

COMMENTARY

Case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*

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1. BACKGROUND

Boundary disputes have dogged the relationship between Honduras and Nicaragua more or less continuously since the end of Spanish colonial rule in the 1820s, and on several occasions the two states have sought third-party assistance in resolving their territorial problems. In 1906 the King of Spain was asked to arbitrate a dispute over the alignment of the eastern section of the land boundary, and in 1960 the International Court of Justice (ICJ) was asked to determine whether the 1906 award – which Nicaragua had rejected – was binding (the Court decided that it was). In 1986 Nicaragua took Honduras to the ICJ over alleged cross-border activities by armed bands from Honduras, and in 1989 Nicaragua intervened in the ICJ boundary case between El Salvador and Honduras to protect its rights in the Gulf of Fonseca. The most recent legal tussle was initiated by Nicaragua in December 1999 when it asked the ICJ to determine the course of the single maritime boundary between the two states in the Caribbean Sea. Following two rounds of written pleadings and oral hearings in March 2007, the Court delivered its Judgment on 8 October 2007.

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2. ISLAND SOVEREIGNTY

Although Nicaragua's application to the Court made no mention of disputed land territory, during the proceedings both parties emphasised their sovereignty over a cluster of cays located between 30 and 40 nautical miles (nm) east of the land boundary terminus, south of the boundary claimed by Nicaragua and north of the boundary claimed by Honduras. In their submissions at the end of the oral hearings, both Nicaragua and Honduras asked the Court to determine sovereignty over the dispute features. The Court decided that this "new claim" was admissible on the grounds that it was inherent in the original claim relating to disputed maritime space.

Nicaragua's initial reluctance to make the cays a focus of the case may have been due to its recognition that its sovereignty claims were weaker than those of Honduras. That was certainly the conclusion of the Court, which ruled that Honduras has sovereignty over the four cays that Honduras identified in its oral submission as being disputed (Bobel Cay, Savanna Cay, Port Royal Cay and South Cay). The Court found that there was insufficient evidence to demonstrate that either party had title to the cays by virtue of *uti possidetis juris* and was unimpressed by Nicaragua's claim to title on the basis of adjacency. Instead, as in other recent cases concerning sovereignty over small and usually uninhabited islands (most notably the *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* case but also the Eritrea-Yemen arbitration concerning islands in the southern Red Sea), the Court was forced to determine sovereignty on the basis of limited *effectivités*. The Court concluded that Honduras had exercised a "modest but real display of authority over the four islands" which, on balance, gave it better title than Nicaragua.

Although island sovereignty became a major feature of the case, neither party argued that the disputed islands were relevant to the alignment of the continental shelf and exclusive economic zone (EEZ) boundary. Indeed neither party argued that the cays generated more than a 12 nm territorial sea. It is unclear whether this meant that the parties considered the cays to fall into the category of "rocks which cannot support human habitation or economic life of their own" addressed in Article 121(3) of the United Nations Convention on the Law of the Sea. As it has done in the past, the Court carefully avoided taking a position on the nature of rocks which are not entitled to continental shelf or EEZ of their own.

3. THE MARITIME BOUNDARY

As far as arguments concerning the maritime boundary were concerned, Honduras claimed that a boundary between the two states already existed along the 14° 59.8' N parallel at the time of independence, and that the conduct of the Parties since independence demonstrated the existence of a tacit agreement to that effect. In case that argument failed, Honduras hedged its bets by asserting that the parallel also accurately reflected the eastward-facing coastal fronts of the two countries, and therefore represented "both an adjustment and a simplification

of the equidistance line”.¹ Nicaragua argued that no maritime boundary had ever been established, and that an equitable division of maritime space could only be achieved by defining a boundary along “the bisector of two lines representing the entire coastal fronts of the two states”, running in a northeasterly direction from the land boundary terminus.²

The Court rejected Honduras’ argument that the *uti possidetis juris* principle provided the basis for a “traditional” maritime boundary, and also concluded that there was no tacit agreement concerning the existence of a boundary along the 14° 59.8’ N parallel. Therefore, the maritime boundary needed to be delimited *de novo*.

Neither party argued for the approach taken by the Court and arbitration tribunals in recent maritime boundary adjudications, namely to begin by identifying the equidistance line between the relevant coasts and then seeing whether any circumstances exist which justify a departure from the equidistance line in order to produce an equitable outcome.³ The Court agreed that such an approach would be inappropriate for this delimitation due to the fact that all of the basepoints controlling the equidistance line are located on the highly unstable tip of Cape Gracias a Dios at the mouth of the River Coco. The Court noted that “continued accretion at the tip of the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future”.⁴

To avoid such an outcome, the Court adopted the methodology advocated by Nicaragua, using the bisector of two coastal fronts to define the boundary. However, the Court used significantly shorter sections of coastline for defining the relevant coastal fronts than Nicaragua had done, producing a bisector running east-northeasterly along an azimuth of 70° 14’ 41.25” rather than northeasterly as proposed by Nicaragua. The Court suggested that the coastal fronts it employed both avoided “cutting off” Honduran territory – the perceived problem with Nicaragua’s proposed frontages – and produced a coastal façade of sufficient length to account properly for the coastal configuration in the disputed area. Both points are probably valid. Nevertheless, as with previous delimitations involving bisectors, the Court’s methodology for determining the relevant coastal frontages appears to have amounted to little more than a subjective assessment of what ‘looks right’. While there is nothing inherently wrong with such an approach, it would be good to see the Court take a lead in examining whether more scientific approaches could be adopted for determining the alignment of coastal fronts.

Although the boundary is defined primarily by the bisector line, it deviates around the cays found to be under Honduran sovereignty. In the vicinity of the cays, the boundary follows 12 nm arcs drawn around Bobel Cay and South Cay, except in the area where the territorial sea of the two cays overlaps with the territorial sea of Nicaragua’s Edinburgh Cay to the south; here the boundary

¹ Judgment, para. 274.

² The azimuth of Nicaragua’s proposed boundary was 53° 24’ 07.9”.

³ The ‘equidistance-relevant circumstances’ approach was explicitly adopted in all maritime boundary adjudications from the Greenland/Jan Mayen (Denmark/Norway) ICJ case (1993) to the Guyana-Suriname maritime boundary arbitration (2007).

⁴ Judgment, para. 277.

follows the equidistance line between the cays.⁵ The Court agreed with Honduras that the starting-point of the maritime boundary should be located 3 nm seaward of the land boundary terminus identified by a mixed commission in 1962, leaving the parties to agree on the best way to connect the two points, taking into account the fact the mouth of the River Coco currently lies some distance to the east of the agreed land boundary terminus. While it is tempting to accuse the Court of a ‘cop-out’ on this question, the fact that the river mouth is constantly shifting and the parties disagree over which of them owns various small islands in the vicinity of the river mouth means that a pragmatic approach reflecting realities on the ground is required. The Court rightly felt that the parties are in a much better position to find a workable solution to this challenging problem than it would be.

Eastward of Point F (the point at which the bisector meets the 12 nm arc around South Cay) the Court ruled that the boundary follows the bisector until it reaches the area where the rights of third States may be affected. While indicating that Honduras was wrong in claiming that the boundary could not extend east of the 82nd meridian without affecting the rights of Colombia, it noted the existence of the joint regime area established by Colombia and Jamaica in 1993 as a potential area in which third-party rights exist. Nicaragua disputes Colombia’s sovereignty over Serranilla Bank, which forms part of the joint regime area, so it may be that the Honduras-Nicaragua boundary will ultimately extend as far east as the 80th meridian. The answer to that question will depend on the outcome of the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case currently before the Court.

4. GENERAL COMMENTS

The governments of Nicaragua and Honduras have both expressed satisfaction at the outcome of the case. With the bisector line neatly dividing the area between the two claim lines more or less equally, that is hardly surprising. Honduras may be marginally happier than Nicaragua since it also had its claim to sovereignty over the four disputed cays upheld by the Court, but there is no obvious ‘winner’ and ‘loser’.

Although the Court’s decision not to begin with a provisional equidistance line might be viewed as a departure from what was becoming settled practice in maritime boundary adjudications, the Court explained clearly why it considered that it was inappropriate to adopt the ‘standard’ approach in this particular case. That said, a bisector of two coastal fronts is still an equidistance line, albeit an

⁵ For the purpose of defining the boundary, the Court appears to have defined Bobel, South and Edinburgh Cays using single points. Charts of the area show that while the areas of these cays which are permanently above water are only a few metres across, significantly larger areas are exposed at low water. In this context, it would appear that Honduras has been denied its full territorial sea entitlement and that the boundary between the cays may be incorrectly located. However, since Judges Gaja and Koroma both expressed reservations about awarding Honduras any territorial sea rights south of the 14° 59.8’ N parallel that Honduras claimed to be the boundary, it would be surprising if Honduras was to object to this aspect of the Judgment.

equidistance line between two simplified coastlines, so the Court's approach does not represent as much of a departure from normal practice as it might first appear. Indeed, there is much to commend the bisector method in general for delimitations between adjacent coastlines, although the lack of an accepted methodology for determining the general direction of a coastline remains a significant drawback.

Considering the criticism the ICJ has received over its failure to specify a reference datum for the coordinates defining the maritime boundary between Cameroon and Nigeria in 2002, it was rather disappointing to see that the Court failed to specify a reference datum for the coordinates defining the Honduras-Nicaragua boundary. The illustrative maps in the Judgment are referred to WGS84, so it would be reasonable to assume that the boundary coordinates should also be referred to WGS84, but there should be no need to have to make such assumptions. The arbitration tribunals that delimited the Barbados-Trinidad and Tobago and Guyana-Suriname maritime boundaries both did an excellent job dealing with technical aspects of the delimitation, and the ICJ would do well to follow their example in future maritime boundary cases.

Maps in the judgment







