

# Reflections on Maritime Delimitation in the *Nicaragua/Honduras* Case

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## I. Introduction

### A. Nature of the Problem

In 2007, two decisions were newly rendered in relation to maritime delimitations: the *Guyana/Suriname* Arbitration of 17 September 2007<sup>1</sup> and the *Case Con-*

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cerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea of 8 October 2007 (hereafter the *Nicaragua/Honduras* case).<sup>2</sup> These two cases include some commonalities, for example:

- (i) The two cases relate to maritime delimitation between States with adjacent coasts.
- (ii) These cases concern the delimitation of a single maritime boundary relating to the territorial sea, the exclusive economic zone (EEZ) and the continental shelf.
- (iii) Parties in these cases have ratified the 1982 United Nations Convention on the Law of the Sea (hereafter the LOSC), and consequently, the delimitation of the territorial sea, the EEZ and the continental shelf is governed by Articles 15, 74 (1) and 83 (1) of the LOSC, respectively.
- (iv) In each case, one of the Parties of the litigations – Suriname and Nicaragua respectively – urged the international courts to apply the so-called bisector method.

On the other hand, the *Nicaragua/Honduras* judgment sharply contrasts with the *Guyana/Suriname* award on an important point, namely the application of the equidistance method in the process of maritime delimitation. While the Arbitral Tribunal in the *Guyana/Suriname* case applied the equidistance method by rejecting the use of the bisector method, the ICJ, in one part of the *Nicaragua/Honduras* case, refused to apply the equidistance method and applied the bisector method.

As explained elsewhere, the essence of the law of maritime delimitation concerns the question how it is possible to ensure predictability, while taking into account a diversity of factors in order to achieve an equitable result.<sup>3</sup> As with all types of law, the law of maritime delimitation should have a certain degree of predictability. At the same time, as each maritime delimitation case differs, flexible consideration of relevant factors is also required with a view to achieving equitable results. Hence the quest for a well-balanced legal framework reconciling predictability and flexibility should be the essential issue in the law of maritime delimitation. The equidistance method is the only objective method for ensuring predictability of results in the sense that, once the base-points are fixed, the delimitation line is mathemati-

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<sup>1</sup> The Award is available at the homepage of the Permanent Court of Arbitration <<http://www.pca-cpa.org/>>. For a commentary on the award, see Y. T a n a k a, *The Guyana/Suriname Arbitration: A Commentary*, 2 Hague Justice Journal (2007), 28-33.

<sup>2</sup> The text of the judgment is available at the homepage of the ICJ <<http://www.icj-cij.org>>. The analysis of this study relies on the electronic version of the judgment. The page numbers quoted in this study are the numbers of the electronic text. For an overview of this judgment, see M. P r a t t, *Commentary: Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, 2 Hague Justice Journal (2007), 34-38; Y. T a n a k a, *Case Concerning the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (8 October 2007)*, 23 International Journal of Marine and Coastal Law (2008), 327-346; P. B e k k e r / A. S t a n i c, *The ICJ Awards Sovereignty over Four Caribbean Sea Islands to Honduras and Fixes a Single Maritime Boundary between Nicaragua and Honduras*, 11 (Issue 26) ASIL Insight (2007); E.A. K i r k, *Case Concerning the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, 57 ICLQ (2008), 701-709; and R. C h u r c h i l l, *Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2007*, 23 International Journal of Marine and Coastal Law (2008), 615-624.

<sup>3</sup> Y. T a n a k a, *Predictability and Flexibility in the Law of Maritime Delimitation*, Oxford 2006, 4-5.

cally determined.<sup>4</sup> In this sense, the equidistance method is an essential element for ensuring predictability in the law of maritime delimitation. Hence, the Court's view concerning the applicability of the equidistance method in the law deserves serious consideration.

Against that background, this study will examine the *Nicaragua/Honduras* judgment focusing particularly on the application of the equidistance method in the law of maritime delimitation. Following the introduction, including the background of the *Nicaragua/Honduras* dispute in Part I, Part II will address the process of maritime delimitation in this case. Part III will review the legal position of the equidistance method in previous case law relating to maritime delimitations. On the basis of the analysis in Part III, Part IV will examine the validity of the *Nicaragua/Honduras* judgment concerning the equidistance method. Part V will then discuss the validity of the bisector method in the current case. Finally a general conclusion is presented in Part VI.

## B. Background

Nicaragua and Honduras – which had been under the rule of Spain, and achieved their independence in 1821 – are located in the south-western part of the Caribbean Sea.<sup>5</sup> The coastlines of Nicaragua and Honduras roughly form a right angle that juts out to sea. The convexity of the coast is compounded by the cape formed at the mouth of the River Coco.<sup>6</sup> The delta of the River Coco and even the coastline north and south of it shows a very active morpho-dynamism, and the river mouth is constantly changing its shape.<sup>7</sup> Since the end of Spanish colonial rule, the two States have attempted to resolve their territorial disputes with third-party assistance, such as the Mixed Boundary Commission set up by Article II of the 1894 Gámez-Bonilla Treaty, the Arbitration by the King of Spain, and the Mixed Commission established by the Inter-American Peace Committee. The Mixed Commission of the Inter-American Peace Committee determined that the land boundary would begin at the mouth of the River Coco at 14° 59.8' N latitude and 83° 08.9' W longitude.<sup>8</sup>

From 1963 to 1979, Honduras and Nicaragua generally enjoyed friendly relations. On 21 September 1979, however, Honduras sent a diplomatic Note to Nicaragua stating that a Honduran fishing vessel had been attacked by Nicaragua 8 miles north of the 15<sup>th</sup> parallel which, according to Honduras, served as the boundary line between Honduras and Nicaragua. Subsequently, numerous incidents in-

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<sup>4</sup> H.W.A. Thirlway, *The Law and Procedure of the International Court of Justice* Part Five, 64 BYIL (1994), 41.

<sup>5</sup> The *Nicaragua/Honduras* case, op. cit., note 2, 11, para. 23.

<sup>6</sup> Ibid., 13, para. 26.

<sup>7</sup> Ibid., 14, para. 32. See also Argument by Mr Colson, Verbatim Record, CR 2007/9, 45, para. 25.

<sup>8</sup> Judgment, op. cit., note 2, 18, para. 47.

volving the capture and/or attack by each State of fishing vessels belonging to the other State in the vicinity of the 15<sup>th</sup> parallel were recorded in a series of diplomatic exchanges.<sup>9</sup> Nicaragua and Honduras attempted in vain to settle the boundary issues through bilateral negotiations. Thus, on 8 December 1999, Nicaragua instituted proceedings against Honduras concerning a dispute relating to the delimitation of the maritime areas appertaining to each of those States in the Caribbean Sea on the basis of Article XXXI of the Pact of Bogotá as well as Article 36 (2) of the Statute of the ICJ.<sup>10</sup> As the Court included on the Bench no judge of the nationality of either of the Parties, Nicaragua chose Mr. Giorgio Gaja and Honduras chose Mr. Santiago Torres Bernárdez as a judge *ad hoc* to sit in the present case.<sup>11</sup>

In its Application and written pleadings, Nicaragua asked the Court to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone (EEZ) appertaining to Nicaragua and Honduras in the Caribbean Sea. Nicaragua claimed that its maritime boundary with Honduras in the Caribbean Sea had not been delimited. During the oral proceedings, Nicaragua further requested that the Court pronounce on sovereignty over islands located in the disputed area to the north of the boundary line claimed by Honduras and running along 14° 59.8' North latitude.<sup>12</sup> On the other hand, Honduras maintained that in the Caribbean Sea, there was already a traditionally recognized maritime boundary between Honduras and Nicaragua which had its origins in the principle of *uti possidetis juris*. During the oral proceedings, Honduras also asked the Court to adjudicate that the islands Bobel Cay, South Cay, Savanna Cay and Port Royal Cay, together with all other islands, cays, rocks, banks and reefs claimed by Nicaragua which lie north of the 15<sup>th</sup> parallel, were under the sovereignty of the Republic of Honduras.<sup>13</sup>

It follows that the *Nicaragua/Honduras* case concerns the territorial disputes over the islands and the delimitation of a single maritime boundary in the disputed area at the same time. With respect to the dispute relating to territorial sovereignty over the islands, the Court unanimously found that Honduras has sovereignty over the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay on the basis of the post-colonial *effectivités*.<sup>14</sup> Thus the Court turned to the maritime delimitation of the disputed area.

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<sup>9</sup> Ibid., 18-20, paras. 49-58.

<sup>10</sup> Ibid., 4, para. 1.

<sup>11</sup> Ibid., 5, para. 5.

<sup>12</sup> Ibid., 38, para. 127. For the sake of simplicity, the Court generally referred to this as the 15<sup>th</sup> parallel. Ibid., 24, para. 72.

<sup>13</sup> Ibid., 24, para. 73.

<sup>14</sup> Ibid., 93, para. 321; 62, para. 227. For an outline of the Court's argument on this issue, see T a n a k a, *op. cit.*, note 2, 330-332. In addition, the Court's argument relating to the maritime delimitation has already been summarized by *ibid.*, 333-338.

## II. Delimitation of Maritime Areas

### A. The Traditional Maritime Boundary Line Claimed by Honduras

#### 1. Application of the Principle of *uti possidetis juris* to Maritime Boundaries

The first issue relating to maritime delimitation was whether or not there was a traditional maritime boundary line as claimed by Honduras. According to Honduras, the line of the 15<sup>th</sup> parallel constituted the maritime delimitation line on the basis of the *uti possidetis juris* principle referred to in the Gámez-Bonilla Treaty and the 1906 Award of the King of Spain. Honduras claimed that Cape Gracias a Dios separated the jurisdictional areas of the different colonial authorities which exercised authority over the maritime areas off the coasts of present-day Nicaragua and Honduras.<sup>15</sup> In this regard, the Court observed that this principle “might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation”.<sup>16</sup> According to the Court, however, no persuasive case had been made by Honduras as to why the maritime boundary should extend from the Cape along the 15<sup>th</sup> parallel. The Court had already denied the relevance of the principle of *uti possidetis juris* in relation to sovereignty over the disputed islands in the present case. Nor had it been shown that Spanish Crown divided its maritime jurisdiction between the colonial provinces of Nicaragua and Honduras even within the limits of the territorial sea. Further to this, the 1906 Award did not deal with the maritime delimitation between Nicaragua and Honduras. Accordingly, the Court concluded that the *uti possidetis juris* principle cannot be said to have provided a basis for a maritime delimitation along the 15<sup>th</sup> parallel.<sup>17</sup>

It is of particular interest to note that in certain circumstances, the Court accepted the applicability of the principle of *uti possidetis juris* to maritime boundaries.<sup>18</sup> Yet, as in the *Nicaragua/Honduras* case, it appears that the role of this principle remains modest in this field. In the *Land, Island and Maritime Frontier* case between El Salvador and Honduras, for instance, the Chamber of the ICJ stated that the principle of *uti possidetis juris* should apply to the waters of the Gulf of Fonseca as well as to the land. However, the Chamber concluded that there was no

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<sup>15</sup> Judgment, op. cit., note 2, 62, paras. 229-230; Counter-Memorial submitted by Honduras, Vol. I, 25-27, paras. 2.25-2.28; 144-146, paras. 7.38-7.45; Argument by Mr Sands, Verbatim Record, CR 2007/9, 10-39, paras. 1-57.

<sup>16</sup> Judgment, op. cit., note 2, 63, para. 232.

<sup>17</sup> Ibid., 62-64, paras. 229-236. However, Judge *ad hoc* Torres Bernárdez considered that on the basis of the principle of *uti possidetis juris*, the 15<sup>th</sup> parallel constituted the boundary of the territorial sea with a breadth of six nautical miles. According to Judge Torres Bernárdez, the Court's standard in the application of this principle is too strict. Dissenting Opinion of Judge Torres Bernárdez, *ibid.*, 18-20, paras. 75-83; 25-26, paras. 102-110.

<sup>18</sup> Concerning the application of the principle of *uti possidetis juris* in maritime delimitations, see G. Nesi, *Uti possidetis juris e delimitazioni marittime*, 74 *Rivista di Diritto Internazionale* (1991), 534-570; M.G. Kohen, *Possession contestée et souveraineté territoriale*, Paris 1997, 461-464.

attempt to delimit the waters of the Gulf according to the principle of *uti possidetis juris*.<sup>19</sup> Although the applicability of the principle of *uti possidetis juris* was discussed by the Parties in the *Guinea/Guinea-Bissau* case,<sup>20</sup> the Court of Arbitration did not investigate this issue, because it decided that the Convention of 12 May 1886 between France and Portugal did not determine a maritime boundary between the respective possessions of those two States in West Africa.<sup>21</sup> In addition to this, the Arbitral Tribunal, in the *Guinea-Bissau/Senegal* case, ruled that the exchange of letters on 26 April 1960 between France and Portugal established a maritime boundary for the territorial sea, the contiguous zone, and the continental shelf. Nonetheless, the Arbitral Tribunal held that the boundary did not comprise the EEZ because the concept of the EEZ was unknown at that time.<sup>22</sup> While the Arbitral Tribunal appeared to admit the application of the principle of *uti possidetis juris* to maritime boundaries,<sup>23</sup> this award did seem to concern the succession of a boundary agreement in reality. Concerning the application of the principle of *uti possidetis juris* to maritime delimitations within the context of colonization, two points should be noted.

First, intertemporal law should be considered in the application of the principle of *uti possidetis juris* to maritime delimitations.<sup>24</sup> It is conceivable that the principle is not applicable to marine spaces which were unknown in the colonial period. Accordingly, the principle will have no role to play in the delimitation of the EEZ, which was crystallised in the post-colonial period.<sup>25</sup>

Secondly, it should be noted that there was no agreement on the maximum breadth of the territorial sea in the colonial period. Thus even where the principle of *uti possidetis juris* can be applied to the delimitation of the territorial sea, a question arises with respect to the extension of the delimitation line. Currently the maximum breadth of the territorial sea is 12 nautical miles under Article 3 of the LOSC. Yet this does not mean that the delimitation line on the basis of the principle of *uti possidetis juris* will automatically extend until 12 nautical miles.

In this respect, it is notable that the Arbitral Tribunal, in the *Guyana/Suriname* case, addressed the question of whether and how a delimitation should extend from the previous limit of the territorial sea (3 nautical miles) to a newly established limit (12 nautical miles). On this issue, the Arbitral Tribunal did not support automatic extension of the territorial sea from the previously accepted limit of 3

<sup>19</sup> ICJ Reports 1992, 589, para. 386; 601, para. 405. See also 598-600, paras. 400-401.

<sup>20</sup> The *Guinea/Guinea-Bissau* case, 25 ILM (1986), 271, para. 40.

<sup>21</sup> *Ibid.*, 288, para. 85; 304, para. 130.

<sup>22</sup> The *Guinea-Bissau/Senegal* arbitration, 94 RGDIP (1990), 274, para. 88.

<sup>23</sup> R. Kolb, *Case Law on Equitable Maritime Delimitation*, The Hague *et al.* 2003, 203; S. Lalonde, *Uti Possidetis: Its Colonial Past Revisited*, RBDI (2001), 84.

<sup>24</sup> *Ibid.*, 85.

<sup>25</sup> Yet Judge Jiménez de Aréchaga was supportive of the application of the principle *uti possidetis juris* to the colonial delimitation of sponge fisheries. Separate Opinion of Judge Jiménez de Aréchaga in the *Tunisia/Libya* case, ICJ Reports 1982, 131-132, paras. 100-102.

nautical miles to the current limit of 12 nautical miles.<sup>26</sup> According to the Arbitral Tribunal, the automatic extension of the existing delimitation line, namely, the N10°E Line, would allow Guyana's territorial sea to cut across the approaches to the river and thus defeat the purpose of that line to protect Suriname's navigational interests. In light of this special circumstance, the Arbitral Tribunal concluded that the territorial sea delimitation must be drawn from the point at which the N10°E line intersects the 3 nautical miles limit to the point at which the equidistance line drawn by the Tribunal of the Award intersects the 12 nautical miles.<sup>27</sup>

## 2. The Existence of a *de facto* Maritime Boundary

Honduras also contended that there was a "*de facto* boundary based on the tacit agreement of the Parties" at the 15<sup>th</sup> parallel. According to Honduras, ever since the 1906 Award was rendered, the Parties' oil concession practice concerning the 15<sup>th</sup> parallel has coincided and has even been co-ordinated along that parallel. Honduras further argued that the existence of a tacit agreement between the Parties on the 15<sup>th</sup> parallel as the maritime boundary could be suggested by fishing activities in the disputed area, the regional practice of third Parties, and statements of many fishermen.<sup>28</sup> On this issue, the Court generally stated that:

The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. [...] Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary.<sup>29</sup>

The Court has noted that from 1961 to 1977, the 15<sup>th</sup> parallel appeared to have had some relevance in the conduct of the Parties. Specifically the Court observed that during this period, several oil concessions were granted by the Parties indicating the 15<sup>th</sup> parallel as their northern and southern limits, that the 15<sup>th</sup> parallel divided the respective fishing areas of the two States, and that the 15<sup>th</sup> parallel was also perceived by some fishermen as a line dividing maritime areas under the jurisdiction of the Parties. According to the Court, 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".<sup>30</sup> The Court further pointed to the fact that in the Note of the Honduran Minister for Foreign Affairs dated 3 May 1982, Honduras concurred with the Nicaraguan Foreign Ministry that "the maritime border between Honduras and Nicaragua has not been legally delimited" and proposed that the Parties at least come to a "temporary" arrangement about the boundary so as to avoid further boundary incidents.<sup>31</sup>

<sup>26</sup> The *Guyana/Suriname* Award, op. cit., note 1, 99, para. 311.

<sup>27</sup> Ibid., 103, paras. 322-325.

<sup>28</sup> Judgment, op. cit., note 2, 64-69, paras. 237-252.

<sup>29</sup> Ibid., 69, para. 253.

<sup>30</sup> Ibid., 70, para. 256.

<sup>31</sup> Ibid., para. 257. See also 20, para. 56.

In conclusion, the Court held 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.<sup>32</sup>

The jurisprudence relating to maritime delimitations demonstrated that normally the international courts and tribunals were reluctant to accept the existence of a *de facto* maritime boundary on the basis of the conduct of the Parties. Apart from the *Tunisia/Libya* judgment,<sup>33</sup> the conduct of the Parties plays but a modest role in the *Gulf of Maine, St. Pierre and Miquelon, Greenland/Jan Mayen, Eritrea/Yemen, Qatar/Bahrain, Cameroon/Nigeria* and *Barbados/Trinidad and Tobago* cases.<sup>34</sup> In particular, the ICJ in the *Cameroon/Nigeria* case explicitly stated that:

Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the sitting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account. In the present case there is no agreement between the parties regarding oil concessions.<sup>35</sup>

This view was echoed by the *Guyana/Suriname* award, which held that: “The [previous] cases reveal a marked reluctance of international courts and tribunals to accord significance to the oil practice of the parties in the determination of the delimitation line.”<sup>36</sup> Accordingly, it may be said that the *Nicaragua/Honduras* judgment is in the line with the existing case law in this field. It appears that the international courts’ approach is valid, because giving too much weight to the conduct of the Parties entails the risk of introducing the idea of effectiveness of occupation – which would be incompatible with the fundamental character of the legal title over marine spaces – into the law of maritime delimitation.

## B. Delimitation of the Single Maritime Boundary

### 1. Establishment of a Bisector Line

The jurisprudence of the Court on various occasions makes it clear that the equidistance method is widely used in the practice of maritime delimitation.<sup>37</sup> Nonetheless, Nicaragua asserted that the instability of the mouth of the River

<sup>32</sup> Ibid., paras. 257-258.

<sup>33</sup> The ICJ in the *Tunisia/Libya* case attached great importance to a *de facto* line drawn from Ras Ajdir at an angle of some 26° east of north, which resulted from concessions for the offshore exploration and exploitation of oil and gas granted by the Parties. ICJ Reports 1982, 71, para. 96.

<sup>34</sup> On this issue, T a n a k a, op. cit., note 3, 288-299.

<sup>35</sup> Judgment, ICJ Reports 2002, 447-448, para. 304.

<sup>36</sup> The *Guyana/Suriname* arbitration, op. cit., note 1, 125, para. 390.

<sup>37</sup> Judgment, op. cit., note 2, 73-74, paras. 267-272.

Coco at the Nicaragua-Honduras land boundary terminus would make fixing base points and using them to construct a provisional equidistance line unduly problematic. Thus Nicaragua urged the Court to apply the bisector method which constructs the entire single maritime boundary from the bisector of two lines representing the entire coastal front of both States, which would then run along a line of constant bearing  $52^{\circ} 45'21''$ .<sup>38</sup> On the other hand, Honduras's principal argument was that there was a tacit agreement on the 15<sup>th</sup> parallel as the single maritime boundary. During the oral proceedings, however, Honduras claimed that if the Court rejected its submission on a tacit agreement, then an adjusted equidistance line would provide the basis for an alternative boundary. Honduras therefore referred to a provisional equidistance line drawn from a single pair of purported mainland base points without using any of the islands as base points.<sup>39</sup>

On this issue, the Court observed that because of the very active morphodynamism of the relevant area, "continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future".<sup>40</sup> Furthermore, there were no viable base points claimed or accepted by the Parties themselves at Cape Gracias a Dios. According to the Court, whatever base points would be used for the drawing of an equidistance line, the configuration and unstable nature of the relevant coasts would make these base points uncertain within a short period of time. Given the set of circumstances, the Court considered that in the current case, it was impossible to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties' mainland coasts. Hence the Court found itself within the exception provided for in Article 15 of the LOSC, namely facing special circumstances in which it cannot apply the equidistance principle.<sup>41</sup>

It followed that the Court must consider the applicability of the alternative methods claimed by the Parties. According to the Court,

In instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method.<sup>42</sup>

In so stating, the Court found that the bisector method was to be applied in the present case. Unlike the equidistance method, this method relies on the macro-geography of a coastline as represented by a line drawn between two points on the coast. In the Court's view, a Honduran coastal front running to Punta Patuca and a Nicaraguan coastal front running to Wouhnta are the relevant coasts for the pur-

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<sup>38</sup> *Ibid.*, 74, para. 273. Concerning the bisector method, see in particular, Memorial submitted by Nicaragua, Vol. I, 95-144, paras. 20-43; Reply of Nicaragua, Vol. I, 180-187, paras. 9.6-9.34; Argument by Mr Brownlie, Verbatim Record, CR 2007/2, 10-43, paras. 1-147.

<sup>39</sup> Judgment, *op. cit.*, note 2, 78, para. 286.

<sup>40</sup> *Ibid.*, 75, para. 277.

<sup>41</sup> *Ibid.*, 75-77, paras. 277-281.

<sup>42</sup> *Ibid.*, 78, para. 287.

poses of drawing the bisector. It follows that the bisector line is an azimuth of 70° 14'41.25".<sup>43</sup>

## 2. Delimitation Around the Islands

The next issue concerns the delimitation around the islands in the disputed area. Nicaragua argued that these islands should be enclaved within only a 3 nautical mile territorial sea, since a full 12 nautical mile territorial sea would result in giving a disproportionate amount of the maritime areas in dispute to Honduras.<sup>44</sup> By rejecting this argument, the Court ruled that the Honduran islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay shall be accorded a territorial sea of 12 nautical miles.<sup>45</sup> It follows that the territorial seas attributed to the Honduran islands and the Nicaraguan island of Edinburg Cay would lead to an overlap in the territorial seas of the Parties.

Concerning the delimitation method applicable to the overlapped area, the Court referred to the *Qatar/Bahrain* case, which stated that:

The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.<sup>46</sup>

Following the precedent, the Court applied the equidistance method in the delimitation of the territorial seas between the Parties. According to the Court,

Delimiting of this relatively small area can be satisfactorily accomplished by drawing a provisional equidistance line, using co-ordinates for the above islands as the base points for their territorial seas [...]. The Court does not consider there to be any legally relevant "special circumstances" in this area that would warrant adjusting this provisional line.<sup>47</sup>

Hence, as illustrated in Figure 2, the equidistance line became the delimitation line in this area.

## 3. Starting Point and Endpoint of the Maritime Boundary

The last issue related to the starting point and endpoint of the maritime boundary. Both Parties agreed that the appropriate starting point should be located 3 nautical miles seaward from the "mouth" of the River Coco; and that for the first 3 nautical miles a negotiated solution should be found. Yet there was no agreement from where on the River Coco these 3 nautical miles should be measured and in

<sup>43</sup> Ibid., 81, para. 298. See Figure 1. The validity of the bisector method will be discussed in Part V.

<sup>44</sup> Judgment, op. cit., note 2, 83, para. 300. This is a response to the question posed by Judge Simma during the oral proceedings. Judge Simma's question was: "What are the reasons for the indication by Nicaragua of 3-mile territorial seas around these cays while both Parties to the present dispute in general claim 12-mile territorial seas?", Verbatim Record, CR 2007/12, 54.

<sup>45</sup> Judgment, op. cit., note 2, paras. 300-302.

<sup>46</sup> ICJ Reports 2001, 94, para. 176.

<sup>47</sup> Judgment, op. cit., note 2, para. 304.

what direction.<sup>48</sup> In this respect, the Court set, by fifteen votes to two, the starting-point 3 miles out to sea (15° 00' 52"N and 83° 05'58"W) from the point already identified by the 1962 Mixed Commission along the azimuth of the bisector.<sup>49</sup> The Court found, by sixteen votes to one, that the Parties must negotiate in good faith with a view to agreeing on the course of the delimitation line which links the end of the land boundary as fixed by the 1906 Award and the point of departure of the maritime delimitation in accordance with this judgment.<sup>50</sup>

By contrast, the Court did not specify the precise location of the endpoint, and merely stated that it extends beyond the 82<sup>nd</sup> meridian without affecting third-state rights.<sup>51</sup> Unlike the earlier case law in this field, no mention was made of the proportionality test, although Nicaragua argued this point.<sup>52</sup> Yet the Court did not clarify the reason for this omission. In conclusion, by fourteen votes to three, the Court drew the single maritime boundary as illustrated in Figure 3.<sup>53</sup>

### III. The Applicability of the Equidistance Method in the Law of Maritime Delimitation: Analysis of the Previous Case Law

On the basis of the above description, the following Parts will examine the validity of the Court's argument with regard to the applicability of the equidistance method at the first stage of maritime delimitations in the *Nicaragua/Honduras* judgment. This issue should be addressed from the perspective of the development of jurisprudence relating to maritime delimitations. Thus, it will be appropriate to review the development of case law in this field.<sup>54</sup> There is no doubt that the equi-

<sup>48</sup> *Ibid.*, 84, para. 307. On this issue, see Memorial submitted by Nicaragua, Vol. I, 75-86, paras. 1-30; Counter-Memorial submitted by Honduras, Vol. I, 136-137, paras. 7.9-7.14; 144-146, paras. 7.38-7.45; Reply of Nicaragua, Vol. I, 195-206, paras. 10.1-10.30; Rejoinder of Honduras, Vol. I, 125-127, paras. 8.02-8.06.

<sup>49</sup> Judgment, *op. cit.*, note 2, 87, para. 311; 93, para. 321 (2).

<sup>50</sup> *Ibid.*, 87, para. 311 and 94, para. 321 (4).

<sup>51</sup> *Ibid.*, 90, para. 319.

<sup>52</sup> Reply of Nicaragua, Vol. I, 193, paras. 9.53-9.54; Argument by Mr Brownlie, Verbatim Record, CR 2007/5, 39-40, paras. 64-66; Argument by Mr Brownlie, Verbatim Record, CR 2007/12, 51-52, paras. 63-66. Concerning the concept of proportionality in the law of maritime delimitation, see Tanaka, *op. cit.*, note 3, 161-183.

<sup>53</sup> Judgment, *op. cit.*, note 2, 93, para. 321 (3). Yet the Court failed to specify a reference datum for the coordinates defining the single maritime boundary, although the illustrative maps annexed to the judgment are referred to WGS84. On this issue, see Pratt, *op. cit.*, note 2, 38.

<sup>54</sup> On this issue, see Tanaka, *op. cit.*, note 3, 51-126; L. Lucchini, La délimitation des frontières maritimes dans la jurisprudence internationale: vue d'ensemble, in: R. Lagoni/D. Vignes (eds.), *Maritime Delimitation*, Leiden/Boston 2006, 1-18; M.D. Evans, *Maritime Boundary Delimitation: Where Do We Go From Here?*, in: D. Freestone *et al.*, *The Law of the Sea: Progress and Prospects*, Oxford 2006, 137-160; D. Anderson, *Developments in Maritime Boundary Law and Practice*, in: D.A. Colson/R.W. Smith (eds.), *International Maritime Boundaries*, Vol. V, Leiden/Boston 2005, 3205-3209.

table principles as customary law are at the heart of the law of maritime delimitation. Nevertheless, the existing case law demonstrates that the approach to the principles is changing with the passage of time; and that the applicability of the equidistance method at the first stage of maritime delimitations is a fundamental issue underlying the change in approach. The development of the law of maritime delimitation can be divided into two phases: the first phase (1969-1992) and the second phase (1993-present).

## A. The First Phase: Case Law relating to Maritime Delimitations between 1969 and 1992

### 1. Genesis of the Two Approaches to the Equitable Principles

It is common knowledge that the ICJ, in the *North Sea Continental Shelf* cases of 1969, did not admit the mandatory character of the equidistance method. The Court rejected the existence of any obligatory method of continental shelf delimitation, asserting that “there [is] no other single method of delimitation the use of which is in all circumstances obligatory”.<sup>55</sup> According to the Court, “it is necessary to seek not one method of delimitation, but one goal”.<sup>56</sup> Thus, the Court indicated solely the factors to be taken into account in a negotiation, without specifying a concrete method.<sup>57</sup> In the Court’s view, it is the goal which should be stressed, and the law of maritime delimitation should be defined only by this goal, i.e., the achievement of equitable results. In this sense, one could speak of a result-oriented-equity approach.<sup>58</sup>

On the other hand, the Arbitral Tribunal, in the *Anglo-French Continental Shelf* case of 1997, followed a line of argument different from that adopted in the *North Sea Continental Shelf* judgment. First, unlike ICJ in the *North Sea Continental Shelf* cases, the Court of Arbitration equated Article 6 of the 1958 Geneva Convention on the Continental Shelf, as a single combined equidistance-special circumstances rule, to the customary law of equitable principles.<sup>59</sup> On the basis of this interpretation, secondly, the Court of Arbitration applied the equidistance method with modification. Specifically, in the Atlantic region, where Article 6 was applica-

<sup>55</sup> ICJ Reports 1969, 53, para. 101. See also, 49, para. 90.

<sup>56</sup> Ibid., 50, para. 92.

<sup>57</sup> Such factors are the general configuration of the coasts of the Parties, the physical and geological structure, the natural resources, the unity of deposits, and a reasonable degree of proportionality. Ibid., 53-54, para. 101.

<sup>58</sup> However, it must be remembered that several judges harboured misgivings about the Court’s approach to the equitable principles because of the lack of any specific method of delimitation. See Dissenting Opinion of Judge T a n a k a, *ibid.*, 195-196; Separate Opinion of Judge A m m o u n, *ibid.*, 145, para. 45; 132, para. 32.

<sup>59</sup> The *Anglo-French Continental Shelf* case, 18 United Nations, Reports of International Arbitral Awards, 45, para. 70.

ble, the Court of Arbitration considered that a strict application of the equidistance method would tend to produce inequitable results.<sup>60</sup> However, the Court did not consider that the existence of a special circumstance gave it “carte blanche to employ any method that it [chose] in order to effect an equitable delimitation of the continental shelf”.<sup>61</sup> It said that:

The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection. [...] [I]t seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation.<sup>62</sup>

Thus, the Court of Arbitration accepted the applicability of the equidistance method as a starting point, even where a particular geographical element exists in a situation of lateral delimitation.<sup>63</sup> In so doing, the Court of Arbitration considered equity to be a corrective element. One may call this the corrective-equity approach. According to this approach, the equidistance method is applied at the first stage of delimitation, and then a shift of the equidistance line may be envisaged if relevant circumstances warrant it. It could thus be contended that the arbitral award set another starting point for the case law in this field. In summary, based on the equitable principles, two different approaches appeared in the 1969 and 1977 decisions.

## 2. Predominance of the Result-Oriented Equity Approach

Later on, the result-oriented equity approach was strongly supported by the 1982 *Tunisia/Libya* judgment. The essence of the ICJ’s approach can be seen in the following passage of this judgment:

The result of the application of equitable principles must be equitable. [...] It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.<sup>64</sup>

Thus the Court accepted neither the mandatory character of equidistance, nor some privileged status of equidistance in relation to other methods.<sup>65</sup> According to the Court’s approach, the application of the equitable principles would be broken

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<sup>60</sup> In this region, the Scilly Isles constituted a special circumstance, *ibid.*, 114, paras. 244-245.

<sup>61</sup> *Ibid.*, para. 245.

<sup>62</sup> *Ibid.*, 116, para. 249.

<sup>63</sup> The Court took into account the fact that, in the Atlantic region, Article 6 was applicable. Yet, as Article 6 is the particular expression of a customary law of equitable principles, the result would be the same as if customary law had been applied.

<sup>64</sup> ICJ Reports 1982, 59, para. 70.

<sup>65</sup> *Ibid.*, 79, para. 110.

down into relevant circumstances in specific situations, ruling out any predetermined method.<sup>66</sup>

The result-oriented-equity approach was echoed by the Chamber of the ICJ in the *Gulf of Maine* case relating to the delimitation of a single maritime boundary (1984). In this case, the Chamber pronounced a “fundamental norm” applicable to every maritime delimitation between neighbouring States. The first norm is that maritime delimitation must be sought and effected by means of an agreement in good faith. The second norm is:

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.<sup>67</sup>

The second part of the fundamental norm includes three elements: (i) equitable criteria; (ii) a practical method; (iii) an equitable result. In this formulation, “an equitable result” should be achieved by resort to “equitable criteria” and a “practical method”. According to the Chamber, there has been no systematic definition of equitable criteria because of their highly variable adaptability to different concrete situations.<sup>68</sup> Thus “equitable criteria” are excluded from the legal domain. According to the Chamber,

[T]he criteria in question are not themselves rules of law and therefore mandatory in the different situations, but ‘equitable’, or even ‘reasonable’, criteria, and that what international law requires is that recourse be had in each case to the criterion, or the balance of different criteria, appearing to be most appropriate to the concrete situation.<sup>69</sup>

The same is true regarding the “practical method,” since the latter would be selected on a case-by-case basis, relying on actual situations.<sup>70</sup> It follows that according to the Chamber, the law defines neither the equitable criteria nor the practical method, simply advancing the idea of “an equitable result”.<sup>71</sup>

The full Court, in the *Libya/Malta* case of 1985, also stressed the result to be achieved, not the means to be applied, by stating that: “[i]t is however the goal – the equitable result – and not the means used to achieve it, that must be the primary element in this duality of characterization.”<sup>72</sup> At the stage of establishing the

<sup>66</sup> Judge Jiménez de Aréchaga clearly advocated this view. Separate Opinion of Judge Jiménez de Aréchaga, *ibid.*, 106, para. 24. By contrast, several judges criticized the Court’s approach, because this approach would blur the distinction between decisions based on equitable principles as law and those taken *ex aequo et bono*. See Dissenting Opinion of Judge Evensen, *ibid.*, 294, para. 14; 291, para. 12. Thus Judge Evensen was supportive of the corrective-equity approach. *Ibid.*, 296, para. 15. See also Dissenting Opinion of Judge Gros, *ibid.*, 149, para. 12; Dissenting Opinion of Judge Oda, *ibid.*, 270-271, paras. 182-184.

<sup>67</sup> ICJ Reports 1984, 299-300, para. 112.

<sup>68</sup> *Ibid.*, 312, para. 157.

<sup>69</sup> *Ibid.*, 313, para. 158.

<sup>70</sup> *Ibid.*, 315, paras. 162-163.

<sup>71</sup> However, Judge Gros criticized the Chamber’s approach, by stating that “this [was] closer to subjectivism than to the application of law to the facts with a view to the delimitation of maritime areas”. Dissenting Opinion of Judge Gros, *ibid.*, 377, para. 26.

<sup>72</sup> ICJ Reports 1985, 38-39, para. 45.

continental shelf boundary, however, the Court accepted the application of the equidistance method.<sup>73</sup> Thus the Court applied the equidistance method as a first provisional step, and the equidistance line was adjusted in a second stage on account of relevant circumstances. In so doing, the Court adopted the corrective-equity approach for the delimitation of opposite coasts at the operational stage. This shows a clear contrast to the *Tunisia/Libya* case, in which the equidistance method was completely discarded. It may be said that the *Libya/Malta* judgment has a hybrid character in the sense that two approaches were used.

The result-oriented approach was echoed by the two arbitral awards. In fact, the Arbitral Tribunal, in the *Guinea/Guinea-Bissau* case of 1985, ruled that: “They [the factors and methods] are not restricted in number and none of them is obligatory for the Tribunal, since each case of delimitation is a unicum, as has been emphasised by the International Court of Justice.”<sup>74</sup> Similarly, the Court of Arbitration, in the *St. Pierre and Miquelon* case (1992), held that the delimitation should “be effected in accordance with equitable principles, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result. The underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method.”<sup>75</sup> Overall it can be observed that between 1969 and 1992, international courts and tribunals basically took the result-oriented-equity approach.

## B. The Second Phase: Case Law relating to Maritime Delimitation between 1993 and 2007

### 1. The *Greenland/Jan Mayen* Case as a Turning Point

Nonetheless, the law of maritime delimitation was to change radically toward the corrective-equity approach. A turning point was the *Greenland/Jan Mayen* judgment of 1993. In the *Greenland/Jan Mayen* dispute, there was no agreement on a single maritime boundary, and, thus, the Court was “not empowered – or constrained – by any such agreement for a single dual-purpose boundary”.<sup>76</sup> Accordingly, the law applicable to the continental shelf and to the Fishery Zone must be examined separately.

Concerning the continental shelf, the applicable law was Article 6 of the 1958 Convention on the Continental Shelf which both Parties had ratified. The Court equated Article 6 with customary law by relying on a passage of the 1977 award of

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<sup>73</sup> Ibid., 47, para. 62.

<sup>74</sup> 25 ILM (1986), 251-307, 289-90, para. 89. Underline in the original. The French text is the authentic one. See Award of 14 February 1985, 89 RGDIP (1985), 484-537.

<sup>75</sup> The *St. Pierre and Miquelon* case, 31 ILM (1992), 1163, para. 38.

<sup>76</sup> The *Greenland/Jan Mayen* case, ICJ Reports 1993, 57, para. 43; 42-43, para. 9.

the Court of Arbitration in the *Anglo-French Continental Shelf* case.<sup>77</sup> For the Court,

[I]n respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether “special circumstances” require any adjustment or shifting of the line.<sup>78</sup>

Considering the fact that the Court had rejected Article 6 as customary law, this represents a turning point in terms of the relationship between treaty law and customary law. According to this interpretation, the equidistance method is incorporated into customary law.

With respect to law applicable to the Fishery Zone, the Court equated the customary law applicable to the FZ with that governing the EEZ on the basis of the agreement of the Parties.<sup>79</sup> The next issue is the relation between the law applicable to the FZ and that governing the continental shelf. The Court, referring to the *Gulf of Maine* and the *Libya/Malta* cases, ruled that:

It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.<sup>80</sup>

Furthermore, quoting the *Anglo-French* arbitral award, the Court held that:

It cannot be surprising if an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary.<sup>81</sup>

Thus the Court assimilated the law of continental shelf delimitation with that of the FZ at the customary law level.

In summary, the Court attempted to achieve assimilation at three levels: (i) the assimilation of Article 6 of the Convention on the Continental Shelf to customary law; (ii) assimilation between the law applicable to the EEZ delimitation and that governing the FZ delimitation in customary law; and (iii) the assimilation of customary law for the continental shelf delimitation and for an EEZ/FZ delimitation. The Court’s view is significant in the sense that so far as the coasts face each other, the law of maritime delimitation is to be unified under a triple rule of “agreement-equidistance-special circumstances”. Consequently, the equidistant (median) line is to be drawn at a first stage, and relevant circumstances are to be considered at a second stage. Thus, for the first time in the case law of the ICJ, the corrective-equity approach was adopted as customary law. On the basis of this approach,

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid., 61, para. 51.

<sup>79</sup> Ibid., 59, para. 47.

<sup>80</sup> Ibid., 62, para. 53.

<sup>81</sup> Ibid., para. 56.

the Court drew a coincident maritime boundary for the continental shelf and the FZ.

## 2. Development of the Corrective-Equity Approach

The Court's approach in the *Greenland/Jan Mayen* case was echoed by the *Eritrea/Yemen* arbitration (the Second Phase) of 1999.<sup>82</sup> The view of the Tribunal is worth quoting in full:

It is a generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention, and in particular those of its Articles 74 and 83 which respectively provide for the equitable delimitation of the EEZ and of the continental shelf between States with opposite or adjacent coasts.<sup>83</sup>

Thus the Tribunal decided that:

[T]he international boundary shall be a single all-purpose boundary which is a median line and that it should, as far as practicable, be a median line between the opposite mainland coastlines. This solution is not only in accord with practice and precedent in the like situations but is also one that is already familiar to both Parties.<sup>84</sup>

Hence the Tribunal expressly ruled that, so far as the maritime delimitation between States with opposite coasts was concerned, a median or an equidistance line would provide an equitable maritime boundary under Articles 74 and 83 of the LOSC. At the same time, it should be stressed that the Tribunal did not consider a median line as the end product. Indeed, the Tribunal applied a proportionality test to examine the equitableness of the median line drawn by it. This means that if there is disproportionality, such a line should be modified, which will lead to the corrective-equity approach.

The corrective-approach was further promoted by the ICJ in the *Qatar/Bahrain* dispute of 2001. This dispute simultaneously included the delimitation of both territorial sea and single maritime boundaries. Neither Bahrain nor Qatar was a party to the 1958 Geneva Conventions on the Law of the Sea. While Bahrain had ratified the 1982 LOSC, Qatar was only a signatory to it. Thus, it was customary law which was applicable to this case.<sup>85</sup> Concerning the law applicable to territorial sea delimitation, the Court held that Article 15 of the LOSC was to be regarded as having a customary character. In this respect, the Court clearly adopted the corrective-equity approach for a territorial sea delimitation.<sup>86</sup> Concerning the law appli-

<sup>82</sup> For the text of the *Eritrea/Yemen* arbitration (the Second Phase), 40 ILM (2001), 983-1013. Concerning the commentary on this arbitration, see Y. T a n a k a, Reflections on the *Eritrea/Yemen* Arbitration of 17 December 1999 (Second Phase: Maritime Delimitation), 48 NILR (2001), 197-225.

<sup>83</sup> The *Eritrea/Yemen* arbitration (the Second Phase), op. cit., note 82, 1005, para. 131.

<sup>84</sup> Ibid., para. 132.

<sup>85</sup> ICJ Reports 2001, 91, para. 167. It should be noted that both Parties agree that most of the provisions of the 1982 Convention which are relevant for the present case reflect customary law. Ibid.

<sup>86</sup> Ibid., 94, para. 176.

cable to a single maritime boundary, it should be recalled that customary law was applicable in the northern sector. Referring to the approach taken by the *Greenland/Jan Mayen* case, i.e., the corrective-equity approach, the Court in the *Qatar/Bahrain* case clearly stated that it would follow the same approach in the present case.<sup>87</sup> In this regard, it is important to note that in the area where a single maritime boundary was to be drawn, “the coasts of the two States [were] rather comparable to adjacent coasts”.<sup>88</sup> Accordingly, the ICJ explicitly accepted, for the first time in the case law of the Court, the applicability of the corrective-equity approach as customary law in the delimitation between States with adjacent coasts.<sup>89</sup> Moreover, the Court noted that:

[T]he equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.<sup>90</sup>

This appears to suggest assimilation between the law applicable to a territorial sea delimitation and a single maritime boundary delimitation.

The ICJ, in the *Cameroon/Nigeria* case, broke new ground by applying the corrective-equity approach under Articles 74 and 83 of the LOSC. With respect to the law applicable to the maritime delimitation, both Cameroon and Nigeria were Parties to the LOSC.<sup>91</sup> Accordingly, the relevant provision, in particular Articles 74 and 83 of the Convention, was applicable to the maritime delimitation.<sup>92</sup> In this regard, the Court took the following interpretation:

They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result”.<sup>93</sup>

On the basis of the *Greenland/Jan Mayen* and *Qatar/Bahrain* cases where the corrective-equity approach was applied, the Court explicitly stated that it would “apply the same method in the present case”.<sup>94</sup> Hence, the corrective-equity approach was applied in the *Cameroon/Nigeria* case. It is worth noting that the

<sup>87</sup> Ibid., 111, para. 230. In this regard, the Court held that “it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line”. Ibid.

<sup>88</sup> Ibid., 91, para. 170.

<sup>89</sup> Y. T a n a k a, Reflections on Maritime Delimitation in the *Qatar/Bahrain* Case, 52 ICLQ (2003), 76-77.

<sup>90</sup> ICJ Reports 2001, 111, para. 231.

<sup>91</sup> Cameroon ratified the UN Convention on the Law of the Sea on 19 November 1985 and Nigeria ratified the Convention on 14 August 1986.

<sup>92</sup> Judgment, ICJ Reports 2002, 440, para. 285. See also Memorial of Cameroon, 533-34, para. 5.75-5.78; argument by Mr K a m t o, Verbatim Record, CR 2002/22, 43, para. 24.

<sup>93</sup> The Judgment, ICJ Reports 2002, 441, para. 288.

<sup>94</sup> Ibid., 442, para. 290.

Court applied the corrective-equity approach under Articles 74 and 83 of the LOSC.<sup>95</sup> According to the Court's interpretation, a specific method, i.e. the equi-distance method, should be incorporated into Articles 74 and 83.

### 3. Two Arbitral Awards in 2006 and 2007

The corrective-equity approach was also applied by the *Barbados/Trinidad and Tobago* arbitration of 2006 and the *Guyana/Suriname* arbitration of 2007. In the *Barbados/Trinidad and Tobago* arbitration, the Arbitral Tribunal ruled:

The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result.<sup>96</sup>

In relation to this, the Arbitral Tribunal stated that: "While no method of delimitation can be considered of and by itself compulsory, and no court or tribunal has so held, the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified."<sup>97</sup> The first part of this sentence does not coincide with the previous case law because the ICJ confirmed the application of the equidistance method at the first stage of the delimitation process under Articles 74 and 83 of the LOSC as well as customary law. To this extent, it would appear that the *Barbados/Trinidad and Tobago* award was still affected by the result-oriented-equity approach advocated in case law at the early stage. Even so, it is worth noting that the Arbitral Tribunal adopted the corrective-equity approach in the operation of maritime delimitation.

The *Guyana/Suriname* arbitration of 2007 reflected the corrective-equity approach more clearly. With respect to the law applicable to the delimitation of the territorial seas, the Tribunal ruled that Article 15 of the Convention places primacy on the median line as the delimitation line between the territorial seas between opposite or adjacent States.<sup>98</sup> The Tribunal then examined special circumstances

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<sup>95</sup> Y. T a n a k a, Reflections on Maritime Delimitation in the *Cameroon/Nigeria* Case, 53 ICLQ (2004), 388-390.

<sup>96</sup> The *Barbados/Trinidad and Tobago* arbitration, para. 242. The text of the Award is available at the home page of the Permanent Court of Arbitration. <<http://www/pca-cpa.org>>. For an overview of this award, see Y. T a n a k a, Award of the Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the UN Convention on the Law of the Sea: the Barbados and the Trinidad and Tobago Case (11 April 2006), 21 IJMCL (2006), 523-534; B. K w i a t k o w s k a, The 2006 Barbados/Trinidad and Tobago Award: a Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation, 22 IJMCL (2007), 7-60.

<sup>97</sup> The *Barbados/Trinidad and Tobago* arbitration, op. cit., note 96, para. 306.

<sup>98</sup> The *Guyana/Suriname* arbitration, op. cit., note 1, 93, para. 296.

which might require the adjustment of the equidistance line, and ruled that special circumstances of navigation may justify deviation from the median (equidistance) line. The delimitation of the continental shelf and EEZ in the present case is governed by Articles 74 and 83 of the LOSC. In this respect, the Tribunal ruled that:

In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance.<sup>99</sup>

The Tribunal further stated that in addition to maritime delimitation between opposite coasts, the presumption in favour of equidistance applied in maritime delimitations between States with adjacent coasts.<sup>100</sup> Thus the Tribunal took the corrective-equity approach, by stating that:

The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution. The Tribunal will follow this method in the present case.<sup>101</sup>

Having examined whether there were relevant circumstances which might justify departure from the provisional equidistance line, the Arbitral Tribunal held that there were no such circumstances. The Tribunal therefore concluded that the equidistance line should be the delimitation line of the continental shelf and the EEZ between the Parties.<sup>102</sup>

#### 4. Summary

In summary, it may be observed that in broad perspective, the law of maritime delimitation has developed from the co-existence of the two approaches toward the unification of the corrective-equity approach. The unification of the law can be seen at four levels:<sup>103</sup>

- (i) The interpretation of treaties: the unification of the interpretation of Article 6 of the 1958 Geneva Convention on the Continental Shelf and that of Article 83 of the 1982 LOSC;
- (ii) Sources of the law: the unification between customary law and treaty law in the field of maritime delimitation;
- (iii) Maritime spaces: the unification of the law applicable to the delimitation of the territorial sea, the continental shelf and the EEZ.
- (iv) The configuration of the coast: the unification of the law applicable to delimitation between States with adjacent coasts, and those with opposite coasts.

<sup>99</sup> Ibid., 108, para. 335.

<sup>100</sup> Ibid., 109, para. 338.

<sup>101</sup> Ibid., 110, para. 342.

<sup>102</sup> Ibid., 127, para. 392.

<sup>103</sup> Y. T a n a k a, Quelques observations sur deux approches jurisprudentielles en droit de la délimitation maritime: l'affrontement entre prévisibilité et flexibilité, *Revue Belge de Droit International* (2004), 454. See also A n d e r s o n, *op. cit.*, note 54, 3209.

The unification of the law of maritime delimitation under the corrective-equity approach would be significant with a view to enhancing the normative level of the law of maritime delimitation. Indeed, from a normative viewpoint, the result-oriented-equity approach is problematic for three main reasons.<sup>104</sup>

The first problem is its excessive subjectivity. Without any objective criteria for judging equitableness, the result-oriented equity approach runs the risk of producing legal impressionism. An unlimited discretion for the Court would lead not only to a fragmentation of the law of maritime delimitation, but would also equate the result of its application with a decision *ex aequo et bono*.

The second problem is unpredictability. With the result-oriented approach, it is the specific factors characterising any given individual situation which define the equitable result. Consequently, the appreciation of equity is defined by each of the factors of any given case and this makes it difficult to form predictable rules of maritime delimitation. This is contrary to an essential requirement of law: certainty and predictability. As an essential condition, the law of maritime delimitation should have a degree of predictability beyond the reliance on the particular circumstances of each case. Over-individualisation prevents this by undermining the certainty and predictability of law.<sup>105</sup>

Third, the result-oriented equity approach is nothing but a truism.<sup>106</sup> The problem is that of determining which rules of international law should be applied in order to achieve an equitable result.<sup>107</sup> In fact, the point disputed between the Parties is the concrete method to be applied for maritime delimitations. According to the result-oriented equity approach, however, such criteria and methods are considered as outside the realm of law. In sum, because of its excessive subjectivity and unpredictability, the result-oriented equity approach carries the danger of undermining the normativity of the law of maritime delimitation.<sup>108</sup>

By contrast, the important advantage of the corrective-equity approach is that it has a certain degree of predictability by incorporating a specific method of delimitation, i.e., the equidistance method, into the legal domain. According to the corrective-equity approach, a consideration of equity may come into play at a second stage, but only in cases in which equidistance lines provisionally drawn produce

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<sup>104</sup> T a n a k a, op. cit., note 3, 123-125.

<sup>105</sup> It is of particular interest to note that in the *Libya/Malta* case, Malta argued that "an excessive individualisation of the rule of law, which changes from one case to another, would be incompatible with the very concept of law". Pleadings, Vol. II, 293, para. 111.

<sup>106</sup> According to Judge O d a, the equitable principles under this approach are merely "the principle of non-principle", Dissenting Opinion of Judge O d a in the *Tunisia/Libya* case, ICJ Reports 1982, 157, para. 1.

<sup>107</sup> *Ibid.*, 255, para. 155.

<sup>108</sup> P. W e i l, *Perspective du droit de la délimitation maritime*, Paris 1988, 174-75. See also by the same author, *Le droit international en quête de son identité*, Cours général de droit international public, 237 RCADI (1992), 245-60; and *L'équité dans la jurisprudence de la Cour internationale de Justice: Un mystère en voie de dissipation?*, in: V. Lowe/M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, Essays in Honour of Sir Robert Jennings, Cambridge 1996, 121-44.

inequitable results. To this extent, the corrective-equity approach makes it possible to reduce the subjectivity and unpredictability of equitable principles.

#### IV. Questions Concerning the Court's View on the Equidistance Method in the *Nicaragua/Honduras* Case

##### A. The Court's View Concerning Instability of Basepoints

Although the ICJ, in the *Nicaragua/Honduras* dispute, applied the equidistance method to delimitation around the islands in the disputed area, the Court precluded the application of this method in delimitation of the other overlapping area. In so doing, the Court took the view that the application of the equidistance method at the first stage of maritime delimitations is not obligatory, even though "equidistance remains the general rule".<sup>109</sup> As explained earlier, an essential reason for rejecting the use of the equidistance method in the *Nicaragua/Honduras* judgment related to the instability of the basepoints. Accordingly, a question arises whether or not this can be a decisive reason to exclude the equidistance method in the process of maritime delimitation. In this regard, it would appear that the majority opinion is not free from controversy.

First, as suggested by Judge R a n j e v a and Judge *ad hoc* T o r r e s B e r n á r d e z, it would appear that the difficulty in the instability of basepoints is not insurmountable.<sup>110</sup> In fact, during the oral proceedings, Honduras showed its provisional equidistance line.<sup>111</sup> Similarly, in relation to the seaward starting point, Nicaragua argued that: "The proposed starting line would be located at a point along that median line direction situated 3 nautical miles out to sea from the mouth of the Coco River."<sup>112</sup> In its Reply, Nicaragua further explained that: "This point [...] represents an approximate median line and the sector produced by this method is coincident with the alignment resulting from the bisector method [...]."<sup>113</sup> It would seem to follow that the seaward fixed starting-point proposed by Nicaragua arose from the application of the equidistance method. In fact, Nicaragua attached an il-

<sup>109</sup> Judgment, op. cit., note 2, 77, para. 281.

<sup>110</sup> Separate Opinion of Judge R a n j e v a in the *Nicaragua/Honduras* case, *ibid.*, 3, para. 10 (electronic text); Dissenting Opinion of Judge T o r r e s B e r n á r d e z, *ibid.*, 30, para. 128.

<sup>111</sup> Argument by Mr C o l s o n, Verbatim Record, CR 2007/10, 24-28, paras. 123-141. The equidistance line proposed by Honduras was constructed on the basis of Bobel Cay, Port Royal Cay and South Cay on the Honduran side, and Edinburgh Cay and Edinburgh Reef on the Nicaraguan side. The first segment of the provisional equidistance line extends in an east-south-east direction from the mainland to a point which is a trijunction point that is equally distant from Bobel Cay, Edinburgh Cay and the point fixed by the 1962 Mixed Commission, *ibid.*, 25, para. 127 and 26, para. 132. See also Judgment, op. cit., note 2, 75, para. 276; 78, para. 285.

<sup>112</sup> Memorial submitted by Nicaragua, Vol. I, 83, para. 23.

<sup>113</sup> Reply of Nicaragua, 197, para. 10.5.

lustration identifying an approximate median line in its Memorial.<sup>114</sup> During the oral proceedings, Nicaragua also showed its provisional median line dividing Nicaraguan and Honduran waters.<sup>115</sup> Hence it appeared to be possible to draw a provisional equidistance line in the *Nicaragua/Honduras* case.

Second, it must be noted that Article 7 (2) of the LOSC does envisage the problem of shifting coastlines:<sup>116</sup>

Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

Where, as the Court stated, the configuration of the coastlines of Nicaragua and Honduras is highly unstable, it appears that Article 7 (2) would have provided a solution for identifying reliable basepoints.<sup>117</sup> This provision explicitly recognizes that the straight baselines remain effective notwithstanding changes in the coastline. It would follow that a delimitation line on the basis of the baselines shall also remain effective.

Third, the impact of changes in coastline upon maritime boundaries should not be exaggerated. In reality, the configuration of coastlines is more or less changeable owing to erosion, accretion, and sea-level rise resulting from global warming. Considering the requirement for stability of maritime boundaries, however, it is arguable that in principle, changes in basepoints or baselines resulting from natural causes will not affect maritime boundaries already established between States concerned, unless those States agree otherwise.<sup>118</sup> It must also be remembered that un-

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<sup>114</sup> Memorial submitted by Nicaragua, 197.

<sup>115</sup> Argument by Mr Brownlie, Verbatim Record, CR 2007/12, 45, paras. 28-30.

<sup>116</sup> Separate Opinion of Judge Ranjeva in the *Nicaragua/Honduras* case, op. cit., note 2, 2, para. 7. See also Dissenting Opinion of Judge Torres Bernárdez, *ibid.*, 30, para. 131. With respect to Article 7 (2) of the LOSC, see S. McDonald/V. Prescott, *Baselines along Unstable Coasts: An Interpretation of Article 7 (2)*, 8 *Ocean Yearbook* (1990), 70-89; V. Prescott/E. Bird, *The Influence of Rising Sea Levels on Baselines from Which National Maritime Claims are Measured and an Assessment of the Possibility of Applying Article 7 (2) of the 1982 Convention on the Law of the Sea to Offset Any Retreat of the Baseline*, *International Boundaries and Boundary Conflict Resolution*, Proceedings of the IBRU Conference held at the University of Durham 14-17 September 1989 (International Boundaries Research Unit, University of Durham, 1989), 279-300.

<sup>117</sup> Dissenting Opinion of Judge Torres Bernárdez in the *Nicaragua/Honduras* case, op. cit., note 2, 30, para. 131; 36, para. 161.

<sup>118</sup> Professor Soons has examined the question whether changes in basepoints or baselines resulting from sea level rise may affect existing maritime boundaries, and answered in the negative. A.H.A. Soons, *The Effects of a Rising Sea Level on Maritime Limits and Boundaries*, 37 *NILR* (1990), 226-229. The answer will be the same with respect to changes in basepoints resulting from erosion or accretion. In practice, for instance, Article 3 (3) of the 2000 Agreement on the Delimitation of the Territorial Sea, Exclusive Economic Zone and Continental Shelf in the Beibu Gulf (Gulf of Tonkin) between the People's Republic of China and the Socialist Republic of Vietnam makes clear that no topographical change shall change the demarcation line for the territorial seas of the two countries unless otherwise agreed by the Parties. For the text of the Agreement, see Colson/Smith, op. cit., note 54, 3755-3758.

der Article 62 (2) of the Vienna Convention on the Law of Treaties, treaties establishing a boundary – which must be deemed to include treaties establishing maritime boundaries – are excluded from invocation of a fundamental change of circumstances.<sup>119</sup> For the same reasons, boundaries established through international adjudication will not be affected by subsequent changes in the configuration of the coasts.<sup>120</sup>

Fourth, the Court appeared to consider that an equidistance line may automatically become “arbitrary and unreasonable” if the location of the basepoints was changed because of the shift of coastlines. If this is the case, the equitableness of an equidistance line will rely solely on the choice of the basepoints. However, it should be noted that the equitableness of a provisional equidistance line must be envisaged by taking all relevant circumstances into account. Having constructed a provisional equidistance line, the international courts and tribunals are required to examine whether there are any circumstances which necessitate its adjustment. Where an equidistance line was established as a maritime boundary by international courts and tribunals, the line was considered as equitable in relation to all relevant circumstances. Should an equidistance line today be equitable with regard to all relevant circumstances, it is arguable that the shift of coastlines alone will not automatically make the equidistance line inequitable.<sup>121</sup>

Fifth, the Court stated that “the pair of base points to be identified on either bank of the River Coco at the tip of the Cape would assume a considerable dominance in constructing an equidistance line”.<sup>122</sup> However, as Judges Ranjeva and Torres Bernárdez pointed out, it is inconceivable that the use of a single pair of base points would become an obstacle requiring a complete rejection of the application of the equidistance line.<sup>123</sup> In fact, the Court, in the *Cameroon/Nigeria* case, constructed the equidistance line on the basis of only two points of the mouth of the Akwayafe and Cross Rivers, West Point and East Point, as determined on the 1994 edition of British Admiralty Chart 3433.<sup>124</sup> Accordingly, it may be argued that the limited number of base points cannot be a decisive factor for one to discard the application of the equidistance line at the first stage of maritime delimitation.

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<sup>119</sup> Soons, op. cit., note 118, 228.

<sup>120</sup> Ibid., 229.

<sup>121</sup> I am obliged to Professor Hugh Thirlway for drawing my attention to this point.

<sup>122</sup> Judgment, op. cit., note 2, 75, para. 277.

<sup>123</sup> Separate Opinion of Judge Ranjeva in the *Nicaragua/Honduras* case, *ibid.*, 3-4, para. 10; Dissenting Opinion of Judge Torres Bernárdez, *ibid.*, 30, para. 132. See also Argument by Mr Quéneudec, Verbatim Record, CR 2007/14, 24-29, paras. 1-25.

<sup>124</sup> ICJ Reports 2002, 443, para. 292.

## B. Inter-Linkage between Legal Title and the Delimitation Method

The next issue relates to whether the equidistance method should be applied at the first stage of maritime delimitations as a legal obligation. In this respect, the Court, in the *Nicaragua/Honduras* case, ruled that:

[T]he 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.<sup>125</sup>

However, it would appear that this view is not free from controversy. The issue should be examined in connection with the legal title over marine spaces. The *Libya/Malta* case concerning the delimitation of the continental shelf provides an important insight into this. In this case, the full Court made two important points.

First, the Court accepted that the distance criterion constitutes the common legal title for both the continental shelf and the EEZ. In the Court's view,

[T]he institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law. [...] Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as the exclusive economic zone.<sup>126</sup>

Accordingly, "at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf".<sup>127</sup>

Second, the Court supported the existence of a link between the legal title and a method of delimitation by saying that:

The criterion is linked with the law relating to a State's legal title to the continental shelf. [...] It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.<sup>128</sup>

For the Court,

[T]he legal basis of that which is to be delimited cannot be other than pertinent to the delimitation.<sup>129</sup>

Having examined the equities of the distance criterion and of the results of its application, the Court affirmed the validity of the approach consisting in tracing a median line at the provisional stage.<sup>130</sup>

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<sup>125</sup> Judgment, op. cit., note 2, 74, para. 272.

<sup>126</sup> ICJ Reports 1985, 33, para. 34.

<sup>127</sup> Ibid., 35, para. 39.

<sup>128</sup> Ibid., 46-47, para. 61.

<sup>129</sup> Ibid., 34, para. 34.

<sup>130</sup> Ibid., 47, para. 62.

In the present writer's view, as the Court itself ruled, there seems to be a general sense that the method of delimitation should be connected to the legal title. For instance, *Weil* explicitly advanced the view, by saying that:

[I]l est tout aussi évident, faut-il le rappeler, que la délimitation est étroitement liée à la base juridique du titre. La délimitation ne peut pas être comprise en dehors du titre; elle est fille du titre.<sup>131</sup>

*Lucchini* and *Voelckel* echoed this view, by stating that:

Le titre est, en effet, l'élément fondamental de base. La délimitation ne peut avoir lieu qu'à partir de lui et en s'appuyant sur lui.<sup>132</sup>

Since the legal title over maritime spaces is attributed by virtue of distance, it is logical that the method of delimitation should reflect this element. The criterion of distance is spatial in nature. Equidistance is the only method which reflects the spatial nature of the distance criterion, for it comes nearest to an equal division of overlapping area by relying on the distance from the coasts.<sup>133</sup> Should a method of delimitation be combined with the distance criterion, it is arguable that the equidistance method should logically be singled out. Currently, as the Court ruled in the *Libya/Malta* case, there is no doubt that the distance criterion as the common legal title for the continental shelf and the EEZ has become customary law. Where the legal title based on the distance criterion reflects customary law, the method derived from the legal title would also have a customary nature. Hence, in the present writer's opinion, much can be said for the view that the equidistance method should be regarded as an obligatory method at the first stage of maritime delimitations.

## V. Questions Concerning the Validity of the Bisector Method

The next issue which needs to be discussed is the validity of the bisector method adopted in the *Honduras/Nicaragua* case. In this regard, three questions should be highlighted.

### A. Consistency with the Previous Case Law

The first question pertains to a consistency with the previous case law concerning the use of the bisector method. The Court stated that in instances where any

<sup>131</sup> *Weil*, op. cit., note 108, 53. The translation by *MacGlashan*, which differs slightly from the original text, is as follows: "[I]t must be remembered that delimitation is nonetheless closely linked with the legal basis of title. Delimitation cannot be understood without title, which lies at its very heart." *P. Weil*, *The Law of Maritime Delimitation – Reflections*, translated by *M. MacGlashan*, Cambridge 1989, 48-49.

<sup>132</sup> *L. Lucchini/M. Voelckel*, *Droit de la mer*, Tome 2, *Délimitation, Navigation et Pêche*, Vol. I, *Délimitation*, Paris 1996, 211.

<sup>133</sup> *Weil*, op. cit., note 108, 53, 86.

basepoints that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method. According to the Court,

This was the situation in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, where equidistance could not be used for the second segment of the delimitation because the segment was to begin at a point not on any possible equidistance line. The Court there used a bisector to approximate the northerly change in direction of the Tunisian coast beginning in the Gulf of Gabes (ICJ Reports 1982, 94, para. 133 C (3)). The Chamber of the Court in the *Gulf of Maine* case also used a bisector of the Gulf-facing mainland because it deemed the small islands in the Gulf unsuitable for use as base points and because the first segment of the delimitation was to begin at "Point A", which was also off any equidistance line. The Arbitral Tribunal in the 1985 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau* case drew a perpendicular (the bisector of a 180° angle) to a line drawn from Almadies Point (Senegal) to Cape Shilling (Sierra Leone) to approximate the general direction of the coast of "the whole of West Africa". The Tribunal considered this approach, rather than equidistance, necessary in order to effect an equitable delimitation that had to be "integrated into the present or future delimitations of the region as a whole" (International Law Reports, Vol. 77, 683-684, para. 108).<sup>134</sup>

Nonetheless it appears questionable whether these cases quoted in the above paragraph could provide proper precedents with respect to the bisector method.

First, in the *Tunisia/Libya* case, the Court drew a line bisecting the angle between the line of the Tunisian coast (42°) and the line along the seaward coast of the Tunisian Islands of Kerkennah (62°). Consequently, the line of delimitation in the second sector runs at an angle of 52° to the meridian. In so doing, however, the Court purported to give the Kerkennah Islands a "half-effect". The Court's view in this matter is worth quoting:

The Court would recall however that a number of examples are to be found in State practice of delimitations in which only partial effect has been given to islands situated close to the coast. [...] One possible technique for this purpose, in the context of a geometrical method of delimitation, is that of the "half-effect" or "half-angle". Briefly, the technique involves drawing two delimitation lines, one giving to the island the full effect attributed to it by the delimitation method in use and the other disregarding the island totally, as though it did not exist. The delimitation line actually adopted is then drawn between the first two lines, either in such a way as to divide equally the area between them, or as bisector of the angle which they make with each other, or possibly by treating the island as displaced toward the mainland by half its actual distance therefrom. Taking into account the position of the Kerkennah Islands, and the low-tide elevations around them, the Court considers that it should go so far as to attribute to the Island a "half-effect" of a similar kind.<sup>135</sup>

Thus the purpose of drawing a bisecting line in the *Tunisia/Libya* case totally differs from the aim of the bisector line in the *Nicaragua/Honduras* case. In rela-

<sup>134</sup> Judgment, op. cit., note 2, 78-79, para. 288.

<sup>135</sup> ICJ Reports 1982, 89, para. 129.

tion to this, it has to be stressed that in the *Tunisia/Libya* case, the bisecting line was drawn between two lines along the seaward coasts of the same State, i.e. Tunisia,<sup>136</sup> while the bisector method in the *Nicaragua/Honduras* case concerns the coastlines of two States. It must also be noted that the *Tunisia/Libya* case is not an instance where any basepoints that could be determined by the Court are inherently unstable. Accordingly, it may be said that the *Tunisia/Libya* case does not provide a proper precedent in this matter.

Second, in the *Gulf of Maine* case between the United States and Canada, the primary reason for renouncing the equidistance method was the difficulty of the persistent uncertainty as to sovereignty over Machias Seal Island and the Parties' choice of point A as the obligatory point of departure for the delimitation line.<sup>137</sup> In the *Nicaragua/Honduras* case, however, no similar factors existed. In fact, the Court resolved the question concerning territorial sovereignty over the disputed islands before proceeding with maritime delimitation. While the Court made no finding as to sovereign title over islands in the mouth of the River Coco because of the changing condition of the area,<sup>138</sup> it is inconceivable that this could be a decisive reason to renounce the equidistance method. It must also be noted that the bisector method adopted in the *Gulf of Maine* case differs from the method used in the *Nicaragua/Honduras* case. In the *Gulf of Maine* case, the Parties had already selected point A as the obligatory point of departure for the delimitation line. Hence the Chamber of the ICJ drew from point A two lines respectively perpendicular to the two basic coastal lines, that is to say, the line from Cape Elizabeth to the international boundary terminus and the line from that latter point to Cape Sable. At point A, these perpendiculars form a reflex angle of about 278°. The Chamber drew a line bisecting the reflex angle as the delimitation line in the first segment.<sup>139</sup> In short, an obligatory starting point A played a primordial role in drawing the bisector line. Conversely, in the *Nicaragua/Honduras* case, a starting point of the delimitation line was determined by the Court after it drew a bisector line, and the point played no role in drawing the bisector line. Given these differences, it appears doubtful whether the *Gulf of Maine* case provides a proper precedent in relation to the bisector method.

In relation to this, it will be recalled that in the *Guyana/Suriname* arbitration, Suriname urged the Arbitral Tribunal to use the bisector method on the basis of the *Tunisia/Libya*, *Gulf of Maine* and *St. Pierre and Miquelon* cases. According to

<sup>136</sup> It will be recalled that the line of 52° in the second zone was criticised by Judge Oda because this line completely neglects the Libyan coastline by relying solely on the Tunisian coast. Dissenting Opinion of Judge Oda, *ibid.*, 268-269, para. 179. Kolb also criticised the judgment on this point. Kolb, *op. cit.*, note 23, 194. See also L.L. Herman, *The Court Giveth and the Court Taketh Away: An Analysis of the Tunisia-Libya Continental Shelf Case*, 33 ICLQ (1984), 830.

<sup>137</sup> ICJ Reports 1984, 332, para. 211.

<sup>138</sup> Judgment, *op. cit.*, note 2, 41, para. 145.

<sup>139</sup> Concerning the construction of the single maritime boundary in the *Gulf of Maine* case, the following article is of particular interest: J. Cooper, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 16 ODIL (1986), 59-90.

Suriname, the *Gulf of Maine* case provided the best example of the bisector method.<sup>140</sup> Nonetheless, the Arbitral Tribunal clearly discarded the “angle bisector methodology”, by stating that:

The Tribunal is bound to note that the coastlines at issue in these cited cases cannot be compared to the configuration of the relevant coastlines of Guyana and Suriname. For instance, the *Gulf of Maine* case where the angle bisector was utilised in the maritime delimitation between Canada and the United States bears little resemblance to the maritime area which is of concern in this delimitation. It seems to this Tribunal that the general configuration of the maritime area to be delimited does not present the type of geographical peculiarities which could lead the Tribunal to adopt a methodology at variance with that which has been practised by international courts and tribunals during the last two decades. Such peculiarities may, however, be taken into account as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line.<sup>141</sup>

It appears that the above view can also apply to the *Nicaragua/Honduras* case.

Third, the method used in the *Guinea/Guinea-Bissau* arbitration is not the bisector method as used in the *Nicaragua/Honduras* case. As Weil correctly pointed out, “[t]he bisector method is possible only where two clearly distinguished coastlines form a sharply defined angle; otherwise it rests on artificially reconstructed coastal directions”.<sup>142</sup> Nonetheless, the Arbitral Tribunal, in the *Guinea/Guinea-Bissau* case, drew a *grosso modo* perpendicular line to a straight line joining Pointe des Almadies and Cape Shilling. Consequently, only one coastline is involved in the system of a line perpendicular to the general direction of the coast. A perpendicular line to the general direction of the coast is nothing but an equidistance line based on the coast thus simplified.<sup>143</sup> In fact, Gidel regarded the perpendicular method as a special variant of the median line understood in its broad sense.<sup>144</sup>

It would follow from the above discussion that the *Tunisia/Libya*, *Gulf of Maine* and *Guinea/Guinea-Bissau* cases are not proper precedents for the bisector method used in the *Nicaragua/Honduras* judgment.

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<sup>140</sup> The *Guyana/Suriname* arbitration, op. cit., note 1, 118-119, paras. 369-370.

<sup>141</sup> Ibid., 120, para. 372.

<sup>142</sup> Weil, op. cit., note 131 (English version), 59.

<sup>143</sup> Kolb, op. cit., note 23, 302.

<sup>144</sup> G. Gidel, *Le droit international public de la mer: le temps de paix*, Tome III, *La mer territoriale et la zone contiguë*, reprint, Paris 1981, 769. See also Kolb, op. cit., note 23, 302; C. Carleton/Schofield, *Developments in the Technical Determination of Maritime Space: Delimitation, Dispute Resolution, Geographical Information Systems and the Role of the Technical Expert*, 3 *Maritime Briefing* (2002), (International Boundaries Research Unit), 20.

## B. Lack of Scientific Methodology for Drawing General Direction of a Coast

A second question associated with the bisector method concerns the lack of a scientific method for identifying the general direction of coastlines.<sup>145</sup> In selecting the relevant coastal front, the Court considered several options. A first option, which was the primary proposal of Nicaragua, was the coastal fronts running from Cape Gracias a Dios to the Guatemalan border for Honduras and to the Costa Rican border for Nicaragua. The Court discarded this proposal because it would cut off a “significant” portion of Honduran territory falling north of this line.<sup>146</sup> A second option was the Cape Falso-Putu Gorda coast generating a bisector with an azimuth of 70° 54’. According to the Court, however, this coast is also inappropriate since it is quite a short façade (some 100 km) from which to reflect a coastal front more than 100 nautical miles out to sea.<sup>147</sup> A third option was a coastal front extending from Cape Camerón to Rio Grande generating a bisector with an azimuth of 64° 02’. In the Court’s view, this coastal front would also overcompensate since 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.<sup>148</sup> In the end, the Court ruled that a Honduran coastal front running to Punta Patuca and a Nicaraguan coastal front running to Wouhnta were the relevant coasts for the purposes of drawing the bisector.<sup>149</sup>

Nevertheless, the Court specified no ground with respect to the selection of relevant coasts. It would seem that the Court attempted to avoid coastal fronts that would cut off a “significant” portion of the territory of the Parties. However, the term “significant” is so vague as to be devoid of objective content. It can also be observed that the Court attempted to ensure a balance between the length of the coastal façade and the extent of the maritime area generated from the façade. Yet it appears highly difficult to find an objective criterion in this matter. The inescapable conclusion may be that the bisector method is subjective in the sense that the result is changeable depending on the subjective selection of the general direction of the coasts. In relation to this, it must be noted that the problem associated with the identification of a general direction of the coast was already raised in the *Tunisia/Libya* and *Guinea/Guinea-Bissau* cases. In the *Tunisia/Libya* case, the ICJ drew a straight line drawn from the westernmost point of the Gulf of Gabes to Ras Kaboudia in order to identify the general direction of the Tunisia coast. However, Judge Evensen criticized the line on the grounds that it was drawn inland, some 11 kilometres from the actual sea-coast. According to the learned Judge, this is a

<sup>145</sup> Pratt, op. cit., note 2, 38.

<sup>146</sup> Judgment, op. cit., note 2, 82, para. 295.

<sup>147</sup> Ibid., para. 296.

<sup>148</sup> Ibid., 81, para. 297.

<sup>149</sup> Ibid., 81, para. 298.

refashioning of nature.<sup>150</sup> In the *Guinea/Guinea-Bissau* case, the line representing the general direction of the coast cuts almost all the coast of Guinea-Bissau for nearly 350 kilometres and runs approximately 70 kilometres inside of the latter's territory. Arguably the line departed radically from the actual sea-coast, and the problem of the refashioning of nature is more serious than in the *Tunisia/Libya* case.<sup>151</sup>

Furthermore, considering that the coastlines of Nicaragua and Honduras are unstable, the line connecting two points on the coast is also subject to change with the passage of time. If this is the case, the question arises why a current bisector line between the general directions of two coastlines remains reasonable regardless of the change of coastlines, while an equidistance line so constructed today suddenly becomes unreasonable in the future.

### C. Lack of Legal Ground of the Bisector Method

A third question pertains to the legal ground of the bisector method. In this respect, Nicaragua advanced a variety of reasons, such as: (a) the method produces an effective reflection of the coastal relationships; (b) the bisector produces a result which constitutes an expression of the principle of equal division of the areas in dispute; (c) the bisector method has the virtue of compliance with the principle of non-encroachment; (d) it also prevents, as far as possible, any cut-off of the seaward projection of the coast of either of the States concerned; and (e) the bisector method ensures "the exercise of the right to development of the Parties".<sup>152</sup> Nicaragua also referred to many relevant circumstances in order to demonstrate the equitable character of its own proposed bisector line.<sup>153</sup> Nonetheless, the Court refused to admit the pertinence of these factors. Indeed, the Court did not find them "legally determinative for the purposes of the delimitation to be effected".<sup>154</sup>

According to the Court, "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".<sup>155</sup> Yet this does not seem to be a legal ground to justify the bisector method. It would seem that the bisector method was used merely for the purpose of convenience.

<sup>150</sup> ICJ Reports 1982, 303, para. 19.

<sup>151</sup> E. David, La sentence arbitrale du 14 février 1985 sur la délimitation de la frontière maritime Guinée-Guinée Bissau, 31 AFDI (1985), 385; Weil, op. cit., note 108, 238-239.

<sup>152</sup> Judgment, op. cit., note 2, 79, para. 290.

<sup>153</sup> Ibid., para. 291. The relevant circumstances include the incidence of natural resources, equitable access to the natural resources, the unitary character of the Nicaraguan Rise as a single geological and geomorphological feature, security considerations, and equitable access to the main navigable channel in the adjacent coastal areas.

<sup>154</sup> Ibid., 80, para. 292.

<sup>155</sup> Ibid.

## VI. Conclusion

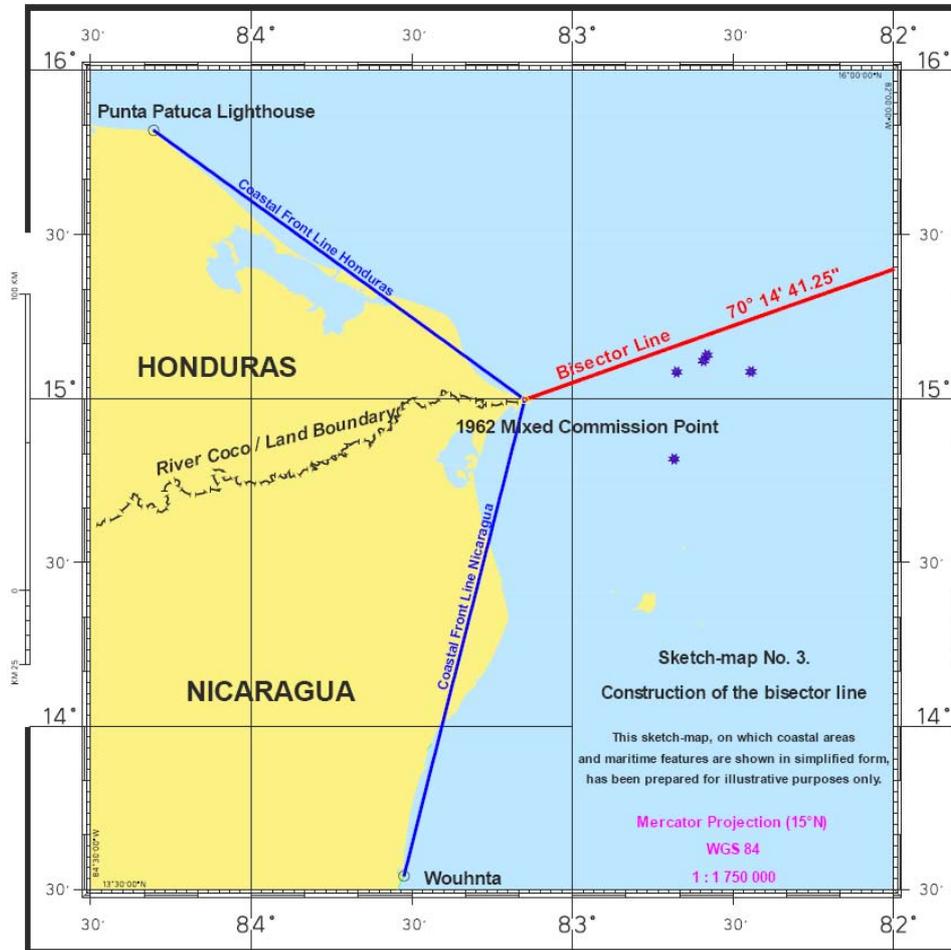
It is significant that the ICJ peacefully settled the territorial and maritime delimitation dispute between Nicaragua and Honduras. With all due respect to the Court's authority, a principal concern with the *Nicaragua/Honduras* judgment is that by rejecting the priority of the equidistance method at the first stage of maritime delimitations, this decision might undermine predictability of the law of maritime delimitation, and, thus, weaken the normativity of the law developed through jurisprudence. In light of the central importance of maritime delimitation in international law of the sea, it is desirable that rules governing them should be clear and predictable. As Judge Sørensen stated in the *North Sea Continental Shelf* cases, there is good reason to argue that the rules of international law should be so framed and constructed as to reduce causes of disagreement and dispute to a minimum. The clearer the rule, and the more automatic its application, the less the seeds of discord that will be sown.<sup>156</sup> It is also noteworthy that, in the *Libya/Malta* case, the ICJ itself stressed the importance of consistency and a degree of predictability going beyond the circumstances of each case.<sup>157</sup> By incorporating the equidistance method, the corrective-equity approach can enhance predictability as a requirement of law in the international community.<sup>158</sup> The corrective-equity approach developed by jurisprudence in this field may provide a useful criterion for limiting exaggerated unilateral claims by coastal States in an area where a maritime delimitation line is not yet drawn. Thus it will be necessary to maintain the unity of the law of maritime delimitation under the corrective-equity approach.<sup>159</sup>

<sup>156</sup> Dissenting Opinion of Judge *ad hoc* Sørensen, ICJ Reports 1969, 256. Akehurst also stated that: "Although it is desirable that rules of law should be just, it is perhaps even more desirable that they should be certain, clear and predictable", M. Akehurst, *Equity and General Principles of Law*, 25 ICLQ (1976), 809.

<sup>157</sup> The *Libya/Malta* case, ICJ Reports 1985, 39, para. 45.

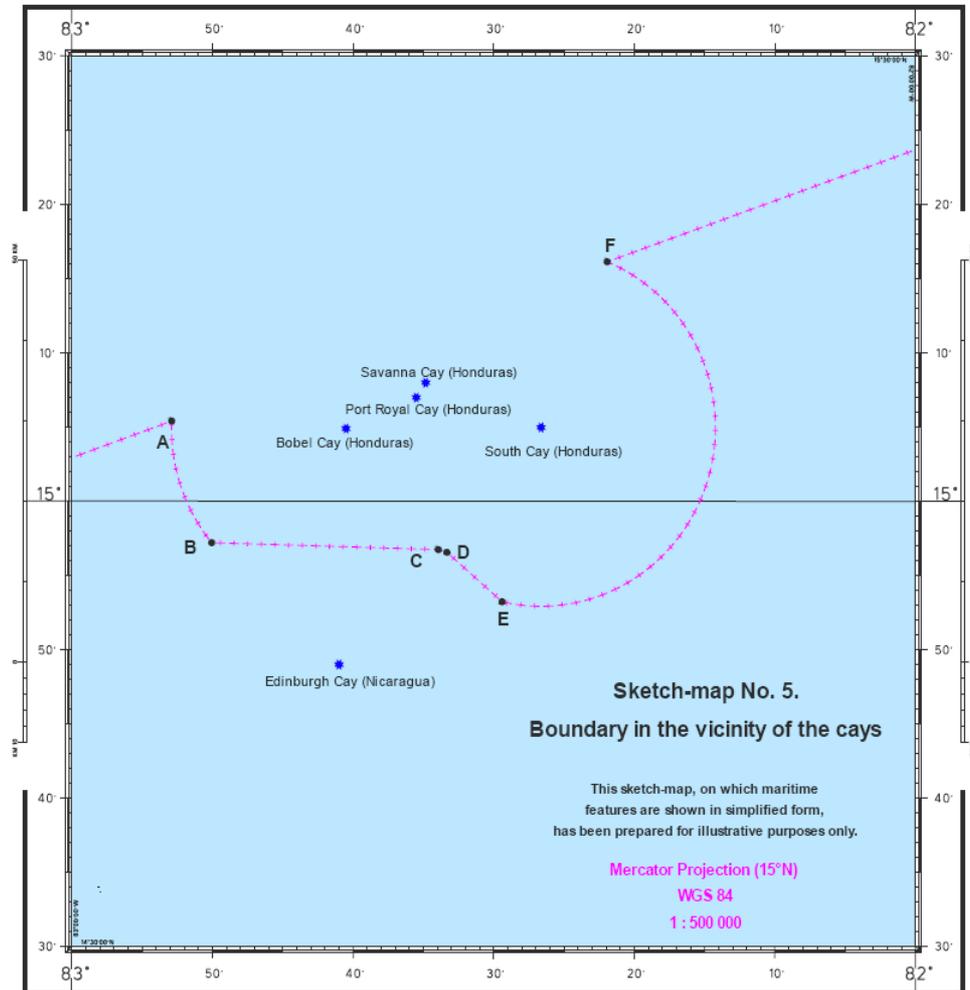
<sup>158</sup> Cf. M. Bedjaoui, L' "énigme" des "principes équitables" dans le droit des délimitations maritimes, 17 *Revista Española de Derecho Internacional* (1990), 384.

<sup>159</sup> In this regard, Judge Gilbert Guillaume's view, as expressed in the Sixth Committee of the General Assembly of the United Nations, should be remembered: "[I]t is encouraging to note that the law of maritime delimitations, by means of these developments in the Court's case law, has reached a new level of unity and certainty, whilst conserving the necessary flexibility. [...] *In all cases*, the Court, as States also do, must first determine provisionally the equidistance line. It must then ask itself whether there are special or relevant circumstances requiring this line to be adjusted with a view to achieving equitable results." (emphasis added) Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001, 10.



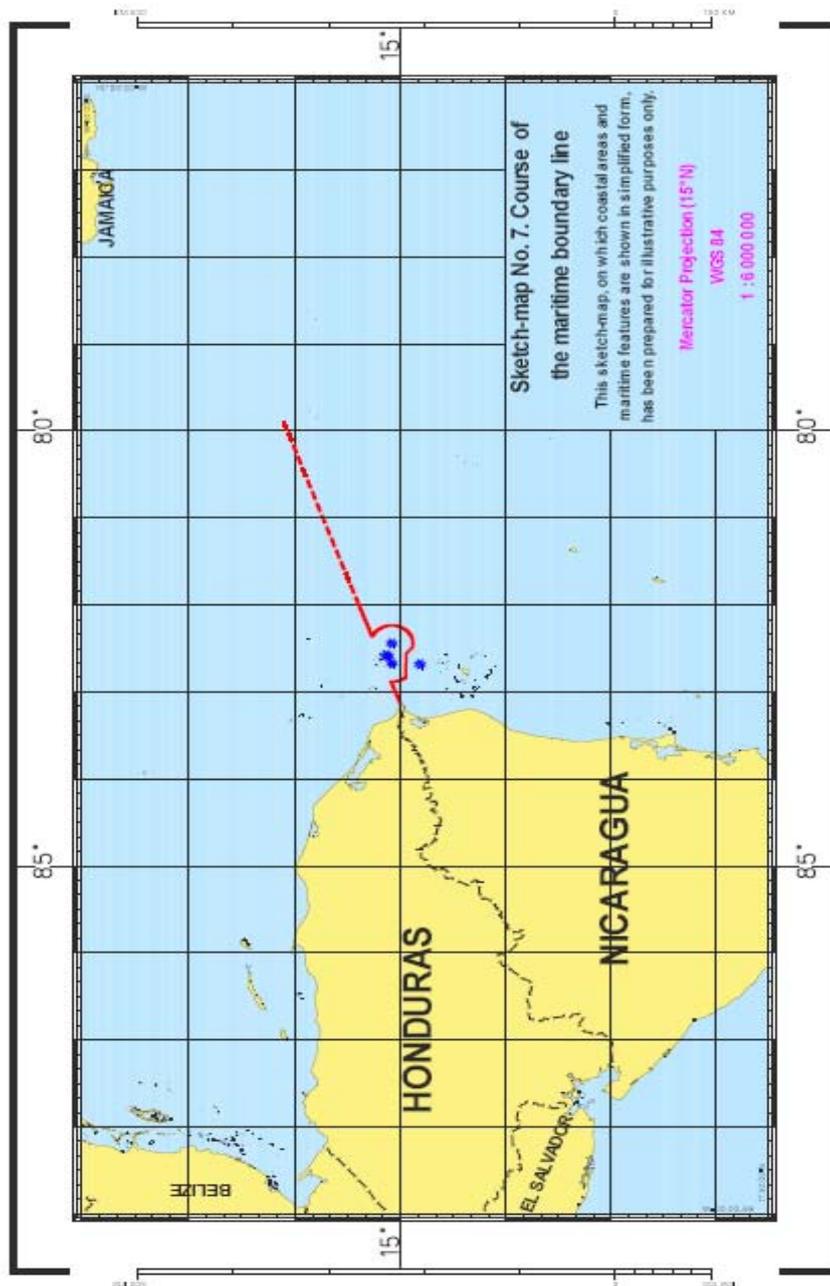
Source: Sketch-map No. 3 annexed to the *Nicaragua/Honduras* Judgment, ICJ Reports 2007, p. 82.

Figure 1



Source: Sketch-map No. 5 annexed to the *Nicaragua/Honduras* Judgment, ICJ Reports 2007, p. 86.

Figure 2



Source: Sketch-map No. 7 annexed to the *Nicaragua/Honduras* Judgment, ICJ Reports 2007, p. 91.

Figure 3

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