International Court of Justice—title to insular territory—maritime delimitation—equidistance and angle bisector delimitation methods—third-state interests—UN Convention on the Law of the Sea Article 15 special circumstances

TERRITORIAL AND MARITIME DISPUTE BETWEEN NICARAGUA AND HONDURAS IN THE CARIBBEAN SEA (NICARAGUA V. HONDURAS). *At* <http://www.icj-cij.org>.
International Court of Justice, October 8, 2007.

On December 8, 1999, Nicaragua filed an application with the International Court of Justice requesting that it "determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras" in the Caribbean Sea.[1] During the proceedings, Nicaragua also raised the question of sovereignty over several small islands lying within the area of overlapping maritime claims (para. 127). On October 8, 2007, the Court determined a geography-based, single maritime boundary to divide the territorial sea, continental shelf, and exclusive economic zones of Nicaragua and Honduras (para. 321(2), (3)). The Court also found that Honduras was sovereign over the identifiable islands in dispute: Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay (para 321(1)).[2] Unstable coastal features at the land boundary terminus caused the Court to leave undelimited a short section of the territorial sea boundary. The Court found that the parties must negotiate the course of this undelimited, near-shore section of their maritime boundary in good faith (para. 321(4)).

Nicaragua and Honduras are adjacent coastal states that share a land boundary stretching across the isthmus of Central America from the Gulf of Fonseca in the west to the Caribbean Sea in the east. The eastern sector of the land boundary follows the thalweg, or deepest channel, of the River Coco and terminates in the mouth of the River Coco on the delta commonly referred to as Cape Gracias a Dios. The 1894 Gámez-Bonilla Treaty, which entered into force in 1896, provided that "each Republic is owner of the territory which at the date of independence constituted respectively, the provinces of Honduras and Nicaragua" (para. 37), and established a mixed boundary commission to demarcate the boundary.[3]

In the following decade, after the mixed boundary commission was unable to agree on the demarcation of the eastern two-thirds of the land boundary, the parties, pursuant to the Treaty, submitted their dispute over the outstanding portion of the boundary to arbitration by the King of Spain. The king's 1906 award placed the land boundary terminus in the thalweg

[1] Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), para. 17 (emphasis omitted) (Int'l Ct. Justice Oct. 8, 2007). The basic documents, decisions, pleadings, transcripts, press releases, and other materials for this case and others are available on the Court's Web site, <http://www.icj-cij.org>.

With the exception of a short, partial delimitation within the Gulf of Fonseca, the parties' maritime boundary in the Pacific remains in dispute; that delimitation was not before the Court.

[2] In addition to finding that Honduras was sovereign over Bobel, Savanna, Port Royal, and South Cays, the Court noted (para. 136) that

> [i]n addition to these four main cays, there are a number of smaller islets, cays and reefs in the same area, of which the physical status (such as whether they are completely submerged below sea level, either permanently or at high tide), and consequently their legal status (for the purposes of the application of Articles 6, 13 or 121 of [the LOS Convention]) are not clear.

[3] This translation of the Treaty appears in *Arbitral Award Made by the King of Spain on 23 December 1906* (Hond. v. Nicar.), 1960 ICJ REP. 192, 199 (Nov. 18).

of "the mouth of the River Coco . . . where it flows out in the sea close to Cape Gracias a Dios"[4] (para. 38).

Despite the 1906 arbitral award, territorial disputes over the land boundary continued, including a dispute over the boundary point at the mouth of the River Coco. In 1958 Honduras instituted proceedings before the International Court of Justice requesting the Court to "adjudge and declare . . . that Nicaragua was under an obligation to give effect to the [1906] Award" (para. 40). Nicaragua responded, in part, by arguing that the award was "incapable of execution by reason of its omissions, contradictions and obscurities."[5] Specifically, Nicaragua "argued that the mouth of a river is not a fixed point and cannot serve as a common boundary between two States."[6] In 1960, the Court issued its judgment, rejecting Nicaragua's argument and confirming that "the thalweg was contemplated in the Award as constituting the boundary between the two States even at the 'mouth of the river.'"[7] In 1962, a second boundary commission fixed the coordinates of the land boundary terminus in the mouth of the River Coco at 14° 59.8′ N, 83° 08.9′ W (1962 Point) (para. 47).

Offshore the mainland coasts of Honduras and Nicaragua, at distances of 30 (nautical) miles or more from Cape Gracias a Dios, are numerous banks, reefs, and cays. Many of these features—some of which remain above water at low and high tides (islands or rocks, which are territory), and others which are above water at low tide, but submerged at high tide (low tide elevations, which are not territory)[8] —lie within the disputed maritime area. Although Nicaragua did not mention these features in its application, it claimed them during the proceedings (paras. 105–07, 127). This late-coming claim raised the question of admissibility.[9] In finding it admissible (para. 115), the Court observed that this new claim of sovereignty was "implicit in and arises directly out of the [maritime delimitation] which is the subject-matter of Nicaragua's Application" (para. 114).[10]

In order to determine sovereignty over the islands, the Court considered the principle of *uti possidetis juris*, the evidentiary value of maps, recognition by third states, and postcolonial *effectivités*.[11] While the Court acknowledged that the principle of *uti possidetis juris* applied to insular, or island, territory, "nothing [submitted to the Court] clearly indicates whether the islands

[4] Quoting *id.* at 202.

[5] Quoting *id.* at 199.

[6] *Id.* at 216.

[7] *Id.*

[8] *See* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 ICJ REP. 40, at 102 (Mar. 16) (reported by Glen Plant at 96 AJIL 198 (2002)).

[9] Nicaragua sought to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá and the parties' declarations under Article 36(2) of the Court's statute (para. 1). Honduras did not contest jurisdiction on either the territorial or delimitation claims, and the Court did not address the question. Honduras also did not contest the admissibility of Nicaragua's island claim (para. 116).

[10] The Court also found that the critical date for the purpose of assessing *effectivités* on the disputed islands was in 2001, when Nicaragua filed the memorial in which it first "expressly reserved 'the sovereign rights appurtenant to all the islets and rocks claimed by Nicaragua in the disputed area'" (para. 129). This late critical date allowed the Court to consider many Honduran *effectivités* that would have been irrelevant if it had adopted Nicaragua's critical date of 1977.

[11] *Uti possidetis juris* is the principle that the internal administrative boundaries of the pre-independence sovereign, in this case Spain, form the international boundaries of the several successor states, here including Nicaragua and Honduras. *Effectivités* are acts that demonstrate the exercise of authority over an area.

were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence" (para. 167). The Court consequently found no sovereignty on the basis of that principle, and it also found that the arguments based on map evidence (paras. 209–19) and recognition by third states (paras. 220–26) were unpersuasive. The remaining question was that of the postcolonial *effectivités* on the islands.[12] While its *effectivités* were not numerous, Honduras presented evidence that it applied and enforced its criminal and civil law, that it regulated immigration, and that it carried out public works on the islands—which the Court took as demonstrating Honduras's "'intention and will to act as a sovereign' and [as] constitut[ing] a modest but real display of authority over the four islands" (para. 208).[13] In the absence of countervailing evidence from Nicaragua, the Court found that Honduras was sovereign over Bobel, Savanna, Port Royal, and South Cays. The Court then turned to the maritime delimitation.

In the process of delimiting the maritime boundary, the Court encountered two fundamental problems caused by the unstable geomorphology at the mouth of the River Coco: finding the current location of the land boundary terminus (the theoretical starting point for this delimitation) and identifying base points for the construction of a provisional equidistance line. The current location of the River Coco's mouth was not known. As the Court explained, "the sediment carried to and deposited at sea by the River Coco [has] caused its delta, as well as the coastline to the north and south of the Cape, to exhibit a very active morpho-dynamism" (para. 277). The parties agreed that the mouth had moved eastward from its 1962-era location (paras. 99–101), and the Court speculated that this eastward movement was likely to continue (paras. 277, 307). Moreover, the parties had apparent differences "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" (para. 279). The uncertain coastal and political geography near the land boundary terminus made it "impossible for the Court to identify base points and construct a provisional equidistance line" (para. 280). The Court solved the problem of the land boundary terminus by leaving undelimited the first three nautical miles of the boundary as measured from the 1962 Point (para. 311), and it solved the problem of identifying base points for the construction of a provisional equidistance line by adopting a delimitation method other than equidistance. The Court's delimitation method is discussed after a review of the parties' boundary claims.

In their final submissions both parties requested a single maritime boundary formed by a single segment starting approximately three nautical miles offshore the land boundary terminus and running until the jurisdiction of a third state. Beyond these apparent similarities, the starting points, bearings, and legal arguments made in support of these maritime boundary claims were quite different.

Nicaragua claimed a geography-based boundary starting offshore from the mouth of the River Coco running on a constant bearing of 52° 45′ 21″ until it reached the maritime area of a third state (para. 83). Nicaragua's line bisected the angle formed by generalized versions of the parties' entire coasts from the Nicaraguan border with Costa Rica to the Honduran border with Guatemala. Additionally, Nicaragua argued that the equidistance method was not feasible

[12] The Court reviewed evidence of *effectivités* in the categories of legislative and administrative control, application and enforcement of criminal and civil law, regulation of immigration, regulation of fisheries activities, naval patrols, oil concessions, and public works (paras. 176–208).

[13] Quoting Legal Status of Eastern Greenland (Den. v. Nor.), 1933 PCIJ (ser. A/B) No. 53, at 46 (Apr. 5).

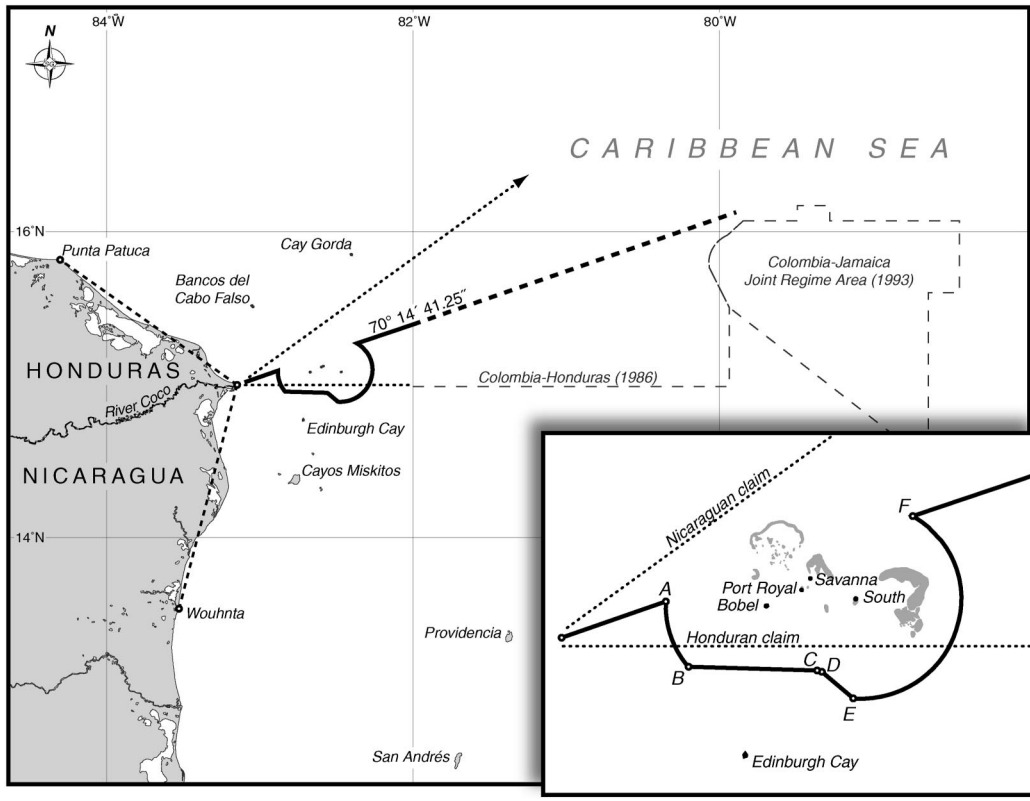
because of the instability of the coast in the vicinity of the land boundary terminus and the prominence of Cape Gracias a Dios on this convex coast (para. 84; see para. 277).

Honduras argued that the maritime boundary was already settled by virtue of colonial-era history and the postcolonial conduct of the parties. The Honduran "traditional line" boundary started offshore the mouth of the River Coco and ran due east along the parallel of latitude of the 1962 Point (14°59.8′ N, or approximately 15° N) until it reached 82° W and the beginning of the Honduras-Colombia maritime boundary agreed in 1986. Applying the *uti possidetis juris* principle to the delimitation, Honduras argued that maritime jurisdiction near shore was divided along the 15th parallel at the time of independence and that postcolonial conduct in oil leasing, fisheries licensing, and naval patrols evidenced a tacit agreement extending the boundary eastward along the same parallel (paras. 86–87). In the alternative, Honduras argued that the Court could and should use the equidistance method to delimit a boundary (para. 91).

The Court acknowledged that the *uti possidetis juris* principle could play a role in maritime delimitation but rejected Honduras' *uti possidetis* argument (paras. 229–36). Honduras's tacit agreement argument also failed (paras. 237–58), leaving the Court to delimit the boundary. Applying the provisions of the UN Convention on the Law of the Sea (LOS Convention) to the coastal geography of the parties (paras. 268–70), the Court employed three geometric methods to delimit the boundary: the angle bisector method for the lateral boundary between the adjacent mainland coasts, and the 12-nautical-mile arc and equidistance methods to delimit around and between the opposite-facing offshore islands. As the Court wrote, "the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate" (para. 272). The Court found a number of factors, including the instability and prominence of Cape Gracias a Dios, that made the equidistance method inappropriate for the purpose of delimiting a single maritime boundary (paras. 277–80). These geomorphological problems near the land boundary terminus constituted a special circumstance "in which it cannot apply the equidistance principle" (para. 281), triggering the exception to equidistance (in the territorial sea) provided by Article 15 of the LOS Convention.

To delimit the lateral boundary, the Court turned to the angle bisector method. Like equidistance, the angle bisector method is based on coastal geography. A bisector is "the line formed by bisecting the angle created by the linear approximations of coastlines" (para. 287). Unlike equidistance, which responds to only the most prominent microgeographic features, the angle bisector method generalizes irregular coastal features. The Court's linear approximations of the "relevant coasts" (para. 289) hinged at the 1962 Point and ran northwest to Honduras's Punta Patuca Lighthouse and south to Nicaragua's Wouhnta (para. 298).[14] The bisector of the angle formed by these lines ran from the 1962 Point on a constant bearing of 70°14′ 41.25″ and formed the backbone of the Court's delimitation (*id.*).

[14] The Court acknowledged that the process of "[i]dentifying the relevant coastal geography calls for the exercise of judgment in assessing the actual coastal geography" (para. 289). The Court considered whether the relevant coasts faced the disputed area, whether the relevant coasts were long enough to "account properly for the coastal configuration in the disputed area," and whether the linear approximation of the relevant coast would cut off significant portions of territory, thereby depriving them of effect on the delimitation (paras. 295–98).



The Court's bisector, which bisected only the relevant parts of the mainland coasts, taking no account of offshore islands, ran to the north of the Honduran islands, thereby placing them on Nicaragua's side of the bisector. The Court's solution is shown in the inset in Figure 1; it created a Honduran semi-enclave to the south of the bisector consisting of the arcs of the territorial sea limits of Bobel Cay (arc A-B) and South Cay (arc E-F) joined by the multisegment equidistance line between Nicaragua's Edinburgh Cay and Honduras's Bobel, Port Royal, and South Cays (line B-C-D-E) (para. 305).[15] Although the Court's bisector used the 1962 Point as the vertex of its angle, the Court started its boundary, as previously noted, at a point on the bisector line three nautical miles seaward of the 1962 Point.

The eastern end of the delimitation was also problematic because of the potential maritime interests of Colombia and Jamaica in that area.[16] After considering the possible interests manifested by Colombia's apparent boundary claim against Nicaragua, its negotiated boundary with Honduras, and its joint-regime area agreement with Jamaica, the Court concluded that

[15] Judge Koroma, in his separate opinion, and Judge *ad hoc* Gaja, in his declaration, both noted that in the area between the opposite-facing islands, Honduras was awarded a maritime area south of 14° 59.8′ N that it did not claim. Such awards are unusual in maritime boundary delimitations.

[16] The territories of Jamaica, to the northeast, and Colombia, to the southeast, are within 400 nautical miles of Honduras and Nicaragua, which suggests potentially overlapping claims. During the proceedings, both Colombia and Jamaica requested and were granted copies of the pleadings and annexes (para. 9). Also, two bilateral maritime delimitations were previously concluded in the vicinity of this delimitation: the 1986 Colombia-Honduras maritime boundary and the 1993 Colombia-Jamaica joint regime area.

its delimitation would not affect Colombia's interests (paras. 315–18).[17] While the Court did not specify an eastern endpoint, it did indicate that the boundary extends along the bisector line "until it reaches the area where the rights of third States may be affected" (para. 321).[18]

* * * *

With this judgment the Court moved away from the two-step process that it has used to delimit maritime boundaries over the past two decades. In following that process, the Court first draws a provisional equidistance line and then considers whether circumstances require that the line be adjusted in order to achieve an equitable result.[19] In the instant case the Court revived the angle bisector delimitation method, which it had not used since the mid-1980s.[20] Even though it was forced to do so by an unusually difficult geographical situation at the land boundary terminus, the Court's use of the angle bisector method is significant.[21] This decision might allow more flexibility in the choice of method in future delimitations.[22]

The use of the angle bisector method had a secondary impact with respect to the analysis of the effect of islands, rocks, and low-tide elevations on the delimitation. In applying the two-step equidistance process, the Court and other boundary tribunals have given full effect to the base points on all features, regardless of size, in the first step of the analysis: the construction of the provisional equidistance line.[23] In the second step of the analysis, the effect of these features on the equidistance line has then been discounted, either partially or fully, if necessary, to achieve an equitable result. Often, the Court explains the reason for discounting a particular feature. In contrast, the macrogeographic angle bisector method presumes a mainland-to-mainland delimitation. Here, the chosen method led the Court to treat the offshore features

[17] Jamaica did not get as much consideration from the Court as Colombia. It should be noted that an endpoint located at the easternmost extreme of the Court's bisector line would be well within 200 nautical miles of Jamaica.

[18] The Court did provide a range within which this endpoint might ultimately be located: between 82° W and "200 nautical miles from the baselines from which the breadth of the territorial sea is measured" (para. 319).

[19] Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea intervening), 2002 ICJ REP. 303, para. 288 (Oct. 10) (reported by Peter H. F. Bekker at 97 AJIL 387 (2003)); *see also* Continental Shelf (Libya/Malta), 1985 ICJ REP. 13 (June 3); Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 ICJ REP. 38 (June 14); Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 ICJ REP. 40 (Mar. 16). Other maritime boundary tribunals have followed this same approach. *See* Delimitation of the Continental Shelf (UK/Fr.), 18 R.I.A.A. 3 (1977), 18 ILM 397 (1979); Maritime Delimitation, Phase II (Eri./Yemen) (Arb. Trib. Dec. 17, 1999), *at* <http://www.pca-cpa.org>, 40 ILM 900 (2001) (reported by W. Michael Reisman at 94 AJIL 721 (2000)); Award, Jurisdiction and Merits (Barb./Trin. & Tobago) (UN Law of the Sea Annex VII Arb. Trib. Apr. 11, 2006), *at* <http://www.pca-cpa.org>, 45 ILM 800 (2006) (reported by Barbara Kwiatkowska at 101 AJIL 149 (2006)); Award, Jurisdiction and Merits (Guy./Surin.) (UN Law of the Sea Annex VII Arb. Trib. Sept. 17, 2007), *at* <http://www.pca-cpa.org> (reported by Stephen Fietta in this issue of the *Journal*).

[20] *See* Continental Shelf (Tunis./Libya), 1982 ICJ REP. 18 (Feb. 24); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246 (Jan. 20).

[21] It could be argued that the Court's resort to the angle bisector method was not such a large step. After all, an angle bisector is essentially a simplified equidistance line, or an equidistance line drawn using simplified coasts. Both are distance-based methods grounded in coastal geography. The Court itself mentions that the bisector method provides, in certain circumstances, an "approximation" of the equidistance method (para. 287).

[22] In a delimitation award rendered only weeks before the instant judgment, the tribunal in the Guyana/Suriname arbitration rejected the use of the angle bisector method in that particular situation. Guyana/Suriname, para. 372 (UN Law of the Sea Annex VII Arb. Trib. Sept. 17, 2007), *at* <http://www.pca-cpa.org> (reported by Stephen Fietta in this issue of the *Journal*).

[23] *See, e.g.,* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain; Maritime Delimination, Phase II (Eri./Yemen).

as an afterthought, enclaving them after the mainland-to-mainland boundary had been decided.[24]

In addition to the geomorphological problems at the starting point of this boundary, the Court was keenly aware that its decision would potentially affect the interests of third states at the delimitation's eastern end—specifically, Colombia and Jamaica. Throughout the present proceedings, the Court would have been mindful of the case that Nicaragua brought against Colombia in December 2001. In that case, Nicaragua requested the Court to decide sovereignty over numerous insular features and to delimit a mainland-to-mainland equidistance line between the opposite coasts of the two states.[25] Among the features claimed by both Nicaragua and Colombia are those on Serranilla Bank (located within the Colombia-Jamaica joint regime area) and the features on Quitasueño and Serrana Banks, south of Colombia's 1986 boundary with Honduras. In dealing with the question of third-state interests, the Court "indicate[d] that the alleged third-State rights said to exist east of the 82nd meridian do not lie in the area being delimited and thus present no obstacle to deciding that the line continues beyond that meridian" (paras. 314, 319). On its face, the Court's decision appears to complicate the boundary relationship between Honduras and Colombia by establishing an area of Nicaraguan jurisdiction north of some part of the 1986 Colombia-Honduras boundary (para. 315). Jurisdiction in the area east of 82° W is still largely undecided, but the boundary relationships in this region should be clearer after the Court determines the merits of the territorial and maritime dispute between Nicaragua and Colombia.

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[24] The Court hints that the islands received this treatment because "as regards the islands in dispute no claim has been made by either Party for maritime areas other than the territorial sea" (para. 262).

[25] On December 13, 2007, the Court ruled on Colombia's preliminary objections, *see* Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, para. 12, finding that it had jurisdiction to rule on the maritime delimitation and on the sovereignty dispute over all features except the islands of Providencia, San Andrés, and Santa Catalina.