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10 Le PRESIDENT : Veuillez vous asseoir. M. Piernas, veuillez poursuivre.

Mr. JIMÉNEZ PIERNAS: Thank you, Madam President.

1. Madam President, Members of the Court, in the closing minutes of my presentation yesterday morning, I concentrated on the emergence of the dispute over the maritime boundary between Nicaragua and Honduras following the first capture of a Honduran fishing boat by the Sandinista navy in 1979. I will conclude my presentation today by discussing the technical problem of determining the critical dates in the present case, as well as the lack of effect of Nicaragua's stratagems of conduct.

2. The hidden intent behind the campaign of harassment targeting Honduran fishing boats was to make up for the time lost since 1821, to seize again the historic opportunities lost over a century and a half and to bring the Caribbean well and truly into the new régime's sights. How was this intention to be put into practice? By breaking with the principle of the stability and permanence of the maritime boundaries with neighbouring States (Colombia and Honduras), despite the fact that they were well established explicitly or by tacit approval. Since Nicaragua had even dared to dispute its maritime boundary with Colombia, delimited by a formal agreement[1], its maritime boundary with Honduras, the delimitation of which was (as I have explained) informal, could hardly hope for a kinder fate.

3. The victory of the Sandinista revolution radically transformed Nicaragua's maritime policy, which swept aside the order prevailing before 1979, not just with respect to Honduras but to Colombia as well, as was also shown when the revolutionary government unilaterally declared the 1928 Treaty null and void on 4 February 1980[2]. However, even at that point, the dispute fabricated by Nicaragua on the spur of the moment was basically limited to a proposal for an *ex novo* delimitation between the two neighbouring adjacent States of the new maritime areas resulting from developments in the law of the sea. And nothing more.

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[1]The principle of the stability and permanence of boundaries, especially those delimited by treaty, is well established: Art. 62, para. 2, of the Vienna Convention on the Law of Treaties provides that a fundamental change of circumstance may not be invoked as a ground for terminating a treaty establishing a boundary.

[2]CMH, Vol. I, pp. 41-42, paras. 3.25-3.27.

11 4. Thus, from the 1980s everything pointed to a dispute over maritime boundaries, but not about sovereignty over the islands; the dispute was managed strategically by the Sandinista Party by the capture of Honduran fishermen in an area close to the 15th parallel. With regard to those acts, from 1979 to 1994, that is to say for 15 years, Nicaragua's claims were made through diplomatic channels and couched in very imprecise and vague terms limited to contesting the 15th parallel as the maritime boundary, but with no mention of the islands at all. Furthermore, no document suggested that the dispute fabricated by Nicaragua in 1979 was to be as ambitious and extensive in its geographical scope[3] as is the case today.

5. Not until 12 December 1994 did Nicaragua's Minister for Foreign Affairs venture, in a Note addressed to his Honduran counterpart, to claim for the first time that "Nicaragua has always executed jurisdictional acts in those maritime areas, up to parallel 17"; that Note elicited a strong, unequivocal protest from Honduras against such a fanciful claim[4]. Nicaragua's Agent acknowledged this at the beginning of the oral phase[5]. And I emphasize once again: the precedents constituted by the decisions of 1906 and 1960 and the 1928 Treaty with Colombia did not exactly support such claims. But the escalation of Nicaragua's wild and implausible claims against Honduras in the Caribbean Sea culminated in 2001 in the submission of its Memorial to the Court, for the first time laying claim to sovereignty over all the islands north of the 15th parallel and up to the 17th parallel[6]; whereas Nicaragua's Application of 8 December 1999 had made absolutely no mention of the islands[7]. Nicaragua's Agent also acknowledged this fact at the beginning of the oral phase[8].

6. Nicaragua, which had overlooked the relevance of the Honduran cays to the maritime delimitation between the two States, to the extent that no account was taken of them in the bisector

12 line it proposed to the Court[9], finally cut the Gordian Knot of their troublesome presence north of

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[3]CMH, Vol. 1, p. 52, para. 3.49; see MN, Vol. 2, Anns. 65-66 and 73, pp. 152-155 and 169-171.

[4]CMH, Vol. 1, pp. 52-53, para. 3.50 (quote); see MN, Vol. 2, Ann. 49, pp. 116-117.

[5]CR 2007/1, para. 50 (Argüello Gómez).

[6]MN, Vol. I, p. 166.

[7]See Nicaragua's Application of 8 December 1999, para. 6.

[8]CR 2007/1, paras. 69-70 (Argüello Gómez).

[9]CR 2007/1, paras. 49-50 (Elferink); CR 2007/2, paras. 148-177 and 188 (Brownlie).

the 15th parallel. How? By assuming sovereignty over them in order surreptitiously to transform a dispute over maritime delimitation into one about attribution of sovereignty.

7. With its outrageous claims in 1994 and 2001, Nicaragua reverted once again (albeit a century later) to the position it had held prior to the Arbitral Award of 1906, when in its arguments presented to the King of Spain it (unsuccessfully) claimed sovereignty over all the land and sea as far as the Swan Islands, beyond the 17th parallel[10]. How many more times will Honduras have to appear before this Court to get Nicaragua to accept once and for all (and no longer just nominally) the consequences of the 1906 and 1960 decisions and of its subsequent conduct until 1979?

8. But this question also raises a technical problem, relating to the critical date of the dispute over the islands. Honduras has rejected 1977 as the critical date for the maritime dispute. In view of all that has been said on the diplomatic history of the dispute, however, numerous doubts persist as to the critical date of the dispute concerning sovereignty over the islands north of the 15th parallel. Until 2001, when it filed its Memorial in the current case, Nicaragua had not formally claimed sovereignty over those islands[11]. It is of course for the Court to consider and weigh up those facts.

THE LACK OF EFFECT OF NICARAGUA'S STRATAGEMS OF CONDUCT ON THE CONSOLIDATED LEGAL SITUATION OF THE TERRITORIES AND MARITIME AREAS

9. Madam President, Members of the Court, with respect to the lack of legal effect of Nicaragua's stratagems of conduct, I must first recall that international jurisprudence has in its *ratio decidendi* drawn on the notion of the "behaviour" or "reciprocal conduct" of the Parties in relation to the *effectivités* and *uti possidetis*. This notion refers to a whole series of complex acts and reactions (positive or negative) by the Parties with respect to a specific territorial situation, from which ensues, in the final analysis, the existence of implicit consent to accept that the situation is legally opposable to them and has given rise to territorial rights and obligations. The concept of States' "behaviour" or "reciprocal conduct" is closely linked to those of acquiescence, recognition and estoppel and even to the principle of good faith (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, pp. 14, 23 and 32-33).

[10]CR 2007/7, footnote 66 (Jiménez Piernas).

[11]See above para. 5.

10. Since 1979, Nicaragua has resorted to a whole range of acts well known in international law in an attempt to establish a new situation at odds with the delimitation of maritime areas with Honduras following the traditional line of the 15th parallel: *ad hoc* internal rules, tailor-made cartography[12], the provocation of incidents (such as the capture of fishing boats and arrest of Honduran fishermen north of the 15th parallel)[13], notes of protest, repeated insertion of references to its new position in the minutes of mixed commissions established for other purposes, as well as other paper claims[14]. But that whole strategy remains nothing but a series of stratagems in the eyes of the law. Nicaragua has not managed to present to the Court, either during the written pleadings or during the oral phase, any evidence of occupation or *effectivité* north of the 15th parallel either before or after 1979. Nicaragua has never occupied or exercised peaceful, lawful control over the waters and islands north of the 15th parallel, despite its acts of harassment of Honduran fishing boats and fishermen, especially since 1982, which have always been the subject of vigorous protests by Honduras[15].

11. Those stratagems of conduct, including the protests, are aimed at impeding the continuity of the peaceful and sustained exercise by Honduras of its authority over the maritime areas delimited north of the 15th parallel. Those stratagems also seek to prevent the opposability of Honduras's valid and in all respects definitive title. But none of this can fulfil the condition imposed by international law for such conduct to succeed: the immediacy and repeated nature of the reaction to the emergence of a *de facto* or *de jure* situation[16].

14 12. In a territorial dispute, the acts, reactions, silence or lack of response relative to a given subject are not neutral in law. The attitude and behaviour of the parties can be decisive for the settlement of a dispute of this type. Beyond the role and importance commanded by legal titles and *effectivités* in each case, evidence or otherwise of the implicit or tacit consent of one of the parties can be inferred from the reciprocal conduct of the parties concerned. This notion was used and

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[12]See CR 2007/7, paras. 18-19 (Jiménez Piernas).

[13]CMH, Vol. 1, pp. 47-48, paras. 3.37-3.39, p. 51, para. 3.47 and p. 54, para. 3.53.

[14]CMH, Vol. 1, pp. 53-54, paras. 3.51 and 3.53.

[15]CMH, Vol. 1, p. 40, para. 3.24, p. 55, para. 3.55.

[16]See United Nations, *Report of the International Law Commission, Fifty-sixth Session, Supplement No. 10 (A/59/10)*, p. 224, paras. 206-207 (Chap. VIII, Unilateral Acts of States, Seventh Report of the Special Rapporteur).

expanded upon by the 1992 Judgment in the case already cited concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, precisely against Honduras (*Judgment, I.C.J. Reports 1992*, pp. 577 and 579, paras. 364 and 367-368).

13. Thus, the evidence submitted by Honduras shows that Nicaragua's reaction came very late. Its silence and acquiescence throughout the period of diplomatic history that I have just covered are a good illustration of that. When Nicaragua reacted for the first time in 1979, when Sandinista harassment was stepped up in the maritime areas north of the 15th parallel in 1982 when the United Nations Convention on the Law of the Sea was signed, Nicaragua was not acting against Honduras alone, but also against its own actions, against the conduct it had adopted for a very long time with respect to the maritime areas and islands which it now claims. Consequently, in 1979, and still more so in 2001 when Nicaragua claimed the Honduran cays for the first time, it surprisingly adopted conduct in contradiction to what it had previously done and tacitly acknowledged; in short, it acted against all its previous conduct. The precise legal characterization of such conduct, which is based on adopting a position now expressly contradicting everything which was tacitly acknowledged in the past, is of little consequence. It can only be concluded that Nicaragua has withdrawn the consent it previously gave to the traditional boundary with Honduras along the 15th parallel. That withdrawal is contrary to the principle of good faith and the principle of the stability of boundaries.

14. To summarize, in order to settle this dispute, the Court cannot disregard the reciprocal relations of the contending Parties regarding the existence of the traditional maritime boundary of the 15th parallel. That reciprocal conduct constitutes ample evidence of Nicaragua's tacit consent. The diplomatic history of the dispute endorses Honduras's position in this regard. It is clear that that boundary exists in accordance with international law.

15 15. Madam President, Members of the Court, I would like to express my gratitude for your kind attention. Madam President, would you be so kind as to give the floor to my colleague, Professor Jean-Pierre Quéneudec? Thank you.

Le PRESIDENT : Je vous remercie infiniment, M. Piernas. J'appelle maintenant à la barre M. Quéneudec.

Mr. QUÉNEUDEC: Madam President, Members of the Court, it is an honour, and also, I confess, a pleasure, to plead again before the Court. I thank the Government of the Republic of Honduras for the confidence it has shown in me, and I would also like cordially to greet the members of the delegation of the Republic of Nicaragua.

THE GEOGRAPHY OF THE DISPUTED MARITIME AREA

1. Madam President, Members of the Court, it falls to me to present to you the main elements characterizing the maritime area to which the dispute brought before you by the Nicaraguan Application relates. Accordingly, it is the geographical data that will be my concern.

2. These geographical data will of course have to be considered in relation to the subject of the present proceedings, in other words, in the legal context of a maritime delimitation case in which what is in issue is the establishment of a single maritime boundary. I shall therefore also have to respond to the arguments based on the geographical situation that have been advanced by the other Party, which seem to us open to challenge in view of the subject-matter of the present case.

3. There is no disagreement between the Parties as to the importance of geography in a maritime delimitation exercise. Thus, Nicaragua rightly stated in its Memorial: "Geography is the essential element that must be taken into consideration for obtaining an equitable result in any maritime delimitation."[17] Similarly, during the first public hearing held in the present case it was clearly affirmed by one of Nicaragua's counsel that: "Geography is no doubt the major factor in any maritime delimitation."[18] It goes without saying that we unreservedly endorse that affirmation.

4. However, while there is indeed agreement between the two Parties on this principle, there is a marked difference of opinion between them as to what concrete implications this entails in the present instance. The differing approaches to geography in the present case are attributable, in our view, to the fact that the opposing Party is seeking to give a distorted image of the context and geographical factors characteristic of the area of the Caribbean Sea affected by the maritime

[17]MN, Vol. I, p. 5, para. 1.

[18]CR 2007/1, p. 48.

delimitation between Honduras and Nicaragua. That is what I would like to try and show in my statement.

5. Madam President, my presentation will take the following form. First, I shall have to return to the question of the definition of what truly constitutes the disputed maritime area in the present case (I). Then we shall need to try to identify the relevant coasts with regard to the delimitation between Honduras and Nicaragua (II). Next, it will also be necessary to list the most striking geographical particularities of the area in question (III). Lastly, by way of a conclusion, we will have to evaluate the link between the geographical factors and circumstances identified and the arguments put forward by Honduras (IV).

I. The disputed maritime area

[Slide: Central America (JPQ 1)]

6. As can be seen from the map of Central America and the western Caribbean Basin now on the screen, Honduras and Nicaragua are two neighbouring States, whose respective coasts on the Caribbean Sea are adjacent. The land boundary between these two States ends on that sea at the mouth of the river Coco, also known as the river Segovia, and the mouth of that river lies at the end of Cape Gracias a Dios. That is the first fact.

[End JPQ 1]

7. It should here be stressed that, between two States whose coasts are adjacent, the terminus of the land boundary at the sea is always of particular importance in determining the course of the maritime boundary. That terminus of the land boundary constitutes what the Court called, in its

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Judgment of 10 October 2002, the point at which "the maritime boundary between the Parties is 'anchored' to the mainland" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 429, para. 261). Once can therefore say, following the Court, that here too "the maritime boundary between the Parties is 'anchored' to the mainland" and that, in the present instance, it is "anchored" to Cape Gracias a Dios.

[Slide: Cape Gracias a Dios and the offshore area (JPQ 2)]

This can clearly be seen from the map that is now being projected, which specifically shows the maritime area off Cape Gracias a Dios.

8. This means that it is from and around the terminus of the land boundary at the sea that the maritime area is located in which there may be an overlap between the respective titles that each of the two States can assert over this part of the Caribbean Sea. It is thus an area where opposing claims confront one another and where the maritime delimitation line must consequently be drawn. It is this sector that represents what a Chamber of the Court once called "[t]he area within which the delimitation . . . is to be carried out, in other words, the geographical area directly concerned in this delimitation" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 268, para. 28). It is thus in the maritime area off and around Cape Gracias a Dios that, in the present case, what is commonly referred to as the "delimitation area" is to be found (*ibid.*, p. 272 *et seq.*, para. 40 *et seq.*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 91, para. 169 and p. 97, para. 187). Nicaragua affects to be unaware of this. To be precise, Nicaragua forgets three things. It forgets, first, that the area in question cannot be defined taking what is referred to as the Nicaraguan Rise as a starting-point. It forgets, secondly, that the area in question is certainly not limited to north of the 15th parallel; and it forgets, thirdly, that the extent of the area in question is dependent on the general context in which it is situated. I shall take each of these three points in turn, beginning with the so-called Nicaraguan Rise.

[End JPQ 2]

18 9. In its written pleadings, Nicaragua claimed to define the disputed maritime area by reference to what it had called "the Nicaraguan Rise"[19] or "seuil nicaraguayen"[20]. In his first pleading, devoted to the geographical framework of the dispute, Mr. Elferink maintained that position. After a brief reminder of the location of the Parties' respective territories, he apparently concluded that the "Nicaraguan Rise" was a major characteristic of the regional geography, since it

[19]MN, Vol. I, p. 9, para. 13; p. 18, paras. 42-45. RN, Vol. I, p. 30, para. 3.11.

[20]RN, Vol. I, p. 23, para. 3.11.

was the first feature that he addressed under that heading[21], and particularly in view of the fact that he addressed it again at greater length towards the end of his presentation[22].

10. Honduras has already pointed out that it could not accept that singular view of the disputed area, as it does not reflect the realities of the present case. Moreover, Honduras has already stressed in its written pleadings that it seemed, to say the least, strange to claim to determine the disputed area in this way, on the exclusive basis of the geomorphological characteristics of a particular sector of the continental shelf of the Caribbean Sea, whereas the Court is otherwise being requested to draw a single maritime delimitation line, valid both for the water column and for the sea-bed and subsoil of the sea, irrespective of the legal characterization of the maritime areas concerned.

11. Need I recall that, since the 1982 and 1985 Judgments in the *Tunisia/Libya* and *Libya/Malta Continental Shelf* cases, the geological and geomorphological characteristics of the sea-bed have no longer been recognized by the Court's jurisprudence as factors to be taken into consideration in a delimitation exercise? Furthermore, when, as in the present case, it is asked to determine a single maritime delimitation line dividing both the sea-bed and the superjacent water column, the Court has very clearly shown that one cannot rely on factors concerning only one of the categories of area in dispute.

12. Madam President, Members of the Court, there would be no need to dwell further on this aspect of Nicaragua's presentation, which reflects — it must be stressed — an obsolete view of the factors to be taken into consideration in a maritime delimitation exercise — there would be no need

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to dwell on it, I was saying, if the opposing Party had not invoked, in support of its statements, a Note from the Minister for Foreign Affairs of Honduras addressed to the Minister for Foreign Affairs of Nicaragua. On the basis of this Note dated 11 July 1995[23], Mr. Elferink did not scruple to claim the other day, not only that "Honduras had no difficulty in recognizing the existence of the

[21]CR 2007/1, p. 49.

[22]*Ibid*., pp. 66-67.

[23]CMH, Vol. 2, Ann. 54, pp. 139-142.

Nicaraguan Rise", but, furthermore, that Honduras had also recognized "the fact that it was relevant for the maritime delimitation between Nicaragua and Honduras"[24].

13. Now one would be hard put to it to find in the text of the diplomatic Note in question any recognition whatsoever of the relevance of that geographical and above all geomorphological feature to the delimitation between the two States. On the contrary, in that Note the Honduran Minister disputed the name given by Nicaragua to that underwater feature and unequivocally affirmed its appurtenance to the continental shelf of Honduras. The Court can verify this by referring to Annex 54 to the Honduran Counter-Memorial. Thus, one cannot now seriously claim that Honduras has recently endorsed Nicaragua's contention on this matter.

14. Let us now turn to the alleged limitation of the area north of the 15th parallel. Nicaragua claimed in its Reply that the dispute between the two States relating to their maritime boundary "is confined to the area north of the 15th parallel"[25]. In order to do so, Nicaragua believed that it could base itself on a citation taken from the Counter-Memorial of Honduras, in which it was indeed stated that the maritime areas off the coasts of the two States which were the subject of the present proceedings were those which "are located in the area north of latitude 14° 59.8', traditionally referred to as the '15th parallel' from Cape Gracias a Dios".

15. But Nicaragua affected to have forgotten that, in that extract from the conclusions of the Counter-Memorial, containing a brief summary of Honduras's arguments, it was also expressly stated, at the end of the phrase cited, that the maritime areas concerned in the instant case were

20 those "north and south of the mouth of the Coco/Segovia/Wanks river"[26]. That was tantamount to saying that the maritime areas concerned were those situated on both sides of Cape Gracias a Dios, where the mouth of that river lies. In other words, for Honduras, the maritime area in issue in the dispute between the two States is an area off their respective mainland coasts around Cape Gracias a Dios, and that area cannot on the face of it be bounded to the south by the 15th parallel.

16. Furthermore, the Court will not have failed to note that, somewhat inconsistently, Nicaragua now appears *implicitly* to accept the Honduran definition. Thus, during the first hearing

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[24]CR 2007/1, p. 67.

[25]RN, Vol. I, p. 6, para. 1.5.

[26]CMH, Vol. I, p. 147, para. 8.3 (French translation, p. 129).

last week, the presentation on the cays located in the area to be delimited was the subject of three successive interrelated slides (AE1-5 to AE1-7, in the judges' folder)[27], said to be taken from figures III and IV of the Reply of Nicaragua. What was not very clear from the illustrations — figures III and IV — accompanying the Reply[28] has now become pellucidly clear: the area to be delimited extends well south of the 15th parallel, if we are to believe these sketch-maps. The Members of the Court can confirm this from the folder that was submitted to them by Nicaragua for the first hearing[29].

17. It should also be pointed out in this regard that, if one were to follow the definition that Nicaragua seeks to give of the area where the maritime projections of the two States meet, the outcome would be somewhat anomalous, as, according to Nicaragua, that area would comprise only the maritime area off the eastern coastline of Honduras.

[Slide: Area of Convergence as shown on IB17 (JPQ 3)]

What is more, this would be an unprecedented situation, since, for the first time, a maritime delimitation dispute brought before the Court — as can be seen from the slide that we have simply
21 blocked and highlighted, as presented by Nicaragua — would concern a maritime area entirely located off the coast of only one of the two States.

[End of JPQ 3]

18. Third and last, Nicaragua appears to have been unaware of the general framework on which the extent of the maritime area in issue depends; as Honduras sees it, it is an area of relatively modest dimensions, basically for two closely related reasons.

19. On the one hand, we must not lose sight of the fact that the case submitted to the Court concerns a delimitation in the Caribbean Sea, that is, in a semi-enclosed sea within the meaning of Article 122 of the United Nations Convention on the Law of the Sea. It is a sea of small dimensions in comparison with the wide ocean areas. The distances and proportions are not here the same as in the case of a delimitation between riparian States of a major ocean. It is thus important to take account of the relative nature of the distances at issue and of the scales of

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[27]CR 2007/1, p. 50.

[28]RN, Vol. II, Anns., figs. III and IV.

[29]Republic of Nicaragua, judges' folder, Monday, 5 March 2007.

magnitude in the particular context of a delimitation area of fairly small dimensions, within that sea which has sometimes been called "the American Mediterranean".

20. On the other hand, it is a sea bounded by a number of riparian States, including several island States, and also studded with various types of small island features. The respective maritime claims of these States meet and intersect in this sea. The result is that none of them can really develop the projection of its rights over the sea to the full, as far as the famous 200 nautical-mile limit. And we must therefore denounce the quite unrealistic and artificial character of some of the sketch-maps presented by the opposing Party in the first round of oral pleadings.

[Slide: The Relevant Area IB33 (JPQ 4)]

21. One example is the figure now being projected on screen, which was presented by counsel for Nicaragua at the hearing on 6 March as indicating the "relevant area" in the case before us[30]. But such a presentation or representation of the area totally disregards the regional geography. It could even give the impression that, from the standpoint of the maritime delimitation, the situation of Honduras and Nicaragua is, in the final analysis, not fundamentally

22 different from that of Canada and the United States in the Gulf of Maine area. Which, it will be agreed, is surely somewhat paradoxical.

[End of JPQ 4]

22. We are not here in a situation where the two States concerned might develop their rights over the maritime areas to the full, to a distance of 200 miles offshore. Their coastal projections very soon start to compete with those of other States of the region. Thus, to take just one example, there are only some 65 nautical miles between Cape Gracias a Dios and the first point of the delimitation line established by the 1986 Treaty between Colombia and Honduras.

23. In this regard, it should also be recalled that Nicaragua does not simply overlook the physical geography, but would seem to take no greater account of various important aspects of the political geography of the region.

24. In referring to what it called "the area of relevance for the delimitation", ("la région (ou zone) pertinente aux fins de la délimitation")[31], Nicaragua does not always seem disposed to

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[30]CR 2007/2, p. 39 (Brownlie).

[31]RN, Vol. I, p. 27, para. 3.2, p. 30, para. 3.13 (French translation, pp. 21 and 24).

take full account of the rights and interests that third States have asserted or may assert in the region. On this point, Nicaragua confines itself to disputing any relevance to the delimitation agreements already concluded in the region with or among third States.

[Slide: Maritime Agreements in the Western Caribbean (JPQ 5)]

25. Now, whatever opinion one may have regarding the validity or opposability of all or some of these agreements — a matter on which Nicaragua laid the greatest stress in its written pleadings and to which it reverted at length last week at the end of the first round of oral pleadings[32] —, it is nevertheless not in doubt that these agreements are an integral part of what Nicaragua itself called "the legal context" when considering the political geography of the region[33].

23 26. Thus, it seems to us that, despite what Nicaragua says on the matter, the Court will not be able to disregard the rights and interests of third States, as revealed by the very fact that those agreements have been concluded. Whether in the case of the 1928 Treaty between Nicaragua and Colombia or of the 1986 Treaty between Honduras and Colombia, they give an idea of the way in which the area to which the maritime delimitation dispute between Honduras and Nicaragua is confined may be circumscribed.

[End of JPQ 5]

27. Madam President, I shall now, in the second part, consider the question of the identification of the relevant coasts in the present case.

II. The relevant coasts

28. It has long been established in jurisprudence that the coasts which need to be considered in a delimitation exercise are those with maritime projections which meet. Parts of coasts which do not border on the zone or area to be delimited cannot therefore be taken into account.

29. In 1977, the Anglo-French Court of Arbitration thus dismissed the French argument that the delimitation of the two States' continental shelf in the Western Approaches should have been governed by reference to the general direction of the Channel coasts. According to the Court, the only coasts of relevance for delimitation purposes in the Atlantic sector were those actually facing

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[32]CR 2007/5, pp. 22-26.

[33]RN, p. 34 (French translation p. 26).

that sector, however short they might be[34]. And we know that the Court regarded only the coasts of the island of Ouessant on the French side and of the most westerly of the Scilly Isles on the British side as relevant in that sector.

30. Moreover, according to the Court's most recent jurisprudence on the matter, it is by determining the relevant area for purposes of delimitation that the relevant coasts from which the delimitation line may be determined can be identified. In the last maritime delimitation case settled by the Court, five years ago, it became clearly apparent that only the coastlines which were directly related to the dispute, that is to say those which actually faced that area, could be considered for purposes of delimitation (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 436, para. 280 and p. 443, para. 291).

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31. That is why, in the current maritime delimitation dispute between the two Republics of Nicaragua and Honduras, "it is not the whole of the coast of each Party which can be taken into account" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 75). In particular, "the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other" *(ibid.)*, to quote the words used by the Court 25 years ago, is to be excluded from consideration. But that is precisely what Nicaragua does not seem prepared to admit. In the instant case, the coasts of the two States which are to be taken into consideration are constituted, on the one hand, by only part of their mainland coastlines and, on the other, by the coasts of the islands lying in the area concerned.

(a) ***The mainland coasts***

32. Ever since the start of proceedings, Nicaragua has claimed that its entire coastal front, as well as the whole of Honduras's coastline, should be considered. It has done so with the sole purpose of attempting to justify the application it advocates of the bisector method to the angle

[34] *Delimitation of the Continental Shelf (France/United Kingdom)*, Award of 30 June 1977, *RIAA*, Vol. XVIII, p. 115, paras. 246-247.

which, it claims, is formed by the two coastlines. The first map appended to Nicaragua's Memorial, entitled Figure A, is a perfect illustration of this[35].

[Slide: Figure A of Nicaragua's Memorial (JPQ 6)]

33. The map which has just appeared on the screen, and which was also shown last week to support Nicaragua's arguments[36], provides an opportunity to make a number of comments to the Court regarding the coasts for consideration and the way in which they have been presented by each Party to the case.

25 34. *Firstly*, from a cursory glance at this map, we can immediately see that Nicaragua has a strange way of representing Honduras's coastal front by means of a "line A". For, unlike "line B", which represents the coastal front of Nicaragua, "line A" is drawn so as to run entirely through the inland territory between Cape Gracias a Dios and the terminus of Honduras's land boundary with Guatemala. This results in what could be called a "planing effect", as it effectively "planes" off the entire northern part of Honduras's territory and even, as Professor Greenwood said the other day, a very substantial part of that territory. This fact alone shows that the line, despite being called the "coastal front", cannot in any way be regarded as representing Honduras's Caribbean coastline, still less, of course, as representing the segment of coast which, on Honduras's coastline, is relevant in the present case.

[End of JPQ 6; slide: Spain's Atlantic coast (JPQ 7)]

35. All things considered, it is as though we were to try to represent the northern coastal front of Spain by a straight line, as shown on this map. Who could believe that that coastal front could be validly represented by a straight line running from, at one end, the terminus of the land boundary with Portugal in the west and, at the other end, the terminus of the Franco-Spanish land boundary on the Bay of Biscay in the north? That, however, is what Nicaragua has not hesitated to do in the case of the Honduran coast.

[End of JPQ 7]

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[35]MN, Vol. III (maps), fig. A: "Illustration showing the geography and bathymetry of the Nicaraguan and Honduran coast with coastal front vectors and the coastal front bisector."

[36]CR 2007/2, p. 11.

36. *Secondly*, on the pretext of demonstrating the cut-off effect that would, in its opinion, result from the delimitation line being drawn along the parallel of latitude invoked by Honduras, Nicaragua produced a sketch-map in its Reply entitled: "Cut-off effect the use of the 15° parallel would have on the Nicaraguan maritime area if it were used as a line of delimitation with Honduras."[37]

[Slide: Plate 1, RN (JPQ 8)]

On the sketch-map shown here, Nicaragua has used a different presentation technique. It has, so to speak, replaced the "planing" by "smoothing". As we can see on the sketch-map, it has
26 tried to "smooth" the Honduran coast north of Cape Gracias a Dios as much as possible, in order to give the false impression that no part of that coast has a north-south orientation. But that is simply a trick.

[End of JPQ 8]

37. A sketch-map is, as we know, a rough drawing intended to show the main features of a motif or something else one wishes to highlight. By juggling with the proportions, one can more or less diminish or distort what one wishes to reduce or distort, if it cannot be omitted completely. But such a sketch-map is never an objective representation of reality. I regret to say that, despite the accompanying reference to the United Kingdom Hydrographic Office as its source, this sketch-map must be seen for what it is, namely, a completely distorted representation of reality.

38. *Thirdly*, contrary to all cartographic evidence, Nicaragua absolutely insists that Cape Gracias a Dios is the salient point on the coast which, in this region, marks a sharp change in the direction of the Central American coastline on the Caribbean Sea.

[Slide: Successive coastal direction turns along the Honduran Coast (JPQ 9)]

As Honduras stressed in the written pleadings, it is the change in the general direction of the coastline in the vicinity of Cape Falso that actually marks the beginning of the radical shift in the orientation of the Central American coast facing the Caribbean[38]. From Cape Falso, the Honduran coast undergoes a series of changes in direction, as can be seen from this map. And it is only after

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[37]RN, Vol. II, fig. 1.

[38]RH, Vol. I, p. 111, para. 6.18.

Cape Camarón, located north-west of Cape Falso, that the coast clearly takes a general east-west direction.

[End of JPQ 9]

39. *Fourthly*, and following on from the previous point, it can be noted that Nicaragua is apparently obsessed with the argument it has put forward that the respective coastal fronts of Honduras and Nicaragua have an east-west and north-south orientation. And that is why it has claimed that the two coastal fronts represent the two sides of an inverted right angle. In so doing,
27 however, it also forgets that a stretch of the Honduran coastline between Cape Falso and Cape Gracias a Dios also follows a north-south orientation.

[Slide: British Admiralty chart 2425 showing the east-facing coastal features of Honduras and Nicaragua (JPQ 10)]

And it is precisely that stretch of the Honduran coast running north-south which constitutes the part of the mainland coast of Honduras facing the relevant maritime area.

[End of JPQ 10]

40. *Fifthly*, Nicaragua refuses to take into account the change in the direction of the Honduran coast from Cape Falso, that is, Cape Gracias a Dios.

[Slide: Cabo Gracias a Dios and the offshore area (JPQ 11)]

The map now appearing on the screen shows that from that point (Cape Falso) Honduras's mainland coast, by virtue of its orientation, can no longer be regarded as facing the area of the delimitation. The part of the Honduran coast situated beyond Cape Falso faces north-north-east, that is to say towards a sector of the Caribbean Sea where the projection of that stretch of coast cannot possibly meet the projection of the Nicaraguan coast. It is therefore also difficult to conceive that it could have any geographical relation whatsoever to the Nicaraguan coast for the purposes of the delimitation.

[End of JPQ 11]

41. *Sixthly* and lastly, Nicaragua also totally fails to mention the fact that its own mainland coast is also affected by a quite marked change of direction to the south of Cape Gracias a Dios at the headland of Punta Gordo, lying south of Dacura.

[Slide: British Admiralty chart 2425 (JPQ 12)]

However, a quick glance at a maritime chart of the region shows that beyond Punta Gordo the Nicaraguan coastline can no longer, in view of its orientation, be regarded as facing the delimitation area or as having the slightest geographic relationship with the Honduran coast for the purposes of a delimitation exercise. That being so, it is difficult to claim, as the opposing Party does, that the whole of the Nicaraguan coast should be taken into consideration. We might thus

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quote the words used by the Court in a previous case: "It is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 61-62, para. 75.)

[End of JPQ 12]

42. The resulting conclusion is that ultimately only two relatively short segments of the coastlines of the two States, on either side of Cape Gracias a Dios, can be regarded as representing the relevant mainland coasts of those States for the purposes of the present delimitation. This will be all the more apparent from an enlargement of the relevant portion of the British Admiralty chart which has already appeared on the screen.

[Slide: British Admiralty chart 2425 showing the east-facing coastal features of Honduras and Nicaragua (JPQ 10) *repeated*]

In its written pleadings, Honduras demonstrated that these two segments of coast were made up of the portions of adjacent coasts in the immediate vicinity of the terminus of the land boundary[39]. The distinctive features of those portions of coast are not only their modest length — just some 30 km each — but also the almost perfect symmetry of their respective forms.

[End of JPQ 10]

(b) ***The island coasts***

43. A final series of comments is needed regarding the relevant coasts, in so far as these coasts not only consist of two small sections of the mainland coast of the two States either side of Cape Gracias a Dios, but also include the coasts of islands lying off that Cape.

[Slide: British Admiralty chart 2425 (JPQ 13)]

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[39]RH, Vol. I, pp. 111 and 112, para. 6.17 and 6.19 (French translation of the Rejoinder, pp. 104-107).

44. This map, which is again taken from British Admiralty chart 2425, shows the existence
29 of several island formations off Cape Gracias a Dios. These formations are not really part of the general configuration of the mainland coast. They are relatively . . .

Le PRESIDENT: M. Quéneudec, pourriez-vous aller un peu plus lentement pour les interprètes. Je vous en remercie beaucoup.

Mr. QUÉNEUDEC: Yes, Madam President. As I was saying, these formations do not really form part of the general configuration of the coast, since the distances separating them from Cape Gracias a Dios are approximately 27 nautical miles for Bobel Cay, 30 miles for Edinburgh Cay and some 41 miles for South Cay. These islands therefore lie beyond the outer limit of the territorial sea adjacent to the mainland coast. As a result, the territorial waters that surround these islands do not overlap with the territorial sea off the mainland, except in one sector north-north-east of Cape Gracias a Dios.

[End of JPQ 13]

[Slide: Cape Gracias a Dios and the offshore area (JPQ 2) *repeated*]

45. Looking at a more detailed map makes one thing clear to start with: these formations fall into two quite distinct groups, separated by the 15th parallel. Bobel Cay and South Cay are situated 4.5 and 5.5 miles north of this parallel respectively, while the northernmost point of Edinburgh Reef lies 8.5 miles south of it. However, there are reefs in front of both these groups, approximately 3 or 3.5 miles either side of the 15th parallel: Hall Rock to the north is marked on the map as a rock, i.e., a rocky or coral geological formation of limited size which remains above water at high tide, while Cock Rocks to the south are reefs whose high point is very close to the surface and which are no doubt exposed by the tides, since the sea charts attach the term "Cover" to them.

46. One can also see that the island formations north of the 15th parallel are a fairly compact group. In fact, the distances between them are rarely more than 5 nautical miles. Bobel Cay is 4 miles away from Half-Moon Cay, which lies further north, 5 miles from Port Royal Cay, which in turn is 2 miles from Savanna Cay and 1 mile from Porpoise Cay, from where South Cay is some
30 5 nautical miles away. South of the 15th parallel, there are just two formations of the same type in

the area concerned, Edinburgh Cay and Edinburgh Reef, about 2 nautical miles apart. It should be noted here that, contrary to what Nicaragua has claimed, both in its written pleadings[40] and at the hearing of 5 March[41], Miskito Cay, situated a good deal further south — which does not really appear on the map here — off Punta Gorda, cannot be regarded as forming part of the relevant area for delimitation.

[End of JPQ 2]

47. All these island formations are cays, as indicated by their names. A cay — or key, or "*cayo*" in Spanish — usually refers to a small island formed of coral sand blown by the wind onto a reef or atoll and more or less stable. In this part of the Caribbean Sea, the name appears to have been given, in colonial times, when this sea was regarded as a "Spanish lake", to all the small sandy islands, whereas further north, in the Florida Strait, the same word ("key") refers instead to a group of rocks only just rising above the level of the sea.

48. However, the use of this name "cay" must not conceal the fact that, in terms of international law, these are very much islands, whatever their size may be. One need only recall that in the case between Qatar and Bahrain, the Court found, with regard to Qit'at Jaradah, that a sandy formation 12 m long by 4 m wide, no more than 40 cm high at average high tide, had to be considered an island from the legal point of view (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 195).

[Slide: Aerial photographs of Bobel Cay and South Cay (JPQ 14)]

49. As can be seen from the photographs now on the screen, the formations in question in the maritime area that concerns us are admittedly small, but nonetheless genuine islands in terms of the law of the sea, with all the legal consequences appertaining to their status as islands, as my
31 colleagues Pierre-Marie Dupuy and David Colson will explain in their presentations. At this stage, there is no need to say more on the subject.

[End of JPQ 14]

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[40]RN, Vol. I, p. 31, para. 3.13.

[41]CR 2007/1, p. 50, para. 8.

50. Madam President, this last comment now leads me to consider the main geographical features of the area for delimitation, which is the third part of my presentation.

III. The main geographical features of the area

51. For Honduras, the geography of the relevant area has two key characteristics. The first concerns the configuration of the relevant mainland coasts of the two States. The second relates to the location and distribution of small islands belonging to the two States in the region for delimitation.

52. Let us look at the first characteristic. From its first decisions on the subject, the Court has constantly stressed the primacy of coastal geography in any maritime delimitation exercise. One need only recall the phrase from the famous Judgment of 1969, stating that it is necessary "to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96).

[Slide: British Admiralty chart 2425 (JPQ 13) *repeated*]

53. In the present case, the key feature of the coastal configuration lies in the fact that the relevant mainland coasts of the two States are almost symmetrical in forming, as I have already said, the two sides of a cone-shaped promontory, as can be seen clearly from the map. The segments of coast in question may well be rather short, as has been pointed out. But the quite distinctive form they give to the mainland coast in the region of Cape Gracias a Dios is all the more remarkable as a feature of the coastal geography because this conical shape is almost equally shared between the two States.

[End of JPQ 13]

32 54. This situation is made even more distinctive by the fact that the land boundary between the two States ends at the tip of this promontory, at the mouth of the river that acts as a frontier between them [Slide: Satellite analysis of coastal changes at Cape Gracias a Dios (1979-2001) (JPQ 15)]. The tip of the promontory is constantly changing because of significant alluviation taking place. Everyone agrees on this, and it is perfectly illustrated by the satellite pictures showing the successive coastal changes at Cape Gracias a Dios between 1979 and 2001.

[End of Slide 15]

55. Madam President, Nicaragua has produced for the oral phase a photograph taken on 29 November 2006 by the Spot satellite, and this picture was presented to the Court by the Agent of the Republic of Nicaragua[42]. Not to be outdone, Honduras has obtained another photograph, taken on 24 January 2004 by the Quickbird satellite.

56. Like the photograph presented last week by Nicaragua, the one now on the screen [Slide: Quickbird imagery of Cape Gracias a Dios (JPQ 16)] cannot be regarded as a new document within the meaning of Article 56 of the Rules of Court. It is an item which is readily accessible, since it can easily be obtained from various bodies whose contact details can be found through Google on the Internet, for example from the Eurimage company — though this should not be seen as any kind of advertising on my part.

57. This is of course a less recent photograph, since in contrast to the one presented by Nicaragua, it was taken in January 2004, but the picture is much sharper, even the trees being visible. The resolution of this image is in fact 60 cm per pixel, as opposed to 20 m per pixel for the Spot picture. On this image, unlike the one presented by Nicaragua, one can clearly see that in addition to the existing island in the middle of the mouth, a new island was appearing three years ago in the north-east channel of the Coco River, dividing that channel into two new arms. The mouth does indeed now have three channels.

33 58. If the data collected by Spot in 2006 are transferred onto the Quickbird image from 2004, it is possible to reconstruct quite accurately the outlines of these two islands' present coasts and of the banks of the river Segovia at its mouth.

[End of JPQ 16; Slide: Spot imagery of Cape Gracias a Dios (JPQ 17)]

59. These pictures clearly show that the mouth of the river Segovia or Coco cannot be defined as being formed by the northern bank on the one hand and on the other by a sandy island which might have come to narrow the river at that point. The images make it clear that the mouth is bounded by the two main banks, and contains islands whose outlines change according to the conflicting processes of alluviation and erosion. And the most obvious consequence is that the

[42] Judges' folders, 5 March 2007, graphic CAG 7.

mouth of the river is now divided into three distinct arms because of the presence of the two islands which have been formed there by accretion.

[End of JPQ 17]

60. Madam President, Members of the Court, these data on the coastal configuration of Cape Gracias a Dios are objective facts, not speculation about potential changes. In the light of these data, I am afraid the rather sophisticated hypotheses presented to us last week by my friend Professor Pellet have already been refuted and brought to nought by the whims of Mother Nature.

61. The second characteristic of the area concerns the islands. The location and distribution of these islands show that, despite their small size, they have a role to play here in the delimitation, in so far as some of them, such as Bobel Cay, Port Royal Cay, Savanna Cay and South Cay, are under the sovereignty of Honduras, while others, lying further south, fall under Nicaraguan sovereignty. Their situation in relation to each other is, then, one of opposite coasts, between which a delimitation line therefore has to be drawn as the boundary between the respective territorial seas generated by these islands.

62. There is no need to develop further these comments on the islands situated in the area of delimitation. With the Court's permission, I would refer to the explanations provided on this subject by Professor Greenwood in the general presentation that he made on Monday, and in particular to illustration CJG 19 which accompanied his statement.

34 63. In our view, the outcome of all the comments we have made, both on the relevant coasts and on the features of the maritime areas in question, is that the maritime area for delimitation is bounded to the west by adjacent mainland coasts and is also studded with opposite island coasts to either side of the 15th parallel. As Mr. David Colson will show in his presentation, this situation is not without effect on the approach to the delimitation line in the present case.

64. One can perhaps apply here, *mutatis mutandis*, what the Court found in October 2002 in relation to another situation: "The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 443 and 445, para. 295.)

65. Madam President, I now come to the fourth and final part of my statement, which will also form a conclusion, since it will look at the arguments of Honduras regarding geography.

IV. The arguments of Honduras regarding geography

66. In this case, as in many other maritime delimitation cases brought before the Court or other international tribunals, the two States clearly have a markedly different view of what is a given in terms of geography and the consequences that can be drawn from this as regards the course of the maritime delimitation. The fact is that the assessment of the geographical data involves a greater or lesser degree of subjectivity. Honduras, for its part, has tried to reduce this subjective element as far as possible in presenting and assessing the geographical facts. I hope I have convinced the Court of that.

67. It is indeed on the basis of geography, as it exists, that the appropriate legal rules on maritime delimitation need to be applied. Pierre Dupuy will come back to this point in a few moments. The Court has specified and refined these rules over the years. Its case law on the

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subject is therefore well established. It contains that element of stability and predictability which some, even within this Court, had hoped and prayed for nearly a quarter of a century ago. The Court certainly cannot risk questioning this acquired wisdom, which has now become consolidated. It therefore cannot agree to take the approach advocated by Nicaragua to drawing a maritime boundary.

68. The solution sought by Honduras is more in tune with the rules of the law on maritime delimitation. This solution may indeed be anchored in history; but it is equally in keeping with the geographical and other factors in the case.

69. Whether the Court recognizes without ado the existence and validity of the traditional line of the 15th parallel, or whether it begins by drawing a provisional equidistance line and then adjusts this along the 15th parallel to adapt it to the circumstances of the present case — the solution it decides on in either case will surely be totally in keeping with a geographical and historical situation that is perfectly reconciled regarding the 15th parallel of latitude north.

70. If that is indeed the case, the commentators on the Judgment delivered by the Court will perhaps then have to reflect on the old Latin adage: "*Linea recta semper praefertur transversali*."

Madam President, Members of the Court, thank you for your attention. The presentation of the arguments of Honduras will continue with the address by Mr. Dupuy.

Pourrais-je suggérer, Madame le président, que vous donniez la parole à M. Dupuy après la pause que la Cours voudra peut-être faire maintenant.

The PRESIDENT: Thank you, we will do that.

La Cour fera à présent une pause et l'audience reprendra sous peu.

L'audience est suspendue de 11 h 30 à 11 h 45

Le PRESIDENT : Veuillez vous asseoir. M. Dupuy, vous avez la parole.

Mr. DUPUY:

The applicable law

1. Madam President, Members of the Court, it is always a privilege and pleasure for me to appear before the Court and I am doing so for the fourth time in a case involving the Republic of
36 Honduras, to which I express particular thanks for trust and loyalty by which I am honoured.

2. Madam President, while this is admittedly a very rare occurrence, it does sometimes happen that islands gradually emerge above the waves, especially in volcanic zones, as exist in Central America incidentally. They then constitute a new presence in areas previously considered essentially maritime. The scientific community, particularly geologists, takes a keen interest in these telluric phenomena of island emergence.

3. In a way, we observe a rather similar phenomenon in the case which brings us here today, although it is one of interest foremost to lawyers. Islands, islets and cays have in fact always existed in the Caribbean Sea. It was in particular precisely because they offered a port of call, albeit a precarious one, to the "Brethren of the Coast" — meaning buccaneers, pirates, galleon robbers and looters of wrecks — that the Spanish Crown took care to apportion amongst its captaincies the duty of ensuring security on the seas. Thus, it projected the apportionment of territorial authority beyond the shore, an apportionment subsequently inherited, under *uti possidetis*, by the new States which succeeded it. True, these islands have physically existed from

time immemorial. But Nicaragua never showed much interest in them from the time it was created until the very recent past! Clearly more oriented towards the coastal front it also has on the Pacific, it paid no heed to the support to be had from territorial claims, even in a maritime delimitation case initiated nevertheless by it alone. For the present case, I shall remind you, was brought by means of a unilateral Application for which Nicaragua bears sole responsibility.

4. Now, its Application makes no mention of the islands. It is confined to setting out a claim to a delimitation which I venture to characterize as exclusively maritime, based on the construction, truly arbitrary, of a geometric line having no rationale other than the way in which it ruthlessly slices up the general configuration of the Honduran coastline from the Guatemalan border to the unruly mouth of the Coco River!

37 5. Nothing in the Application. And not much in its first written pleading either. Well, not much formally but already a great deal substantively. Indeed, it is in its Memorial that Nicaragua, as if as one last second thought, appears to have added, at the tail end of paragraphs until then systematically numbered, the first claim to "sovereign rights" to what it still calls mere "Islets and Rocks" situated north of what we are, for convenience, calling the 15th parallel[43].

In their very conception and logic, the delimitation method proposed by Nicaragua and the line resulting from it nevertheless dispensed with any help from these "islets and rocks"; nor did the submissions presented to the Court at that time make any reference to these island features.

6. The incidental and belated mention of these islands in Nicaragua's Memorial did however immediately draw Honduras's attention. In its Counter-Memorial, it wondered whether the other Party was thereby surreptitiously transforming a maritime delimitation case into a dispute over the attribution of island territories as well.

7. However, despite this belated disinterment of interest in the cays, Nicaragua continued, in its written pleadings, even still at the Reply stage, paradoxically to manifest a haughty indifference, as it were, to these small islands dotting the sea above the 15° parallel, at least when Nicaragua was speaking of delimitation. After having accused Honduras of excessive interest in the islands, Nicaragua thus continued to make the curious assertion, in contravention of the fundamental rules

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[43]MN, p. 166.

of the applicable law and of Honduras's position, that both Parties "consider that the islands or islets in the area have no effect on the delimitation"[44]! This assertion, which is wrong in respect of Honduras, was moreover confirmed by the lack of any reference to the islands and islets in Nicaragua's submissions.

8. Yet now in the course of these proceedings the Agent of the Republic of Nicaragua in his opening statement officially announced to us that in the end his country was going to amend its submissions in order "specifically [to] request a decision on the question of sovereignty over the

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islands"[45]. Culminating outcome of the gradual, but seemingly inexorable, emergence of the islands in this litigation, but so at odds with the premises of the dispute that the Court and the Respondent now feel they have been misled as to the true nature and real substance of this case. Indeed, it might initially have seemed correct to call it, as the Registry has done, the "case concerning *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*". That is still true. But it would be better from now on to call it the "case concerning the island and maritime dispute between Nicaragua and Honduras in the Caribbean Sea".

9. Be that as it may, and as in the past, regardless of the importance of the emergence of these islands into Nicaragua's field of vision, Professor Ian Brownlie, on last Tuesday and Friday, not only showed the great goodness of rereading to the Court copious passages from our own written pleadings. He also cited jurisprudence whose wealth was matched only by its diversity. It would however appear from this accumulation of case law citations that Nicaragua is changing its view of the islands without however changing its approach. Without in any way modifying either its method or the compelling bisector which it yields. Nicaragua in fact appears to claim the islands only because it initially drew a line allowing it to appropriate them. Its avenging bisector is not the product of a careful approach based on testing a preliminary drawing of an initial equidistance line. It is an arbitrary slash of the scissors through the warp and weft of the sea. Nicaragua has thus adopted an approach opposite to one of the cardinal rules of the law of the sea.

10. It remakes geography with the help of a great many geometric constructions, at once complex in elaboration and simplistic in result. As if it viewed the law as reflected in the turbid

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[44]RN, p. 10, para. 1.17.

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

waters of the Atlantic, it inverts the famous saying of the Court. For Nicaragua, the land no longer dominates the sea; instead, the sea, re-tailored to Nicaragua's wishes, grants it island features even though its prior conduct shows that it long neglected them.

39 11. Nicaragua's approach thus bespeaks a major violation of the cardinal rules of maritime delimitation. It is in breach of the applicable law and that is why I am here today to speak to you about it. True, Madam President, all counsel for Honduras are speaking about the law here before you and my task, modest of course but still pleasant, will merely be to assemble these diffuse points in an arrangement and respectfully offer it to you. To take just one example, Jean-Pierre Quéneudec is not only a professor of geography! The statement he made sets out in legal terms the significance of the geography that must be taken into account. Before him, Philippe Sands spoke to you not only about the facts but especially about the law. Let us note here that the applicable law he discussed is not the law of the sea but of the land! By that I mean not the law of delimitation but the law of territorial attribution, the full import of which we will see again later on. As for myself, I shall speak to you directly about the law that should in principle, pursuant to Nicaragua's initial Application, have been our sole concern, the law of maritime delimitation.

12. Of course, Nicaragua has not contested Honduras's statement in its Counter-Memorial to the effect that "[t]he law applicable to the case is, therefore, the positive customary international law of the sea, as reflected by the practice of States, the relevant articles of the 1982 Convention, and the international case law, beginning with the judgments of the International Court of Justice"[46]. That law is now stabilized. As President Guillaume said in presenting an overview of your jurisprudence to the General Assembly in October 2001: "[I]t is encouraging to note that the law of maritime delimitations, by means of these developments in the Court's case law, has reached a new level of unity and certainty, whilst conserving the necessary flexibility."[47] It is indeed that stabilized body of law which should be applied here.

It has however been confirmed, after the other Party's first round of oral argument, that a two-fold clarification is required. We shall therefore deal with it in two parts.

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[46]CMH, p. 60, para. 4.8.

[47]Speech by President Guillaume to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001, http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_6thCommittee_2001.htm

The first will concern equity in relation to the relevant circumstances, the second the delimitation method.

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I. Equity's role and place in relation to the relevant circumstances

13. In respect of equity's role and place in relation to the relevant circumstances, the Parties agree in principle that the objective in any maritime delimitation is to arrive at an equitable solution and I shall spare the Court a review of its jurisprudence from the *North Sea Continental Shelf* case onwards concerning the characteristics of equity as it should apply in the legal determination of a delimitation.

The fundamental point to be recalled here is that equity is achievable solely through taking into account the relevant circumstances for the delimitation and that there is nothing more specific to a case than the circumstances relevant to it. We have already earlier recalled this observation by the Chamber in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment, I.C.J. Reports 1984,* p. 246); and, as the Court itself later noted in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), (Judgment, I.C.J. Reports 1993,* p. 76, para. 85), there is no legal obligation to transpose onto one case a solution adopted in a different one.

14. On the subject of terminology, I would in passing like to clarify one point. In the area in question, the delimitation is to a great extent that of the territorial sea, as you will see from this map.

[PMD1 (CJG21)]

In respect of the territorial sea, Article 15 of the Convention on the Law of the Sea speaks of "special circumstances". In the rest of my statement this term, specific to delimitation of the territorial sea, will however be as it were subsumed into, in other words included in, the broader concept of "relevant circumstances", which is appropriate for the delimitation of the other maritime areas, the continental shelf and the exclusive economic zone. The present case involves the plotting of a single delimitation line.

15. Here the circumstances that are at once special and relevant are varied but in no way justify the surprise expressed the other day by counsel for the Applicant. Is there any need to

recall, as the Court has said, that: "there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures . . ." (*North*

41 *Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 50, para. 93.) And those are mainly, at least here, of three types: geographical, historical and, lastly, legal.

A. The geographical circumstances

16. *Geographical circumstances*, first of all. We should indeed start with these, since, as already noted in the 1977 United Kingdom — France award, "it is the geographical circumstances which primarily determine the appropriateness of the equidistance or any other method of delimitation in any given case"[48].

I will however be brief on the matter of the geographical circumstances, as Professor Quéneudec has just set out before you all the factors to be taken into account. On the other hand, I will dwell a bit longer, starting from this initial review, on the one factor among these which Nicaragua has paradoxically left out of its delimitation. This is, of course, the presence of islands.

(1) ***Geographical circumstances concerning the whole of the area in question***

17. The geographical circumstances concerning the whole of the area in question are by definition specific to each case. And yet the various categories into which they fall are time-honoured; they cannot be ignored or distorted: as others before me have noted, one must start at the end-point of the land boundary and then continue relying solely on those coasts whose maritime projections overlap in the relevant area, that is to say in the area to be delimited. This means that it is necessary to identify on each relevant coast the "point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for . . . delimitation", as the Court said in 1982 (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 61-62, para. 75). And that is because, to quote from the same case, "the submarine extension of any part of the coast of one

[48] Award of 30 June 1977, para. 96.

Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other" should be excluded (*ibid.*, p. 61, para. 75).

42 18. An analysis of the coastal configuration thus identified must then be undertaken. As the Court said in the *Cameroun/Nigeria* case: "The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 443-445, para. 295.) Pursuant to those same principles, it is necessary, beyond the relevant coasts, to acknowledge the presence of features having a direct impact on the dividing line, and that now brings me to the islands.

(2) ***A pre-eminent geographical circumstance: the presence of islands***

19. What I referred to a short while ago as "Nicaragua's island paradox" consists of both its initial disregard of the islands and the belated interest it claims in them.

20. In response to Nicaragua's confused and self-contradictory position, the law calls for recourse to simple, clear considerations, expressed in three questions.

(1) To focus on the principal features — Savanna Cay, South Cay, Bobel Cay, and Port Royal Cay, lying 28, 41, 27 and 32 nautical miles from the mouth of the Coco River[49], respectively: are they or are they not islands within the meaning of Article 121 of the Convention on the Law of the Sea?

(2) If so, are these islands entitled to their own maritime areas?

(3) If so, in light of these features' geographical position vis-à-vis the "15th parallel" (14º 59.8'), is the delimitation line likely to be affected if they are taken into account?

21. The "*délabyrinthage*" ("de-labyrinthing"), to use a word invented by Molière[50], of Nicaragua's inconsistent positions would seem to yield the following answer to the first question, "are the cays islands": the initial description, "islets and rocks", employed by the Applicant in its Memorial did not prevent it in its Reply from conferring island status on these features. It then

[49]For the sake of precision, it is the *fleuve* Coco in French, because it is a watercourse emptying into the sea.

[50]*Les femmes savantes* (The Learned Ladies).

43 merely states that it considers them small, very small even, which, it goes on to tell us, should prevent them from being taken into account in a delimitation exercise[51].

22. We would just observe that there are two problems here: first, island *status*, which the cays do in fact have; second, the issue as to whether, given their small size, which can only be judged *in situ*, they will ultimately be capable of influencing the delimitation. Let us not confuse the two and let us for the moment go no further than the first: the cays are islands. Nicaragua eventually admits so. Honduras has always said so.

23. Let us then turn to the second question: are islands entitled by law to their own maritime areas? The response is common knowledge; it is in the affirmative and an island's size is not in itself legally significant. To ascertain this, one need only reread the relevant provision of the Montego Bay Convention. It was in reliance on it that this Court stated in 2001:

> "In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory." (*I.C.J. Reports 2001, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment*, p. 97, para. 185.)

24. As the cays are islands, albeit small ones, it follows that each is entitled to a territorial sea, an economic zone and a continental shelf. And this is in contradistinction to the case of features which are merely rocks, such as Hall Rock or Cock Rock in the same area. Pursuant to the third paragraph of that same Article 121, they have no right to generate their own maritime areas. We can now better understand why Nicaragua preferred from its Memorial onwards to lump together under a single heading of its own choosing, that of "islets and rocks", "features" which it first claimed and then paradoxically described as serving no purpose.

25. And yet there lies the response to the third question: as a general rule, an island must, regardless of its size, be taken into consideration if it is liable in fact to have an effect on the course of the dividing line. Here again, I am not the one to proclaim this; the Court is, for instance in

44 paragraph 195 of its Judgment in the case already frequently cited as *Qatar* v. *Bahrain.* The Court states in respect of the maritime feature of Qit'at Jaradah, also very small, "that it is an island

[51] RN, p. 32, para. 3.17.

which should as such be taken into consideration for the drawing of the equidistance line" (*ibid.*, p. 99).

26. Accordingly, to the questions asked a little while ago there are two fundamental answers: *(a)* the cays referred to earlier are entitled to their own maritime areas; *(b)* they must be taken into consideration for the delimitation.

The Parties maintain rather conflicting positions on these points.

— As we have already seen, Nicaragua, having first asserted a claim to the island features concerned, denies them any effect on the course of the dividing line[52].

— Honduras, for its part, does not deny the importance of the islands. On the contrary, it argues that the line advocated by Nicaragua is illegal and in any event inequitable notably as a result of the fact that the line does not respect Honduras's ownership of these island features.

27. The relevant historical circumstances are such because the inhabitants have always been required to come to terms with this territory's nature and configuration ever since they first settled there. The historical circumstances are of course of that much more relevance in that the traditional line originated in the distant past in the way in which the Spanish Crown apportioned authority on either side of Cape Gracias a Dios between the Captaincy-General of Guatemala and the General Command of Nicaragua.

28. Authority extending not only to mainland but also island areas and therefore maritime areas. Because already at that time, when the seas were the only medium for carrying out trade and maintaining links with the mother country, as well as smuggling, the coastal power took a keen interest in the sea and islands. And under the *cedulas reales* those areas were divided by the so-called "15th parallel" line, a line which — it will be noted in passing — at the time conveniently, and drawing admittedly on primitive geodesy, embodied the notion of a division equidistant from the two, nearly symmetrical, sides of the cone whose point is Cape Gracias a Dios.

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29. Thus, a way to apply on a regional scale, and using parallels, the same method previously used on the global scale by Pope Alexander VI (Borgia), employing, for his part, meridians in his famous Alexandrine bull. The scale changes but not the process. Under the Spanish Crown, the

[52] RN, p. 32, para. 3.17.

dividing lines, drawing inspiration from papal authority, thus often formed the sign of the cross! (CR 2007 11, p. 41, para. 27.)

30. Now, the Chamber of the Court was of the view in 1992, in the *El Salvador/Honduras: Nicaragua intervening* case, that it should begin with *uti possidetis juris* in maritime areas as well; there is no reason why it should be any different in the present case. Honduras is not saying that the continental shelf has devolved to it on the basis of *uti possidetis*; quite simply because in the era of the Spanish Crown, the continental shelf *did not exist*, at least not legally speaking.

On the other hand, there were warships and merchant ships, sailing under any number of flags, and their safety had to be ensured.

31. Thus we see the link uniting history and geography. As early as colonial times, all the islands were distributed and any notion of *terra nullius* rejected. As for all the islands situated above the 15th parallel, the Applicant has proved unable, either last week or in its written pleadings, to offer the slightest evidence that any of them was ever placed under the authority of the General Command of Nicaragua.

32. Thus, contrary to the Applicant's insinuation, Honduras is not seeking to substitute the weight of history for the weight of the positive law of the sea. It wishes merely to show you, in the context of the law of the sea, how the legacy from colonial times has, by way of a rule for the handing down of territorial boundaries, right up to the contemporary era, governed the apportionment of authority by an equitable method.

33. If this had not been so, Madam President, Members of the Court, one might wonder why Nicaragua waited so long before proposing to its neighbour that it define another boundary. Even assuming that the agreement proposed in 1977 had a purpose other than to formalize a *de facto* agreement, the latter however having been the case, as seen from the text of the diplomatic Notes commented on the other day by Professor Greenwood[53], how could Nicaragua have suffered an inequitable situation in silence for 156 years?

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[53]CR 2007/6, pp. 24-25.

No, Madam President, Members of the Court, there is no conflict or contradiction, let alone any incompatibility, between citing history's legacy and citing, as we must do, the law of the sea applicable to delimitations as it stands today.

It is because that law is crystallized in the obligation to find an equitable solution that the International Court must take account of all signs pointing the way to such a solution.

C. The legal circumstances

34. Professor Brownlie rightly recalled the other day that the applicable law must be applied within the context of the case: there are legal facts which characterize the specific context in which the other relevant circumstances must be taken into account. Quite apart from *res judicata*, which should be borne in mind in connection with your Judgment of 1960 (*I.C.J. Reports 1960*, p. 192) upholding the Arbitral Award of 1906, whose key importance for the terminus of the land boundary Mr. Colson will tell you about again tomorrow, there are two types of legal circumstance which are important because of their direct impact on the way in which the area to be delimited is to be dealt with.

(1) ***The need to respect the rights of third parties in the region under consideration***

35. This is directly linked to the existence in the area concerned of *treaties* concluded with third parties by one or other of the Parties to the dispute, it being understood that the rights of third parties must be protected and that the Court would apparently not have jurisdiction to draw a single delimitation line disregarding, in particular, the rights of Colombia as established both by the 1928 Treaty concluded with Nicaragua and by the 1986 Treaty with Honduras. There is also the Maritime Delimitation Treaty between Jamaica and Colombia of 12 November 1993 concerning the same matter, which it is essential to take into account. It will be recalled that the recent Arbitral Award between Barbados and Trinidad and Tobago also took into consideration existing treaties,

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including one involving a third State party to the dispute, as relevant circumstances[54].

36. I will not dwell on this point — those treaties exist. The Court does not have to decide whether the 1928 Treaty was validly denounced by Nicaragua, as that is a matter for another case

[54]Arbitral Tribunal constituted pursuant to Art. 287 and in accordance with Ann. VII of the UNCLOS, The Hague, 11 April 2006, pp. 103 *et seq*., paras. 339 *et seq.*

to which it will revert shortly. Nor has the Court to consider here whether the 1986 Treaty between Honduras and Colombia is opposable to Nicaragua. But the Court has a duty in this as in other cases to respect the rights of third parties in its ruling, whose rights it cannot prejudge. I now come to the second important legal consideration which is a relevant circumstance, namely, the conduct of the Parties.

(2) ***The importance of the conduct of the Parties***

37. This cannot be separated from the history. It falls within the continuity of the colonial legacy passed down by way of *uti possidetis*. The consideration of conduct, irrespective of the conclusions the Court has drawn from it in practice, can be found in a number of its judgments on maritime delimitation. And this conduct bears upon two issues in the present case:

— firstly, the conduct of the Parties in relation to the exercise of sovereign rights over the islands;

— secondly, the conduct of the Parties in relation to the boundary of their respective maritime areas.

38. *(a) Called upon primarily to draw a maritime delimitation line between the Parties, it is important for the Court to know which of the two countries exercises effective control over the island features concerned* as understood by the sole arbitrator, Max Huber, in the pivotal *Island of Palmas* case[55].

With respect to formations whose small size has been amply emphasized, reference has already been made, and I will not cite it any further, to the famous Judgment of the Permanent Court of International Justice concerning Eastern Greenland (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J. Series A/B No. 53*, pp. 45-46). However, it was on the basis of that jurisprudence that your Court, in recent cases ruled upon in 2001 and 2002, namely, that between Qatar and Bahrain (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, para. 198), and that between Indonesia and Malaysia (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, para. 134), had to consider the criteria for determining the exercise of sovereignty over what might be called “confetti islands”.

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[55]PCA, *Award of 4 April 1928, RIIA II*, pp. 839-840 and *RGDIP* 1935, pp. 156 *et seq*.

39. As we know, you regarded the fact that Bahrain had constructed a navigational aid on Qit'at Jaradah as sufficient to demonstrate, to Bahrain's advantage, that that island belonged to it (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, paras. 197-198). We also know how Malaysia obtained satisfaction in its dispute with Indonesia regarding the attribution of sovereignty over Pulau Ligitan and Pulau Sipadan.

40. Now Philippe Sands has already taken you, in his arguments yesterday, on a tour of the islands and cays where fishermen of various nationalities put in, subject to authorizations issued by the Honduran authorities. He has also drawn your attention to manifestations of sovereignty appropriate to this type of territory. I will thus refrain from enumerating them again.

41. Contrary to what Nicaragua asserts, it is not because Honduras allegedly has a "territorial" and "sovereignty-focused" conception of maritime delimitation that it is requesting you to take account of the *effectivité* of its control over the islands in issue; it is because of the impact on the delimitation line, to which I will turn in a minute.

42. Incidentally, Nicaragua's continued acquiescence in the appurtenance of the islands to Honduras until a quite recent date needs to be seen in the light of the fact, mentioned yesterday, that as late as April 1998 Nicaragua saw no particular obstacle to participating in the adoption, as a Central American country, of the free-trade treaty concluded between the countries of the region and the Dominican Republic or in ratifying it in 2001. In that treaty, it was, however, clearly stipulated that its territorial scope included, as far as Honduras was concerned, Palo de Campeche Cay, the Media Luna archipelago and a series of nearby shoals. We might, incidentally, note how the dates tally. That treaty came into force for Nicaragua in 2002 and it was only in 2001, in its Memorial in the present case, that Nicaragua openly expressed its initial claim over islands, the

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possession of which by its Honduran neighbour it had never previously dreamed of challenging, except in a Note in 1994, to which there was no follow-up[56].

43. *(b) As regards consideration of the conduct of the Parties with respect to the area to be delimited*, it has been recognized at least since the North Sea fisheries case between the United

[56]CMH, Vol. I, pp. 52-53, para. 3.50; MN, Vol. 2, Ann. 49, pp. 116-117.

Kingdom and Norway (*Fisheries, Judgment, I.C.J. Reports 1951*, pp. 116 *et seq*.) — which was indeed a case involving the determination of maritime areas, having regard to the straight baselines — that an absence of protest amounts to consolidation of the title to the detriment of the other Party. Moreover, in a case directly related to maritime delimitation, that concerning the continental shelf between Tunisia and Libya *(Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*), the Court also had occasion to find that the conduct of the Parties, precisely with respect to the same type of practices as in the case at hand, namely the determination of respective oil exploration concessions, constituted proof of implicit agreement or, at any rate, of recognition by the party which does not protest.

44. In the *Gulf of Maine* case, the Chamber of the Court decided that an examination of the Parties' conduct was relevant (*I.C.J. Reports 1984*, pp. 303 *et seq*., paras. 126 *et seq*.), although its response was ultimately in the negative. The same is true of the *Jan Mayen* case (*I.C.J. Reports 1993*, p. 75, para. 82).

45. Now, as you will hear again in greater detail tomorrow from my friend Philippe Sands, that is what it was: acquiescence. Not only did Nicaragua not protest against the permits issued by Honduras north of the 15th parallel, but it used this line itself in issuing its own permits[57]. The assertion of Professor Remiro Brotóns that the upper limits of those permits remained open is not correct, as Professor Sands will show you when he follows me. Consequently, it is difficult to imagine a clearer and more unashamed admission of recognition that the maritime delimitation line is indeed that one. Lastly, let us recall that the Court's Judgment in the *Cameroon* v. *Nigeria: Equatorial Guinea intervening* case, far from denying the importance the oil concessions were given in 1982, actually upholds it, at least where, as is the case in the current dispute, there is an agreement between the parties, whether express or tacit, that is to say *de facto*.

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46. In connection with what I have just said, is there really any need to add that the principle of good faith applies in our case, as in any other.

[57]See CMH, pp. 98-102, paras. 6.24-6.28; RH, pp. 81-85, paras. 5.04-5.05.

47. Similarly, for Honduras it seems inconceivable that Nicaragua should now unilaterally call into question a maritime boundary which its own practice had consolidated since its origins as a sovereign State.

II. Criteria and methods of delimitation

48. The second part of my presentation will be shorter, as the delimitation method is, in a sense, the result of all of the foregoing. As I have said, the Parties agree that the method must give rise to an equitable result.

49. They also agree that a *single* delimitation line must be drawn. With respect to such a line, need I remind you that the Court observed, in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, that "the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice . . . [I]t finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various . . . zones of maritime jurisdiction appertaining to them." (*Merits, Judgment, I.C.J. Reports 2001*, p. 93, para. 173.)

50. But this finding prompted the Court immediately afterwards to conclude, echoing the words of its Chamber in the *Gulf of Maine* case, that the delimitation "can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these . . . objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them" (*ibid.*; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 324, para. 194).

51. On this basis, I will now examine two further points which seem to me at this stage to synthesize the remarks concerning the legal principles to be respected in the choice of a delimitation method.

51 — The first is contained in an observation: that it is legally impossible to dissociate the appurtenance of the islands from the determination of the dividing line.

— The second concerns the choice of method, as indicated by the applicable law and as has been practiced by each of the Parties.

A. Indissociability of identification of sovereignty over the islands and determination of the delimitation line

52. In the frequent cases where the maritime areas concerned include islands, the method must result in the drawing of a line that respects the division of sovereignties established over those islands. This is in application of the principle that "the land dominates the sea" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 51, para. 96) and not the reverse. We are here touching on the fundamental reason why Honduras, ever since its Counter-Memorial, has focused on the status of the islands.

53. The law and practice of the Court now seem to have been clarified, at least since your Judgments in the 1985 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case (*Judgment, I.C.J. Reports 1985*, particularly p. 48, para. 64) and in the 1993 *Jan Mayen* case (*I.C.J. Reports 1993*, p. 60, para. 49); one should first apply, at least as a preliminary, provisional step, the test whereby a median line is drawn, and ascertain thereafter whether special or relevant circumstances call for a different delimitation.

54. Another way of reaching the same conclusion as to the indissociable nature of the appurtenance of the islands and delimitation entails referring to the equitable principles, one of the most important of which, set forth as long ago as your Judgment of 1969, prohibits any encroachment by one party on the natural prolongation of the other party. Applied to a single line, this principle no longer relates only to the continental shelf but also to the other maritime areas concerned. It is thus once again surprising that what I just called "Nicaragua's island paradox" means that it continues to call for the application of a method without first taking into account the ownership of the islands, despite having gradually accepted that identifying their owner was a prerequisite.

55. In this connection, I think it useful to remind you of the illustration of this principle provided by Professor Greenwood last Monday, even though, after me, it will fall to Mr. Colson to explain to you in detail the method applied.

52 — You will see, in the graphic displayed on your screen, the equidistance line obtained if the islands concerned are regarded as Honduran and also if each of them exerts its full effect.

[PMD2]

— You now see the result of the same operation if, applying the same method, the islands are regarded as belonging to Nicaragua.

[PMD3]

56. You will thus have been able to ascertain that the two lines have, to say the least, nothing in common.

Madam President, Members of the Court, you have once again had to turn to Honduras in order to see the result of drawing a provisional equidistance line. To conclude, let us now turn to the method chosen by each of the Parties.

B. The method chosen by each of the Parties

57. What method is to be adopted for the delimitation? The method is a means. The equitable solution is an end. The former can be justified only in relation to the latter. And the purpose of any delimitation procedure, as everyone agrees, is to reach an equitable solution for all the maritime areas to which it is applied. Now in the present state of positive law, as the Court noted, *inter alia*, in its *Qatar* v. *Bahrain* Judgment: "[t]he most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 58, para. 176.) However, there too we must read the Court's findings without vitiating its intention; it explains immediately thereafter: "The Court will further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined." *(Ibid.)*

58. There can be no better way of putting it than to say that what has thus become the ordinary practice is the approach, but not necessarily its result in terms of equidistance. The "equidistance/special circumstances" rule remains a method, and not necessarily the obligatory source of all delimitations; the Court does not rule out the possibility of using other methods if they are appropriate for reaching an equitable result. Thus, citing its own Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the Court recalled with regard to *Qatar* v. *Bahrain* that:

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> "the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 47, para. 63, cited in para. 233 of the *Qatar* v. *Bahrain* Judgment.)

59. In other words, the need to take account of the relevant circumstances is in any event implicit in the search for an equitable solution. But one does not inevitably reach that solution by confining the role of those circumstances to one of correcting the equidistance. Furthermore, as the Award recently made between Barbados and Trinidad and Tobago rightly stresses, the method for reaching an equitable solution must always be chosen with a view to accommodating both the predictability and the stability of the adjudication or award[58].

Le PRESIDENT : M. Dupuy, pourriez-vous aller un tout petit plus lentement afin que l'interprétation ne soit pas trop en retard sur ce que vous dites. Je vous en remercie.

M. DUPUY : Certainement.

60. In the present case, let us briefly examine the respective positions of Nicaragua and Honduras with regard to the equidistance method to which I have referred. Contrary to what it emphatically asserts, Nicaragua does not really apply that method. It is true that it draws upon it very indirectly, albeit basing itself on arbitrary presuppositions. In fact, Nicaragua has two proposed "methods" for justifying its line: one based on bathymetry, the other on geometry; the one is the result of an improbable morphology that is in any case irrelevant from the standpoint of the law of the sea; the other derives from a misconception of the geographical reality. I shall now revert one last time to the "Nicaraguan Rise".

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(1) The "Nicaraguan Rise"

61. It will quickly be seen that the reference to this submarine formation has nothing to do with the equidistance method — except, perhaps, its very opportune location to support the Nicaraguan conception of the delimitation. Offering evidence, moreover, of the decidedly volcanic character of the opposing Party's arguments, the reference to the "Nicaraguan Rise" seems to have undergone various seismic movements and shifts in the course of the Applicant's pleadings.

[58] Award of 11 April 2006, *op. cit.*, *supra*, para. 232.

Initially afforded spectacular prominence in Nicaragua's Memorial, it seemed for a while almost to vanish in its Reply, only to resurface, apparently intact, in Mr. Oude Elferink's oral arguments last week.

62. These tectonic upheavals in the northern shallows of the Caribbean Sea are of only very relative interest to jurists. They conjure up only the fragile and discreet charm of outdated notions; ah, those good old days, straddling the period between the 1945 Truman Proclamation and the Judgment of the Court in the *Tunisia/Libya* case, during which one could still believe that the jurists' continental shelf, a natural prolongation of the State's land territory into and under the sea, as the Court had stated in 1969 (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 22, para. 19 and p. 29, para. 39), still remained faithful to that of the geomorphologists. Alas, those times are now past and Nicaragua, nostalgically, seems still not to have quite found consolation for their loss.

63. However, Madam President, Members of the Court, there are at least two reasons for setting aside the bathymetric argument of the "Nicaraguan Rise" already briefly mentioned by my colleague Mr. Quéneudec. The first is that, in matters of delimitation, the bathymetric criterion is no longer accepted in the international law of the sea, at least *within* the outer limit of the exclusive economic zone. To confirm this, one need only reread articles 74 (1) and 83 (1) of the 1982 United Nations Convention in conjunction with its article 76, which defines the continental shelf. Furthermore, these provisions are corroborated by your jurisprudence, which drew the appropriate conclusions therefrom, as can be seen, as if in anticipation, as long ago as your Judgment of 1982: "It is only the legal basis of the title to continental shelf rights — the mere distance from the coast — which can be taken into account as possibly having consequences for the claims of the Parties." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*,
55 p. 48. para. 48.) That tendency to abandon the morphology of the sea-bed reliefs, encouraged by the provisions of a convention that had not yet entered into force at the time but would subsequently do so for the vast majority of existing States, was confirmed by the Court in the dispute between Malta and Libya, since, in its Judgment, the Court found that "the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone . . ." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 33, para. 34).

64. Admittedly, in the new law of the sea, specifically in Article 76, paragraph 3, of the Convention, a reference still remains to the geomorphological dimension of the continental shelf. However, it could not be applied in the instant case since it is valid only beyond the 200 nautical mile limit calculated from the baselines, and Mr. Quéneudec reminded you that that is not so in the present case.

65. The second reason why the "Nicaraguan Rise" seems to have the ephemeral consistency of a mirage is that, even supposing this criterion was still valid and applicable in the present case, it would apply, if at all, only to part of the continental shelf.

Now, the Court must draw a single line separating both the water column, the sea-bed and the soil and subsoil of the sea for each of the two States. Decidedly, Nicaragua seems not to have plumbed the depths of its deep-sea arguments, preferring to confine itself to their surface waters, and its attachment to the bathymetric argument can only be explained by the extreme dearth of its arguments in support of its misleading bisector line.

(2) *The bisector line*

66. This method, more or less tacked on to the bathymetric argument, has already been shown by some of my colleagues to be not only arbitrary, but also untenable: in particular, it is based, as has already been said, not on a "smoothing off" of Honduran territory but on planing away large parts of it.

[PMD4 (CJG28); PMD5 (CJG27)]

67. It is difficult to see how the Court could view such an approach as not "completely refashioning nature". In particular, it respects none of the genuinely relevant characteristics of the configuration of the coasts, a factor which, as the recent Arbitral Award between Barbados and
56 Trinidad and Tobago, relying on your own jurisprudence, makes clear in a timely reminder, provides the basis and identifies the scope of the legal title of each State to the maritime areas concerned[59].

68. There could be nothing less Cartesian then, less rational even, than the way Nicaragua conceives its "discourse on the method"! This combination of two arbitrary elements, one

[59] *Ibid*., paras. 231-239.

discovered on the sea-bed and the other inspiring the bisector line of an improbable angle, has no bearing on the calculation of the median line between the territory of the two adjacent States. In reality, Nicaragua wants to make us dance to the "equidistance-relevant circumstances" tune, when it is in fact playing an entirely different one. Admittedly, the sea is a great source of inspiration . . .

69. As for Honduras, it has never concealed the fact that the so-called traditional line which it relies upon is not based on equidistance. Its line is born of a marriage of history and geography. It is they which have given rise to State practice. Such is the essence of the "traditional line": respect by both Parties for the legacy of the Spanish Crown, and also for the geography of the areas over which it held sway.

70. That said — and I emphasize this point, to which Mr. Colson will revert — Honduras is anything but unaware of the need to verify the equitable nature of the delimitation to which it believes it is entitled. It does so by comparing the "traditional line" with what would result, were we to draw an equidistance line taking into account all the relevant circumstances; beginning with the presence of the islands to the north of the 15th parallel which are under its jurisdiction.

71. At this point, however, Honduras's position can ultimately be summarized as follows: *(a)* as it has always done, the line must at least respect the appurtenance of the islands to the maritime areas it controls; *(b)* it should not result in any disproportionate effect that would cause it to deviate from the so-called "15th parallel" (14° 59.8') turning downwards, that is, by and large, towards the south-east.

[Fig PMD2]

57 72. If there is anything special about the present case, it is that in it we see — a rare event, it must be said — a sovereign State — Honduras — voluntarily relinquishing the advantages it would gain from the application of the equidistance method because it considers that in this instance one prime relevant circumstance prevails over all others, that bequeathed by a long-standing tradition which respects the stability of boundaries.

Consequently, to conclude on this point, three assertions can be made: (1) equidistance is the mot satisfactory method, but it is not the only one; (2) despite what it says, Nicaragua does not apply equidistance; it distorts it in two ways — in depth and on the surface; and (3) Honduras does not claim to apply the equidistance method to draw the dividing line, but it does use it to

verify the equitable nature of that line. What counts above all is the *equity — infra legem* — of the solution adopted. And it is achieved, precisely, by ascribing to relevant circumstances in the current case the weight and also the weighting which they warrant in order to arrive at an equitable result.

73. Thus, Honduras does not forget that the cays are small. And it does therefore make them produce an effect, since the traditional delimitation line, as in the era of the Spanish Crown, respects the attribution of effective control over the islands to Honduras. Yet Honduras does not make those cays produce anything like the full effect which they might have on an equidistance line, which would respect their right to their own territorial sea, their own economic zone and their own continental shelf. David Colson will return to this point. The line of the 15th parallel (14° 59.8') does not give the features concerned the full effect which they would have on an equidistance line calculated from their low water baseline. It does not do so precisely because it dates back to a time before that of the maritime areas recognized by the modern law of the sea, but also because the tradition drew on what I might call intuitive equity.

74. For all that, Honduras remains convinced that giving these "maritime features" their full effect or even a more limited effect on the line (which would in this case be an equidistance line) would lead to an inequitable result. That would cause the dividing line to turn very markedly
58 south-eastwards, resulting in an undue encroachment on Nicaragua's maritime areas, a line not sanctioned by tradition in the region.

75. Does this therefore mean that Honduras strays from the facts and, more importantly, from the jurisprudential practice of the new law of the sea? Apparently not. And I will refer once more to Qit'at Jaradah in the *Qatar* v. *Bahrain* case. We find that the Court, while acknowledging Bahrain's sovereignty over that island by virtue of activities similar to those in which Honduras engages in the islands concerned, *inter alia* navigational aid, did *not* ultimately use it in determining the dividing line. We see here, not the operation of a hard and fast rule, but the taking into account, *in concreto*, of the effect which taking such an island feature into account would have on the maritime boundary in that case. In fact, the Court acted as it did by contrasting the very small size of that island with the disproportionate and thus inequitable impact that the opposite outcome would have had on the resulting line. In so doing, it referred to its earlier jurisprudence in

the case concerning the *North Sea Continental Shelf* (*I.C.J. Reports 1969*, p. 36, para. 57) and in the *Libya/Malta* (*I.C.J. Reports 1985*, p. 48, para. 57) case.

76. Such an attitude corresponds exactly to Honduras's position in the current case with respect to the way it views the role of the small islands lying immediately north of the "15th parallel" (14° 59.8'). The traditional line in any case respects the appurtenance of the islands north of that parallel to Honduras. Whether it chooses to go further than Honduras is asking, as international jurisprudence allows it to do, will be for the Court to decide.

77. Lastly, Madam President, Members of the Court, I would not like to end this presentation on the applicable law without recalling a principle. True, it is not an inviolable principle and there may be numerous exceptions to it. It is nonetheless worth bearing it in mind and considering in each case concerned whether there are sufficient reasons for disregarding it. This principle, which, as your jurisprudence clearly shows, has also inspired it in cases involving maritime areas, is the principle of stability. As long ago as the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978*, pp. 35-36, para. 85), the Court excluded the idea that the fundamental change of circumstances rule could be applied to boundary agreements. In the *Qatar/Bahrain* case, you rejected on the same

59 grounds Bahrain's belated claim that it was an archipelago State, although it had not previously made such a claim when the occasion arose (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 96, para. 183). In the recent Arbitral Award on the delimitation between Barbados and Trinidad and Tobago, the Permanent Court of Arbitration, presided over by a former President of this Court, also stressed the need for stability in maritime delimitation[60].

78. Thus, Madam President, Members of the Court, you will have noted that the law applicable in this area is not at variance with the traditional boundary line, but, on the contrary, lends weight to its continued existence. Tradition can sometimes be a good thing, provided it can renew itself. Rather than the telluric upheavals that appear to have our opponents' argumentation tied up in conflicting impulses, Honduras prefers the tranquillity of a delimitation with its basis in history, its support in geography and its durability in the respect of sovereignty.

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[60] *Op. cit.*, para. 232.

Thank you, Madam President. And with your permission we thus conclude Honduras's oral arguments for this morning.

Le PRESIDENT : Je vous remercie infiniment, M. Dupuy.

L'audience est à présent levée. Les audiences se poursuivront demain matin à 10 heures.

L'audience est levée à 13 heures

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