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CR 2007/4 (traduction)

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Jeudi 8 mars 2007 à 10 heures

Thursday 8 March 2007 at 10 a.m.

10 Le PRESIDENT : Veuillez vous asseoir. Monsieur Oude Elferink, vous avez la parole.

M. ELFERINK : Je vous remercie, Madame le président. Madame le président, Messieurs de la Cour, je vais aujourd'hui conclure ma présentation au sujet des cayes situées dans la zone de chevauchement des revendications maritimes.

Le dernier thème que j'ai traité hier est celui de la pratique des Parties en matière pétrolière et gazière.

j) ***L'index géographique du Nicaragua***

69. Un document publié à l'époque où les concessions pétrolières et gazières furent accordées confirme que la pratique en question ne signifiait nullement que le Nicaragua reconnaissait la souveraineté hondurienne sur les cayes situées dans la zone de chevauchement des revendications maritimes. Il s'agit de la publication intitulée *Indice Geográfico de Nicaragua* (index géographique du Nicaragua), qui date de 1971. Ce volume fut établi par Jaime Incer, qui était alors à la tête du département de la géographie à l'Institut géographique national du Nicaragua, sous la direction de Cristobal Rugama, le directeur de cet institut. Le volume fut publié par le ministère des travaux publics du Nicaragua et par l'Institut géographique national.

70. La page 124 de l'*Indice Geográfico de Nicaragua* contient une référence à Media Luna, qui est décrite comme un «[g]roupe de cayes et de récifs situé à environ 70 kilomètres du cap Gracias a Dios sur le plateau sous-marin. Il inclut les îlots suivants : Logwood, Bobel, Savanna, Sud, Half Rock, récif d'Alargado et Cock Rock. Il se situe à 15° 10' de latitude nord et 82° 35' de longitude ouest.» (RN, annexe 31, p. 153.) Dans la réplique, le Nicaragua a noté qu'il s'agissait là de l'un des très rares cas où un élément antérieur à la date critique aux fins du présent différend désignait expressément et sans équivoque les cayes en litige comme faisant partie du territoire de l'une des Parties (RN, p. 133, par. 6.106). De ce fait, ce document est particulièrement important pour répondre à la question de la souveraineté sur les cayes *(ibid.)*. Il est intéressant de relever que, dans sa duplique, le Honduras n'a rien eu à dire à propos de cette publication.

k) ***Le différend relatif à la pêche à la tortue entre le Nicaragua et le Royaume-Uni***

71. Les Parties ont accordé une attention considérable à ce qu'il convient d'appeler le différend relatif à la pêche à la tortue. Il s'agit là d'un différend qui vit le jour pendant la seconde

11 partie du XIX^{e} siècle entre le Nicaragua et le Royaume-Uni au sujet de l'accès des pêcheurs des îles Caïmanes à la zone de pêche à la tortue qui se trouvait au large de la côte nicaraguayenne. Dans le contre-mémoire, le Honduras a invoqué cette affaire pour soutenir que le Nicaragua n'avait alors revendiqué aucune des cayes qui divisent aujourd'hui les Parties (CMH, chap. 3. III).

72. Dans sa réplique, le Nicaragua dit que les faits invoqués dans le contre-mémoire, — qui concernent essentiellement les négociations ayant abouti à la signature d'un traité bilatéral entre le Nicaragua et le Royaume-Uni en 1916 —, ne justifient pas les conclusions qui y sont dégagées par le Honduras (RN, p. 62-64, par. 4.46-4.52). Le Nicaragua précise que ces faits montrent que dans la période qui a précédé le traité de 1916, sa revendication des îles situées au large de sa côte continentale s'étendait au nord des cayes qui font l'objet de l'actuel différend (RN, p. 62 et 63, par. 4.48). Rien n'étaye l'affirmation du Honduras selon laquelle le traité de 1916 «ne visait pas — et ne toucha pas dans la pratique — la pêche à la tortue au nord du 15^{e} parallèle» (CMH, p. 35, par. 3.12). Le Nicaragua joint à sa réplique des documents relatifs à d'autres négociations qu'il a engagées avec le Royaume-Uni à la fin des années cinquante au sujet de la pêche à la tortue. S'il est vrai que ces négociations n'ont pas abouti au renouvellement du traité de 1916, elles sont une preuve supplémentaire du titre du Nicaragua sur les cayes actuellement en litige. Plus précisément, ces négociations apportent la réfutation de l'argument du Honduras selon lequel le traité de 1916, — qui, comme le Honduras le reconnaît lui-même, (DH, p. 74 et 75, par. 4.57) a constitué le fondement de la pêche à la tortue des insulaires caïmanais jusqu'en 1960 — couvrait uniquement la pêche à la tortue dans les cayes et eaux environnantes situées au sud du parallèle de 14° 59' 48" de latitude nord. Les documents de l'administration britannique qui sont joints en annexe 39 de la réplique et qui couvrent la période 1958-1959 — années où le traité de 1916 était encore en vigueur — montrent que les cayes qui font l'objet de l'actuel litige étaient réputées appartenir au Nicaragua.

73. L'un des documents joints en annexe 39 est une lettre adressée le 15 avril 1959 par P. J. Kitcatt du Colonial Office à Londres à J. M. Stow, secrétaire général de l'administration en Jamaïque. Cette lettre fait mention d'une autre lettre, qui lui est jointe, émanant du commandant Kennedy de l'Amirauté et montrant un tracé schématique du type de système de lignes de base que le Nicaragua pourrait adopter en vertu de la convention de 1958 sur la mer territoriale. Le schéma dessiné par le commandant Kennedy — qui est représenté sur la figure 15, qui apparaît à présent à l'écran derrière moi — montre que le Nicaragua pourrait inclure dans un système de lignes de bases droites toutes les cayes aujourd'hui en litige. Comme l'indique la note
12 explicative jointe à la figure, les points noirs représentent des cayes, etc., découvertes en permanence. Les lignes droites indiquent des distances approximatives en milles entre les cayes et entre les cayes et la côte continentale.

74. La souveraineté du Nicaragua sur les cayes situées au sud du Main Cape Channel est confirmée par un autre document figurant à l'annexe 39 de la réplique. Il s'agit d'un extrait d'une lettre adressée le 27 novembre 1958 par le commandant Kennedy du service hydrographique à E. C Burr du Colonial Office. Cet extrait mentionne Logwood Cay, Burn Cay, Bobel Cay, Savanna Cay et South Cay, toutes situées entre le Main Cape Channel et le parallèle de 14° 59' 48" de latitude nord.

75. Dans sa duplique, le Honduras ne mentionne pas la carte des cayes qui a été dressée par le commandant Kennedy. Il commente néanmoins d'autres documents contenus dans l'annexe 39 de la réplique. Tout d'abord, le Honduras invoque le fait que l'extrait de la lettre du commandant Kennedy datée du 27 novembre 1958 indique, au sujet des cayes situées sur les récifs de la Demi-Lune — à savoir Logwood Cay et Burn Cay — qu'elles pourraient être revendiquées comme faisant partie du plateau continental du Honduras, en fonction de l'accord final sur la manière dont la frontière traverse le plateau (DH, p. 76, par. 4.62).

76. Le Honduras ajoute que cette précision indique clairement «qu'en 1958, le Royaume-Uni n'avait connaissance d'aucune revendication du Nicaragua sur les îles situées au nord du 15^{e} parallèle» (DH, p. 76, par. 4.62). Madame le président, la remarque du commandant Kennedy au sujet des récifs de la Demi-Lune a-t-elle réellement le sens que lui attribue le Honduras ? Pas du tout. Premièrement, cette remarque dément l'affirmation du Honduras selon laquelle la ligne située

par 14° 59' 48" de latitude nord a été utilisée depuis l'époque coloniale comme ligne d'attribution de la souveraineté sur les îles. Deuxièmement, le commandant Kennedy laisse entendre qu'en 1959, les cayes situées sur les récifs de la Demi-Lune appartenaient au Nicaragua, et non au Honduras. La remarque du commandant Kennedy montre en réalité qu'il considérait que la délimitation du plateau continental pourrait aboutir à l'attribution soit au Nicaragua, soit au Honduras des cayes de petite dimension situées sur les récifs de la Demi-Lune. Autrement dit, il était considéré que la souveraineté sur ces cayes ne serait pas un facteur déterminant de la délimitation du plateau continental.

77. On peut relever que le point de vue exprimé par le commandant Kennedy s'accorde parfaitement avec la position, adoptée par le Nicaragua dans la présente procédure, selon laquelle la délimitation du plateau continental et de la zone économique exclusive entre ce pays et le Honduras
13 doit être effectuée sur la base de la relation entre leurs côtes continentales et ne devrait pas accorder de poids décisif aux cayes situées autour de la zone à délimiter.

78. Dans sa duplique, le Honduras fait également valoir que l'obligation faite aux pêcheurs caïmanais souhaitant exercer leurs activités dans les eaux du Nicaragua de se rendre tout d'abord au cap Gracias a Dios pour effectuer leur entrée officielle dans les eaux territoriales nicaraguayennes «implique manifestement qu'aucune zone située … au nord du cap Gracias a Dios n'était considérée comme eaux territoriales nicaraguayennes» (DH, p. 76, par. 4.63). Cela n'est guère logique. L'obligation qu'avaient les pêcheurs caïmanais de se rendre tout d'abord au cap Gracias a Dios et d'y effectuer des formalités de sorties au moment de rentrer chez eux est mentionnée dans l'un des documents joints en annexe 39 de la réplique. Il s'agit d'une note du 18 décembre 1958 sur la pêche à la tortue dans les eaux nicaraguayennes. Cette note ne concerne nullement la définition de la limite septentrionale des eaux du Nicaragua. En revanche, elle fait état d'une obligation de notifier *officiellement* les autorités nicaraguayennes des entrées et sorties effectuées dans les eaux de ce pays. Le cap Gracias a Dios était le point le plus septentrional de la côte atlantique du Nicaragua. Les obligations de signaler les entrées et sorties auraient aidé les autorités de ce pays à contrôler les activités liées à la pêche à la tortue dans la région.

l) ***Conclusions***

79. Madame le président, au total, à quoi se résument les éléments de preuve soumis à la Cour au sujet des cayes ? Le Honduras souligne à plusieurs reprises que le Nicaragua n'a présenté rien qui prouve son titre sur les cayes en litige. Le Nicaragua n'est pas d'accord avec cette affirmation. Les éléments de preuve antérieurs à la date critique — par exemple le différend relatif à la pêche à la tortue et l'ouvrage de 1971, *Índice Geográfico de Nicaragua*, publié par le ministère nicaraguayen des travaux publics et par l'Institut géographique national du Nicaragua — prouvent que le Nicaragua détenait un titre sur les cayes situées au sud du Main Cape Channel bien avant que le Honduras n'ait formulé ses revendications. Ainsi que l'a dit M. Remiro hier dans son exposé, le fait que les cayes en litige contiguës au territoire non contesté du Nicaragua constitue, en l'absence de toutes preuves relatives à l'*uti possidetis juris*, l'indication de l'existence du titre sur les cayes en 1821, date à laquelle la Nicaragua et le Honduras sont devenus indépendants de l'Espagne.

80. Certes, il n'y a pas beaucoup d'éléments de preuve. Le Nicaragua en convient. Comme le Honduras lui-même l'a admis, point n'est besoin d'une abondance d'éléments de preuve dans une affaire comme celle-ci (DH, p. 21, par. 2.29-2.30). Etant donné cette admission, ce qui est

14 l'aspect le plus remarquable de l'espèce, c'est sans doute l'immense quantité de documents que le Honduras a présenté à la Cour pour prouver son titre sur les cayes. Il ne fait pas de doute qu'un tel comportement amènera la Cour à être sur ses gardes. Et, de fait, tout ce que ces documents prouvent, c'est que le Honduras cherche à fonder sa cause sur une pratique récente, face à l'opposition continue du Nicaragua à cette nouvelle revendication créée de toutes pièces. Pareille revendication devrait être rejetée et ne saurait l'emporter sur le titre du Nicaragua qui est antérieur à la date critique.

L'objet du différend soumis à la Cour

81. Avec ces conclusions à l'esprit, je voudrais m'intéresser à présent à la prétention du Honduras selon laquelle le Nicaragua a cherché à élargir le différend soumis à la Cour, en priant celle-ci de déterminer quel Etat a souveraineté sur les cayes situées au nord du parallèle 14° 59' 48" de latitude nord (DH, p. 1, par. 1.03). Le Honduras prétend par ailleurs qu'il n'a pas cherché à élargir le différend soumis à la Cour (DH, p. 2, par. 1.04).

82. La Nicaragua nie catégoriquement que c'est lui qui a cherché à élargir le différend soumis à la Cour. Le Nicaragua considère que toutes les cayes situées au sud du Main Cape Channel font partie du territoire du Nicaragua. En 1977, le Nicaragua a proposé au Honduras d'ouvrir des négociations au sujet de leur frontière maritime. Jusqu'alors, il n'avait aucune raison de penser que le Honduras contestait la souveraineté du Nicaragua sur les cayes. C'est seulement après 1977 que le Honduras a commencé à formuler une revendication sur les cayes situées au sud du Main Cape Channel. Au départ, cette revendication était exprimée de manière plutôt ambiguë. Le Honduras mettait l'accent sur les droits qu'il avait sur les eaux situées au nord du 15e parallèle de latitude nord, et non sur les cayes se trouvant dans lesdites eaux. Le Honduras a formulé pour la première fois sa thèse selon laquelle il existait une frontière traditionnelle le long du 15e parallèle de latitude nord dans une note en date du 23 mars 1982 adressée par le ministre des affaires étrangères du Honduras au ministre des affaires étrangères du Nicaragua (MN, vol. II, annexe 8). La note ne faisait aucune mention de l'existence d'un titre hondurien sur les cayes qui sont à présent en litige. Au lieu de cela, il y était affirmé que le Nicaragua avait violé la souveraineté du Honduras dans les eaux relevant de la juridiction du Honduras.

83. Pratiquement tous les éléments de preuve se rapportant au prétendu titre du Honduras sur les cayes et qui concernent directement les cayes elles-mêmes datent de la deuxième moitié des années quatre-vingt-dix, soit quelque vingt années après que le Nicaragua a proposé des pourparlers au Honduras sur la délimitation maritime. Le Nicaragua n'a jamais accepté la revendication tardive du Honduras concernant les cayes situées au sud du Main Cape Channel.

15 84. Il n'appartient pas au Nicaragua de dire au Honduras comment défendre sa cause. Le Honduras a choisi l'option d'insister sur sa revendication concernant les cayes et a choisi de plaider sa cause en avançant un mélange inextricable d'arguments se rapportant aux cayes et à la frontière maritime, très souvent sans préciser si tel argument concerne les cayes ou la frontière maritime, ou les deux. Or, tout comme le Nicaragua ne saurait décider pour le Honduras comment il faut procéder, le Honduras ne peut décider pour le Nicaragua et l'amener à accorder crédit à la revendication tardive du Honduras concernant les cayes, en faisant de cette revendication l'objet de la requête soumise à la Cour. Le Honduras a décidé de défendre ladite revendication devant la

Cour. Le Nicaragua lui a répondu. Le Honduras ne saurait à présent prétendre que le Cour est empêchée de rendre une décision sur la délimitation maritime entre le Nicaragua et le Honduras parce que le Honduras aurait élargi le différend soumis à la Cour.

85. Madame le président, ceci met fin à mon exposé. Je vous remercie vous et les autres membres de la Cour pour votre aimable attention. Je vous demanderais respectueusement de bien vouloir appeler à la barre mon collègue M. Remiro Brotóns.

Le PRESIDENT : Merci beaucoup, Monsieur Elferink. Monsieur Remiro Brotóns, vous avez la parole.

Mr. BROTÓNS:

The alleged existence of a traditional line

A. Presentation

1. Madam President, Members of the Court, Honduras uses varied, fluctuating terminology in its endeavour to escape a delimitation of its maritime areas with Nicaragua which would be equitable, taking account of all relevant circumstances.

2. In Honduras's view, "there is an existing boundary at the 15th parallel"[1]. This is a "traditional line"[2], a "traditional boundary"[3], a "traditional boundary line"[4], which has long been the result of the consistent practice of the Parties, a practice not disputed — Honduras tells us — until recent years[5]; a line, lastly, "based in . . . practice"[6]. Honduras refers to this boundary as a "*de facto* line"[7], a "*de facto* boundary"[8], and again a "*de facto* boundary"[9], based on the tacit

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[1]RH, paras. 1.07-1.08, 1.23, 2.47.

[2]RH, paras. 2.4, 2.5, 2.7, 2.33, 2.45, 2.46, 5.15, 6.02, 6.04, 7.01, 8.01, 8.16, 8.19, 8.20, 9.01, 9.04, 9.05, 9.06.

[3]RH, paras. 2.3, 5.02, 9.01.

[4]RH, paras. 1.04, 1.22.

[5]RH, paras. 2.4, 9.04, 9.05, 9.06.

[6]RH, para. 8.15.

[7]RH, paras. 2.7, 2.9.

[8]RH, paras. 4.04, 4.08, 5.39.

[9]RH, para. 9.02.

agreement of the Parties deduced from their practice[10], a boundary, lastly, "tacitly agreed"[11]. The repeated references to the *tacit agreement*[12] are scarcely fewer than the references to *the traditional line* with which it forms a pair. But Honduras also refers to a long-standing *modus vivendi*[13], to Nicaragua's acquiescence in the "traditional line of delimitation"[14]; to Nicaragua's having long tacitly but actively recognized a boundary at the 15th parallel[15], to a "mutual understanding"[16], to the "importance of the conduct of the Parties", etc., as evidence of the validity of the traditional line of delimitation"[17].

3. Honduras urges the Court to endorse an agreement of which there is no written trace as regards — Honduras says — the sudden statement by Nicaragua claiming to abolish an ancient existing boundary, substituting another for it thanks to a decision of the Court *ex aequo et bono*[18].

4. The Court, Honduras adds, should not become embroiled in this sort of machination, for which responsibility falls to the Sandinista government, which in 1979 led Nicaragua to unilaterally

17 deny the traditional line and to "abruptly change[]" its practice[19]. The Court "should affirm the established traditional line and deny Nicaragua a benefit for changing its position to gain further advantage"[20].

5. The respect which is due to agreements, even when not in writing, would appear to be supported, in our case, because, according to the *revelation* that Honduras now wishes to share with us, the traditional line which comes down to us from history is reinforced by the fact that it produces "an equitable result"[21].

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[10]RH, paras. 2.7, 2.9, 4.08, 9.02.

[11]RH, para. 1.19.

[12]RH, paras. 1.09, 1.15, 2.9, 2.32, 2.40, 4.03, 4.05, 4.08, 4.22, 4.29c and e, 4.31, 4.33, 5.15.

[13]RH, paras. 2.8, 2.32, 2.39.

[14]RH, paras. 2.33, 2.37.

[15]RH, para.2.35.

[16]RH, para. 5.04.

[17]RH, para. 2.46.

[18]RH, paras. 1.20, 2.39, 2.40, 2.42, 2.43, 2.47.

[19]RH, paras. 2.7, 2.46, 4.04, 4.22, 9.01.

[20]RH, para. 9.01.

[21]RH, paras. 2.45, 8.16-8.20, 9.05.

6. Mr. Brownlie will show on Friday that this is not true, that the line advocated by Honduras does not end in an equitable result when all relevant circumstances are taken into account.

7. It is now my task to show that the non-equitable line proposed by Honduras in order to divide the maritime areas with Nicaragua in the Caribbean sea is by no means a line which already exists, based on a tacit agreement, on recognition or acquiescence deduced from constant and long-standing practice.

B. *Effectivités* and proof of consent

8. Madam President, Members of the Court, yesterday I referred to *uti possidetis juris* as the first step in the endeavour by Honduras to sew confusion. We will now consider the following steps in the argument. It is very striking that the Respondent, which sets out its claims on a traditional line based on a tacit agreement deduced from practice, did not reflect this in the wording of the chapter headings of its Rejoinder.

9. Honduras preferred to conceal the assertion of the traditional line dividing the maritime areas of Nicaragua and Honduras in chapters on the *effectivités* and the *sovereignty over the islands* of each of the Parties[22]. Setting the document out in this way is perhaps surprising, considering the role Honduras reserves to the islands in the dispute submitted to the Court[23].

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10. It is all the more striking since, in its Counter-Memorial, Honduras entitled one of its chapters "*Effectivités* and the exercise of Honduran sovereignty and jurisdiction over the islands and *surrounding waters* north of the 15th parallel"[24]. In its Reply, Nicaragua divided its response into three chapters, whose respective titles are "The relevance of the e*ffectivités* to maritime delimitation", "Title to the islets and rocks" and "The weakness of the Honduran argument based on conduct"[25].

11. This presentation confirms the intent to confuse which underpins the Honduran Rejoinder. Honduras forces the maritime areas to link up with the islands, despite their differences,

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[22]RH, Ch. 4 and 5.

[23]RH, para. 1.05.

[24]CMH, Ch. 6.

[25]NR, Ch. V, VI and VII.

developing a very artificial argument on its alleged *effectivités*[26]. The *effectivités* may come into play when sovereignty over the islands is discussed. My colleague, Dr. Oude Elferink, has dealt with this point. But the *effectivités* play a quite different role, as Mr. Brownlie has already indicated, when it comes to proving the existence of a legitimate interest over maritime areas.

12. More serious still is the fact that Honduras claims to be unaware of the elementary distinction between *effectivités* as confirmation of a title of territorial acquisition or as proof of that title and the claim to infer consent from the active, and above all passive, consent of the opposing Party.

13. Lastly, Nicaragua finds itself forced to glean the arguments with which Honduras appears to claim to prove Nicaragua's consent to its alleged traditional line in the chapters of the Honduran Rejoinder devoted to the *effectivités* over the islands.

14. Honduras glories in the "consistent display of effective sovereignty and jurisdiction throughout the area north of the 15th parallel"[27] and characterizes the evidence as "extensive"[28], "substantial"[29], "clear and compelling"[30], "compelling"[31], "overwhelming"[32], and "conclusive"[33]. In reality, Honduras is engaging in an exercise of pure self-persuasion.

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15. Nicaragua, poor thing, is apparently not only incapable of refuting this evidence but the evidence of its own *effectivités* north of the 15th parallel is also supposedly very weak, insignificant, and does not "begin to compare with that offered by Honduras"[34].

16. In fact, even a cursory examination shows that the alleged evidence of Honduran *effectivités* is a combination of autosuggestion and conjuring. The evidence Honduras offers is the exact opposite of what it preaches. There is, of course, no evidence of post-colonial *effectivités* which would confirm any *uti possidetis*; just as, incidentally, there is none of *effectivités* which

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[26]See, for example, RH, paras. 1.18, 4.01, 9.02.

[27]RH, para. 2.4. See also paras. 1.18, 5.01-5.04, 5.16-5.17, 5.20.

[28]*Ibid.*, paras. 1.04, 5.62.

[29]*Ibid.*, paras. 1.10, 5.01.

[30]*Ibid.*, paras. 5.03, 5.71, 5.73.

[31]*Ibid.*, para. 5.01.

[32]*Ibid.*, paras. 4.29, 5.07.

[33]*Ibid.*, paras. 5.13.

[34]*Ibid.*, paras. 1.10-1.11, 2.05, 4.05, 4.12, 4.17, 4.19, 4.34, 4.35-4.36, 4.65, 5.22, 5.46, 9.05.

might serve as the basis of a title of acquisition, or of facts or situations prior to the crystallization of the dispute which might have given rise to rights of Honduras as a result of Nicaragua's conduct. Moreover, there is no point in proving situations or facts which cannot be legally characterized as *effectivités* or with respect to which no specific reaction from other subjects can be required. In reality, Honduras does not provide proof of any practice of any kind which it could use as a mainstay to avoid application of the normal rules of the law of the sea until the 1960s. It has built a shaky house of cards.

17. As to the paucity Honduras ascribes to the proofs of Nicaragua's *effectivités* north of the 15th parallel, it is patent that the only *effectivités* proved by the Parties in the nineteenth century have been provided by Nicaragua, to which the only port in the area, Cape Gracias a Dios, belonged, as the Agent of Nicaragua mentioned on Monday.

18. But more than that, what I wish to emphasize now is that the symmetry Honduras seeks to achieve by proposing a sort of competition of *effectivités* reflects a wrong and biased attitude in the position of the Parties before the Court. It is Honduras which argues the existence of a *traditional line*, a boundary deriving from the alleged *effectivités*. Hence, Honduras asserts that it

20 "is not . . . making a shelf claim but endeavouring to show the location of an existing single maritime boundary . . . "[35]. Nicaragua, on the other hand, uses its own *effectivités* solely to combat Honduras's claim, not in order to support its own claim, which is based, precisely, on the fact that no line exists, which is why Nicaragua is asking the Court to establish one in accordance with the relevant circumstances.

C. The critical date and proof of consent

19. Honduras is seeking to trivialize the *critical date* in a case such as the present one where, according to it, "the conduct of both States go[es] back a long way and [is] based on a pattern of practice manifesting a tacit agreement between the Parties"[36]. Again it creates confusion. My colleague, Dr. Oude Elferink, has already referred to the *critical date* in considering the *effectivités* on the islands.

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[35]RH, para. 1.18.

[36]RH, para. 1.15.

20. As regards what concerns us here, and contrary to the Honduran view[37], it is quite clear that Honduras's actions after 1977, the date on which the dispute crystallized, do not constitute the "normal continuation of prior acts" which may be considered by the Court. On the contrary, in accordance with the criterion adopted in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (*Judgment, I.C.J. Reports 2002*, p. 682, para. 135), Honduras's acts have been "undertaken for the purpose of improving [its] legal position" with respect to Nicaragua. Hence the *effectivités*, real or presumed, after 1977 are not relevant to the Court's decision. The *long-standing* practice on which Honduras relies is quite simply imaginary.

21. All influence of the colonial status on the point which concerns us here having been dismissed, this "*long-standing*" practice ought to refer to the entire history of relations between Nicaragua and Honduras as independent republics. Honduras provides no evidence, nothing, absolutely nothing, in relation to the facts or situations before the last third of the twentieth century. Nor could this be otherwise since it was Nicaragua which, until 1963, occupied the coast as far as the mouth of the Cruta River, well beyond the north of Cape Gracias a Dios.

21 22. Considering that the dispute crystallizes in the second half of the 1960s, the *long-standing practice* is prominent by its absence. What Honduras proves is not a *long-standing practice*, but *long-standing non-practice*.

23. Moreover, Honduras reluctantly accepts the period of 1960 (date of the Judgment of the Court on the Arbitral Award of the King of Spain of 1906) to 1979 (when the Sandinista Government came to power) as the period during which, as the dispute between the Parties had not yet crystallized, the Parties, according to Honduras, treated the 15th parallel as their "*de facto* boundary"[38]. Honduras considers that this period is "of central importance to this case"[39]. Furthermore, it expressly asserts that, bearing in mind the long-established common practice, a maritime frontier "was well-established by 1979"[40].

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[37]DH, par. 1.15, 1.16.

[38]RH, para. 4.04.

[39]RH, para. 4.32.

[40]CMH, para. 7.25.

24. However, we for our part consider this period shorter, running from 1963, the date of the Judgment of the Court on the Arbitral Award of the King of Spain and the date (1977) on which Nicaragua proposed negotiations with a view to the delimitation of the maritime boundary, negotiations which Honduras unconditionally accepted. Curious. Since the traditional line on which it now relies must already have existed then and, if that was so, Honduras would not have failed to indicate it.

25. Honduras must therefore prove that, throughout those 14 years (1963-1977), the conduct of the Parties was such that Nicaragua behaved so it was condemned to accept parallel 14° 59.8' N for ever after as the single boundary in all its maritime areas with Honduras in the Caribbean.

26. In any event, the coming to power of the Sandinista Government brought no radical change in Nicaragua's policy as Honduras claims, since it was the Minister for Foreign Affairs of the *Somoza* Government who, over two years before, had proposed to negotiate, and it was he who, at that *non-suspect* time, publicly declared that the dividing line did not exist[41]. On 7 March 1977,

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the Minister replied as follows to questions from a journalist: "The maritime border between Nicaragua and Honduras has not been determined . . . on the Caribbean side there still exists no line dividing the territorial sea, the economic zone and the continental shelf between Nicaragua and Honduras". And which are the principles which the two governments could follow in order to draw such a line? asked the journalist. And the Minister replied: "The single revised text which is being discussed at the Third United Nations Conference on the Law of the Sea states that these questions are to be resolved by applying equitable principles using a median line . . . where possible"[42]. Two months later, the Minister proposed "to initiate conversations leading to the determination of the definitive marine and sub-marine delimitation in the Atlantic and Caribbean Sea zone"[43], which the Government of Honduras "accept[ed] with pleasure"[44].

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[41]MN, p. 36-38.

[42]MN, Vol. II, Ann. 3.

[43]Diplomatic Note of 11 May 1977 (No. G-286), *ibid.*, Ann. 4.

[44]Diplomatic Note of 20 May 1977 (No. 1025), *ibid.*, Ann. 5.

D. The alleged proofs of Nicaragua's consent to the traditional line

27. Honduras feels it is able to show, basing itself on the legislation, on the acts of the Government and administration allegedly applicable to the disputed zone, on the practice of oil concessions, the granting of fisheries licences and on naval patrols[45], that Nicaragua had already, in 1979, agreed to a line based on the prolongation of the parallel on which the terminal point of the land boundary is situated (14° 59.8′ N): Honduras being the exclusive holder of sovereignty or sovereign rights north of this parallel, and Nicaragua south of it[46]. Honduras mentions many times the absence of protest by Nicaragua to Honduras's activities in order to infer from its conduct an obligation to accept that line[47].

28. But this alleged proof falls apart as the activities prior to 1979 are in no way specific in relation to the delimitation or the claim of sovereignty up to parallel 14° 59.8′. So what is there to protest about? As to the subsequent activities, they cannot be used either — even where their nature and content makes them appear relevant — in view of their date. In any event, all of them

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have formed the subject of a protest as proved by the diplomatic correspondence amply documented by Nicaragua in its Memorial[48].

29. It must be strongly emphasized that Honduras in no way establishes the validity of its claim to the traditional line until 1982. Indeed, the Diplomatic Note of 23 March 1982 is the first which, in the correspondence between Nicaragua and Honduras, identifies the 15th parallel north as the dividing line "traditionally recognized by both countries"[49]. Nicaragua immediately and clearly rejected it, and has adhered to that position consistently and unconditionally[50].

30. Honduras has not produced a single official document in which it is stated that parallel 14° 59.8' north is the dividing line of the territorial sea, the continental shelf and the exclusive economic zone with Nicaragua. Had such a document existed, had there had been an express claim, Honduras could turn the silence, the absence of any protest from Nicaragua and its passivity to advantage. But it cannot.

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[45]RH, para. 5.02.

[46]RH, paras. 1.09, 2.4, 2.5, 4.05, 4.08.

[47]RH, paras. 4.17, 5.03, 5.06, 5.15, 5.19, 5.42, 5.45, 5.59, 5.64, 5.72.

[48]MN, Chap. 4 and Vol. II, Anns. 8-83 and 100-103.

[49]MN, p. 42; and Vol. II, Ann. 8.

[50]See Note 49.

E. Legislation and administrative acts

31. Honduras asserts that Nicaragua did not protest against Honduran administration and application of Honduran legislation[51]. Quite to the contrary, Nicaragua did so as soon as it learned of them and whenever it was relevant. But there was nothing before the dispute crystallized: only very general legislation, nothing specific to the area in dispute. As the Court observed in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, only that legislation and those administrative acts "which leave no doubt as to their specific reference" to the area in dispute can be considered relevant displays of authority. Regulations or administrative acts of a general nature can therefore be considered "only if it is clear from their terms or their effects" that they pertain to that area (*ibid., Judgment, I.C.J. Reports 2002,* pp. 682-683, para. 136).

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32. Once the dispute had crystallized, Nicaragua systematically protested against any and all acts whereby Honduras attempted to fabricate an *effectivité* after the fact. In any event, this concerned activities not germane, under the criterion reaffirmed by the Court in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*, (*ibid.,* p. 682, para. 135), for purposes of the Court's decision.

F. Oil exploration concessions

33. Thus, it is appears clear that Honduras, relying on outer appearances and finding support in the period, between 1963 and 1975, in which the oil concessions were granted, clutches at them as the lifeline conferring some semblance of credibility to its claim.

34. Honduras thus lingers over an examination of the oil concessions, first those of Nicaragua[52] and then its own[53]. The Honduran concessions extended up to the 14° 59' 08" parallel, that is to say up to the parallel where it has — wrongly — situated the terminus of the land boundary, which, as we know, corresponds to the 14° 59.8' N parallel. For a time Nicaragua's concessions did not extend beyond that point.

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[51]RH, paras. 5.42-5.45.

[52]RH, paras. 4.20-4.33.

[53]RH, paras. 5.04-5.15.

35. Honduras infers that there is therefore a "tacit agreement" adopting the 15th parallel "as the dividing line between oil concessions granted by the two States"[54]. Honduras repeats this assertion over and over[55], transforming the dividing line between concessions (a line which is, moreover, very uncertain) into a *de facto* boundary between the two States[56].

36. In reality, there was neither agreement nor acquiescence. Honduras grossly exaggerates when it states that nine of Nicaragua's 18 concessions explicitly referred to the 15th parallel as their northern limit (that being understood to be 14° 59' 08" N)[57].

37. First, concessions were not so numerous in the northern part of Nicaragua's continental
25 shelf. Honduras does not distinguish correctly between decrees granting concessions, decrees extending them and renewals[58]. From 1965 onwards, Nicaragua had ten concession areas in the northern part of its continental shelf (Department of Cape Gracias a Dios), practically all of them granted to two subsidiaries of a United States parent company: Union Oil and Western Caribbean/Occidental.

38. Secondly, in 1974 the concessions referring to the 14° 59' 08" N parallel formed a front of only 23 miles in the outermost zone of the continental shelf, while all the others, on a front of more than 70 miles (from the coast to the 81° 54' meridian), had open, undefined northern limits (slide No. 1).

39. Let us take a closer look at this. In late 1965 Union Oil, formerly Pure Oil, was granted the areas closest to the coast. It received one half of the concession areas in the zone, the most extensive ones; the northern limits of these were left open and undefined along a broad front of more than 70 miles — as I have said — pending determination of the dividing line with Honduras[59] (slide No. 2).

40. While the south-eastern end was well defined, these concessions stretched northward "to the intersection with the borderline with the Republic of Honduras, *which remains undefined*" — I

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[54]RH, para. 1.09.

[55]RH, paras. 1.16, 2.32, 4.64, 5.03.

[56]RH, paras. 4.03, 4.05, 4.08, 4.22, 4.28, 4.29 *(c)* and *(e)*, 4.31, 4.32, 4.33, 5.15.

[57]RH, paras. 4.22-4.24.

[58]RH, para. 4.24.

[59]RN, paras. 5.17-5.24.

stress: *which remains undefined*. From that point the line turned directly westward until reaching the meridian serving as its north-western limit[60]. This was so even though the mixed commission had already at those dates determined the end point of the land boundary to be on the 14° 59.8' parallel[61].

41. The criterion adopted in delimiting Union Oil's continental shelf concessions contrasts with the exact determination of the continental land area granted to that company, that area having its express northern limit "at the intersection with the border line with the Republic of Honduras at the mouth of the Coco river"[62] (slide No. 3).

42. In 1967 the other company, Western Caribbean, a subsidiary of Signal Oil, subsequently associated with Occidental, started acquiring the most distant areas of the northern zone of

26 Nicaragua's continental shelf, setting the northern limit of nearly all its concessions at the 14° 59' 08" parallel[63]. This was also the case of Mobil's concession (slide No. 4).

43. However, Mobil relinquished its concession in 1973; Union Oil acquired and enlarged that concession in 1974. At that time, the Union Oil *model* (calling for an open and undefined limit) was adopted for the concession area (slides Nos. 5 and 6)[64].

44. It is also very noteworthy that, to the north of its concessions, between the 81° 54' and the 81° 30' meridians, Western Caribbean/Occidental in 1970 sought and in 1971 obtained a new *lid*-shaped concession, the so-called *Northern Block*, which used the 14° 59' 08" parallel as its southern limit, fixing the northern limit at the same 15° 00' parallel, that is to say to the north of the parallel on which the terminal point of the land boundary lies[65]. Given the logic adopted by Honduras, it is surprising that it failed to protest against what it could have considered to be encroachment on an area over which it claimed sovereign rights (slide No. 7).

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[60]RN, para. 5.18; and Vol. II, Anns. 14 and 15.

[61]MN, p. 77; and Vol. II, Ann. 1.

[62]RN, para. 5.20; and Vol. II, Ann. 14.

[63]*Bloque Misquito* (Decreto No. 46-DRN, of 17 February 1967, *La Gaceta, diario official*, No. 117, of 29 May 1967, p. 1254), *Bloque No. 1* (Decreto No. 86-DRN, of 15 May 1968, *La Gaceta, diario official*, No. 206, of 9 September 1970, p. 2612); *Bloque Agua Azul* (Decreto No. 145-DRN, of 10 January 1971, *La Gaceta, diario official*, No. 46, of 24 February 1971, p. 565).

[64]RN, paras. 5.22, 5.23; and Vol. II, Anns. 16 and 18.

[65]Decretos No. 144-DRN, of 10 January 1971 and No. 151-DRN, of 9 February 1971 (*La Gaceta, diario official*, No. 203, of 7 September 1977, p. 563). See the judges' folder document No. 1.

45. In sum, in 1974 none of Nicaragua's concessions lying closest to Honduran concessions had a northern limit fixed at the 14° 59.8' N parallel, where the end point of the land boundary lay, according to the determination by the mixed commission in 1962.

46. The fact, acknowledged by Honduras itself[66], that within the space of a few days some concessions followed one criterion and others a different one shows the influence the concession holders had over the drafting of the decrees and the lack of any governmental policy concerning the maritime dividing line. The republics had no *policy*, the American companies did. The fact that Mobil's northern limit was modified when the Mobil concession passed to Union, changing from defined to indeterminate, is very significant and revealing (slides Nos. 5 and 6).

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47. The references to the 14° 59' 08" N parallel in the Honduran concessions and in a few of the Nicaraguan concessions suggest that the provisions concerning these concessions were drafted in the offices of the concession holders. In fact, the error in situating the end point of the land boundary appears in the English translation of the report by the Honduras-Nicaragua mixed commission having chosen that point, not in the original Spanish-language text, which correctly refers to the 14° 59.8' parallel[67], as my friend and colleague Professor Alain Pellet will discuss in greater detail.

48. The limits of a concession are one thing, the territorial boundaries of a State another. Establishing the limits of a concession does not mean fixing a boundary between two States. Thus, none of the Honduran concessions states that its southern limit coincides with the maritime boundary with Nicaragua. Similarly, none of the Nicaraguan concessions defining a northern limit specifies that the limit coincides with the maritime boundary with Honduras.

49. For example, the biggest of the concessions granted to Western Caribbean/Occidental, which fixes its northern limit at the 14° 59' 08" parallel, is described as an area 24.7 km wide and 53.5 km long "limited on the north, south, east and west by the waters of the Atlantic ocean or the Caribbean Sea"[68], not by a boundary between States.

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[66]RH, para. 4.25.

[67]MN, p. 77, footnote 82.

[68]*Solicitudes de exploración de petróleo de Western Caribbean Petroleum Co., La Gaceta, diario official*, No. 170, of 28 July 1967, p. 1734.

50. It must be kept in mind that Nicaragua in its oil legislation did not follow the model calling for public tenders for concession areas defined by the administration. Its law was based on applications made by companies interested in exploring, and they were free to define the limits of the area which they wished to explore. The legislation defined only the surface area of the concession (400,000 hectares at most), recommending that it be quadrilateral in shape. Nothing more. The Nicaraguan authorities thus granted the concessions sought. It was for lack of applications that concessions were not granted north of the 15th parallel. When Western Caribbean sought a concession with a northern limit at 14° 59' 08", and then another with a northern limit at 15° 00', the Nicaraguan administration said "yes indeed" without considering whether or not those
28 concessions extended up to the boundary or even went beyond it. The Nicaraguan administration said "yes indeed" in keeping with its usual practice in its relationships with oil companies.

51. If the *policies* of the administration are determined by the companies, one may well think that, for both Mobil and Western Caribbean/Occidental, it was above all a question of enhancing certainty and security in the definition of their concession zones; thus, they refer to the 14° 59' 08" parallel in light of the indisputable fact that, whatever the line dividing the continental shelf between Nicaragua and Honduras, it can never lie south of that parallel. Union Oil, on the other hand, does not share those concerns, because the areas granted by Honduras adjoining those of Nicaragua belong to it as well.

52. In an area likely to be contested, parties wishing to remain on good terms can refrain from granting concessions in order to avoid conflict, without thereby implying any disclaimer of legitimate interests. Thus, in referring to the limits of the oil concessions granted by Indonesia in 1966 and Malaysia in 1968, the Court observed that

> "[t]hese limits may have been simply the manifestation of the caution exercised by the Parties in granting their concessions. This caution — adds the Court — was all the more natural in the present case because negotiations were to commence soon afterwards between Indonesia and Malaysia with a view to delimiting the continental shelf". (*Sovereignty over Pulau Ligitan and Pulau Sipadan, Judgment, I.C.J. Reports 2002,* p. 664, para. 79)

53. It is a qualitative leap from oil concession limits to the boundary line between sovereign States. Honduras plays semantic games. For instance, it has accused Nicaragua of distorting its words, on the ground that Nicaragua in its Reply has Honduras stating that the Nicaraguan

concessions "used the 15th parallel as the northern boundary", when what Honduras really said in its Counter-Memorial was that Nicaragua's concessions treated "the 15th parallel as the northernmost limit of the territory of Nicaragua, *in the sense that none of the concessions reaches north of that parallel*"[69].

54. But Honduras also asserts: "Oil concession practice by Nicaragua reveals that Nicaragua
29 has long accepted that it does not exercise sovereignty and jurisdiction north of the 15th parallel"[70]. Going even further, it asserts without hesitation that Nicaragua "has expressly recognized" Honduras's sovereignty north of the 15th parallel "for example, in recognizing Honduras's right to grant the Coco Marina oil concession"[71], an assertion for which no documentary support is provided.

55. Honduras believes the Coco Marina operation, carried out in 1969, to be "clear and decisive"[72]. "The existence of a tacit agreement between the Parties as to a boundary at the 15th parallel", says Honduras, "is unambiguous in the clear and compelling evidence provided by Honduras on the 'Coco Marina Joint Operation', a joint venture which treated the 15th parallel as the dividing line of the two Parties' areas of respective competence"[73] (slide No. 8).

56. In the view of Honduras, this operation "is incontrovertible proof that Nicaragua accepted that the area north of the 15th parallel was subject to Honduran jurisdiction, otherwise" — Honduras goes on — "it would never have entered into such a joint undertaking"[74]. Honduras, citing a report by Union Oil to the Honduran Minister of Natural Resources, points out that the operation was approved by the Nicaraguan and Honduran Governments on the understanding that the expenses would be equally shared by Union Oil Nicaragua and Union Oil Honduras[75].

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[69]RH, para. 4.29(b). Emphasis by Honduras.

[70]RH, para. 2.5.

[71]RH, para. 2.30.

[72]RH, para. 4.08.

[73]RH, para. 4.29.

[74]*Ibid*.

[75]RH, para. 5.13; and Vol. II, Ann. 252.

57. To characterize this operation as an acknowledgement by Nicaragua of Honduras's sovereign rights north of the 15th parallel is brazen, to say the least. In truth, the Coco Marina operation undermines Honduras's claims. If the wells the companies wanted to open were on the Honduran continental shelf, along the 15° 00' N parallel, the rationale for a joint operation cannot be explained. The operation lies to the north of the parallel marking the end point of the land boundary and accordingly disproves that the parallel fixes the maritime dividing line. The same report cited by Honduras specifies that the operation was carried out "in the area of the maritime
30 boundary in the Caribbean Sea between Honduras and Nicaragua". The report also states, although Honduras preferred not to mention this here, that, as agreed between the Union Oil subsidiaries, the base of operations and logistics centre for the project would be at Puerto Cabezas (Nicaragua).

58. Further, while this is a joint undertaking, it is a joint project of Union Oil subsidiaries, not of Nicaragua and Honduras. From Union Oil's point of view, it was definitely prudent to act by way of a joint operation between its subsidiaries, as the delimitation between Nicaragua and Honduras was still in progress.

59. The operation was agreed by the two subsidiaries and, as stated in the report, was approved by the Governments of Honduras and Nicaragua, but there is not a single document confirming this latter assertion and therefore allowing any conclusions to be drawn as to the respective positions of Nicaragua and Honduras on the questions of sovereignty. We are dealing here with internal correspondence between a senior executive of a concessionaire and his contact in the Honduran administration.

60. The fact that only three exploratory wells were drilled in the Honduran concessions lying in the disputed area, and then only in marginal zones, is very significant. The companies refrained from involvement in exploratory activities where sovereignty was undetermined. In places, like Coco Marina, where the prospects of finding oil appeared very good and conflict was likely to be unavoidable owing to the location of the wells, the companies set up a joint operation.

61. Honduras accuses Nicaragua of manipulation, based on Honduras's allegation that "[i]nstead of addressing the merits of the arguments, . . . Nicaragua raises questions of minor importance about the Honduran evidence; . . . an approach which seems intended to divert attention"[76].

62. We must however go to a footnote to learn what "questions of minor importance" are being referred to by Honduras. That note states that Nicaragua highlights the fact that a document submitted by Honduras was undated or that the "Interstate Study Commission", the source of the document, was only a Honduran commission[77].

31 63. If manipulation there is, it is by Honduras. Given the name of that Commission, it was very reasonable for Nicaragua to point out that it was a Honduran national commission. But that is not the issue. Honduras ignores Nicaragua's observations on the report; yet these are very much on point[78]. According to Honduras, the Commission's opinion "stated that the maritime boundary with Nicaragua was at 14° 59' 08"'"[79]. But that was absolutely not the Commission's opinion. One need only read the document produced by Honduras itself[80].

64. In respect of the oil concessions, the Commission maintained that Honduras should *propose* — the word is important: *proponer* in Spanish — the parallel passing through the end point of the land boundary (which it places at 14° 59.8' N) as the maritime dividing line with Nicaragua. It is clear that the Commission's opinion reflected political intent; it did not place a right on record. But this did not lead to any type of diplomatic exchange between the Parties. The Honduran Government did not propose what it had been asked to "propose" to the Nicaraguan Government. Thus, in 1969 Honduras was continuing to study where its boundary with Nicaragua should run on the continental shelf, but no concrete proposal issued from this study in later years.

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[76]RH, para. 4.29 *(e)*.

[77]RH, para. 4.29 *(e)*, footnote 33.

[78]RN, para. 5.26.

[79]CMH, para. 6.28.

[80]CMH, Vol. II, Ann. 109.

65. According to Honduras, "there is ample support in the jurisprudence of the Court for the proposition that the grant of oil concessions and the use by two adjacent States of the same line as a terminus for their concession areas is highly relevant" in delimiting a boundary[81].

66. In fact, to go by the jurisprudence, oil concessions are not in themselves a relevant circumstance for delimitation. Mr. Brownlie has already made this point in an earlier statement. As the Court noted in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening),* oil concessions "may . . . be taken
32 into account" "[o]nly if they are based on express or tacit agreement between the parties" (*Judgment, I.C.J. Reports 2002*, p. 140, para. 304).

67. Honduras attempted in its Counter-Memorial to turn to account the Court's Judgment in the *Continental Shelf* case between Tunisia and Libya. In its view, the practices of Nicaragua and Honduras as to the 15th parallel are *"strikingly"* coincident with those of Tunisia and Libya, which both respected the line forming a 26° angle from Ras Ajdir. It is not possible, concluded Honduras, "to see this line of coincidence as anything other than a maritime boundary"[82].

68. The comparison made by Honduras does not stand up if we go somewhat beyond a superficial reading. In its Reply Nicaragua refuted this "striking" semblance[83]. The conclusion to be drawn from this precedent is that:

> "The reason for admitting conduct as a circumstance relevant to delimitation is the consideration that the Parties associate it with an equitable result . . . [T]he harmonious conduct of the Parties . . . ends up being a circumstance that corroborates and confirms the equitable character of a specific line determined by judges or arbitrators based on all the circumstances, primarily geographic, relevant to the area affected by the delimitation. If what is equitable, according to these circumstances, does not match that conduct, the conduct by itself cannot be considered relevant. And it is clear that although the method of using the 15th Parallel as a division in the context of Honduran and Nicaraguan branches of the same United States oil companies was convenient for their own ends, by no means can it be considered as equitable for the Parties who today bring their claims before the Court, taking into account all the relevant circumstances of the area."[84]

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[81]RH, para. 1.18.

[82]CMH, paras. 7.18 and 7.19.

[83]RN, paras. 7.24-7.29.

[84]RN, para. 7.29.

69. We cannot but believe that Honduras shares these conclusions, as it did not revert in its Rejoinder to the value to its case of the Court's Judgment in the *Continental Shelf* case between Tunisia and Libya.

70. To date neither the Court nor any other international judicial body has ever accepted that a dividing line between the maritime areas of neighbouring States could be based on the tacit agreement inferred from oil concession practice. Not even in reference to a dividing line limited to the continental shelf alone. Still less when a single dividing line is requested for both the continental shelf and the exclusive economic zone.

33 71. Determining when an obligation starts or changes or when a right is lost on the basis of tacit agreement or acquiescence is patently more complicated than establishing the effects of an express declaration of intent, particularly bearing in mind the difficulty of discerning intent or purpose from conduct alone, and still more so from omissions. Particular rigour is thus required in the appraisal of conduct from which legal consequences are claimed.

72. This is particularly so in the appraisal of consent which is not express when territorial sovereignty or sovereign rights are at issue. And even more so when the prejudice which such consent would cause to the legitimate interests of the State concerned is well known.

73. In addition, the distinction between *knowledge* of a fact and *awareness* of its legal consequences may be particularly useful. Developing countries very often lack adequate diplomatic, technical and administrative infrastructures; their institutional framework is weak; they exist in situations of great instability. Consequently, simple negligence must be ruled out as a cause of possible *oversights* or *omissions of conduct*, as the latter should not be interpreted as *acquiescence*, especially when territorial interests are at stake. Even if *knowledge* of the facts can be shown — more or less — *awareness* of their legal consequences can often elude their real capabilities.

74. The least that can be required of anyone seeking to turn the other party's conduct and omissions to advantage is that he should base himself upon acts to which the other party is under an obligation to respond or must bear the consequences. It is only in such circumstances that one party might turn the other's conduct, silence or lack of protest to advantage.

75. It was precisely because there had been no official notification that the Court held, in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, that there was no ground for interpreting as acquiescence the silence of Great Britain regarding a map appended to the Explanatory Memorandum submitted by the Dutch Government to the Second Chamber of the States-General for the ratification of the treaty of 20 June 1891, ruling on the
34 frontier in the Borneo region; this despite the fact that the documents had been published in the Official Journal of the Netherlands and were known to the Foreign Office thanks to the diligent work of Her Britannic Majesty's diplomatic agent in The Hague (*ibid.*, *Judgment, I.C.J. Reports 2002*, p. 28, para. 48).

76. Were the Honduran concessions and the subsequent exploration work known to Nicaragua? Was Nicaragua supposed to know of them? Should Nicaragua have presumed their effects on frontier delimitation in the Caribbean Sea?

77. If a State is not under an obligation to be familiar with the political constitutions of neighbouring countries, it is under even less of an obligation to scour their Official Journals every day to inform itself of their oil concessions. We are talking here about situations which occurred over 40 years ago and of ministries of foreign affairs, such as that of Nicaragua, which had a staff of 40 employees at the most. Regarding the Nicaraguan and Honduran oil concessions, we could speculate as to the motives prompting one or the other to act as they did. But there is nothing which might reasonably be shown to prove any intent on Nicaragua's part to consent to a dividing line such as the one Honduras claims exists.

78. The companies which obtained oil concessions in Honduras and Nicaragua were subsidiaries of the same parent company in the United States; that is why one might suppose that the concession areas they held corresponded to their own interests, without there necessarily being any reason to infer the intent of the neighbouring Republics to decide tacitly on a dividing line. Neither the concessions granted by Honduras nor those granted by Nicaragua which referred to parallel 14° 59' 08" mentioned any relationship with the Parties' maritime boundary.

79. Similarly, not the slightest relevant exchange of diplomatic or official correspondence between the two Parties' Ministries of Foreign Affairs or other government departments or offices exists. Nor is there a trace of any exchange of notes, protocols, memoranda or minutes for the

Coco Marina project. Nothing, absolutely nothing. To establish its so-called traditional line, Honduras has to resort to a letter addressed by a Union Oil executive to a Honduran civil servant to show that the Governments approved the project. Was the agreement verbal? Made at a presidential barbecue? That *modus operandi* was characteristic of "*compadre*" politics, which left

35 companies free to act as they chose once the personal demands of the *compadres* had been satisfied. This has nothing to do with the intention of the Parties, States or peoples to fix a maritime dividing line.

80. Unable to call on God as a witness in a legal dispute, Honduras turns for support as a last resort to the statements of Somoza's former *compadre*, Mr. López Arellano, and of two other persons, who were Honduran civil servants[85] at the time, who state that the oil concessions were attributed "based on the mutual understanding of Honduras and Nicaragua that the 15th parallel was the location of the maritime boundary between the two States"[86].

81. For its part, Nicaragua could certainly invoke the testimony of the man who was Minister for Foreign Affairs during those years, Dr. Alejandro Montiel Argüello, but has decided not to take part in an affidavit "contest", aware that what the protagonists in either Party now say will be devoid of any probative value, except in matters which could cause them prejudice. Nevertheless, Nicaragua did refer to the testimony by Dr. Montiel Argüello 30 years ago, in 1977, when he was Minister under Somoza, before the dispute surfaced. That testimony, which has never been refuted, is mentioned in Nicaragua's Memorial and can be found in Annexes 2 and 3[87]: "The maritime border between Nicaragua and Honduras has not been determined", asserted Foreign Minister Montiel[88]. When Honduras put its cards on the table, which it did not do until 1982, Nicaragua clearly rejected Honduras's claim on a number of occasions[89].

82. We are, moreover, speaking here of exploration activities carried out with no particular urgency over some 12 years and which were halted, for lack of results, over a quarter of a century ago.

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[85]RH, Vol. II, Anns. 246-248.

[86]*Ibid.*, para. 5.04.

[87]MN, Vol. I, pp. 37-38; and Vol. II, Anns. 2-3.

[88] MN, Vol. II, Ann. 3.

[89]MN, p. 42 *et seq*.

83. Every time one of the parties to a maritime delimitation dispute brought before the Court has sought to have a line recognized by alleging that the conduct of the other party could be viewed as acquiescence, the Court has concluded that that the necessary conditions to do so did not exist.

36 It was thus in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case between Canada and the United States (*Judgment, I.C.J. Reports 1984*, pp. 303-312, paras. 126-154), to which I will refer later; so it was too in the *Maritime Delimitation in the Area between Greenland and Jan Mayen* case between Denmark and Norway (*Judgment, I.C.J. Reports 1993*, pp. 53-56, paras. 33-41).

84. If there is a precedent which can be cited in the case currently before the Court it is undoubtedly that of the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case between Canada and the United States (*Judgment, I.C.J. Reports 1984*, pp. 303-312, paras. 126-154). That precedent clearly supports the position which Nicaragua has upheld from the start.

85. In that case, the Parties discussed at length the issue of whether their conduct over a given period of their relationship constituted acquiescence by one of them in the application of a specific method of delimitation advocated by the other Party or whether such conduct had not resulted in a *modus vivendi*, respected in fact, with regard to a line corresponding to such an application (*ibid*., pp. 303-304, para. 126).

86. It was Canada which argued that the conduct of the United States involved a kind of consent by that country to the equidistance method, particularly as regards the delimitation to be effected in the Georges Bank sector (*ibid.*, p. 304, para. 127).

87. According to Canada the conduct of the United States might be taken into account, first, as evidence of genuine acquiescence; secondly, as an indication, at least, of the existence of a *modus vivendi* or of a *de facto* boundary, which the two States had allowed to come into being; and, thirdly, as mere indicia of the type of delimitation that the Parties themselves would have considered equitable (*ibid.*, pp. 304, para. 128).

88. The relevant facts relating to Canada's claim may be summarized briefly. Canada began in 1964 to issue offshore options (permits) for the exclusive exploitation of oil and gas on its own side of what it regarded as the median line dividing Georges Bank. The Canadian Government had

published information on the subject in the *Monthly Oil and Gas Report* and the issuance of Canadian offshore permits was known to the United States authorities by 1 April 1965 at the latest,

37 following correspondence between the Bureau of Land Management of the United States Department of the Interior and the Canadian Department of Northern Affairs and National Resources. That was followed by diplomatic correspondence between the United States Embassy in Ottawa and the Canadian Department of External Affairs. A letter sent on behalf of the Canadian Under-Secretary of State for External Affairs, dated 30 August 1966, explicitly mentioned the median line, but the United States did not reserve its position until an aide-memoire of 5 November 1969. Canada argued that, in practice followed from 1964 until the end of 1970, the United States did not oppose the Canadian contention and submitted that mention was first made in diplomatic correspondence of the claim advanced by the United States to a boundary along the Northeast Channel on 18 February 1977 (*ibid.*, pp. 305-307, paras. 131-136).

89. Although, in the Chamber's view, the attitude of the United States until the end of the 1960s was characterized by "uncertainties and a fair degree of inconsistency", it refused to acknowledge the supposed acquiescence of the United States claimed by Canada:

> "the facts advanced by Canada do not warrant the conclusion that the United States Government thereby recognized the median line once and for all as a boundary between the respective jurisdictions over the continental shelf; nor do they warrant the conclusion that the mere failure to react to the issue of Canadian exploration permits, from 1964 until the aide-memoire of 5 November 1969, legally debarred the United States from continuing to claim a boundary following the Northeast Channel . . ." (*ibid.*, p. 307, para. 138).

90. The Chamber considered that Canada could not rely on the technical arrangements of an official of the Bureau of Land Management of the United States with his Canadian correspondents as though they were an official declaration of the United States Government (*ibid.*, p. 308, para. 139).

91. Furthermore, while it might have been conceded that the United States showed a certain imprudence in maintaining silence after Canada had issued the first permits for exploration, "any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far", the Chamber declared (*ibid.*, p. 308, para. 140).

38 92. The Court recognized that, when Canada clearly stated its claims at the diplomatic level, a more rapid reaction from the United States Department of State might have been expected; "to conclude from this, however, in legal terms, that by its delay the United States had tacitly consented to the Canadian contentions, or had forfeited its rights is, in the Chamber's opinion, overstepping the conditions required for invoking acquiescence or estoppel" (*ibid*., p. 308, para. 142).

93. As for the existence of a "*modus vivendi* boundary" or a "*de facto* maritime limit" based on a coincidence between the lines used by the Parties, which was claimed to have been respected by them and by numerous oil companies from 1965 to 1972, at least, the Chamber noted that, even if a demarcation existed between the areas for which each of the Parties issued permits, "the period from 1965 to 1972, 'at least' . . . [was] too brief to have produced a legal effect of this kind" (*ibid*., p. 311, para. 151).

94. Lastly, the Court rejected Canada's claim that it could be inferred from the conduct of the Parties that the application of the method advocated by Canada had been accepted by the United States as "an equitable culmination of the delimitation process" (*ibid*., p. 311, para. 152) and declared that it was impossible to conclude that there was "a binding legal obligation, in their bilateral relations, to make use of a particular method for delimiting their respective maritime jurisdictions" (*ibid*., p. 312, para. 154).

95. In the case at hand, there was no diplomatic exchange regarding the practice of attributing oil concessions which would have enabled Nicaragua to learn of Honduras's claim to take the parallel 14° 59.8' N as the dividing line for the continental shelf, not even any correspondence between the technical departments of the two countries. It was Nicaragua which suggested in 1977 negotiations for delimitation, which were unconditionally accepted by Honduras at a time when the practice of concessions was at its height. This practice lasted from 1965 to 1978 only and was limited to exploratory wells, of limited scale, in the disputed area and was halted owing to a lack of results without leaving any trace. When Honduras made its claim official in 1982, Nicaragua rejected it clearly and persistently. In the *Gulf of Maine* case, the Chamber
39 made the findings to which we have just referred without using them as an argument — as it itself indicated — as the continental shelf was only one of the subjects of the delimitation which it was

required to make (*ibid*., p. 307, para. 137). Similarly, in our case, the purpose of the Application filed with the Court is not confined to requesting a delimitation of the continental shelf.

Madam President, do you think this would be a good moment for a break?

Le PRESIDENT : Oui, je le crois. Merci, Monsieur Remiro. L'audience est suspendue.

L'audience est suspendue de 11 h 30 à 11 h 50.

Le PRESIDENT : Veuillez vous asseoir. Monsieur Remiro, vous avez la parole.

Mr. BROTÓNS:

96. Madam President, Members of the Court, I will now refer to fisheries activities. As far as these are concerned, Honduras asserts that it has "provided extensive evidence demonstrating its long-standing regulation of fisheries activities in the maritime and insular area north of the 15th parallel", with such activities taking place "under governmental authority"[90]. Madam President, Members of the Court, all this is mere verbiage.

97. Now, in its Rejoinder, Honduras mentions three fisheries concessions between 1975 and 1979[91]. It should be noted that only one of those, the temporary permit granted in 1977 to *Mariscos de Bahía S.A.,* refers to parallel 15° beyond the 80° meridian. Incidentally, the administrative decision of the Honduran Ministry of Natural Resources of 7 January 1977 was not published, but, even supposing that Nicaragua had had knowledge of it, and quite apart from the suspect date of the decision, Honduran fishing boats were seized by Nicaraguan coast guards north of parallel 15° in the following years. Can there be any more expressive way of asserting a right than that?

40 98. Unlike Honduras, Nicaragua — according to Honduras once again — has not produced a single fishery licence or concession north of the 15th parallel[92].

99. However, as we have already shown with respect to turtle fishing, it was Nicaragua which, for over a century, negotiated successive agreements with Great Britain, which wanted to

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[90]RH, para. 5.16.

[91]RH, para. 5.23.

[92]RH, para 4.19; see also paras. 4.34, 4.36 and 4.64.

safeguard the fishing activities of the Cayman Islanders[93]. The last of those agreements expired in August 1959. Dr. Oude Elferink has already referred to this subject. For the moment, I would just like to point out that those negotiations implied a presence, historical legislation and administrative activity towards the end of the nineteenth century, as well as undeniable continuity until, at the end of the 1950s, Nicaragua decided not to renew the agreement sought by the United Kingdom. Thus it is possible to document the boarding and inspection of fishing boats for dates as far apart as 1904 and 1970. So what was Honduras doing before and after these dates? It is clear that Honduras was not present in the disputed area of the Caribbean Sea and that it had no activity there until well into the second half of the twentieth century.

100. The correspondence of British experts with the Foreign Office in 1958 regarding the extent of Nicaragua's territorial waters, to which Nicaragua referred in its Rejoinder[94], might be purely speculative, but it is relevant speculation not "immaterial" as Honduras claims[95], because it reveals that there was no awareness whatsoever of the existence of a traditional dividing line between Honduras and Nicaragua at the end of the 1950s. Honduras itself, in its Rejoinder, emphasizes an extract from the letter dated 27 November 1958 addressed to Mr. Burr of the Colonial Office by Commander Kennedy, in which, referring to the Half Moon Reefs, he said: "They might . . . be claimed to be on the continental shelf of Honduras, depending on how the boundary across the shelf be finally agreed"[96]. These are facts that Honduras cannot deny.

101. Honduras lays stress on witness statements to show the existence of fishery concessions, an issue which it views as relevant to the determination of an existing boundary[97]. Logically enough, Honduras did not greatly appreciate Nicaragua's criticisms on this point[98]. But why should Nicaragua have protested against these activities on the basis of licences whose territorial scope was not specified and of which we are now aware solely by virtue of witness statements of fishermen no doubt carefully selected?

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[93]RN, paras. 4.46-4.50.

[94]RN, Addendum.

[95]RH, para. 4.62.

[96]RH, para. 4.61.

[97]RH, paras. 1.18, 2.28, 5.03, 5.17, 5.22, 5.24 and 5.25.

[98]RH, paras. 5.26-5.30; CMH, paras. 6.34-6.36, 6.43-6.44 and 6.50; RN, para. 6.51 *et seq.*

102. The statements by those who claim never to have seen Nicaraguan fishing vessels north of parallel 15° are devoid of credibility, for these are the very same persons who claim, immediately afterwards, to have seen only Honduran vessels, even though the presence of Jamaican fishermen is a well-established fact[99]. Some of the witnesses express themselves with such technical precision that one is inclined to doubt that they are responsible for the intellectual content of their statements: while one of them speaks to us of the "fishing community"[100], another astounds us by declaring that "since the Award issued by the International Court of Justice", parallel 15° has always been recognized as the border between Honduras and Nicaragua[101]. How many lawyers could refer to the principal judicial organ of the United Nations with such great precision? How is one to explain the fact that Honduras boarded and inspected Nicaraguan fishing vessels north of parallel 15° if, according to the testimony of old Honduran sea-dogs, they had not been seen in the area for 30 or 40 years? How is one to account for the fact that the Nicaraguan coastguards boarded, inspected and "bothered" Honduran fishing vessels north of parallel 15° if, according to these same depositions, they had been conspicuous by their absence from those waters for decades[102]?

103. Honduras particularly censures Nicaragua for its silence about evidence provided in the Honduran Counter-Memorial referring to fishing licences obtained from Honduran authorities in the 1950s[103]. But it turns out that the evidence provided by Honduras is confined to a single deposition, that of Mr. Daniel Santos Solabarrieta Armayo[104], who claims to have been granted one of these licences in 1958.

42 104. It is possible that Honduras issued fishing licences during those years. Nicaragua also issued some. But to deduce from that that Honduras exercised sovereign jurisdiction as far as parallel 15° is a very different matter. In fact, Honduras should be grateful to Nicaragua for not entering into the details of the statement by Mr. Daniel Santos Solabarrieta Armayo who, based in

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[99]CMH, para. 6.37.

[100]CMH, para. 6.7; Vol. 2, Ann. 68.

[101]CMH, p. 106, note 69, Vol. 2, Ann. 78.

[102]CMH, Vol. 2, Ann. 66.

[103]RH, para. 5.19.

[104]CMH, Vol. 2, Ann. 82.

one of the remote Bay Islands, Guajana, informs us that in 1958 he devoted himself to shrimp fishing, sailed the Caribbean and the Antilles, and reached Serranilla and Rosalinda, stopping at parallel 15°.

105. According to the statement of Mr. Daniel Santos Solabarrieta Armayo, he was the only fisherman in the whole of Guanaja. Don Daniel had ability. Over the years he built up a small fleet of ten vessels and quit his fishing activities in 1974, because the credit banks on land were more of a threat to him than the sandbanks at sea. His experience is surprising for, according to the literal text of his deposition, throughout his 16 years' activity "[he] never found any fishing vessels north of parallel 15°". This is no doubt a slip that the drafters of the Counter-Memorial of Honduras are assiduously correcting. Even so, Don Daniel must have felt very much alone. He himself tells us that it was not until 1964 that three other skippers from other islands in the archipelago joined him, each with a vessel of his own. That solitude enabled him to make a very interesting observation that he now shares with us: "when he operated in the area of the cays: Media Luna, Savanna, Bobel, Serranilla and South *they were not occupied by anyone*". Is this the statement on which Honduras would like to hear us say a few words?

106. In its Rejoinder Honduras returns to the charge, with the FAO fisheries reports[105] which, it states, "consistently show fishing banks and other geographical points located north of the 15th parallel as being treated by relevant organizations as falling within the territory or jurisdiction of Honduras"[106]. Nicaragua has analysed these reports in its Reply[107]. Honduras accuses Nicaragua of seeking

> "to undermine the FAO reports on the Regional Project of Fishing Development in Central America . . . by referring to a different document — the Final Report on the Regional Project of Fishing Development in Central America — which includes a note stating that names employed in the Report do not imply any judgment on the legal or constitutional situation of any territories or maritime areas"[108].

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[105]RH, paras. 5.31-5.35.

[106]RH, para. 5.31.

[107]RN, paras. 6.44 *et seq.*, 6.81.

[108]RH, para. 5.33.

Honduras notes that the reports to which it refers contain no such note and that these reports, to which Nicaragua did not object when they were published[109], treat the cays and maritime areas north of the 15th parallel as unequivocally Honduran[110].

107. Let us be serious. The reports from which Honduras claims to derive the recognition of its sovereignty north of parallel 15° form part of a Regional Project of Fishing Development in Central America of the governments of the isthmus, supported by UNDP and executed by FAO between December 1968 and October 1971, the Final Report of which, with its results, conclusions and recommendations, was dated Rome, September 1972[111]. This Project arose in a context of predominantly small-scale subsistence fishing, with primitive vessels, low productivity and inadequate management of catches.

108. This simple statement suffices to show that, while such reports might be of great value for an enhanced geographical, topographical and hydrological knowledge of the region and of the varieties, quality and volume of its living resources and possibilities of commercial exploitation of fishing, by their very nature they were not appropriate to serve the objectives claimed by Honduras. These reports could have no significance for the delimitation of maritime areas between the riparian States, particularly if account is taken of the note accompanying the Final Report which, logically, should apply to the partial reports concerning FAO operations in various areas of Central America, the Caribbean and the Pacific. Nicaragua thus had nothing to object to in a work of that nature, requested jointly by all the countries of Central America.

109. Furthermore, when the project was executed, Honduras had not promulgated legislation claiming jurisdiction beyond the territorial sea. The FAO Final Report of 1972 concluded with

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regard to Honduras that, although it had found quite extensive resources, "unfortunately, the country has no means of regulating the exploitation of those resources by other countries. Given the 'free sea' system that reigns in Honduras, its resources are extensively and even improperly

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[109]RH, para. 5.34.

[110]RH, para. 5.33.

[111]FAO, *Informe sobre los resultados del Proyecto. Conclusiones y recomendaciones.* Proyecto regional, FI: DP/RLS/65/030, Rome, 1972 (see judges' folder, doc. No. 2).

exploited by foreign vessels"[112]. *(Translation by the Registry.)* Thus, it was difficult to speak of a "traditional line" in such an untraditional area as the exclusive economic zone that Honduras, at that time, did not yet claim.

110. It should be added that the part of the Project devoted to the presentation of the fisheries legislation of the countries of Central America and Panama makes not the slightest reference to the existence of maritime boundaries between them. It is evident that dealing with the sub-zones of the fishing grounds by areas, through reference to parallels and meridians, had practical value, as did referring to Honduran waters and Nicaraguan waters in lay terms. The maps contained in the technical report of the Project contain no political dividing lines[113].

111. If one wishes to engage in a political reading of the reports, one must take into consideration the general summary of the explorations conducted in the western Caribbean between December 1968 and June 1970, in which it is stated that the hard bed areas of the "extensive eastern shelf *between 15° 00' N and 16° 00' N* should be explored with a view to providing more extensive information on stocks of crayfish *in Honduras and Nicaragua*"[114].

112. It should also be stressed that in the report on the deep water fisheries explorations carried out between April and October 1971, the area rightly called "Great Nicaragua Plateau" which starts at parallel 15° 15' N is indisputably attributed to Nicaragua[115].

113. Although Honduras did not appreciate the fact[116], Nicaragua pertinently cites — given
45 the Honduran manner of reasoning — the FAO evaluation report on fishing in the Pacific, in which it is affirmed that in that ocean only El Salvador, Guatemala and Nicaragua had coasts outside the Gulf of Fonseca[117]. Should we have drawn some legal conclusion from that affirmation? Did Honduras protest?

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[112]*Ibid*., para. 2.6.4 (see judges' folder, doc. No. 3).

[113]FAO, *Boletín Técnico del Proyecto,* Vol. V, pp. 61 and 64.

[114]M. Giudicelli and M. Yesaki, "Resumen de las Operaciones de Pesca Exploratoria del R/V Canopus en el Mar Caribe occidental (diciembre 1968 a junio 1970)", *Boletín Técnico del Proyecto*, Vol. IV, No. 5, San Salvador, 1971, p. 19, para. 7.5; emphasis added.

[115]M. Giudicelli, Exploraciones pesqueras en el Mar Caribe de Centroamérica con énfasis en aguas profundas (R/V Canopus, abril a octubre de 1971)", *Boletín Técnico del Proyecto*, Vol. V, No. 5, San Salvador, 1971, para. 4.2.6.

[116]RH, para. 5.34.

[117]RN, para. 6.46.

114. If the positions set forth in the partial reports by FAO were not legally irrelevant, the recognition by the Court of the status of Honduras as a Pacific riparian State would have been inexplicable, given that the reports of the vessel *R/V Sagitario* which conducted the exploration in that area mention only Guatemala, El Salvador and Nicaragua as offshore areas of the exploration, without mentioning Honduras, which is, however, mentioned when the Gulf of Fonseca is referred to. The figures accompanying the reports draw a single line in the mouth of the Gulf: that separating El Salvador from Nicaragua[118]. And in the FAO Final Report (September 1972), we read: "On the Pacific coast, Honduras has limited access to the Gulf of Fonseca because the narrow mouth of the Gulf is controlled by El Salvador and Nicaragua." (Para. 2.2.1.)

115. Following the same line of argument, and returning for a moment to the oil concessions, it should be recalled that the concessions granted by Nicaragua to the Oceanic enterprise between 1973 and 1977 in the Pacific, started from a point situated in the median of the mouth of the Gulf of Fonseca, between Punta Cosigüina, in Nicaragua, and Punta Amapala, in El Salvador[119]. Did Honduras protest? Are we to deduce from this that its silence is at the origin of its acquiescence, a tacit agreement on a traditional line in the Pacific? I turn now to the naval patrols.

H. The naval patrols

116. With regard to the naval patrols, to which Honduras reverts in its Rejoinder[120], we have already indicated at the appropriate time that these patrols took place after the critical date, as the
46 Honduran navy was created only in 1976[121]. Now, Honduras puts before the Court the statement of another retired naval officer[122] to which Dr. Oude Elferink has already referred, who informs us that he was involved in patrols as early as 1968. Irrespective of the ambiguity of that activity with

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[118]J.S. Cole and R. Wieme, Results of exploratory fishing in the Pacific Ocean region of Central America by the *R/V Sagitario* (December 1967 to December 1968)", *Boletín Técnico del Proyecto*, Vol. III, No. 4, San Salvador, 1970, Table of Contents, pp. 7-9, 12 and 13.

[119]CMH, Vol. II, Ann. 118, pp. 364-365, Diagrams of Oil Concessions 1971 and 1974 (Source: Bulletin of the American Association of Petroleum Geologists, Vol. 56/9, pp. 1653-1654, September 1972; and 59/10, pp. 1806 and 1808, October 1975).

[120]RH, paras. 5.54-5.57.

[121]RN, para. 5.4 (iv), and para. 6.65.

[122]RH, para. 5.57.

regard to its effects on maritime delimitation, it is striking to note that, in order to establish it, Honduras has to have recourse to a personal testimony and that it cannot provide registers in due form. Nicaragua was in any case not obliged to acknowledge these patrols, a fortiori if there were no arrests or incidents involving units under its flag.

J. Treaties concluded with third States

117. Honduras also mentions as a relevant circumstance treaties concluded with third States "when they manifest recognition of title to islands or maritime spaces and where they serve to confirm the existence of a tacitly agreed boundary"[123]. Given that my colleague Dr. Oude Elferink has already considered this question with regard to the islands, I do not think I need to dwell on it further, as what has already been said on this matter is also applicable to maritime areas.

118. But I should like to draw attention to the "lowering of intensity" of Honduras's arguments regarding the Colombian delimitation treaties with which it has tried to stifle Nicaragua. While, in its Counter-Memorial, Honduras strove with pitiable enthusiasm to heighten the importance of these treaties[124] in the "geographical context of the dispute"[125] now, in its Rejoinder, it confines itself to referring back to the Counter-Memorial[126], accusing Nicaragua of ignoring, through its "blinkered vision" of the circumstances relevant to the case, the critical importance of "numerous boundary treaties circumscribing the relevant area"[127]. But if Nicaragua's vision is so blinkered and if such treaties are a critical element for the delimitation of the boundary, one must
47 ask oneself why Honduras does not refute the long, solid and firm response that Nicaragua made to it in its Reply[128]. Nicaragua's "blinkered vision" is backed up by awards such as that of the Arbitral Tribunal which ruled on the maritime delimitation between Barbados and Trinidad and

[123]RH, para. 1.19; see too paras. 2.35, 2.46, 4.42-4.45, 4.64, 5.59, and 5.62-5.70.

[124]CMH, paras. 2.13-2.20.

[125]CMH, Chap. 2.

[126]RH, para. 2.6.

[127]RH, para. 2.9.

[128]RN, paras. 3.22-3.54.

Tobago. Thus, the Award of 11 April 2006 clearly affirms that treaties such as those on which Honduras bases itself are indeed important, but important in order to reveal the limitations of the claims of the parties thereto, and not to limit the claims of third States[129].

Conclusion

119. There is no line dividing the maritime areas of Nicaragua and Honduras based on a tacit agreement or any form of acquiescence or recognition whatever resulting from long-established and consistent practice.

120. Honduras has not proved its presence in the disputed area until virtually the last third of the twentieth century. Only Nicaragua was present in that area until at least 1963.

121. Honduras's activities in the area between 1963 and 1977 were confined to a few oil exploration concessions which came to an end 30 years ago, leaving no trace. Those activities always took the exclusive material form of relations between the administration and the companies to whom the concessions were granted. They never took the form of exchanges, whether diplomatic or technical, between the administrations of Nicaragua and Honduras. Nor has Honduras been able to establish any relation whatever between the boundaries of the oil exploration areas and the territorial boundaries of Nicaragua and Honduras. In any case, in 1974 none of Nicaragua's concessions closest to those of Honduras had as its northern limit the parallel corresponding to the point at which the Mixed Commission fixed the terminus of the land boundary in 1962.

122. Honduras has not proved and cannot prove that, between 1963 and 1977, Nicaragua conducted itself in such a manner that it is now obliged to accept parallel 14° 59.8' N as the sole boundary of all its maritime areas with Honduras.

48 123. In 1977, Nicaragua proposed to Honduras the opening of negotiations on the delimitation of the maritime areas in the Caribbean, a proposal that Honduras accepted unconditionally.

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[129] Arbitral Tribunal constituted pursuant to Article 87, and in accordance with Annex VII, of the UNCLOS in the matter of an *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award of 11 April 2006, paras. 344-349.

124. The practice subsequent to 1977 is not relevant, because it does not constitute the normal continuation of previous activities, but was undertaken with a view to improving the legal position of Honduras vis-à-vis Nicaragua.

125. It was only in 1982 that Honduras officially declared its claim to a dividing line established on the parallel on which the terminus of the land boundary was located in 1962. Nicaragua's objection was immediate, clear and persistent.

126. In the absence of agreement between the Parties, the situation has remained unchanged: that delimitation does not exist, it still does not exist; and it is for that very reason that Nicaragua has brought the matter before the Court.

Madam President, Members of the Court, thank you for your very kind attention. Madam President, may I ask you to call Professor Pellet to address the Court with the continuation of Nicaragua's presentation?

Le PRESIDENT : Merci beaucoup, Monsieur Remiro Brotóns. La Cour appelle maintenant M. Pellet à la barre.

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

THE ENDPOINTS OF THE DELIMITATION — DELIMITATION OF THE TERRITORIAL SEA

1. Madam President, Members of the Court, before turning to the heart of the matter, it may be helpful for me to make two points about the oral argument that is to follow and about the end of the presentation by Nicaragua:

— firstly, so as not to make the Court lose valuable time, we thought it preferable to divide in two the pleading that I was originally due to make tomorrow in a single statement on the extreme points for delimitation and the delimitation of the territorial sea, and it was therefore better for me to make a start today. Having said that, it is a single pleading, and I shall stop at your convenience, Madam President, since otherwise I shall risk going a little beyond the fateful limit of 1.00 p.m. In any event, I shall only finish it tomorrow morning, and whatever happens, we do not think that we shall need the whole of tomorrow morning to bring our first round to a close;

— and secondly, Madam President, I am aware of your concern to accommodate the interpreters, and I shall try all the more to speak slowly, not only because we have the time, but also because my Agent's French still leaves something to be desired, even though we have been working together for nearly a quarter of a century.

2. Madam President, Mr. Brownlie explained on Tuesday which method should be used, in Nicaragua's view, to draw the single line of delimitation between the maritime areas belonging to Nicaragua on the one hand and Honduras on the other. My task is to provide some details regarding the endpoint and the starting-point of that line, the latter being inextricably linked to the delimitation of the territorial sea between the two States. And it is with that aspect, the more complicated one, that I shall begin.

I. The starting-point of the line and delimitation of the territorial sea

3. Madam President, Honduras and Nicaragua both have a territorial sea extending for 12 nautical miles, calculated from the baselines. Because of the very particular topographical circumstances of the coast of the two States, fixing the terminus of the land boundary and, correlatively — at least in principle — the starting-point of the maritime delimitation, presents some difficulty. Only when this problem has been resolved is it possible to determine the course of the boundary between the two States' respective territorial seas.

(a) *The terminus of the land boundary*

4. Although the determination — it would perhaps be more accurate to talk of the *in*determination — of the terminus of the land boundary is one of the clearest points of agreement between the Parties, it is probably not unhelpful to recall how the difficulty arises[130].

50 [Start of Slide 1: Arbitral Award of the King of Spain (AP1)]

5. Under the terms of the Arbitral Award made by the King of Spain in 1906:

> "The extreme common boundary point on the coast of the Atlantic will be the mouth of the River Coco, Segovia or Wanks [these are the three names of the river which forms the main part of the boundary between the two countries – the extreme point will therefore be the mouth of this river], where it flows out in the sea close to Cape Gracias a Dios, taking as the mouth of the river that of its principal arm between Hara and the Island of San Pío where said Cape is situated, leaving to Honduras the

[130] See MN, p. 13, para. 28; CMH, para. 7.41; RN, para. 3.10; RH, para. 1.25.

> islets and shoals existing within said principal arm before reaching the harbour bar, and retaining for Nicaragua the southern shore of the said principal mouth with the said Island of San Pío, and also the bay and town of Cape Gracias a Dios and the arm or estuary called Gracias which flows to Gracias a Dios Bay, between the mainland and said island of San Pío."

And the Award continued: "Starting from the mouth of the Segovia or Coco, the frontier line will follow the *vaguada* or thalweg of this river upstream . . .". (*Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, pp. 202-203.) (Arbitral Award of 23 December 1906; translation from the Spanish revised by the Registry of the Court, Judgment of 18 November 1960.)

6. On the face of it, things are clear, and, as counsel for Honduras constantly repeated in their oral arguments concerning the Award made by the King of Spain:

> "The Court will note the clarity and lucidity of these paragraphs"[131]; "these operative parts of the Award are a model of clarity"[132]; "there is no obscurity, gap or contradiction in the Award of the King of Spain which renders it incapable of execution at this point"[133]; or again "the Award is absolutely clear on this point"[134].

And indeed, as the Court found in its Judgment of 18 November 1960 in that case: "in this context the thalweg was contemplated in the Award as constituting the boundary between the two States even at the 'mouth of the river'. In the opinion of the Court, the determination of the boundary in this section should give rise to no difficulty." (*Ibid., I.C.J. Reports 1960*, p. 216.)

[End of Slide 1]

7. This prediction, Madam President, nevertheless proved somewhat optimistic. In fact,

51 determining the starting-point of the land boundary between the two States on the Atlantic Ocean has raised some difficult problems — not for legal reasons (from the point of view of law, the indications provided in the Award of 1906 are sufficient), but for practical and topographical ones. When it came, in practice, to locating this point on the ground and marking it on a map — moving, in a sense, from delimiting to demarcation — it was realized that things were less simple than they

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[131]Oral argument of Mr. Briggs (Honduras), 23 September 1960, *Pleadings, Oral Arguments, Documents* — case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, p. 202.

[132]*Ibid.*, p. 203.

[133]*Ibid.*, 24 September 1960, p. 204.

[134]Reply by Mr. Guggenheim, 7 October 1960, *ibid.*, p. 422; see also the RH, 3 August 1959, *ibid.*, pp. 537-540, paras. 124-129.

might have appeared. Between 1906 and 1961-1962, when the Mixed Commission set up under the auspices of the Inter-American Peace Committee attempted to give substance to this concept, the configuration of the mouth of the River Coco itself had changed considerably:

> "[I]t is noted that the topography of this area has undergone constant changes throughout the years, some caused by the closing of secondary channels and the appearance of new ones, while others resulted when part of the Gracias a Dios Bay filled up and Sunbeam Bay appeared. In general, it has been noted that in this region of the mouth of the Coco River, the land has been advancing toward the sea. On the British map [prepared by the British Navy for the area of Cape Gracias a Dios], there are various notes that indicate topographical changes in the years 1883, 1886 and 1912. The numerous changes in the topography of the region through the years can be seen very clearly in the aerial photographs taken."[135]

And this is very striking if one looks at the map based on aerial photographs, which is included in the judges' folder as item 2.1 and which the Boundary Commission used as its basis.

[Slide 2: Joint Boundary Commission: terminus of the land boundary (AP 2.3)]

8. It is important to make one point clear: although it notes these changes in the topography of the region, the Mixed Commission quite rightly does not stop there. It fixes the terminus of the land boundary on the basis of the indications provided in the Award of 1906, but in terms of the situation obtaining at the time it made its decision, i.e. in 1961-1962. I shall return to this in a moment.

9. The geographical co-ordinates of this terminus are as follows:

— in longitude: 83° 08.9' (8 minutes and nine tenths, i.e. in seconds, 83° 08' 54") west;

52 — in latitude: 14° 59.8' (59 minutes and eight tenths, i.e. 14° 59' 48") north.

10. These are very precise co-ordinates, and the Mixed Commission pointed out that they were established "*hasta el décimo de minuto*"[136] — "to the tenth of a minute". I am referring to the original Spanish text, even though Spanish is not an official language of the Court, because the English translation, carried out by the OAS, is erroneous: "décimo de minuto" was rendered by the translators — who must have forgotten their geography lessons — as "to the second"[137]. Now, as

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[135] *Report of the Inter-American Peace Committee to the Council of the Organization of American States on the Termination of the Activities of the Honduras-Nicaragua Mixed Commission*, 16 July 1963, App. 3, Report of the Honduran-Nicaraguan Joint Boundary Commission on the Studies Made at the Mouth of the Coco, Segovia or Wanks River, 14 July 1962, MN, Vol. II, Ann. 1, p. 22 (Ann., p. 28).

[136] See MN, p. 77, note 82; see the original Spanish text filed in the Registry of the Court with the Memorial and reproduced in the judges' folders (item 2.2).

[137] *Ibid.*

we know (when we have been good pupils in our geography classes and not forgotten everything — but I confess that this did not apply to me, and that I had to refresh my memory to appreciate these subtleties), a second is not a *tenth*, but a *sixtieth* of a minute. So the intersection of the thalweg and the line representing the mouth of the Coco River is indeed situated at latitude *14° 59′ 48″* north, corresponding to 14° 59.8', and not at 14° 59' 08", as the English translation of the report of the Mixed Commission wrongly indicated[138]. The difference is a little over 1 km.

11. In any event, the Honduran authorities, whose official language is nevertheless Spanish, not English, have relied on this translation error in numerous circumstances to claim a maritime boundary following latitude 14° 59' 08" north, a parallel which Honduras has also used to establish the boundary of its maritime areas with Colombia in the (invalid) treaty concluded between those States on 2 August 1986[139]. However, Nicaragua has noted that, in its written pleadings relating to the present case, Honduras appears to have stopped relying on the erroneous English transposition of the Mixed Commission's report of 1962; not without some twists and turns, after acknowledging the mistake in translation[140], Honduras states that "as regards Nicaragua, the Honduran claim is that the traditional boundary lies at latitude 14 degrees 59.8' 00"'"[141]. Of course, the two Parties disagree on the relevance of this parallel for establishing their whole maritime
53 boundary; but as regards determining the terminus of the land boundary as it was fixed in 1962, they are in agreement — duly noted.

[End of Slide 2]

(b) ***The starting-point of the maritime delimitation by the Court***

12. Their agreement also goes further in this respect. Both take the view that the instability of the mouth of the river demands particular caution in fixing the starting-point of the maritime boundary which the Court has been requested to establish. And both consider that this point is not necessarily bound to coincide with the terminus of the land boundary or, more precisely, that some degree of flexibility needs to be maintained between the two.

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[138] *Ibid.*, p. 26 (Ann., p. 20).

[139] See MN, pp. 79-80, paras. 11-12.

[140] CMH, p. 26, para. 2.27.

[141] *Ibid.*, p. 27, para. 2.28; see also RH, p. 1, para. 1.03, or p. 12, para. 2.3.

13. The Parties agree that it would probably be preferable to use a method whereby — and I am borrowing this expression from the Honduran Rejoinder — "the maritime boundary need not change as the mouth of the river changes"[142]. In this respect, Honduras[143] seems to have come round to the suggestion made by Nicaragua, which, in its Memorial[144], proposed drawing on the example of the Treaty concluded on 23 November 1970 between the United States and Mexico, Article V *(a)* of which provides that, to neutralize the effects of fluctuations at the mouth of the Rio Bravo del Norte or Rio Grande, "the international maritime boundary in the Gulf of Mexico shall begin at the centre of the mouth of the Rio Grande, *wherever it may be located*; from there it shall run in a straight line to a fixed point . . .". It is this method, also used in other treaties and in the Arbitral Award of 1985 in the case concerning *Delimitation of the Maritime boundary between Guinea and Guinea-Bissau*[145], that the two Parties have therefore agreed to ask the Court to apply in the present case.

54 14. The idea would therefore be, Madam President and Members of the Court, that in carrying out the maritime delimitation which Nicaragua has asked you to perform, in its Application and in the submissions of its written pleadings, you do not start from the terminus of the land boundary, but that you make the delimitation of the single line begin from a "neutral" point, situated off the coast and chosen so as to ensure the stability of the maritime boundary for a very long period. Moreover, the two Parties have, in their written pleadings, undertaken to negotiate an *ad hoc* solution applicable to the maritime area immediately adjacent to the mouth of the Coco, to take account of its rapidly changing nature[146]. Nicaragua will not go back on that proposal if the Court adopts it. However, as Ambassador Argüello indicated on Monday[147], for reasons which I shall return to in a few moments, we are wondering if, on reflection, this is not an

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[142]RH, p. 126, para. 8.02. See also MN, p. 82, para. 22; CMH, p. 136, para. 7.13; RN, pp. 196-197, paras. 10.5-10.6.

[143]See RH, p. 126, para. 8.03. See also CMH, p. 137, para. 7.14.

[144]MN, pp. 83-84, para. 25.

[145]See MN, pp. 83-85, paras. 24-28.

[146]See MN, pp. 85-86, para. 30, and RH, p. 8, para. 1.25, or p. 127, para. 8.06; see also the conclusions of Honduras, p. 135.

[147]CR 2007/1, 5 March 2007, p. 102, para. 46 (Argüello).

unduly complicated solution, and we believe that a simpler answer, in the same spirit, could be found to the challenge of the vagaries of the Coco River, without having to leave the matter to negotiations between the Parties, with their still uncertain outcome.

[Slide 3: Changes in the mouth of the Coco River (AP 3)]

15. Moreover, while the Parties are in agreement in suggesting a method that is likely to make it possible to "neutralize" the rapid changes at the mouth of the river, they do not agree when it comes to putting this into effect. Their disagreement begins with the analysis of the changes that have taken place since 1962.

16. The fact is that the mouth of the Coco River changes very rapidly. But in which direction?

17. Honduras states with some insistence that "these . . . changes have continued, moving the mouth *eastwards*"[148]. This is a very "skewed" presentation and, in reality, rather poorly skewed. If one looks at the satellite photographs which the two Parties have annexed to their written
55 pleadings[149], it is clear that the mouth has moved not due east, but in fact east-north-east and even, in recent times, simply north-east: this is shown by the angle formed between due east, indicated by the red arrow on the sketch now being projected behind me, and the prolongation of the river bed. Today, subject to corrections or qualifications that might be provided by further soundings (since we have used only satellite photos to calculate the centre of the mouth), the co-ordinates of the intersection of the thalweg of the Coco with the line closing its mouth are 15° 00' 11" of latitude north and 83° 07' 54" of longitude west, and this point is situated one nautical mile — a little under 2 km — east-north-east of that fixed by the Mixed Commission in 1962.

18. It is this point alone which corresponds to the starting-point of the land boundary towards the west — and consequently of the maritime boundary towards the east — as determined by the Arbitral Award of 1906. Indeed, the King of Spain established the starting-point of the land boundary not at a fixed and immutable place, but at the mouth of the river Segovia or Coco where it flows into the sea and, as I have said, in its Judgment of 1960, the Court clearly indicated that

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[148]CMH, p. 136, para. 7.12; see also p. 144, para. 7.39 or RH, p. 109, paras. 6.07 or 6.09, or pp. 125-126, para. 8.02.

[149]MN, figure VII; CMH, plate 19; RH, plate 46.

"the thalweg . . . constitut[ed] the boundary between the two States even at the 'mouth of the river'". As the mouth of the river moves, so the starting-point of the land boundary towards the west, and of the maritime boundary towards the east, moves as well, along the thalweg, and today that point is situated at latitude 15° 00' 11" north and longitude 83° 07' 54" west.

19. As Nicaragua has shown in convincing detail in its Reply[150], it is well established that river boundaries between States follow movements in the course of the river on which they are fixed, and that riparian States (like coastal States on the sea) benefit from any accretions that may be formed on the banks belonging to them. It is telling that, in its Rejoinder, Honduras has been careful not to criticize these conclusions, from which it nonetheless declines to draw any consequences.

20. So it is quite clear that if the Court began the maritime delimitation which it has been asked to perform not from the point currently situated at the intersection of the thalweg of the Coco River and the line of its mouth on the Atlantic Ocean — that point is marked with a cross on the
56 sketch projected behind me — but from the point used by the Mixed Commission in 1962 — marked with a small red circle — it would be performing not a maritime delimitation, but a land (or river) delimitation. At the same time, Nicaragua would be deprived of the territory reclaimed naturally from the sea by means of accretion, and the boundary fixed by the Award of 1906 would be called into question — without the slightest legal basis existing for that to happen.

[End of Slide 3; Slide 4: Delimitation at the mouth of the Coco River (AP 4)]

21. However, that is what Honduras seemed to be requesting when, in its Counter-Memorial, it asked the Court to distinguish three sectors of maritime delimitation, the first being:

> "[a] straight and horizontal line following the thalweg of the River Coco from the point identified in 1962 by the Honduras/Nicaragua Mixed Commission to the current mouth, where it reaches the sea as agreed by the two Parties", and the second "[a] continuation of this line through territorial waters, from the current mouth to the 12-mile limit at a point where it intersects the parallel of 14 degrees 59.8 minutes"[151].

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[150]RN, pp. 203-206, paras. 10.23-10.30.

[151]CMH, p. 145, para. 7.41.

Apart from being particularly confusing — since here Honduras seems to be switching between the mouth from 1962 and the present mouth — there are numerous objections to this approach, which is illustrated by the sketch now being projected behind me.

22. As regards the first alleged "sector", the very idea of a "straight and horizontal line following the thalweg" is completely absurd: the thalweg of a river simply cannot follow this command; nature is more temperamental than Honduras would have it. It is one thing or the other, Madam President: either the Award of 1906 is disregarded; or it is respected — there is no middle way.

23. Honduras, whatever it may say, is in favour of the first option, since it is asking the Court, regardless of the Award of 1906, to draw a straight and horizontal line from the point fixed in 1962, leaving Nicaragua deprived of the land it has acquired from the deposits of the Coco River, which is totally unacceptable — but that is the solution adhered to by Honduras, which reaffirms in paragraph 8.05 of its Rejoinder, without troubling to refute the arguments contained in the Reply, that "in the view of Honduras, the seaward fixed point should be established precisely
57 three nautical miles due east of 14° 59.8' N. latitude, 83° 08.9' W. longitude". Why from that point? Why "due east"? It is true that, in the same Rejoinder, Honduras says it has abandoned this three-sector approach[152], but in fact the only effect of this is that it is even harder to explain by what mysterious means the "15th parallel" is arrived at from the mouth of the river — the real mouth. Nowhere is this explained, and this ignoring of the actual finishing-point of the land boundary is certainly not in accordance with the principle which Honduras says it endorses, whereby "[t]he boundary to be determined by the Court should be enduring, *whilst respecting both the 1906 Award and the 1962 Agreement*"[153].

24. If, on the other hand, one actually remains faithful to the letter and the spirit of the 1906 Award as it was interpreted by the Judgment of the Court and implemented in due course by the Agreement of 1962, then it is the real and *present* endpoint of the land boundary that must be taken into account. This is the only solution that is legally possible and can reasonably be envisaged: any maritime delimitation has to begin where the land boundary ends; and that point can only be

[152]RH, pp. 127-128, note 8.

[153]CMH, pp. 136-137, para. 7.13 (our italics).

where the thalweg of the Coco River meets the (imaginary) line which closes the mouth of the river. At present, to repeat, its co-ordinates are, on the basis of a reasonably accurate — but not necessarily definitive — assessment, 15° 00' 11" of latitude north and 83° 07' 54" of longitude west.

[End of Slide 4]

25. In normal circumstances, it is from this point that the maritime boundary should be delimited. However, it must be borne in mind that this could well be only a temporary or provisional delimitation, since there is every likelihood that the mouth of the Coco River will continue its advance towards the sea (and probably in a north-easterly direction or, at any rate, east-north-east) at the rapid pace which it has maintained since the region was mapped[154]: as soon as this endpoint of the land boundary (and starting-point of the maritime delimitation) has been fixed, it will be out of date, which may well be undesirable for a number of reasons, not least in my view the "geo-judicial" history of the boundary between the two countries.

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26. The two Parties are aware of this, and that is why they have suggested that the Court might only begin the delimitation of the maritime boundary between them from a point situated off the mouth of the Coco River, chosen so as to neutralize the fluctuations of its mouth. That is one possibility, and again Nicaragua does not seek to challenge it. However, as I have said, this solution is not without its drawbacks:

— firstly, it is inevitable that, sooner or later, this solution will in a sense be "overtaken by the alluviation of the river mouth", which is advancing towards the sea at an average rate of around one nautical mile — almost 2 km — per century, which is huge[155];

— secondly, it is a complicated solution, whereas the same result can be achieved differently by simple and sustainable means;

— thirdly, and in any event, the Parties disagree on how to implement the method which they have advocated in their written pleadings.

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[154]MN, pp. 81-82, paras. 18-20; CMH, p. 119, para. 7.12; RN, pp. 29-30, para. 3.10; RH, p. 108, para. 6.05, or pp. 108-109, para. 6.07.

[155]See MN, p. 11, para. 19, or p. 158, para. 23.

27. Honduras, which is very concerned to have us believe that the single line it is proposing is perfectly consistent with the Arbitral Award made by the King of Spain in 1906, is clinging to the starting-point of the land boundary fixed by the Mixed Commission in 1962. We have seen, Madam President, that this position is untenable: it is incompatible with the Award, and it is not possible to begin a *maritime* delimitation from a point that is situated not on the Parties' coast, but within their *landmass*. The only option that is both logical and legally defensible is to start from the present mouth of the river. It is also not without significance that, when it fixed the co-ordinates of the starting-point of the land boundary in 1962, the Mixed Commission did not try to find out what the situation had been in 1906 — which was cartographically possible — but took as its basis the situation obtaining on the ground in 1962. I do not see how the Court could do otherwise: it is bound to note that the boundary has moved east-north-east, and that the point from 1962 is now included within the land boundary between the two States.

59 28. To neutralize the fluctuations at the mouth of the river, Nicaragua proposed in its Memorial that the starting-point of the maritime boundary between the Parties should be fixed at a point situated three nautical miles seaward of the present mouth, on the bisector line. This line corresponds to the approximate equidistance line, or median, between the coasts of the two Parties[156]. Honduras was initially opposed to this suggestion as regards both the distance of this point from the coast and where it should be located.

[Slide 5: Argument of Honduras (AP 5)]

29. On this second point, it is clearly not surprising that there is a difference between the Parties. Nicaragua's suggestion is in keeping with its fundamental position whereby the bisector forms the single line of delimitation, a position whose validity has been demonstrated by my friend and colleague Ian Brownlie. Honduras, for its part, continues to maintain that this line has to follow what it calls "the 15th parallel", in other words the parallel of latitude 14° 59' 48" north. I do not think it would be helpful to go back over the general reasons why this argument is

[156]See MN, p. 83, para. 23 and p. 160, para. 29, and RN, p. 197, para. 10.5.

unacceptable — my colleagues have explained these at some length. On the other hand, I would like to emphasize, Madam President, the very strange nature of the Honduran position as regards in particular the part of the line that is situated near the coast.

30. The sketch now being projected behind me, and which is included as item 5 in the judges' folders, illustrates this strangeness:

— the starting-point of the maritime boundary (which, it must be repeated, necessarily coincides with the endpoint of the land boundary) is situated nearly one mile north-east of latitude 14° 59' 48" north[157]; it is marked with a yellow cross (x) on the sketch;

— if the Honduran argument were to be followed, it would immediately be necessary to turn the boundary line southwards, for no obvious reason (this is the segment x-b of the line, marked in red on the sketch); and

60 — this would have the effect of hemming in — and indeed cutting off — the Nicaraguan territory reclaimed from the sea by means of accretion; furthermore, this territory is crossed by the x-b line in question, which amounts to asking the Court to carry out what is implicitly a new (and unacceptable) land delimitation.

31. No doubt, in that event, Honduras would be careful not to formally ask the Court to take such action for the section a-b; but acceptance of the Honduran position would necessarily lead to that kind of situation.

[End of Slide 5; Slide 6: Proposal of Nicaragua (AP 6)]

32. A mere glance at the new sketch now being projected behind me (which is item 6 in the judges' folder) is enough to see that Nicaragua's position does not involve these drawbacks. The segment x-B, marked in green on this sketch, represents the extension of the mouth of the Coco River; it corresponds both to the bisector and the configuration of the Nicaraguan Rise, without differing notably from the result that would have been produced by the equidistance method; and it avoids any encroachment of the area belonging to one of the Parties on the natural extension of the other.

[157] RN, p. 196, para. 10.4.

33. While it is accepted that the point of "neutralization" (B on the sketch) must lie somewhere on the bisector, the question remains of how far this point is to be placed from the present mouth of the Coco River. As I pointed out a moment ago, Nicaragua indicated in its Memorial that the distance of three nautical miles was a reasonably prudent one, and it repeated this proposal in its Reply[158]. After suggesting that the Court should refrain from performing a delimitation to the outer limit of the territorial sea, i.e. 12 nautical miles from the mouth where it actually is or from where it existed in 1962[159] — given the wording used by Honduras, this is not clear — which Nicaragua had in any event deemed excessive[160], Honduras seems, in its Rejoinder, to have come round to the distance of three miles. In paragraph 1.25 of its Rejoinder, it writes:

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> "Honduras, seeking to minimise the points of difference with Nicaragua, can accept a starting point for the Court's line at 3 miles from the terminal point adopted in 1962, rather than 12 miles from the coast, as proposed in its Counter-Memorial, but not premised on the bisector method, which is contrary to principle."[161]

34. Unfortunately, despite the excellent attitude thus announced, this "acceptance" is largely a matter of appearance. Three miles to be sure. But on the 15th parallel — which is clearly not acceptable — I will not go back to that for the moment; above all, however, three miles from the terminus of the land boundary *of 1962*, in other words from a point located in the river territory of the two States and in no sense on their coast; and this with all the drawbacks to which I have just drawn attention. So there is no agreement between the Parties on this point.

[End of Slide 6]

35. Madam President, Nicaragua does not intend to go back on the suggestion it has made to neutralize part of the maritime area immediately adjacent to the Parties' coasts, whereby it would be possible for the Court only to start the delimitation requested from a distance of three nautical miles from the mouth of the Coco River. Since the Parties agree on the idea that the "neutralization point" must be fixed three nautical miles from the endpoint of the land boundary, the Court might

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[158] *Ibid.* or RN, p. 200, paras. 10.16 and 10.17.

[159] See CMH, p. 145, para. 7.41; see also p. 137, para. 7.14.

[160] See RN, p. 8, para. 1.14 *(a)*.

[161] RH, p. 8, para. 1.25.

confine itself to taking note of their agreement on this point — of course with one important caveat: the starting-point of this line can clearly only be the *present* endpoint of the land boundary, and not the totally obsolete one from 1962.

36. In its written pleadings, Nicaragua had suggested that the Court leave open the question of the exact course of the boundary between the mouth of the Coco and the neutralization point fixed in this way, with that delimitation being referred to subsequent negotiation between the Parties[162]. However, on carefully re-examining the situation during preparation for these oral arguments, it seemed to us, as I said just now, that the concerns which lay behind this proposal could be answered in a simpler and possibly more effective way — and without altering it radically.

62 37. This alternative suggestion consists of asking you, Madam President, Members of the Court, to fix the starting-point of the maritime delimitation not on the basis of precise geographical co-ordinates, but according to the very formula used in the Award made by the King of Spain in 1906 and confirmed by the Judgment of 1960. In other words, instead of finding that the maritime boundary between Honduras and Nicaragua begins, for example, at co-ordinates 15° 00' 11" north and 83° 07' 54" west, your judgment might simply state: "From the mouth of the Coco River where it reaches the sea . . ." or "From the terminus of the land boundary resulting from the Arbitral Award made by the King of Spain on 23 December 1906, the boundary of the areas belonging respectively to the Republic of Honduras and the Republic of Nicaragua shall take the following course . . .". It would then suffice to indicate the point on the bisector line which is currently three nautical miles away from the mouth of the river.

38. There is no doubt that this would have the following results:

— firstly, the maritime boundary would start from the endpoint of the land boundary between the two States, as fixed by the Arbitral Award of 1906; and

— secondly, this boundary would take the form of a straight line, adjustable according to the fluctuations of the mouth of the river.

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[162] MN, p. 83, para. 23 and p. 85, para. 30; RN, p. 197, para. 10.5.

In Nicaragua's view, such an approach would have major advantages and hardly any drawbacks.

Madam President, I believe it is one o'clock. I have about 15 minutes more. Would you like me to stop here, or go on with this first part now? In any event, I shall be continuing tomorrow.

Le PRESIDENT : Oui. Merci Monsieur Pellet. S'il vous faut encore 15 minutes, je crois que nous allons lever l'audience et entendre demain matin la fin de cet exposé, ainsi que le reste de votre plaidoirie. Merci beaucoup.

L'audience est levée.

L'audience est levée à 13 h 5.
