

The ICJ Awards Sovereignty over Four Caribbean Sea Islands to Honduras and Fixes a Single Maritime Boundary between Nicaragua and Honduras

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insights

In a 94-page judgment issued October 8, 2007, the International Court of Justice (ICJ or Court) found unanimously that Honduras, not Nicaragua, has sovereignty over four disputed islands in the Caribbean Sea. In addition, the Court fixed (14-3) the course of the single maritime boundary line between the two countries in the Caribbean Sea.^[1] The case, brought by Nicaragua in December 1999, took nearly eight years to be resolved, and followed decades of diplomatic wrangling and occasional maritime incidents souring the relations between these two Central American neighbors.

1. Historical Background

The territorial and maritime dispute between Nicaragua and Honduras dates back to 1821, when both countries gained independence from Spain and obtained sovereignty over their respective territories, including the adjacent islands along their coasts. Since 1821, different aspects of the dispute were submitted to arbitration by the King of Spain (in the early 1900s), the ICJ (in 1960), the Central American Court of Justice (in 1999 and 2001) and then again to the ICJ (in 1999). The following is a brief summary of the dispute from 1821 up to the time of the filing by Nicaragua of an Application instituting ICJ proceedings in 1999.^[2]

In 1894, the two countries concluded a general boundary treaty (the "Treaty") pursuant to which each gained title to the territory, which until 1821 had constituted the Spanish provinces of Honduras and Nicaragua, respectively. The Treaty did not demarcate the boundary between the two states nor did it contain any description of the territory over which either country had title. The Treaty instead tasked a Mixed Boundary Commission to demarcate the land boundary from the Pacific Ocean to the Atlantic coast. The Commission fixed the boundary only in respect of one-third of the land territory, from the Pacific Ocean to Portillo de Teotecacinte. Demarcating the maritime boundary off the Atlantic coast was not an issue that concerned the two countries at the time since, except for a small body of water adjacent to the coast, most countries regarded the waters and oceans as forming part of the high seas and not capable of being controlled by any country.

Pursuant to the Treaty, the dispute over the remaining portion of the land boundary was submitted to arbitration by the King of Spain, who issued an award on December 23, 1906. Following a challenge by Nicaragua, the ICJ confirmed in 1960 that the 1906 Award was valid and binding.^[3] After further twists and turns, another Mixed Commission determined the land boundary on the Atlantic coast at the beginning of the mouth of the River Coco separating the land territory of Nicaragua and Honduras. The two countries enjoyed a period of friendly relations from 1963 to 1979 during which attempts were made to reach agreement concerning the maritime boundary in the Caribbean Sea. However, relations deteriorated in the period that followed, and there were numerous incidents in the vicinity of the 15th parallel involving the capture and/or attack by each state of the fishing vessels belonging to nationals of the other. In addition, in 1986 Honduras concluded a controversial treaty (the "1986

Treaty") on maritime delimitation with Colombia. It was Honduras' decision to ratify the 1986 Treaty that eventually triggered legal action by Nicaragua.

On November 29, 1999, Nicaragua instituted proceedings before the Central American Court of Justice, requesting the Court to declare that, by ratifying the 1986 Treaty with Colombia, Honduras would violate certain legal instruments of regional integration. On November 30, 1999, the Central American Court of Justice ordered Honduras to suspend the procedure of ratification of the 1986 Treaty pending the determination of the merits in the case.^[4]

On December 8, 1999, Nicaragua instituted separate proceedings against Honduras before the ICJ concerning the territorial and maritime dispute between the two countries in the Caribbean Sea. As the basis for the ICJ's jurisdiction, Nicaragua invoked: (i) Article XXXI of the American Treaty on Pacific Settlement, officially known as the "Pact of Bogotá;" and (ii) the declarations whereby both countries have accepted the compulsory jurisdiction of the ICJ pursuant to Article 36(2) of the Court's Statute. Since the ICJ's jurisdiction was not contested by Honduras, what follows is an analysis of the parties' arguments and the ICJ's decision concerning the sovereignty over certain islands in the disputed area and the delimitation of the maritime boundary between them.

2. Sovereignty over Disputed Islands in the Caribbean Sea

The issue of sovereignty over the disputed islands was not submitted by Nicaragua in its original application to the ICJ. Because the Court was not requested to pronounce on the sovereignty claim until the oral proceedings in March 2007, it could have refused to entertain that claim. However, since the islands are located in the very area that formed the subject-matter in dispute, the Court concluded that its jurisdiction to decide the sovereignty of the islands was inherent in Nicaragua's original claim. Under international law as accepted by the parties, a state with sovereignty over an island also has a right to claim a territorial sea and other maritime areas around it. Accordingly, in order to draw the maritime boundary between the two countries in the disputed area, the Court first had to determine which state had sovereignty over the islands. ^[5]

Both countries claimed sovereignty over four islands in the disputed area of the Caribbean Sea to the north of the parallel 14° 59.8 North latitude (the "15th parallel"). Both agreed that Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay (the "Islands") remain above water at high tide and, therefore, fall within the definition and regime of islands under Article 121 of the 1982 United Nations Convention on the Law of the Seas ("UNCLOS"), to which both states are parties. The Court acknowledged that other smaller islands and cays are located in the disputed area, including Logwood Cay and an island situated in the "mouth" of the River Coco. It concluded, however, that it had inadequate information to determine who had sovereignty over the first, and the constantly changing conditions in the estuary of the River Coco meant that it could not make a definitive finding as to the sovereignty over the latter. Hence, the Court made a pronouncement upon the four Islands only and left the sovereignty dispute over other islands and cays unresolved.

Both states agreed that the Islands in dispute were not *terra nullius* (meaning "uninhabited and unoccupied" territory) at the time of their independence from Spain in 1821. However, Honduras argued that it had original title over the disputed islands pursuant to the doctrine of *uti possidetis juris* requiring that boundaries inherited upon decolonization be respected,^[6] and that its title has been confirmed by many so-called *effectivités*, defined as "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial [or post-colonial] period."^[7] Nicaragua maintained that at the time of independence the Islands were not assigned to either country

and, therefore, the *uti possidetis* doctrine had no application to the situation before 1821. In Nicaragua's view, recourse should instead be had to "other titles," including giving effect to the so-called "principle of adjacency."

The Court confirmed that the principle of *uti possidetis* is an important legal principle concerning territorial title and boundary delimitation at the moment of decolonization. Moreover, it noted that in the present case the principle had been the basis for concluding the 1894 Treaty and for the arbitral award of the King of Spain. It then applied this principle to determining the question of sovereignty over the Islands. Given that the parties agreed that the Islands were not *terra nullius*, the Court concluded that it necessarily followed that they belonged to Spain prior to the parties' independence in 1821. Consequently, the application of the *uti possidetis* principle required the Court to determine to whom the Spanish Crown had allocated the Islands. The Court found, however, that neither state had produced documentary evidence from the pre-independence era that explicitly referred to the Islands. Having examined all the other evidence submitted, the Court's majority concluded that it had not been established that either Honduras or Nicaragua had title to the Islands by virtue of *uti possidetis*.

Regarding Nicaragua's claim to the Islands based on the principle of adjacency, the ICJ rejected the principle both as a general legal principle for determining sovereignty and as being relevant in the specific case before it. First, the Court pointed out that proximity, as such, is not necessarily determinative of legal title. Second, it noted that the principle of adjacency referred to in treaties between the two states and Spain, respectively, applied to the mainland coasts rather than to offshore islands and that, in any event, the Islands in dispute are closer to the coast of Honduras than the coast of Nicaragua.

Having concluded that there was no evidence of legal title to the Islands resting with either country, the Court examined the conduct (*effectivités*) of the administrative authorities during the colonial period for proof of any effective exercise of territorial jurisdiction in the region. The ICJ found that information about the conduct of the colonial administrative authorities was lacking and, consequently, it concluded that there was insufficient evidence to determine who owned the Islands as at 1821.

The Court then examined the *effectivités* of both states since 1821 to determine whether such post-colonial conduct amounted to proof of effective exercise of jurisdiction over the Islands. It considered, in particular: legislative and administrative control exercised by both countries; application and enforcement of criminal and civil law; regulation of immigration and of fisheries activities; naval patrols; granting of oil concessions; and conduct of public works. The Court concluded that Honduras had shown a modest but sufficient overall pattern of conduct to demonstrate its intention to act as sovereign over the Islands. It assigned particular importance to the following conduct of Honduras as evidencing sovereignty: (i) Honduras granted the United States permission to fly over the Islands in 1993; (ii) Honduran immigration officers visited the Islands in 1999 and Honduras issued work permits to Jamaican and Nicaraguan nationals living on the Islands; (iii) Honduras issued fishing permits in respect of the Islands; and (iv) Honduras conducted public works on one of the Islands in 1975. The Court found that Nicaragua's continuing assertions of the right to the maritime area that included the Islands since 1977 were not sufficient to deny the above-mentioned conduct by Honduras from being construed as sovereign acts over the Islands.

Finally, having found that there was no evidence to support the contentions made by either state with respect to maps and the recognition by third parties of their respective sovereignty over the disputed islands, the Court unanimously held that Honduras has sovereignty over the Islands on the basis of post-colonial conduct (*effectivités*).

3. Delimitation of Disputed Maritime Areas

The Court next turned to the delimitation of the disputed maritime areas between Honduras and Nicaragua in the Caribbean Sea.^[8] Those areas comprise the territorial sea, the exclusive economic zone (a 200-mile zone in which the coastal state exercises functional jurisdiction), and the continental shelf, for which the Court was requested to fix a single maritime boundary, i.e., one uninterrupted boundary line delimiting the various zones of coincident jurisdiction appertaining to Honduras and Nicaragua. The applicable law was formed by UNCLOS. Nicaragua maintained that the maritime boundary had never been delimited, whereas Honduras claimed that a traditionally recognized boundary already existed in the Caribbean Sea along the 15th parallel.

The Court's task was made more difficult because of the location of the Islands, necessitating a two-part delimitation exercise: (1) delimitation of the maritime area from the Nicaragua-Honduras mainland out to sea; and (2) delimitation of the maritime areas surrounding the four Islands belonging to Honduras and another island belonging to Nicaragua, each of which generates its own 12-mile territorial sea under UNCLOS. Because the islands were all located within 24 miles of each other and more than that distance from the mainland, the single maritime boundary also included segments delimiting overlapping areas of the islands' opposite-facing territorial seas as well as segments delimiting the exclusive economic zones and continental shelf.

(a) Maritime Delimitation Based on the Relevant Mainland Coasts

With regard to the delimitation from the Nicaragua-Honduras mainland out to sea, the Court first addressed the claim of Honduras that the application of *uti possidetis* in the parties' general boundary treaty of 1894 and the 1906 Award of the King of Spain (establishing the parties' land boundary) resulted in the 15th parallel as marking the maritime boundary line.

The Court confirmed that the *uti possidetis* principle might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation. However, it found that no persuasive case had been made by Honduras that, based on practices followed by the Spanish Crown, the boundary was a "traditional" one extending along the 15th parallel.

The Court next concluded that there was no compelling evidence of a tacit agreement between the parties to establish the 15th parallel as the legally binding maritime boundary in the area concerned. Nicaragua flatly denied that it ever accepted or recognized the 15th parallel as the maritime boundary with Honduras. While the Honduran Foreign Minister had stated in a 1982 diplomatic note addressed to Nicaragua's Foreign Ministry that the maritime border between the two countries had not been legally delimited, Honduras maintained that its claim to the 15th parallel line was supported by the parties' oil concession practice, the licensing of fishing activities and naval patrols around the 15th parallel, sworn statements by fishermen active in the area, and the regional practice of using lines of latitude and longitude as maritime boundaries followed by third countries such as Jamaica and Colombia. In the Court's view, while the 15th parallel may have had some relevance in the parties' conduct, the events invoked by Honduras were of a short duration and were insufficient to support a legally established international maritime boundary. Thus, the Court concluded it would be required to draw the boundary.

As regards the methodology for fixing the course of the maritime boundary, Nicaragua requested the Court to draw a single maritime boundary for purposes of the delimitation of the disputed areas of the territorial sea, exclusive economic zone, and continental shelf based on a

bisector, i.e., the line formed by bisecting the angle created by the linear approximations of the coastlines of both states. Honduras asked the Court to confirm that the 15th parallel was the existing maritime boundary line or, alternatively, to fix an adjusted equidistance line^[9] to account for any special circumstances.

The provisions of UNCLOS set out the methodology to be used for delimiting the territorial sea, exclusive economic zone, and continental shelf. In particular, Article 15 of UNCLOS calls for the provisional drawing of a median or equidistance line subject to a possible adjustment to give effect to "special circumstances" in the case of the delimitation of the territorial sea, whereas the exclusive economic zone and the continental shelf are to be delimited by "agreement on the basis of international law" to "achieve an equitable solution" (Articles 74(1) and 83(1) of UNCLOS). The plotting of a single maritime boundary is usually carried out based on the "equitable principles/relevant circumstances" method. This method is very similar to the equidistance/special circumstances approach applicable in territorial sea delimitation. It involves the drawing of a provisional equidistance line, then considering any additional factors calling for the adjustment of that line in order to achieve an "equitable solution."

In this case, the Court found that there were several factors that made the application of the equidistance method inappropriate, even provisionally. Those factors included the overall geographical configuration of the coast, the active morpho-dynamism at the River Coco delta (resulting in considerable instability and fluctuations of the "mouth" of the River Coco at the Nicaragua-Honduras land boundary terminus), the small and uncertain nature of the offshore islands and cays north and south of the 15th parallel, and the absence of viable base points (i.e., coordinates serving as starting-points for drawing a boundary line) claimed or accepted by the parties themselves at the endpoint of the land boundary. These factors made fixing reliable base points and using them to construct a provisional equidistance line unduly problematic in this case. Thus, the Court found that coastal geomorphological problems as such could constitute "special circumstances" justifying the non-application of the equidistance rule under Article 15 of UNCLOS.

The ICJ agreed with Nicaragua that the bisector method is a viable substitute method of delimitation in certain circumstances where equidistance is not possible or appropriate, especially in instances where, as in the present case, any base points that could be determined by the Court are inherently unstable. Like equidistance, the bisector method represents a geometrical approach to delimitation, it seeks to approximate the relevant coastal relationships (namely, based on the macro-geography of a coastline as represented by a line drawn between two points on the coast), and it has been used by the Court in previous cases.^[10] The key elements for purposes of a bisector method of delimitation are, first, the geographical configuration of the coast and, second, the geomorphological features of the area where the endpoint of the land boundary is located.

The parties having advanced differing versions of the relevant mainland coast for purposes of drawing the bisector, the Court decided that it would be convenient to use the point fixed by the 1962 Mixed Commission at Cape Gracias a Dios as the point where the parties' coastal fronts meet. The Court opted for a Honduran coastal front running from the 1962 point to the lighthouse at Punta Patuca and a Nicaraguan coastal front running from the 1962 point to Wounhta, resulting in a bisector line having an azimuth of 70° 14' 41.25".

(b) Maritime Delimitation between the Opposite-facing Islands in the Disputed Area

The ICJ faced the separate task of effecting a maritime delimitation between opposite-facing islands, namely, delimiting the waters around and between the four Islands situated north of

the 15th parallel which it had awarded to Honduras, and one Nicaraguan island (Edinburgh Cay) located south of the 15th parallel. Given that these islands generate territorial seas, the delimitation was to be effected based on the "equidistance/special circumstances" rule. Nicaragua's position was that the four Islands should be enclaved within only a three-mile territorial sea in order to avoid giving a disproportionate amount of the disputed waters to Honduras. Honduras claimed 12 nautical miles as the breadth of the Islands' territorial sea.

The Court confirmed that Article 3 of UNCLOS entitles Honduras to claim a 12-mile breadth of territorial sea both for its mainland and for islands under its sovereignty. With regard to the resulting overlap in territorial seas of Nicaragua and Honduras in the area of their islands (except for Savanna Cay), the Court found that delimitation of this area could be satisfactorily accomplished by drawing a provisional equidistance line. It did not find any legally relevant "special circumstances" in this area that warranted shifting this provisional line.

(c) Determining the Starting-point and the Endpoint of the Maritime Boundary

This left the Court with two remaining matters pertaining to the course of the single maritime boundary: determining the starting-point and the endpoint of the boundary. While the parties agreed that the starting-point for the boundary between them should be located some distance from the mainland coast because of the uncertain endpoint of the land boundary, they disagreed on exactly where. Both parties preferred the starting-point to be located three nautical miles from the mouth of the River Coco separating their land territory, but they disagreed from where on the river these three miles should be measured, and in what direction. The Court agreed (15-1) with Honduras that the starting-point should be set three nautical miles out to sea from the point already identified by the parties' Mixed Commission in 1962 as the land boundary terminus along the bisector line fixed by the Court.^[11]

In accordance with the parties' desire to reach a negotiated solution for the first three miles from the mainland at the mouth of the River Coco up to the starting-point of the single maritime boundary, the Court held (16-1) that the parties must negotiate in good faith with a view to agreeing on the course of the line that links the present endpoint of the land boundary as established by the 1906 Award of the King of Spain and the starting-point of the single maritime boundary line fixed by the Court.

With regard to the endpoint, neither party had specified a precise seaward end to the boundary between them. In order not to prejudice the rights of third states not party to the proceedings before the ICJ, especially Colombia and Jamaica, the Court left the precise endpoint undefined. Thus, the ICJ found that the single maritime boundary line runs along the bisector line determined by the Court "until it reaches the area where the rights of certain third States may be affected," while specifying that "in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial is measured."^[12]

4. Concluding Observations

This Judgment represents the seventh maritime delimitation decision of the ICJ in three decades, and the fifth in which it has fixed a single maritime boundary dividing coincident zones of jurisdiction.^[13] The decision comes on the heels of two prominent maritime delimitation awards rendered by *ad hoc* tribunals created under Annex VII of UNCLOS both within 3½ years of the creation of the tribunals. On September 20, 2007, a five-member tribunal fixed a single maritime boundary between Guyana and Suriname that represents an unadjusted equidistance line in the exclusive economic zone and continental shelf. On April 11, 2006, another Annex VII tribunal under the presidency of former ICJ President Stephen

Schwebel (U.S.) fixed a single maritime boundary that for the most part follows the equidistance line between Barbados and Trinidad and Tobago, but which is adjusted in the eastern, Atlantic sector to take account of the coasts of Trinidad and Tobago abutting upon the area of overlapping claims.^[14] It appears that coastal states prefer to submit their maritime boundary disputes to the ICJ and ad hoc tribunals created under Annex VII of UNCLOS rather than the International Tribunal for the Law of the Sea (ITLOS) in Hamburg. The ITLOS, which was set up under UNCLOS especially to deal with maritime disputes of a wide variety, is celebrating its 10th anniversary without having rendered any maritime delimitation decisions.

In its Judgment, the ICJ confirmed that equidistance remains the general rule for the delimitation of the territorial sea - absent the existence of "special circumstances" such as geomorphological problems along the relevant coast, while pointing out that "the equidistance method does not automatically have priority over other methods of delimitation" when it comes to fixing an all-purpose boundary covering the territorial sea, the exclusive economic zone, and the continental shelf.^[15]

While creating binding effect only for Nicaragua and Honduras,^[16] this Judgment will be of interest to other states both inside and outside the region. Two other cases between Central American countries remain pending at the ICJ, namely, a territorial and maritime dispute between Nicaragua and Colombia and a dispute between Costa Rica and Nicaragua regarding navigational and related rights on the San Juan River. The ICJ is also adjudicating a maritime dispute between Romania and Ukraine. The Nicaragua-Honduras Judgment may have an impact on the dispute between Namibia and South Africa over the precise location of the endpoint of the land boundary in the Orange River delta and title to alluvial diamond gravels off their coasts. It may also have ramifications for the dispute between Japan and China over the East China Sea, where China is invoking geology and Japan is relying on strict equidistance and claiming title to the disputed Senkaku Islands. Given that the majority of the world's maritime boundaries remain unresolved, this latest decision will provide additional guidance to states looking to settle their boundary disputes in accordance with contemporary international law.

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Footnotes

^[1] *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), judgment of October 8, 2007, para.321 [hereinafter: Judgment].

^[2] See Judgment, *supra* note 1, paras. 33-71.

^[3] *Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), Judgment, *I.C.J. Reports 1960*, p. 192 (Nov. 18).

[4] Honduras proceeded to ratify the 1986 Treaty notwithstanding this Order. On November 27, 2001, the Central American Court of Justice issued a judgment finding that Honduras had infringed a number of treaty provisions, including the concept of the "territorial patrimony of Central America." See Judgment, *supra* note 1, para. 70.

[5] See Judgment, *supra* note 1, paras. 74-227.

[6] The *uti possidetis juris* principle was described by the Court's Chamber formed to deal with the case concerning the *Frontier Dispute* (Burkina Faso/Mali) as follows in 1986: "The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved - [By this principle] administrative boundaries [were] transformed into international frontiers in the full sense of the term." *I.C.J. Reports 1986*, p. 554, 566, para. 23 (Dec. 22).

[7] *Id.*, at 586, para. 63.

[8] Judgment, *supra* note 1, paras. 228-320.

[9] A median or equidistance line is the line which at all points is equidistant from the baselines of states with opposite or adjacent coasts. Baselines denote the starting-points for maritime delimitation of the offshore zones of a coastal state. The starting-point is generally the low-water line along the coast.

[10] Namely, in *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya) decided in 1982 and in *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/U.S.) decided in 1984.

[11] The co-ordinates of this point are 15° 00 52 N and 83° 05 58 W.

[12] Judgment, *supra* note 1, para. 319. Under UNCLOS, any claim of continental shelf rights beyond 200 nautical miles falls within the exclusive jurisdiction of the Commission on the Limits of the Continental Shelf.

[13] The ICJ previously fixed single maritime boundaries in decisions rendered in 1984 (*Gulf of Maine (Canada/U.S.)*), 1993 (*Jan Mayen (Denmark v. Norway)*), 2001 (*Qatar v. Bahrain*), and 2002 (*Cameroon v. Nigeria*).

[14] For the text of these awards, see the website of the Permanent Court of Arbitration, www.pca-cpa.org.

[15] Judgment, *supra* note 1, para. 272.

[16] See Article 59, ICJ Statute.