DISSENTING OPINION OF JUDGE *AD HOC* TORRES BERNÁRDEZ

[Translation]

Introduction — I. The territorial dispute: A. The applicable law for determining sovereignty over the disputed islands: uti possidetis juris*, post-colonial* effectivités *and acquiescence; B. The decision in the Judgment and post-colonial* effectivités*; C. Honduras's* uti possidetis juris *in the disputed islands; D. "Adjacency" relied on by Nicaragua; E. Acquiescence by Nicaragua; F. Conclusion — II. Delimitation of the maritime areas by a single maritime boundary: A. The rejection of the "traditional maritime boundary" claimed by Honduras; B. Non-application by the Judgment of succession to the territorial waters from the colonial period under* uti possidetis juris*; C. The* ex novo *delimitation of maritime areas effected by the Judgment: 1. The Parties' maritime claims and the question of defining the "area in dispute"; 2. The law applicable to maritime delimitation; 3. Areas to be delimited and the methodology adopted by the Judgment: the abandonment of equidistance and delimitation in stages in favour of the bisector method; 4. The bisector in the Judgment and its construction (coastal fronts); 5. Application of equidistance to the delimitation around the islands; 6. The demarcation by the Mixed Commission of 1962 and the starting-point of the single maritime boundary; 7. The endpoint of the single maritime boundary, bilateral treaties and third States; 8. Conclusion.*

Introduction

1. I have voted in favour of the decision in the Judgment to the effect that sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay lies with the Republic of Honduras (subparagraph (1) of the operative clause), as it is my view — in the light of the oral arguments, as well as the evidence and information submitted by the Parties — that these islands, all lying north of the 15th parallel, belong to Honduras for three reasons: *(a)* Honduras possesses a legal title to the islands pursuant to the *uti possidetis juris* position in 1821, which applies as between the Parties; *(b)* the post-colonial *effectivités* exercised by Honduras *à titre de souverain* over the islands and in the territorial sea around them and the absence of *effectivités* of Nicaragua; and *(c)* Nicaragua's acquiescence in Honduras's sovereignty over the islands until the belated assertion of a claim in the Memorial filed by the Applicant in the present proceedings on 21 March 2001.

2. Thus, in my view, the legal basis for Honduras's sovereignty over the islands is threefold. However, according to the reasoning set out in the Judgment, Honduran sovereignty over the islands is based solely on the post-colonial *effectivités*. As is explained in that reasoning, the majority deems that the evidence is insufficient to allow for ascertaining which

of the two Parties inherited the Spanish title to the islands by operation of the principle of *uti possidetis juris*, and that there is no proof of any acquiescence by Nicaragua in Honduras's sovereignty over the islands. I disagree with the negative findings of the majority in these respects, whilst agreeing that Honduras *also* has sovereignty over the islands based on the post-colonial *effectivités*.

3. It follows that the discussion below concerning the "territorial dispute" is the statement of a separate, rather than a dissenting, opinion. The reason why the present opinion is a "dissenting opinion" lies elsewhere, namely in the "maritime delimitation", because on this latter subject I am in utter disagreement, save on one point, with the majority's decisions and supporting reasoning, and this explains my vote against subparagraphs (2) and (3) of the operative clause of the Judgment.

4. The point in question, and I acknowledge its importance, concerns the delimitation of the territorial sea surrounding the islands effected by the Judgment, as this delimitation is in full accord with the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, in force between the Parties. Had there been a separate vote on that section of the single maritime boundary, I would have voted in favour of it. Thus my vote against subparagraph (3) as a whole must be understood as a qualified one, since I fully endorse the route of the delimitation line around the islands.

5. Finally, I voted in favour of subparagraph (4) of the operative clause, as I am of the opinion, given the circumstances of the case, that the best solution is for the Parties to agree on the course of the delimitation line in the territorial seas between the endpoint of the land boundary established by the 1906 Arbitral Award and the starting-point of the single maritime boundary determined by the present Judgment.

I. The Territorial Dispute

A. The Applicable Law for Determining Sovereignty over the Disputed Islands: Uti Possidetis Juris, *Post-colonial* Effectivités *and Acquiescence*

6. Confronted with repeated attempts by the Applicant to have the island dispute settled through the application of the law of the sea, the Judgment rightly reaffirms that the question of sovereignty over the four islands in dispute, located north of the 15th parallel, must be resolved in accordance with international law on the acquisition of land territories. And, in that field, it is no longer possible to question the role of the principle of *uti possidetis juris*, as the dispute over the islands can be traced back to the decolonization which took place in 1821 in Central America, when the Republic of Nicaragua and the Republic of Honduras proclaimed their independence from Spain. Simple geographic adjacency,

post-colonial *effectivités* and acquiescence were also relied upon by one or other of the Parties as a basis for legal title to the islands in dispute.

B. The Decision in the Judgment and Post-colonial Effectivités

7. According to the Judgment, the post-colonial *effectivités* demonstrated by Honduras attest to the intent and will of the Respondent to act *à titre de souverain* and constitute in the present case a sufficient and effective manifestation of State authority over the four islands. In contrast, the Court found no evidence of any intent or will on the part of Nicaragua to act *à titre de souverain* with regard to the disputed islands, nor any evidence of the effective exercise or demonstration of its authority over any one of the four islands concerned.

8. The Judgment's finding is based on generally accepted principles articulated in the Permanent Court's decision in the case concerning the *Legal Status of Eastern Greenland*, and on the present Court's recent jurisprudence on the subject of small islands that are intermittently inhabited, uninhabited or of slight economic importance (Qit'at Jaradah; Pulau Ligitan and Pulau Sipadan).

9. I subscribe wholeheartedly to that finding, since the evidence presented to the Court of post-colonial *effectivités* concerning the islands weighs heavily in favour of Honduras. While the various evidentiary offerings are variable in number and probative value, as a whole they provide ample proof of Honduras's intent and will to act *à titre de souverain* and of the effective exercise and manifestation of its authority over the islands and in the adjacent waters. Confronted with the Respondent's post-colonial *effectivités*, the Applicant was unable to prove the existence of a single Nicaraguan post-colonial *effectivité* in respect of the contested islands.

10. Moreover, *in the circumstances of the present case*, the fact that Honduras obtained title to the islands by a process of acquisition based on post-colonial *effectivités* — in other words, separately from the situation arising from the *uti possidetis juris* of 1821 — can hardly give rise to any conflict with the holder of a title based on *uti possidetis juris*, since Nicaragua is just as lacking in post-colonial *effectivités* in the islands as it is in title by way of *uti possidetis juris*.

C. Honduras's Uti Possidetis Juris *in the Disputed Islands*

11. Upon independence, the Parties freely accepted the *uti possidetis juris* principle, which had been formulated a few years earlier following a political initiative by Simon Bolivar. It was supposed to act as an objective criterion to facilitate the peaceful settlement of the territorial issues already outstanding at the time or which could arise in the future for the new Republics. Both the Republic of Honduras and the Republic of

Nicaragua declared themselves to be successor States to the Spanish Crown with regard to the former Spanish colonial administrative unit on whose territory they were respectively established — namely the former province of Honduras for the Republic of Honduras and the former province of Nicaragua for the Republic of Nicaragua — initially as constituent Republics of the Federal Republic of Central America. The dissolution of the Federation in 1838-1840 did not lead to any territorial changes for either of the Parties to the present case.

12. The province of Honduras and the province of Nicaragua were both, prior to 1821, part of the same, broader colonial administrative unit, the Captaincy-General of Guatemala, which in turn was part of the Vice-Royalty of New Spain (Mexico). As was observed in the Arbitral Award made on 23 December 1906 by Alfonso XIII, the King of Spain, in the border dispute between Honduras and Nicaragua:

> "the Spanish provinces of Honduras and Nicaragua were gradually developing by historical evolution in such a manner as to be finally formed into two distinct administrations *(intendencias)* under the Captaincy-General of Guatemala by virtue of the prescriptions of the Royal Regulations of Provincial Intendants of New Spain of 1786, which were applied to Guatemala and under whose régime they came as administered provinces till their emancipation from Spain in 1821" (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XI, p. 112).

13. On succeeding to independence, the Republic of Honduras and the Republic of Nicaragua incorporated the *uti possidetis juris* principle into their respective constitutions and into their treaties. Thus, for example, Article II, paragraph 3, of the Gámez-Bonilla Treaty of 7 October 1894 — the basis of the delimitation carried out in 1900-1904 by the Mixed Commission established by Article I of that Treaty and, later, of that established by the Arbitral Award made by the King of Spain on 23 December 1906 — pithily expresses the very core of the *uti possidetis juris* principle as follows:

> "It is to be understood that each Republic is owner of the territory which at the date of independence constituted, respectively, the provinces of Honduras and Nicaragua." (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 199.)

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14. During the nineteenth century and the first half of the twentieth century, *uti possidetis juris* was viewed by European legal scholars as a regional doctrine or principle specific to relations between the Latin American republics alone, with, in Europe, considerable resistance to

universal application of the principle as a positive norm of general international law. Certain scholarly criticisms made at the time of the Award of 30 June 1865 by Isabella II, the Queen of Spain, in the Aves Island case between the Netherlands and Venezuela reflect very accurately such sentiment (see P. Lapradelle et Politis, *Recueil des arbitrages internationaux*, Vol. 2, pp. 404-421).

15. At the same time, a number of arbitral awards rejected arguments which, in the final analysis, were based on the *uti possidetis juris* principle, in favour of alleged *effectivités* as far-fetched as they were limited, such as declaring sovereignty over an island from aboard a merchant ship cruising some half a mile off the island in question, without leaving any sign of sovereignty on the island (see the Arbitral Award of 28 January 1931 concerning the dispute between France and Mexico regarding sovereignty over Clipperton Island, *Revue générale de droit international public*, 1932, Vol. 39, pp. 129-132). Even much more recently, in the *Beagle Channel* case between Argentina and Chile (1977), an arbitral tribunal composed of Members of the International Court of Justice characterized *uti possidetis juris* as a "doctrine" and not a "principle" (United Nations, *RIAA*, Vol. XXI, p. 81, para. 9).

16. However, once the intangibility of boundaries inherited upon decolonization had gained general acceptance among African States, recognition of the principle of *uti possidetis juris* became so widespread that in 1986 a Chamber of the International Court of Justice was able to state:

> "*Uti possidetis* . . . is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 566, para. 23.)

In 1992, another Chamber of the Court was prompted to apply the *uti possidetis juris* principle in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*), at the same time clarifying a number of questions of interest, in particular regarding the territorial, island and maritime scope of the principle and the inherent consequences of its application by international courts and tribunals (*Judgment, I.C.J. Reports 1992*, p. 351). In 1994, in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the two Parties were in agreement that, by virtue of the *uti possidetis juris* principle, Chad and Libya inherited the frontiers resulting from colonization by France and Italy respectively.

17. More recently, in 2005, the principle was applied by another Chamber of the Court in the case concerning the *Frontier Dispute (Benin/Niger)* (*Judgment, I.C.J. Reports 2005*, p. 90). Elsewhere, in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* (*Merits, Judgment, I.C.J. Reports 2001*, p. 40), Bahrain also raised the *uti possidetis juris* principle

in respect of the island part of the dispute, but there was no need for the Court to apply it because the case did not involve State succession. Furthermore, over recent decades, the practical usefulness of the principle has given rise to legal writings in favour of extending its application to cases of State succession other than those resulting from decolonization (for example, situations arising from the dissolution of a federal State).

18. However, that kind of problem does not arise in the present case, which concerns a precise instance of decolonization: the succession of States which took place on 15 September 1821, when the former Spanish provinces of Honduras and Nicaragua became independent sovereign States.

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19. The Judgment confirms that *uti possidetis juris* is no longer one of those regional norms whose substance and existence must be demonstrated by the party relying on it. While the Court thus recognizes *(juris novit curiae) uti possidetis juris* as a principle of general international law, the present Judgment also confirms the difficulties still encountered in applying that principle to a particular area when the internal law referred to by the Latin genitive *juris* is an historical *jus* such as that which the Spanish Crown applied in America over more than three centuries.

20. The Judgment also confirms that the *uti possidetis juris* principle refers to a notion of possession understood as possession of a right or legal title established within the legal order of the predecessor State, regardless of whether the territory in question was occupied or not. Furthermore, according to the Judgment, the *uti possidetis juris* principle is just as relevant to seeking title to a territory as it is to determining the position of boundaries, which is in accordance with practice. In other words, it covers disputes over delimitation in the strict sense as well as those as to the holder of title to a particular land, island or maritime area (disputes over attribution).

21. The *uti possidetis juris* principle is thus perfectly applicable to determining sovereignty over the disputed islands in the present case, as expressed in the Judgment as follows:

> "If the islands are not *terra nullius*, as both Parties acknowledge and as is generally recognized, it must be assumed that they had been under the rule of the Spanish Crown. However, it does not necessarily follow that the successor to the disputed islands could only be Honduras, being the only State formally to have claimed such status." (Judgment, para. 158.)

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22. It is from this point — i.e., the issue of whether Spain had attributed the disputed islands to the province of Honduras or to that of Nicaragua — that my views part company with those of the majority. Our differences thus concern the production of evidence of such attribution and, in particular, how such evidence can be better appreciated in the light of the nature of the original title of the Spanish Crown in its American territories and the characteristics and goals of its American legislation.

23. In this respect, it is appropriate to bear in mind what was said by a Chamber of the Court in 1992:

> "it has to be remembered that no question of international boundaries could ever have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries; *uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 388, para. 43).

24. Where the *uti possidetis juris* position must be proved retroactively, it is not always possible to obtain legislative or like documents specifying the ownership or extent of the territories in question or showing the exact location of provincial boundaries. It then becomes necessary, in attempting to reconstruct the position, to take into consideration all the evidence and additional information made available through historical and logical interpretation. I would add that evidence in respect of the *territorial facet* of *uti possidetis juris* is often very useful in clarifying the delimitation aspect and vice versa.

25. However, in the present case, identifying and proving title to the disputed islands pursuant to *uti possidetis juris* is greatly facilitated by the fact, in particular, that the King of Spain defined as follows the territories of the provinces of Nicaragua and Honduras on the eve of independence in the reasoning supporting his Arbitral Award of 23 December 1906, made on the basis of the principle of *uti possidetis juris* as set out in the Gámez-Bonilla Treaty of 1894:

Province of Nicaragua

> "[O]n the organization of the Government and Administration of Nicaragua in accordance with the Royal Administrative Statutes of 1786 it consisted of the five districts of Leon, Matagalpa, El Realejo, Subtiaga, and Nicoya, not comprising in this division nor in that proposed in 1788 by the Governor and Intendant Don Juan de Ayssa territories to the north and west of Cape Gracias a Dios, which are at the present day claimed by the Republic of Nicaragua, there being no record either that the jurisdiction of the diocese of Nicaragua reached to that Cape, and whereas it is worthy of note that the last

Governor and Intendant of Nicaragua, Don Miguel González Saravia, in describing the province which had been under his rule in his book *Bosquejo Político Estadístico de Nicaragua*, published in 1824 stated that the divisionary line of said Province on the north runs from the Gulf of Fonseca on the Pacific to the River Perlas on the Northern Sea (Atlantic).

[T]he Commission of investigation has not found that the expanding influence of Nicaragua has extended to the north of Cape Gracias a Dios, and therefore not reached Cape Camarón; and that in no map, geographical description or other document of those examined by said Commission is there any mention that Nicaragua had extended to said Cape Camarón, and there is no reason therefore to select said Cape as a frontier boundary with Honduras on the Atlantic Coast, as is claimed by Nicaragua." (*Recueil international des traités du XX^e^ siècle*, Descamps et Renault, 1906, pp. 1033-1034; English translation of the Award Made by the King of Spain, as appeared in *British and Foreign State Papers, Vol. 100, 1906-1907,* quoted in *I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I, p. 22.)

Province of Honduras

"[T]he demarcation fixed for the Province or District of Comayagua or Honduras, by virtue of the Royal Decree of the 24 July 1791 continued to be the same at the time when the Provinces of Honduras and Nicaragua achieved independence, because though by Royal Decree of the 24 January 1818 the King sanctioned the re-establishment of the chief municipality of Tegucigalpa with a certain degree of autonomy as to its administration, said chief municipality continued to form a district of the Province of Comayagua or Honduras, subject to the political chief of the province; and in that capacity took part in the election, 5 November 1820, of a Deputy to the Spanish Cortes and a substitute Deputy for the Province of Comayagua, and likewise took part together with the other districts of Gracias, Choluteca, Olancho, Yoro with Olanchito and Trujillo, Tencoa and Comayagua, in the election of the Provincial Council of Honduras, said election having taken place on the 6 November of the same year, 1820." (*Ibid.*, pp. 21-22.)

"[T]hough at some time it may have been believed that the jurisdiction of Honduras reached to the south of Cape Gracias a Dios, the Commission of investigation finds that said expansion of territory was never clearly defined, and in any case was only ephemeral below the township and port of Cape Gracias a Dios, whilst on the other hand the influence of Nicaragua has been extended and exercised in a real and permanent manner towards the afore-mentioned Cape Gracias a Dios, and therefore it is not equitable that the common boundary on the Atlantic Coast should be Sandy Bay as claimed by Honduras." (*Ibid.,* p. 22.)

26. The validity and binding nature for the Parties of the Arbitral Award made by the King of Spain on 23 December 1906 were confirmed by the Judgment of the International Court of Justice of 18 November 1960. In the present case, Honduras relied upon both those decisions as evidence to support its argument that it possesses sovereign title to the disputed islands pursuant to *uti possidetis juris*, which can be readily understood by recalling what the Court said in its reasoning in the 1960 Judgment:

> "Nicaragua contends that the arbitrator fixed what he regarded as a natural boundary line without taking into account the Laws and Royal Warrants of the Spanish State which established the Spanish administrative divisions before the date of Independence. *In the judgment of the Court* this complaint is without foundation inasmuch as the decision of the arbitrator is based on the historical and legal considerations *(derecho histórico)* in accordance with paragraphs 3 and 4 of Article II [of the Gámez-Bonilla Treaty]." (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 215; emphasis added.)

27. Further, the substance of the evidence and information supporting those two decisions is both considerable in quantity and unassailable in quality and authoritativeness, making it an essential element, in my view, in a judicial determination of the *uti possidetis juris* situation of the islands disputed by the Parties. I must therefore give it due consideration in this opinion. Such a choice is a necessary one, moreover, as indicated by the jurisprudence in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*:

> "in the previous Latin American boundary arbitrations it is the award that is now determinative, even though it be based upon a view of the *uti possidetis juris* position. The award's view of the *uti possidetis juris* position prevails and cannot now be questioned juridically, even if it could be questioned historically". (*Judgment, I.C.J. Reports 1992*, p. 401, para. 67.)

28. Honduras also relies on the Royal Warrants of 23 August 1745 and 30 November 1803, as well as the documentation relating to the 1906 Arbitration published in *I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, for example the information contained in the "Report of the Commission of Investigation of the Question of the Boundary between the Republics of Honduras and Nicaragua submitted to His Majesty Alfonso XIII, Arbitrator, on 22 July 1906", which

was appended to Honduras's Reply in the case judged by the Court in 1960 (Vol. I, Ann. XI, p. 621).

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29. Thus, to determine whether sovereignty over the disputed islands belongs to Honduras or Nicaragua, the Court must begin with the assessment of the *uti possidetis juris* position of 1821 made by the 1906 Arbitral Award. The islands concerned are not mentioned in the operative part of the Award, but the delimitation of the land boundary between the Parties established by the Award makes it possible to identify precisely which, in the relevant area, are the coasts belonging to Honduras and which to Nicaragua. The Award states that:

> "The extreme common boundary point on the coast of the Atlantic will be the mouth of the River Coco, Segovia or Wanks, where it flows out in the sea close to Cape Gracias a Dios, taking as the mouth of the river that of its principal arm between Hara and the Island of San Pío where said Cape is situated, leaving to Honduras the islets and shoals existing within said principal arm before reaching the harbour bar, and retaining for Nicaragua the southern shore of the said principal mouth with the said Island of San Pío, and also the bay and the town of Cape Gracias a Dios and the arm or estuary called Gracias which flows to Gracias a Dios Bay, between the mainland and the said Island of San Pío." (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 202.)

Further, the Court's Judgment of 1960 stipulated that:

> "The operative clause of the Award, as already indicated, directs that 'starting from the mouth of the Segovia or Coco the frontier line will follow the *vaguada* or thalweg of this river upstream'. It is obvious that in this context the thalweg was contemplated in the Award as constituting the boundary between the two States even at the 'mouth of the river'. In the opinion of the Court, the determination of the boundary in this section should give rise to no difficulty." (*Ibid.*, p. 216.)

30. It is therefore clear that, according to the *uti possidetis juris* position as established by the Arbitral Award with the force of *res judicata*, *the coast of Honduras* stretches northwards from the extreme common point of the land boundary on the Atlantic coast, situated in the mouth of the principal arm of the River Coco where it flows out in the sea close to Cape Gracias a Dios, up to the boundary with Guatemala, and *the coast of Nicaragua* extends to the south of the same extreme common boundary point up to the boundary with Costa Rica.

31. The establishment of the endpoint of the land boundary in the mouth of the principal arm of the River Coco where it flows into the sea

close to Cape Gracias a Dios determines precisely what were the Parties' coastlines in 1821 and, accordingly, the reference point allowing for unproblematic application of the notion of "adjacent island" under historical Spanish law. Such a clear situation did not exist for the islands in dispute between El Salvador and Honduras in the waters of the historic Bay of Fonseca referred to in the Judgment. The relationship between the coasts of the three riparian States in the Bay of Fonseca was not as apparent and clear-cut as that existing between the coast of Honduras and Nicaragua in the present case.

32. However, what is of interest in the relevant quotation given by the Judgment is the confirmation that

> "when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 559, para. 333).

And the *jus* applied by the Spanish Crown in its American territories made use of a notion of "adjacent islands", as a general criterion for attributing islands to one or other colonial district or province, whose scope is different from that of the notion of "adjacent island" in contemporary international law.

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33. Under historical Spanish law as applied by the Spanish Crown to its American territories, the notion of "adjacent island" was considerably broader and more flexible than that of "coastal island" in contemporary international law. The 1865 Arbitral Award in the Aves Island (Netherlands/Venezuela) case demonstrates that the notion of "adjacent island" in Spanish colonial law also covered small islands a long way from the coast, whether or not they were suitable for human habitation or possessed an economic activity or strategic importance. Aves Island (Bird Island) was a small, low-lying rock, located in the middle of the Caribbean Sea, incapable of sustaining permanent habitation and which had never really been occupied. When it was discovered by the Spanish, it was initially included in the territories of the former *Audiencia* of Santo Domingo and then transferred to the *Audiencia* of Caracas (Royal Order of 13 June 1786), despite its distance from the coast of the Captaincy-General of Venezuela (see P. Lapradelle et Politis, *Recueil des arbitrages internationaux*, Vol. 2, pp. 404-406). Clipperton Island, which was also discovered by the Spanish, lies a very long way from the Mexican coast; nevertheless, it was claimed by Mexico as the successor to Spain (*Revue générale de droit international public*, 1932, Vol. 39, p. 130).

34. The San Andrés Islands are also situated a considerable distance from the mainland. Swan Island, which Nicaragua expressly claimed

from the Arbitrator in 1906, lies around 200 kilometres (110 nautical miles) from Cape Camarón. Thus, the fact that the islands in dispute in the present case lie from 27 to 32 miles from the Honduran coast north of Cape Gracias a Dios does not preclude their characterization as "adjacent islands" of the province of Honduras under historical law as applied by the Spanish Crown. Reference can be made, for example, to the 1793 official hydrographical chart of the Mosquito Coast and *adjacent islands* by Juan de Azoaz submitted by Honduras (Counter-Memorial of Honduras, (CMH), Vol. 3, second part, Map 26). I therefore cannot agree with the finding in paragraph 163 of the present Judgment.

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35. It goes without saying that the general criterion for the attribution of the islands mentioned above was merely a kind of residual rule in that it could be set aside at any time by a specific normative provision to the contrary enacted by the King. By way of example, there was the Royal Warrant of 1803 on the islands of San Andrés or the Royal Order of 13 June 1786 on Aves Island. But Nicaragua has offered no evidence of any specific decision by the King departing from that general criterion in favour of the province of Nicaragua in respect of the islands involved in the present case. What Nicaragua has argued in this case is that it was impossible to settle the issue of sovereignty over the cays on the basis of the *uti possidetis juris* of 1821.

36. The Spanish Crown used a particularly broad and flexible notion of "adjacent island", an expression which occurs very often in its overseas legislative texts, both for practical reasons and as a matter of principle. In the first place, it sought to protect the integrity of its original title to vast areas — defined by parallels and meridians — which had been set aside for it by Papal Bulls and treaties with Portugal, i.e., "all lands discovered and yet to be discovered" within those areas. Secondly, exploration of the huge expanse of the Americas could only be carried out by stages, and the undertaking lasted for centuries. Finally, the risk had to be avoided of other Powers taking control of territories that were unexplored, unknown, sparsely populated or difficult to defend. And in that respect, the "islands" were certainly the most exposed territories, especially those a long way from the coasts or from Spanish jurisdictional waters.

37. In any event, the role and rule-making importance of the broad and flexible concept of "adjacent island" in Spanish colonial law cannot be doubted. The treaties concluded by Spain in the nineteenth century with the new Republics, including the Republic of Nicaragua (1856) and the Republic of Honduras (1860), attest to that: indeed, they confirm the relinquishment by Spain of its previous title not only to the mainland territories of the province of Nicaragua and the province of Honduras, but also to the island territory of both provinces as it existed in 1821. Fur-

thermore, the Constitutions of the Republic of Honduras and the Republic of Nicaragua also include the expression "adjacent islands" in their respective definitions of national territory.

38. The 1906 Arbitral Award made by the King of Spain delimited a section of the land boundary between the two Parties, but the decision also, barring evidence to the contrary, inevitably determined sovereignty over the island possessions and the Spanish jurisdictional waters adjacent to the mainland. Why? Because in delimiting the land boundary, the Award defined the mainland coast of Honduras in the area concerned as being situated north of the mouth of the River Coco, close to Cape Gracias a Dios, i.e., north of approximately the 15th parallel, and that of Nicaragua as being located south of the said river mouth and the 15th parallel.

39. Consequently, the Arbitral Award of 1906 makes it possible to give a legal answer, on the basis of the *uti possidetis juris* of 1821, to the question of sovereignty over the islands in dispute between the Parties, since the four cays concerned lie offshore north of the 15th parallel and in the vicinity of Honduras's mainland coast, and closer to that coast than to the Nicaraguan mainland coast south of the 15th parallel. In such a situation, if the general criterion for the attribution of "adjacent islands" in historical Spanish law is taken into consideration, as it should be, there can be no possible doubt that the cays belong to Honduras. The conduct of the Parties during the arbitration proceedings bears out such a conclusion. It therefore follows that I cannot accept the finding to the contrary by the majority of the Court set out in paragraph 167 of the Judgment.

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40. In the arbitration by the King of Spain, Nicaragua sought to obtain from the Arbitrator a boundary line running along the 85th meridian west, making it into a sort of land, island and maritime boundary with Honduras. Indeed, in its submissions concerning the last part of the boundary line, Nicaragua asked the Arbitrator for the frontier line to continue

> "along the middle of the river until it meets the meridian which passes through Cape Camarón and from that meridian until it loses itself in the sea, leaving to Nicaragua Swan Island" (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I, p. 624).

The origin of that submission can be traced back to a proposal made by Nicaragua to the Mixed Commission established pursuant to the Gámez-Bonilla Treaty (for the reasoning advanced by Nicaragua at the time and Honduras's reply within the Mixed Commission, see *ibid.*, pp. 246 and 248; see also in the present case CMH, Vol. 1, Plate 9).

41. If the Arbitrator had accepted Nicaragua's submission, the disputed islands in the present case would have been "adjacent islands" to the main-

land coast of the province of Nicaragua and, consequently, islands of the Republic of Nicaragua from 1821 by virtue of the *uti possidetis juris*. However, the King of Spain rejected Nicaragua's submission. The Arbitrator's decision was, as we have just said, to fix the extreme common boundary point of the two Republics in the mouth of the principal arm of the River Coco, where it flows into the sea, close to Cape Gracias a Dios — that is to say practically on the 15th parallel North, and not to the north or the south of that parallel — because, as observed in the Arbitral Award of 1906, the "documents" described Cape Gracias a Dios as the boundary point of the "jurisdictions" which the Royal Decrees of 1745 assigned to the Governors of the provinces of Honduras (Juan de Vera) and Nicaragua (Alonso Fernández de Heredia) (*Recueil international des traités du XX^e^ siècle*, Descamps et Renault, 1906, p. 1031).

42. It is surprising that the majority does not draw any conclusions in terms of the production of evidence from the combined effect of *(a)* the 1906 Arbitral Award's adoption as a limit, on the basis of the *uti possidetis juris*, of the parallel at Cape Gracias a Dios, and *(b)* its rejection of the Cape Camarón meridian advanced by Nicaragua. On the contrary, according to the Judgment, the provinces of Honduras and Nicaragua appear to have had, in reality, neither coastlines, nor territorial seas, nor their own adjacent islands, which are said to have been under the control of the joint higher colonial administrative unit, namely the Captaincy-General of Guatemala. This argument — often repeated in legal and arbitral proceedings relating to Central America, for want of anything better — may also be answered by the reasoning of the Arbitral Award made by the King of Spain in 1906, where it is observed that:

> "when by virtue of the Treaty with Great Britain in 1786 the British evacuated the country of the Mosquitos, at the same time that new Regulations were made for the port of Trujillo, it was likewise ordained to raise four new Spanish settlements on the Mosquito Coast in Rio Tinto, Cape Gracias á Dios, Blewfields and the mouth of the River San Juan, although it is nevertheless true that these settlements remained directly subject to the Captain-General's command of Guatemala, both parties agreed to recognize that this fact in no way altered the territories of the provinces of Nicaragua and Honduras, the latter Republic having shown by means of certified copies of despatches and accounts both before and after 1791 the Intendant Governorship of Comayagua superintended everything appertaining to its competence in Trujillo, Rio Tinto and Cape Gracias á Dios" (*Recueil international des traités du XX^e^ siècle*, Descamps et Renault, 1906, p. 1031; English translation of the Award Made by the King of Spain, as appeared in *British and Foreign State Papers, Vol. 100, 1906-1907*, quoted in the *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua),* Application Instituting Proceedings, Ann. II).

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43. It thus transpires from the King of Spain's Arbitral Award that, north of the 15th parallel, the coastline and, consequently, the islands adjacent to it belong to Honduras, according to the principle of the *uti possidetis juris* of 1821; and that south of that parallel, the coastline and, consequently, the islands adjacent to it belong to Nicaragua, since neither of the Parties has produced before the Court a royal decision to the contrary.

44. Therefore, in application of the *uti possidetis juris* principle, sovereignty over the island features south of the 15th parallel North, such as Edinburgh Cay, Morrison Dennis Cays and Cayos Miskitos, appertains to Nicaragua in the same way that sovereignty over the island formations north of the 15th parallel, including the cays in dispute in the present case, appertains to Honduras. Moreover, this conclusion corresponds to the description of the province of Nicaragua provided by the Arbitral Award of 1906, when it noted *inter alia* that "the Commission of investigation has not found that the expanding influence of Nicaragua has extended to the north of Cape Gracias a Dios" (*op. cit.*, p. 1033; see para. 25 above).

45. The Royal Warrants relied on by Honduras in the present case endorse the Arbitral Award's finding. The Warrants of 23 August 1745 established, for the purpose of observing and defending the coast, two military jurisdictions answering to the Captaincy-General of Guatemala, one stretching from the Yucatan to Cape Gracias a Dios and the other from Cape Gracias a Dios down to but not including the River Chagres. Juan de Vera, Governor of the province of Honduras, was appointed Commander-General of the royal forces in the province of Honduras, and Alonso Fernández de Heredia, Governor of the province of Nicaragua, was appointed Commander-General of the royal forces in Nicaragua and Costa Rica (see CMH, pp. 74-76).

46. Further, the Royal Warrant of 30 November 1803 also confirms the role played by Cape Gracias a Dios as the jurisdictional boundary between the provinces of Honduras and Nicaragua by declaring that:

> "The King has resolved that the Islands of San Andrés and the part of the Mosquito Coast from Cape Gracias a Dios inclusive to the Chagres River shall be segregated from the Captaincy-General of Guatemala and become dependent on the Viceroyalty of Santa Fé." (CMH, pp. 76-77.)

47. Honduras also produced a diplomatic Note dated 23 November 1844 to Her Britannic Majesty from the Minister representing both Honduras and Nicaragua in which he acknowledged the sovereign right of Nicaragua along the Atlantic coast, but only "from Cape Gracias a Dios in the North to the dividing line which separates it from Costa Rica" (CMH, p. 31).

48. I accept that Note as evidence from the Republican period concerning the interpretation by the Parties of the *uti possidetis juris* of 1821, given the date of the Note, its official nature and the authority of its sig-

natory. It is clear from the Note that it is the Republic of Honduras, and not the Republic of Nicaragua, which has sovereignty along the Atlantic coast north of Cape Gracias a Dios by virtue of the *uti possidetis juris* and, consequently, over the islands in dispute in the present case, which are "adjacent islands" with respect to that Honduran coastline according to historical Spanish law.

D. "Adjacency" Relied on by Nicaragua

49. At the hearings, Nicaragua affirmed that it accepted in principle the application of the *uti possidetis juris* principle to "island disputes", whilst ruling it out in the present case. It has relied on this principle in the past, for example in the turtle fisheries dispute. There, Great Britain contended that the decree of 4 October 1864 by the Government of Nicaragua declaring that the islands and islets adjacent to its Atlantic Coast belonged to it and regulating their imports and exports contravened the Zeledón-Wyke Treaty between the two countries. However, Nicaragua replied that the Treaty acknowledged its sovereignty over Mosquitia and, on that basis, it held full sovereignty over the adjacent islands and islets (Reply of Nicaragua, hereinafter referred to as RN, p. 62). Nicaragua is currently advancing a similar argument *mutatis mutandis* with regard to the islands of San Andrés and Providencia in its dispute with Colombia concerning the Bárcenas Meneses-Esguerra Treaty of 1928 (CMH, p. 77).

50. So, on what basis does Nicaragua exclude the principle in question in the present dispute? It uses the argument that there is no *documentary* evidence demonstrating the existence of either Nicaraguan or Honduran title to the islands by virtue of the *uti possidetis juris* of 1821. I cannot agree with the Applicant in limiting the evidence regarding the principle in this way, as it runs counter to international practice and jurisprudence, including that of the Court (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 388, paras. 44 *et seq.*). Further, that argument overlooks the system of government used by the Spanish Crown for its American territories and the features of the Spanish historical law that was applied.

51. The fact that the islands in dispute are located north and not south of the 15th parallel makes things decidedly difficult for Nicaragua. I can appreciate that. What then is the solution suggested by Nicaragua in its quest for legal title to the disputed islands? In the second round of oral argument, its counsel invoked "adjacency" without further qualification, that is to say adjacency standing alone. But mere geographical adjacency by itself, without operation of the *uti possidetis juris* principle or another relevant rule of international law incorporating the criterion, does not constitute territorial title under international law (*Island of Palmas* case).

52. Moreover, the disputed islands are in the vicinity of and geographically closer to the mainland coast of Honduras than to the coast of

the Nicaraguan mainland. It goes without saying that there is equally no ground in international law for Nicaragua's argument that the islands are Nicaraguan because they are located south of the so-called *"Main Cape Channel"*.

53. I therefore reiterate my conclusion that the Republic of Honduras has sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay by virtue of both *uti possidetis juris* and the *effectivités* which it has demonstrated to the Court's satisfaction in the present case. Thus the only issue left outstanding is that of acquiescence.

E. Acquiescence by Nicaragua

54. Honduras contends that there was acquiescence by Nicaragua to Honduran sovereignty over the disputed cays; in that respect, it bases itself on the complete silence of Nicaragua in response to Honduran acts of sovereignty concerning the islands. Nicaragua, on the other hand, denies having acquiesced in or tacitly accepted Honduran sovereignty over the cays. Nicaragua explains its silence by the fact that Honduras did not claim the cays until 1982 at the earliest, i.e., after 1977, which Nicaragua regards as the critical date. In its Judgment, however, the Court has identified the critical date with regard to the dispute over the islands as the year 2001 (Judgment, para. 129).

55. If Nicaragua still believed after the Court's 1960 Judgment regarding the Arbitral Award made by the King of Spain that it was entitled to the islands north of the 15th parallel, that is to say the islands in dispute in the present case, it should have said so earlier. But Nicaragua failed to make that clear either before or after the maritime delimitation dispute crystallized in 1982. When the President of Nicaragua signed the original text of the 1998 Free Trade Agreement, Nicaragua had not yet expressed any claims to the islands in dispute in the present proceedings (Judgment, para. 226). It was not until 21 March 2001 that Nicaragua finally asserted claims to these islands. Yet, in remaining silent over the years, Nicaragua engaged in conduct which could have led Honduras to believe that it accepted the *uti possidetis juris* position vis-à-vis the disputed islands, as that position had, in my opinion, been binding on the Parties ever since the 1906 Arbitral Award fixed the endpoint of the land boundary at the mouth of the River Coco in the sea close to Cape Gracias a Dios.

56. The total lack of Nicaraguan *effectivités* on the disputed islands and of any protest by it against the demonstrations of sovereignty by Honduras concerning the islands bears out such a conclusion. In view of this and of the evidence produced before the Court, Nicaragua's acquiescence to Honduras's sovereignty over the disputed islands has, in my view, been established. To safeguard the rights claimed in the present proceedings, Nicaragua should, in accordance with international law, have exercised greater vigilance and expressed clearer opposition in respect of Honduras's acts concerning the islands in question (see *Temple*

of Preah Vihear (Cambodia v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, separate opinion of Judge Alfaro, p. 39).

57. The sovereignty of Honduras over the disputed islands by virtue of the *uti possidetis juris* and the post-colonial *effectivités* is thus confirmed.

F. Conclusion

58. The foregoing considerations explain why I am of the opinion that the legal basis for Honduras's sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay is threefold, the post-colonial *effectivités* and Nicaragua's acquiescence reinforcing the legal title to the islands held by the Republic of Honduras since 1821 by virtue of the principle of *uti possidetis juris*.

II. Delimitation of the Maritime Areas by a Single Maritime Boundary

A. Rejection of the "Traditional Maritime Boundary" Claimed by Honduras

59. Honduras defended the existence of a so-called "traditional" maritime boundary running along the 15th parallel North, through the territorial sea and beyond, based initially on the principle of *uti possidetis juris* (for the 6 nautical miles of territorial waters from the colonial period) and, subsequently, on a *tacit agreement* between the Parties concerning all the areas to be delimited by the Court in the present case. Nicaragua, however, contended that no such "traditional maritime boundary" existed, accused Honduras of invoking the said line to avoid an equitable maritime delimitation and requested the Court to proceed with an *ex novo* delimitation by application of the so-called "bisector" method.

60. Inasmuch as a principle of international law such as *uti possidetis juris* is applicable or in the presence of an explicit or tacit agreement between the Parties, it is self-evident that a maritime delimitation carried out according to that principle or within the terms of the agreement cannot be regarded as inequitable in law. In this respect, it is appropriate to recall here that maritime delimitations are primarily effected by means of agreements between the States in question, on the issues of territorial seas, exclusive economic zones and continental shelves that fall under the 1982 United Nations Convention on the Law of the Sea.

61. Agreements are in fact the method most favoured by the Convention for delimiting the maritime areas recognized in international law and, consequently, for a delimitation of the three areas (territorial sea, exclusive economic zone and continental shelf) by means of a single line, as was requested of the Court by the Parties. The other rule-making parts of the relevant articles of the Convention on the Law of the Sea are only

intended to be applied in the event of a lack of agreement between the States concerned.

62. Honduras was therefore within its rights when it raised, as a preliminary to the *ex novo* delimitation requested by Nicaragua, the issue of the existence of a "traditional maritime boundary" between the Parties along the 15th parallel of latitude north and asked the Court to take this into account in its delimitation. However, tacit or otherwise, the agreement invoked must evidently have existed at the critical date. It was in this respect that problems arose with the "traditional maritime boundary" on which Honduras relied.

63. Indeed, having considered all the arguments and the numerous items of evidence produced by Honduras (oil and gas concessions; fisheries activities and regulation; naval patrols; recognition by third States; witness statements in the form of sworn affidavits; bilateral treaties between Colombia and Nicaragua (1928), Honduras (1986) and Jamaica (1993) and exchanges of diplomatic Notes), as well as all the arguments and evidence to the contrary from Nicaragua, the Court concludes that "there was no tacit agreement in effect between the Parties in 1982 — nor *a fortiori* at any subsequent date — of a nature to establish a legally binding maritime boundary" (Judgment, para. 258).

64. As is indicated in paragraph 256 of the Judgment:

> "The Court has noted that at periods in time, as the evidence shows, the 15th parallel appears to have had some relevance in the conduct of the Parties. This evidence relates to the period after 1961 when Nicaragua left areas to the north of Cape Gracias a Dios following the rendering of the Court's Judgment on the validity of the 1906 Arbitral Award and until 1977 when Nicaragua proposed negotiations with Honduras with the purpose of delimiting maritime areas in the Caribbean Sea. The Court observes that during this period several oil concessions were granted by the Parties which indicated that their northern and southern limits lay respectively at 14° 59.8′. Furthermore, regulation of fishing in the area at times seemed to suggest an understanding that the 15th parallel divided the respective fishing areas of the two States; and in addition the 15th parallel was also perceived by some fishermen as a line dividing maritime areas under the jurisdiction of Nicaragua and Honduras. However, these events, spanning a short period of time, are not sufficient for the Court to conclude that there was a legally established international maritime boundary between the two States."

65. On this point, it should be emphasized that the period in question is considerably longer than that in the *Gulf of Maine* case. In any event, as far as I am concerned, I believe that the evidence submitted by Honduras, notably that concerning the oil and gas concessions and fisheries

regulation and related activities, argues decisively in favour of the idea of the existence of a tacit agreement between the Parties on the "traditional" maritime boundary. The majority of the Court holds a different opinion, which I respect although I do not subscribe to it. It is a judge's prerogative to weigh and take a position on the evidence presented by the Parties. I shall make just two comments on particular points. The first concerns the Note from the Minister Dr. Paz Barnica of 3 May 1982. I disagree with the interpretation made by the Judgment of that Note. The second relates to Nicaragua's reaction to the Honduran Note of 21 September 1979 which stated that the seizure at sea of a Honduran vessel by the Nicaraguan navy on 18 September 1979 took place "eight miles to the north of the fifteenth parallel *that serves as the limit between Honduras and Nicaragua*" (CMH, p. 48, para. 3.38; emphasis added). The Judgment, however, attributes no legal effect to the fact that, in its reply, Nicaragua neither contested nor qualified Honduras's assertion.

B. Non-application by the Judgment of Succession to the Territorial Waters from the Colonial Period under Uti Possidetis Juris

66. The Court's conclusion on the non-existence in 1982 of a legally binding "traditional maritime boundary" does not, however, settle all the questions raised by Honduras regarding the 15th parallel of latitude north. There remains that of the succession or otherwise of the Parties to the 6 miles of territorial waters of the colonial period by virtue of the *uti possidetis juris* of 1821, as a principle of international law.

67. That is also a logical preliminary to the plotting by the Court of an *ex novo* maritime delimitation line, since Article 15 of the 1982 United Nations Convention on the Law of the Sea attributes a role to "historical titles" in the delimitation of territorial seas, i.e., the first of the areas for which the Parties have requested the Court to establish a single maritime boundary.

68. The Court's Judgment summarizes as follows the overall position of Honduras in this respect, as set out in the Counter-Memorial:

> "Honduras maintains that the *uti possidetis juris* principle referred to in the Gámez-Bonilla Treaty and the 1906 Award of the King of Spain is applicable to the maritime area off the coasts of Honduras and Nicaragua, and that the line of 15th parallel constitutes the line of maritime delimitation resulting from that application. It asserts that Nicaragua and Honduras succeeded in 1821, *inter alia*, to a maritime area extending 6 miles . . . and that *uti possidetis juris* 'gives rise to a presumption of Honduran title to the continental shelf and EEZ north of the 15th parallel'." (Judgment, para. 229.)

69. In the Rejoinder, Honduras was even more precise about the issue of the Parties' succession to the 6-mile maritime area in question:

> "The principle of *uti possidetis juris* provides a legal title to determine maritime (up to six nautical miles during colonial times and independence) and insular sovereignty of Honduras to the north of parallel 15° that passes through Cape Gracias a Dios as confirmed by the Royal Order of 1803. Paragraph 17 of the King of Spain Arbitral Award of 1906 was, therefore, correct when it stated that: 'In said documents [the Royal Decrees of 1745 and 1791] Cape Gracias a Dios is fixed as the *boundary point of the jurisdiction* assigned to the above mentioned Governors of Honduras and Nicaragua in the respective capacities in which they were appointed'". (Rejoinder from Honduras, hereinafter referred to as RH, p. 51, para. 3.60; emphasis in the original.)

70. Honduras thus clearly raised the question of the application of the *uti possidetis juris* of 1821 to the maritime areas concerned by the present proceedings as an independent issue, i.e., separately from that of the constitution of the "traditional maritime boundary" by tacit agreement. In this respect, the Judgment declares that "the *uti possidetis juris* principle might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation" (Judgment, para. 232). In view of the Applicant's hesitancy on the subject, the Court's finding confirms the relevant jurisprudence of the 1992 Judgment in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*. I fully endorse this point of law which is clarified by the Judgment.

71. However, the Court then dismisses succession to the 6-mile territorial waters of the colonial period ("jurisdictional waters", to use the Spanish terminology of the time) because, according to the Judgment, Honduras made no persuasive case as to why the maritime boundary should extend along the 15th parallel from Cape Gracias a Dios, but merely asserted "that the Spanish Crown tended to use parallels and meridians to draw jurisdictional divisions, without presenting any evidence that the colonial Power did so in this particular case" (Judgment, para. 232). Thus, in the Court's view, Honduras did not show that the principle of *uti possidetis juris* led to a maritime division along the 15th parallel between the 6 nautical miles of territorial waters of the province of Honduras and those of the province of Nicaragua in the colonial era. As is stated in the Judgment (para. 234): "In the circumstances of the present case, the *uti possidetis juris* principle cannot be said to have provided a basis for a maritime division along the 15th parallel."

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72. The above findings are ultimately based on a restrictive interpretation by the majority of the scope of the Arbitral Award of 1906 and its *res judicata* to which I do not subscribe at all. For the majority, the fact that the Arbitrator fixed, on the basis of the *uti possidetis juris* of 1821,

"the extreme common boundary point on the coast of the Atlantic" at the mouth of the River Coco close to Cape Gracias a Dios does not confirm the existence of a maritime boundary between the Parties along the 15th parallel in respect of the territorial waters of the colonial period. The Parties, however, appear to have followed much broader interpretations, which admittedly do not correspond, both of the scope of the 1906 Arbitral Award and of the *uti possidetis juris* of the Gámez-Bonilla Treaty of 1894.

73. For example, in the Note of 19 March 1912 sent by the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs of Honduras, whereby he indicated the reasons for which Nicaragua regarded the King of Spain's Arbitral Award as null and void, it was stated that:

> "[t]he disagreement having been thus defined, the entire portion of the frontier line was left undemarcated from the point on the Cordillera called Teotecacinte to its endpoint on the Atlantic Coast *and to the boundary in the sea marking the end of the jurisdiction of the two States*. In respect of determining how to draw the disputed portion of the line, it was decided to carry out the provisions of Article III of the treaty cited above." (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, Vol. I, p. 292; emphasis added.) *[Translation by the Registry.]*

And further:

> "It is also a universal principle that awards which are inconsistent in themselves *(contradictorias)* are without value and inapplicable, and there is an evident inconsistency in this Award when it deals with that section of *the frontier line which should separate the jurisdiction of the two countries in the territorial sea*, in that, after having laid down that the direction of the frontier is the thalweg or main watercourse of the principal arm of the Coco River, it then declares that the islets situated in that arm of the River belong to Honduras, thus leading to the impossible result of leaving Honduran territory enclaved within Nicaraguan waters, and thus also leaving without effect the line of the *thalweg* referred to — *quite apart from the fact of deciding nothing as regards the direction of the frontier line which, according to international law, should show the territorial waters of each Republic as forming part of its respective territories*." (*Ibid.*, p. 294; emphasis added.)

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74. In the present case, Honduras's position on the question concerned can be summarized as follows: (1) the principle of *uti possidetis juris* referred to in the Gámez-Bonilla Treaty, as well as in the 1906 Award of the King of Spain, is applicable to the maritime area off the coasts of

Honduras and Nicaragua; (2) the 15th parallel constitutes the line of maritime delimitation resulting from the application of that principle; (3) Honduras and Nicaragua succeeded, in 1821, to a maritime area consisting of a 6-mile territorial sea; and (4) the *uti possidetis juris* gives rise to a presumption of Honduran title to the continental shelf and exclusive economic zone north of the 15th parallel.

75. My position on each of these elements of the Honduran position is as follows:

Reaction to point (1): No doubt. At present, as a principle of general international law, *uti possidetis juris* is applicable to both land and maritime delimitations, as is upheld by the Judgment. Moreover, the Gámez-Bonilla Treaty constituted a friendly settlement of "all pending doubts and differences" in order to "demarcate on the spot the dividing line which is to constitute the boundary between the two Republics" (Article 1 of the Treaty). The word "boundary" is thus not qualified by the adjective "land". The practice of the Parties bears out this interpretation, moreover, as the Minutes II of the Mixed Commission of 12 June 1900 effected a demarcation between the two Republics in the part of the Bay or Gulf of Fonseca "contiguous to the coastline of both States without there being a distance of 33 km between their coasts" (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, Vol. I, p. 235). See also the Nicaraguan Note of 19 March 1912 referred to in paragraph 73 above.

Reaction to point (2): Yes, if the statement is understood to apply to the maritime area of the 6-nautical-mile territorial sea from the colonial period; no, however, as far as the whole of the "traditional maritime boundary" is concerned, as I agree with Nicaragua that title to the exclusive economic zone or the continental shelf is an obviously modern legal notion which did not exist in 1821.

Reaction to point (3): No doubt, under the principle of *uti possidetis juris*.

Reaction to point (4): I understand this point as meaning that the *uti possidetis juris* principle was used to determine the coasts of each Party, which in turn form the basis of the title governing the delimitation between the Parties to the present case of the maritime areas comprising the continental shelf and exclusive economic zones.

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76. The Judgment of the Court acknowledges — as do both Parties — that the 1906 Arbitral Award fixed the extreme common point of the land boundary which it established on the Atlantic coast. In which case, how can it be said, in the context of application of the *uti possidetis juris* principle, that nothing in the 1906 Arbitral Award indicates that the 15th parallel of latitude north has been regarded as constituting the boundary line? We have at least one point, the extreme common boundary point on

the Atlantic coast resulting from the Arbitral Award, which is the "starting *uti possidetis juris* point" of a line delimiting the territorial seas between the Parties and, in that respect, it can definitely be invoked as evidence of succession to a maritime dividing line along the horizontal line of the 15th parallel North for the 6 nautical miles under consideration here.

77. The fact that this point is located in the vicinity of the 15th parallel North close to Cape Gracias a Dios and not, for example, on a parallel or a meridian passing close by Cape Camarón, Punta Patuca, Cape Falso or Sandy Bay is admittedly a circumstantial indication or piece of evidence, but undoubtedly a very significant one for a judge or arbitrator involved in applying the *uti possidetis juris* principle. The Chamber formed for the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)* case understood this point well when it adopted methods of assessing and interpreting the evidence that were in keeping with the essentially historical character of that principle in Latin America.

78. It is correct to say that the Arbitral Award of 1906 as such did not carry out any maritime delimitation in the Atlantic, but much less so to state that it "is not applicable" to the present maritime delimitation between the Parties. In my opinion, in any event, the Award is essential for identifying which of the islands belongs to which of the Parties and for examining the legal basis, the title, of their respective claims in the maritime delimitation exercise which forms the subject of these proceedings. It is necessary to examine the reasons for the Arbitral Award in order to gain a proper view of the *uti possidetis juris* position in 1821 along the Parties' coasts and in their respective adjacent maritime areas, because the land dominates the sea. And the land — the coastal fronts of the Parties — was defined by the 1906 Arbitral Award and not by the resources of the exclusive economic zones located out beyond the territorial seas.

79. As to the different issue of the scope of the *res judicata* of the 1906 Arbitral Award, what is required is to apply, where appropriate, the jurisprudence of the Court concerning the relationship between the operative part and the reasoning of a judgment, since *res judicata* does not apply only to what is materially indicated in the operative part of an award or a judgment (see, for example, the case concerning *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, para. 26).

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80. I cannot follow the majority when the Judgment practically ignores the historical, geographical and legal facts set out in the reasoning of the 1906 Arbitral Award. I would like to emphasize the importance of the documentation in that arbitral case for applying the principle of *uti pos-*

sidetis juris to the present maritime delimitation, documentation submitted to the Court in 1960 by the Parties, who were the same as the Parties to the present proceedings (see *I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, Vols. I and II).

81. An examination of the reasoning of the Arbitral Award and the documentation in question — to which the Respondent referred, moreover — makes it possible to appreciate the full importance of the historical role of Cape Gracias a Dios as the projection separating the coast of the province of Honduras from that of the province of Nicaragua, and thus to arrive at an image of the area of the 6-mile territorial sea appertaining to one or other of these Spanish colonial provinces prior to 15 September 1821.

82. Such an image is, moreover, sufficiently precise — for the purpose of applying the *uti possidetis juris* principle — to acknowledge and assert that it was indeed at the parallel running through Cape Gracias a Dios (i.e., the 15th parallel North) that, on the day of their independence, the area of the mainland territorial sea of the Republic of Honduras came to an end and the area of the mainland territorial sea of the Republic of Nicaragua began, to the north and south respectively. We are, of course, talking about a "delimitation" from 1821 and not a "demarcation" at sea in 2007. As was said in the 1906 Arbitral Award

> "Whereas, from what is inferred from all the foregoing, the point which best answers the purpose by reason of historical right, of equity and of a geographical nature, to serve as a common boundary on the Atlantic Coast between the two contending States, is Cape Gracias a Dios for the Atlantic Coast, and further, as this Cape fixes what has practically been the limit of expansion or encroachment of Nicaragua towards the north and of Honduras towards the south." (*Recueil international des traités du XX^e^ siècle*, Descamps et Renault, 1906, p. 115.)

83. I sometimes have the impression, reading the Judgment, that the Court demands too much as evidence of *uti possidetis juris* and as a definition of what constituted, at the beginning of the nineteenth century, a maritime delimitation of the territorial waters between the adjacent coasts of two States. One must ask whether it was customary at the time, even in Europe, to effect collateral delimitation of territorial seas by means of precisely defined lines in treaties concluded in due form. I have some doubts in that respect. Moreover, in the present case, the evidence, information and geography are particularly clear for *uti possidetis juris* to be applied to the delimitation of the first 6 miles of territorial sea between the Parties' mainland coasts in question.

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84. Honduras asserts that the 15th parallel is the dividing line between the Parties of the maritime area represented by the 6-mile territorial waters inherited from Spain. It relied *inter alia* on the fact that, in accordance with the Royal Decree of 23 August 1745, which originally divided jurisdiction in the maritime area concerned between the Governor of Honduras and the military command of Nicaragua, and with the Royal Decree of 1803, Cape Gracias a Dios marked the limit between the two jurisdictions, and also on the tendency of the Spanish Crown to use parallels and meridians when drawing up jurisdictional divisions.

85. In addition, Honduras submitted geographical maps to the Court as evidence appended to its Rejoinder (in particular a "Geographical Plan of the Viceroyalty of Santa Fé de Bogotá, New Kingdom of Granada, 1774" (RH, Vol. 2, Ann. 232)), together with the opinions of two experts, namely:

(1) an "Opinion by Professor Doctor José Manuel Pérez-Prendes Muñoz-Arraco on Spanish Captaincies-General and Governments in the Historical Overseas Law. General Competencies. Its Practice in Lands and Seas Belonging Today to the Republic of Honduras" (*ibid.*, Vol. 2, Ann. 266); and
(2) an "Opinion by Professor Doctor Mariano Cuesta Domingo on the Question of the Honduran Rights in the Waters of the Atlantic Ocean. Maritime Limits of Honduras in the Atlantic Ocean" (*ibid.*, Ann. 267).

86. The conclusions of Professor Pérez-Prendes's opinion are as follows:

> "1. The powers granted by Overseas legislation to the Captaincies-General, included, unequivocally and at all times, the actions that were considered timely on the part of those authorities in the maritime areas, wherever those coasts and seas existed.
>
> 2. The Captaincy-General of Guatemala, to which the Government of Honduras belonged, exercised the cited competencies from specifically Honduran ports.
>
> 3. Such exercise was constant from the XVI century up to the XIX century, and especially fulfilled through the reconnaissance, control and defense of the area of the Atlantic Ocean which washes ashore the current Republic of Honduras and specifically also in the area of Cape Gracias a Dios.
>
> 4. The demarcations indicated for the cited exercise included both land and maritime spaces, and it was a common understanding that these border lines that separated the corresponding land surface areas, prolonged into the sea.
>
> 5. It has also been testified in this opinion how the islands included in the maritime spaces cited in the previous conclusion, fell under the authority and power of the military authorities that were quartered in the land that was considered prolonged (follow-

ing its land limits) into the maritime space that washed its coasts." (RH, Vol. 2, Ann. 266.)

87. As regards the second opinion, Professor Mariano Cuesta Domingo concluded that:

"[t]he parallel that goes through Cape Gracias a Dios (which can very well be designated as parallel 15) is the one that in a perfectly, geometrically, astronomically, geographically and historically and legal *(Indiano)* form, constitutes the limit of Honduran waters in the South in a clear and indubitable manner" (*ibid.*, Ann. 267).

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88. During the oral arguments stage, Nicaragua attacked the first of these expert opinions, claiming that it showed serious methodological deficiencies and invoking in this respect the following instruments: (1) the Royal Order on coastguards of 22 May 1802; (2) the Instruction for the regulation of coastguard vessels in the Indies of 1803; (3) the Ordinance on privateering vessels of 1796, amended in 1801; and (4) the Ordinance concerning the régime and military governance of sailors' registration *(matrícula del mar)* of 1802. I do not see in what way the texts of these instruments, submitted to the judges during the hearings, alter the general conclusions resulting from the opinions delivered by the Honduran experts.

89. However, Nicaragua did not confine itself to discussing items of evidence. It presented arguments in the form of a proposition entitled "The sea, one area under one jurisdiction in the Spanish monarchy", accompanied by a historical interpretation regarding "The régime of the sea adjacent to the coasts of the Captaincy-General of Guatemala" and another entitled "The settlements on the Mosquito Coast were never under the jurisdiction of the Intendancy of Comayagua (Honduras)." For the interpretation of these historical events, I stand by what emerged from the Arbitral Award of 1906 (see for example paragraph 42 above).

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90. However, we have still to address the central thrust of Nicaragua's argument, whereby it asserts that under the former Spanish monarchy "the whole sea" formed a single area, over which a special centralized jurisdiction — that of the navy — exclusively applied. Having made this thunderous assertion, the argument goes on to state that jurisdiction over the territorial sea belonged to the Spanish authorities in Madrid and not to the local authorities in the Americas, including the Captaincies-General, contending finally that the Spanish Crown's claim to a 6-mile territorial sea "tells [us] nothing with regard to the *limit* of this territorial sea between the Provinces of Honduras and Nicaragua" (Judgment,

para. 231; emphasis in the original). We are thus confronted with a kind of syllogism.

91. But it is a syllogism which does not stand examination. Let us begin by pointing out that the major premise is incorrect, because historical Spanish law — in any case in the eighteenth century (Royal Decree of 17 December 1760) — already distinguished between the waters under Spanish jurisdiction adjacent to the coast (the 6 miles) and the rest of the sea, without prejudice to the existence of historic waters or bays such as those of the Gulf of Fonseca on which Nicaragua has a coast. In these circumstances, how can it be claimed that the sea formed a "single area" for the Spanish Crown at that time?

92. If the first premise is incorrect, the second is no more accurate, since the Spanish Kings of the age of enlightenment were, as elsewhere in Europe, at the head of an absolute monarchy in which the King's will alone was the beginning, middle and end of all jurisdiction. Everything flowed from his person, with the assistance of ministers, organs and administrations on both sides of the Atlantic. Thus all jurisdictions, both general and specific, territorial and functional, governmental and judicial, civil, military and naval, were all organized around and as a function of the King's person and, in that respect, were all centralized in the person of the King both for Spain and for the Crown's overseas territories. All the powers or jurisdictions of an organ, a representative or an official were exercised on behalf of the King and were no more than the delegation of the sovereign's power.

93. But what does Nicaragua seek to prove with this argument? Quite simply to deprive the Republics of Honduras and Nicaragua of the benefit of the 6-mile maritime area enjoyed by the Spanish provinces of Honduras and Nicaragua at the end of the colonial period. In other words, Nicaragua denies to the republics created from the former "colonial provinces" of Honduras and Nicaragua this maritime area as part of their territorial inheritance from Spain, as the predecessor State, in order to rule out the application of the principle of *uti possidetis juris* in the present case. Thus, the republics established on the territory of the former "colonial provinces" in the Americas received no more than "dry coasts" under the *uti possidetis juris* principle, in the same way, possibly, as the "Viceroyalties" and "Captaincy-Generals", since the proposition that the sea was a single area administered by a centralized jurisdiction in Madrid does not make it possible to distinguish between the "colonial provinces" and the other administrative territorial entities established by the Spanish Crown in the Americas.

94. But no such thing could come out of the organization of jurisdictions and authority under historical Spanish law, as the definition of the active subjects and the object of the principle of *uti possidetis juris* belongs to international law and not to historical Spanish law. The role played by the genitive *"juris"* in the principle only concerns the evidence for the existence of a 6-mile territorial sea off the coasts of the territories

of the Spanish Crown in the Americas. Its role does not go any further. It follows that the centralized administration or otherwise of the sea by the Spanish Crown is of no relevance whatsoever for the determination, in international law, of the ability of the successor States of the Spanish Crown to benefit, from the date of their independence, from the said 6-mile territorial seas as part of their "territorial inheritance" from Spain, as the predecessor State.

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95. The Nicaraguan argument is therefore based on a conceptual confusion between the respective roles of the principle of *uti possidetis juris* in international law and the historical Spanish law of the Americas. Moreover, it does not correspond to the reality of historical Spanish law either. The fact that the Spanish royal navy was reorganized in the second half of the eighteenth century, in an attempt to turn it into a more effective instrument for the accomplishment of its own duties as defined by the King, does not in any way change the fact that even the royal navy was represented on land in the Americas by the heads of navy departments, for example at the *Apostaderos* of Havana and Cartagena de Indias. Otherwise, how could the navy have contributed effectively, as an additional force, to the defence and security of the Crown's American territories and to the prevention and suppression of smuggling in the Caribbean Sea, to the benefit of the Royal Treasury? In these circumstances, to talk about "exclusive titles" makes little sense. Everything fell within the exclusive title held by the King himself, that is to say his title over the royal navy and over everything else.

96. The existence of a special jurisdiction of the navy did not in any way prevent the exercising of governmental, military or maritime powers within the 6-mile territorial sea by a Captaincy-General or a provincial Government (the latter were also strengthened by the introduction of the Intendant system in the eighteenth century). The jurisdiction at sea of a Captain-General or a Governor was not curbed by that of the Spanish royal navy. The scope of jurisdictions varied according to what the King decided when appointing office holders or during their mandates.

97. The Royal Warrant of 23 August 1745 appointing Colonel Juan de Vera

> "Governor and Commander-General of the Province of Honduras and Commander-General for the command of the said Province of Honduras and of the territory comprised between the limit of jurisdiction of the Governor and Captain-General of the Province of Yucatan up to Cape Gracias a Dios" (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, Vol. I, p. 382),

and that naming Alonso Fernández de Heredia "Governor and Com-

mander-General of Nicaragua and Commander-General of the territory comprised from Cape Gracias a Dios until the River Chagres" (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua*, Vol. I, p. 379) concerned the ongoing war situation, the security and defence of the coasts and the suppression of illicit trade.

98. Furthermore, a captain-general of a captaincy or a governor of a province could be called upon at any time to perform activities of all kinds both on land and at sea. In this respect, the royal directives of 23 August 1745 to Colonel Juan de Vera are particularly instructive (*ibid.*, p. 385). Moreover, the directives could authorize the exercise of power beyond the 6-mile area, as Nicaragua implicitly acknowledged in the following passage of its Reply:

> "[T]he Monarch's orders to his Captains General and other authorities to oppose piracy, the corsairs and trade in contraband in a more or less defined geographical area, by no means can be confused with acts of attribution of territorial jurisdiction on the high seas." (RN, p. 66, para. 4.61.)

99. Thus within a given area, be it on land or at sea, several jurisdictions co-existed, with each such holder exercising the functions or activity that had been entrusted to him by general legislation or the specific instructions of the monarch. Conflicts of jurisdictions were frequent. They were settled by the higher authority and, in the last resort, by the monarch himself.

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100. Nicaragua finally fell back on the non-division of the 6-mile maritime area of the territorial sea from the colonial period. It did so in the following terms:

> "[t]he only thing that can be said is that, at the date of independence, a joint sovereignty of the riparian republics arose over the waters of the Spanish Crown . . . and persists until such time as the areas corresponding to each of them are delimited" (CR 2007/3, p. 35, para. 82).

This amounts to acknowledging that the Republic of Nicaragua and the Republic of Honduras did indeed succeed to the 6 miles of territorial waters from the colonial period off Cape Gracias a Dios under the principle of *uti possidetis juris*, without prejudice to the division between the Parties of those waters, which, according to Nicaragua, had yet to be made.

101. Let us point out, in this respect, that in the area of territorial sea to be delimited between the mainland coasts of the Parties to the present case, the legal circumstances and the circumstances of physical and politi-

cal geography are not those obtaining in the Gulf of Fonseca. "Non-division", purely as such, does not mean that we are dealing with a situation of joint sovereignty. For that, the undivided waters would have to be *in a situation or state of community, which does not exist in the present case*. The Chamber was very clear on that point in 1992 (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 599, para. 401).

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102. The conclusions of the expert opinions submitted by Honduras have strengthened my conviction — based on all the documentation in the case — that the line of the 15th parallel North (i.e., the continuation out to sea of the parallel roughly corresponding to Cape Gracias a Dios) was — at least during the eighteenth century — the dividing line between the jurisdictions of the two Spanish colonial provinces in question, including the 6 miles of territorial waters of the period (Royal Decree of 17 December 1760).

103. If one examines all the points of law in the case, it stands to reason that the situation obtaining in 1821 was one in which, *according to the* uti possidetis juris *principle of international law, the line of the parallel running through Cape Gracias a Dios acted as a dividing line between the new republics as regards the 6-mile area of territorial waters in the Caribbean Sea from the former colonial period.*

104. The Parties knew this well in 1821, as is shown by the diplomatic Note of 1844 (paragraph 47 above), and it was confirmed for them by the 1906 Arbitral Award. It is true that neither of the Parties filed Spanish documents or maps with the Court concerning the path of a dividing line of the 6-mile area along the 15th parallel, but both Parties acted, immediately after independence, as if such a maritime division genuinely existed between the two provinces of the colonial era.

105. Having confirmed this conclusion, there is no reason to look any further. The conduct of the Parties from then on has constituted an authentic expression of the *uti possidetis juris* of 1821. As the Chamber of the Court declared in 1992, if the *uti possidetis juris* can be interpreted by international adjudication and by treaty, there seems no reason why it should not be by way of acquiescence or recognition by the Parties (*I.C.J. Reports 1992*, p. 401, para. 67).

106. Finally, the Judgment does not seem to take the slightest note of the fact that *uti possidetis juris* is a principle which automatically applies (*I.C.J. Reports 1992*, p. 565, para. 345). On independence, the colonial administrative divisions in question on land or at sea are transformed into international boundaries "by the operation of the law". No additional deliberate act is required.

107. Furthermore, since the demarcation carried out in 1962 by the

OAS Mixed Commission, the Parties have been aware that the endpoint of the land boundary resulting from the *uti possidetis juris* is situated in the main channel of the mouth of the River Coco where it meets the sea, in the vicinity of Cape Gracias a Dios, at exactly 14° 59.8′ N (14° 59′ 48″ N) and 83° 08.9′ W (83° 08′ 54″ W), this main channel being "easterly oriented" (see the Mixed Commission's report and map), i.e. running towards the sea at around the 15th parallel North.

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108. However, the Judgment takes a different view from that of the author of this opinion. Indeed, in paragraph 232, the Court demands more in terms of evidence from Honduras. In the Court's view, Honduras ought to have shown that the maritime boundary should follow the 15th parallel from Cape Gracias a Dios, and produced evidence that the colonial Power had used parallels and meridians *in this particular case*.

109. But such a standard is too demanding in terms of assessing an *uti possidetis juris* situation concerning two States which, in 1821, had the same understanding of that principle as regards the maritime area concerned. This bears out my criticism of the Judgment for opting for a rather too mechanical and "unhistorical" approach in its assessment of the evidence regarding application of the *uti possidetis juris* principle.

110. As a consequence of this finding, the Judgment holds that Honduras does not possess a "historic title" which could be invoked in relation to the interpretation and application of Article 15 of the 1982 United Nations Convention on the Law of the Sea for the purposes of delimitation of the mainland territorial sea in the present case. It goes without saying, on the basis of the above considerations, that I hold a contrary view to this finding by the Court. Indeed, that is the first reason for my vote against subparagraphs (2) and (3) of the operative clause.

C. The Ex Novo *Delimitation of Maritime Areas Effected by the Judgment*

1. The Parties' maritime claims and the question of defining the "area in dispute"

111. In the present case, the Parties have adopted fundamentally different approaches towards the delimitation of their "single maritime boundary" in the Caribbean Sea. Nicaragua contends that there is no existing maritime boundary and requests the Court to draw a boundary line. As for Honduras, it maintains that an accepted traditional maritime boundary line already exists along the 15th parallel and asks the Court to confirm that boundary line accordingly. These positions of principle have governed the respective written and oral pleadings of the two Parties and also the terms of their final submissions.

112. Thus Nicaragua requests the Court to adjudge and declare that:

> "[t]he bisector of the lines representing the coastal fronts of the two Parties as described in the pleadings, drawn from a fixed point approximately 3 miles from the river mouth in the position 15° 02′ 00″ N and 83° 05′ 26″ W, constitutes the single maritime boundary for the purposes of the delimitation of the disputed areas of the territorial sea, exclusive economic zone and continental shelf in the region of the Nicaraguan Rise".

113. Honduras, for its part, requests the Court to adjudge and declare that:

> "[east] of the point at 14° 59.8′ N latitude, 83° 05.8′ W longitude, the single maritime boundary which divides the respective territorial seas, exclusive economic zones and continental shelves of Honduras and Nicaragua follows 14° 59.8′ N latitude, as the existing maritime boundary, or an adjusted equidistance line, until the jurisdiction of a third State is reached".

114. For the delimitation, one initial consequence of these claims by the Parties is that the "area in dispute" as defined by them does not correspond to the "area" in which the maritime delimitation must be effected, taking account of the coastal geography concerned by the delimitation. The bisector line claimed by Nicaragua on the basis of the entire coastal fronts of both Parties, the line of the 15th parallel North claimed by Honduras and, for the purposes of the argument, the 80th meridian West form a triangular "area in dispute" which is an entirely artificial one in the sense that it is divorced from the reality of the geographical, legal and historical circumstances of a case which concerns the delimitation of maritime areas situated north and south of the mouth of the River Coco close to Cape Gracias a Dios.

115. The majority of the Court appears to presuppose that an equal or almost equal sharing of the above triangle would represent, in the present circumstances, an equitable outcome. I do not agree. It is true that the ratio between the areas of the triangle attributed to Nicaragua and those attributed to Honduras is approximately 3:4 (1: 1.3) in favour of Honduras (including a significant extension in terms of territorial sea because of the islands). However, we cannot ignore the fact that, while the bisector claimed by Nicaragua was certainly designed to back up its relatively recent political ambitions (1994-1995) to go beyond the 82nd meridian and reach the 17th parallel near Rosalinda Bank, it lacked any legal credibility, since the bisector in question was based on: (1) all the coastal fronts of both States regardless of their relationship with the area of delimitation and, moreover, (2) those fronts were replaced by straight lines which bore no relation to the physical geography of the coast.

116. To support its bisector line the Applicant, Nicaragua, chose to invoke equity or equitable principles relating to the delimitation of the continental shelf and the exclusive economic zone, while leaving the particularities of the delimitation of the territorial sea in the background. Honduras, for its part, defended the traditional maritime line along the 15th parallel between Cape Gracias a Dios and the 82nd meridian as the boundary for the three areas in dispute.

117. In defining the "area in dispute", the bisector line claimed by the Applicant is a device that creates a distortion and an inequitable outcome in this case. The Judgment does not correct this effect. It therefore does not discourage this sort of claim by States. It should be added that the Respondent's main position did not initially help to restore a more balanced definition of the "area in dispute" as regards its southern limit (Honduras's alternative submission of an adjusted equidistance line was presented at the hearings). Consequently, the lines principally claimed by the Parties resulted in the area in which their respective claims overlap being situated north of the 15th parallel.

2. The law applicable to maritime delimitation

118. Honduras (5 October 1993) and Nicaragua (3 May 2000) having become parties to the 1982 United Nations Convention on the Law of the Sea, the Convention is now in force between the Parties. The relevant articles of the Convention are therefore applicable as treaty law in the present dispute, as is very rightly indicated by the Judgment (para. 261). However, the weight of tradition being what it is, the overall structure of the Judgment is based more on the case law than on the text of the Convention. For example, it is difficult to explain, given the geomorphological problems raised by the mouth of the River Coco, why there is no mention in the Judgment of Articles 7 (2) and 9 of the Convention. In contrast, the references to case law are numerous, often to the detriment of the particular nature of delimitation of the territorial sea.

3. Areas to be delimited and the methodology adopted by the Judgment: the abandonment of equidistance and delimitation in stages in favour of the bisector method

119. In paragraph 262, the Judgment addresses the various maritime areas to be delimited by the Court by means of a single maritime boundary and comes to certain conclusions on the methodology to be used in the delimitation. The Judgment acknowledges (1) that in the western part of the area to be delimited, the Parties' mainland coasts are adjacent and that, for some distance, the boundary will *delimit exclusively their territorial seas*; (2) that the four islands in dispute north of the 15th parallel, attributed by the Judgment to Honduras, and Edinburgh Cay, the Nica-

raguan cay south of the 15th parallel, are entitled to generate their own territorial seas for the coastal States. It also indicates that, as regards these islands, no claim has been made by either Party for maritime areas other than the territorial sea.

120. I accept those clarifications, but what I find considerably less acceptable are the findings of the Judgment as regards the methodology to be used in order to determine the course of the single maritime boundary, not, it is true, in terms of the principles, but as regards their application in the present case. Thus I readily admit that the Court, in order to perform the task at hand, must first and foremost apply the rules on delimitation of the territorial sea, without forgetting that the ultimate task is to draw a single maritime boundary that will also be valid for other purposes.

121. However, the Judgment does not do this. In fact, what it does is to reject out of hand the equidistance method that is specifically and expressly referred to in Article 15 (Delimitation of the territorial sea) of the 1982 Convention on the Law of the Sea, relying on the existence of "special circumstances" in order to consider the issue thereafter in terms of the Convention's rules on delimitation of the exclusive economic zone (Art. 74) and the continental shelf (Art. 83) — which, where no agreement exists between the Parties, only oblige the Court to apply such delimitation "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution" — and indeed in terms of the customary rule which it calls the "equitable principles/relevant circumstances method" (para. 271 of the Judgment).

122. Consequently, the efforts of recent years to make judicial decisions on maritime delimitations more objective by firstly drawing a provisional equidistance line, even if this subsequently has to be adjusted in the light of "special" or "relevant" circumstances, have thus been set aside. There is thus a return to the idea of *sui generis* solutions for each delimitation, in other words a relapse into pragmatism and subjectivity.

123. The least that can be said is that the Judgment does not put the equidistance method at the centre of the approach to be followed in the present case for the course of the single maritime boundary, except for the segment delimiting the territorial seas of the islands. According to the Judgment, a series of difficulties made it impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties' mainland coasts (para. 280). Let us see what these "difficulties" are.

124. First, the Judgment recalls that neither Party has as its main argument a call for a provisional equidistance line as the most suitable method of delimitation, before subsequently acknowledging that, at the end of its oral argument, Honduras presented a provisional equidistance

line as an "alternative solution" to its favoured one of using the 15th parallel. This line (with an azimuth of approximately 78° 48′) is drawn from a pair of base points fixed at the low-water line of the apparent easternmost endpoint of the mainland Honduran and Nicaraguan coasts at Cape Gracias a Dios, as identified from a recent satellite photograph. The line was adjusted by Honduras to take account of the 12-mile territorial seas of the cays lying north and south of the 15th parallel (see para. 276 of the Judgment).

125. The Parties' positions regarding the equidistance method differ considerably. One of the Parties, Honduras, as we have just indicated, put forward a provisional equidistance line drawn from two base points, situated on the mainland coasts of one and the other of the Parties, and also asked the Court in its final submissions, as an alternative to the line of the 15th parallel, for *an adjusted equidistance line*. Nicaragua, on the other hand, maintained throughout the proceedings and in its final submissions that the method of equidistance and special or relevant circumstances would not be appropriate for the purposes of delimitation in the present case because, it contended, of the instability of the mouth of the River Coco. For Nicaragua, the Court has to construct *the whole of the single maritime boundary on the basis of the bisector* of the angle formed by two straight lines representing the entire coastal front of both Parties (azimuth 52° 45′ 21″).

126. The Judgment then considers the difficulties of a geographical and geological nature indicated by the Parties. In this respect, it is emphasized that Cape Gracias a Dios, where the land boundary ends, is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west. In such a geographical configuration, the pair of base points to be located on either bank of the River Coco would, according to the Judgment, assume considerable dominance in constructing an equidistance line and, given their close proximity to each other, any error in situating them would become disproportionately magnified in the resulting equidistance line, especially as it travelled out from the coast. Moreover, the sediment carried to and deposited at sea by the River Coco is said to have caused its delta, *as well as the coastline north and south of the Cape*, to exhibit a very active morpho-dynamism. And the Judgment concludes that continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future (Judgment, para. 277).

127. The Judgment also adds that the Parties themselves have not claimed or accepted any viable base points at Cape Gracias a Dios, and that differences apparently still remain between the Parties as to the interpretation and application of the King of Spain's 1906 Arbitral Award in respect of sovereignty over the islets formed near the mouth of the River Coco and the establishment of the extreme common boundary point on the coast of the Atlantic (Judgment, paras. 278 and 279).

128. Of all the considerations and difficulties mentioned in the Judgment in order to justify the Court's decision not to use the equidistance method in the present case, even as an initial provisional measure, the only ones which in my opinion might be upheld are those concerning the geographical configuration of the coastline on either side of Cape Gracias a Dios and the marked instability of the delta of the River Coco at its mouth. These are two elements of physical geography to be taken into account by the Court in the delimitation exercise, but, in my view, neither of them justifies abandoning the equidistance method in favour of one such as the bisector, which creates far more serious problems of law and equity than equidistance.

129. The solution advocated by the 1982 Convention on the Law of the Sea, where physical circumstances of this type are present, is to use the "straight baselines" method to identify the base points (Articles 7 and 9 of the Convention), rather than a method such as the bisector, which is unable in the present circumstances to safeguard the principle of non-encroachment. When the Court ruled out the equidistance method in 1969, it did so precisely in view of the coastal configuration concerned, to avoid the areas situated off the coastal front of the other State from being amputated by the equidistance line. In the present case, the opposite occurs. In fact, over the first segment of the delimitation line, the equidistance method would make it possible to safeguard non-encroachment or ensure non-amputation of the areas situated off the coastal fronts of both Parties, whereas the bisector method selected by the Judgment, on the contrary, proves incapable of doing this as far as Honduras is concerned.

130. The macro-geographic basis underlying the bisector method means that it is not suitable for delimitations in proximity to coastlines and, consequently, for the delimitation of territorial seas. However, in the present case, the line of the single maritime boundary, *which begins by delimiting only the territorial seas of the two States for a certain distance*, passes too close to the mainland coast of Honduras because of the use of the bisector method. This line is therefore inequitable and it is so in a maritime area in which security and defence interests are bound to prevail over economic considerations. That is one of the reasons why I reject the application of the bisector method to the first segment of the line of maritime delimitation established by the Judgment.

131. And I am all the more adamant in my rejection because I am by no means convinced that *"the construction of an equidistance line from the mainland is not feasible"*, as asserted by the Judgment (para. 283). During the oral proceedings, both Parties presented sketch-maps which showed various provisional equidistance lines. Today, the technology exists to do this (satellite photography, for example), and the legal means are available (straight base lines) to overcome any difficulties that might arise, for the base points selected, from the instability of the mouth of the

River Coco for the foreseeable future. Thus I do not consider it "necessary", to use the term included in Article 15 of the 1982 Convention, to abandon the equidistance method.

132. Lastly, I cannot accept the argument that the existence of only two base points on the mainland coasts in question of Honduras and Nicaragua has to be regarded as a circumstance that precludes the equidistance method. It is a reflection of the coastal geography, and not in any way a factor of inequity. Otherwise, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, the Court would not have selected only two base points as "land-based anchorage points to be used in the construction of the equidistance line" (*Judgment, I.C.J. Reports 2002*, p. 443, para. 292). In the maritime areas a long way from the coast, any possible inequities resulting from the application of the equidistance method could, moreover, be corrected by an equitable adjustment of the provisional equidistance line.

4. The bisector in the Judgment and its construction (coastal fronts)

133. The Judgment of the Court has not adopted the delimitation lines requested by either of the Parties. With regard to Honduras, it rejects the line of the 15th parallel as well as an adjusted equidistance line. But the Judgment also rejects the bisector of the angle formed by two lines representing the entire coastal front of each State (azimuth 52° 45′ 21″) requested by Nicaragua, those lines being straight lines constructed by the Applicant through a process of "planing" or "smoothing" the coastal geography of Honduras.

134. However, the Judgment has chosen to use the bisector method to determine the course of the single maritime boundary established by the Court itself. In this respect, the Court begins by acknowledging that the use of the bisector — the line formed by bisecting the angle created by the linear approximations of coastlines — has proved to be a viable substitute method in certain circumstances "where equidistance is not possible or appropriate" (Judgment, para. 287). It should, nevertheless, be noted that the Court's jurisprudence referred to in support of this first finding does not concern cases in which delimitation of the territorial sea was at issue.

135. The Judgment then turns to the relative advantages of the two delimitation methods under consideration for assessing the "actual coastal geography", concluding that the bisector method seeks to approximate the relevant coastal relationships, but does so on the basis of the macrogeography of a coastline as represented by a line drawn between two points on the coast, hence the need for care to be taken to avoid "completely refashioning nature" (Judgment, para. 289). This part of the Judg-

ment is a little too abstract. The Court should have assessed the virtues of the bisector method in relation to the actual "coastal configuration" in the present case in order to arrive at the area where the delimitation has to be made. Indeed, as scholarly opinion has not failed to emphasize:

> "The bisector method is possible only where two clearly distinguished coastlines form a sharply defined angle; if not, it rests on artificially reconstructed coastal directions." (Prosper Weil, *Perspectives du droit de la délimitation maritime*, 1988, p. 65; *The Law of Maritime Delimitation — Reflections*, 1989, p. 59.)

136. But the Judgment becomes more concrete when, having examined the various circumstances raised by Nicaragua to justify the use of the bisector method in the present case, including the equitable nature of its bisector, it declares:

> "The Court is not persuaded in the present case as to the pertinence of these factors and does not find them legally determinative for the purposes of the delimitation to be effected. *Rather, the key elements are the geographical configuration of the coast, and the geomorphological features of the area where the endpoint of the land boundary is located.*" (Para. 292; emphasis added.)

137. Thus there is in the Judgment a total symmetry between the reasoning which has led the majority to reject the equidistance method and that which has persuaded it to adopt the bisector method. For my part, I do not think that there must necessarily be a cause and effect relationship between these two methods, or that a bisector is the only possible means of achieving an equitable solution in this case.

138. I see just the opposite, since in terms of maritime areas, the bisector method imposes on one Party alone, Honduras, the burden of a geographical and morphological situation *that is shared by both Parties, as it exists along the entire coastline, both north and south of the mouth of the River Coco, as the Judgment itself acknowledges*. Added to that, the Judgment does not make any equitable adjustment of the bisector line in favour of Honduras, to compensate for this burden which Honduras has to bear alone.

139. The considerations of the Judgment regarding the choice of the *Parties' coastal fronts* for the purposes of the application of the bisector method by the Court do not suggest that any factor of equity in favour of Honduras was taken into account. It is true that the Court dismisses, as we have said, Nicaragua's proposal that the coastal front should extend for Honduras from Cape Gracias a Dios to the border with Guatemala and for Nicaragua from Cape Gracias a Dios to its border with Costa Rica, because such a proposal would give rise to "an exaggeratedly acute angle to bisect" (azimuth 52° 45′ 21″). In fact, the straight line running from Cape Gracias a Dios to the border with Guatemala as pro-

posed by Nicaragua would cut off a significant portion of Honduran territory falling north of this line (Judgment, para. 295). The rejection of this line therefore has nothing to do with equity.

All the Court has done is to restore the actual coastal geography of Honduras which had been "planed" in the Applicant's proposal. Furthermore, the choice by the majority of the bisector method has had the effect of extending the relevant coasts for the purposes of the delimitation, since in order to apply that method, "coastal fronts" have to be used instead of "base points". Hence the relevant coast from Cape Falso to Laguna Wano put forward by Honduras was rejected in favour of longer coastal fronts.

140. Similarly, a coastal front extending from Cape Camarón to the Río Grande would, according to the Judgment, lead to overcompensation because the line would run entirely over the Honduran mainland and thus would deprive the significant Honduran land mass lying between the sea and the line of any effect on the delimitation (para. 297). The azimuth of the angle of the Camarón-Rio Grande bisector is 64° 92′.

141. But the Court also rejects the front from Cape Falso to Punta Gorda, even though it indisputably faces the disputed area, as the Judgment itself acknowledges. It does so, according to the Judgment, on the grounds that its length (some 100 kilometres) is not sufficient to reflect a coastal front more than 100 nautical miles out to sea, especially if account is taken of how quickly to the north-west the Honduran coast turns away from the area to be delimited after Cape Falso, as it continues past Punta Patuca and up to Cape Camarón. Cape Falso, according to Honduras, constitutes the major "turn" in its mainland coast (para. 296).

142. It must be borne in mind that the azimuth of the angle of the Cape Falso-Punta Gorda bisector is even so 70° 54′. But that was not yet enough for the majority. Finally, the Court has settled on a Honduran coastal front extending from Cape Gracias a Dios to Punta Patuca and a Nicaraguan front from Cape Gracias a Dios to Wouhnta, which the Judgment considers to be of sufficient length "to account properly for the coastal configuration in the disputed area" (Judgment, para. 298). The bisector of the angle formed by these two coastal fronts has an azimuth of 70° 14′ 41.25″. This is the azimuth of the bisector in the Judgment.

143. Yet if we compare this azimuth in the Judgment with that of a provisional equidistance line (approximately 78° 48′) drawn from base points situated north and south of the mouth of the River Coco, we note that the difference between the two azimuths is more than 8°. That explains a great many things, including my rejection of the two segments of the single maritime boundary based on the Judgment's bisector. The geographical and geomorphological difficulties referred to by the Court cannot justify the choice of a delimitation method that is so inequitable for one of the Parties. The result of the application of the bisector method in fact provides confirmation that it is not a neutral means made

necessary in order to overcome the physical problems that are shared by both Parties' relevant coastal fronts.

144. A difference of 8° is a huge disparity. I cannot accept it as the equitable solution advocated by the 1982 United Nations Convention on the Law of the Sea, especially when it is combined with breaches of the principle of non-encroachment in the first sector of delimitation. In my view, beyond the islands, an equitable solution would be an equidistance line drawn from the mainland (azimuth approximately 78° 48′), with possibly some adjustments of the line towards the north, but well to the south of the Judgment's bisector line (70° 14′ 41.25″).

145. Let it also be noted that the coast between Cape Falso and Punta Patuca is a part of the Honduran coastline oriented towards the north-east, which does not directly adjoin the space or area for delimitation. I had always thought that the coasts concerned by a delimitation constituted an objective geographic fact which did not change according to the delimitation method used by the judge. In this Judgment, however, that assumption seems to have been abandoned, since the coasts concerned by the present delimitation expand and contract depending on the method chosen or even the azimuth selected.

5. Application of equidistance to the delimitation around the islands

146. My criticism of the single maritime boundary line in the Judgment only concerns the segments which follow the bisector selected by the Court. It thus does not apply to the segment of the line which effects the delimitation around the islands. In this section of the maritime boundary, the Court has fully applied Articles 3, 15 and 121 of the United Nations Convention on the Law of the Sea of 1982, which constitutes the law in force between the Parties. Nicaragua's claim that would have enclosed the islands attributed to Honduras within a territorial sea of 3 nautical miles was consequently rejected by the Judgment.

147. Each of the islands concerned — Bobel Cay, Savanna Cay, Port Royal Cay and South Cay for Honduras and Edinburgh Cay for Nicaragua — is accorded a 12-mile territorial sea, and the overlapping areas between these territorial seas of Honduras and Nicaragua, both north and south of the 15th parallel, are delimited by application of the equidistance method. The Court first drew a provisional equidistance line, using the co-ordinates for these islands as the base points for their territorial seas, and then constructed the median line in the overlapping areas. Lastly, having established that there were no special circumstances warranting an adjustment, it adopted this provisional line as the line of delimitation (para. 304). The course of the delimitation line lies partly south of the 15th parallel, as the existence of any kind of maritime boundary along that parallel, based on the tacit agreement of the Parties, is rejected by the Judgment (see above).

6. The demarcation by the Mixed Commission of 1962 and the starting-point of the single maritime boundary

148. The two Parties agreed in their written pleadings that, in view of the continued eastward accretion of Cape Gracias a Dios as a result of alluvial deposits, the starting-point of the maritime boundary to be drawn by the Court should be located 3 nautical miles seaward from the mouth of the River Coco. However, two differences remained between them: (1) from where on the River Coco those 3 miles should be measured; and (2) in what direction. Moreover, during the oral proceedings and in its final submissions, Nicaragua requested the Court to adjudge and declare that "[t]he starting-point of the delimitation is the thalweg of the main mouth of the River Coco such as it may be at any given moment as determined by the Award of the King of Spain of 1906" (Judgment, para. 19).

149. However, the two Parties left the Court the task of establishing the starting-point of the single maritime boundary. This starting-point was set by the Judgment 3 miles out to sea from the point identified in the River Coco by the Mixed Commission in 1962, as Honduras wished, but it has been placed along the azimuth of the bisector, as proposed by Nicaragua (Judgment, para. 311). The co-ordinates of the starting-point thus decided by the Court are 15° 00′ 52″ of latitude north and 83° 05′ 58″ of longitude west (subparagraph (2) of the operative clause).

150. I disagree with the location of this point as decided by the Judgment because, in my view, it should have been a point equidistant from the base points situated north and south of the mouth of the River Coco. The point chosen by the majority is not a neutral one in relation to the principal claims of the Parties. Moreover, although it does not prejudge the negotiations between the Parties referred to below, it could nonetheless make these more difficult.

151. In contrast, I endorse the Court's finding that the Parties must negotiate in good faith with a view to agreeing on the course of the delimitation line in the territorial sea between the endpoint of the land boundary as established by the 1906 Arbitral Award and the starting-point of the maritime delimitation in the present Judgment (subparagraph (4) of the operative clause).

7. The endpoint of the single maritime boundary, bilateral treaties and third States

152. The solution provided by the Judgment to the question of defining the endpoint of the maritime boundary gives rise to even more serious problems than those concerning the starting-point. In its written pleadings, Nicaragua explains that it draws its bisector up to the area of the seabed occupied by the Rosalinda Bank, in which area the claims of third States come into play (Judgment, para. 313). Further, Nicaragua's final submissions refer to the delimitation of areas "in the region of the Nica-

raguan Rise", without saying anything about the endpoint (Judgment, para. 19).

153. For its part, Honduras in its pleadings suggests that Colombia has interests under various treaties that would be affected by a delimitation continuing beyond the 82nd meridian. All the maps produced by Honduras seem to take the 82nd meridian as the *implied* endpoint to the delimitation, including that displaying Honduras's adjusted equidistance line (Judgment, para. 313). In its third final submission, Honduras asks the Court to draw the maritime boundary "until the jurisdiction of a third State is reached" (Judgment, para. 19). In the light of the wording of this final submission, as well as the written pleadings and maps presented by Honduras, that expression cannot be interpreted as modifying the position that the endpoint for the delimitation cannot be located beyond the 82nd meridian.

154. In paragraphs 314 to 319 of the Judgment, the Court considers the various possibilities open to it as regards the question of the endpoint of the line and analyses the potential third-State interests beyond the 82nd meridian, namely those of Colombia and Jamaica. The Court arrives at the conclusion that it cannot draw a delimitation line that would intersect with the line established by the 1993 Treaty between Colombia and Jamaica, but that it can state that the maritime delimitation between Honduras and Nicaragua extends beyond the 82nd meridian without prejudicing Colombia's rights under its treaty with Nicaragua of 1928 and with Honduras of 1986.

155. Hence the Judgment states that

> "[t]he Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-State rights" (para. 319 of the Judgment and p. 761, sketch-map No. 7 of said Judgment).

To my great regret, I cannot be as certain as the Judgment with regard to this finding. That the Court can "delimit the maritime boundary" in the present case is one thing, but that it can do so beyond the 82nd meridian without affecting the rights of third States is quite another.

156. It is true that, in its reasoning, the Judgment adds the following important detail: "[the Court's] consideration of these interests is without prejudice to any other legitimate third party interests which may also exist in the area" (para. 318). The legitimate interests of third States "in the area" delimited by the Judgment would thus seem duly protected. However, there remains the question of the rights and legitimate interests of third States in the maritime areas adjacent to the area that has been delimited. The presence of Nicaragua north of the 15th parallel and east of the 82nd meridian can only prejudice the rights and interests of Colombia, since the latter is no longer protected by the delimitation line of the 1986 Treaty with Honduras and is therefore exposed to claims from Nicaragua to the south and east of that line. This is the reason why,

in my opinion, the delimitation east of the 82nd meridian in the Judgment could impair the rights and legal interests of third States that were not parties to the present case.

157. Moreover, I am also opposed to the delimitation east of the 82nd meridian because Honduras has invoked in this case the maritime delimitation treaty concluded with Colombia in 1986 which is still in force between the two States and registered with the Secretariat of the United Nations. Yet the delimitation effected by the Judgment takes no account of that treaty concluded between the Respondent in the present case and a third State. That is surprising. Why? Because the dispute regarding the treaty in question was not included by the Applicant, Nicaragua, within the subject of the dispute as defined in its Application instituting these proceedings, nor did it ask the Court, in its final submissions, to rule on any legal aspect of the dispute between the Parties concerning that treaty.

158. In the light of these considerations, going beyond the 82nd meridian implicitly involves taking a position on a dispute which does not fall within the subject of the one here and which consequently was not addressed by the Parties during the present case. Yet this raises a jurisdictional issue deserving of particular consideration which is absent from the Judgment. A maritime delimitation line in itself cannot settle a dispute concerning the treaty-making power of States and the validity of the treaties thus concluded.

159. Can the Court, within the context of the present case, take decisions on the maritime delimitation between the Parties which have the effect of laying to one side for all practical purposes the 1986 Treaty between Honduras and Colombia without determining beforehand the status of that treaty? I do not think so, since according to Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea, the delimitation of the exclusive economic zone and of the continental shelf must be effected "*on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice*, in order to achieve an equitable solution".

8. Conclusion

160. I have voted against subparagraphs (2) and (3) of the Judgment's operative clause because I believe that the line of single maritime delimitation contained in the Judgment does not entirely comply with the relevant requirements of the 1982 United Nations Convention on the Law of the Sea, except as regards the section around the islands (the second section of the line).

161. For the first section, which begins by delimiting for a certain distance the Parties' mainland territorial seas, it is obvious that the general rule of equidistance contained in Article 15 of the 1982 Convention has not been applied. This has been rejected for the first time in the Court's

jurisprudence in relation to the territorial sea, and from the start of the delimitation exercise, in favour of a bisector which is unable to secure the principle of non-encroachment with regard to Honduras's mainland coasts. In the Judgment, the bisector method chosen is justified on the grounds that the configuration of the mainland coasts in question and the instability of the mouth of the River Coco are said to constitute "special circumstances" within the meaning of the second sentence of the above-mentioned Article 15. I cannot accept this justification, since the remedy for such situations under the 1982 Convention is not the bisector method, but that of straight baselines (Art. 7, para. 2, and Art. 9 of the Convention). That being so, and the Judgment having rejected the historic titles *(uti possidetis juris)* relied upon by Honduras, it is not in any way "necessary" to delimit the territorial sea other than by the median line (equidistance method) provided for in Article 15 of the 1982 Convention.

162. As regards the third section, which delimits only the exclusive economic zone and the continental shelf, the bisector in the Judgment is likewise unable, in my view, to achieve an equitable solution. Firstly, the construction of the bisector makes it necessary to bring into play a Honduran coast (from Cape Falso to Punta Patuca) which does not directly adjoin the area of delimitation. Secondly, and above all, the azimuth of the angle of the Judgment's bisector line is not justified by the relationship between the coasts directly involved in the delimitation, nor by the historical circumstances of the dispute. A bisector line where the azimuth of its angle favours one of the Parties by a difference of 8° compared with the azimuth of the angle of the provisional equidistance line drawn from base points situated north and south of the River Coco is not an equitable result, since in the present case, the Judgment invokes no "relevant circumstance" that would warrant adjusting the provisional equidistance line on such a scale. This is particularly true when one bears in mind that the circumstance of the instability of the coasts and river mouth referred to above is common to the coastal fronts of both States. Finally, the fact that the line delimiting the third section extends beyond the 82nd meridian raises jurisdictional questions concerning the treaty concluded in 1986 between Honduras and Colombia, and as regards Colombia's rights and legal interests in the maritime areas lying south and east of the delimitation effected by that treaty.

(Signed) Santiago TORRES BERNÁRDEZ.