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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Monday 12 March 2007, at 10 a.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le lundi 12 mars 2007, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The Government of the Republic of Nicaragua is represented by:

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

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Ms Ana Mogorrón Huerta,

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

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The PRESIDENT: Please be seated. The sitting is now open. The Court meets today to hear the first round of oral argument of the Republic of Honduras. I recall that Honduras will conclude its first round of oral argument on Friday 16 March, and I now give the floor to the Agent.

Mr. VELÁSQUEZ:

1. Thank you, Madam President. Madam President, Members of the Court, it is a great honour for me to appear before the Court and to represent my country as its Agent in this case.

2. Our delegation is today joined by His Excellency Mr. Milton Jiménez Puerto, Secretary of State for Foreign Affairs.

3. Honduras is a peaceful and law-abiding nation committed to the international rule of law. It has been involved in several cases before this Court and has always abided with the judgments.

4. The Constitution of Honduras emphasizes the central importance of international law. Article 8 guarantees the primacy of international law. Article 9 defines Honduras's international boundaries by reference to international judgments, arbitral awards and treaties. And Article 15 expressly provides for compliance with judgments rendered by this Court and other competent international tribunals.

5. This morning I can be brief. I will not trouble the Court with a full reiteration of the Honduran position, which will be developed by our counsel. As Agent, however, it falls to me to address a number of overarching issues of principle. I will address five matters that have become particularly pertinent following Nicaragua's oral presentation last week. Then I will have the pleasure of introducing the counsel who will speak for Honduras.

6. My *first observation* relates to geography, a matter that plays a central role in this case. In his opening statement, the Agent of Nicaragua made an "elementary description" of the territories of Nicaragua and Honduras and rebuked Honduras for claiming that any part of its coast faced east. I respectfully suggest that, when addressing this Court, resort should be made to authoritative legal sources rather than an encyclopaedia. If one consults the 1906 Arbitral Award issued by His Majesty the King of Spain, we find that the Honduran territory is described as having the following borders: "on the South with Nicaragua, on the South-West and West with the Pacific

Ocean, San Salvador and Guatemala; and on the North, *North-East and East* with the Atlantic Ocean . . ."[1]. It seems that with its statement, Nicaragua now wishes to revise the recognition of Honduras territory, including the islands, in the 1906 Arbitral Award. I need not remind this Court that the validity and binding force of that Award were confirmed by this Court in 1960.

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

8. Sovereignty over the islands has a decisive impact on the maritime delimitation. The fact that Nicaragua had nothing to say about the islands in its Application speaks loudly about the merits of the new claim it has chosen to make, at this unprecedentedly late stage.

9. Madam President, Members of the Court, the principles and rules of international law pertaining to territorial sovereignty are clear. They point decisively to the conclusion that Honduras has title to the islands north of the 15th parallel. That sovereignty cannot be ignored. There is no question of the Court proceeding outside the framework of international law and rendering a judgment *ex aequo et bono*, which could incidentally draw a line of attribution transferring sovereignty over these islands from Honduras to Nicaragua.

10. The *third observation* is to recall that Honduras is here as the Respondent. Honduras has negotiated maritime boundaries in the Caribbean Sea with Colombia, Mexico, and the United Kingdom with regard to the Cayman Islands. With Nicaragua we have always considered the 15th parallel as a boundary agreed between our two countries. It is why we accepted Nicaragua's 1977 invitation to negotiate a definitive delimitation of the boundary which had already been

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[1]Arbitral Award made by H.M. Alfonso XIII, King of Spain, in the border dispute between the Republics of Honduras and Nicaragua (Annexes to Application (No. 2), p. 20).

agreed in practice. But the abrupt change in government and policies in Nicaragua meant that those negotiations never took place.

11. Having been called before the Court, Honduras has participated in the proceedings in good faith, and is confident that the Court will confirm its position. That position is a long-standing one. It is not new. It does not seek to disrupt the long-standing relationship between our two neighbouring States. It is not dependent upon novel or imaginative legal theories. The position of Honduras is grounded in history, geography and the conduct of the Parties. For many years Nicaragua too was comfortable with this position. For that reason, from the beginning of the present proceedings, Honduras has reasserted the "traditional line" based upon reciprocal conduct and resulting from a long-standing *modus vivendi.*

12. *The fourth observation* I wish to raise concerns the starting-point of our boundary delimitation. Nicaragua made the accusation at paragraph 1.14 of its Reply, of an "Honduran attempt to take over part of the right bank of the River Coco". That is not true. The territory to which Nicaragua was referring is not on the right bank of the River Coco, but on a small island that has built up in the mouth of the Rio Coco *today*. I emphasize *today*. That is clear from the maps appearing in the Honduran pleadings.

13. On behalf of Honduras I wish to emphasize — and wish the record to show very clearly — that this island does not belong to Nicaragua. The 1906 Award is very clear on this matter: the island is part of Honduras, not Nicaragua.

14. *The fifth — and final — observation* concerns the line of delimitation that Honduras proposes. Counsel will demonstrate that the line Honduras claims can be achieved through the strict application of the rules and principles of international law, in particular the 1982 United Nations Convention on the Law of the Sea and the jurisprudence of the Court. On this side of the room we have noted that Nicaragua has changed its case. An application for the delimitation of maritime spaces is, apparently, about to become a case on sovereignty over islands. The distinguished Agent of Nicaragua indicated that a new submission would be made on this aspect, as well as a revised submission on the starting-point of the line of delimitation. We will pay close attention to the new submission, as well as the clarification of the existing one. It may be that these

will require Honduras to reflect further on its final submissions, a matter on which we reserve our position.

15. Madam President, *let me now turn to the outline* of the Honduran presentations in this first round of oral proceedings and introduce the counsel who will present the Honduran position.

16. Professor Christopher Greenwood will begin with some fundamental observations about the case, and provide an overview of the approach that will be taken by Honduras.

17. Professor Luis Ignacio Sánchez Rodríguez will then address the question of State succession and the role and place of *uti possidetis* in this maritime boundary case between the Parties. He will show clearly that the islands north of the 15th parallel belong to Honduras by virtue of the *uti possidetis* principle and that this has important consequences for the maritime boundary.

18. Professor Philippe Sands will then address the conduct of the Parties. His first presentation will be on *effectivités* over the islands; his second presentation, later in the week, will address conduct in relation to respect for the traditional line dividing the maritime area, along the 15th parallel.

19. Professor Carlos Jiménez Piernas will address the diplomatic history, showing the change of policy in Nicaragua's position in support of the traditional line between Honduras and Nicaragua. His presentation will also show that Nicaragua did not, before these proceedings were underway, claim sovereignty over the islands.

20. Professor Jean-Pierre Quéneudec will address the geographic context. He will focus attention on the area to be delimited, the relevant coasts and the main geographic features to be considered.

21. Professor Pierre-Marie Dupuy will then address the applicable law, with particular reference to the delimitation of the maritime spaces.

22. After Professor Sands's second presentation on conduct, Mr. David Colson will examine the Honduran line in detail and address its equitable character.

23. As usual Honduras is providing judges' folders containing copies of the graphics they are going to show on the screen. In addition, counsel will indicate the references in the written text of their pleading.

24. Madam President, this concludes my opening statement. I wish to thank you and the distinguished Members of the Court for your kind attention. May I ask that you now call on Professor Christopher Greenwood.

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

Mr. GREENWOOD:

1. Madam President, Members of the Court, may it please the Court. It is an honour to appear before you today on behalf of the Republic of Honduras and a personal pleasure for me to do so during your presidency, Madam President.

(1) Introduction

2. My task this morning is to give an overview of the arguments of Honduras — both the positive arguments in support of the boundary line claimed by Honduras and our arguments in response to the case put last week by Nicaragua. As in the written pleadings, my colleagues and I will refer — for simplicity — to the line constituting the traditional boundary between the two States as being the 15th parallel, rather than giving the exact co-ordinate, which is 14° 59.8'.

3. In accordance with the Rules of Court[2], Honduras will concentrate on the issues that continue to divide the Parties and will not repeat what is said in its written pleadings. For the avoidance of doubt, however, let me make clear that — save to the extent that the contrary is expressly stated — Honduras stands by the entirety of its written pleadings.

(2) The issues between the Parties

4. Madam President, it is a matter for regret that the pleadings to date — far from reducing the issues dividing the Parties — have in fact increased them. That was made clear by the distinguished Agent of Nicaragua when he told the Court, last Monday, that "in its final submissions at the end of these oral pleadings" Nicaragua "will specifically request a decision on the question of sovereignty" over the islands[3].

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[2]Art. 60 (1).

[3]CR 2007/1, p. 46, para. 103.

5. Now, the Application by which Nicaragua seised the Court was confined to a claim for a maritime boundary. There was no mention of any dispute over land territory of any kind. The Memorial was also largely silent on this subject. The Reply said rather more, but even then there is no hint that Nicaragua was seeking a judgment from the Court that it had title to the islands.

6. Then, Madam President, we had the extraordinary spectacle of the claimant telling the Court on the first day of the oral hearings that it wanted to turn the case about a maritime boundary, which *it* had chosen to put to the Court, into a case about title to land as well. And all of this more than seven years after the filing of the Application and three-and-a-half years after the close of the written pleadings in which Honduras had specifically raised the fact that Nicaragua had not made a claim in respect of the islands!

7. Nevertheless, Madam President, Nicaragua's remarkable volte-face has one important advantage. Its promised new submission places in stark relief the nature of the task facing the Court. Now that the Court is asked to decide both on title to the islands and on the maritime boundary, two matters become clear.

8. First, the order in which the two issues has to be addressed — it is a well-established principle that it is the sovereignty of the State over land territory which determines the extent and the boundaries of its maritime spaces. As it is often put "the land dominates the sea" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment*, *I.C.J. Reports 1978*, p. 36, para. 86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001,* p. 97, para. 185). Now, this necessarily means that a court faced with a dispute over land and maritime spaces — as the Court is now — *must* resolve the question of sovereignty over the land *before* it turns to the maritime boundary. Moreover, it is plain that the choice of methodology for drawing the maritime boundary is determined by the relationship of the land territory of one party to the land territory of the other — as Mr. Brownlie put it, "the method reflects coastal relationships"[4]. It follows that the first question — which party has sovereignty

[4]CR 2007/2, p. 16, para. 32.

over the islands — has to be determined before the methodology to be used in answering the second question — where is the maritime boundary — *can* be selected.

9. Secondly, Madam President, it is now clear — if it was not before — that there are two quite separate bodies of law for the Court to apply. The determination of the maritime boundary is governed by the provisions of the Law of the Sea Convention of 1982. But those provisions have no relevance to the prior question of title to the islands. Title to land territory — whether mainland or insular — is governed by quite different and distinct principles of international law.

10. It follows that this case calls, first, for a decision on title to the islands by application of the principles of customary international law regarding title to land territory. And only once that decision is made, the relationship of the land territory of Honduras to Nicaragua becomes clear and the focus then shifts to the maritime spaces. At that point, the Court is asked to determine the boundary between the maritime territories of the Parties by an application of the law of the sea.

11. Now, Nicaragua has not expressly denied either of these propositions — it is difficult to see how it could do so. It has even paid lip service to them at various times. But its entire argument last week was an attempt to avoid them. Mr. Brownlie took you straight to his favoured bisector method, ignoring the islands completely. While he told the Court that the method of maritime delimitation had to reflect the coastal relationship between the Parties — which is plainly correct — it seems that it is only those coasts to which he wants to refer which affect the methodology.

12. But the real clue to Nicaragua's strategy was buried away in the Agent's speech. In paragraphs 77 to 79 of that speech, the distinguished Agent for Nicaragua said — and I quote — "Nicaragua considered that by using a bisector as a method of delimitation, sovereignty over these features [as he calls the islands], could be attributed to either Party depending on the position of the feature involved with respect to the bisector line"[5]. So, *first* choose the method of maritime delimitation, *then* apply it to determine the maritime boundary and *then* the title to the islands will follow, will simply fall into place. In plain words, what Nicaragua is suggesting is that it is the

[5]CR 2007/1, p. 38, para. 77.

method of maritime delimitation which will determine the question of sovereignty over land — the land will follow the sea rather than dominate it.

13. Now, Madam President, that simply cannot be right. This is not a case in which it has been — or could be — suggested that the Parties have asked the Court to decide a question *ex aequo et bono*; it is a case in which each question has to be decided in accordance with law. And there *is* no law which justifies the proposition that title to land can be determined by the methodology of maritime delimitation. Nicaragua's strategy is subtle. It has been advanced — as one would expect — in the most skilful way but it is quite simply wrong in law and Honduras has every confidence that the Court will see it for what it is.

14. Unfortunately, the last-minute nature of Nicaragua's change of case means that the Court has not had from the Parties the assistance it is entitled to expect regarding certain essential elements of this case — certain essential elements of the issues now before it. In an attempt to remedy that deficiency, Honduras has substantially revised the presentations we had planned to give. But the overall case of Honduras is simple: title to the land *must* be decided first, and *must* be decided in accordance with the law applicable to the acquisition and retention of land territory. Only once that question has been decided is it possible to determine which methodology is appropriate for determining the location of the maritime boundary and to apply that method to the facts of the present case.

(3) The earlier cases

15. Madam President, before turning to the dispute over the islands, it is necessary to say a little about the historical location of the present proceedings. This is not, of course, the first time that the boundary between these two countries has been the subject of legal proceedings. There have been two earlier cases — the 1906 arbitration before the King of Spain (*Arbitral Award Made by the King of Spain on 23 December 1906* (*I.C.J. Pleadings 1958*, Vol. I, p. 18)) and the proceedings before this Court in 1960 (*Judgment, I.C.J. Reports 1960*, p. 192). They are important parts of the background to the present proceedings and the passages that have been cited to you cannot properly be understood out of context, so it may be useful if I say something about the Award and the 1960 decision as a whole.

16. Let me start with the 1906 Award. Four points about that reward are particularly worthy of note. First, the *compromis*, which was contained in the 1894 Gamez-Bonilla Treaty (*ibid.,* p. 199), was firmly based on the principle of *uti possidetis juris.* That is made quite clear by Article II (3) and (4) of the Treaty.

17. Secondly, in applying that principle, the King of Spain dealt specifically with an issue which Nicaragua raised last week, namely that the coastal settlements on that part of the Caribbean coast were subject — in the period immediately prior to independence — to the Captain-General of Guatemala rather than the Governor of Honduras or Nicaragua. Now, what the Award said about that point is this:

> "although it is nevertheless true that these settlements remained directly subject to the Captain-General's command of Guatemala, both Parties agreed to recognize that this fact in no way altered the territory of the provinces of Nicaragua and Honduras, the latter Republic having shown by means of certified copies of despatches and accounts that before and after 1791 the Intendant Governorship of Comayagua" — which is the old name for Honduras — "superintended everything appertaining to its competence in Tujillo, Rio Tinto, and Cape Gracias a Dios." (*Arbitral Award Made by the King of Spain on 23 December 1906*, *I.C.J. Pleadings, 1958,* Vol. I, pp. 20-21.)

18. Thirdly, Madam President, in those proceedings Nicaragua claimed that the boundary line *"continue par le centre du cours d'eau jusqu'a sa rencontre avec le méridien qui passé au-dessus du Cap Camarón et suit ce méridien jusqu'a la mer, laissant au Nicaragua Swan Island"* (*ibid*., Vol. I, p. 624). Swan Island is depicted here on illustration No. 1. This submission was rejected — the Nicaraguan submission — but it demonstrates that Nicaragua considered that *uti possidetis* justified both a straight line boundary into the sea and title to an island some 90 nautical miles offshore.

19. Lastly, the 1906 Award defined the terminus of the land boundary at Cape Gracias a Dios — only part of the terms were read to you by counsel for Nicaragua last Friday — let me read you the whole passage:

> "The extreme common boundary point on the coast of the Atlantic will be the mouth of the River Coco, Segovia or Wanks, where it flows out in the sea close to Cape Gracias a Dios, taking as the mouth of the river its principal arm between Hara and the Island of San Pio where said cape is situated, *leaving to Honduras the 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 Pio, 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 Pio." (*Ibid.*, Vol. I, pp. 25-26; emphasis added.)

Madam President, on the screen one sees the island of Hara, here, the larger island, and then there are these two islets, here: those are islets formed in the mouth of the main channel of the river and the Award clearly allots them to Honduras. The island of San Pio is this area down here, which is part of Nicaragua, under the terms of the Award (figure 2).

20. Now, Madam President, despite the very clear duty in the 1894 Treaty to honour the award — Nicaragua refused to comply with important parts of it and remained in occupation of part of the land marked with the striped shading on illustration No. 3. This is a map submitted in the distinguished Agent of Nicaragua's folder last week: but we have added the purple colouring to make clear the area north of the Rio Coco which the 1906 Award adjudged was part of Honduras. Now, Nicaragua declined to withdraw from a part of that area, although there is no evidence to support the assertion by Nicaragua last week that it remained in control of the coastal strip of territory between the boundary mark at Cape Gracias a Dios and the northernmost tip — here — which is Cap Falso. I would just highlight one point about this and that is that Nicaragua and Honduras took the question of the validity of the Award to this Court in 1960 and the Court upheld the validity of the Award and its binding character (*I.C.J. Report 1960*, p. 192). Only one of the arguments do I want to refer to, and that is Nicaragua's argument that the Award did not observe the rules laid down in the 1894 Treaty. The Court said "this complaint is without foundation inasmuch as the decision of the arbitrator is based on historical and legal considerations *(derecho histórico)* in accordance with paragraphs 3 and 4 of Article II" (*ibid*., p. 215). The Court will recall that those were the provisions in the 1894 Treaty which embodied the principle of *uti possidetis*.

21. So, Madam President, the Court rejected the suggestion that the land north of the River Coco was, as Nicaragua's map describes it "the historic extent of Nicaragua". Between 1906 and the final implementation of the Court's Judgment in 1962, to the extent that Nicaragua occupied land *north* of the Rio Coco, it did so illegally. It was an illegal occupation of land which was lawfully the sovereign territory of Honduras. The precise consequences of that fact will be addressed later; for now, the important point is to see that occupation for what it was: a clear violation of Nicaragua's international legal obligations. Nicaragua finally withdrew from any

territory north of the Rio Coco not in 1963, as was suggested last week, but according to Nicaragua's Memorial, in May 1961[6].

22. Before leaving this map, let me just make two other points about it. The first is that the title "[t]he historic extent of Nicaragua" has apparently been added for these proceedings — the map in the 1958 pleadings before the Court is not so described. The Court might wonder at Nicaragua's decision to add, wholly unnecessarily, a title which is manifestly inaccurate in view of the Award and the Court's earlier decision.

23. Secondly, Madam President, the addition of that description, *now*, for the purpose of this case is interesting in another respect: the map does not show the islands which are the subject of the current dispute.

24. The last step in the earlier proceedings which needs to be mentioned is that, following the Judgment of the Court in 1960, a Mixed Commission was established by the Inter-American Peace Committee to verify the starting-point of the land boundary at the mouth of the River Coco. It was that Commission which fixed the starting-point, shown on the next illustration (figure 4), at 14° 59.8' N, 83° 8.9' W. The copy of the map in your judges' folder may be a little easier to pick out than the large illustration at the back.

(4) Title to the islands

(a) *The nature and location of the islands*

25. Now, Madam President, let me turn to the dispute regarding the islands: and I sill spend rather longer on this than on the maritime boundary precisely because it is not so fully covered in the written pleadings. Counsel for Nicaragua last week used every euphemism in the English language — and I should say, given Professor Pellet's presence, every euphemism in the French language was doubtless used as well — to avoid referring to these islands as islands. Even when telling the Court he would be seeking a declaration regarding sovereignty over them, the Agent for Nicaragua preferred to speak of "features". But no amount of playing with words should be allowed to distract the Court from the simple fact that there are four substantial islands lying just to the north of the 15th parallel: Savanna Cay, South Cay; Bobel Cay and Port Royal Cay (figures 5

[6]MN, p. 30, para. 27.

and 6). This map, which has just come up, is designed to concentrate on the particular area. I should make one point clear, if I may: when it refers to the disputed maritime area — this is a part of the disputed area — it is not our suggestion that the disputed area lies simply between the red and black lines and we will have more to say about that.

26. Savanna Cay, which is depicted on the next illustration, No. 7, is 28 nautical miles from the Honduran side of the mouth of the River Coco and 8.2 nautical miles north of the 15th parallel. In 1999 a group of Honduran officials visiting the islands, in connection with immigration controls, found 26 people living there (CMH, Ann. 146). Now the photograph which you see here — a double photograph, the first one taken from the sea is a view of the island itself, Savanna Cay, and then below that is the triangulation marking, which was placed there in 1980 to 1981 (figure 8). That was pursuant to a 1976 arrangement between the Government of Honduras and the United States Department of Defense for collaborative work in "hydrographic surveys of the ports and coastal waters of Honduras". That arrangement is to be found in Annex 152 of the Counter-Memorial.

27. Then let me turn to South Cay, the next island (figure 9), that is 41 nautical miles from the Honduran side of the River Coco and 8.2 nautical miles north of the 15th parallel. We have here a photograph (figure 10), which shows again the island — this time an aerial shot — and the triangulation mark placed there under the 1976 Arrangement. At the time of the 1999 visit, there were 19 people living on the island[7].

28. The next island is Bobel Cay (figure 11), which is 27 nautical miles from the Honduran side of the mouth of the Coco and 4.76 nautical miles north of the 15th parallel. Again, we have a photograph of the island (figure 12) and of the 1976 triangulation mark, which shows quite clearly that it is an official Honduran instrument. In addition to that, a radio antenna some 10 m high was placed there in 1975 by the Union Oil Company operating under a concession from Honduras (figure 13)[8]. While there was no one living on Bobel Cay when it was visited in 1999, there have been people living there at various times during the last three decades, as my learned friend Professor Sands will show tomorrow.

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[7]CMH, Ann. 146.

[8]RH, Ann. 264 from which, p. 157, the photograph is taken.

29. Finally, there is Port Royal Cay (figure 14), which is 32 miles from the mouth of the Coco and 7 nautical miles north of the 15th parallel. Now unfortunately we have no photograph in the record of the island, but the 1999 visit found evidence of recent habitation[9].

30. In addition to these four main islands (figure 15) — all of which can now be seen on the next illustration — there is also a number of smaller islands and cays in the same area (figure 16). The four main islands and the cays adjacent to them are sometimes referred to collectively as "Media Luna", although, confusingly, that term is also used to describe one of the smaller cays and a reef in the area. I will just highlight them on the screen: there is the reef; there is Media Luna Cay; but "Media Luna" is also used as a term to describe the group there. One sees it in that sense in an Annex in the Nicaraguan Reply. Annex 31 to the Reply is an extract from an unofficial volume entitled, in its English translation, *The Geographic Index of Nicaragua*, that was published in 1971. It contains the following definition of "Media Luna" or "Half Moon". Underneath that term we find this definition: "Group of cays and reefs located approximately 70 kilometres east of cape Gracias a Dios, on the submarine shelf. It includes the following islets: Logwood, Bobel, Savanna, South, Half Rock, Alargado Reef and Cock Rock. It is located at Latitude 15 degrees, ten minutes North and Longitude 82 degrees, 35 minutes."

31. Let me also mention Logwood, which is one of those expressly referred to in the *Geographic Index* (shown on figure 16) — Logwood is just there. On older maps this is frequently referred to by the name "Palo de Campeche". And it is under that name that it was the subject of some of the earlier *effectivités* on the part of Honduras.

32. Madam President, Nicaragua has devoted a lot of time and energy to telling the Court that these islands are small, insignificant and cannot sustain permanent habitation. They *are* small, yes; Honduras has never suggested otherwise. But they are *not* insignificant, as the photographs demonstrate, and the largest islands are *not* uninhabited. Those who live there are fishing people who migrate during the year as the fish stocks and conditions change but who tend to return each year and to stay for large parts of the year, and there is clear evidence of that in the Honduran pleadings, to which my learned friend Professor Sands will refer tomorrow.

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[9]CMH, Ann. 146.

33. Moreover, in spite of Nicaragua's best efforts to paint the islands as unstable features at constant risk of being submerged by changing conditions, the photographs I have just shown the Court make plain that the four main islands are not at all in that category — there are records of these islands, including records of persons living on them, going back to the nineteenth century. They certainly bear comparison with the islands with which the Court dealt in the recent *Indonesia/Malaysia* case (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625) and the *Qatar/Bahrain* case (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment, I.C.J. Reports 2001*, p. 40).

34. Most importantly, Madam President, they are islands for the purpose of Article 121 of the Law of the Sea Convention — naturally formed and above sea level at high tide — and they are not "rocks which cannot sustain human habitation or economic life of their own", within the sense of Article 121 (3). Indeed, that is not contested by Nicaragua and represents a point of agreement between the Parties.

(b) ***The attribution of sovereignty over the islands***

35. These then are the characteristics of the islands. The next question is how the Court is to go about the business of resolving the two competing claims to sovereignty. In the first place, it is clear that, contrary to what is suggested by Nicaragua, the resolution of such competing claims cannot be accomplished by the process of drawing a maritime boundary line, whether by the bisector or any other method, and then treating that as a line of allocation which gives sovereignty over the islands to the State on whose side of that maritime boundary each island happens to lie. That approach is completely contrary to principle and the practice of the Court and other tribunals, in resolving mixed land and maritime disputes. And the Court — albeit in a slightly different context — has observed that:

> "a 'boundary', in the ordinary meaning of the term, does not have the function that Indonesia attributes to the allocation line that was supposedly established by Article IV out to sea beyond the island of Sebatik, that is to say allocating to the parties sovereignty over the islands in the area." (*Sovereignty over Pulau Ligitan and Pulau Spiadan (Indonesia/Malaysia), Judgment*, *I.C.J. Reports 2002*, p. 648, para. 43.)

36. Instead, Madam President, the task of determining sovereignty over the islands requires the application of the principles of international law on acquisition and maintenance of title to land. Since both Parties were formerly part of the Spanish Empire, there are potentially two stages to this task. The first is to apply the principle of *uti possidetis juris.* If the application of this principle establishes that the island passed on independence to one or other Party, that is conclusive unless there is clear evidence that that Party has subsequently abandoned or lost title. The second stage is to examine the practice, or *effectivités*, of each Party in relation to the disputed islands. The principle of *uti possidetis* will be addressed in detail by Professor Sánchez Rodríguez later this morning and the *effectivités* by Professor Sands tomorrow. I shall merely offer a brief overview.

(c) *The critical date*

37. But before doing so, I must say a little about the question of the critical date since this concept has featured so prominently in Nicaragua's arguments last week. Madam President, Nicaragua's arguments regarding the critical date are both confused and wrong in law. Nicaragua contends that the critical date in this case is May 1977. Why? Because that is when its Government approached the Honduran Government to propose conversations regarding the boundary, a proposal accepted by Honduras. Now for this exchange of letters to constitute a critical date — let alone *the* critical date — it would have to mark what the Court termed in the *Indonesia/Malaysia* case "the date on which the dispute between the Parties crystallized", and it would only be that if it was when conflicting claims to the islands were advanced (*ibid.*, p. 682, para. 135).

38. It is worth, therefore, looking at the letters on which Nicaragua relies, to see exactly what they say. Nicaragua's letter — illustration No. 17 — is now on screen. The critical passage, which is highlighted, reads as follows: "my Government wishes to initiate conversations leading to the determination of the definitive marine and sub-marine delimitation in the Atlantic and Caribbean Sea zone".

39. And here in No. 18 is the reply from the Foreign Minister of Honduras. The critical passage (again highlighted) accepts with pleasure the invitation to negotiations in the terms set out in Nicaragua's earlier letter. Three comments are called for about these letters.

40. First, they make no mention whatever of any dispute regarding the islands. They refer only to negotiations "leading to the determination of the *definitive* marine and sub-marine delimitation". By no stretch of the imagination could they be said to have crystallized a dispute over the islands, nor do they hint at, let alone contain, conflicting claims to those islands. Nicaragua has confused what, it is now clear, are two separate disputes: one over title to the islands and the other over the determination of the maritime boundary. Even if the letters could be said to mark the critical date for the maritime dispute, they clearly do not do so with regard to the dispute over the islands.

41. Secondly, Madam President, even in respect of the maritime boundary, it is frankly difficult to see these letters as marking a crystallization of any dispute. No conflicting claims are made to anything. Instead, Nicaragua proposes, and Honduras accepts, negotiations — not on an identified dispute, but for the purpose of arriving at a *definitive* delimitation. The language used — far from crystallizing a dispute — does not even suggest the existence of one. On the contrary, it suggests that the Parties are largely in agreement and all that is called for is the establishment of a definitive boundary line. I will say more about that later, if I may.

42. Lastly, even if the letters did mark a critical date, they would not act so as to exclude evidence — or even attach to it reduced weight — if that evidence related to acts which, in the Court's words, "are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them". The acts on which Honduras relies in connection with the islands fall into just that category. Thus, to take one example, the installation on Savannah, South Cay and Bobel Cay of the triangulation marks may have taken place in 1980-1981 but it followed naturally and directly from the arrangement with the United States, concluded in 1976. Similarly, the visit by the immigration officials in 1999, to which I have already referred, was clearly a continuation of earlier such visits.

43. What then is the critical date — if indeed there is one — in respect of the dispute about sovereignty over the islands? The reality is that there may be more than one critical date. To the extent that the issue of title turns on the application of *uti possidetis*, the critical date is 1821 — the date when Honduras and Nicaragua obtained independence from Spain. So far as the consequence of *effectivités* is concerned, any critical date is obviously much later. As the Chamber made plain

in its 1992 Judgment in the *Land, Island and Maritime Frontier* case, there is nothing unusual in having different critical dates for different issues in a case of this kind (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351, para. 67).

44. Given the difficulty that Nicaragua has had in making up its mind what case it wants to bring to the Court, the Court might well feel that the critical date for the islands was last Monday morning! Certainly, it cannot be earlier than the date of filing the Memorial — 21 March 2001 — since this was the first time that Nicaragua asserted that it had title to the islands. No such assertion can be found in the Application and, Madam President, Nicaragua knows how to make a claim of title to islands in an application to this Court. Members of the Court might like to compare the Application in the present case with the Application Nicaragua made against Colombia, in the proceedings you will be hearing later this year.

45. It follows that in this case, Madam President, the Court can and should take full account of any *effectivités* which predate the filing of the Memorial. And of course, acts of recognition by one State of another State's title and statements against interest would be relevant no matter when they were made.

(d) Uti possidetis juris

46. Now with that in mind, let me say a little about the application of *uti possidetis*, although Professor Sánchez Rodríguez will deal with this issue in greater detail and with greater expertise than I can bring to bare. At the outset it is important to note that there is agreement between the Parties on one particularly significant issue, namely that the islands were not *terrae nullius* at the time of independence and have not become *terrae nullius* at any subsequent time. That was expressly accepted by Professor Remiro Brotóns last Wednesday[10].

47. It is plain that the islands did not remain Spanish — any rights Spain might have claimed to retain after the independence of the Central American States it formally relinquished in the treaties it concluded with them in the 1850s and 1860s. In the case of Honduras, the Treaty of Recognition of 15 March 1866 expressly provided that Spain recognized the sovereignty of

[10]CR 2007/3, p. 36, paras. 85 and 86.

Honduras over her mainland territory and the adjacent islands and renounced any claims it might have had[11]. There is a similar provision in the treaty between Nicaragua and Spain concluded in 1850[12]. Obviously neither treaty establishes which of the two successor States acquired title by way of *uti possidetis* but they do make clear that there can be no Spanish claim in the post-independence era. Nor are the islands claimed by any other State on the basis of a title not derived from Spain.

48. So the only question is this: to which of the successor States did Spain's rights to the islands devolve? And here, Madam President, it is noticeable that Nicaragua does not make a claim to have succeeded to Spain's rights with regard to the islands. Nor has any such claim ever been made by, for example, Guatemala. Honduras and Honduras alone claims sovereignty on the basis of *uti possidetis*. That is what makes this case markedly different from that decided by the Chamber in 1992, where both El Salvador and Honduras advanced such claims (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351).

49. Instead, Madam President, Nicaragua contends that the islands were under Spanish sovereignty prior to independence but either they had not been attributed to one or other province or it cannot be established to which province they appertained. On that basis, Professor Remiro told the Court last week, *"il faudra alors avoir recours à d'autres titres ou appliquer le principe de la proximité"* (CR 2007/3, p. 36, para. 85).

50. Madam President, Nicaragua has sought to make light of this issue but the approach which it urges on the Court really does raise serious difficulties. The principle of *uti possidetis* has emerged as an important principle in the law of title to territory, precisely because of the stability it brings to the vital issue of borders and sovereignty. In the case of what was formerly the Spanish Empire in the Americas, the principle means that whatever territory was Spanish at the time of the collapse of that empire devolved to one or other of the successor States — the principle is comprehensive in its scope.

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[11]CMH, Vol. II, Ann. 8.

[12]RN, Vol. II, Ann. 11.

51. In the present case, there is no dispute that the islands were Spanish immediately prior to independence, no dispute that they have been renounced by Spain, no dispute that they have not been *terrae nullius* at any relevant time and, crucially, they are claimed on the basis of *uti possidetis* by only one of Spain's successor States. In these circumstances to hold — as Nicaragua invites you to do — that no title can be established at all on the basis of *uti possidetis* would be seriously to undermine the effectiveness of that principle.

52. Moreover, as Professor Sánchez Rodríguez will explain, Nicaragua's analysis is quite simply wrong. The evidence — accepted, as we have seen, in the 1906 Award — is that the coast as far south as Cape Gracias a Dios and including the coastal settlements formed part of Honduras, or Comayagua as it used to be called. The "adjacent islands that lie along its coasts" — to use the term employed in the Treaty of 1866 — were included within that province.

53. Those islands are closer to the coast of Honduras than the coast of any other part of the then Spanish Empire. And here, Madam President, I should just make the point that it is adjacency to the coasts which is mentioned in 1866 and which was significant throughout the Spanish period. Nicaragua's attempt to build a proximity argument on the basis of the distance between these islands and Edinburgh Cay[13], just south of the 15th parallel, really is clutching at straws.

54. In addition, the practice during the imperial period was to make extensive use of lines of latitude and meridians as the basis for determining the attribution of small islands to one or other of the mainland provinces. We saw an instance of Nicaragua relying unsuccessfully on such an approach in relation to a meridian in its arguments in the 1906 arbitration. In the present case, it was the 15th parallel, running out to sea from Cape Gracias a Dios, which was treated as the boundary in the imperial era.

55. So for all these reasons, Honduras maintains that the principle of *uti possidetis* provides a solid Honduran title to the islands north of the 15th parallel.

(e) Effectivités

56. Let me now turn, Madam President, to the issue of *effectivités* in relation to the islands. The *effectivités* in this case are entirely post-colonial and, as the 1992 Judgment demonstrates, they

[13]CR 2007/1, p. 51, para. 8.

are relevant in two ways: first, as confirmation of the *uti possidetis* title and, secondly, as an alternative, free-standing basis of sovereignty in the event that the Court finds that *uti possidetis* does not provide a sufficiently clear answer.

57. Nicaragua said nothing last week about the law on this subject. Fortunately, the Court has recently reviewed that law in its Judgment in the *Indonesia/Malaysia* case. The Court there quoted with approval an earlier statement by the Permanent Court in the *Eastern Greenland* case in these terms:

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon the continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority" (*Sovereignty over Pulau Ligitan and Pulau Sipadan, I.C.J. Reports 2002,* p. 682, para. 134, quoting *Legal Status of Eastern Greenland, P.C.I.J. Series A/B, No. 53,* p. 45).

In that context, the Court made clear that the extent of conduct required was closely related to the nature of the territory in question. To quote again, this time from the Court itself in *Indonesia/Malaysia*:

> "In particular, in the case of very small islands which are uninhabited or not permanently inhabited — like Ligitan and Sipadan, which have been of little economic importance (at least until recently) — *effectivités* will indeed generally be scarce." (*Ibid.*, para. 134.)

Now these considerations are of particular importance here. The islands, like Ligitan and Sipadan, are small and of limited economic importance, although important enough to those who fish in the area around them, and fish from them. It is also noticeable, Madam President, that the Court in *Indonesia/Malaysia* quoted with approval another passage from the *Eastern Greenland* case, in these terms:

> "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries. (*P.C.I.J., Series A/B, No. 53*, pp. 45-46.)"

58. Now, Madam President, Nicaragua seeks to restrict reference to those *effectivités* as far as it can and for a very good reason — there are no *effectivités* to which Nicaragua can point in support of its own claim and, try as it might, it has no answer to the evidence of significant Honduran activity in relation to the islands. It has therefore sought to minimize the role of

effectivités in two ways: by restricting the period within which they can be found and by launching and attack on the evidence advanced by Honduras. Each of these tactics calls for a brief comment.

59. So far as the first is concerned, Nicaragua seeks to exclude or at least minimize the importance of anything occurring after May 1977 but, as we have seen, that cannot be the critical date for the dispute about the islands.

60. But it has quietly sought to advance another argument to restrict the period of time. Nothing that happens before 1963 could be relevant because it has said until that date it was Nicaragua that controlled the coast to the north of Cape Gracias a Dios. Well, Madam President, a few comments about that. This led incidentally to the distinguished Agent for Nicaragua's rather nice comment about how the period was so short that the practice couldn't even have reached the age of maturity and consent, so brief was it. It's a nice line, Madam President, but it's wildly inaccurate. First of all, Nicaragua itself concedes that it withdrew from the territory north of the Cape by May 1961, not 1963; so the dates are wrong. Secondly, there is no evidence before the Court that it was Nicaragua that controlled the coast as opposed to some of the inland areas between Cape Gracias a Dios and Cape Falso. Thirdly, Madam President, even if Nicaragua had controlled the coast during this period, it was doing so unlawfully, in violation of the principle of *uti possidetis* and in a clear breach of its obligation under the 1894 Treaty to give effect to the 1906 Award of the King of Spain. Now it challenged that Award certainly, but it challenged it, and before this Court, on grounds that convinced not one single Member of the Court except for the *ad hoc* judge nominated by Nicaragua.

61. Now that illegality has two important consequences for these purposes. First, it is plain that Nicaragua cannot be allowed to derive any legal benefit from it — the principle of *ex injuria jus non oritur* precludes it from doing so. Secondly, to the extent that there is any practice linking the islands to the coast north of Cape Gracias a Dios during the period of the occupation, that must be taken to inure today to the benefit of Honduras, the lawful sovereign, and not to have somehow survived to the benefit of Nicaragua even after the latter's belated withdrawal from the occupied territory.

62. And there is another consequence, more practical than juridical. Until the Nicaraguan withdrawal, there was a degree of uncertainty for third parties — whether States or individuals, and

for the governments — about the ultimate fate of the territory north of Cape Gracias a Dios. So it is not surprising that, when that problem is finally resolved by the Court's 1960 Judgment, the result if an intensification of activity in relation to the areas just offshore.

63. That's Nicaragua's first tactic. Her second tactic has been to launch an attack on the evidence tendered by Honduras. In part that has consisted of the usual forensic device of trying to portray inconsistencies between the statements of different witnesses. That is fair enough as far as it goes although the Court might feel the underlying assumption — that you can take a witness statement made by a fisherman and apply the same techniques of interpretation you would apply to a double-taxation treaty — might perhaps be a little far-fetched. But counsel for Nicaragua went much further and appeared to be alleging that some at least of these witness statements were artificially manufactured and could not be relied upon by the Court.

64. Madam President, you and your colleagues will be very well aware that that is a serious suggestion and one which no advocate before this Court should make unless he has evidence to support it. Nicaragua has not offered you a shred of evidence to support that allegation. In fact, the witness statements were the product of a visit to the islands by one of my colleagues — a member of the English Bar — who understands perfectly well his duty to this Court in relation to the preparation of evidence and who was subject, of course, to the very strict disciplinary code of the English Bar in everything he did, wherever he did it. The witnesses were told that their evidence was sought in connection with proceedings in this Court — that is perfectly natural and perfectly proper — but their testimony was their own and was honestly given. To suggest otherwise without any evidential basis for doing so would be wholly improper. We are sure, Madam President, that the suggestion was made inadvertently, or, at least, without full realization of the implications and we hope to hear and say nothing more about it. Obviously, if we do hear more of this, then we shall have more to say, a great deal more to say, in the second round.

65. So let me turn now to what the evidence of *effectivités* before the Court shows. Given the small size of the islands and the shifting nature of habitation — factors the Court has stressed are of considerable importance — there is in fact a surprisingly substantial body of Honduran *effectivités*. They fall into seven broad categories.

66. First, there are statements in Honduran laws. Not surprisingly, Honduran law does not list every island appertaining to Honduras by name; very few legal systems would do. But despite that, successive Constitutions of Honduras and its agrarian laws make express mention of Palo de Campeche — Logwood Cay — as falling within the territory of Honduras together with "all others located in the Atlantic". The 1982 Constitution also expressly refers to Media Luna, as well as Rosalind Bank and Serranilla. In view of the close proximity of the islands, the reference to Palo de Campeche and other islands in the Atlantic must be taken to include Bobel, Port Royal, Savannah and South Cay. Moreover, we have already seen that the term "Media Luna" is frequently used to refer to the entire group of islands and cays, including evidence on which Nicaragua relies before the Court.

67. Secondly, Madam President, there is the application of Honduran law on the islands. That can be seen in, for example, the application of Honduran criminal law, detailed in paragraphs 6.20 and 6.21 of the Counter-Memorial and in the witness statements referred to there. The application of that law to cases of theft and assault, amongst others on South Cay, Savannah and Bobel. Civil law has been applied to diving accidents and other incidents on and around the islands and cays.

68. Thirdly, Honduras has applied its immigration laws to the islands. The 1999 visit to which I referred earlier and which is the subject of Annex 146 to the Counter-Memorial, is one example, but it is clear from a reading of the report that there had been earlier such immigration visits.

69. Fourthly, there is the fishing activity carried on from the islands. In the *Indonesia/Malaysia* case, the Court made clear — in the context of an Indonesian claim — that "activities by private persons cannot be seen as *effectivités*" but significantly it added "if they do not take place on the basis of official regulations or under governmental authority" (*Judgment, I.C.J. Reports 2002*, p. 683, para. 140). But that is precisely what happened here. The fishing activity carried on from the cays has been subject — as numerous witnesses have testified — to the grant of *bitacoras* — licences — by the authorities of Honduras.

70. Fifthly, there is the evidence of the oil concession practice. Suffice it to say for now that Honduras — and *only* Honduras — has granted oil concessions for the areas around the islands and

the only oil companies which have operated on or around those islands have been Honduran concessionaires: the building of the radio mast by Union Oil on their Bobel Cay in 1975, is an example.

71. Sixthly, there is the evidence, already touched on, of the joint Honduran/United States survey.

72. And lastly, as Professor Sands will demonstrate, there is the assertion by Honduras in its foreign relations of sovereignty over the islands and the acceptance of those assertions by other governments — a factor considered particularly important, for example, in the *Eastern Greenland* case.

73. By contrast, Nicaragua has put before the Court no evidence of comparable *effectivités* on its part. Indeed, it cannot be said to have shown any *effectivités* at all. It is reduced to relying on a geographical index, which is not an official governmental publication, an internal British Government letter in highly qualified terms which appears never to have been communicated to either Honduras or Nicaragua, and the 1982 fishing boat arrests, which on Nicaragua's own arguments, relate to control of maritime rights under the law of the sea and cannot be regarded as an assertion of sovereignty over the islands themselves.

74. These points will be developed later by my colleagues but one has only to look at them in summary to see that Honduras has a substantial record of conduct in relation to the islands whereas Nicaragua has no significant activity at all. Honduras will submit that the evidence before the Court is clear, it is compelling, it is more extensive than that relied on by the Court in, for example, the *Indonesia/Malaysia* case, and more than sufficient to establish Honduran sovereignty over these islands.

(4) The Maritime Boundary

(a) The significance of the islands for the maritime boundary

75. Madam President, I have taken some time over the dispute concerning the islands because Nicaragua's change of case means that this has not been as fully argued as the maritime boundary dispute. But there is another reason and that is that sovereignty over the islands is the key to a proper understanding of the maritime boundary. Once the situation of those islands is

understood, four matters immediately become apparent with regard to the maritime boundary dispute.

76. First, Nicaragua's justification for jumping straight to its preferred bisector method is the confident assertion given to the Court by Mr. Brownlie that the construction of a provisional equidistance line is impossible[14]. But that is simply wrong. Illustration 19 shows just such a line.

77. Article 121, paragraph 2, of the Law of the Sea Convention is quite unequivocal: anything which is an island under Article 121, paragraph 1, that is to say, "a naturally formed area of land, surrounded by water, which is above water at high tide" carries the same right to a territorial sea as other land territory. In addition, unless it falls under Article 121, paragraph 3, as a rock which cannot sustain human habitation or economic life of its own, it also generates a continental shelf and an EEZ entitlement. The islands in this case are all islands within Article 121 and they do not fall within the provisions of Article 121, paragraph 3. The evidence tendered by Honduras would make that clear, but it is not disputed in any event. Accordingly, they are a part of the land territory of one Party or the other. They therefore can — and must — play a part in the construction of a provisional equidistance line.

78. They would be just as relevant in this respect, incidentally, if they were part of the territory of Nicaragua rather than, as is clearly the case, part of Honduras. To illustrate this proposition the next illustration, No. 20, shows the provisional equidistance line calculated as if the islands south of the navigation channel were Nicaraguan; south of the navigation channel but north of the 15th parallel. Interestingly that line is still well to the south of the bisector line which Nicaragua invites you to draw.

79. But the point for the moment is not the location of the line but the possibility of constructing it. Once it is clear that drawing a provisional equidistance line is possible, then the justification for departing from the normal practice in maritime boundary cases and rushing to the use of a bisector method — the line preferred by Nicaragua — and there is nothing provisional about *that* line, nothing at all. That justification simply falls away.

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[14]CR 2007/3, p. 10, para. 192.

80. Secondly, Madam President, an important part of the maritime case is about the territorial sea, not the continental shelf or exclusive zone. But just how important a part becomes apparent only when one considers the islands.

81. As counsel for Nicaragua helpfully reminded the Court last week, the provisions of the Law of the Sea Convention regarding the drawing of a territorial sea boundary could not be clearer. Article 3 gives the coastal State a right to a territorial sea to a breadth of 12 nautical miles. That right is of course subject to the rights of other States to their territorial seas, but it cannot be displaced by claims to a continental shelf or exclusive economic zone. Moreover, where two adjacent States, such as Honduras and Nicaragua, have overlapping territorial sea claims, in the absence of agreement on some other method, the use of the median line or equidistance method is mandatory except where "it is *necessary* by reason of historic title or other special circumstances to define the territorial seas of the two States in a way which is at variance therewith".

82. The next illustration, No. 21, shows the application of these principles to the present dispute; shows all of the islands in the area with a 12-mile arc drawn around them. As the matter has been raised by Nicaragua, let me say a word about the method by which this map has been prepared. The basis is United States NIMA chart 28140, for the area north of the 15th parallel, and United States NIMA chart 28130, which covers the area south of the 15th parallel. Each of the offshore features, shown as having a territorial sea, is marked as an island on those charts and thus has an automatic entitlement to a territorial sea. The next illustration, No. 22, is an enlarged rendition from NIMA 28140 showing two islands, the area which is above water at high tide being the smaller area in the darkest shading. If one just looks for a moment at Port Royal Cay here, you see the small area in the top right-hand corner: that is the area that is proud of the water at high tide. The green area around it, the penumbra, is the area which is only proud of the water at low tide. As provided in for in Article 5 of the Law of the Sea Convention, the extent of the territorial sea is measured from the low-water line.

83. We have applied this criterion both north and south of the 15th parallel. Nicaragua's complaint last week that we had not done so consistently may, we suggest, be based on a misunderstanding of the markings on the charts. The depiction of that part of an island visible only at low water is easily confused with the marking for "dangerous shoals". And there is an example

here from south of the 15th parallel: this marking here, the dotted line, that is a "dangerous shoals" or "dangerous waters" marking; there are plenty of those in this area, it is a notoriously dangerous area for navigation (figure 23). Now, Madam President, that is an area which is permanently below water and is therefore irrelevant for the purpose of measuring the breadth of the territorial sea, although of course it is obviously very important for the purposes of navigation.

84. Thirdly, Madam President, once it is realized that the islands are part of Honduras, it becomes clear that the bisector approach advanced by Nicaragua produces a result which is wholly indefensible. If one superimposes the lines claimed by Nicaragua and by Honduras on the map showing the territorial seas around all of the islands, then it becomes clear that the Nicaraguan line would be unworkable — one looks at illustration No. 24. South of the Nicaraguan line would lie large areas of Honduran territory and territorial waters — this whole are here. No wonder that Nicaragua has belatedly sought to claim the islands north of the 15th parallel: its entire strategy in relation to its claimed single maritime boundary simply falls apart if those islands are Honduran. But that fact cannot alter the law applicable to the dispute concerning the islands and when that law is applied it is clear that Nicaragua simply has no case. The implications for its maritime boundary are then all too apparent. Mr. Brownlie told the Court last week that two of the goals of maritime delimitation were clarity and simplicity. But where are they in this picture? In the patchwork quilt which the Nicaraguan line would create? Or in the line which has served the Parties for many years as a clear, simple and straightforward boundary for their activities in the region?

85. Lastly, Madam President, the realization that the islands form part of the territory of Honduras brings into stark relief the inequity of what Nicaragua is urging on the Court. Nicaragua's proposed line would cut off the Honduran mainland from the islands and their territorial seas; it would deprive Honduras of access to the natural resources of the area around its islands and it would have obvious implications for the security of Honduras in that the Honduran islands would be isolated within Nicaraguan maritime spaces.

Madam President, I have about another 15 minutes to go, but I wonder whether that would be a convenient moment for the Court to break? I am happy to carry on if you would prefer.

The PRESIDENT: I think we would prefer you to conclude your statement.

Mr. GREENWOOD: Certainly Madam President.

The PRESIDENT: Thank you.

Mr. GREENWOOD: :

(b) ***The flaws in Nicaragua's approach***

86. Well, Madam President, the next part deals with this issue, which is that even on its own terms, Nicaragua's line is plainly deficient and the arguments advanced to show that it produces an equitable result are flawed. Let us examine the area claimed by Nicaragua. The Nicaraguan coast terminates at the 15th parallel — at Cape Gracias a Dios. The 1906 Award and the 1960 Judgment make that a given. If we then consider the area to the north of the 15th parallel, in illustration No. 25, we see that Nicaragua has simply no territorial presence there at all, whatever it may once have claimed. We also see, incidentally, why the 1906 Award described Honduras as bounded to the east, as well as north and north-east, by the Caribbean.

87. In these circumstances, it is not immediately obvious to the impartial observer why it is equitable for Nicaragua to have a continental shelf and a zone extending to the 17th parallel and perhaps beyond (figure 26). One is left with the sense that Nicaragua is desperately trying to gain at sea as much as possible of what she might have had if the King of Spain or this Court had found in her favour in relation to the land dispute. But they did not. Nicaragua failed in its claim to a large slice of the territory of Honduras and that failure has consequences at sea as well as on land.

88. Moreover, Madam President, the methodology proposed by Nicaragua is flawed. We have already seen that its use was predicated on the impossibility of drawing a meaningful provisional equidistance line whereas in fact drawing such a line is perfectly possible. We have also seen that the proposed bisector line produces unworkable results because of the Honduran islands. But the Nicaraguan methodology is deficient even on its own terms.

89. There is nothing inherently wrong with using a bisector method to construct a maritime boundary — it is one of the methods, albeit not the most widely used, in State practice. But the line is only as good as the angle which it bisects. Nicaragua's angle is supposed to have been constructed by taking account of the coastal directions of the Parties. It treats the two coasts as

straight lines, as we can see from illustration No. 27. In the case of some coastal fronts, that might be a perfectly reasonable approach but here it creates an angle that bears no relationship to the actual coasts at all (figure 28). Between the line drawn as representing the Nicaraguan coastline and the actual location of the coast is nearly 7,000 km^2 of the Caribbean Sea — that is in this area here.

90. But what Nicaragua does to Honduras is even more dramatic. The line drawn to represent what is supposed to be the coastal direction of Honduras is so far from the actual coast that there are 22,500 km^2 of land between that line and the sea. Now, the total land area of Honduras is only some 112,000 km^2. So what Nicaragua asks you to do is to cast adrift, so to speak, one fifth of the total landmass of the Honduras — a block more than 100,000 times the size of the iceberg which sank the *Titanic*. No wonder these waters are marked as dangerous for navigation on all the charts!

91. The reality is that the angle chosen by Nicaragua is wholly artificial. It comes nowhere near being a true reflection of the relationship between the two coasts.

92. Nor are the other arguments advanced by Nicaragua in an attempt to show that its line achieves an equitable result convincing. Other members of the Honduran team will deal with them in detail: let *me* just highlight four points.

93. First, Nicaragua rebukes Honduras for not appreciating that security considerations can be a relevant circumstance in achieving an equitable result. We heard quite a lot about that last week, how we got this point wrong. But the question is not whether security considerations *can* be a relevant circumstance, but whether on the facts of this particular case they *are* a relevant circumstance. And Nicaragua has not shown any Nicaraguan security considerations that would be adversely affected by the adoption of their preferred line rather than that advanced by Honduras. In fact it is Nicaragua's line which has security implications for Honduras because of the position of the islands.

94. Secondly, Nicaragua has made much of the so-called "Nicaraguan Rise" depicted here in illustration 30. It looks, Madam President, a little bit like the horn on the "orange rhinoceros" which Professor Pellet mentioned to you last week — and it must be said it is about as relevant to this case as such a mythical beast.

95. Of course, Nicaragua does not actually acquire rights in the maritime area simply by calling a submarine geomorphological feature the "Nicaraguan Rise". The Chamber in the *Gulf of Maine* case had no difficulty rejecting the suggestion that rights in that Gulf could be attributed to the United States because it was called the Gulf of Maine rather than the Gulf of Nova Scotia.

96. But there is a far more fundamental problem with Nicaragua's argument and that is that the Court has made it clear (for example in its decision in the *Libya/Malta* case) that geomorphological features such as the "Nicaraguan Rise" cannot determine the method of delimitation to be adopted or have any substantial weight in relation to the equity of the boundary to be determined. When one looks at the other features in the present case, such as the long-standing practice regarding the grant of oil concessions depicted here on illustration 31, and the reality of Honduran sovereignty over the islands, it becomes more than ever apparent that reliance on a submarine feature to which it is adventitiously given the name "Nicaraguan Rise" is wholly misplaced.

97. Thirdly, Madam President, Nicaragua's argument about equitable access to natural resources: this is really nothing more than an attempt to repackage its "Nicaragua Rise argument" in a more contemporary way. Nicaragua argues that for the Court to prefer the Honduran line to its own would be inequitable, because it would deny Nicaragua access to the resources of the "Nicaragua Rise". But Nicaragua has offered no evidence that natural resources are particularly linked to the "Nicaragua Rise". It makes an *assertion* to that effect as regards fisheries and then adds that "a similar correlation can be *assumed* to exist in relation to the incidence of oil and natural gas"[15].

98. But that is not enough to single out this particular part of the sea-bed and the waters above it. A far more pertinent consideration is that for many years both Parties have treated as giving equitable access a boundary along the 15th parallel. The use of that boundary by both Parties in granting oil concessions is particularly marked (see figure 31). Although Nicaragua has told the Court that its concessions *could* have gone north of the 15th parallel, the simple fact is that they *did not* do so. Even where a potential oil field straddling that line was to be developed by the

[15]MN, p. 127, para. 7.

same corporate group — Union Oil —, the two Governments granted separate concessions to separate subsidiaries with the 15th parallel as the dividing line. That is as clear an act of mutual consent by the two States as one could hope to find. Nicaragua's suggestion that this was done for the convenience of Union Oil is quite simply fanciful. Members of the Court might like to ask themselves, why on earth would one corporation want to be saddled with the complication of two separate concessions, granted to two separate subsidiaries, by two separate governments, if it could have made do with a single concession for a single company from a single State?

99. Lastly, Madam President, there is the argument about the effect of the right to development. Now I am as attached to the right to development as Mr. Brownlie, but what implications does it have for where you draw a single maritime boundary? The Court has made clear, repeatedly, that it does not consider that the function of maritime delimitation is to compensate at sea for the relative wealth or poverty of States on land. And here, where both Parties are developing countries with gross domestic products per capita among the lowest in Latin America, there really cannot be any argument for saying that one Party's right to development must permit encroachment on the maritime spaces which would otherwise pertain to the other.

100. Madam President, as Honduras is the Respondent, I have begun by considering the case made against us. Let me now — and in conclusion on the maritime boundary — say something about the case for the Honduran line. That will be dealt with in detail by my colleagues later in the week but there are four points which stand out.

101. The first is a very simple but absolutely fundamental point. It is that Honduras's line — in marked contrast to Nicaragua's — does what a single maritime boundary, or *any* maritime boundary, should do: it runs between Honduran territory on the one side and Nicaraguan territory on the other. There are no enclaves, no encroachment. This can be seen most clearly in illustration No. 24, if we could look at that again.

102. The second point is that the Honduran line is constructed using real coastlines, real territory, not artificial "coastal directions" which either lie well to seaward of the real coast or leave huge tracts of territory between the "coastal direction" and the sea. Maritime boundaries have to be based on real, not virtual, geography. We do not live in a virtual world removed from reality, as the Nicaraguan bisector seems to.

103. The third point, Madam President, is that the Honduran line is based in the conduct of the Parties in relation to fisheries, oil concessions and other activities which will be detailed in later speeches. The position regarding the oil concessions is particularly clear, as illustration 31 demonstrates. The Parties' conduct in respect of those concessions is conduct which, in the words of the Court in *Cameroon/Nigeria*, is "based on express or tacit agreement" (*Land and Maritime Boundary between Cameroon and Nigeria*, *Judgment, I.C.J. Reports 2002*, p. 448, para. 304).

104. Last week, Mr. Brownlie told the Court that "if there had been Nicaraguan consent, we would not be before the Court today"[16]. Well, if that were the test, Madam President, you would never hear a case of breach of treaty in this Court, or a case on failure to honour any undertaking of any kind. But that is not what happens and it is not the test. And, frankly, it is a statement that has particularly little credibility coming from Nicaragua. Nicaragua had consented to honour the Arbitral Award in the 1894 Treaty, but for 50 years it refused to do so for reasons which convinced no one except its own nominated *ad hoc* judge when the matter came before this Court.

105. The reality is that Nicaragua had a change of heart when it had a change of government, just as it had a change of heart at the same time about the 50-year-old treaty with Colombia. But changes of heart cannot retrospectively alter history any more than changes of government can do so.

106. The last point, Madam President, is that the Honduran line is actually more favourable to Nicaragua than a provisional equidistance line would be. (Figure 24 again.)

107. None of these factors stands by itself. Whatever Nicaragua may say, Honduras — I am afraid that what has come up here is not the illustration I had intended to show you: there is another one which shows the Honduran line and the provisional equidistance line earlier in your judges' folder. None of these factors stands by itself, Madam President. Whatever Nicaragua may say, Honduras does not, and has not, relied on one argument to the exclusion of all others. What it relies on is the combination of this range of considerations which together show that the 15th parallel — a clear and simple line if ever there was one — meets the requirements of the law of the sea and delivers an equitable result.

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[16]CR 2007/5, p. 31, para. 23.

108. That, in summary, is Honduras's case. I would now ask you, Madam President, perhaps after the coffee break, to call upon my colleague Professor Sánchez Rodríguez to begin the task of developing that case in detail.

The PRESIDENT: Thank you, Professor Greenwood. The Court will now briefly rise and resume in about ten minutes.

The Court adjourned from 11.40 to 11.50 a.m.

The PRESIDENT: Please be seated. Professor Sánchez Rodríguez.

M. SÁNCHEZ :

Madame et Messieurs les Membres de la Cour, permettez-moi de commencer mon intervention en exprimant l'honneur que je ressens de comparaître à nouveau devant vous.

1. L'objet principal de la première partie de mon intervention consiste à démontrer :

— *premièrement*, qu'avant 1821 et aussi immédiatement après, le cap Gracias a Dios constituait la limite terrestre et maritime entre les provinces du Honduras et du Nicaragua ;
— *deuxièmement*, qu'à l'occasion de la sentence du roi d'Espagne de 1906, le Nicaragua a tenté, sans aucun succès d'ailleurs, de réclamer des frontières terrestres, insulaires et maritimes situées plus au nord, en l'espèce au cap Camarón passant par le méridien 85° ouest. C'est dire qu'il a tenté de modifier l'orientation initiale des côtes et des îles nicaraguayennes dans l'océan Atlantique d'une perspective ouest-est en une projection nord-sud et pour ce faire, il a demandé d'une façon précise, une ligne passant par un accident géographique et par une coordonnée déterminée. Mais le roi d'Espagne a affirmé en 1906, à l'identique, ce qu'avait décidé avant 1821 la Couronne d'Espagne, c'est-à-dire que le Nicaragua jusqu'au XXe siècle était dépourvu d'une quelconque projection insulaire et maritime au nord du cap Gracias a Dios. La prétention actuelle du Nicaragua d'avancer au nord de ce cap est ainsi déniée tant par l'histoire que par le droit ; et,
— *troisièmement*, que durant la plus grande partie du siècle passé, l'attitude et le comportement réciproque des deux Etats tenaient pour établi leur consentement implicite de reconnaître au cap Gracias a Dios une projection à la fois terrestre et maritime.

2. Pour ce faire, je me verrai obligé de me référer à l'histoire commune des deux provinces avant l'indépendance aux fins de fixer l'*uti possidetis* de 1821, ainsi qu'à l'histoire commune partagée par les deux Parties alors devenues des Etats nouveaux et indépendants. Le Nicaragua considérait depuis l'indépendance que sa seule projection dans la mer des Caraïbes était en direction de l'est, comme le prouve sa pratique législative et conventionnelle et il a tenté d'y remédier sans succès en 1906 pour avancer vers le nord. Après, il a accepté la situation terrestre, insulaire et maritime pendant plusieurs décennies. Aujourd'hui, à nouveau, il retourne à ses vieux démons. Il recherche par une autre voie — celle de l'évolution du droit de la mer — un remède à ce qui avait déterminé son statut juridique définitif (ou plutôt, au statut qui ne lui a jamais correspondu et, par conséquent, ne lui a jamais été reconnu) en 1906, et en 1960 précisément devant cette même Cour dans la seconde des décisions citées. Dans cet ordre d'idées, je ne peux moins faire que d'attirer l'attention sur la contradiction d'un tel comportement avec le principe de stabilité et d'intangibilité des frontières héritées de la décolonisation.

A. La signification du cap Gracias a Dios comme limite terrestre et maritime durant la période coloniale : l'histoire et le droit colonial

3. Au cours de la période coloniale, la limite administrative entre les provinces du Honduras et du Nicaragua suivait le Rio Segovia (appelé aussi la rivière Coco ou Wanks) jusqu'à son embouchure au cap Gracias a Dios[17]. Cette limite séparait les territoires des juridictions de toutes les autorités civiles et militaires de la colonie, lesquels territoires comprenaient non seulement la terre ferme mais encore les possessions maritimes adjacentes ainsi que les eaux continentales et insulaires qui baignaient le continent et les îles. C'est pour cette raison que la province du Honduras exerçait son autorité au nord du cap Gracias a Dios et la province du Nicaragua au sud dudit promontoire.

4. Toutes les références au cap Gracias a Dios le situent au, ou à proximité du 15e parallèle nord et il n'y a aucune preuve que sa dénomination et sa localisation aient soulevé des doutes et posé des problèmes tant durant l'époque de la colonie qu'après l'indépendance en 1821. Les preuves de cela ont été présentées devant cette Cour par le Nicaragua lui-même dans l'affaire

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[17] Voir DH, chap. 5.

décidée en 1960 (voir *C.I.J. Mémoires 1958, Sentence arbitrale rendue par le roi d'Espagne le23 décembre 1906 (Honduras c. Nicaragua)*, vol I, annexes au contre-mémoire, p. 379-432). C'est ainsi qu'une note du 23 novembre 1844 du ministre commun du Honduras et du Nicaragua au ministre des affaires étrangères de Sa Majesté britannique reconnaissait expressément la souveraineté du Nicaragua sur la côte atlantique «depuis le cap Gracias a Dios jusqu'au nord de la ligne le séparant du Costa Rica»[18].

5. Je ferai remarquer, en outre, qu'il n'existe aucun précédent, d'aucune sorte, de différends ou de conflits de limites dans cette région jusqu'en 1870-1875, ce qui implique que la conduite des parties postérieure à l'indépendance corrobore pendant cinquante années l'*uti possidetis juris* de 1821. Comme d'ailleurs aussi la doctrine scientifique[19], qui cependant observe que ces premières divergences ne se limiteront pas au cap Gracias a Dios mais aussi à d'autres secteurs de la frontière. C'est ce que confirme l'article I du traité Gámez-Bonilla du 7 octobre 1894, qui se lit comme suit[20] :

> «Les Gouvernements du Honduras et du Nicaragua nommeront des commissaires qui, dûment autorisés, organiseront une commission mixte des limites chargée de résoudre de façon amicale tous les doutes et tous les différends pendants et de tracer sur le terrain la ligne frontière indiquant la limite entre les deux Républiques.»

6. Mais encore plus pertinent pour la présente affaire, c'est la reconnaissance explicite par les deux Parties de l'application du principe de l'*uti possidetis juris* dans ledit traité, en l'espèce au paragraphe 3 de son article II, qui dit[21] : «Il sera entendu que chaque république est maîtresse des territoires qui, à la date de l'indépendance, constituaient respectivement les provinces du Honduras et du Nicaragua.» Parce que la sentence de 1906 et l'arrêt confirmatif rendu par cette Cour en 1960 établissent bien la frontière entre les deux Etats au large du Rio Segovia et son point terminal à l'embouchure de ladite rivière au cap Gracias a Dios, il s'ensuit nécessairement que le Nicaragua, juridiquement ou moralement, ne devrait pas aujourd'hui réclamer les îles et les espaces maritimes

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[18] CMH, vol. 2, annexe 5.

[19] CMH, vol. 1, p. 31-32, par. 3.7.

[20] *Ibid.*

[21] *Ibid.*

adjacents au nord dudit promontoire sans porter gravement atteinte à l'*uti possidetis* et sans mettre en évidence l'incohérence manifeste de son comportement.

7. Or, d'une façon surprenante et injustifiée, le Nicaragua nie ou interprète à nouveau à sa guise, dans cette affaire, le principe de l'*uti possidetis juris*. Ceci m'oblige à aborder, maintenant, les caractéristiques essentielles de ce principe dans le cadre de l'Amérique hispanique.

8. Il est connu que le principe de l'*uti possidetis juris* ne contredit pas le droit international sur la délimitation des espaces maritimes en vigueur mais qu'au contraire il s'y intègre pleinement grâce à l'article 15 de la convention des Nations Unies sur le droit de mer de 1982. Cet article 15, en définissant le principe général de la délimitation de la mer territoriale entre Etats voisins sur la base de la règle de l'équidistance, envisage une exception importante. La règle précédente ne s'appliquera pas en raison de l'existence de titres historiques ou d'autres circonstances spéciales, et parmi ces dernières, sans doute aucun, se distingue l'application de l'*uti possidetis* continental et insulaire. Pour cette raison, en conformité avec le droit international en vigueur, la règle de l'équidistance ne saurait prévaloir sur le droit applicable tel que déterminé par les circonstances historiques de l'affaire.

9. Et je dis que le Nicaragua a tenté de déprécier l'application de l'*uti possidetis* dans le présent contentieux[22]. Il ignore ou manipule la jurisprudence internationale en général et la jurisprudence de cette Cour en particulier. Il cache les difficultés et les carences que provoque dans son argumentation l'application dudit principe aux espaces maritimes.

10. Comme je l'ai déjà démontré, en ne citant seulement que quelques précédents de la pratique historique en la matière, le Nicaragua se trouve dans l'incapacité de mettre en question l'application de l'*uti possidetis* aux espaces maritimes parce qu'il a toujours accepté ce titre comme fondement de ses délimitations frontalières. Le Nicaragua ne peut soutenir aujourd'hui que le manque d'équité — pour autant que cette affirmation soit fondée — rendrait inapplicable ce principe à la délimitation des espaces maritimes[23]. Parce que, si l'on accepte ce principe, l'on accepte aussi son équité. Ainsi que l'a défendu le professeur Remiro Brotóns, membre distingué de

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[22] RN, vol. I, p. 49-68, par. 4.1-4.68.

[23] RN, vol. I, p. 49, par. 4.2.

l'équipe du Nicaragua, «*es equitativo todo lo que ha sido consentido libremente»*[24] [«tout ce que à quoi il a été consenti librement est équitable»]. Ce qui signifie que le Nicaragua ne peut en même temps accepter et rejeter le principe selon ce qui lui convient. En outre, l'invocation d'une équité abstraite ne saurait exclure le droit applicable (*C.I.J. Recueil 1974*, p. 33, par. 78).

11. Qu'il me soit permis, Madame et Messieurs les juges, d'énoncer quelques évidences relativement à ce principe. Il est vrai que le principe de l'*uti possidetis* ne se retrouve pas à l'identique, que ce soit quant à son origine ou que ce soit quant à sa nature, dans toutes les hypothèses de décolonisation. Dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* — délimitation entre deux Etats successeurs d'un même colonisateur — la Chambre de la Cour l'a décrit comme «un principe d'ordre général nécessairement lié à la décolonisation où qu'elle se produise» (*arrêt, C.I.J. Recueil 1986*, p. 566, par. 23). Dans la présente affaire, il faut prendre en considération que la succession d'Etats s'est produite au sein d'une puissance coloniale unique. Ceci implique que le droit directeur de la succession au territoire soit l'ordonnancement interne de l'Etat prédécesseur au regard de la délimitation de ses circonscriptions administratives internes. Ce sont ces dernières qui se transformeront en Etats. Tout ceci nous ramène au droit colonial espagnol en Amérique.

12. Relativement à l'*uti possidetis* hispanique, il convient de prendre en compte, en premier lieu, ce qu'a affirmé le Conseil fédéral suisse dans sa sentence de 1922 dans l'affaire des questions de limites entre la Colombie et le Venezuela : «This general principle offered the advantage of establishing an absolute rule that there was not in the old Spanish America any *terra nullius*.»[25] Dans le même sens, la sentence de la Chambre de la Cour de 1992 a pris la position que : «Ainsi le principe de l'*uti possidetis juris* touche autant à la recherche du titre à un territoire qu'à l'emplacement de frontières ; un aspect essentiel de ce principe est certainement d'écarter la possibilité d'un territoire sans maître.» (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992*, p. 387, par. 42.)

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[24] A. Remiro Brotóns, *«Problemas de fronteras en América: la delimitación de los espacios marinos», in* A. Mangas Martín (éd.), *La Escuela de Salamanca y el Derecho Internacional en América: del pasado al futuro,* Salamanca, 1993, p. 129, dans l'original en caractères gras.

[25] *UNRIAA*, vol. I, p. 228.

13. Ce fut la sentence arbitrale du 31 juillet 1989 dans l'affaire *Guinée-Bissau/Sénégal* — délimitation entre deux Etats successeurs de deux puissances coloniales différentes — qui attacha l'application *in genere* du principe de l'*uti possidetis juris* à la décolonisation, sans admettre des régimes distincts selon qu'il s'agit de la terre ou de la mer : «D'un point de vue juridique, il n'existe aucune raison d'établir des régimes juridiques selon l'élément matériel où la limite est fixée.»[26]

14. Et puis, dans l'arrêt *El Salvador/Honduras ; Nicaragua (intervenant)* de 1992, la Chambre de la Cour fut encore plus concrète en faisant deux affirmations importantes sur l'application dudit principe. En premier lieu, qu'«en effet, le principe de l'*uti possidetis juris* devrait s'appliquer aux eaux du golfe ainsi qu'aux terres» (*C.I.J. Recueil 1992*, p. 589, par. 386) ; et, en second lieu, que :

> «La Chambre ne doute pas que le point de départ de la détermination de la souveraineté sur les îles doive être l'*uti possidetis juris* de 1821. Les îles du golfe de Fonseca ont été découvertes par l'Espagne en 1522 et sont demeurées pendant trois siècles sous la souveraineté de la Couronne espagnole. Lorsqu'en 1821 les Etats d'Amérique centrale sont devenus indépendants, aucune des îles n'était un territoire sans maître ; la souveraineté sur ces îles ne pouvait donc être acquise par occupation de territoire.» (*Ibid.*, p. 558, par. 333.)

Permettez-moi, Madame le président, à propos de ce passage jurisprudentiel que je viens de citer, de tenter de donner une explication raisonnable aux raisons ayant conduit le Nicaragua à demander initialement dans sa requête la délimitation des espaces maritimes, pour ensuite, dans son mémoire, — en une sorte d'arrière-pensée *(afterthought)* —, réclamer la souveraineté sur les îles situées au nord du 15e parallèle. Ce pays et ses conseillers ont immédiatement détecté que s'ils n'invoquaient pas la souveraineté sur lesdites îles, ils étaient dépourvus d'une affaire digne d'être soutenue devant vous.

15. En conclusion, dans la phase écrite, les tentatives du Nicaragua de nier l'application de l'*uti possidetis juris* aux espaces maritimes adjacents aux territoires continental et insulaire sont dépourvues de tout fondement. La jurisprudence internationale n'a laissé aucun espace au doute en relation à la projection de ce principe tant pour les îles que pour les eaux adjacentes à la terre ferme. En ce qui concerne les îles, toutes celles adjacentes aux territoires continentaux

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[26] *ILM*, vol. 83, p. 36, par. 63.

appartenaient à l'Espagne et toutes passèrent automatiquement à leurs successeurs centraméricains en 1821, sauf quand elles firent l'objet de revendications par un Etat tiers non hispanique. Cette dernière situation ne fut pas celle des îles et cayes honduriennes. Ignorer ce fait implique de faire l'impasse sur l'application du principe tel qu'il a été envisagé dans le récent arrêt de la Chambre de la Cour de 1992 que je viens de citer.

16. Ce que j'ai dit au sujet des îles s'applique également à la mer territoriale espagnole, qui s'est transformée *ipso jure* et *ipso facto* en mer territoriale, tant continentale qu'insulaire, des nouveaux Etats de par leur émancipation coloniale. En effet, la Couronne d'Espagne, au moyen d'une cédule royale du 17 décembre 1760, a établi à cette date une extension de 6 milles marins (2 lieues) des eaux continentales et insulaires espagnoles[27], non seulement pour des raisons de sécurité et de défense, mais encore pour lutter contre la contrebande, très fréquente sur les côtes de la mer des Caraïbes. Par conséquent, la succession sur le territoire comprenait aussi la partie des eaux sous juridiction qui existaient pour toutes les côtes américaines de l'Empire espagnol à la date critique de 1821.

17. D'autre part, dans les réformes réalisées au XVIIIe siècle, et plus spécifiquement, en conséquence de la création en 1739 de la vice-royauté de la Nouvelle-Grenade (aussi appelée Santa Fé de Bogotá), la Couronne a promulgué deux ordonnances royales successives sur le même sujet de fond : l'amélioration de la capacité opérationnelle des circonscriptions militaires et logiquement de leurs zones maritimes.

18. L'ordonnance royale du 23 août 1745[28] a créé deux juridictions militaires, une au nord, qui s'étendait du Yucatan au cap Gracias a Dios, et une autre au sud, de ce même cap au Rio Chagres, toutes deux dépendantes de la capitainerie générale du Guatemala. Selon le texte de cette ordonnance royale et la pratique habituelle de gouvernance appliquée par les autorités espagnoles, il résultait de cette disposition que les compétences sur la zone maritime environnante étaient aussi divisées. Il revenait alors d'un côté au Gouvernement du Honduras la compétence sur

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[27] Voir le texte dans J. A. de Yturriaga (éd.), *España y la actual revisión del Derecho del Mar., vol. II, Primera Parte (Textos y Documentos)*, Madrid, 1974, p. 47.

[28] Voir les citations clés du rapport de la commission d'examen, qui servirent de base à la décision du roi d'Espagne dans la sentence de 1906, en CMH, vol. 1, p. 74-75, par. 5.13.

la côte atlantique jusqu'au cap Gracias a Dios. Etait réservé à la *Commandancia* générale[29] du Nicaragua, territoire depuis lors plus orienté vers l'océan Pacifique qu'Atlantique, la zone maritime relative à la Costa de los Mosquitos, depuis le cap Gracias a Dios jusqu'au sud. Nier une affirmation aussi élémentaire consiste à dénier l'évidence.

19. Un demi-siècle plus tard, une autre ordonnance royale en date du 20 novembre 1803, datant d'à peine dix-huit ans avant la déclaration d'indépendance de la Centramérique, confirmait la réalité de la distribution des espaces. Le roi d'Espagne retirait de la capitainerie générale du Guatemala les îles de San Andrès et la côte des Mosquitos, depuis le cap Gracias a Dios jusqu'au Rio Chagres, les faisant dépendre de la vice-royauté de Santa Fé et nommant un gouverneur pour les îles. Il est alors évident qu'il résultait de ce texte que le cap Gracias a Dios servait de limite entre la capitainerie générale du Guatemala et la vice-royauté de Santa Fé. J'ajoute que la zone au nord du cap Gracias a Dios restait sous l'autorité de la capitainerie générale du Guatemala, concrètement sous le Gouvernement du Honduras[30].

[Carte LISR 1]

20. Quant aux compétences des capitaineries générales, il faut savoir qu'elles s'exerçaient sur «les forces de terre et de mer» dans tous les espaces pourvus de côtes, de sorte à prévenir les menaces et les risques que la méticuleuse réglementation juridique tentait d'éviter. A cet égard, les preuves historiques sont abondantes : levés hydrographiques, choix de ports sûrs (tels que *Puerto Cortés* et *Puerto Trujillo*), constructions de fortifications, répression de la contrebande et actions militaires diverses contre les Britanniques et les Indiens mosquitos sur la côte et la mer du Honduras, au nord du cap Gracias a Dios[31]. Tout spécialement, il convient de souligner les compétences, en temps de paix, des capitaineries générales pour la répression de la contrebande (celle du «commerce illicite») qui exigeaient nécessairement l'exercice de leur autorité tant sur la terre que sur la mer situées sous leur autorité.

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[29] Je préviens que *«Commandancia»* est un terme générique qui signifie «avoir des fonctions de chef». Appliqué à un territoire, il indique une autorité subordonnée à celle du capitaine général d'abord et à celle du gouverneur ensuite.

[30] CMH, vol. 1, p. 76-77, par. 5.17 ; DH, vol. 2, annexe 266, (rapport cité, p. 7 et 14 (où sont clairement exposées les compétences des gouverneurs, qui reflètent dans un cadre local les facultés dont la capitainerie générale pouvait être titulaire).

[31] Carte illustrative de ce qui est décrit dans le CMH, vol. 1, p. 75-76, par. 5.14-5.15 ; DH, vol. 2, annexe 266, p. 16-20.

21. Je tiens à souligner que l'ordonnance royale du 20 novembre 1803 — curieusement oubliée dans une note de bas de page de la réplique du Nicaragua — manifeste la volonté explicite du monarque espagnol d'établir les circonscriptions militaires correspondant à la capitainerie générale du Guatemala et à la vice-royauté de Santa Fé dans la mer des Caraïbes. Le cap Gracias a Dios constituait la limite entre la capitainerie et la vice-royauté. Sa projection maritime s'orientait vers l'est de sorte que toutes les îles et les eaux adjacentes situées à l'est et au nord dudit promontoire correspondaient à la juridiction militaire et maritime de la capitainerie générale du Guatemala dans l'océan Atlantique. Par conséquent, l'ordonnance précitée constituait un titre parfait pour l'origine et la preuve de l'*uti possidetis juris*. Si le Nicaragua persiste à nier ce qui précède, c'est qu'il continue à rejeter un fait qui s'impose à l'évidence.

22. Tout ceci autorise l'Etat successeur (en l'espèce le Honduras), conformément au droit espagnol de l'outre-mer, d'invoquer le principe de l'*uti possidetis juris* en sa faveur sur les îles et les eaux adjacentes au nord du cap Gracias a Dios[32]. Je désire attirer l'attention de la Cour sur le fait que toutes les tentatives du Nicaragua d'ignorer, de minorer ou de dénaturer l'importance de l'ordonnance royale de 1803 au regard du cap Gracias a Dios et des espaces maritimes adjacents ont été définitivement réfutées par les opinions de deux des spécialistes espagnols les plus réputés en droit et dans les circonscriptions géographiques de la Couronne d'Espagne dans la région, et qui se trouvent en annexes à la duplique du Honduras.

23. Ainsi, les tergiversations du Nicaragua[33] au regard de l'*uti possidetis* en général, et de la sentence arbitrale de 1906 en particulier, sont dépourvues de sens et sont réfutées expressément par le droit colonial espagnol. Il est certain que le roi d'Espagne à fixé en 1906 la limite terrestre entre les deux Etats. Mais, en conformité avec le droit colonial espagnol, sa décision affecte aussi irrémédiablement la souveraineté sur les possessions insulaires et sur les eaux adjacentes tant du continent que des îles, au moins jusqu'à 6 milles marins (2 lieues) de largeur.

24. De fait, le Nicaragua a prétendu sans succès que la sentence arbitrale de 1906, en vertu de l'*uti possidetis juris* qu'aujourd'hui il renie, l'aurait reconnu comme souverain à l'est du

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[32] DH, vol. 2, annexe 266, p. 13 et 8-10. Les capitaines généraux des armées étaient spécifiquement comparés aux capitaines généraux de la marine et détenaient un pouvoir général de contrôle et de décision sur toutes les forces militaires de la circonscription, y compris les forces navales.

[33] RN, vol. I, p. 57 et suiv., par. 4.30 et suiv.

méridien 85° ouest, identifiant ledit méridien comme une frontière terrestre, insulaire et maritime avec le Honduras. Ses conclusions devant l'arbitre quant à la dernière partie du tracé de la frontière ne laissent subsister aucun doute : «elle [la limite] suit cette même rivière qui s'appelle ici le Patuca ; elle continue par le centre du cours d'eau jusqu'à sa rencontre avec le méridien qui passe au-dessus du cap Camarón et suit ce méridien jusqu'à la mer, laissant au Nicaragua Swan Island» (*C.I.J. Mémoires 1958, Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua)*, vol. I, annexe n° 11 à la réplique du Honduras, p. 624)[34].

[Carte LISR 2]

25. Mais le roi d'Espagne, en donnant plein effet aux preuves présentées en l'affaire, a rejeté la prétention nicaraguayenne au méridien 85° ouest qui passe par le cap Camarón. Il choisit le cap Gracias a Dios[35], qui se situe approximativement au parallèle 15°. En vertu du principe de *res judicata*, le Nicaragua ne peut aujourd'hui ressusciter subrepticement son ancienne revendication, écartée il y a un siècle (en 1906), et aspirer encore une fois à la souveraineté sur des îles et des eaux situées au nord du cap Gracias a Dios[36].

26. L'histoire prouve, au final, la projection du Gouvernement hondurien vers le nord, au nord-est et à l'est du cap Gracias a Dios comme l'indique le traité de reconnaissance de l'indépendance du Honduras de 1866. Mais confronté à l'affirmation du Honduras que le cap Gracias a Dios, en tant que limite d'une juridiction militaire, s'identifiait fondamentalement pendant la période coloniale avec le parallèle 15°[37], le Nicaragua a tenté de discréditer aussi, sans aucune preuve, l'importance dudit parallèle en tant que frontière maritime[38]. Ce qui est certain, c'est que l'utilisation de critères géographiques facilement identifiables, tels des parallèles et des méridiens, était habituelle dans la pratique coloniale espagnole lorsqu'il s'agissait de diviser des

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[34] Voir le rapport de la commission d'examen de la question des limites entre les Républiques du Honduras et du Nicaragua, soumis à S. M. Alphonse XIII, arbitre, le 22 juillet 1906. Cette prétention nicaraguayenne est aussi reprise textuellement dans le rapport du Conseil d'Etat espagnol du 15 décembre 1906 qui a assumé les conclusions de la commission d'examen précitée. (Dossier n° 94.446, p. 3.) Pour une représentation graphique de la prétention nicaraguayenne rejetée, voir le CMH, vol. I, planche 9.

[35] CMH, vol. 1, p. 72-73, par. 5.6-5.10.

[36] CMH, vol. 1, p. 74, par. 5.11-5.12.

[37] CMH, vol. 1, p. 18-19, par. 2.11.

[38] RN, vol. I, p. 56-59, par. 4.26-4.37.

juridictions internes qui englobaient aussi les espaces maritimes de leurs autorités militaires (comme c'est le cas dans notre affaire). C'était la seule alternative valable pour diviser de manière claire et indubitable les espaces maritimes respectifs de leurs autorités militaires, sur lesquels le Honduras a exercé et exerce des compétences étatiques de façon pacifique, continue et ininterrompue.

27. L'utilisation de la géographie astronomique tant dans la délimitation de leurs empires respectifs par les puissances ibériques (Espagne et Portugal) que dans le droit colonial de chaque puissance est amplement prouvé par les spécialistes. L'utilisation des parallèles était fréquente dans l'Amérique hispanique pour séparer les compétences des capitaines généraux espagnols dans la région, comme le prouve la carte du vice-roi de la Nouvelle-Grenade (ou Santa Fe) de 1774, conservée au Musée naval de Madrid. Sur cette carte, on y constate de façon expresse la ligne, passant à l'endroit qui était alors appelé Cabo Blanco, très proche du parallèle 5° sud, comme limite générale avec la vice-royauté de Lima[39].

28. Ce qui précède peut s'étendre également à l'Amérique non hispanique. En ce qui concerne la colonie du Brésil, le Portugal a décidé de contrôler l'espace le plus accessible, la côte. Cela a consisté (entre 1534 et 1536) à la répartir en une série de capitaineries que suivait la ligne du littoral. Les limites septentrionales et méridionales de la terre et de la mer de chaque capitainerie étaient constituées de deux parallèles géographiques et l'éventuelle limite intérieure (vers le continent) était le méridien de Tordesillas[40].

29. Dans la présente affaire, si je m'en tiens au rôle du cap Gracias a Dios, situé aux environs du 15e parallèle, comme ligne qui séparait cartographiquement les compétences terrestres et navales de la capitainerie générale du Guatemala (qui projetait ses possessions au nord de ce

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[39] Voir Geographical Plan of the Viceroyalty of Santa Fé de Bogota, New Kingdom of Granada, 1779 dans DH, vol. 2, annexe 232. *Plan geográfico del Virreynato de St^{a} Fe de Bogotá, Nuevo Reyno de Granada que manifiesta su demarcación territorial, islas, rios principales, provincias, plazas de armas, lo que ocupan los indios bárbaros y naciones extranjeras, demostrando los dos confines de Lima y Méjico y establecimientos de Portugal sus lindantes: con notas históricas del ingreso anual de sus rentas reales y noticias relativas a su actual estado civil, político y militar.* [Plan géographique de la vice-royauté de Santa Fe de Bogotá, nouveau Royaume de Grenade qui montre la démarcation territoriale, les îles, les principales rivières, les places d'armes, ce qu'occupent les Indiens barbares et les nations étrangères et qui montre les deux limites de Lima et de Mexico et les établissements du Portugal : avec des notes historiques du revenu annuel de rentes royales et les notices d'état civil, politiques et militaires.] Formado en servicio del Rey Ntro Sr por el Dor D. Francisco Antonio Moreno Escandon, fiscal protector de la Real Audiencia de St^{a} Fe y juez conservador de rentas. Gobernando el reyno el Excmo. Sr. Baylio Frey D. Pedro Messia de la Cerda, Marqués de la Vega Armijo (Ms ; col ; 147x200 cm.,dans en MN Sig. 27-C-10, [1774]).

[40] DH, vol. 2, annexe 267, rapport, épigraphe «parallèle» ; voir en particulier les cartes qui y sont jointes.

parallèle) et la vice-royauté de Santa Fe (qui projetait les siennes au sud), je ne peux que conclure qu'il constituait une référence à la fois simple et précise à cet effet de division cartographique, par sa connaissance notoire et évidente pour tout marin qui aurait navigué dans ces eaux. Ledit cap et son parallèle correspondant (15° nord) délimitaient (conformément au droit des Indes) les eaux de la capitainerie générale du Guatemala et celle du Gouvernement du Guatemala, de façon claire et parfaite et dans tous ces aspects, et spécialement l'aspect juridique[41].

B. L'insoutenable position du Nicaragua sur l'histoire et sur l'uti possidetis juris **dans la présente affaire**

30. L'invocation de l'*uti possidetis* dans la présente affaire de délimitation maritime se justifie, du point de vue du droit intertemporel, par son application à la présente controverse en sa qualité de droit applicable pour les parties tant en 1821, qu'en 1906, qu'en 1960 et qu'aujourd'hui. C'est-à-dire, tout au long de la vie des deux Républiques du Nicaragua et du Honduras, le principe a toujours constitué l'argument juridique fondamental pour la délimitation de leurs espaces. Mais ce n'est pas tout, le cap Gracias a Dios impliquait une délimitation équitable conforme à l'*uti possidetis juris* et le parallèle 15° est aussi en conformité avec les principes de délimitation du nouveau droit de la mer.

31. En effet, d'un point de vue matériel, bien que l'application de ce *legal title* fut initialement territoriale, tant continentale qu'insulaire, son application sur certains espaces maritimes ne peut être mise en doute. Prenant comme point de départ le principe connu «la terre domine la mer», la souveraineté sur les côtes continentales ou insulaires s'accompagne inévitablement de la possession sur la mer territoriale desdites côtes. De sorte que la mer territoriale du Nicaragua et du Honduras, dès l'indépendance en 1821, comportait les marques respectives de la souveraineté territoriale. De plus, quand émergea au XXe siècle le concept de plateau continental, les compétences étatiques sur ce nouvel espace découlèrent *ab initio* et *ipso jure* de la souveraineté sur les espaces correspondants, de sorte que la convention de Genève de 1958 n'a même pas exigé une proclamation formelle pour l'exercice des compétences reconnues aux pays riverains. Et, quand la convention des Nations Unies sur le droit de la mer de 1982 a

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[41] *Ibid.*, rapport, épigraphe «La côte atlantique centraméricaine» et «Application au thème du Honduras», et la «Conclusion».

réglementé la zone économique exclusive, à l'origine des compétences sur cet espace se trouvait également la souveraineté territoriale de l'Etat riverain.

32. Dans sa requête du 8 décembre 1999, le Nicaragua a demandé à la Cour la délimitation de ses espaces maritimes dans la mer des Caraïbes «conformément aux principes et circonstances pertinentes que le droit international général reconnaît comme s'appliquant à une délimitation [d'une frontière maritime unique]». Relativement à cette demande, je me permets de rappeler trois éléments fondamentaux. *En premier lieu*, l'*uti possidetis juris* est «un principe d'ordre général nécessairement lié à la décolonisation où qu'elle se produise» (cf. *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 566, par. 23), et son caractère de principe général de droit international a été confirmé sans aucun genre de doutes par cette Cour en 1992, qui l'a appliqué aussi aux eaux maritimes (cf. *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992*, p. 589, par. 386). *En second lieu*, ce principe est inhérent à l'idée d'équité, entre autres raisons par son acceptation par les deux Parties[42]. *Enfin*, dans l'Amérique hispanique, il n'existait pas de *terra nullius*[43], l'horloge s'étant arrêtée à la date de l'indépendance, la délimitation maritime fut menée à bien par la Cour à partir d'une condition *sine qua non*, et avec la photographie à ce même jour : la certitude de la souveraineté territoriale — continentale et insulaire — de chaque Partie, c'est-à-dire du titre dérivé de l'*uti possidetis juris*.

33. La requête nicaraguayenne du 6 décembre 2001 déposée devant cette Cour contre un autre Etat hispanique voisin a reconnu tout ce que je viens de rappeler. En particulier — et j'attire l'attention de la Cour sur ce point — la requête a reconnu la projection insulaire et maritime de *l'uti possidetis juris sur* les espaces et les éléments adjacents au territoire continental, la projection globale en direction de l'orient de toute la masse continentale ainsi que la validité et le caractère opératoire de ce principe «à la délimitation complète et définitive des espaces maritimes relevant du Nicaragua, ainsi qu'à toute délimitation à laquelle il pourrait y avoir lieu de procéder»[44]. Dans cette situation concrète, le Nicaragua ne soulève aucun doute sur le caractère équitable ou non

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[42] Cf. DH, vol. I, p. 29-30, par. 3.03-3.05.

[43] Cf. *Ibid.*, p. 23-34, par. 3.10 et 3.15.

[44] Cf. *Ibid.*, p. 30 et 31, par. 3.58-3.59.

équitable de l'*uti possidetis juris*. De plus, en demandant l'application de ce principe pour la détermination des espaces maritimes correspondants au Nicaragua, ainsi que pour la délimitation des espaces avec la Colombie, il est clair que le Nicaragua considère l'équité comme étant un élément inhérent à ce principe de l'*uti possidetis*.

34. Le virage copernicien détecté dans les deux requêtes nicaraguayennes au cours de la brève période de moins de deux années peut être qualifié de spectaculaire, mais aussi comme étant intrinsèquement contradictoire, puisque ce que le Nicaragua argumente en sa faveur contre la Colombie en 2001 il l'a rejeté initialement en relation avec le Honduras en 1999. Il s'agit d'une conduite que je pourrais qualifier de schizophrénique (argumenter quelque chose et son contraire), mais le bon sens nicaraguayen se situe sans nul doute dans son ultime prise de position en date : à savoir, la reconnaissance complète de l'application de l'*uti possidetis* pour la délimitation équitable des espaces maritimes qui concernent des limites continentales et insulaires.

35. Il est bien connu que la sentence arbitrale de 1906 a fixé le point terminal de la frontière terrestre entre les deux pays au cap Gracias a Dios. On sait aussi que ce cap était parfaitement connu des géographes et des navigateurs depuis le XVIe siècle, qu'il établissait une division objective et évidente avec une projection d'ouest en est, facilement perceptible, et que son résultat, du point de vue des espaces insulaires et maritimes adjacents, ne pouvait être autre que de laisser les îles, îlots et cayes au nord de cette projection au Honduras, tandis que ceux situés au sud au Nicaragua[45]. Il est de plus certain que depuis 1821 aucun litige n'a surgi entre les deux pays relativement à leurs mers territoriales respectives et aux îles situées immédiatement au nord et au sud du parallèle 15°. Ce comportement des Parties doit indubitablement être situé dans le contexte de l'article 15 de la convention des Nations Unies sur le droit de la mer qui fait de l'existence de droits historiques ou d'autres circonstances spéciales une exception à l'application de la ligne d'équidistance. Et ici, on est confronté à un droit historique et une circonstance spéciale d'une grande ampleur : l'*uti possidetis juris* tel qu'il a été déclaré obligatoire par la sentence arbitrale de 1906.

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[45] Cf. CMH, vol. I, chap. V, p. 71 et suiv.

36. Lorsque le Nicaragua met en cause la validité de la sentence de 1906 devant votre Cour, il le fait parce que sa prétention antérieure avait été écartée spécifiquement par le tribunal arbitral : à savoir, une frontière qui passerait par le méridien 85° correspondant au cap Camarón aurait laissé toutes les terres continentales et les îles adjacentes sous sa souveraineté. Mais, au contraire, la sentence décida en faveur du cap Gracias a Dios et son parallèle correspondant[46]. Les parallèles et méridiens sont des moyens faciles pour définir et concrétiser une limite. Ces moyens furent revendiqués par les deux parties en 1906 et il a été décidé en faveur du Honduras. En tout cas, ces moyens sont habituels dans les délimitations territoriales et maritimes des Amériques espagnole et portugaise, comme s'est chargé de le démontrer un des plus distingués géographe espagnol spécialisé dans l'Amérique hispanique[47]. De toute façon, l'utilisation récurrente par le Nicaragua de la notion d' «adjacence» est patente, de 1821 à 2001, en passant par 1906. Il s'ensuit que j'attire vigoureusement l'attention sur la qualification par l'autre Partie du concept «îles adjacentes» comme étant «ambiguë» et «inacceptable»[48]. Une autre fois encore, nos adversaires font surgir des affirmations contradictoires et irréconciliables. Nos collègues de l'autre Partie devraient expliquer à la Cour pour quelles raisons l'appel hondurien à l'adjacence mérite des jugements si négatifs, alors que le Nicaragua en a fait de même de 1821 à 2001, en passant par 1906 et 1960. Un Etat peut-il maintenir devant cette Cour une chose et son contraire sans aucune sanction sur la solidité et la rigueur de ses arguments ?

37. Les effectivités républicaines immédiatement postérieures à la date de l'indépendance prouvent clairement l'*uti possidetis* terrestre et insulaire que j'ai mentionné précédemment. Il ne s'agit pas d'une opinion soudaine ou partiale. Tout au contraire, les effectivités républicaines ont été affirmées par la voie juridictionnelle en 1906 et le Nicaragua, un siècle plus tard, et en méconnaissance notoire de l'arrêt de cette Cour en 1960, revient à la charge de nouveau quarante années plus tard. Ce qui signifie que pour le Nicaragua le principe de base de la *res judicata* n'existe pas. En 1906, il a été décidé avec force obligatoire que le cap Gracias a Dios constituait la frontière terrestre dans l'océan Atlantique entre les deux pays. Cette sentence a ajouté

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[46] Cf. *Ibid.*, p. 72-74, par. 5.8-5.12 ; DH, p. 37-38, par. 3.23-3.25.

[47] Cf. DH, vol. I, p. 40, par. 3.30 et 3.31 ; et vol. II, annexe 267 dans laquelle figure l'opinion du géographe espagnol.

[48] Cf. RN, vol. I, p. 61, par. 4.43 ; aussi DH, vol. I, p. 43, par.3.40.

quelques affirmations remarquables : *a)* que le Nicaragua n'a jamais exercé sa juridiction au nord du cap Gracias a Dios ; *b)* que le seul pays qui ait exercé sa juridiction au sud dudit cap a été le Honduras, quoique de façon éphémère et imprécise ; *c)* que la pratique diplomatique postérieure à l'indépendance prouve que le Nicaragua avait toujours reconnu le cap Gracias a Dios comme la frontière commune ; *d)* que le principe de Gracias a Dios est «le point qui correspond le mieux aux raisons du droit historique, d'équité et de caractère géographique, pour servir de frontière commune, entre les deux Etats en litige» ; et *e)* que le cap Gracias a Dios constitue la frontière commune entre les deux Etats «pour le littoral atlantique» (*C.I.J. Mémoires 1958, Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua)*, vol. I, p. 21-23). Le Nicaragua a méconnu l'autorité de la *«res judicata»* en 1906, il a récidivé son mépris en 1960 et continue à combattre la chose jugée en 2007.

38. Une autre question particulière relative à l'*uti possidetis juris* en Amérique hispanique sur laquelle je désire attirer l'attention de la Cour à cause de sa pertinence particulière pour la présente affaire, et qui a fait l'objet de constantes disqualifications de la part de nos adversaires, est relative à la prise en compte du cap Gracias a Dios et du parallèle 15° nord comme un point clé de la séparation des compétences militaires (c'est-à-dire territoriales, insulaires et maritimes) à la date critique de l'*uti possidetis*, c'est-à-dire en 1821.

39. Le Honduras a démontré de façon catégorique que le cap Gracias a Dios séparait, depuis l'ordonnance royale de 1803, la capitainerie générale du Guatemala de la capitainerie générale de Santa Fé de la Nouvelle-Grenade (aujourd'hui Santa Fé de Bogotá en Colombie)[49]. Il convient de rappeler devant la Cour que l'importance que ces capitaineries générales comportaient au regard de l'*uti possidetis* insulaire et maritime a été reconnue expressément par le Nicaragua dans sa requête du 6 décembre 2001 à l'encontre de la Colombie[50].

40. Par conséquent, tout lecteur objectif sera frappé par la nouvelle contradiction intrinsèque des affirmations et des thèses nicaraguayennes, selon qu'elles sont destinées au Honduras ou à la Colombie. *D'une part*, parce que le Nicaragua tente de rabaisser l'importance de cette donnée

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[49] Cf. CMH, vol. I, p. 74-78, par. 5.13-5.18.

[50] Cf. *ibid.*, p. 83, par. 5.31.

décisive[51]. *D'autre part*, parce que le Nicaragua a tenté, sans succès, et ce qui est pire encore sans la moindre rigueur historique, de dénaturer l'importance centrale de l'ordonnance royale de 1803. Le Honduras a produit une opinion d'un expert, peut-être le plus grand spécialiste espagnol de l'administration militaire de la Couronne d'Espagne en Amérique. Cette opinion, sur laquelle je reviendrai évidemment, réfute totalement les artifices, les subterfuges et les inexactitudes contenus dans la position nicaraguayenne[52]. Les conclusions de l'expert s'avèrent déterminantes et avalisent, en tout, les affirmations contenues dans le contre-mémoire du Honduras, et ont servi de base pour la ratification qu'en fait le Honduras dans sa duplique. Le Honduras possède un *probate, original, full and legal title* sur les terres et les îles situées au nord du 15e parallèle qui passe par le cap Gracias a Dios. Quant au Nicaragua, il n'a apporté aucune preuve, ni même une simple apparence de la possession d'un titre juridique sur ce point.

41. En résumé, le Nicaragua nie que le Honduras ait un quelconque titre dérivé de l'*uti possidetis* (ceci étant, le Nicaragua en accepte le principe) sur les îles, cayes et îlots situés au nord du parallèle 15. Mais les faits et les preuves objectives apportés par cette Partie démentent sans un quelconque doute sa vaine prétention, de la même manière qu'émerge la réalité nue. Le Nicaragua ne prouve rien au nord du 15e parallèle. Et il doit être pris en compte que chacune de ces îles situées à cet endroit possède sa propre mer territoriale. Le Nicaragua a soutenu que le concept d'«*îles adjacentes*» est ambigu et inacceptable (c'est-à-dire qu'il nie l'*uti possidetis* insulaire en soutenant qu'il existe des territoires insulaires *nullius*), mais il a été démontré par le Honduras que ce concept non seulement était inhérent à toute la pratique coloniale espagnole, mais encore qu'il avait été accepté par la jurisprudence. Elle a été même défendue par le Nicaragua, précisément dans la même région, dans sa réclamation contre la Colombie. Le Nicaragua soutient enfin que l'application de l'*uti possidetis* est sans pertinence au regard du plateau continental et de la zone économique exclusive actuels[53]. Cette dernière affirmation ne tient pas debout car elle ignore de façon flagrante le principe essentiel que la terre domine la mer et aussi pour le plateau continental que pour la zone économique exclusive. Il est vrai que la réglementation de cette zone

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[51] Cf. RN, vol. I, p. 56-59, 60 et 66, par. 4.26-4.37, 4.40, 4.41, 4.60 et 4.61.

[52] Cf. DH, vol. I, p. 35-41, par. 3.18-3.32, et vol. II, annexe 266.

[53] Cf. *ibid.*, p. 43 et 44, par. 3.40.

est très tardive dans la législation nicaraguayenne car sa loi sur le plateau continental et la mer adjacente du 19 décembre 1979 ne vise pas exactement cet espace. Je rappellerai, dans ce contexte, que son adhésion à la convention des Nations Unies sur le droit de la mer de 1982 est postérieure au dépôt de sa demande. En résumé, la fragile construction nicaraguayenne sur l'*uti possidetis juris* est confrontée à une complète démolition de l'édifice mal édifié et comportant de nombreuses malfaçons argumentaires et probatoires.

42. Madame et Messieurs les juges, qu'il me soit permis de rappeler que les deux pièces écrites présentées par le Nicaragua n'ont pas seulement été élaborées sur la base de contradictions constantes dans son argumentation, mais encore avec une singularisation étonnante : son amnésie continue de la jurisprudence internationale la plus directement pertinente à l'affaire qui nous occupe.

43. Dans cet ordre d'idées, je dois reconnaître devant la Cour que les écrits honduriens ne présentent aucune singularité sur ce principe, ayant été construits à partir d'une application littérale, rigoureuse, réitérée et systématique de la jurisprudence internationale. Ce rejet viscéral nicaraguayen de la jurisprudence internationale applicable est particulièrement éloquent relativement à l'arrêt de 1992. Pourquoi ? Pour des raisons parfaitement explicables. Parce que cet arrêt affirme : *a)* la pertinence de l'*uti possidetis juris* pour son application aux espaces continentaux, insulaires et maritimes ; *b)* l'inexistence de territoires *nullius* ou sans maître en Amérique hispanique ; *c)* la pertinence du concept d'«îles adjacentes» ; *d)* l'importance des capitaineries générales ; *e)* la possibilité d'évaluer le comportement des Parties postérieur à l'indépendance, comme moyen de confirmation de l'*uti possidetis* existant ; et *f)* la pertinence du principe susmentionné pour générer des droits, au-delà de la mer territoriale, sur le plateau continental et sur la zone économique exclusive (par exemple, celle du Honduras dans l'océan Pacifique).

44. Un des leitmotive du Nicaragua pour rejeter l'application de l'*uti possidetis juris* aux espaces maritimes (ignorant même la mer territoriale du continent et des îles) réside dans sa complète inadéquation avec le nouveau droit de la mer, spécialement en relation avec le plateau continental. Naturellement, cette position implique une ignorance flagrante de la jurisprudence

établie par cette Cour en 1992, malgré l'intervention du Nicaragua dans cette affaire. Comme l'a affirmé la Cour dans l'arrêt *El Salvador/Honduras ; Nicaragua (intervenant)* :

> «Le droit de la mer moderne n'en a pas moins ajouté la mer territoriale, qui s'étend à partir de la ligne de base, c'est-à-dire de la laisse de basse mer ou la ligne de fermeture des eaux revendiquées à titre de souverain ; il a reconnu le plateau continental, qui s'étend au-delà de la mer territoriale et appartient de plein droit à l'Etat côtier ; il confère à l'Etat côtier le droit de revendiquer une zone économique exclusive s'étendant jusqu'à 200 milles de la ligne de base servant à mesurer la mer territoriale.
>
> Il ne saurait être douteux que ce droit, qui s'applique aux espaces maritimes, aux fonds marins et au sous-sol au large d'une côte, s'applique maintenant à la zone qui s'étend au large du golfe de Fonseca ; et que, comme toujours, le titre afférent à ces droits dépend de la situation territoriale de la côte dont relèvent les droits et la reflète.» *(Arrêt, C.I.J. Recueil 1992*, p. 608, par. 419-420.)

45. Comment mes éminents collègues de l'autre côté de la barre ont-ils pu ou voulu ignorer ou oublier cet important passage de l'arrêt de la Cour de 1992 lorsqu'on prend en compte le fait que le Nicaragua était un Etat intervenant dans cette affaire ? Le plateau continental ou la zone économique exclusive proviendraient-ils de nulle part ou, au contraire, procéderaient-ils de la souveraineté terrestre et seraient-ils adjacents à mer territoriale ? Si la terre domine la mer, ce qui ne fait pas l'ombre d'un doute pour cette Cour, n'est-ce pas alors de la plus haute importance et ne se pose-t-il pas une question préalable pour élucider les titres juridiques dérivés de l'*uti possidetis juris* dans notre affaire, respectivement au Nicaragua et au Honduras ? Est-il possible de délimiter leurs espaces maritimes sans la détermination préalable des titres territoriaux qui génèrent les droits concernant ces espaces que chaque riverain peut établir ? Dans notre affaire, il est essentiel de savoir si le Nicaragua possède un quelconque type de titre juridique au nord du cap Gracias a Dios. Si le Nicaragua est dépourvu de titre au nord de Gracias a Dios, et j'ai prouvé que tel était le cas, sur quelle base juridique justifie-t-il ses prétentions maritimes ? Et nos prestigieux collègues ne peuvent ignorer le fait que les îles situées au nord du parallèle 15° génèrent aussi leur propre mer territoriale, leur plateau continental et leur zone économique exclusive. Le titre insulaire est, par conséquent, un titre définitif aux fins de la prétention du Nicaragua à une quelconque mer territoriale, plateau continental ou zone économique exclusive au nord du cap Gracias a Dios.

46. Je me permets de me rapporter ici encore à l'arrêt de cette Cour de 1992 lorsqu'il s'agit de la question de l'évolution du droit dans le temps. C'est la vraie raison pour laquelle le

Nicaragua s'est efforcé de retirer cette affaire de son contexte historico-juridique et prétend le situer dans le domaine exclusif du «nouveau» droit de la mer, en ignorant aussi l'«ancien» droit de la mer. Ce dernier droit n'est pas du tout incompatible avec le nouveau, comme nous le rappelle l'arrêt de la Cour précité, parce que, à l'origine, des espaces maritimes étatiques à délimiter, il y a la compétence territoriale de l'Etat. A présent, lorsque le Nicaragua constate qu'il est dépourvu d'un titre juridique original sur le territoire en question, il tente d'utiliser l'inacceptable raccourci du «nouveau» droit de la mer. Madame, Messieurs les juges, l'autorité de cette Cour ne faisait pas l'ombre d'un doute en 1992, et ceci continue d'être d'actualité, malgré les artifices persistants utilisés par le Nicaragua. Pourquoi, ce pays ignore-t-il l'autorité de la chose jugée de la sentence arbitrale de 1906 ? Justement, c'est parce qu'elle écarte sa prétention initiale d'établir la frontière terrestre au méridien 85° et de lui attribuer les îles du Cygne (que le Nicaragua appelle ensuite des «îles adjacentes»), c'est-à-dire qu'elle a nié la projection vers le nord et le nord-est de la mer des Caraïbes de ce pays, le roi d'Espagne limitant strictement ladite projection vers l'est et jusqu'au cap Gracias a Dios[54]. Aujourd'hui, le Nicaragua s'entête à ignorer l'autorité de la chose jugée de l'arrêt de la Cour de 1960, qui a confirmé la validité de ce qui précède. Il fait aussi la sourde oreille à la jurisprudence établie par cette Cour en 1992. Tout ceci pour revendiquer aujourd'hui une projection insulaire et maritime au nord du parallèle qui passe par le cap Gracias a Dios, projection rejetée, comme je viens de le dire, par le roi d'Espagne en 1906. Il est alors difficile d'expliquer les arguments historico-juridiques sur lesquels s'appuie le Nicaragua pour la prétention qu'il soutient aujourd'hui devant cette Cour.

47. A mon avis, ce que le Nicaragua doit clarifier définitivement, ce sont les points suivants : *Premièrement*, accepte-t-il ou non l'application de l'*uti possidetis* aux îles ? *Deuxièmement*, accepte-t-il ou non que chaque île possédait sa propre mer territoriale en 1821 et a continué à ce faire aujourd'hui ? *Troisièmement*, accepte-t-il ou non le caractère opératoire dans notre affaire du concept d'«îles adjacentes» ? *Quatrièmement*, accepte-t-il ou non uniquement l'*uti possidetis* insulaire pour les îles peuplées ou pour toutes les îles, îlots et cayes de la zone ? Et, *cinquièmement*, accepte-t-il ou non qu'en règle générale elles génèrent un plateau continental ? Je

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[54] Tout ceci, en relation avec la prétention du Nicaragua formulée en 1904 et sur laquelle il a été décidé en 1906 est parfaitement illustré par la carte présentée dans le contre-mémoire du Honduras, vol. III (première partie), planche 9.

demande à mes distingués collègues nicaraguayens de présenter des réponses concrètes à chacun de ces points. Je les invite à réfléchir à ce qui pourrait constituer une contradiction flagrante avec leur thèse à l'encontre de la Colombie, autre thèse dont est saisie la Cour.

Madame le président, je peux continuer deux minutes et laisser la deuxième partie de mon exposé pour demain ?

The PRESIDENT: Yes. I think that would be convenient.

M. SÁNCHEZ: Thank you very much indeed.

48. Je prends un exemple révélateur. Au chapitre IV de sa réplique, le Nicaragua soutient que le *principe juridique* (pas la doctrine) de l'*uti possidetis juris* n'est pas applicable aux îles adjacentes et, en tout cas, aux îles lointaines et dépeuplées[55]. Une pareille affirmation est extrêmement dangereuse pour le Nicaragua, parce que, en outre qu'elle ignore l'inexistence de *terra nullius* (y compris insulaire) en Amérique hispanique, elle rejette en même temps le principe de la succession d'Etats sur le territoire, comme l'a démontré l'autre sentence arbitrale d'une reine d'Espagne dans l'affaire de l'*Ile d'Aves*. Pourquoi toutes les îles, îlots et cayes et archipels situés au sud du cap Gracia a Dios (à une large distance de la côte) seraient-ils nicaraguayens, si ce n'est à cause de la distance qui les sépare de la côte, de l'existence d'effectivités coloniales sur ceux-ci, de leur superficie et de leur caractère habité ou non ? Et, à titre de pure hypothèse, s'il était déclaré judiciairement qu'à la date critique de 1821, lesdites îles étaient nicaraguayennes en vertu du principe de l'*uti possidetis juris*, le titre originaire ne servirait-il pas pour affirmer ses droits sur le plateau continental et la zone économique exclusive adjacente ? Je n'oublie pas qu'un jugement ou une sentence ne constitue pas le titre original dérivé de l'*uti possidetis juris*, mais qu'il déclare simplement son existence.

Il est 13 heures, je crois. Si vous voulez, je m'arrête ou je continue deux ou trois minutes. Je ne veux pas vous perturber, vraiment.

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[55] Voir tout spécialement les affirmations faites par le Nicaragua dans RN, vol. I, p. 52, par. 4.16 ; p. 54, par. 4.21 ; p. 56, par. 4.28 ; p. 60, par. 4.40-4.41 ; p. 61, par. 4.43 ; p. 65, par. 4.57 ; p. 66, par. 4.60-4.62 ; p. 67, par. 4.64, etc.

The PRESIDENT: It is very kind of you. I think it is for you to decide, Professor Sánchez Rodríguez, whether you wish to stop now or in a few minutes' time. What is clear is that you will have to continue tomorrow. So please choose, within the next few moments, a convenient point to stop.

M. SÁNCHEZ: Thank you.

49. Le Nicaragua n'a rien dit sur le comportement des Parties depuis le moment immédiatement postérieur à l'indépendance comme élément confirmatif de l'existence de l'*uti possidetis juris* communément accepté et reconnu par les Parties. Cependant, et en prenant en compte l'affirmation que la «[l]a législation est l'une des formes les plus frappantes de l'exercice du pouvoir souverain» (*Statut juridique du Groënland oriental, arrêt, 1933*, *C.P.J.I. série A/B n° 53*, p. 48), la législation nicaraguayenne postérieure à 1821 ne saurait être plus explicite[56]. L'article 2 de la Constitution de 1826 définit le territoire comme se projetant uniquement vers l'est dans la mer des Antilles tandis que vers le nord est mentionné uniquement l'Etat du Honduras. Et l'article premier de la Constitution politique de 1911 inclut aussi dans le territoire national les *«îles adjacentes»*, et tout ceci dans le contexte de l'acceptation commune de l'*uti possidetis juris*. Pourquoi alors aujourd'hui nos collègues de l'autre Partie ne donnent-ils aucun crédit au législateur constitutionnel du pays qu'ils représentent ?

50. La réalité est que depuis 1821, pendant plus de cent cinquante années, les deux Parties ont considéré à tout moment que leurs mers territoriales respectives se situaient au nord et au sud du cap Gracias a Dios. Et que toutes les îles situées au nord relevaient de la souveraineté hondurienne, tandis que celles au sud étaient nicaraguayennes. C'est un fait objectif que le point terminal de la frontière terrestre, à l'embouchure du Rio Coco, au cap Gracias a Dios, était localisé sur le parallèle 15°. Où pourraient alors commencer ou se terminer les mers territoriales respectives ? Si la souveraineté sur la mer territoriale provient de la terre et si la souveraineté sur les îles adjacentes provient de la souveraineté sur les espaces territoriaux continentaux, et en tenant compte de l'*uti possidetis* existant en 1821, déclaré par le roi d'Espagne en 1906, à quel titre juridique peut prétendre le Nicaragua sur ces espaces maritimes ou la souveraineté insulaire au

[56] Cf. DH, vol. I, p. 41-42, par. 3.34-3.35.

nord du cap Gracias a Dios ? Aucun, Madame et Messieurs les juges. Absolument aucun. Madame le président, merci beaucoup.

The PRESIDENT: Thank you very much, Professor Sánchez Rodríguez. The Court now rises and will resume at 10 o'clock tomorrow morning for the continuation of the case of Honduras.

The Court rose at 1.10 p.m.

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