INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING THE LAND, ISLAND AND MARITIME FRONTIER DISPUTE

(EL SALVADOR/HONDURAS: NICARAGUA intervening)

VOLUME V

Reply of Honduras (Vol. II); Written Observations on the Application for Permission to Intervene, and the related Oral Arguments

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COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DU DIFFÉREND FRONTALIER TERRESTRE, INSULAIRE ET MARITIME

(EL SALVADOR/HONDURAS; NICARAGUA (intervenant))

VOLUME V

Réplique du Honduras (vol. II); observations écrites sur la requête à fin d'intervention, et procédure orale y relative

FOURTH PUBLIC SITTING (7 VI 90, 10 a.m.)

Present: [See sitting of 5 VI 90, 11 a.m.]

ARGUMENT OF MR. HIGHET

COUNSEL FOR THE GOVERNMENT OF EL SALVADOR

Mr. HIGHET: Good morning. Mr. President, Members of the Chamber. It is, as ever, a great honour to be invited to plead in this courtroom and to address this Chamber today, in its particular composition, on behalf of the Republic of El Salvador.

I have been assigned the task of arguing that in order to intervene in these proceedings between El Salvador and Honduras, a "valid link of jurisdiction" between Nicaragua and those two States should be required. I am in fact in my capacity here as the other crust on Mr. Lauterpacht's loaf of bread.

We obviously run, dealing with this question, a risk of traversing old ground on this subject and I shall try to avoid this. Yet what more can be said about what the Court's Judgment in the *Italy* case referred to as the vexed question, "the vexed question of the 'valid link of jurisdiction'"? (*I.C.J. Reports 1984*, p. 28, para. 45).

What I would like to do this morning is to take up some selected issues that have newly come to my mind when reflecting on this "vexed question" of the jurisdictional link and I have put these issues together in a series of brief propositions, 13 brief propositions, which I will go through and I hope that they will bring some fresh air into our discussions of this difficult and perilous subject.

1. The first point is one of general application

In the *Malta* case the Court expressly stopped short of considering the question of the jurisdictional link (*I.C.J. Reports 1981*, p. 2, para. 36; p. 16, para. 27; p. 19, para. 32). In the *Italy* case the treatment by the Court was much the same (*I.C.J. Reports 1984*, pp. 27-28, paras. 44-45) the Court holding squarely that the question was difficult; that the law was not settled; and that the matter was best left to future decision in the light of the particular circumstances of each case.

And in a particularly trenchant passage of the *Italy* case, the Court stated it observed that it was convinced of the wisdom of the conclusion reached by its predecessor in 1922 that

> "it should not attempt to resolve in the Rules of Court the various questions which have been raised, but leave them to be decided as and when they occur in practice *and in the light of the circumstances of each particular case*" (*ibid.*, p. 28, para. 45) (emphasis added).

Here then is the fresh air: it is the circumstances of the present case that require us to take a fresh look at this vexed question, and to decide that — in the light of those circumstances — the Chamber will be acting consistently by prudently exercising its discretion to deny Nicaragua the right to intervene at this stage and in this type of proceeding.

It is also not necessary for the Chamber to decide matters that might otherwise fall to be decided later or decided once again by the full Court — the Court that has already progressed through two difficult cases in deciding a number of these points, although not this one. The Court will doubtless have these issues and similar issues to consider once again on a different day and in different circumstances and moreover, why, Mr. President, why should the Chamber be forced into deciding points that it does not *have* to decide in order to reach a result in this particular case?

It is for example not necessary to decide that a valid link of jurisdiction *is* always required, or *is not* always required. It is only necessary for the Chamber to decide, here and now, that a valid link of jurisdiction should be required in *this* case.

Were the Chamber to do otherwise, Mr. President, it would be going beyond the scope of its duties perhaps under Article 61, paragraph 1, which are to "decide upon this request", and by necessary implication not to decide on other requests not before it. More important, we have law on this subject, even if that law is not popular with the representatives of Nicaragua.

Any such determination would also be inconsistent with paragraph 45 of the decision in the *Italy* case that I just cited. And finally, if yet further reinforcement is needed, it can be found plainly in the dispositive language of the Court's Order of 28 February 1990.

2. The second point is that there are two important distinctions between this case and both of the others (Malta and Italy)

(i) The first distinction is that there never has yet been an application to intervene in a case brought by special agreement, and then assigned to a Chamber — and that is an important distinction.

(ii) The second distinction is that, in relative terms, the Application of Nicaragua to intervene in this case which was submitted only shortly before the filing of the final written pleadings — comes, relatively speaking, far later than either the Application of Malta or that of Italy to intervene did in the past (*I.C.J. Reports 1981*, p. 6, para. 5; *I.C.J. Reports 1984*, p. 8, para. 10).

Now these points must surely be of some relevance to the Chamber in the exercise of its powers based upon prudential discretion under Article 62, paragraph 2, of the Statute.

3. The third point relates to Article 62 itself

Even if one were to take the position that the Committee of Jurists did not intend, on and after 1920, that a jurisdictional link was to be a necessary or an indispensable condition precedent to bringing a successful application to intervene under Article 62, this is not the same as taking the position that the committee of Jurists *did* intend that in all cases it could be dispensed with — or that in no case would it ever be proper to require it. This distinction is a distinction with a difference.

Moreover, the provisions of Article 26, paragraph 2, of the Statute of the Court (relating to consensual or particular Chambers) were only added in 1945, and did not form part of the original Statute. Now the Committee of Jurists and the Court could not then possibly have foreseen how, 70 years later, a new provision of the Statute would come to be applied as between two States to further embody — and in fact intensify — what has appropriately been called "the

exclusivity of the relationship emerging from the Special Agreement" (see separate opinion of Judge Eduardo Jiménez de Aréchaga appended to the *Italy* case, *I.C.J. Reports 1984*, pp. 63-64, para. 27).

Mr. President, even if the Committee of Jurists, and the Permanent Court, had been unsettled in their original opinion as to whether a valid link of jurisdiction should be required in all, or some, or most, or none of the cases to be brought to the Court — it does not take much imagination to visualize how they would have resolved the matter in the instance that two parties had not merely sought to place their dispute before the Court by agreement, but had done so by seeking a specific Chamber for that purpose. In regard to that type of case, the Committee and the Court would have had no doubt whatever about requiring the existence of a valid link of jurisdiction before permitting an intervention on those grounds. It is an *a fortiori* proposition.

4. The fourth point is that this problem is of course made more acute when one takes into account the question of specifying the identity of the judges comprising the Chamber as well as the lateness of the Application in this case

Now these are difficult questions. The question of the identity of the judges is a vexing one — and one that has already arisen in a new form in connection with Nicaragua's Application, original Application — in particular in relation to the suggestion that there might be some reformation or reconstitution of the Chamber.

But it does demonstrate one thing clearly: that is: how awkward and inappropriate it seems for a third State, not party to the setting-up of the procedures, now to come knocking at the door of the Chamber and seeking to rearrange the furniture as well as the inhabitants. Surely it is not the kind of uninvited guest that should be welcomed in the absence of an express invitation. The fact that the knock on the door comes so late only adds to the difficulties.

5. The fifth point follows from the last two: it is that to require a valid link of jurisdiction seems to make sense generally in the case of special agreements and most obviously in cases where a chamber is involved

Since the Court reached this issue in neither the *Malta* case nor the *Italy* case, it did not have to consider the relationship between special agreements and the idea of the jurisdictional link. It did not. But here obviously is such a connection.

If one were viewing this juridical puzzle from a wholly fresh point of view, it would seem that as long as the intervening State really does have an interest of a legal nature that can be affected by the decision in a case brought by special agreement between two other States — and if that State is permitted to intervene in that case by a decision of the Court (or the Chamber) under Article 62 — then there is *pro tanto* a clear amendment or alteration in the provisions of the special agreement.

Consider for example the provisions of the Special Agreement in this case, the "Esquipulas Agreement" of 24 May 1986. How can *Nicaragua* be inserted into this case without distorting, or affecting, the object and purpose of the Esquipulas Agreement? It is not possible. This would be true, Mr. President, even if the role of Nicaragua were to be purely hortatory or advisory.

Now it is obviously open for Nicaragua to say that El Salvador and Honduras can agree on what they want, but when they agree to go before the Court or a chamber they then agree to operate under its Statute and Rules, particularly in

connection with matters of intervention. But this answer is a circularity because if the implementation of the Statute and Rules, and the exercise of the Court's powers under Article 62, paragraph 2, effectively results in an amendment or alteration of the very instrument that brought about the case in the first place, is it not inconsistent with what we all take to be the first principle of international law, that States cannot be bound without their consent?

I noted that in his speech Professor Remiro could not of course avoid saying that:

> "Il est évident que le fondement de la juridiction de la Cour est dans le consentement des parties, un principe essentiel que l'article 36 du Statut concrétise dans ses différentes manifestations." (C4/CR 90/2 of 5 June 1990, p. 28.)

Does consent to Article 62 of the Statute imply a consent that *any* special agreement bringing a case before the Court or a chamber can be amended by way of intervention? Of course not. Where can one stop the analysis possibly urged here, at least by implication, by Nicaragua? Does it not ineluctably lead to a hunting licence being issued to any State with an interest that might be affected — but with nothing more — and no jurisdictional links whatever outside the claimed intervention, to seek to enter into any cases that it wishes?

If the Chamber were now to hold that a valid link of jurisdiction need never be required, because it was already supplied by Article 62, then is it not true that any and all cases brought by any and all parties could be open to any other States for intervention as long as they could demonstrate an interest of a legal nature that might be affected, without more? It is, I submit, like grafting a universal optional clause on to every existing title of jurisdiction.

6. The sixth point is that it is, therefore, particularly appropriate in cases brought by special agreement that a valid additional link of jurisdiction could or should be required by the Court or a chamber

And this is in order to empower, in jurisdictional terms, any developments or implications that might otherwise be viewed as distorting the special agreement between the original parties. It would at least rationalize and regulate the potential effects, on those parties, of a judgment flowing from a successful intervention.

For if there is a jurisdictional link between the applicant to intervene and the existing parties, it *could* justify the bringing of a separate action in the Court against either or both of them. This might not be ripe for joinder under Article 57 of the Rules. In addition there might be additional requirements for the emergence or crystallization of a dispute, or for prior negotiations, *or* for an attempt to settle the matter, and so forth.

There may be a variety of reasons why — in cases brought by application or under a compromissory clause of a treaty — intervention could be both more rational and expeditious than separate or parallel proceedings, for the Court as well as for the parties.

But at least one could not say in those instances that by permitting the intervention the Court would have allowed a distortion of the original special agreement; that would still exist in its original tenor, but it would — as it were — be supplemented, or reinforced, by the operation of an independent link of jurisdiction that, in such a case, might make it possible for the intervention to proceed in a non-disruptive manner.

I might note there, with the greatest of respect, that the distinguished Agent for Nicaragua, in his address, seemed to mischaracterize the concept of a valid link of jurisdiction when he said: "It is absurd to demand a jurisdictional link particularly in cases that are brought by special agreement. Obviously", said the Agent, "the only States that will have this jurisdictional link will be the States party to the Special Agreement." (C4/CR 90/1 of 5 June 1990, p. 22.)

With the greatest respect: this is in fact a *petitio principii*. It begs the question and assumes that the only jurisdictional link that could be available or that is being discussed is the *compromis* between the Parties to the existing case. It is easy enough to use that assumption to reach the conclusion that the whole matter is absurd, but it is in fact the assumption itself that is absurd. What would make sense, of course, is to require that there be some *other* jurisdictional link between the applicant to intervene and the parties to the special agreement: the compromissory provisions of two treaties, *or* of one or more conventions, or three optional clause declarations, or the like.

I find that my argument may now have come some of the distance toward suggesting what might be the actual sense of intervention proceedings as opposed to separate and independent cases, perhaps subject to joinder under the Rules of Court.

Now, it is no good to counter this proposition by suggesting that it should all have been thought out clearly in 1920, or in 1922, or in 1945, or even in 1978. Experience is the life of the law, and the development of particular cases in relation to evolving patterns of juridical relationships is what will give content to the application of the Statute and the Rules of Court. Courts do not necessarily react cogently to legal problems *in abstracto*: indeed they cannot. This is beyond their role and training — it makes the drafting, for example, of rules provisions always an exhausting and, at best, an imperfect task.

Courts are made to decide particular cases, and the present proceedings are just such a case: one where it suddenly has become necessary, for the first time in 70 years, to elucidate otherwise ambiguous provisions of the Statute in relation to these particular facts. And this will of course be done in accordance with sound legal principles, and also with common sense.

7. The seventh point relates to the suggestion that has been made — and was debated in the Malta *and* Italy *cases — as to whether Article 62 of the Statute could by itself be an independent source of jurisdictional power*

It is the bootstrap argument. Now if this were true, it would obviously be unnecessary for the intervening applicant to go further to specify any valid link of jurisdiction outside Article 62.

But I have not seen it mentioned, Mr. President, that the very existence of Article 81, paragraph 2 *(c)*, of the Rules, since 1978 would be an absurdity if this argument were correct. Why would it be necessary to "set out . . . any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case", if Article 62 were already supplying a basis of jurisdiction?

Why would an applicant be asked to indicate whether there was "any such basis" if an entirely sufficient one were already — and always — in existence as to any State that was a Member of the United Nations and thus party to the Statute? It is out of Kafka. It would be as if a government office were always to require applicants for a given action to fill out a form with a piece of information that would never vary, and that described a permanent condition that was

in fact universally imposed on all those applicants by that very government office from the beginning.

Now I am of course aware that Article 81, paragraph 2 *(c)*, of the Rules is hardly a provision of the Statute. And I am also aware that it was added as part of the 1978 Rules revision — perhaps in an attempt to clarify some of the problems that seemed to emerge from the incomplete consideration of the application of Fiji to intervene in the *Nuclear Tests* case.

But is it for the Court now — or indeed for this Chamber — to pronounce a ruling on this issue that would render absurd a provision adopted with careful thought a dozen years ago by the full Court? One would think that, in the absence of compelling reasons of judicial polity, there would be no place for such a ruling under the present circumstances.

8. The eighth point relates to Article 81, paragraph 2, subparagraph (c), *of the Rules*

Professor Remiro implied that the reason for this provision was not to suggest that a jurisdictional link should be required as such, but rather:

> "Il s'agissait précisément d'éviter qu'à travers l'institut de l'intervention un Etat introduise un différend distinct, bien que connexe, de celui soumis par les parties, qui n'aurait pu être porté à titre principal parce qu'il n'avait pas une base suffisante de compétence." (C4/CR 90/2 of 5 June 1990, p. 27, para. 9.)

And he continued:

> "Propos qui devient plus clair si nous tenons compte du fait que le nouvel alinéa *c)* a suivi le nouvel alinéa *b)*, par lequel l'on dispose que le requérant devait indiquer 'l'objet précis de l'intervention'." *(Ibid.)*

Now, I believe that what Professor Remiro was here suggesting as to the meaning of Article 81 of the Rules was that it was designed to prevent an intervenor from using intervention to "tack on" a separate but somewhat connected claim to the principal litigation, as to which it lacked a sufficient jurisdictional link to the parties other than — presumably — the incidental jurisdiction of the intervention procedure. In American terminology, it was intended to prevent a "free ride" or "piggy-back" or a more or less separate cause of action.

But with all respect, this does not make sense. Why would we need a jurisdictional tool to prevent piggy-backing if the intervenor was already required to satisfy not merely the condition of subparagraphs *(a)* and *(b)* of Article 81, paragraph 2, of the Rules, but also the dominant test of Article 62, paragraph 1, of the Statute?

Also: why would the provisions of subparagraph *(c)* only come into play in that instance, as if they had been reserved for it, but otherwise be suspended as to the "main" intervention? If Article 62 were to generate instant jurisdiction for all purposes relating to the proposed intervention (bootstrap), why would it not do so in any event for piggy-backing? If Article 62 contained a sort of "instant jurisdictional link", that link would remain present for all purposes, and could not be set aside or used for only one purpose or for a limited purpose.

And the provisions of subparagraph *(c)* could not then have been inserted merely to block the use of intervention proceedings for unrelated free rides. They were there for another reason, far less tortuous. They were there to clarify and supplement the whole thrust of the article and of course to give further content to Article 62 of the Statute.

9. The ninth point is that the incidental jurisdiction of the Court or a Chamber extends only to granting the intervention

It cannot extend to taking a decision on the subject-matter of the intervention unless there also exists a valid link of jurisdiction as to the parties; and therefore it is only common sense to enquire, under Article 81, paragraph 2 *(c)*, of the Rules, or otherwise, as to what that other jurisdictional link might be before proceeding to rule on the request.

Now, it is not, with respect, hard to discern a critical distinction between the incidental jurisdiction to permit an intervention and the incidental jurisdiction to indicate, for example, provisional measures under Article 41 of the Statute.

The Court may always indicate provisional measures as an incidental matter, with jurisdiction conferred on it by Article 41 itself, but it is plain as day that the validity and the effect of those provisional measures directly depend on "the final decision" (Art. 41, para. 2) and that they have no independent life of their own. This is settled.

And it was put rather well by Professor Brownlie last Tuesday, in a sporting metaphor, when he said that "the procedure involves a qualifying round and not the race itself" (C4/CR 90/1 of 5 June 1990, p. 41).

10. The tenth point relates to Articles 62 and 63

In his speech yesterday, Professor Remiro drew a contrast between these two articles and he said:

> "Il faut affirmer que si l'intervention à l'égard de l'article 63 ne requiert pas de lien juridictionnel entre le requérant et les parties au litige, ce n'est pas non plus requis dans le cas — symétrique selon M. Schwebel — de l'article 62." (C4/CR 90/2 of 5 June 1990, p. 33.)

With great respect, one cannot draw any conclusions favourable to Nicaragua by comparing Articles 62 and 63. The symmetry referred to is not parallelism or identity.

Construction of a convention (Art. 63) is a far cry from a decision that might affect "an interest of a legal nature". If a matter raises *both* the question of construction and the question of affecting an interest, the intervenor can pick or choose.

It can seek and obtain, *as of right*, an Article 63 intervention. We know that. And it can be prepared to be bound by the construction in the Court's judgment in accordance with the Statute. We know that. It can go further, and it can seek to come in as an intervenor under Article 62, in which case it will be bound by more than the construction of a treaty provision. It will also be fully subject to the binding force of the judgment in that matter under Article 59.

But the test to come in under Article 62 is a lot tougher than the test under Article 63. In fact, all that is required to be proved under Article 63 is that there is a convention with certain parties, and that it is being construed.

It therefore does not do any good to suggest, as Professor Remiro does, that just because Article 63 does not require a "jurisdictional link" then Article 62 should not be held to require one either. The two articles serve wholly different purposes with wholly different results, and are complementary and mutually reinforcing rather than cut from the same cloth.

11. The eleventh point relates to Article 53 of the Statute

I am afraid that again I must take issue with another argument made by my learned friend, Professor Remiro. If I take his point correctly, he concludes that, in cases of non-appearance (or disappearance), the reference in Article 53 to the Court's having to satisfy itself that it has jurisdiction in accordance with Articles 36 and 37 can be read as implying that where such a reference is *not made* (as in Article 62), it is because it is unnecessary (C4/CR 90/2 of 5 June 1990, p. 33, para. 15). And the further implication is that it is unnecessary *because* Article 62 supplies its own jurisdiction — on the bootstrap basis — and that the omission of a *renvoi* to Article 36 is because it is therefore not needed.

Again, with respect, this is not acceptable. First, it is entirely questionable whether Article 53 is a case of "incidental jurisdiction". I would think that it could hardly be further from being one.

What Article 53 does — as the Chamber well knows — is to make clear that what will happen if a party does not show up in a case or disappears from a case where it is subject to the principal jurisdiction of the Court. There is nothing incidental about it. It is just a question of drawing the appropriate lines and getting the job done right.

And the Court's duty to find jurisdiction under Article 53, paragraph 2, had to be expressed. Why? Because it was something that the non-appearing party (the party that was not there) could not challenge the appearing party about. It was therefore something that the *Court* was obliged to do. Article 53 reminds the Court of this. When the Court has investigated and satisfied itself that it *has* Article 36 principal jurisdiction, that jurisdiction is *principal* in every sense of the word.

Per contrario, the provisions of Article 62 do not have to spell out jurisdictional requirements because the Court doesn't have an independent duty there. It is up to the intervenor to demonstrate it. And in our opinion, it is implicit in the very concept of intervention: *cela va de soi.*

It might be helpful here to refer to the distinction made between "principal" and "incidental" jurisdiction in the separate opinion of Judge Jiménez de Aréchaga to the *Italy* case (*I.C.J. Reports 1984*, p. 57, para. 6) — and in particular to the language there quoted from Judge Morelli on the subject.

12. The twelfth point is that one cannot convincingly escape the logic of these arguments by claiming that Article 36, paragraph 1, indicating "all matters specially provided for", would include Article 62, paragraph 2, of the Statute

This is a classic *petitio principii*: it assumes that the type of reference that we find in Article 62 is the type of "provision" that is intended by, or that could satisfy, Article 36. But this does not satisfy common sense. It could hardly be less "specially provided for"; Article 62 is not only general, it is merely facultative and deliberately unspecific.

And moreover, as Judge Jiménez de Aréchaga wrote in 1984: "An implicit attribution of jurisdiction cannot be held to be something specially provided for in a treaty." (*Ibid.*, para. 7.) It is a different form of "bootstrap" operation from the argument that Article 62 provides its own jurisdictional link at all times, but it is fallacious nonetheless.

13. The thirteenth and final point is that just because of all those difficulties, all is not lost in intervention

I would like to re-emphasize what my colleague Mr. Lauterpacht was saying yesterday afternoon about the meaningfulness of the concept of intervention. It

really is not right to conclude that this institution can never be used and is therefore meaningless. And as I suggested earlier, Mr. President, there is a variety of cases in which one can imagine intervention serving a valid purpose, serving perhaps the purpose originally reserved for it — more or less — 70 years ago. It is just that to date we have not seen the right kind of case. We had one uncompleted intervention in a case that became moot *(Nuclear Tests)*, and we have had two continental shelf cases brought by special agreement that came in some ways close to being anticipatory delimitation cases. And surely this is an unpromising selection for the development of the law of intervention under the Court's Statute.

At least they permitted the instance of a modified form of "intervention by pleading": that is to say, at least the Court (or Chamber of the Court) became aware of the applicant's problems in the very course of making the application. And, as my colleagues have already indicated, this is not altogether an inhumane result, considering the complexities and particularities of the cases involved.

Yet the cases where intervention would be rational — and orderly, and permissible — cannot now be specified or indicated with any greater clarity or precision, I would think, than the Committee of Jurists or the Permanent Court or even the International Court itself has been able to indicate in the past. In a "vexed question" such as this, it can only be by the adaptation of legal principles to the particular circumstances of every relevant case that the framework for those principles acquires a rational pattern and design. And it so happens that this is precisely in accordance with paragraph 45 of the *Italy* case.

Nor can it really be concluded, Mr. President, in the performance of a judicial task, that policy reasons should encourage the Court or a Chamber to reject a correct but close reading of Article 62 and Article 36 of the Statute, for the reason that otherwise the institution of intervention would have no purpose in the scheme of the Statute, or because it is desirable that States be encouraged to seek to intervene.

First, it is not the Chamber's fault, and it is not the Court's fault, that the institution of intervention is not entirely clear. *Second*: policy decisions about the desirability of intervention might be precisely to the contrary; States might avoid using the Court by special agreements if "the exclusivity of the relationship emerging from the Special Agreement" (*I.C.J. Reports 1984*, p. 63, para. 27) can be disturbed against the joint will of the parties, and without satisfying the same requirements that are imposed on all other States in all other cases by Article 36.

Such a result should probably be taken into account as a likely speculation — just as much as its opposite. And this leaves the Chamber, Mr. President, with this case precisely where it found it: to be decided on legal principles alone in the light of the particular circumstances of the matter.

Mr. President, I would like to thank you and the Members of the Chamber for the patience with which you have listened to my argument and I would like to give way, if I may, to our Agent to present the submissions of El Salvador.

STATEMENT BY DR. MARTÍNEZ MORENO

AGENT FOR THE GOVERNMENT OF EL SALVADOR

Dr. MARTÍNEZ MORENO: Mr. President, the Government of El Salvador respectfully makes the following submission in this case. That the Application of the Republic of Nicaragua to intervene in the case in process between El Salvador and Honduras be rejected.

The PRESIDENT OF THE CHAMBER: The Chamber will take a short break now before we start hearing the oral observations of the delegation of Honduras.

The Chamber adjourned from 10.45 to 11.00 a.m.

STATEMENT BY DR. VALLADARES SOTO

AGENT FOR THE GOVERNMENT OF HONDURAS

Dr. VALLADARES SOTO: Mr. President, Members of the Court. I appear, as Agent of the Republic of Honduras, for the very first time before this distinguished Court. In that capacity I have the honour to address you in the form of a brief introductory statement regarding the petition presented by the Republic of Nicaragua, to intervene in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, at present before the Court.

On page 2 of its petition, Nicaragua states that its interest "is limited to that part of the object of the Special Agreement contained in paragraph 2 of Article 2 of the Agreement. That second paragraph of the Agreement requests the Chamber to: "2. Determine the juridical situation of the islands and maritime areas."

Then Nicaragua adds, and I quote:

> "Nicaragua wishes to make very clear that it has no intention of intervening in those aspects of the procedure relating to the land boundary which is in dispute between El Salvador and Honduras."

Restricted in this manner the scope of the request to intervene presented by the Republic of Nicaragua does not seem unreasonable. Taking into consideration the amicable relations which should exist between the Central American nations, and the fact that we are immediate neighbours as coastal States, with an existing maritime boundary treaty, Honduras sees no objection to Nicaragua being allowed to intervene in the existing case for the sole purpose *of expressing its views on the legal status of the waters within the Gulf.*

But Honduras wishes to emphasize that the rights it claims in the present case against the Republic of El Salvador in the Gulf of Fonseca and in the waters outside the Gulf of Fonseca, in no way affect the rights that Nicaragua might claim. Honduras also takes this opportunity to remind the Court that the waters within the Gulf of Fonseca between Honduras and Nicaragua have already been delimited, to a large extent, and since the year 1900, according to the provisions of the Bonilla-Gámez Treaty of 1894.

On the other hand, Honduras does not accept Nicaragua's claim to reform the Chamber as presently constituted. Nor does it accept Nicaragua's claim for a re-ordering of the written pleadings already presented, for the reasons stated in detail in the written pleadings filed by Honduras on 23 March 1990. Nor does it accept the Nicaraguan claim, formulated in paragraph 24 of its written request of 17 November 1989, asking the Court to exclude from the mandate of the Chamber the power to determine the situation of the maritime areas within and outside the Gulf. Such a claim would impede the total solution to the dispute that the Republics of Honduras and El Salvador have submitted to the decision of this high tribunal. It is a claim which also violates the fundamental principle that, where parties come before the Court by special agreement, their consent to the jurisdiction rests on that agreement, and it cannot be changed against their will.

I also have the honour to inform the Court that the arguments of Honduras in this oral phase of the proceedings will be presented by Professor Derek Bowett.

Mr. President, I thank you for your kind attention, and ask that Professor Bowett be allowed to address the Court.

ARGUMENT OF PROFESSOR BOWETT

COUNSEL FOR THE GOVERNMENT OF HONDURAS

Professor BOWETT: Mr. President, Members of the Court. In this matter I have the honour to represent the Government of Honduras and in that capacity, I must register a partial opposition to the Nicaraguan request to intervene.

But before turning to the essentials of the Nicaraguan request, I want to say a word about its underlying rationale. This appears quite clearly at paragraphs 14-17 of the request in the guise of the principle of the sovereign equality of States and it is on the basis of this principle that Nicaragua argues that it has a right to intervene.

1. The Principle of Sovereign Equality of States

The originality of this argument is a tribute to its authors, and I would hope that this Court will always welcome originality. But originality is not, of itself, enough. The argument must also be consistent with established principles: otherwise its acceptance will produce chaos. And this argument by Nicaragua does exactly that.

In the context of judicial settlement of disputes between States the most basic, fundamental and overriding principle is that the competence of any court or tribunal rests *on the consent of the parties*. It is because of this principle that intervention by a third party is so exceptional.

Clearly, therefore, the principle of the sovereign equality of States cannot be invoked so as to override the basic requirement of consent. All States are equal. Are we now to understand that all States can intervene, as of right, in any case before this Court? If that were so, the Court would need not only to revise its Statute quite substantially, but to look for larger premises! In fact the argument, put simply on the basis of sovereign equality, is patently absurd. If States are to be allowed to intervene it cannot be because they are sovereign equals. There must be some other criterion: and, indeed, there is. This is the criterion of *an interest of a legal nature which may be affected by the Court's decision*. It is by reference to that criterion — and not to the principle of sovereign equality — that a request to intervene must be tested. Otherwise the result is chaotic and absurd.

The relevance of the principle of sovereign equality lies in quite different directions. It means that where the legal rights or interests of a third State form the very subject-matter of a decision to be made by this Court, such a decision cannot be made unless that State consents to be a party: that is the essence of the *Monetary Gold* case, (*I.C.J. Reports 1984*, p. 25).

Would that be so in this case? Surely not! Nicaragua has failed to demonstrate that it has any claim of right or title to any island in dispute in this case. It has equally failed to demonstrate that it has any genuine claim to any area of water, either inside or outside the Gulf, which might be allocated to either El Salvador or to Honduras as a result of the Court's decision. The one respect in which Nicaragua's legal rights are in issue is in respect of the El Salvadorean claim that the waters of the Gulf are a condominium. If the Court were to decide that the waters had that status, contrary to the views of both Honduras

and Nicaragua, then it is perhaps arguable that Nicaragua's legal interests would be prejudiced. Not formally perhaps, because of the protection of Article 59 of the Statute; but, in practice, Nicaragua might be disadvantaged.

The second area of relevance of the principle of sovereign equality lies in the protection afforded to non-parties by Article 59 of the Statute. A State is never bound by a decision in a case to which it is not a party.

Of course, it may be argued that, whilst this is formally true, in practice a non-party could be prejudiced by a decision. Indeed, the possibility of prejudice to a non-party is recognized by the institution of intervention itself. For the Statute, in requiring the State to show that it has a legal interest which might be affected by the Court's decision, in effect concedes that the decision may affect a third State, notwithstanding Article 59.

Similarly, when the Court limits its decision *proprio motu*, as it did in the interests of Italy in the *Libya/Malta* case, there too one has a recognition by the Court that Article 59 may not give absolute protection, and that further steps may be needed to safeguard the legal rights of non-parties.

There is yet a third area of relevance. The Nicaraguan Application rightly makes the point that the principle of sovereign equality requires that its consent must be sought to any delimitation with Nicaragua. That is perfectly correct. But it is entirely irrelevant in this case, because neither El Salvador nor Honduras seeks a delimitation with Nicaragua arising from this case. Nor, as I shall presently show, will the delimitation sought by Honduras — that is the delimitation line as between Honduras and El Salvador — trespass into maritime areas appertaining to Nicaragua. So Nicaragua cannot say, in effect, that the Court's decision will be imposing a delimitation on Nicaragua without its consent.

My conclusion is, therefore, that the provisions of the Court's Statute and the jurisprudence of the Court fully recognize, and safeguard, the principle of sovereign equality of States. But it is misconceived to argue that, on the basis of that principle, there is a right to intervene. Such a conclusion would produce a quite chaotic situation, and one contrary to the Court's Statute which sets out in clear terms the conditions which a State must fulfil if its application to intervene is to be entertained by the Court.

It is, therefore, to the express requirements of Article 62 of the Statute that I now turn.

2. Article 62 Requires an Intervenor to Demonstrate an "Interest of a Legal Nature Which May Be Affected by the Decision in the Case"

Article 62 requires an intervenor to demonstrate an "interest of a legal nature which may be affected by the decision in the case". Honduras accepts that there is no logical reason to require that the intervenor's legal interest extends to the whole case. It should be sufficient if that interest lies in a part of the case which must be incorporated in the decision.

The terms of Article 2 of the Special Agreement require the Court: "To determine the legal situation in the islands and maritime areas."

Accordingly, the Court decision must embrace this question — the second question addressed by the *compromis* — and if Nicaragua can demonstrate that it has a legal interest in this question, which may be affected by the decision, Nicaragua meets the criterion of Article 62.

So the essential question is, has Nicaragua demonstrated that it has such a legal interest?

In the Written Observations of Honduras, the issues involved in this second question were identified as four. They were the following:

(a) first, sovereignty over the islands in the Gulf;
(b) second, whether the waters within the Gulf are subject to a régime of condominium, excluding delimitation;
(c) third, if not, what the delimitation line within the Gulf should be, *as between Honduras and El Salvador;*
(d) and fourth, that Honduras has an entitlement to maritime areas outside the Gulf and that the Court should determine what the delimitation line should be outside the Gulf, *as between Honduras and El Salvador.*

We need to examine each of these issues with some care, in order to see whether in relation to any one of them, Nicaragua has demonstrated the required interest.

(a) *Sovereignty over the Islands*

So I take first sovereignty over the islands. Here, Nicaragua has demonstrated no such interest. El Salvador and Honduras are at one in asserting that they make no claim to any island under the sovereignty of Nicaragua — such as Farallones — and they know of no claim by Nicaragua to any island in dispute between the Parties — such as Meanguera or Meanguerita. Accordingly, it must be concluded that Nicaragua has no interest in this aspect of the second question and this conclusion is re-inforced by what Professor Remiro said on Tuesday (C4/CR 90/2, p. 16).

(b) *Whether the Waters within the Gulf Are Subject to a Régime of Condominium, Excluding Delimitation*

So I turn to the second issue, whether the waters within the Gulf are subject to a régime of condominium, excluding delimitation. Now, here, Honduras is prepared to concede that Nicaragua does have an interest, and essentially for two reasons.

First, whatever the status of the waters of the Gulf, the status has to be the same for all three littoral States. It is impossible to conceive of the Gulf as a condominium vis-à-vis two of them, but not vis-à-vis the third. Second, it is clear that El Salvador's position depends upon the effect to be given to the 1917 Award in the *Gulf of Fonseca* case, for that case is the source of El Salvador's condominium theory. Now Nicaragua was a party to that case, unlike Honduras. And it is generally believed that Nicaragua refused to accept that Award. It therefore seems impossible to Honduras to deny that Nicaragua has a legal interest in a decision by this Court which may rule on the effect of an Award to which Nicaragua was a Party.

Would Nicaragua's legal interest be affected by the decision of this Court? To Honduras, this seems inevitable. Whatever view this Court takes of the 1917 Award, Nicaragua's legal interests must be "affected". I would invite the Court to consider the analogy with Article 63 of the Statute. Where an intervenor is a party to a treaty, the construction of which is before the Court, the intervenor has a right to intervene. Suppose that the intervenor is a party to an award, and the award is under construction by this Court: is there any logical reason why the intervenor should be denied the right to intervene?

Honduras necessarily has sympathy with this aspect of the Nicaraguan request. Because in the present case, Honduras is likely to be affected by the

Court's construction of the 1917 Award — and Honduras was not even a party to that award. How much more so, therefore, is Nicaragua likely to be affected, given that it was a party to the award?

There are yet further ways in which Nicaragua may be affected. Let us suppose that the Court adopts the condominium theory. What happens then, if Nicaragua seeks a delimitation with Honduras, prolonging the 1900 Treaty line to the closing line of the Gulf? Presumably Honduras would have to reply to Nicaragua that no delimitation was possible, since Honduras was bound to accept the Court's decision that a condominium excluded delimitation. Or suppose that Nicaragua wishes to adopt unilaterally measures of control in that part of the waters of the Gulf deemed to be Nicaraguan. Would not both Honduras and El Salvador be bound to deny the right of Nicaragua to proceed unilaterally since the régime of condominium implied joint responsibility?

Frankly, Honduras cannot follow the reasoning behind the opposition by El Salvador to this aspect of the Nicaraguan request. El Salvador argues in paragraph 5 of its written observations that this case concerns the interpretation of the Special Agreement, which is *res inter alios acta* as regards Nicaragua. With respect, this is a formalistic and superficial argument. For what is in issue is the status of the waters of the Gulf, and Nicaragua, as a littoral State is not a third party in relation to that issue.

That is why the precedent of the *Libya/Tunisia* case, which El Salvador cites in support of its view, is so clearly distinguishable. In refusing Malta's request to intervene the Court was able to protect fully Malta's concern that a delimitation between Libya and Tunisia should not trespass into areas of shelf that might appertain to Malta. This the Court did by the device of stopping short the illustrative line, with a question-mark as to its terminal point. But the question of the legal status of the waters of the Gulf is not one that concerns only part of the Gulf. It is impossible for the Court to say "but we make no judgment as to the waters on the Nicaraguan side". On the condominium thesis, the waters are indivisible and if El Salvador wants to uphold that thesis, it must accept that Nicaragua has an interest.

Indeed, El Salvador's position on the request to intervene is strangely at odds with the emphatic way in which El Salvador championed Nicaragua's interests in the waters of the Gulf in its written pleadings. There we were told that Nicaragua controlled the closing-line of the Gulf, jointly with El Salvador (Counter-Memorial, para. 7.7); that within the Gulf "the rights of the three riparian States co-exist" (Counter-Memorial, para. 7.63); that the 1917 Award is *res judicata* for Nicaragua (Counter-Memorial, para. 7.69); that Nicaragua shares in the community of interests in the Gulf (Reply, para. 6.63); that the effect of the Nicaraguan islands is to cut off Honduras from any access to the closing line (Reply, para. 6.101). So much concern for Nicaragua's rights and interests, yet we are now told Nicaragua should mind its own business!

No, Mr. President, that cannot be right. In justice we would have to concede that Nicaragua is entitled to express its views on the legal status of the waters of the Gulf.

There is yet a further question raised by El Salvador, and that is this. Assuming Nicaragua is allowed to state its views, should this be by intervention? Or should it be, as El Salvador suggests (Written Observations, para. 8), sufficient to allow Nicaragua the opportunity of these proceedings?

El Salvador is obviously much impressed by the precedent in the *Italian* case. I refer to the opportunity afforded to Italy to stake out its claims in the relevant area, during the *Libya/Malta* case, without requiring Italy to intervene formally.

Mr. President, I have to say that the Italian precedent is not one which impresses me. I believe it wrong to allow a State, not a party to a case, to use the Court's proceedings to make claims never previously made to the actual parties, to then treat those claims as valid to the extent that they limit the area of dispute between the parties, and even though neither party has had the opportunity to discuss the legitimacy of those claims.

In any event, whatever view the Court may take on that, the solution simply will not work in this case — or in the majority of cases. For at this stage of the proceedings the Intervenor is not required to address the substance of the issue. Nicaragua is not required to explain what its views are on the status of the waters of the Gulf. It is required to demonstrate that it has a sufficient legal interest likely to be affected by the decision, that is all. We need not know (or Nicaragua need not tell us) whether it is for, or against, the condominium thesis at this stage. All Nicaragua is required to demonstrate is that, whichever way the Court decides, Nicaragua's legal interests will be affected.

So, for all these reasons, Honduras would support Nicaragua's *request on this aspect of the case*. I turn now to a third and quite separate aspect.

(c) *If There Is No Condominium, What Should the Delimitation Line within the Gulf Be, as between El Salvador and Honduras?*

Here we are concerned with what is clearly an issue of delimitation. So two questions arise. First, does Nicaragua have a legal interest likely to be affected by the decision? And, second, if there is such an interest, should the Court exercise its discretion to allow Nicaragua to intervene, as the most appropriate way of protecting that interest?

As to the first question, it is perhaps best to start by eliminating what is clearly not a sufficient legal interest.

Paragraph 2 *(d)* of Nicaragua's Application refers to "the essential character of the legal principles, including relevant equitable principles, which would be relevant" as an item illustrative of Nicaragua's legal interest. Now, of course, all States — certainly all maritime States — have an interest in the legal principles to be enunciated by this Court. But it is settled law that that kind of general interest is not sufficient to justify intervention. This must be right, for an interest of itself is not enough: the Statute requires that a State's interest must be affected by the decision. So this kind of general interest will not suffice, and a would-be intervenor has to demonstrate that its interests would be affected by the Court's decision.

It will be recalled that the Court reviewed this matter very thoroughly in the *Tunisia/Libya* Judgment of 14 April 1981. Having examined the drafting history of Article 62, the Court concluded:

> "it becomes clear that the interest of a legal nature to which Article 62 was intended to refer was an interest which is in issue in the proceedings, and consequently one that 'may be affected by the decision in the case'." (*I.C.J. Reports 1981*, p. 14, para. 22).

Here we see the difference between Nicaragua's interest in the legal status of the waters of the Gulf — clearly in issue in these proceedings — and Nicaragua's interest in the legal principles relevant to the delimitation between Honduras and El Salvador. The latter type of general interest is clearly not in issue.

So, in my submission, this item of interest must be properly eliminated.

Then we come to a second item of "legal interest" which must also be eliminated. In paragraph 2 *(g)* of its Application, Nicaragua raises the possibility

that the Court's decision might involve "the designation of one or more zones of joint exploration and exploitation", citing the *Jan Mayen* case. Although Nicaragua does not spell it out, presumably the thought is that, if the Court were to accept El Salvador's condominium thesis, this might carry, as a corollary, the obligation on littoral States, including Nicaragua, to join in joint measures of exploitation or exploration of resources.

Now with respect, this anxiety on the part of Nicaragua seems to be misplaced. *Jan Mayen* was a conciliation, and it was entirely proper for a conciliation commission to make recommendations of that kind to the parties. But I think that it is inconceivable that this Court could decide to impose a régime of joint exploration or exploitation on the littoral States — even on the actual Parties, El Salvador and Honduras. The Court simply does not have the power to impose that kind of agreement on the Parties, let alone on a non-party like Nicaragua.

Then Nicaragua makes a third and quite separate point. A different item of interest. In paragraph 2 *(f)*, the Application reads as follows:

> "The leading role of coasts and coastal relationships in the legal régime of maritime delimitation and the consequence in the case of the Gulf of Fonseca that it would be impossible to carry out a delimitation which took into account only the coasts in the Gulf of two of the three riparian States."

Here we reach a point where elimination is not so obvious, so that the nature of Nicaragua's legal interest, as a co-riparian State, one of three littorals, needs careful and more detailed examination.

It cannot be disputed that the law requires States — and indeed the Court itself — to take account of neighbouring coasts. The *dispositif* of the 1969 Judgment refers expressly to the need to take account of delimitations, actual or prospective, with third States. In the 1977 *Channel Award*, the tribunal took account of the coasts of Ireland. In the *Libya/Malta* Judgment of 1985, the Court took account of the coasts and claims of Italy. And so on: the point is so clear as to require no further elaboration.

And in this case, as I shall shortly demonstrate, Honduras has taken full account of Nicaragua's coasts, both inside and outside the Gulf.

But let there be no suggestion that every State, whose coasts are taken into account in this way, has a right to intervene. What Nicaragua ignores is the requirement in Article 62 that its interests must be *affected* by the decision. In my submission, Nicaragua has to show *either*:

(a) that there is a real risk of the decision producing a delimitation line which will trespass into maritime areas to which Nicaragua has a good prima facie claim; or

(b) that Nicaragua's future delimitations will be in some way prejudiced.

In the present case, there is no risk of either. In order to demonstrate this, I want to take the Court very briefly through the methodology devised by Honduras in its written pleadings for the delimitation, inside the Gulf. I do this not for the purpose of arguing the merits of the proposed delimitation between Honduras and El Salvador — I shall avoid any such argument — but for the purpose of demonstrating two things. First, that Honduras has taken the Nicaraguan coast fully into account, as the law requires. And, second, that it is not conceivable that there can be any trespass into areas legitimately claimed by Nicaragua, or any prejudice to Nicaragua's interest in future delimitations.

Let me start with the methodology inside the Gulf. On the easel behind me is the illustration, Map C.5, produced at page 704 of the Honduran Memorial.

You will see that, in essence, Honduras has proposed a method which divides the Gulf into a western and eastern section. Point X is midway on the closing line of the Gulf. A perpendicular has been constructed from this point, back inside the Gulf, to reach the Honduran coast at Point Y. It has been the aim of Honduras to confine the relevant area for the purposes of a delimitation with El Salvador, to the *western* sector of the Gulf. We assume — and I submit reasonably assume — that there can be no justifiable claim by Nicaragua to any part of the waters of this western sector. Certainly there has never been any such claim made by Nicaragua to Honduras, and apparently neither to El Salvador. So, provided that the delimitation is confined to this western sector, there can be no trespass into maritime areas appertaining to Nicaragua, and no prejudice to any future delimitation which Nicaragua might seek within the Gulf.

The existing Honduran/Nicaraguan delimitation under the 1900 Treaty runs from the terminal point of the land boundary, which is here, following median line principles to Farallones, this group of islands here. You will note that, necessarily, it remains completely unaffected by anything in the western sector. And, indeed, whenever this line is, in the future, extended to the closing-line of the Gulf, whatever its actual course may be, it must surely lie within the eastern sector. So that future line will not be prejudiced.

Of course it may be said that this is merely the Honduran methodology, and El Salvador has quite different ideas. Well, El Salvador does have different ideas, but I would suggest that, however mistaken or misguided they may be, they, too, pose no threat of prejudice to Nicaragua's interests. For, essentially, El Salvador makes no claim to any delimitation within the Gulf — that is outside the 3-mile limit — and only claims rights up to the mid-point of this closing line at point X, assuming the other half to belong to Nicaragua.

It might equally be said that, whatever the Honduran methodology, Nicaragua has quite different ideas. But, having read the Nicaraguan Application, and having listened very carefully to Nicaragua's oral arguments, it is clear that Nicaragua is making no *claim* incompatible with this methodology. Nicaragua asserts no rights in conflict with those claimed by the Parties, and requires no ruling from the Court on Nicaraguan claims as regards delimitation, inside the Gulf. This is the crucial point. We have heard no "good arguable claim" (I use Professor Brownlie's words) that Nicaragua has any legal rights in the western half of the Gulf that will be prejudiced by a delimitation between El Salvador and Honduras, confined within that relevant area. So it is no use the Agent for Nicaragua saying that it is "obvious" that Nicaragua's rights will be affected. It is not obvious at all. Nor is it any use Professor Remiro telling us that the Court's judgment as regards sovereignty over the islands is bound to affect Nicaragua. Why so? Whether Meanguera and Meanguerita belong to El Salvador or Honduras will neither increase, nor diminish, the area of the Gulf to which Nicaragua is entitled.

We must not lose sight of the fact that, as between Honduras and Nicaragua, the waters of the Gulf are in large part already delimited by the 1900 Treaty. So, unless Nicaragua is claiming to denounce that Treaty, which is impossible, it cannot make claims in the western half of the Gulf. The Treaty necessarily means that a delimitation confined to the western half cannot infringe on the rights of Nicaragua *as regards delimitation*. And delimitation is a quite separate matter from the condominium issue. Now of course it presuppoes a negative answer on the condominium issue, but I believe Professor Brownlie to be mistaken in assuming that a legal interest in the one necessarily means a legal interest in the other: that is a *non-sequitur*.

So I reach my conclusion on this third item of Nicaraguan interest, based on coast relationship. And that is that there is no risk of prejudice to Nicaragua's legal interests, so this, too, is an item which must be dismissed.

But even if the Court were not to share that view, and were to accept that Nicaragua *had* demonstrated a sufficient legal interest, it does not follow that intervention is then required. For we then reach the second question to which I referred earlier, namely, is intervention the appropriate way of safeguarding Nicaragua's interest? It must be recalled that under Article 62 intervention is not *as of right*, even if there is a legal interest. It is permissive, and the Court has the discretion to allow or disallow the intervention according to its own assessment of how any Nicaraguan interests may be protected. Intervention is not the only answer. The Court has independent powers to protect third States, and these were used quite effectively to safeguard the interests of both Malta and Italy in the 1982 and 1985 Judgments, even though neither Malta nor Italy was permitted to intervene. In short, the Court itself has the power to ensure that no trespass into Nicaraguan waters occurs, and that future delimitations by Nicaragua are not prejudiced.

This, thereore, reinforces my submission that Nicaragua should not be allowed to intervene in delimitation within the Gulf.

So this brings me to the fourth, and last, aspect of the case.

(d) *The Claim that Honduras Has an Entitlement to a Maritime Area outside the Gulf and that the Court Should Determine What the Delimitation Line Should Be outside the Gulf as between Honduras and El Salvador*

This would require another map, so if you would give me a moment. Now here much the same considerations apply to those which I have just covered — and I need not burden the Court with repetition. The only difference relates to the methodology proposed by Honduras, for it is a somewhat different methodology outside the Gulf. Of course, it has the same aim; to avoid any trespass into areas which might legitimately be the subject of Nicaraguan claims, or prejudice future Nicaraguan delimitations.

May I invite the Court to look at the map now behind me? It is a reproduction of Map C.6 from the Honduran Memorial, opposite page 720.

Now to establish the relevant coasts we have taken only half of the coast of El Salvador facing directly into the Pacific: that is to say from Punta Amapala, here, to Point A, some 68.4 miles to the west. Now why? Because the coast of El Salvador further west is relevant to a future delimitation between El Salvador and Guatemala — and we had no wish to prejudice that. By the same reasoning we limited the relevant area in the west by this line here, AB.

It is a line drawn from Point A, perpendicular to the general direction of the coast out to the 200-mile limit. So we avoid entering into the area of sea further west, which is relevant only to some future delimitation between El Salvador and Guatemala. In short, the interests of Guatemala are completely safeguarded and I note that we have no request to intervene from Guatemala.

Now our approach to safeguarding the interests of Nicaragua is similar. The only relevant Honduran coast is that lying west of Point Y at the back of the Gulf, the point you saw on the previous map; it is the Honduran coast lying west of that point, because that is the coast relevant to delimitation with El Salvador. The remainder of the Honduran coast, the coastline east of Point Y, we have ignored because it is relevant to some future delimitation between Honduras and Nicaragua. But by the same reasoning we have limited the relevant maritime area to the east by a line drawn from Point X — midway along the

closing-line — perpendicular to the general direction of the coast, out to 200 miles, the extreme easterly line on this map. Everything to the east of that line is outside the relevant area for purposes of this delimitation.

The result is that Nicaraguan claims, both in respect of the closing-line and the maritime areas outside, are untouched. *Provided,* provided only, that you can assume that Nicaragua has no plausible claim to the waters beyond the mid-point of the closing line, Point X: or to the waters west of the perpendicular projected from that mid-point. On that assumption the Nicaraguan interests will be represented in some future delimitation in the area to the east of this perpendicular, between Nicaragua and Honduras. And the only impact of the Court's decision will be to determine that Nicaragua must negotiate with Honduras and not with El Salvador.

Now Nicaragua's oral argument has, with respect, left this conclusion unchallenged. Certainly Professor Brownlie is right to say that the area beyond the closing-line remains in issue between all three States and that will remain so until both delimitations are effected. He is equally right in saying that Honduras does not accept that El Salvador is entitled to the western half of the closing-line, up to Point X, up to the mid-point. But how does that prejudice Nicaragua's legal interests? Again I emphasize to the Court that Nicaragua has made no good, arguable claim to go *beyond* that mid-point, or the perpendicular projected from it seawards. So a delimitation by the Court, within the relevant area west of that perpendicular will not impair Nicaraguan rights in any way. The Court's delimitation will simply determine who is to be Nicaragua's neighbour for purposes of a future delimitation.

Now as to the argument that Honduras has recognized Nicaragua's legal interests, I have to say that this is not so *within the relevant area.* Of course we recognize that Nicaragua has a right to a maritime area beyond the closing-line. Of course we recognize that the Court, in making a delimitation between Honduras and El Salvador must bear in mind prospective third State delimitations, such as a future Honduran/Nicaraguan delimitation. Of course we recognize that the Nicaraguan entitlement will depend on all its coast, including that within the Gulf. But none of that constitutes recognition that Nicaragua has legal interests beyond the mid-point of the closing line and the perpendicular drawn from that mid-point out to 200 miles.

To conclude, Mr. President, the only aspect of the case in which Nicaragua has a legitimate legal interest, likely to be affected by the decision, is whether the waters of the Gulf should or should not be subject to a régime of condominium. And that is why Honduras did not feel it proper to oppose a Nicaraguan intervention, provided it is limited to this specific aspect of the case.

Yet, having said this, there remains a further question. Can such an intervention occur without a jurisdictional link between Nicaragua and the two Parties?

3. The Question of a Need for a Jurisdictional Link

So I turn now to the question of a need for a jurisdictional link. This question is not an easy one. Article 62 of the Statute contains no reference to any need for a jurisdictional link. The only express reference is in Article 81 (2) *(c)* of the Rules, of the provision inserted in the Rules for the first time in 1978. The history of this provision was reviewed by the Court in its Judgment on the Maltese intervention in the *Tunisia/Libya* case (*I.C.J. Reports 1981,* para. 27). And there the Court made clear that the purpose of introducing this new reference to a

jurisdictional link was not to make such a link mandatory for all interventions under Article 62 but rather

> "to ensure that, when the question did arise in a concrete case, it would be in possession of all the elements which might be necessary for its decision . . . the Court left any question with which it might in future be confronted in regard to intervention to be decided on the basis of the Statute and in the light of the particular circumstances of each case".

It is, in fact, very difficult to read Article 81 of the Rules so as to make a jurisdictional link a *sine qua non* of the admissibility of a request to intervene. Paragraph 2 *(c)* requires an intervenor to inform the Court of any basis of jurisdiction claimed to exist. Its purpose is therefore to provide information to the Court. Compare the drafting of paragraphs 2 *(a)* and 2 *(b)*. The word "any" does not appear, and the existence of an "interest of a legal nature" and a statement of a "precise object of intervention" appear more as mandatory requirements. Nevertheless, the question may still be regarded as unsettled. In my submission two factors need to be borne in mind. The first is that "intervention" is not a fixed concept: it can, in fact, take various forms. The second is that Article 63 of the Statute, and Article 82 of the Rules, which give a right to intervene to a State party to a treaty the construction of which is in question, make no reference to a jurisdictional link.

It is therefore necessary for the Court to take a view of the need for a jurisdictional link under Article 62 which is not incompatible with the absence of any such need under Article 63. In short, if a State can offer its views on the construction of a treaty under Article 63, without the need for a jurisdictional link, should not a similar, limited intervention under Article 62 also require no jurisdictional link? In other words, a State offering its views on the construction of a treaty is not normally intervening as a party. It is not subjecting its own legal rights to adjudication but merely expressing a view about the interpretation it would itself adopt in relation to a treaty to which it is a party.

Now with these factors in mind, I would offer a number of tentative suggestions to the Court, in the hope that they may assist the Court in reaching its own conclusion. In offering these suggestions I would acknowledge my indebtedness to the separate opinion of Judge Mbaye in the *Italian Intervention* case (*I.C.J. Reports 1984*, p. 43). The suggestions are as follows:

First, where a State intervenes *as a party* there must be a jurisdictional link. Whether the intervenor subjects its own legal rights to adjudication on the same issues; or, *a fortiori* where it seeks to add an additional issue, the fundamental requirement of consent involves a need for a jurisdictional link. Now for cases brought under Article 36 (2) of the Statute, this would mean an optional clause declaration of sufficient scope to embrace the dispute. For cases brought under Article 36 (1) it would mean *either* subjection to the same compromissory clause in the same treaty, or when the case is brought under a special agreement it would mean that the *ad hoc* consent of both parties to that agreement would be required.

Second, it follows from this that, in the present case, Nicaragua cannot intervene as a party. This is a case brought under a Special Agreement, and the parties to that Agreement have not given their consent to Nicaragua intervening as a party. I would submit, further, that in cases brought under Article 36 (1) of the Statute, a would-be intervenor cannot find a jurisdictional link in an optional clause declaration under Article 36 (2). But Nicaragua does not argue that jurisdiction does exist on that basis, so the point is academic. And, given the reservations to the optional clause declarations of both El Salvador and Honduras, it

is clear that no jurisdiction could be established on that basis. Now, let me turn to the other hypothesis where a State intervenes, but *not as a party*, then:

(a) Under Article 63, the sufficient legal interest is deemed to exist by virtue of being a party to a treaty under construction, but no jurisdictional link is required. The fact that the intervenor is, under Article 63 (2), bound by the judgment does not make the Article 63 intervenor a party, nor does it require a jurisdictional link. That was certainly the view of Judge Oda in 1981 (*I.C.J. Reports 1981*, p. 28), of Judge Mbaye in 1984 (*I.C.J. Reports 1984*, p. 43) and also of Judge Schwebel, again in the *Italian* case (*ibid.*, p. 144).

(b) Now under Article 62, by analogy — and assuming a sufficient legal interest to have been demonstrated — no jurisdictional link would be required.

Thus a State could intervene to express its views on the legal status of waters in which it had a clear legal interest, as in this case. Or to express a view on the legality of conduct on the high seas where its own interests were involved. For example, State A might wish to express a view about the legality of the arrest of vessels of State B by State C, precisely because, if the arrest were valid, in similar circumstances its own vessels are likely to be arrested.

Now an intervention designed to express a view about the general law would be unlikely to succeed, because of lack of sufficient legal interest. So the jurisdictional point would not arise.

It follows from what I have said that, in the present case, it is the view of Honduras that Nicaragua need not prove a jurisdictional link. Because it is clear that Nicaragua does not seek to intervene as a party. As the Nicaraguan Application makes clear, the purpose of its intervention is simply "to inform the Court of Nicaragua's legal rights". Provided that expression of opinion is confined to the status of the waters of the Gulf — a matter on which the Nicaraguan legal interest is clear — Honduras sees no need for a jurisdictional link.

Now it is true that the Nicaraguan Application is a little obscure. In stating that Nicaragua "intends to subject itself to the binding effect of the decision to be given" (para. 6); and in suggesting that there is a "long-existing dispute involving the three riparian States" (para. 19) there is a suggestion that Nicaragua envisages being a party. But neither El Salvador nor Honduras have any knowledge of such a dispute — for no claim has ever been submitted by Nicaragua — so the suggestion is not a very serious one. And Nicaragua's oral statement before the Court has confirmed that it does not intend to be a party. Professor Brownlie explained that Nicaragua requests "a form of intervention limited to the demonstration and protection of the interests of the intervening State" (C4/CR 90/1, p. 39). Or to use the words of Professor Remiro, an intervention *"d'une fin purement défensive, conservatoire . . ."* (C4/CR 90/2, p. 12). So it is clear that Nicaragua does not intend to be a party.

On this basis, therefore, we can pass over the question of a jurisdictional link and address the final question which the Court must face. How will such a limited right of intervention affect the procedural handling of this case from now on? This is the matter to which I now turn.

4. The Procedural Consequences of Allowing a Limited Nicaraguan Intervention

One has to start with the Statute and the Rules of the Court. Article 85 of the Rules lays down the procedural consequences of a permitted intervention quite clearly. These are that Nicaragua would have the right:

1. "to submit a written statement within a time-limit to be fixed by the Court"; and
2. "in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention".

And that is all. Moreover, in fixing these time-limits, including the time to be allowed to the parties to make their own written observations on the written statement of the intervenor, the Court "shall, so far as possible" ensure that these time-limits "coincide with those already fixed for the pleadings in the case" (para. 2).

Thus, there is to be minimal interruption or disturbance of the procedures in being between the parties. The Court's Order of 28 February 1990 confirms this: it emphasized that a State requesting intervention must "take the procedural situation in the case as it finds it".

Now against this background, we need to look at the quite extraordinary proposals which Nicaragua has in mind.

(a) *The first, the proposal to reform the Chamber, is in the Application, paragraph 23, where Nicaragua proposes*

> "not a reformation of the Chamber and its jurisdictional basis *tout court* but only the making of those changes strictly necessary in order to maintain the minimum standards of efficacy and procedural fairness".

We now know what that means. The assumption that Nicaragua is entitled to appoint its own *ad hoc* judge is quite unfounded. Article 31 of the Statute confines the right to choose an *ad hoc* judge to parties. Nicaragua is not, and will not be, a party, so no right of appointment exists. And it is this point — a very crucial point — which is perhaps under-emphasized in Judge Shahabuddeen's dissenting opinion attached to the Court's Order of 28 February 1990. The argument that an intervenor has an equal interest in the composition of a Chamber to the original parties really assumes that it will have, or should have, equal status. But if the intervenor chooses not to be a party, then the argument loses its force, whatever its other merits or demerits. And that is the case here.

The assumption that the present composition of the Chamber can be reviewed is equally fallacious. No right to request a change in the composition of a Chamber is contemplated by either the Statute or the Rules, as a consequence of intervention. The full Court has already determined the composition of this Chamber, with the approval of the Parties, as required by Article 26 (2) of the Statute. Apart from the specific case of the death or resignation of a member, no further basis for a change in composition is contemplated by either the Statute or Rules. Moreover, even if they were a power in the full Court to alter the present composition, it would follow that the approval of the two Parties would be needed. And the Court could anticipate with reasonable confidence that such approval would not be given.

(b) *The re-ordering of the written proceedings*

The second proposal is the re-ordering of the written proceedings. This is in the Application, at paragraph 23.

As I have already indicated, Article 85 of the Rules sets out exactly what Nicaragua is entitled to. The Nicaraguan pretensions are quite without foundation, and would clearly contravene the Court's existing Order of 28 February 1990, requiring an intervenor to take the procedural situation in the case as it finds it.

Then we come to the third proposal.

(c) *In the alternative, that this Chamber should be confined to the land boundary and that the maritime dispute should, with the agreement of the two Parties, be submitted to the full Court or a different Chamber*

This audacious and unprecedented alternative request is without parallel in the history of the Court. It has nothing whatever to do with intervention. Because Article 62 contemplates intervention in an *existing* case. And what this proposal envisages is the creation of two, totally new cases. And the consequences would be very far-reaching.

The Special Agreement of 24 May 1980 would have to be revised, so as to confine the present case to the land boundary.

A new tripartite Special Agreement would need to be concluded, dealing with what Nicaragua regards as the maritime dispute, in which it alleges an interest. But both those changes are fraught with potential hazards, and no one can say whether these new agreements would ever be concluded. Even the practicality of the division is questionable. Could a maritime boundary be settled until the terminal point of the land boundary between El Salvador and Honduras had been settled? I think not. Could the dispute over the islands in the Gulf — in which Nicaragua has no interest — be separated from the maritime delimitation within the Gulf, in which Nicaragua says it has an interest? I think not. There are good reasons for integrating all aspects of the dispute into one case. And this proposal is both too hazardous, and too impractical, to merit serious consideration at this stage. It would serve only to frustrate completely the Special Agreement of 24 May 1986, under which the present dispute is now before the Court.

And there is yet a further point. Honduras views these proposals with considerable scepticism. Because the fact is that the dispute now before the Court was first defined — and made a matter of public record — not in May 1986, but in the General Treaty of Peace of 1980. The issue of "the legal situation of islands and maritime areas" was referred to the Joint Frontier Commission in Article 18 of the 1980 Peace Treaty, and Article 31 envisaged that, if not settled within five years, that same issue would be referred to the International Court.

So Nicaragua has had, not four years but ten years, *ten years*, in which to indicate that it had a legal interest and in which to suggest to the Parties ways and means of taking that interest into account. But what happened? Nothing, precisely nothing. Not a single word or note of claim or interest was sent to either Party during all those ten years by Nicaragua.

The doctrine of laches is not unknown to international law. Founded in equity, it can operate so as to debar a State from a remedy it might have secured had it acted in a timely and reasonable manner. Nicaragua's proposals for re-ordering this case are both out of time, and wholly unreasonable.

Mr. President, it remains for me to conclude by stating the submissions of Honduras. They are as follows:

— First, Honduras would see no objection to Nicaragua being permitted to intervene in the existing case *for the sole purpose of expressing its views on the legal status of the waters within the Gulf.* Nicaragua has, under Article 62, no *right* to intervene, and the Court in granting its permission, may limit that permission to the extent necessary to safeguard the legal interests of the requesting State. Indeed, it can be argued that the Court is bound to impose such limits on its permission; and

— Second, in this case the Court is, for all purposes, the Chamber as presently constituted and all proposals by Nicaragua to reform or re-constitute the Chamber, or to allocate the present case in part to the Chamber and in part to the full Court must be rejected.

QUESTION PUT BY THE PRESIDENT OF THE CHAMBER

The PRESIDENT OF THE CHAMBER: Professor Bowett's presentation this morning concludes the observations on the part of Honduras. Immediately after the closing of this sitting, I shall convene the Agents of the two Parties, and of the State seeking to intervene, to meet with me in the adjacent room No. 3 so that we may discuss further procedure in the oral proceedings, if any. But before closing this sitting, the Chamber wishes to put a question to the Agent of Nicaragua. The purpose is merely one of clarification, because the Chamber is anxious to be sure that it understands aright what was being said on behalf of Nicaragua; so it may be this is a simple matter that the Agent can deal with straight away.

The Agent stated at the outset that, "Nicaragua reaffirms its Application for permission to intervene made to the full Court on 17 November 1989" in the present case (C4/CR 90/1, p. 12), and he went on to say that "In making this Application for permission to intervene, Nicaragua assumes the obligations of a party to the case within the meaning of Article 59 of the Statute" *(ibid.)*. A little later (p. 14), when dealing with the Order made by the Court on 28 February 1990, the Agent stated that the Order "does not mean that the request made by Nicaragua and addressed very carefully to the full Court can be — without Nicaragua's consent — dealt with by this Chamber". And he added (also, page 14):

> "One of our major problems in deciding whether to present ourselves for this hearing of our request for intervention addressed to the full Court was that we could not accept that any decision — I emphasize *any* decision — given by the Chamber as presently constituted could be binding on Nicaragua." (*Ibid.*, p. 14.)

After quoting the Order of 28 February 1990, the Agent then said:

> "Plainly stated Nicaragua maintains, before this Chamber of the Court, its Application for permission to intervene but modified in the sense that the requests made in Sections 23 and 24 of its original Application of 17 November 1989 are not being submitted for decision by this Chamber." (*Ibid.*, p. 16.)

What the Chamber wishes to ask is this:

Is the Chamber correct in understanding that Nicaragua accepts that it is this Chamber which is properly seised of an application by Nicaragua for permission to intervene before it in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*; and does Nicaragua recognize that the eventual decision of this Chamber granting or refusing permission to intervene will be binding and final?

That is the question of the Chamber.

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GÓMEZ: Mr. President, Members of the Chamber. Subject to further clarification, I wanted to say immediately that we have come before the Chamber because we accept that the decision on intervention — and anyway the Order of the full Court made it very clear — that this decision was entirely for the Chamber; we have come before the Chamber, and we accept that the Chamber has full authority to decide on Nicaragua's intervention. Nicaragua's intervention has been submitted, and we accept that it has been, and is now before the Chamber. Mr. President, I do not know whether this completely answers the question. I will have to read it carefully again, but I think it important to make it very clear that we have come before the Chamber because we understand that the Chamber has the authority of the Court to decide on the matter of the request of Nicaragua's intervention in the case at hand.

The Chamber rose at 12.30 p.m.