethiopia and Eritrea, was that they failed to establish or significantly strengthen the claims of either party to sovereignty over the disputed islands (Award, para. 437).

62. In the Rejoinder, Honduras makes a number of observations to suggest that its oil and gas practice pertains to the cays in dispute, making up for its silence in the Counter-Memorial. The Rejoinder notes that "[t]he connection between the oil concessions and activities on the islands is demonstrated by the work carried out by an oil company (pursuant to Honduran Government approval) on Bobel Cay in the 1960s and 1970s" (RH, p. 81, para. 5.04). This is a revealing admission on the part of Honduras. Only on *one* cay in the area of overlapping maritime claims there arguably took place activities related to oil and gas concessions. However, that is not all. Contrary to what Honduras suggests, in paragraph 5.04 of the Rejoinder, this did not concern activities that spanned two decades. The Rejoinder, in making that assertion, refers to a report contained in Annex 264 of the Rejoinder. This is a report prepared by Geophysical Service Inc. of a survey carried out for the Union Oil Company. That report, in the abstract contained on its page 1, points out that a base station for positioning the ship *M/V Midnight Worker* was placed on Bobel Cay in the spring of 1975. Honduran activities allegedly spanning two decades actually concern one single event carried out by a private company — not Honduras — that most likely took place in a time span of no more than a couple of days or weeks.

63. The Tribunal in the *Eritrea/Yemen* arbitration had to consider a similar activity. At paragraph 506 of the Award, in the first stage of the proceedings, it is noted:

> "There was some emphasis by Eritrea on a scheme to put beacons on Hanish to assist Amoco's seismic testing; there is no clear evidence that they were actually installed. Any such installation of beacons covered several locations, of which Greater Hanish Island was only one, and would have been short-lived: the evidence provided by Eritrea mentions two weeks, and provides for removal of the beacons on completion of the seismic work. Moreover, the beacons were placed by the oil company, Amoco, with only a limited role for the Ethiopian Government in protecting the oil company personnel and the temporary beacons from the attentions of 'random individuals'."

64. A comparison of the two cases points out that Honduras has not provided any evidence of its involvement in respect of the placing of the base station at Bobel Cay similar to that of Ethiopia. That placement of a beacon on Bobel Cay by a private company is the only activity

relating to oil and gas exploration on one of the cays that is now in dispute for which Honduras has placed evidence before the Court.

65. The Rejoinder also submits that the joint operation of the Coco Marina well — an exploratory well that was drilled in 1969 — is conclusive evidence concerning the sovereignty of Honduras over the cays to the north of the parallel of 14° 59' 48" N (RH, p. 84, para. 5.13). As Honduras points out, the Coco Marina well was drilled within 6 nautical miles from Bobel Cay and was thus located in the territorial waters of Bobel Cay (RH, plates 35 and 36). Honduras also points out that the Coco Marina well was located inside a concession area licensed by Honduras (RH, p. 84, para. 5.13). The fact that the drilling of this well concerned a joint operation of the concession holder of Honduras, Union Oil, and the concession holder of Nicaragua, also Union Oil, operating in the adjacent concession areas, indicates that Honduras is wrong in concluding that this operation confirms its sovereignty over the cays. If the well had been drilled in the undisputed territorial waters of an island that was the undisputed territory of Honduras, there would not have been any need to drill the well under a joint operation of the concession holders of Nicaragua and Honduras. The fact that this was a joint operation proves that there was no agreement on the parallel of 14° 59' 48" N as a line allocating either territory or maritime areas.

66. As I mentioned earlier, the Reply indicated that the licensing practice of Nicaragua envisaged that certain Nicaraguan concessions provided for an open-ended definition of their northern limit in view of the absence of a maritime boundary with Honduras. As the Reply indicated that fact is particularly relevant to the cays in dispute (RN, p. 106, para. 6.38).

67. The only response to the Reply seems to be contained in paragraph 4.20 of the Rejoinder where it is argued that there is no concession of Nicaragua "in any area which is remotely proximate to the islands". It is not clear how Honduras is able to reach this conclusion. Honduras depicts the concession areas of Nicaragua as ending at the parallel of 15° N, ignoring the open-ended character of the concessions (CMH, plate 13). All of the reefs and cays to the south of the Main Cape Channel are in the immediate vicinity of the Nicaraguan concession areas as depicted by Honduras. By way of example, on the screen on figure 13 you can see the concessions Union II, Union III and Union IV. These concessions were originally acquired by the Pure Oil Company in 1962, but were later acquired by Union Oil. Given that the concession of these areas

would expire on 3 March 1972, Union Oil renewed its requests for the concessions on 25 February 1972, under the same terms but now with the names Union II, Union III and Union IV. It was indicated that the boundary with Honduras had not been established (RN, pp. 77-78, paras. 5.18-5.21). Even a minimal extension of these concession areas beyond the parallel of 15° N includes the reefs and cays inside these concession areas.

68. The Rejoinder accuses Nicaragua of silence on evidence introduced in the Counter-Memorial that allegedly demonstrates Nicaragua's respect for the parallel of 14° 59' 48" N as a maritime boundary. Reference is made to a series of diagrams published in international oil journals (RH, p. 63, para. 4.29, Sect. *(c)*). Nicaragua considers that these diagrams did not constitute evidence as regards the positions of the Parties on their maritime boundary. However, the Rejoinder's insistence warrants having a closer look at what these diagrams actually show. One of the diagrams reproduced by Honduras in the Counter-Memorial (CMH, Ann. 118, p. 364) shows Nicaraguan concessions in December 1971. As the copy of the figure included in the Counter-Memorial is a bit blurred, another copy of the original figure was made. That copy is on the screen. Madam President, I would like to draw your attention to the land boundaries of Nicaragua indicated in the figure. As can be seen both the land boundary with Costa Rica and that with Honduras extends seaward for some distance. One of them concerns the boundary with Honduras in the Gulf of Fonseca, which is now enlarged on the screen. This is figure 14. In the case of the Rio Coco, the boundary extends seawards to the north of the parallel that according to Honduras allegedly serves as a line to allocate territory and maritime areas (figure 14 *(a)*). If the Court considers that the diagrams published in international oil journals that have been introduced by Honduras have any evidentiary value, Nicaragua urges the Court to consider the implications of the inclusion of a boundary in the sea to the north of the parallel of 14° 59' 48" N.

Madam President, I note that it is past one o'clock. Would you like me to continue? I still have some . . .

The PRESIDENT: I would like you to continue, please.

Mr. ELFERINK: It's about 20 minutes. Is that agreeable to you? That may be a bit long?

The PRESIDENT: Do you really feel that six more pages is going to take 20 minutes? Perhaps using graphics it will do. Is that your estimate?

Mr. ELFERINK: That was my estimate, yes.

The PRESIDENT: Then I think we had better hear you first thing in the morning.

Mr. ELFERINK: OK. Thank you.

The PRESIDENT: The Court will now rise and meet again at 10 in the morning to continue with Nicaragua's presentation of its pleadings.

The Court rose at 1.05 p.m.

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