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CR 2007/13

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Thursday 22 March 2007, at 3 p.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le jeudi 22 mars 2007, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of the Republic of Nicaragua is represented by:

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

as Agent, Counsel and Advocate;

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

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

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

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

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Ms Ana Mogorrón Huerta,

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The Government of the Republic of Honduras is represented by:

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The PRESIDENT: Please be seated. The Vice-President is unable to sit this afternoon. We are here now to hear the reply of Honduras today and also tomorrow morning, and I now give the floor to Professor Dupuy.

M. DUPUY : Merci, Madame le président.

1. Madame le président et Messieurs de la Cour, à ce stade de nos plaidoiries, comme j'ai coutume de le dire, votre temps est précieux et le nôtre est compté. Un second tour doit avant tout servir la cause de la justice internationale et contribuer dans toute la mesure du possible à éclairer une dernière fois la Cour sur les positions respectives des parties. J'analyserai par conséquent, en premier lieu, la stratégie générale du Nicaragua telle qu'elle a perduré au cours de son dernier tour de parole. Ensuite, sans répéter ce que j'ai déjà dit la semaine dernière, j'apporterai les corrections nécessaires concernant le droit applicable.

I. La stratégie générale du Nicaragua au cours du second tour

2. La stratégie générale du Nicaragua au cours du second tour n'a pas fondamentalement changé. Elle est simplement le reflet de ses faiblesses et de ses contradictions. Le Nicaragua sait fort bien qu'il ne dispose d'aucun titre valide pour revendiquer la souveraineté sur les îles, îlots et rochers au nord du 15e parallèle, et pas davantage de droits sur une quelconque zone maritime au dessus de la «ligne traditionnelle». Il ne peut pas s'appuyer sur l'*uti possidetis juris*. Il ne peut pas davantage invoquer des effectivités dont il n'a toujours pas pu apporter la moindre preuve consistante. Il a par conséquent cherché à dissocier d'un bout à l'autre de ses plaidoiries, orales comme écrites, la délimitation des espaces maritimes de l'identification préalable des titres de souveraineté sur les îles. Ceci a pu encore se vérifier lundi et mardi derniers.

3. Le Nicaragua a, il est vrai, fait une toute dernière tentative, qu'il savait sans doute désespérée, pour trouver enfin un titre substitutif en s'épargnant du même coup toute référence à l'effectivité. Il a de plus tenté de persuader la Cour que ces îles étaient non seulement insignifiantes mais aussi indéterminées dans leur appellation sinon même dans leur localisation, se permettant ainsi d'en revendiquer la possession sans même les désigner nommément dans ses conclusions. Les éléments les plus importants de cette stratégie, à la fois habilement menée dans la

forme mais dépourvue de pertinence dans le fond, seront réexaminés par mes collègues lors de ce second tour. Je voudrais pour ma part m'attacher simplement à deux incohérences que les dernières plaidoiries de nos talentueux contradicteurs n'ont pu dissimuler.

— La première concerne la persistance de la contradiction fondamentale concernant l'importance des îles dans la présente affaire.

— La seconde est liée à cette quête désespérée du titre juridique qui fait revenir le Nicaragua sur l'*uti possidetis* pour la nier tout en revendiquant finalement son application.

A. Persistance de la contradiction nicaraguayenne quant au rôle à attribuer aux îles

4. D'une part, en effet, le Nicaragua reconnaissait lundi dernier, dès la plaidoirie du professeur Alain Pellet que «le différend dont le Nicaragua a saisi la Cour est relatif à la délimitation maritime»[1] ;

Il reconnaissait encore que «le tracé de cette ligne doit respecter la souveraineté territoriale appartenant respectivement à chacune des Parties sur les petits îlots *(sic)* se trouvant au nord du parallèle 14° 59' 48"»[2]. Pourtant, il ajoutait que «ceux-ci [les îlots] ne *doivent* avoir aucun effet sur le tracé de la ligne ainsi conçue» (les italiques sont de nous). Impératif catégorique.

5. Par ailleurs, le lendemain, dans sa plaidoirie, le professeur Brownlie, manifestant ainsi qu'il refuse décidément de concilier attribution et délimitation, persistait dans l'étrange logique suivante :

> «Counsel for Honduras have . . . insisted that the issues of territorial sovereignty must be decided before the question of maritime delimitation.
>
> That is no doubt true, *but* [et je me permets d'insister sur ce «but»] the principal question remains that of maritime delimitation…»[3]

6. Enfin, et de façon peut-être plus éloquente encore, l'ordre dans lequel M. l'agent de la République du Nicaragua a énoncé les conclusions soumises par son pays à la Cour, parle en quelque sorte de lui-même. Il a commencé par proposer de consacrer «the bisector of the lines representing the coastal fronts of the two Parties as described in the pleadings…». Puis, d'une

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[1] CR 2007/11, p. 49, par. 51.

[2] *Ibid.*

[3] CR 2007/12, p. 39, par. 5.

façon semble-t-il totalement indépendante, il ajoute : «*Without prejudice to the foregoing*, the Court is requested to decide the question of sovereignty over the islands and cays within the area in dispute.»

Le Nicaragua, ainsi, persiste et signe. Il délimite d'abord, il attribue ensuite, mais sans même dire nommément de quelles îles il s'agit !

7. De plus, ce *«Without prejudice to the foregoing»*, avec tout le respect que l'on doit à ces conclusions, n'est pas sans susciter la perplexité. Il semble décidément confirmer, si besoin en était, comme, d'ailleurs incite à la faire la dernière plaidoirie du professeur Brownlie[4], que la délimitation maritime est conçue par ce pays comme participant d'une démarche totalement autonome, sinon même indépendante de la question de l'attribution des îles.

8. Madame le président, le rideau est désormais tombé sur les plaidoiries du demandeur. Il a soufflé ses dernières bougies. C'était, en quelque sorte, sa symphonie des adieux[5]. Il n'aura plus, désormais, l'occasion de préciser ses thèses. Or, il s'avère qu'il n'a décidément pas pu sortir de sa contradiction fondamentale. Il commencer par mentionner *in fine* les îles dans son mémoire ; puis il leur accorde une place croissante, dans sa réplique et dans ses plaidoiries du premier tour ; il annonce officiellement une modification de ses conclusions en faveur de la requête de leur appartenance au Nicaragua. Mais, finalement, jusqu'à la fin dernière, il ne leur accorde pas le moindre rôle dans l'opération de délimitation. Comme on le redira plus loin, par contraste, la position du Honduras est toujours restée fondamentalement différente[6].

B. La quête désespérée du titre de souveraineté sur les îles par le Nicaragua

9. La quête désespérée du titre de souveraineté sur les îles par le Nicaragua constitue la seconde contradiction persistante qui se révèle lorsqu'il aborde la question du fondement des titres qu'il pourrait alléguer pour soutenir sa demande d'attribution de la souveraineté sur les îles concernées. Nous savons tout le mal que le Nicaragua, du moins dans cette affaire, pense de l'*uti possidetis*. Le professeur Antonio Remiro Brotóns a encore rappelé mardi dernier qu'elle serait inapplicable pour toute une série de raisons dont la dernière mentionnée serait que, «dans la

[4] CR 2007/12.

[5] Joseph Haydn.

[6] Voir plus bas, conclusion de la présente conclusion.

monarchie espagnole, surtout depuis le XVIII[e] siècle, la mer constitue un espace unitaire sous la juridiction de la marine, et non un espace fragmenté sous la juridiction des différentes entités territoriales terrestres qui représentent la monarchie en Amérique»[7].

10. Voilà un enterrement royal, si j'ose dire, de ce principe tant décrié. Mais alors, comment le réconcilier avec cette affirmation faite la veille par un autre conseil du Nicaragua ? M. Elferink, lorsqu'il déclarait : «Nicaragua's title to the cays dates from 1821. There is no indication that Nicaragua ever relinquished this claim.»[8]

11. Qu'est-ce alors que ce titre de 1821 si, par ailleurs, M. Remiro Brotóns interdit qu'on le fonde sur l'*uti possidetis* ? Ce second tour des plaidoiries n'est d'ailleurs qu'une nouvelle occasion de confirmer les contradictions inhérentes à la thèse du Nicaragua puisque, dès le jeudi 8 mars, M. Elferink avait prononcé des conclusions identiques[9], en écho, du reste, à ce qui avait déjà été posé dans la réplique nicaraguayenne[10].

12. Il est vrai que son second tour a permis au demandeur de constater que sa revendication de la souveraineté sur les îles au nord du parallèle 15 cherche désespérément un appui. Aucun apport de la preuve d'une quelconque effectivité n'a davantage été apporté la semaine dernière qu'auparavant, je l'avais déjà dit ; aucune preuve d'un exercice de souveraineté dans les semaines ou les écrits précédents. Dès lors, comment conclure positivement cette quête désespérée d'un titre justifiant la revendication finale d'îles au demeurant innomées dans les conclusions soumises à la Cour ?

13. C'est alors que mon ami Alain Pellet, brave entre les braves, tente, non sans panache, une dernière sortie. Rassemblant tout son courage, en un revers de manche, il brandit l'étendard de la proximité, ou plutôt, nous disait-il lundi dernier, le critère de l'adjacence : «Le titre dont se prévaut le Nicaragua n'est autre que le titre alternatif que le Honduras n'hésite pas à revendiquer : celui de l'adjacence», laquelle, nous affirme-t-il un peu plus loin, parlerait «en faveur du Nicaragua»[11]. Il est vrai que mon ami sait non seulement faire tourner les côtes pertinentes comme d'autres font

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[7] CR 2007/12, p. 13, par. 13.

[8] CR 2007/11, p. 65, par. 38.

[9] CR 2007/4, p. 13, par. 79.

[10] RN, vol. I, p. 50, note de bas de page 130.

[11] CR 2007/11, p. 40, par. 25.

tourner les tables, en infligeant en l'occurrence une rotation de 37 degrés aux parallèles et aux méridiens[12]. Il sait aussi faire parler l'adjacence, selon, il est vrai, une perception tout aussi orientée. Mais le problème n'est au demeurant pas là. Foin de dérive des continents, de rotation des côtes ou de proximités habilement concertées. Il se trouve qu'en droit, l'adjacence n'est pas à elle seule un critère pertinent pour attribuer un titre. Nous touchons ici à la question du droit applicable que je vais aborder dans ma seconde partie.

II. Le droit applicable

14. Deux points ici, parce qu'il faut faire un tri, seront brièvement abordés, étant entendu que le Honduras n'approuve pas pour autant l'ensemble des assertions incorrectes que nous n'aurons pas ici le temps de redresser :

— en premier lieu, la non-pertinence du critère de l'adjacence ;

— en second lieu, l'inanité de la tentative de faire l'économie des preuves de l'effectivité dans la démonstration d'un titre territorial.

A. La non-pertinence du critère de l'adjacence

15. La non-pertinence du critère de l'adjacence est double. Elle est vérifiée d'une façon générale dans le droit international relatif à l'attribution des territoires contestés. Elle est d'autant moins invocable dans le contexte de la présente affaire, en référence à l'application de l'*uti possidetis*.

La première affirmation nous fait revenir à l'île de Palmas, décidément presque aussi inévitable lorsqu'on parle de souveraineté insulaire que le sont l'usine de Chorzów lorsqu'on aborde la responsabilité ou le *Lotus* lorsqu'on aborde, entre autres, la théorie des lacunes du droit. Incontournables lieux de mémoire du droit international. Dans son célèbre arbitrage, donc, Max Huber rejetait sans ambiguïté la théorie de la contiguïté comme titre de souveraineté ; et ceci, notamment, pour deux raisons : l'incertitude quant à l'existence juridique de ce prétendu «principe», d'abord, le manque de précision auquel son application aboutirait, ensuite[13].

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[12] *Ibid.*, par 27.

[13] *RSA*, vol. II, p. 854-855.

Quant à elle, il est vrai que la sentence rendue dans l'affaire de l'île d'Aves était un peu moins négative puisqu'elle plaçait la contiguïté au rang des titres imparfaits ou *«inchoate titles»*[14]. Cependant, dans l'affaire entre El Salvador et le Honduras devant une chambre de cette Cour, s'il est exact que celle-ci s'est référée au critère de dépendance à propos de Meanguera, ce n'est pas sur la base de ce critère que la souveraineté a été reconnue à El Salvador. C'est sur celui d'une revendication salvadorienne de l'île, effectuée en 1854, suivie par une possession effective par ce dernier Etat jusqu'à l'époque contemporaine, laquelle a été confortée par l'acquiescement du Honduras à cette occupation (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras) ; Nicaragua (intervenant), C.I.J. Recueil 1992*, p. 579, par. 367).

16. En définitive, comme le démontrent du reste de nombreux exemples, tel celui des îles Anglo-Normandes, qui sont britanniques quoique plus proches des côtes françaises, ou celui de l'île Martin Garcia, sous juridiction argentine bien que plus proche des côtes uruguayennes, l'adjacence ou contiguïté est en elle-même insuffisante pour constituer un titre en faveur de l'Etat le plus proche, par manque de fiabilité tant du droit que du fait.

Encore moins pourrait-on suppléer l'absence de titre par la référence à l'adjacence, comme le fait pourtant mon ami le professeur Pellet, lorsqu'on est par ailleurs dépourvu d'effectivité.

Votre Cour n'a pas dit autre chose, dans son avis consultatif relatif au Sahara occidental, lorsqu'elle affirmait à propos de la rareté des preuves quant à un exercice effectif d'autorité : «On ne peut pas remédier à cette difficulté en faisant appel à l'argument de l'unité ou de la contiguïté géographique.» (*Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 43, par. 92.)

17. En l'occurrence, au demeurant, l'adjacence des côtes concernées à la côte du Nicaragua, à moins qu'on lui inflige une rotation douloureuse des côtes de 37° ou plus, ne paraît pas, c'est vraiment le moins qu'on puisse dire, supérieure à celle qui existe quant à la position de ces îles vis-à-vis des côtes du Honduras.

En outre, le professeur Pellet se référait à l'adjacence en puisant sa mention dans deux traités conclus par la Couronne d'Espagne avec chacun des pays en litige au cours du XIX^{e} siècle. Or, comme l'expliquera plus en détail le professeur Sánchez Rodríguez, ces traités ne faisaient que se

[14] De Lapradelle et Politis, *Recueil des arbitrages internationaux*, Paris, éditions internationales, 1905, t. II, p. 413.

référer, en une formule du reste standardisée, à la façon dont les îles avaient été attribuées, à la date de l'indépendance, c'est-à-dire en 1821, entre les anciennes provinces et circonscriptions administratives de l'époque coloniale. Ces traités, en d'autres termes, ne contredisaient en rien l'application de l'*uti possidetis* ; tout au contraire, ils l'utilisaient et, donc, la confortaient.

B. Le jeu respectif des titres et de l'effectivité dans le présent litige

18. Le jeu respectif des titres et de l'effectivité dans le présent litige, qui est le second point relatif au droit applicable, a été évoqué par le professeur Pellet au cours de sa plaidoirie de lundi dernier. C'est ici lui qui parle et non pas vous :

> «— lorsqu'un Etat peut se prévaloir d'un titre juridique sur un territoire, celui-ci prévaut sur toute autre interprétation ;
>
> — dans ce cas, [et là il vous citait lui-même], «il y a lieu de préférer le titulaire du titre»».

On voit ici l'habileté de la manœuvre, car il faut bien dire que c'en est une, au sens tactique s'entend. Regardez bien, nous dit-il : Je n'ai pas d'effectivité, rien dans les mains, rien dans les poches, mais, qu'importe ! Je n'en ai pas besoin car j'avais une carte dans la manche, c'est un titre sur les îles et ce titre m'est fourni par l'adjacence. Et le tour est ainsi joué…

19. Pas mal, en effet ! Sauf, Madame et Messieurs les juges, qu'il y a un «truc», et même plusieurs, dans ce joli tour. D'abord, nous l'avons vu — et ce n'est pas un petit détail — il n'y avait rien de caché dans sa manche ! L'adjacence, en effet, ne peut fournir un titre. Ensuite, ce qui est en cause, c'est l'exacte appréciation par la jurisprudence du rôle de l'effectivité par rapport au titre. Et alors, toute la jurisprudence internationale se réfère désormais à ce que votre Chambre avait dit dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*. Cette jurisprudence fut ensuite reprise notamment par la Chambre constituée pour juger de l'affaire opposant El Salvador au Honduras (*C.I.J. Recueil 1992*, p. 398, par. 61). Je cite ce passage désormais célèbre, dans lequel la Chambre abordait en 1986 le rôle complexe des effectivités :

> «[P]lusieurs éventualités doivent être distinguées. Dans le cas où le fait correspond exactement au droit, où une administration effective s'ajoute à l'*uti possidetis*, l'«effectivité» n'intervient en réalité que pour confirmer l'exercice du droit né d'un titre juridique. Dans le cas où le fait ne correspond pas au droit, où le territoire objet du différend est administré effectivement par un Etat autre que celui qui possède le titre juridique, il y a lieu de préférer le titulaire du titre. Dans l'éventualité ou l'«effectivité» ne coexiste avec aucun titre juridique, elle doit

> inévitablement être prise en considération.» (*Différend frontalier (Burkina Faso/République du Mali), C.I.J. Recueil 1986*, p. 586-587, par. 63)

20. Il est alors particulièrement intéressant de comparer la situation respective du Honduras et celle du Nicaragua à l'égard des îles situées au nord du parallèle 15 au regard de la critériologie ainsi établie par la Cour. Le Honduras, quant à lui, possédait bel et bien un titre originel, celui hérité de l'*uti possidetis*. Il a manifesté à sa suite une effectivité suffisante sur les îles eu égard à leurs caractéristiques respectives. Nous sommes dans le premier des trois cas énoncés par la Chambre. Celui dans lequel les effectivités viennent consolider le titre historique.

En revanche, le Nicaragua n'est pas dans le premier cas, car il n'a toujours pas pu vous démontrer l'existence de son titre initial quoi que puisse en dire M. Elferink. Mais il n'est pas non plus dans le second, car il n'a pas davantage d'effectivité, ni même dans le troisième, puisqu'un *autre* Etat que lui possède un titre et qu'il l'a par la suite effectivement exercé.

C'est là, Madame le président, tout le malheur du Nicaragua. Il n'est nulle part. Il n'est même pas, si j'ose dire, sur Pulau Ligitan ou Pulau Sipadan, puisque le Honduras a un titre et que le Nicaragua n'en a pas et que de toute façon ce dernier ne peut mettre en balance aucun «display of sovereignty» qui puisse se mesurer à celui qu'a exercé et qu'exerce aujourd'hui encore le Honduras le Honduras.

Il n'est nulle part, le Nicaragua, et, au fond, il le sait et il le savait depuis le début. C'est bien pour cela qu'il a voulu opter pour une délimitation maritime qui ne prenne pas d'abord en considération les îles mais qui les récupère après s'être taillé, à coups de «bisector», un morceau de mer à partir de côtes préalablement rabotées.

Conclusion

21. Je conclus, Madame le président, en vous rappelant brièvement, quelle a toujours été, par opposition, l'attitude de la République du Honduras à l'égard de la délimitation.

22. Pour sa part, le Honduras est toujours resté fidèle à la même conception, depuis le début de ses plaidoiries, écrites et orales. La détermination de la souveraineté sur les îles constitue un préalable inévitable à la délimitation. Elle passe, dans le cas présent, par la vérification du titre juridique initial qu'il possède sur ces îles et sur les espaces maritimes au nord du parallèle 15 à raison de l'application de l'*uti possidetis*, mais confirmée par l'exercice effectif de sa souveraineté.

Ces îles, contrairement à ce que M. Elferink a voulu vous démontrer, sont tout à fait bien identifiées, en tout cas par le Honduras, quelle que puisse être, par ailleurs, la diversité de leurs appellations géographiques. Il s'agit, comme je le disais moi-même la semaine dernière à propos des trois questions que je posais à leur égard[15], de Bobel Cay, South Cay, Savanna Cay et Port Royal Cay, ainsi que d'un certain nombre d'autres reliefs et formations placés au nord du parallèle 15.

23. Lorsqu'on en vient à la méthode de délimitation, et sans répéter ici ce que je vous disais mercredi dernier[16], ces îles doivent être prises en compte, avec tous les éléments qui les caractérisent. Le résultat définitif est alors à déterminer à raison de son caractère équitable. Ainsi, en droit, et cela est important, je crois, Madame le président, la prise en compte initiale des îles est une chose, leur effet définitif sur la ligne divisoire en est une autre. Les îles, en d'autres termes, peuvent avoir été prises en compte dans la mise en œuvre de la méthode, mais ne pas, finalement, produire un plein effet sur la ligne définitivement retenue si l'incidence qu'elles ont sur cette ligne était jugée excessive.

24. Ainsi, comme vous l'a montré M Colson vendredi dernier[17], les îles pertinentes sont dûment prises en considération dans la ligne provisionnelle d'équidistance que le Honduras a retenue. Cette ligne est bâtie en leur faisant produire l'effet qui leur revient, en application des articles pertinents de la convention de Montego Bay à commencer par son article 15, puisqu'il s'agit ici pour plus des deux tiers, de tracer la délimitation entre des mers territoriales.

25. C'est néanmoins à raison du caractère équitable et très généreusement pondérateur, j'insiste, de la «ligne traditionnelle» que cette dernière est finalement retenue, validée, sans donner à ces îles leur plein effet. A la fois constituée par un titre, consolidée par la pratique des Parties mais, en même temps, très bénéfique au Nicaragua par rapport à l'équidistance «pure et dure» si j'ose dire, la «ligne traditionnelle» est ainsi finalement retenue comme ayant pris en considération les îles, sans pour autant leur faire produire quelque effet qui pourrait éventuellement paraître inéquitable.

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[15] CR 2007/8, p. 42, par. 20.

[16] *Ibid.*, p. 52, par. 57 et suiv.

[17] CR 2007/9.

26. Comme vous le montrera demain Jean-Pierre Quéneudec, il y a cependant d'autres moyens de travailler, si j'ose dire, autour de la ligne traditionnelle pour parvenir à un résultat équitable.

Cette ligne traditionnelle est certes un axe, un vecteur essentiel et, en définitive, elle constitue la moyenne raisonnable entre toutes les considérations d'équité. Mais ce n'est pas pour autant un dogme absolument intangible. Le respect de la «ligne traditionnelle» n'exclut pas, en d'autres termes, que certaines pondérations ou ajustements puissent lui être apportés, notamment par sa conjugaison avec des éléments tirés d'une autre ligne, d'équidistance celle-là, qu'il s'agisse de la ligne d'équidistance qui vous a été montrée la semaine dernière ou de celle qui vous sera expliquée demain.

27. Madame le président, je terminais ma précédente plaidoirie par ce qui pouvait passer pour un éloge de la tradition. La tradition, pourtant, n'exclut nullement l'imagination, dont Jean Giraudoux disait que le droit constitue la meilleure école[18].

A condition, bien sûr, que toute innovation soit pondérée, et que la souveraineté comme la stabilité soient dûment respectées.

Je vous remercie, Madame le président, et je vous prierais de bien vouloir passer la parole à mon collègue et ami le professeur Greenwood.

The PRESIDENT: Thank you, Professor Dupuy. We now call Professor Greenwood.

Mr. GREENWOOD:

1. Madam President, Members of the Court, today I shall reply to Nicaragua's arguments of earlier this week regarding the law on title to the islands. As Professor Dupuy has just demonstrated, Nicaragua has adopted throughout this case a strategy of some subtlety, seeking to blur the distinction between the law applicable to the dispute over the islands and the law applicable to the maritime boundary. But it cannot escape the fact that they are separate, distinct bodies of law. Nor can it avoid the fact that the question of sovereignty over the islands has to be determined before the delimitation of the maritime boundary can be addressed.

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[18] Jean Giraudoux, *La guerre de Troie n'aura pas lieu.*

2. The law on territorial sovereignty is well established. As Professor Pellet told the Court on Monday, the rich jurisprudence on this subject constitutes "un florilège irremplaçable des règles applicables en matière de preuve de la souveraineté territoriale"[19]. But it is clear from Nicaragua's pleadings that there are serious and substantial differences between the Parties regarding both the detail of that *florilège* and its application to the facts of the case.

3. I want to examine two aspects of those differences — the argument over the critical date and the relationship between original title and *effectivités*. Professor Sánchez Rodríguez will then respond to Nicaragua's arguments regarding the application of *uti possidetis* and Professor Sands will deal with the evidence of *effectivités*.

I. The critical date

4. On Monday, Professor Pellet rightly reminded us that the term "critical date" is used in two different senses[20]. In its strict, technical sense, the critical date is — as the Court said in the *Pulau Sipadan* case — "the date on which the dispute between the Parties crystallized", (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Judgment, I.C.J. Reports 2002*, p. 682, para. 135). But the term is also used in a less technical way to identify the point in time at which a certain issue falls to be decided. And it was in that latter sense that the Chamber in the 1992 Judgment (*I.C.J. Reports 1992*, p. 401, para. 67), spoke of the critical date with regard to the application of *uti possidetis* being 1821 — the date of independence from Spain.

5. But if Professor Pellet was right to remind us of the two different senses of the term "critical date", we on this side of the Court were surprised to hear him say that the critical date, in the non-technical sense, might be, not 1821 as regards *uti possidetis*, but 1906, or even 1960, on the basis that the 1906 Award, as subsequently upheld by this Court, somehow superseded the earlier basis of title[21]. Now, it is of course the case that the Chamber in the 1992 Judgment stated that the date of an arbitral award was the critical date in respect of matters settled by that award (*I.C.J. Reports 1992*, p. 401, para. 67). But it is irrelevant in respect of territorial issues not determined by the award. Until Monday, we had understood Nicaragua's position to be that the 1906 Award was

[19]CR 2007/11, p. 38, para. 21.

[20]CR 2007/11, p. 45, paras. 37-39.

[21]CR 2007/11, pp. 44-45, paras. 36-37.

irrelevant to title to the islands. Professor Pellet's comment affords a brief insight into Nicaragua's uncertainty about that aspect of its case and its realization that the 1906 Award may have more of a bearing on this question than it has so far cared to admit.

6. But the real difference between the Parties lies in the application of the critical date — in its technical sense — to the evidence of *effectivités* with respect to the islands. Here, Nicaragua has stuck vigorously to its argument that the 1977 exchange of letters, in which Nicaragua proposed[22] and Honduras accepted[23], negotiations regarding a definitive maritime delimitation constituted the critical date for the dispute regarding sovereignty over the islands[24]. Members of the Court will have noticed that Nicaragua did not suggest any alternative critical date — 1977 is their only candidate.

7. In its first round of pleading, Honduras had challenged this date on the ground that the 1977 letters made no mention of the islands. Professor Pellet dismissed this argument as excessively subtle[25]. Well, Madam President, it is hardly that! The dispute over the islands and the dispute over the maritime boundary are governed by two different bodies of law. In reality, there is a fundamental distinction between what are two separate disputes. But Professor Pellet dismissed that distinction on the basis that "il est évidemment absurde de dissocier la question de la souveraineté sur les îlots . . . de celle de la delimitation maritime"[26].

8. Well, is it absurd, Madam President? Does an offer to enter into negotiations about a maritime boundary automatically embrace the crystallization of a dispute about sovereignty over land? The Court did not seem to think so in the *Pulau Sipadan* case, Madam President. The critical date for the dispute over the islands in that case was held to be 1969, a time when the parties — Indonesia and Malaysia — were actually in the *middle* of talks regarding their maritime boundary. In other words, they had gone *far* beyond the mere suggestion of future conversations, which is all that the 1977 letters represent. But the dispute over the islands was not held to have crystallized as an automatic consequence of opening talks about the maritime boundary. It was

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[22]MN, Vol. II, p. 29.

[23]MN, Vol. II, p. 30.

[24]CR 2007/11, p. 45, para. 38 (Pellet).

[25]CR 2007/11, p. 46, para. 41.

[26]*Ibid.*

held to have crystallized because, *after* those talks had commenced, the two States made express and competing claims regarding sovereignty to the two islands. The distinction between the dispute over the two small islands, whose location gave them an impact on the maritime boundary, and the dispute over the maritime boundary itself, was clearly recognized by the two States and clearly recognized by the Court (*I.C.J. Reports 2002*, p. 642, para. 31 and p. 679, para. 128), however absurd it may seem to Professor Pellet.

9. Moreover, Madam President, Nicaragua's approach ignores the basic concept of the critical date as the moment when *the dispute crystallizes*. There cannot be a critical date unless, first, there is a "dispute" and, secondly, that dispute has in some sense "crystallized". The standard definition of a dispute, often repeated by the Court, is that contained in the *Mavrommatis Palestine Concessions* case, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

10. And the Court has repeatedly said that a dispute does not exist, still less can it be said to have crystallized, just because one State says so. To quote from the *South West Africa* cases decision in 1962:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other." (*I.C.J. Reports 1962*, p. 328.)

11. Well, where, in the 1977 letters, is there a claim of one party to the islands which is positively opposed by the other? The islands are not mentioned by either Government. In fact, there is a particular irony in Professor Pellet making that argument, because only a little earlier in his own speech he had sought to persuade the Court that Honduras had not even claimed the islands in 1977. He invoked the absence of any mention of the islands in the Honduran letter of May 1977 as proof that Honduras did not make a claim until later[27]!

12. Now, there is, of course, a very good reason why Honduras did not mention the islands in 1977. The two States were talking about something different — the delimitation of a maritime boundary. And Professor Pellet is wrong in saying that Honduras did not claim the islands until

[27]CR 2007/11, p. 37, para. 19.

much later. But his comment that no claim to them was advanced by either side in the 1977 letters is fatal to his argument about the critical date. How can Nicaragua at one and the same time argue that a dispute regarding the islands *crystallized* in 1977, but that one of the Parties never even advanced a claim to them until many years later. It is not so much crystallization as the crystal ball that we are gazing into there. Moreover, Madam President, Nicaragua's signature of the Central American Free Trade Agreement in April 1998 is also inconsistent with its argument about the critical date. Counsel will return later today to the question of this treaty. Suffice it to say for now that the text to which Nicaragua's President put his signature on 16 April 1998 *did* contain an annex — incorporated as a provision of that treaty — which expressly defined Honduran territory as including Palo de Campeche and Media Luna. Now, irrespective of what subsequently became of that treaty, the fact of that signature by the Head of State cannot be reconciled with the notion that a dispute regarding sovereignty over the islands had crystallized more than 20 years earlier.

13. Madam President, there is another concern. A moment's reflection shows that any suggestion that accepting an invitation to talks about a maritime boundary operates to crystallize an unidentified — unmentioned — dispute over land territory which might affect that boundary is deeply troubling and promises to have a seriously destabilizing effect. It implies that whenever a State takes a position about, for example, the continental shelf in a particular area it may also be crystallizing a dispute about sovereignty over islands and perhaps about mainland territory as well. One has only to think of the possible effects in, for example, the Aegean or the South China Sea, to realize that this cannot be right.

14. Before I leave the issue of the critical date, I must set the record straight on one other matter. Professor Pellet sought to ridicule Honduras's own attempts to identify the critical date in respect of the dispute over the islands by suggesting that Honduran counsel had offered a melange of different dates to the Court "aussi variées que fantaisistes"[28] — and he tells us that he lacks a theatrical tradition! The footnotes to his speech then seek to make mischief by attributing different dates to Professor Piernas, Professor Sands, Mr. Colson and myself. There is nothing in this at all. If one examines each of the passages cited, it is apparent that references to possible dates *earlier*

[28]CR 2007/11, p. 48, para. 47 and footnotes 66-70.

than March 2001 are all to dates when the *maritime* dispute *might* have crystallized. The passage from my own speech also makes clear that I accepted 21 March 2001 — the date of deposit of the Nicaraguan Memorial — as the critical date for the islands' dispute.

15. Now, since that is the Honduran position and Nicaragua has offered only the obviously unacceptable — almost unarguable — date of May 1977, I respectfully suggest that the critical date for the dispute must be the date of the filing the Memorial. Now, I accept that that is unusual, since the latest that the critical date is normally put is the date of instituting proceedings, but that is a product of the unusual way in which Nicaragua's case has shifted since its Application was filed with the Court.

II. The law applicable to sovereignty over the islands

16. Madam President, let me now turn to the law applicable to the issue of sovereignty and the relationship between *effectivités* and other grounds of title. After two rounds of Nicaraguan pleading on this subject, certain matters are clear. We are agreed that the islands are not *terrae nullius* nor have they had that status at any relevant time. As there is no other claimant, it must follow that sovereignty over the islands resides either with Honduras or with Nicaragua.

17. Nor is there really anything between the Parties as to the law to be applied to resolve that question. Although Nicaragua has briefly repeated its assertion that sovereignty over the islands should be determined by the location of the maritime boundary, its heart was plainly not in it and its own counsel openly disavowed that approach on more than one occasion.

18. That was most obvious in the speech of Professor Pellet, whose summary of the applicable law was that the Court first looks to see whether either State can make out a claim of original title and, if it cannot, then the evidence of *effectivités* is likely to prove decisive[29]. As Professor Dupuy has just said, that was the approach in *Burkina Faso/Mali* (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 587, para. 63) and in *Pulau Sipadan* (*I.C.J. Reports 2002*, p. 678, para. 126).

19. But if the law is clear, the basis on which Nicaragua asserts title remains shrouded in obscurity.

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[29]CR 2007/11, p. 38, para. 21.

20. At the start of the second round, the distinguished Agent of Nicaragua put to the Court the position with which Nicaragua had opened its case. "The position of Nicaragua [he told you] is that sovereignty over these islets and cays should devolve on the Party on whose side of the line of delimitation they are finally located."[30] In other words — contrary to all the jurisprudence and every textbook — the sea dominates the land. We showed in our first round speeches why that proposition was untenable. No reply has been offered to those criticisms. And, not surprisingly, none of Nicaragua's counsel chose to follow the lead of their Agent on that subject.

21. Then there is *uti possidetis* as a basis for title. In the first round, Nicaragua had expressly disavowed any such claim[31]. But then, as Professor Dupuy has just shown, in the second round, we have Dr. Oude Elferink saying "Nicaragua's title to the cays dates from 1821"[32]. Now, Members of the Court might have been surprised to hear him say that, since in his first round speech, he had told you "it is impossible to establish the situation of the *uti possidetis juris* of 1821 in respect of the cays in dispute"[33]. And Professor Remiro Brotóns stuck to that latter view in his second round speech. So it seems that *uti possidetis* is out on the Nicaraguan side, if only by a majority.

22. Instead, Nicaragua has advanced an entirely new claim — that the islands became Nicaraguan because of their supposed adjacency to the Nicaraguan coast. Now, Madam President, this requires a little thought. Adjacency is relevant to the application of the doctrine of *uti possidetis* in that part of the world, as Professor Sánchez Rodríguez will show. But he will also demonstrate that the supposed adjacency of these islands to Nicaragua is another of the mythical beasts in which counsel for Nicaragua takes such delight.

23. But, more fundamentally, as the passage from the *Palmas* award, to which Professor Dupuy has just referred, makes clear, outside the context of *uti possidetis juris* -- and it is outside that context that Nicaragua is advancing its claim, as we have seen — outside the context of *uti possidetis*, adjacency simply does not provide a basis for title to territory. It has, in Judge Huber's words "no foundation in international law".

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[30]CR 2007/11, p. 27, para. 68.

[31]See, e.g., Prof. Remiro Brotóns at CR 2007/3, p. 36, paras. 85-88.

[32]CR 2007/11, p. 65, para. 38.

[33]CR 2007/1, p. 51, para. 11.

24. Nicaragua has also hinted, more obliquely, at a variation on its adjacency argument, that sovereignty over the islands is somehow affected by the fact that they lie to the south of what Nicaragua calls the "main Cape channel". Mr. Colson will deal with the geographical aspects of this argument when he talks about the relevance of the channel tomorrow. Suffice it to say for now that, as a basis for determining sovereignty over islands, their location on one side or the other of a navigation channel has "no foundation in international law", as Judge Huber said about proximity, unless, of course, the parties have agreed upon the use of such a channel as a boundary and there is no hint of that here.

25. So, that leaves the possibility of a Nicaraguan claim based on *effectivités*. Nicaragua has had a lot to say about *effectivités.* But the Court will have been struck by the fact that all that Nicaragua has said has been about *Honduran effectivités*. It has maintained a stony silence about its own conduct. That is not surprising. There is not any. In the first round, I cited the *Eastern Greenland* case as showing that for a State to acquire title in this way, the evidence had to show two things: "the intention . . . to act as sovereign, and some actual exercise or display of such authority" (*Legal Status of Eastern Greenland (Denmark* v. *Norway), Judgment, 1933, P.C.I.J. Series A/B, No. 53*, p. 45)[34]. Nicaragua has shown neither. Incredible as it may seem, Madam President, Nicaragua has offered the Court no evidence — no evidence at all — that *any* Nicaraguan official has ever so much as set foot on one of these islands. It has produced no evidence of anything which could amount to an exercise or display of authority over the islands. This was expressly raised by Professor Sands in the first round[35] and Nicaragua has made no answer to it. The silence is eloquent, Madam President.

26. By contrast, the basis for the Honduran claim is perfectly clear. Honduras claims title derived from the doctrine of *uti possidetis* to all of the islands north of the 15th parallel. My colleague Professor Sánchez Rodríguez will reply in a few minutes to the Nicaraguan arguments regarding *uti possidetis*. I would only add that Nicaragua made no reply to the point put by Honduras in the first round that, if the islands were not *terrae nullius* at the time of independence,

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[34]Quoted with approval in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan, I.C.J. Reports 2002*, p. 682, para. 134.

[35]CR 2007/7, p. 22, para. 7.

then title must have devolved to one of the successor States and Honduras is the only State to have claimed title on that basis of succession from Spain, the *uti possidetis* ground.

27. Now, the *effectivités* — all of which date from after independence — are relevant to this case in two respects. First, they confirm the title based on *uti possidetis*. Secondly, and in the alternative, in the event that the Court finds that no State can make out a claim based on *uti possidetis*, then they provide a free-standing basis for title. That was the approach taken by the Court in the *Pulau Sipadan* Judgment. Of course, in that case the Court relied on the *effectivités* because it had found that there was no original title. Honduras maintains that it has an original title and this is confirmed by the *effectivités*, but the decision in *Pulau Sipadan* shows that if the Court does not accept Honduras's primary case and also holds, as we say it must, that Nicaragua has no original title, then the *effectivités* of both Parties have to be weighed in order to decide which State has the superior claim. Contrary to what is suggested by Nicaragua, there is no question of *effectivités* being adduced in order to override an original title.

III. Witness statements

28. Madam President, before I ask you to hand the floor to Professor Sánchez Rodríguez, there is one point I must deal with about the evidence in this case. In the first round, Nicaragua launched a sustained attack on the integrity of that evidence, suggesting that some of those witness statements filed by Honduras were not to be relied upon because the language used was said to indicate that this was not the testimony of the witnesses themselves but something dictated by a representative of the Honduran Government. Those allegations were repeated in the second round.

29. Madam President, any court is heavily dependent upon the integrity of the parties and their representatives in the way in which evidence is compiled and submitted to the court. *This* Court, as Members know full well, is particularly dependent upon that integrity as it cannot call upon the investigative machinery or the sanctions available to a national court. It is also particularly dependent upon witness statements as opposed to oral testimony.

30. It is, therefore, of the utmost importance that one party should not call in question the integrity of the witness statements submitted by another — and should not allege that these are not honest testimonies — unless it has evidence to support such a claim. If Nicaragua really had cause

to suspect that the witness statements submitted by Honduras were not honest reflections of the testimony of the witnesses, it could have asked the Court to arrange for those witnesses to attend for cross-examination. But it did not do so. Nor has it produced any evidence of its own to contradict most of the evidence in the witness statements tendered by Honduras.

31. The Court will, of course, decide for itself on the evidence before it. We invite Members of the Court to read again all of the witness statements attached to the Honduran pleadings. They are the testimony of people who are patently sincere. They make clear that the only exercise or display of authority over the islands has been that of Honduras. Nicaragua has offered nothing by way of response — that, and its attempts to denigrate the witnesses put forward by Honduras, speaks volumes about its lack of a real case.

32. Madam President, that concludes my arguments and I ask you to call upon my colleague Professor Ignacio Sánchez Rodríguez.

The PRESIDENT: Thank you, Professor Greenwood. I now call upon Professor Sánchez Rodríguez.

M. SÁNCHEZ : Madame le président, Messieurs les juges, je vais consacrer ma dernière intervention devant vous cet après-midi à deux questions distinctes. Tout d'abord, je répondrai aux questions soulevées mardi dernier par mon collègue et ami, le professeur Remiro Brotóns, lequel m'a reproché de ne pas lui avoir déjà répondu alors que ma réponse n'était prévue qu'aujourd'hui. Ensuite, je ferai référence aux thèses de la dernière heure exposées par le professeur Alain Pellet sur l'adjacence.

I. L'*uti possidetis juris*

1. En ce qui concerne l'*uti possidetis*, je suis confronté au «J'accuse» que m'a lancé mon collègue espagnol. Je tenterai par tous les moyens d'exposer d'une manière clinique et froide certains faits, déjà connus de la Cour.

2. Mon contradicteur a soutenu de façon répétitive la notion de l'inexistence d'une «hiérarchie normative» dans le système législatif et réglementaire de la Couronne d'Espagne (cf. CR 2007/3, p. 23, par. 32 ; CR 2007/12, p. 11, par. 7). Le Honduras n'a jamais exprimé cette

notion ni n'en a tiré des conséquences. Il s'est limité à soutenir que les cédules royales de 1745 et de 1803 ne pouvaient être supplantées par l'Instruction pour le gouvernement des garde-côtes de 1803. Cette dernière ne doit ni être sous-estimée ni être surestimée. En effet, lorsque j'ai analysé cette Instruction je me suis demandé de quelles autorités elle émanait, quel était son objet, qui en était le ou les destinataire(s) et quel en était son contenu. Après examen, j'ai conclu que ladite Instruction ne pouvait avoir remplacé les deux cédules royales mentionnées.

3. Mon contradicteur m'a invité à une sorte de combat de boxe, en un ultime et dernier assaut sur le bien ou le mal-fondé des thèses qu'il a présentées devant cette Cour sur l'inexistence d'un *uti possidetis* maritime. Le Honduras, depuis toujours a pris le parti d'utiliser, *premièrement*, les documents présentés à l'époque devant le roi d'Espagne et en particulier le rapport de la commission d'examen. Ce document qui a une importance capitale n'a même pas mérité un seul mot de la part du Nicaragua. *Deuxièmement*, le Honduras s'est appuyé sur l'avis d'un expert en matière d'administration militaire espagnole en Amérique et non pas, comme l'a fait la Partie adverse, sur une construction de dernière minute. C'est pour cette raison que j'ai refusé d'entrer dans un combat de boxe furieux. En même temps, mon contradicteur s'est plaint que cet avis serait tardif, et l'a ajouté seulement très récemment dans la duplique du Honduras — je note en passant que cela veut dire il y a trois ans et demi. Il a demandé instantanément que l'expert espagnol soit appelé pour discuter ses thèses devant la Cour, thèses dont il aurait pris connaissance il y a à peine quelques jours (cf. CR 2007/12, p. 11, par. 3-4).

En ce qui concerne en particulier les compétences des capitaineries générales en mer, je me permets de rappeler que le Nicaragua a expressément soutenu :

> «En outre, les ordres donnés par le monarque à ses capitaines généraux et autres représentants de combattre les actes de piraterie, les corsaires et la contrebande dans une zone géographique plus ou moins bien définie ne sauraient en aucun cas être assimilés à des actes d'attribution d'une compétence territoriale en haute mer.» (RN, vol. I, p. 50, par. 4.61.)

Ceci étant, le Nicaragua a accepté il y a quatre ans dans sa réplique que les capitaines généraux détenaient des compétences tant sur la terre qu'en mer, donnée qu'il nie aujourd'hui. En réalité, le roi d'Espagne possédait non seulement les navires et les eaux, mais aussi les chevaux et les terres.

4. Relativement à la largeur de la mer territoriale espagnole au milieu du XVIII^{e} siècle qui, au Honduras, était de 6 milles marins en vertu de la cédule royale de 1760, mon contradicteur a

affirmé de façon péjorative mardi dernier : «En réalité, à cette époque-là et encore en 1821, la règle générale de souveraineté maritime de la Couronne était déterminée par la portée du canon.» (CR 2007/12, p. 12, par. 12.) Cette affirmation, qu'il ne prend pas la peine de prouver, est en contradiction flagrante avec ce que soutient un manuel de droit international dont l'auteur et l'inspirateur principal est le professeur Remiro Brotóns[36].

> «Bien que cela ne soit pas discuté, la thèse a été soutenue en doctrine et officiellement que, depuis la cédule royale du 17 décembre 1760, l'Espagne disposait d'une mer territoriale — des *eaux juridictionnelles* — selon la terminologie traditionnelle espagnole de 6 milles…»

Pas un seul mot sur le boulet de canon, ni la moindre référence à l'ironie d'attribuer à ce texte un effet qui «pourrait convaincre à condition de ne pas lire la cédule royale».

5. Mon contradicteur — toujours éminent et respecté — critique l'«affirmation légère» sur la carte coloniale espagnole de 1774 (cf. *ibid.*, p. 12, par. 10), carte sans doute d'une importance capitale aux fins de prouver la volonté du monarque espagnol à une date où ni le Nicaragua ni le Honduras n'existaient comme Etats indépendants.

[Carte LISR 2.2.1]

6. J'accepte son invitation de me pencher à nouveau sur cette carte afin de rappeler quelques aspects sur ce qu'il a dit. Premièrement, la ligne de séparation coïncide avec un parallèle et avec un cap ; deuxièmement, dans sa partie supérieure, à droite, un méridien est utilisé pour séparer les possessions espagnoles et portugaises en Amérique du Sud ; troisièmement, la partie supérieure gauche montre clairement qu'à cette date l'*Audiencia* et la capitainerie générale du Honduras se trouvaient en dehors du champ territorial correspondant à la vice-royauté de Santa Fe, tandis que la côte atlantique du Nicaragua en faisait clairement partie. Ceci contredit la position de la Partie adverse sur ce point.

7. Je me tourne maintenant vers les deux nouvelles cartes présentées mardi dernier par le Nicaragua qui leur consacre seulement trois lignes. Sans aucun doute, je crois que l'effort de la Partie adverse mérite quelques commentaires supplémentaires.

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[36] «*Aunque no sin discusión, se ha venido manteniendo doctrinal y oficialmente la tesis de que, desde la Real Cédula de 17 de diciembre de 1760, España disponía de un mar territorial — unas aguas jurisdiccionales según la tradicional terminología española — de seis millas…*» (A. Remiro Brotóns et consorts, *Derecho Internacional*, McGraw-Hill, Madrid, 1997, p. 603.)

[Cartes LISR 2.2]

Le premier permet de corroborer la reconnaissance par le Nicaragua d'une réclamation d'un méridien comme frontière terrestre, alors qu'il occulte soigneusement sa projection maritime et insulaire, de même qu'il cache le fait que le méridien coïncide avec le cap Camarón. Ces deux cartes reconnaissent expressément que le Honduras a toujours réclamé devant le roi d'Espagne des lignes de séparation entièrement artificielles, constituées en totalité par des parallèles et des méridiens. Finalement, et de manière cohérente, le Honduras accepte que la fixation par la sentence arbitrale comme limite le cap Gracias a Dios l'empêche à l'avenir de réclamer l'une quelconque des îles situées au sud dudit cap, de même que le Nicaragua ne peut prétendre aux îles situées au nord. Ce comportement du Honduras, qui paraît tant surprendre la Partie adverse, était parfaitement clair, connu, a fait l'objet de discussions, a été négocié et a été admis par tous en 1906.

8. A ce sujet, mon contradicteur se montre contrarié par les affirmations du Honduras relatives à la méconnaissance et à la non-exécution par le Nicaragua de la sentence arbitrale de 1906. Il affirme concrètement :

> «Cette insistance à imputer un fait illicite qui n'a pas été commis finit par être détestable. Le Nicaragua respecte ces décisions. *Il est vrai que durant des décennies il a discuté la validité de la sentence du roi d'Espagne. C'est un droit de l'Etat* d'invoquer la nullité d'une sentence arbitrale s'il considère qu'il existe une cause pour ce faire. *La situation* de facto*, tant que ce nouveau différend est pendant, ne peut être qualifiée à la légère*. Les Parties, dans notre cas, eurent recours à cette Cour qui déclara que la sentence du roi d'Espagne était valide. *Ceci fut décidé en 1960 et, en 1963, la sentence a été totalement exécutée*. Le Nicaragua retira son administration de la zone en litige ; il y eut un flux migratoire. *L'uti possidetis* prévalut sur les effectivités nicaraguayennes.» (CR 2007/12, p. 13, par. 15 ; les italiques sont de nous.)

Madame le président, Messieurs les juges, permettez-moi de vous dire ma stupéfaction devant les mots que je viens de citer. Le Nicaragua affirme le droit d'un Etat souverain de ne pas exécuter et à méconnaître une sentence arbitrale pendant des décennies. Il ignore que le caractère obligatoire de la chose jugée commence au moment même où la sentence a été notifiée à l'autre partie. Il soutient au surplus qu'un Etat possède le droit de ne pas exécuter une sentence parce que cinquante ans après son prononcé il peut en faire appel si le compromis ou les règles de l'arbitrage le lui permettent. Il méconnaît ainsi l'analogie du Statut et du Règlement de cette Cour relative aux

requêtes en revision et à la compétence de cette même Cour pour demander à la partie qui demande la revision d'exécuter au préalable la sentence. Enfin, l'on pourrait ajouter des pages de considérations complémentaires ; mais cela serait superflu, bien que je ne puisse rester silencieux devant le clin d'œil que cet argument fait à cette Cour. Par ceci, le Nicaragua prétend qu'une sentence arbitrale est quelque chose qui peut être déprécié et ignoré, sauf si sa validité est confirmée par la Cour. Dans ce cas, elle doit être exécutée immédiatement bien qu'auparavant quarante-sept années de non-exécution ont passé. Un Etat commence par ignorer la validité d'une sentence arbitrale et quatre-vingt-quatre ans après finit par ignorer la validité d'un traité international. Ce sont les choses de la vie.

9. Mon contradicteur, ainsi que tous les écrits et interventions orales des conseils du Nicaragua, se sont référés exclusivement à la date critique de 1821, comme la date critique de *l'uti possidetis* — au sens particulier qui peut être attribué à cette date pour ce principe. Cette affirmation de la Partie adverse est, *en principe*, correcte lorsqu'il s'agit de différends entre pays centraméricains, mais seulement en principe. Ce qui veut dire que cela n'est pas forcément le cas dans notre affaire. Comme on le sait, la date critique de l'*uti possidetis juris* pour les pays sud-américains, est celle de 1810. Cette date n'est pas la date critique relevant de notre affaire ou au stade actuel, mais elle est aussi pertinente pour notre affaire puisque, si avant cette date (par exemple en 1803, comme le soutient le Honduras) l'administration militaire du Nicaragua avait été transférée à la vice-royauté de Santa Fe et à la capitainerie générale du Venezuela, la succession d'Etats entre la vice-royauté du Mexique et du Nicaragua n'aurait pas été possible. Pour utiliser les mots de Max Huber dans la sentence de l'*Ile de Palmas «nemo dare potest quod non habet»*. Ceci est la raison pour laquelle l'affirmation du Nicaragua sur ce point est dangereuse en ce qui concerne le Honduras, comme elle le sera, en temps voulu, en ce qui concerne la Colombie.

10. Finalement, la Partie adverse revient sur l'*uti possidetis* dans la présente affaire d'une manière contradictoire, puis elle se refuse à l'utiliser à l'encontre des îles lilliputiennes. Il faut souligner, *en premier lieu*, que le mémoire du Nicaragua ne consacre aucun mot ou une seule phrase à ce principe. *En second lieu*, le Nicaragua soutient dans sa réplique que «*l'uti possidetis* n'est pas un titre» (RN, vol. I, p. 9, par. 1.24), alors que quelques pages auparavant, il affirmait que : «Les îles et cayes en litige dans le cadre de cette dernière instance [celle de la Colombie]

— au contraire de celles en litige en l'espèce — ont été expressément mentionnées dans les documents pertinents aux fins d'établir un titre fondé sur le principe de *l'uti possidetis*.» (RN, vol. I, p. 38, note 130.) Cette contradiction devient plus aiguë lorsque le Nicaragua soutient pour la première fois dans sa réplique que ce principe est applicable aux îles existantes dans la mer (*ibid.*, p. 43, par. 4.31), mais pas à certaines îles lilliputiennes, donnée que le professeur Remiro Brotóns admet expressément dans sa première intervention orale sans limitation dans leur taille ou dimension (cf. CR 2007/3, p. 36, par. 88). Enfin, mon contradicteur devra admettre que le Nicaragua se contredit totalement dans ses appréciations sur *l'uti possidetis*.

11. Pour conclure cette première partie de mon intervention, j'espère que mon collègue et ami, le professeur Remiro Brotóns ne renouvellera pas sa complainte que le Honduras n'ait pas répondu à ses arguments car je crois l'avoir fait. Cependant, ce n'est pas le cas des conseils de la Partie adverse auxquels, au cours de ma précédente intervention, j'ai proposé une série de questions à répondre tout simplement par oui ou non. Malheureusement, je n'ai obtenu aucune réponse.

12. En tout cas, ce ne sera ni à Antonio Remiro, ni à moi-même de s'occuper de l'application de ce principe car l'intervention du professeur Alain Pellet a apparemment fait glisser la question sur le terrain de l'adjacence, ou ce qui est la même chose, sur celui de la contiguïté. Madame le président, avant de passer à la deuxième partie de mon intervention — il me manque à peu près 15 minutes —, je vous propose de faire une pause.

The PRESIDENT: Yes, if it is convenient for you. The Court will shortly rise.

The Court adjourned from 4.25 to 4.40 p.m.

The PRESIDENT: Please be seated. Please continue, Professor Sánchez Rodríguez.

M. SÁNCHEZ :

II. L'adjacence

13. Je dois confesser publiquement mon admiration sincère au professeur Alain Pellet. Il est le digne héritier de la tradition juridique française des présentations orales. Sa maîtrise des silences et des intonations, son utilisation des pauses et des formules vaticanes rendent parfaites ses

interventions d'un point de vue formel. Notre éminent contradicteur sait aussi manier le fouet avec vigueur comme il le fit sur le Honduras à l'occasion de sa dernière intervention. On n'oubliera pas que l'un des mérites de notre collègue français est sa maîtrise de l'illusionnisme et de la magie. A l'occasion de son intervention lundi dernier, notre contradicteur a fait surgir un lapin de son chapeau rompant ainsi la séquence du discours du Nicaragua. Il a dit que :

> «Le titre dont se prévaut le Nicaragua n'est autre que le titre alternatif que le Honduras n'hésite pas à revendiquer également : celui de l'adjacence. M. Colson invoque à cet égard les traités conclus par l'Espagne, respectivement avec le Nicaragua le 25 juillet 1850 et avec le Honduras le 15 mars 1866 ; aux termes des articles premiers de ces deux traités, la reine d'Espagne renonce à toute prétention sur les anciennes provinces du Nicaragua et du Honduras «avec [leurs] îles adjacentes». Mais, Madame le président, ceci conforte la position du Nicaragua et nullement celle du Honduras.
>
> L'adjacence n'est pas une notion susceptible de manipulation : ce qui est adjacent, c'est ce qui est près — et lorsque plusieurs choses, ou îles, ou côtes sont plus ou moins proches les unes des autres, ce qui est *le plus près*. Or, l'adjacence parle en faveur du Nicaragua, pas du Honduras — quoique celui-ci s'efforce de laisser croire.» (CR 2007/11, p. 40, par. 25 et 26.)

Et le professeur français, sans hésitation aucune, conclut avec une grande autorité et sûreté :

> «celui [le titre territorial] qui appartient au Nicaragua du fait de l'adjacence des îlots en question par rapport à ses côtes, adjacence reconnue par les traités conclus avec l'Espagne en 1850 par le Nicaragua et en 1866 par le Honduras, ne peut être remis en cause sur la base des effectivités incertaines invoquées par le Honduras» (*ibid*., p. 49, par. 51, avec référence à RN, p. 95 et 96, par. 6.90-6.92).

14. Madame le président, Messieurs les juges, je vais à nouveau à confesse. Le professeur Pellet a surpris tant ma capacité d'imaginer que mon ingénuité. Maintenant, le professeur Remiro Brotóns va comprendre ce qui s'est passé il y a quelques minutes lorsque soudainement tous les deux nous fûmes mis hors jeu par un drible juridique que même Ronaldinho aurait été incapable de réussir sur un terrain de football. Il a aussi mis en évidence l'ingénuité du Dr Oude Elferink, qui un peu plus tard a soutenu de manière quasi infantile que «the Nicaragua's title to the cays dates from 1821» (*ibid.*, p. 65, par. 38).

15. J'examinerai maintenant avec la plus grande attention l'anatomie du lapin apporté par l'autre Partie. La première affirmation — directe — serait que l'adjacence favorise le Nicaragua et défavorise le Honduras. Cette affirmation est dénuée de toute tentative de justification, de corroboration ou de preuve de la part de la Partie adverse. Non, l'adjacence, au contraire de ce que

prétend le Nicaragua, renforce la souveraineté insulaire hondurienne comme le montre la carte portée à l'écran et préparée *ex profeso* ou au moins laisse le match équilibré.

[Cartes sur l'adjacence insulaire LISR 2.3.1, 2.3.2 et 2.3.3]

Cette carte permet de prouver *tout d'abord* que l'adjacence des îles par rapport à la côte est nettement favorable au Honduras, et *ensuite* que l'adjacence des îles honduriennes entre elles — lesquelles constituent un groupe et un *continuum* en interrelation — milite clairement en faveur de la souveraineté hondurienne en application de ce titre alternatif.

16. La seconde affirmation de notre contradicteur est que l'adjacence constitue un «titre alternatif» pour la souveraineté insulaire hondurienne, lui aussi invoqué par le Honduras. Il convient de rappeler la vieille sentence de l'*Ile de Palmas* et ce qu'a dit l'arbitre Max Huber dans le contexte des conflits d'attribution des îles *terrae nullius* :

> «Ce principe de la contiguïté … il manque totalement de précision et conduirait, dans son application, à des résultats arbitraires.» (*RGDIP*, 1935, p. 182.)

17. La troisième affirmation de l'autre Partie est que «l'adjacence n'est pas une notion susceptible de manipulation». Cette affirmation, incompréhensible en elle-même, contredit la décision de Max Huber que je viens de citer. Il est alors impossible d'expliquer au professeur Alain Pellet que l'expression «îles adjacentes» utilisée dans la sentence arbitrale de 1906 et dans d'autres textes, antérieurs ou postérieurs à l'émancipation coloniale du Nicaragua et du Honduras, aurait été inacceptable, en conséquence de son ambiguïté et de son défaut de précision lorsque c'est le Honduras qui l'utilise. Cependant, grâce à la magie de l'élocution de notre maître français, l'expression s'avère être claire et précise pour le Nicaragua lorsqu'elle est utilisée par la reine d'Espagne au milieu du XIX^{e} siècle.

18. Sur ce point, l'équipe du Nicaragua ne fait pas montre d'unanimité. De manière plus prudente, le professeur Remiro Brotóns ne fait pas de référence directe à l'adjacence, mais il utilise des formules plus vagues comme celles de «principe de proximité» ou encore de «dépendance» lorsqu'il parle de Meanguerita par rapport à l'île de Meanguera. Et puis, la Chambre de cette Cour a prudemment évité l'utilisation du mot «contiguïté» ou «adjacence» (cf. CR 2007/3, p. 36, par. 86) en tant que titre hypothétique de souveraineté d'El Salvador sur cette île.

19. La quatrième affirmation du Honduras a pour point de départ une fois de plus l'observation contenue dans la réplique du Nicaragua lorsque ce pays soutient : «[I]l en découle que le Honduras a la charge de prouver qu'il y a eu glissement de ce titre en sa faveur» (RN, vol. I, p. 103, par. 6.118 *b)*). Alors, le Honduras est aujourd'hui dans son bon droit lorsqu'il regrette que le professeur Pellet et le Nicaragua n'aient pas prouvé l'existence d'un titre alternatif d'adjacence, son contenu et son opposabilité vis-à-vis du Honduras. Le simple fait de mentionner un titre présumé ne convertit pas automatiquement ce dernier en droit, comme la Partie adverse semble le prétendre.

20. La cinquième affirmation apparaît au Honduras comme étant la plus importante et la plus substantive en l'espèce, à savoir la parenté ou l'autonomie des traités de paix et d'amitié signés par l'Espagne, le Nicaragua et le Honduras en 1850 et 1866 en relation avec l'*uti possidetis*. Ceci découle de la thèse du Nicaragua qui semble considérer ces traités comme une source autonome et indépendante d'attribution de la souveraineté territoriale sur les îles. Serait-ce un nouveau titre specifique ? Je commencerai par affirmer que ces deux traités n'apportent aucune nouveauté au panorama de la pratique conventionnelle espagnole étant donné que l'Espagne a signé ce genre de traités à l'époque avec ses anciennes colonies. Dans tous ceux-ci, la formule d'«îles adjacentes» a été répétée.

21. Si le titre de souveraineté insulaire dépend desdits traités, immédiatement quelques questions techniques se posent. La première est celle de l'opposabilité du traité hispano-nicaraguayen par rapport au Honduras et vice versa. La seconde est le problème complémentaire de la date critique applicable au différend insulaire. Quelle est cette date critique : 1850 et 1866, ou bien 1821, 1906, 1960, 1977 ou 1979 ? La troisième affecterait le champ d'application territorial des deux traités. S'appliquent-ils à chacune d'entre elles ? Je me demande combien de différends territoriaux ont surgi entre les pays américains de l'ancienne couronne d'Espagne en application des différents traités de paix et d'amitié signés par l'Espagne au cours du XIX^{e} siècle et au nom de l'adjacence. Mon éminent contradicteur en connaît-il le nombre ? Aucun, professeur Pellet, aucun.

22. Il est vrai que notre collègue de l'autre côté de la barre ressemble à un auteur qui a été depuis des années, depuis 1999, à la recherche de son personnage. Il croit l'avoir rencontré dans

l'adjacence de 1850 et de 1866. Mais sa quête s'est révélée infructueuse et frustrante car lesdits traités ne sont pas autre chose qu'une reconnaissance conventionnelle, expresse et bilatérale de l'*uti possidetis*. La reine d'Espagne s'est limitée à reconnaître à cette époque l'*uti possidetis* espagnol existant en 1810 et en 1821, selon les pays, établi par ses prédécesseurs. J'ai recommandé à l'autre Partie l'utilisation du texte élaboré par la «commission d'examen» qui a servi de base à la sentence arbitrale de 1906, celle-là même que le Nicaragua n'a pas exécuté et a ignoré durant plusieurs décennies. Mais ceci a été une vaine recommandation, malgré ma bonne foi. Ainsi s'explique précisément ce que signifient ces traités dans le contexte général de l'*uti possidetis juris*, et de ses applications particulières et découlant de ce principe. Ce fait qui est connu de tous ceux qui ont étudié le droit colonial espagnol a été ignoré (volontairement ?) par mon contradicteur, avec pour résultat d'essayer de jeter un rideau de fumée sur cette Cour afin d'éviter l'application d'un *uti possidetis* présumé et imprécis en matière insulaire par le biais d'un titre juridique inexistant aujourd'hui, encore plus ambigu et non localisable sur le terrain. Finalement, sept ans plus tard, le professeur Pellet a fini par rencontrer le personnage.

23. Mes conclusions seront très brèves et très simples, Madame le président et Messieurs les juges. Quant aux accusations du professeur Remiro Brotóns, je crois que toutes les manifestations de manichéisme — du type «j'ai toujours raison, la partie adverse jamais» — doivent être évitées. Quant au professeur Pellet, il doit reconnaître que malgré ses tentatives de fuir l'*uti possidetis* depuis 1999, il a fini par retomber sur celui-ci en 2007 ; cette fois sous le déguisement de l'adjacence.

Madame le président, Messieurs les juges, à la fin de ces plaidoiries orales, je dois remercier très sincèrement la patience et l'attention que vous m'avez manifestées. Merci beaucoup.

Veuillez, Madame le président, appeler mon collègue, le professeur Philippe Sands, pour continuer l'exposé du Honduras.

The PRESIDENT: Thank you, Professor Sánchez Rodríguez. I now call Professor Sands.

Mr. SANDS: Madam President, with your permission, I am going to do my very best to finish by 6 o'clock but I may seek your permission to overshoot by three or four minutes. But I shall be in your hands.

1. Madam President, Members of the Court, in my presentation this afternoon I will return to the conduct and intentions of the Parties in relation to two issues: the first is sovereignty over the islands, the second is the tacit agreement between the Parties with respect to the treatment of the 15th parallel as the maritime boundary.

2. As we have already said last week, there is a very close connection between these two issues: Honduras's sovereign intent and activities in respect of the islands informs and supports the Parties' tacit agreement on the 15th parallel. This close connection between sovereignty and tacit agreement is particularly evident in respect of the oil concessions and also fisheries, with the islands being used as a base for activities down to the 15th parallel but not beyond.

3. The fact that there is a close connection does not mean, however, that the issues are identical. Professor Pellet said that our distinction between a dispute over sovereignty and a dispute over delimitation was "artificielle et illogique"[37]. And with great respect, that is not right. This Court has always proceeded on the basis that the legal issues are distinct, that the applicable law is distinct and Nicaragua has now accepted that this is the correct approach: on Tuesday morning, in response to our insistence that issues of territorial sovereignty must be decided before the question of maritime delimitation, Mr. Brownlie said "That is no doubt true."[38] So I will start with the islands and move on to the delimitation.

4. Before doing so I would like to make a small number of preliminary points. As directed by you, Madam President, at the close of the first round, I will only address points made by Nicaragua in its second round, as well as the points that it did not make. For this case is quite striking not only for the arguments that Nicaragua did make in the second round, but those it has chosen not to make. There are points of contradiction. There are points to which it has not responded and on which it now appears to have conceded. I will say more about this during my presentation. At this stage let me just highlight a couple of examples.

5. The most significant feature of Nicaragua's case is that it has given up putting a positive case for its own sovereignty over the islands or any *effectivités* north of the 15th parallel. Dr. Elferink made no effort whatsoever to persuade you of Nicaragua's sovereign intent or activity

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[37]CR 2007/11, p. 49, para. 51 (1).

[38]CR 2007/12, p. 39, para. 3.

over any of the islands. His presentation on Monday was entirely defensive: he tried to undermine Honduras's sovereign actions over the islands and limited himself to that. Equally significantly, he addressed not a single word to the question of Honduras's sovereign intentions. Nicaragua seems no longer to challenge that aspect, and it is difficult to see how it could. All that Nicaragua challenges is the sufficiency of Honduran *effectivités*.

6. But that is not the only part of the case abandoned by Nicaragua. In the first round the Agent and several counsel attacked Honduran *effectivités* on the grounds that they post-dated Nicaragua's supposed critical date. In the first round the Agent said that beyond the oil concessions "all the other material filed as evidence by Honduras refers to activities occurring for the first time after that date of 1977"[39]; and similar claims were made by counsel for Nicaragua[40]. We responded by providing numerous examples of Honduran *effectivités* that pre-dated May 1977, even going back as far as the Agrarian Law of 1936 on which Nicaragua remained conspicuously silent. Those examples seemed to us to be unanswerable, and they were indeed unanswered. So in the second round Nicaragua abandoned its earlier position and adopted a new one. "[P]lusieurs des quelques 'effectivités'", said Professor Pellet, "datent de cette période de deux ans (1975-1977)"[41]. So Nicaragua's case now is not that our *effectivités* are not relevant but they are inadequate. There is much that I could say about this line of attack, beyond the fact that it is manifestly wrong. But

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[39]CR 2007/1, p. 34, para. 65. The Agent went on to state that:

"All of the activities that refer to the area in dispute, as an identifiable area, occur after 1977." (CR 2007/1, p. 35, para. 66.)

"it must be clear that there were no activities of any consequence taken by Honduras in the area in dispute prior to the 1980s" (CR 2007/1, p. 36, para. 70).

"the only certified and verified use of these cays before the critical date was by the Cayman fisherman . . ." *(ibid.)*.

With respect to specific activities, he stated as follows:

"(i) Fisheries: Practically all of the highly selected testimony by fishermen filed by Honduras refers to situations dating from after 1977 . . . The same applies to any fishing regulations before the 1980s. There is no area identified that could even vaguely be considered as referring to the area in dispute.

(ii) Honduran administration and legislation, application and enforcement of Honduran civil and criminal laws, regulation of immigration and public works and scientific surveys, all cited in the Honduran written pleadings, are all related to facts occurring after the 1980s and some even after this case came before the Court. Any references prior to that period are vague and could refer to any area in the Caribbean under Honduran sovereignty.

(iii) The first Honduran Constitution to include some of the islands and cays in dispute dates from 1982." (CR 2007/1, p. 41, para. 90.)

[40]See *inter alia* the comments of Mr. Elferink, CR 2007/3, pp. 38-39.

[41]CR 2007/11, p. 47, para. 45.

the bottom line is this: Nicaragua now accepts that Honduras has *effectivités* that pre-date its own early critical date.

Islands

7. Let me turn then to the islands. The Court is faced with a number of issues that it will wish to address.

8. The first is whether these insular features are islands. The Parties are agreed on the definition. It is that definition found in Article 121 of the 1982 Convention. If it is a "naturally formed area of land, surrounded by water, which is above water at high tide" then it is an island.

9. The second issue is whether the islands in question are susceptible of effective occupation by any sovereign. In the first round the Agent of Nicaragua said that they were not[42]. Nicaragua has changed its position on this also. It seems to have been, perhaps, persuaded by our argument that that was wrong. Professor Pellet confirmed: "ce sont des îles susceptibles d'appropriation"[43]. So this seems no longer to be an issue.

10. The third issue is which of the "cays" and "reefs", as Professor Brownlie described them, are to be treated by the Court as islands in this case. There are a number of islands about which the Parties are not in dispute: the Parties agree that Bobel Cay, South Cay, Savanna Cay and Port Royal Cay are islands within the meaning of the 1982 Convention. You can see these now on the screen, which shows the latest version of the British Admiralty chart, updated to 2006 — they are highlighted in yellow [PS3.1]. And that chart provides confirmation of other evidence put forward by Honduras that these are, indeed, islands.

11. During the course of the hearings one issue has become the subject of attention, assisted perhaps by the helpful question from Judge *ad hoc* Gaja, and that concerns Cayo Palo de Campeche and Cayo Media Luna. In respect of these features two points arise: first, their location, and second, their status. We do not think that a great deal turns on these two islands, but it is important, nevertheless, we think, to address them fully.

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

[43]CR 2007/11, p. 35, para. 16.

12. Let me first deal with their *location*. Professor Pellet tried to show that the islands were adjacent to Nicaragua, not Honduras: and to achieve that effect he had to tilt his map 37º southwards on its axis[44]. The merits of that approach speak for themselves. Dr. Elferink also did his best to sow confusion, and I certainly do not hold that against him. He was doing his job, and it was not an easy one. Given the absence of evidence furnished to him by his client to make any sort of positive case for Nicaraguan *effectivités* it is entirely understandable that he would adopt the tack that he did. But the fact is there is no confusion over the islands. Honduras has been consistent in its presentation of geography. Cayo Palo de Campeche and Cayo Media Luna are where we have always said they are. They are in the same place today as they were in 1936 when Honduras first adopted the Agrarian Law that made explicit reference to Palo de Campeche, and they are in the same place that they were in 1957, when the Constitution did the same thing.

13. The maps and charts that are before the Court make that abundantly clear. Whatever popular names may or may not have been given to particular islands and cays, whatever the folklore from Jamaica or anywhere else in the region, the fact is that the maps and charts have been — and continue to be — perfectly consistent.

14. On the screen is the 1933 map that I took you to last week [PS3.2]; it is plate 24 of our Counter-Memorial. The distinguished Agent of Nicaragua described this map as "an unofficial map dating from 1933"[45]. With respect, that is not accurate. The map was published by the Instituto Panamericano de Geografía e Historia, as you can see on the top. It is an international organization that was created in 1928 by the Governments of American States and Honduras and Nicaragua are members of that international organization. Since 1949 the Instituto has been a specialized organization of the Organization of American States. So, the map has a certain authority.

15. The 1933 map has an insert in the bottom left-hand corner. I would like to read that out to you: it says:

> "This map was constructed with data provided by His Excellency Dr. Ricardo Alduvín, Minister Plenipotentiary of Honduras in Mexico, and by

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[44]CR 2007/11, plate AP2-3.2, 19 March 2007.

[45]CR 2007/11, p. 22, para. 47. Similarly counsel for Nicaragua also stated that this was "not an official map", CR 2007/11, p. 53, para. 8.

> Professor Ulíses Mesa Cáliz, both Delegates of their country to the Preliminary Assembly of the Panamerican Institute of Geography and History. The official map of the Republic of Honduras was also used to this end."

So this indicates the authority of the map, and, of course, the very direct involvement of the Honduran State in its preparation. And the insert does also include the usual caveat on boundaries.

16. [PS3.3] We do not rely on this map, however, for the purposes of establishing any boundaries. We rely on it to confirm the definitive location of Palo de Campeche in 1933. You can see on the screen: it shows Palo de Campeche where we have always believed it to be. Nicaragua has not put any evidence before the Court to show that Cayo Palo de Campeche is located anywhere else. There is no other map before the Court that shows Palo de Campeche except where it is located on this map.

17. Now on the screen, the 1926 version of the United States Navy Hydrographic Office chart [PS3.4]. This is the closest one we could find to the date of 1933, which was easily accessible and in the public domain: and, there, in red, you can see Logwood Cay and there, in green, you can see Half Moon Cay. Now these are both old charts, but with the assistance of our cartographers we have been able to superimpose the 1933 chart over the 1926 chart. You can now see the result on the screen [PS3.5]: in red, Cayo Palo de Campeche and Logwood Cay and in green, Cayo Media Luna — Half Moon Cay; and in blue, Cayo Bobel — and Bobel Cay is underneath that blue inscription. Now it is not a perfect fit — we accept that — but we would not have expected it to be so. It is extraordinarily close. There can be no room for any doubt that the words Cayo Palo de Campeche and Logwood Cay refer to the same feature. There can be no doubt that the words Cayo Media Luna and Half Moon Cay also refer to the same geographical feature. And in both cases the features are shown as islands. The evidence before the Court shows that Palo de Campeche and Logwood are one and the same. When Honduras referred to Palo de Campeche in its Agrarian Law of 1936, adopted three years after this map, it can only have been referring to the island identified as such on the 1933 chart, and to Logwood Cay in the 1926 chart.

18. What has happened since the 1920s and 1930s? Well nothing has changed. We have gone and looked at every version of the United States NIMA chart since; corrections published in 1942, 1964 and 1985, show Logwood Cay in exactly the same location. And every version of the British Admiralty chart, published in 1905, 1917, 1929, 1941, 1989, 1999 and last year in 2006, all

show Logwood Cay (Palo de Campeche) in exactly the same location. So the evidence is dispositive.

19. Let me then turn to the question of the *status* of Palo de Campeche and Media Luna: are they submerged or not? Let us start with the evidence. As I have shown, the evidence before the Court shows that both were islands in 1926 and in 1933. Dr. Elferink told the Court that "Logwood Cay . . . has disappeared under the waves"[46]. What was his evidence for that? His evidence. He had none. Indeed, the evidence with which some of his team members are so closely associated, and they are not apparently here today, directly contradicts him. The most recent British Admiralty chart shows that Logwood Cay (Palo de Campeche) and Media Luna Cay are indeed islands, and that they are not submerged. The most recent chart was published in 2006. And it is on the screen now [PS3.1]. There you can see Logwood and Media Luna where they have always been, and there is no indication that they are submerged. So, according to the British Admiralty, these were islands in 2006. Nicaragua's Memorial proceeded on the basis that Logwood and Media Luna were not submerged[47]. And on Tuesday morning Mr. Brownlie put some plates up that showed Nicaragua's provisional equidistance line. You can see one of those plates — IB3-11 — on the screen [PS3.6]. You can see that Cayo Media Luna, the same one as I have just been taking you to, is taken as a base point. So Mr. Brownlie did not proceed on the basis that Cayo Media Luna was submerged, presumably because he relied on the British Admiralty chart, which shows that it is not. But there is something else. Although he did not advertise the fact, because he did not put a label on it, Mr. Brownlie also used Logwood Cay (Cayo Palo de Campeche) as a base point. On the screen now you can see a series of lines starting off the green colouring just to the north of Media Luna. That is Palo de Campeche, as is now shown on the screen. So Mr. Brownlie also proceeded on the basis that Palo de Campeche was not submerged.

20. Against that evidence is the second footnote at page 14 of our Counter-Memorial, which indicated that "the original Logwood Cay and Media Luna Cay are now submerged". That footnote was inserted at the request of Engineer Luis Torres, who sadly is not able to provide us

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[46]CR 2007/11, p. 54, para. 9.

[47]NM, p. 9, para. 15 and p. 166 (paragraph not numbered).

with assistance or explanation. To the extent that the statement was accurate — and it is now contradicted by new evidence, including the 2006 British Admiralty chart — it could only have described the situation as at the date he described it and we did in the Counter-Memorial, that is to say March 2002. The British Admiralty chart of 1999 does not show the islands as submerged.

21. So all of this brings us to the question posed by Judge *ad hoc* Gaja. The distinguished Agent of Nicaragua said in response to that question that "[i]n accordance with the information presently available to the Government of Nicaragua, the cays of Logwood and Media Luna are now submerged"[48]. The Agent did not however refer to any evidence to back that up and of course he ignored the charts upon which Nicaragua's team is relying and he contradicted Mr. Brownlie. In the time available we have done the best we can to take steps to respond to that question. So in the past few days we have obtained some publicly available satellite imagery that shows the area in question, including the islands. [PS3.7] You can see a large-scale picture now up on the screen. This is an overall picture of the whole area.

The PRESIDENT: Professor Sands, may I interrupt to ask you where this is to be found. That is not identified. What it is, is identified, but not where these and the ensuing ones are to be found.

Mr. SANDS: In fact, I can help you on one matter. It is all the same single image and it was obtained by our cartographer. I am afraid I can't give you a precise detail. He put a call in and obtained, though a United States source.

The PRESIDENT: Yes. You will appreciate the purpose of the Practice Direction. That is information we need. So perhaps, as soon as conveniently possible, it will be passed to us and to the other Party?

Mr. SANDS: Absolutely, Madam President. I can certainly give that undertaking. What we were intending to do, was in the response in writing to Judge *ad hoc* Gaja, we were going to provide obviously all of the information. And we certainly can and will provide that information.

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[48]CR 2007/11, p. 26, para. 63.

The image that you see now is focussing in on that area. It was taken in January 2003 and it is a Landsat satellite image. We do not I'm afraid have the precise time, but we do have the day and we will provide you with that. Judging by the shadows from the clouds, I am told that it is between 10 a.m. and 2 p.m. which is the usual time for images of this kind to be taken. Going clockwise you can see first Savanna Cay, then South Cay, then Port Royal Cay and then Bobel Cay. And then we head north a little and reach Cayo Media Luna, and then a little further north you get to the Arrecifes de la Media Luna. And we are going to focus in on that now. That is the Arrecifes and on the very southern tip of that reef you see a white spot, and that is Cayo Palo de Campeche, as shown on the British chart. So this image of January 2003 is consistent with the latest United Kingdom and United States charts that show Media Luna Cay and Cayo Palo de Campeche (Logwood Cay) as islands. The answer to the question, therefore, appears to be that both features were above water when this satellite image was taken, and they were not, at least at that moment, submerged.

22. That is consistent with the evidence before the Court, showing that Palo de Campeche and Media Luna Cays were islands at least from 1936 onwards. There is no evidence that these were not islands when Nicaragua first asserted sovereignty over them in 2001. Judge *ad hoc* Gaja's question was very precise and it asked about the islands today, and we hope to be able to say a little more about that in our written response to his question with full information provided.

23. I can wrap up on some other issues raised by Dr. Elferink rather quickly. Nicaragua's Memorial makes clear, as do all versions of the British Admiralty chart, that Savanna Cay and Logwood Cay are not the same. Quite why the triangulation marker on Savanna Cay is inscribed with the word "Logwood" we do not know. But Savanna Cay is not Logwood. What we do know is that in the second round Nicaragua had nothing to say about the 1976 Agreement between Honduras and the United States that allowed the triangulation markers to be placed on three islands, and they seem to have abandoned what struck us as a manifestly hopeless argument that the placing of the markers was not a direct result of that 1976 Agreement. Dr. Elferink had no evidence to back up his suggestion that the Jamaican Note of 25 February 1977 requesting assistance for some stranded Jamaican fishermen on Savanna Cay might have referred to another

island[49]. One assumes that the Jamaican authorities might have had available to them the British Admiralty chart of that date, which was the 1964 version and that showed Savanna Cay exactly where it is now. Like the other cays, it has not moved.

24. Before I move on to the question of *effectivités*, there is one other issue I would like to address. My friend Professor Greenwood has already touched upon it, and that is the 1998 Free Trade Agreement to which some reference has been made, since it referred to Palo de Campeche and Media Luna when it was adopted in April 1998. I want to express our gratitude to the Agent of Nicaragua for assisting in clarifying the situation, which we are sure both Parties have sought to address in good faith. The situation seems to be as follows. On 16 April 1998 the Presidents of Nicaragua and Honduras, together with three other Presidents and the Foreign Minister of Guatemala, signed the Free Trade Agreement. Annexed to Article 2.01 was a definition of the territories to which it was applicable, and the territory of Honduras expressly included Cayo Palo de Campeche and Cayo Media Luna — which you have just seen on the screens. The copy which we relied on — the copy actually signed by the Presidents — was obtained last week from the website of the Inter-American Development Bank. And we have now provided a copy to the Registrar and, I hope, to our friends from Nicaragua. What happened after the signature of the treaty appears to be somewhat complex. But following signature there was a subsequent agreement by the parties, which I am told was in the form of an exchange of letters, to make certain amendments, including the removal of the Annex to Article 2.01. The difficulty has arisen because the revised version has not been widely posted. It is available on the website of SIECA, exactly as the Agent of Nicaragua has described[50], but so is the original version with the Annex[51] —and we have indicated where on the website in the footnotes to my presentation. But unfortunately on the SIECA website there is no indication of which of the two is the authoritative version. The original version of the treaty — the one with the Annex — appears to be also the only one available on the website of the Inter-American Development Bank[52] and the Sistema de Información sobre

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[49]CR 2007/11, p. 55, para. 14.

[50] See http://www.sieca.org.gt/op3-2.htm.

[51]See http://www.sieca.org.gt/publico/marco_legal/tratados/texto_del_tratado_de_libre_comercio_ca_repdom.htm.

[52]See http://www.iadb.org/int/commerce/guatemala/TLC_CA_DOM_1998/texto_normativoDOM.pdf.

Comercio Exterior of the Organization of American States (OAS)[53]. To compound the difficulties the treaty has no depositary and has not been registered at the United Nations. And to make things even more interesting the possibility cannot be excluded that parties have ratified different versions of the treaty. We accept *entirely* the Agent's account of what has happened in Nicaragua. The version that was approved and ratified by the Nicaraguan Assembly did not include the Annex. Nevertheless, the fact is that the President of Nicaragua did sign the treaty with the Annex. The *fact* of signature was consistent with our submission that there cannot have been a dispute over the sovereignty of the islands *at that time*. And that *remains* our position. We make no more of the 1998 treaty than the fact of its signature on 16 April 1998. And we doubt that it will be necessary for the Court to address what appears to be a complex series of questions about the status and effect of that treaty at any particular point in time thereafter.

25. So the 1998 treaty appears to cause certain difficulties, but other matters do not. One point is crystal clear after Nicaragua's second round. It has not been able to meet our challenge to identify a single document, or any other evidence, that it has ever articulated or published any formal claim to sovereignty over Bobel, Savanna, Media Luna, Cayo Palo de Campeche, Port Royal, South Cay or any other island or feature north of the 15th parallel *at any time* before March 2001 when it filed its Memorial. So, if this Court were to decide that Nicaragua somehow has sovereignty over the islands, a rather interesting precedent would be set: a State would no longer have to have asserted title to sovereignty over a territory before initiating legal proceedings for a determination that it had sovereignty over that territory.

Effectivités

26. We turn then to the question of *effectivités* in relation to the islands. There was a great deal on which Nicaragua was silent. We invited Nicaragua to assist us and the Court by pointing to a single example of *effectivités.* Dr. Elferink could not provide a single example. No legislation indicating sovereign intent or activity. No fishing licences. No public works. No oil concession activity. No navigational aids. Nothing.

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[53]See http://www.sice.oas.org/trade/camdrep/indice.asp.

27. Dr. Elferink did not even come to the aid of his witnesses. There was simply no response to our arguments. At the end of the day all he was left with were two things: the private writings of a leading Nicaraguan academic, Dr. Incer; and, once again, Commander Kennedy who, he must hope, may yet turn out to be Nicaragua's saviour[54]. Well, a geographical index cannot confirm the existence of long-standing title of Nicaragua[55]. Whatever views Dr. Incer may have had over the islands in 1971, they were ignored by the Government of Nicaragua. The Government did not pick them up and run with them and proclaim any title over any of the islands for three decades, until March 2001. As regards Commander Kennedy, I do not feel the need repeat what we have already said in our pleadings and in our first round. Dr. Elferink confirmed by silence the *one key* fact on this issue of turtle fisheries — the one key fact: throughout the entire period of the turtle fisheries dispute, over more than seven decades, there is not a single piece of evidence that Nicaragua has *ever* asserted title over any of the islands, or authorized any turtle-fishing activity over any of those islands, or done anything else that could amount to an expression of sovereign intent or the exercise of sovereign authority over the islands.

28. And that, presumably, is why the new Nicaraguan submission on sovereignty over the islands is drafted as it is. It is notable, we think, that Nicaragua has not asked the Court to declare that *it* has sovereignty over the islands. It has merely asked the Court "to decide the question of sovereignty over the islands and cays within the area in dispute". It is rather instructive to compare Tuesday's submission with the one that is set out in the Nicaraguan Application of 6 December 2001 instituting proceedings against Colombia. In that case Nicaragua asked the Court to adjudge and declare that "it has sovereignty over the islands of Providencia, San Andres and Santa Catalina and all the appurtenant islands and keys"[56]. So, why, one is bound to ask, is Nicaragua so hesitant on this case?

29. The fact that Nicaragua has no *effectivités* of its own meant that counsel for Nicaragua devoted their time during the second round to the sufficiency of Honduran *effectivités*.

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[54]CR 2007/11, p. 59, para. 23 and p. 64, para. 34.

[55]CR 20007/11, p. 64, para. 34.

[56]http://www.icj-cij.org/icjwww/idocket/inicol/inicolorder/inicol_iapplication_20011206.pdf.

Professor Pellet referred to our *effectivités* as "[d]es manifestations sporadiques at ambigues"[57]. I am not sure whether Members of the Court will consider that to be a fair characterization. For our part, we do not. After all, we believe we have submitted far more than the successful party tendered in the cases of *Qatar* v. *Bahrain* or *Indonesia/Malaysia*, a point that Nicaragua has not disputed and cannot dispute. Honduras has tendered evidence dating back every decade at least as far as the 1930s. Just to give just a few examples from each decade, prior only to the critical date — there is far more after that early start. You could start with the Agrarian Law of 1936 and then move on to the United States Fish and Wildlife Report of 1943[58], then on to the 1957 Constitution, then to the oil concessions of the 1960s, and then the fisheries licenses of 1976 and January 1977 and, still, you would not have reached Nicaragua's premature "critical date". So, even if Professor Pellet is right to characterize these examples as sporadic and ambiguous — which he is not, we say — he has chosen words that could not attach themselves to Nicaragua's own *effectivités*. There can be no ambiguity about Nicaragua's absence of *effectivités*. Nothing is nothing. And when you have nothing the charge of being sporadic is one to which a State can but aspire.

30. There was silence from Nicaragua on a great deal. It seems to have given up on Honduras's sovereign intentions. Nothing about the 1936 or 1950s laws, as I have mentioned.

31. Nothing about the application and enforcement of Honduran civil and criminal laws on and around the islands. Nothing about the judicial decisions that I took you to[59]. There was no effort whatsoever to rebut our evidence, on immigration laws, on work permits, on fishing export licenses on taxes — absolutely nothing.

32. Counsel for Nicaragua also had nothing to say about our evidence on navigational aids. On the 1976 arrangement with the United States, as I have mentioned, there was silence. On the placing of the triangulation markers in 1980 and 1981, there was silence. On the use of the islands — Bobel — to assist in the work of the oil concessions, the argument was put first that this

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[57]CR 2007/11, p. 47, para. 45.

[58]CMH, Ann. 162. This expressly refers to a number of the fishing banks in the maritime area in question and states categorically that they belong to Honduras, contrary to the assertions of counsel for Nicaragua.

[59]CR 2007/7, pp. 34-39.

was private activity, and second, in any event, the antenna was a temporary structure[60]. Well, the Court has ample evidence before it to establish beyond any doubt the antenna was authorized by Honduras as part of the oil concession licence that was granted to the Union Oil Company in the area around and on Bobel Cay and down to the 15th parallel. It is true that we have not been able to provide, for example, an environmental impact statement from the Honduran Environment Ministry, but this was the mid-1970s before EIAs had become fashionable and necessary. We have provided the Court with the concession granted by the State that covered that area. We have also provided a report from the company to the State explaining what it had done. The report provided very detailed information, of a technical and temporal character. It is very difficult for us to see what else it is that counsel from Nicaragua would need from us in order to be satisfied that this was, indeed, activity regulated by the Honduran State.

33. On some of the cartography too Nicaragua was silent in its second round. In my initial presentation I addressed the fact that Nicaragua's three maps were of limited, if any, significance. The first one was undated. It did not show any of the islands now claimed. Silence. The second map — the school map of 1982 — also did not show any of the islands in question. Silence. The third map of 1997 once again failed to show any islands in the main map. Again, silence. Whilst its inset showed several cays off the Miskito Coast, including some that lie north of the 15th parallel, the map expressly states that maritime boundaries in the Caribbean Sea had not been "juridically delimited"[61] and that insert showed no boundary. Counsel had nothing to say about these arguments.

34. And, counsel for Nicaragua was also quiet on the subject of third State recognition of Honduran sovereignty, and recognition by international organizations — including organizations of which Nicaragua was a member. Nothing was said to counter, for example, United States recognition, in the form of the 1943 Report or the 1976 Arrangement. I have already explained why the response to Jamaica's Note of 1975 was singularly inadequate. And that left just Argentina and its request for Overflight in 1975. Dr. Elferink suggested I was "economical with

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[60]CR 2007/11, p. 62, para. 29.

[61]CR 2007/7, pp. 43-44.

the facts"[62]. I hope, Madam President, that I was not. I did choose my words very carefully. I identified the co-ordinates provided by Argentina and I described them as being located, as Dr. Elferink said, "directly over the area around the islands"[63]. I did not say anything about a territorial sea. Dr. Elferink provided a plate. [PS3.8] It is AE3-11, and you can see it now on the screen. What Dr. Elferink did not do was include in his plate the Nicaraguan bisector line. So, we have included it and you can see it. The effect of that line, if adopted by the Court, would be to take a point that Argentina believed in 1975 to be subject to Honduran sovereignty and shift it into Nicaraguan sovereignty.

35. Madam President, I am not sure that there is much more I can usefully say to assist the Court on the issue of sovereignty over the islands. Last week I and several of my colleagues referred to the two elements that the Permanent Court of International Justice had said were central: "the intention and will to act as sovereign, and some actual exercise or display of such authority"[64]. I also suggested that the task for the Court was to weigh Nicaragua's evidence of *effectivités* against that of Honduras. The Permanent Court made clear that the State that fails is the one that "could not make out a superior claim"[65]. And counsel for Nicaragua has now confirmed that it is in agreement with Honduras. As Professor Pellet put it, Honduras's *effectivités* "doivent être mises en parallèle avec celles que peut aligner le Nicaragua"[66]. He called it a "concours d'effectivités"[67]. We see great difficulty to identify any basis upon which Nicaragua could reasonably prevail in this particular "concours". Honduras's *effectivités* are consistent with title arising from *uti possidetis*. We respectfully submit that Honduras has sovereignty over the islands of Palo de Campeche, Media Luna, Bobel, Savanna, Port Royal and South Cay, as well as all the other islands, cays and reefs to the north of the 15th parallel.

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[62]CR 2007/11, p. 63, para. 32.

[63]CR 2007/7, p. 40, para. 47.

[64]*P.C.I.J., Series A/B, No. 53*, pp. 45-46.

[65]*Ibid.* On the need balancing of competing *effectivités*, see also the declaration of Judge Higgins, *Qatar* v. *Bahrain*, 16 March 2001, *I.C.J. Reports 2001*, ("Even if Qatar had, by the time of these early *effectivités*, extended its own sovereignty to the coast of the peninsula facing the Hawars, it performed no comparable *effectivités* in the Hawars of its own").

[66]CR 2007/11, p. 41, para. 28.

[67]*Ibid*.

The maritime boundary along the 15th parallel

36. Madam President, I turn now to the question of the traditional line along the 15th parallel — the issue of tacit agreement. In our first round we took the Court to some considerable material, to explain the basis for our submission that evidence on oil concessions, fisheries concessions and naval patrols point decisively towards the existence of the 15th parallel as the maritime boundary, and its mutual recognition as such by both Honduras and Nicaragua[68]. Taken together the cumulative evidence presents an overwhelming expression of Honduras's long-established sovereignty and exercise of jurisdiction over the waters that lie to the north of the 15th parallel. That was graphically illustrated by the witness statement of Mr. Bodden, who described how he was apprehended by a Nicaraguan patrol for alleged illegal fishing and escorted to the 15th parallel where he was released. Counsel did not respond to that affidavit or to that evidence.

37. To try to introduce some note of variety, I am going to deal this time with the issues in reverse order. I will start with fisheries and patrols, and then move on to the oil concessions. Counsel for Nicaragua had very little to say on fisheries. By their silence they confirmed what we have said in our written pleadings: they have no evidence to show that they have *ever, ever*, sought to regulate any fisheries activity north of the 15th parallel. Nicaragua had nothing to say to our invitation that they could bring to Court a single *bitacora* that shows Nicaraguan activity north of the 15th parallel, or a single fishing licence or act of legislation. It seems they have not been able to do so, and from that only one conclusion can be drawn: Nicaragua has *never* regulated any fisheries activity anywhere north of the 15th parallel.

38. The distinguished Agent for Nicaragua certainly did have quite a lot to say about the INPESCA fishing contract of 1986. That concerned, as you will recall, the amendment by INPESCA of a fishing licence that authorized fisheries activities north of the 15th parallel after Honduras had submitted a formal objection[69]. Much was said about a Mr. Octaviano Ocon Lacayo, who perhaps may not be too delighted about his first appearance in proceedings before this Court. We cannot express any view on him, of course. We could perhaps take a point about the

[68]CR 2007/9, pp. 10-38.

[69]CR 2007/11, pp. 12-15, paras. 7-17.

introduction of new evidence after the close of the written proceedings, but since the material is said to be reasonably accessible that would be, on our part, excessively formalistic. We could dwell on the fact that the evidence concerning his alleged misconduct apparently related to acts occurring five years after — five years after — the INPESCA licence was amended and seemingly, on the face of the material we were given, had no connection whatsoever with INPESCA. But the simple point is this: despite the innuendo there is no claim or evidence before this Court to indicate that the licence was not actually amended as the evidence shows. Nicaragua has not alleged that the document is not real, although it *does* say that the author was not authorized to make the change. We do not express a view on whether that is right or not, it would be a matter of Nicaraguan law. But the rules of international law are perfectly clear on this and we refer you to Article 7 of the International Law Commission Articles on State Responsibility, entitled "Excess of authority or contravention of instructions". Article 7 provides as follows:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[70]

There is no question that we are able to rely on that amendment as evidence before this Court.

39. Professor Remiro Brotóns made the claim that the witness statement of Don Daniel Santos was the only one submitted by Honduras concerning fisheries activities in the 1950s and the 1960s. Now, it is not immediately apparent to us why those years suddenly should become so important, since they come two or more decades before Nicaragua's alleged "critical date". But in any event he is not correct, since there are at least six other witness statements tendered by Honduras in the Counter-Memorial — and I have indicated them in the footnote in my presentation — which confirm fishing in those areas in the 1950s and in the 1960s and, in one case, even earlier[71]. So it seems that Don Daniel was not entirely alone on the seas during that period

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[70]Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001, pp. 99-103. (Available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.)

[71]A number of other witnesses refer to having fished in the waters in question for 30 years or more. See, e.g., CMH, Ann. 67 (visiting the cays for over 30 years), Ann. 68 (in the area of Savanna Cay for approximately 40 years); Ann. 74 (visiting the cays for over 30 years); Ann. 82 (fishing since 1958); Ann. 83 (fished from 1958 to 1974); Ann. 85 (fishing since 1959).

around the islands, although he will, I am sure, feel comforted by the expressions of concern from his former compatriot on that side of the room.

40. I turn to the question of patrols — and I can be brief. I addressed this issue in the second of my first round presentations[72]. Our submissions addressed the material before the Court — including log books and other materials — which indicated clearly that patrols on both sides have *routinely* recognized the 15th parallel as the maritime boundary. Nicaragua had nothing to say about this in its second round, so our first round submissions stand not replied to and unrebutted.

41. The third area I must touch on is that of oil concessions. The evidence supporting our arguments in the first round was, we submit, clear and unambiguous. The practice of both sides has routinely recognized the 15th parallel as the maritime boundary. The joint regulation of the Coco Marina project is compelling and irrefutable.

42. Professor Remiro Brotóns had nothing to say about the merits of our evidence, and it is very difficult to see what he could say. The merits appear to us to be so very clear. On the key points, Nicaragua has abandoned some of its positions. The concept of the open-ended oil concession has turned out to have a rather short life between the start and finish of these hearings. Nicaragua accepts, as it must, that every single one of its oil concessions had a northern limit, the result of the concession area being defined not only by co-ordinates but also by acreages, and every single one of them went up to the 15th parallel and no further.

43. Counsel for Nicaragua tried to explain how the limits to oil concessions granted to the Union Oil Company of Central America had been determined[73]. He confirmed that Union Oil required a concession for which the northern limit was "definitive". That is what was granted by the Government of Nicaragua. Some were then renewed. Our assertion that none — not one — has *ever* extended north of parallel 15, either before or after Nicaragua's critical date, has not been challenged by Nicaragua.

44. There was no greater evidence in support of any other arguments made by Professor Remiro Brotóns. He told the Court that the Instituto Nicaragüense de Energía (INE) did not authorize concessions north of the 15th parallel by reason of its *prudence*. Well, that may or

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[72]CR 2007/9, pp. 35-37.

[73]CR 2007/12, p. 19, para. 44.

may not be correct, but he provided no evidence whatsoever to support the statement[74]. There is nothing in the Instituto's reports to support that conclusion, and there is no other evidence before this Court to support that conclusion.

45. He made a great number of assertions about the practice of oil companies in Central America. Again, no evidence — not a shred of evidence — was provided in support. Our references to the rules of Nicaraguan law that are described in the Instituto's reports of 1994 and 1995 were brushed aside as "extrêmement formaliste"[75]. We seem to have made the mistake of referring to what the Nicaraguan Government's own institute actually said — a governmental body — that the oil concessions granted by Nicaragua between 1955 and 1981 were regulated by law. They are evidence, those two reports, before the Court. They are the *only* evidence that explains *how* all of the oil concessions that you have before you were granted. There is *no* evidence before the Court — none — that indicates that oil companies in Nicaragua or anywhere else in that region could do as they please, or that the Nicaraguan law would have allowed them to act in that way.

46. I could go through each of Professor Remiro Brotóns's points and show how they were unsupported by any evidence whatsoever. Madam President, decisions on factual matters have to be taken on the basis of evidence. Unsubstantiated assertion is not sufficient. This is a court of law, not a court of assertion and evidence is central. In *El Salvador/Honduras* the Chamber expressed its appreciation for the real difficulties faced by El Salvador in collecting evidence and then it said this: "it cannot however apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not been produced" (*I.C.J. Reports 1992*, p. 399, para. 63). The absence of evidence on the part of Nicaragua is compelling. It is simply not good enough to claim that Nicaragua's system of government in that period was wholly inadequate, or that the oil companies simply imposed their decisions on the government of the day, or that Nicaragua could have had no knowledge of the many oil concessions that Honduras granted between 1955 and 1978 despite the fact that they were all published in Honduras's *La Gaceta* and also in many other publications

[74]CR 2007/12, p. 19, para. 45.

[75]CR 2007/12, p. 19, para. 46.

around the world. It is simply not good enough to assert an absence of diplomatic correspondence or to turn a blind eye to the decision of the International Court of Justice in *Tunisia/Libya* where the Court plainly did take into account the consistent practice of the Parties as Mr. Colson explained over a far shorter period of time, leading it to draw a line that followed that practice. And in that case, the Court noted the existence of a *de facto* line which was the result of the manner in which both Parties had initially granted concessions (*Continental Shelf (Tunisia/Libya), I.C.J. Reports 1982*, paras. 96, 116-117 and 133 B (4). The Court found this conduct of the parties to be a highly relevant circumstance (*ibid*., paras. 116-117 and 133 B (4)). It is not good enough to take refuge in the *Gulf of Maine* case when the facts were, as we all know, so very different: I am not aware that there was anything akin to the Coco Marina Project, to take but one example, in relations between Canada and the United States, if there was, counsel for Nicaragua did not direct the Court towards its.

47. Madam President, Professor Remiro Brotóns told us that a picture is worth a thousand words[76]. He is right. And lines in a picture are even better. So let me conclude my response by looking at what actually happened in the relations between Honduras and Nicaragua throughout the 1960s and the 1970s. Let us look again, and more closely and quickly, at some of the images about which counsel for Nicaragua had nothing to say. These are images that were produced by Nicaragua itself or by intergovernmental organizations or by other third persons who had no interest one way or another in the outcome of this dispute.

48. The maps and diagrams are all before the Court in evidence, and none of them have been challenged or rebutted. They all show the 15th parallel as the maritime boundary. I want to take a few, a selection — this is not all of them; we would be here for hours if they were — and look at them chronologically, quickly, starting in 1962:

— PS3.9: 1962 diagram of Honduran oil concessions, published in the *Bulletin* of the American Association of Petroleum Geologists.

— PS3.10: 1968 map of Nicaragua's offshore concessions and wells, published in *Petróleo Americano*.

[76] CR 2007/12, p. 18, para. 41.

— PS3.11: 1968 map of petroleum concessions of Honduras, published in *Petroleum Legislation*.

— PS3.12: 1969 map of the oil concessions of Nicaragua, prepared by the Government itself — Nicaraguan Directorate-General of Natural Resources.

— PS3.13: 1969 diagrams of Honduran and Nicaraguan oil concessions, published in the *Bulletin* of the American Association of Petroleum Geologists.

Now let's go into the 1970s:

— PS3.14: 1971 map of a fisheries project prepared by the FAO-UNDP that provides a general description of the continental shelf off Nicaragua and Costa Rica.

— PS3.15: The next one shows the same thing but on the other side in relation to the continental shelf off Honduras, also 1971.

— PS3.16: Again in 1971, but this way moving away from fisheries to oil concessions — diagrams of both countries' oil concessions — published in the *Bulletin* of the American Association of Petroleum Geologists.

— PS3.17: Again in 1971, a diagram of Nicaraguan oil concessions, published by the *Petroleum Concession Handbook*.

Moving forward to 1974:

— PS3.18: diagrams of Honduran and Nicaraguan oil concessions, again published in the *Bulletin* of the American Association of Petroleum Geologists.

Now let's go forward to the 1980s and 1986:

— PS3.19: this time a map published by Nicaragua itself describing the situation in 1986 as seen by the Nicaraguan Instituto Nicaragüense de Energía.

And then into the 1990s:

— PS3.20: in 1995 a map of the oil concessions, as of 1994, again published by the Instituto Nicaragüense de Energía.

49. Madam President, Members of the Court, there is nothing before the Court that shows any other lines in relation to the consistent practice of the Parties in the 1960s and 1970s. None of these images was produced for the purposes of this litigation or for the purposes of advancement in bringing a claim. Each of these pictures tells its own story. Each one reflects clearly the existence of a tacit agreement over a period of two decades and more. Taken together over a significant

number of years and covering a range of disparate activities originating from disparate sources, including the Nicaraguan Government, they clearly show a line that was agreed and respected by both Parties. This degree of convergence is, we submit, simply without parallel in any international proceedings of this kind. Professor Remiro Brotóns told the Court "les apparences sont trompeuses"; appearances can be deceptive[77]. But over the last three weeks, neither he nor any other counsel for Nicaragua have been able to say why against the background of those images.

50. Madam President, Members of the Court, it remains for me to thank you and all the Members for your very kind attention. I suspect that this is a good time to break, and tomorrow morning my colleagues will be here to take over. Thank you very much.

The PRESIDENT: Thank you, Professor Sands. The second round of Honduras's reply will continue tomorrow morning at 10 a.m.

The Court now rises

The Court rose at 6 p.m.

[77] CR 2007/12, p. 18, para. 42.