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Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Tuesday 23 April 1991, at 10 a.m., at the Peace Palace,

Judge Sette-Camara, President of the Chamber, presiding

in the case concerning the Land, Island and Maritime Frontier Dispute
(El Salvador/Honduras: Nicaragua intervening)

VERBATIM RECORD

ANNEE l991

Audience publique de la Chambre

tenue le mardi 23 avril 1991, à 10 heures, au Palais de la Paix,

sous la présidence de M. Sette-Camara, président de la Chambre

en l'affaire du Différend frontalier terrestre, insulaire et maritime
(El Salvador/Honduras; Nicaragua (intervenant))

COMPTE RENDU

Present:

Judge Sette-Camara, President of the Chamber
Judges Sir Robert Jennings, President of the Court
Oda, Vice-President of the Court
Judges *ad hoc* Valticos
Torres Bernárdez

Registrar Valencia-Ospina

Présents :

M. Sette-Camara, président de la Chambre
Sir Robert Jennings, Président de la Cour
M. Oda, Vice-Président de la Cour, juges
M. Valticos
M. Torres Bernárdez, juges *ad hoc*

M. Valencia-Ospina, Greffier

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Dr. Alfredo Martínez Moreno,

as Agent and Counsel;

H. E. Mr. Roberto Arturo Castrillo, Ambassador,

as Co-Agent;

and

H. E. Dr. José Manuel Pacas Castro, Minister for Foreign Relations,

as Counsel and Advocate.

Lic. Berta Celina Quinteros, Director General of the Boundaries' Office,

as Counsel;

Assisted by

Prof. Dr. Eduardo Jiménez de Aréchaga, Professor of Public International Law at the University of Uruguay, former Judge and President of the International Court of Justice; former President and Member of the International Law Commission,

Mr. Keith Highet, Adjunct Professor of International Law at The Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,

Mr. Elihu Lauterpacht C.B.E., Q.C., Director of the Research Centre for International Law, University of Cambridge, Fellow of Trinity College, Cambridge,

Prof. Prosper Weil, Professor Emeritus at the *Université de droit, d'économie et de sciences sociales de Paris,*

Dr. Francisco Roberto Lima, Professor of Constitutional and Administrative Law; former Vice-President of the Republic and former Ambassador to the United States of America.

Dr. David Escobar Galindo, Professor of Law, Vice-Rector of the University "Dr. José Matías Delgado" (El Salvador)

as Counsel and Advocates;

and

Dr. Francisco José Chavarría,
Lic. Santiago Elías Castro,
Lic. Solange Langer,
Lic. Ana María de Martínez,

Le Gouvernement d'El Salavador est représenté par :

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comme coagent;

S. Exc. M. José Manuel Pacas Castro, ministre des affaires étrangères,

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M. David Escobar Galindo, professeur de droit, vice-recteur de l'Université "Dr. José Matías Delgado" (El Salvador),

comme conseils et avocats;

ainsi que :

M. Francisco José Chavarría,
M. Santiago Elías Castro,
Mme Solange Langer,
Mme Ana María de Martínez,

Mr. Anthony J. Oakley,

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as Counsellors.

The Government of Honduras is represented by:

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Mr. Luis Ignacio Sánchez Rodriguez, Professor of International Law, Universidad Complutense de Madrid,

Mr. Alejandro Nieto, Professor of Public Law, Universidad Complutense de Madrid,

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H.E. Mr. Max Velásquez, Ambassador of Honduras to the United Kingdom,

Mr. Arnulfo Pineda López, Secretary-General of the Sovereignty and Frontier Commission,

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M. Julio González Campos, professeur de droit international à l'Université autonome de Madrid,

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Mr. Raul Andino,

Mr. Miguel Tosta Appel

Mr. Mario Felipe Martínez,

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Mme Olmeda Rivera,

M. Raul Andino,

M. Miguel Tosta Appel,

M. Mario Felipe Martínez,

Mme Lourdes Corrales,

comme membres de la Commission de Souveraineté et des frontières.

Le PRESIDENT : Please be seated. The sitting is open. Today is the turn of El Salvador to begin this second round of hearings, and I give the floor to Professor Prosper Weil.

M. WEIL : Merci, Monsieur le Président.

L'INTERPRETATION DU COMPROMIS

Monsieur le Président, Messieurs les Juges, je tiens avant toute chose à présenter à la Chambre et à la délégation du Honduras, et plus particulièrement au Professeur Paul De Visscher, mes excuses pour mon absence hier au moment où ce dernier a prononcé sa réplique au sujet de l'interprétation du compromis. Je prie la Chambre, la délégation hondurienne et mon ami Paul de Visscher de ne voir là aucun geste discourtois, mais simplement le résultat d'un empêchement, lui-même dû à un malentendu au sujet du calendrier des plaidoiries, et que je suis, soyez-en assurés, le tout premier à regretter. Je tiens également, si vous me le permettez, Monsieur le Président, à souligner combien j'apprécie que nos échanges se soient déroulés au niveau élevé du droit, sans jamais verser dans une polémique partisane contraire à l'esprit scientifique auquel doivent rester fidèles les universitaires que nous sommes. C'est pour moi, je tiens à le dire, un réel privilège que d'affronter un contradicteur d'une pareille qualité.

Monsieur le Président, Messieurs les Juges, il ne saurait être question de reprendre ici l'ensemble du débat et de vous imposer l'épreuve d'un nouvel exposé de la position d'El Salvador. Je ne reviendrai pas sur la différence de signification qui sépare, à première vue comme après un examen approfondi, les concepts de délimitation et de détermination de la situation juridique, aussi différents l'un de l'autre que le jour l'est de la nuit. Je ne reviendrai pas non plus sur l'absence de négociations réelles, sérieuses, "qui aient un sens", au sujet de la délimitation. Je me bornerai à relever dans la belle plaidoirie du Professeur De Visscher deux aspects seulement, dont l'un appelle une mise au point, mais dont l'autre nécessite une contradiction de fond.

I. La mise au point concerne la question des méthodes d'interprétation du compromis. M. De Visscher s'est insurgé contre l'idée que l'on pourrait "soumettre à deux méthodes différentes d'interprétation les clauses d'un même compromis, selon qu'elles ont trait à la création de la

compétence juridictionnelle ou à l'objet du différend" (c4/cr91/6, p. 12). "Pareille dichotomie" (*op. cit.*, p. 11), déclare-t-il, ne repose sur rien.

Je suis tout à fait désolé, Monsieur le Président, si j'ai pu donner à penser à nos adversaires, et peut-être à la Chambre, que telle était ma thèse. Sans nul doute me suis-je mal ou insuffisamment expliqué, pour avoir été si mal compris. Je n'ai jamais pensé que dans un compromis coexistent côte à côte des dispositions générant la compétence juridictionnelle, qui devraient s'interpréter dans une optique subjective selon le principe: "tout le consentement, mais rien que le consentement", et des dispositions définissant l'objet du différend, qui devraient s'interpréter dans une optique objective, sur la base du principe: "le texte, tout le texte, rien que le texte".

Mon observation tendait tout simplement à constater que le compromis - le compromis tout entier, sans différenciation entre telle ou telle de ses dispositions - possède le double caractère d'un instrument générateur de compétence et d'un traité international, et je m'étais demandé si une contradiction ne risquait pas de surgir, dans certaines situations, entre la recherche subjective de l'intention des Parties, qui domine l'interprétation du compromis en tant qu'acte instituant la compétence du juge, et la démarche objective, qui domine l'interprétation des traités. Ma réflexion m'a conduit, la Chambre s'en souvient peut-être, à écarter [toute hypothèse de contradiction ou] toute possibilité de contradiction; et c'est à la lumière d'une approche convergente visant à établir l'intention des Parties au travers du sens naturel et ordinaire des termes employés dans leur contexte que j'ai essayé de conduire l'exercice d'interprétation qui m'incombait. C'est bien entendu cette même méthode - je dis bien cette même méthode - qui gouverne l'interprétation de l'ensemble des dispositions pertinentes du compromis, et il n'est pas question d'appliquer une méthode subjective à certaines dispositions du compromis et une méthode objective à d'autres. Il y a, ai-je dit, parfaite coïncidence entre la subjectivité de l'interprétation du compromis en tant qu'instrument générateur de la compétence de la Chambre et l'objectivité de l'interprétation du compromis en tant que traité international.

Voilà pour le premier point, somme toute mineur.

II. Le second point mérite davantage d'attention. Dans l'espoir d'insuffler une nouvelle vie à

l'argument hondurien de l'effet utile, M. Paul De Visscher a soutenu que le titre du Honduras est un titre inhérent, qui existe *ipso facto* et *ab initio*, qui préexiste donc en quelque sorte à toute décision de la Chambre, sur l'existence duquel il ne peut y avoir aucune contestation, sur lequel la Chambre en quelque sorte n'a pas de prise, et dont la Chambre ne peut en conséquence que constater l'existence dans un jugement déclaratoire:

> "Le Honduras, a-t-il déclaré, n'a pas besoin de l'autorisation de la Cour... pour justifier d'un titre aux espaces maritimes dans le golfe et hors du golfe. Sur base du titre qu'il possède déjà en vertu du droit international général, le Honduras pourrait parfaitement entreprendre l'exploration et l'exploitation de ces espaces... En définitive [c'est toujours le Professeur Paul De Visscher qui parle], le Honduras soutient qu'il possède *hic et nunc* par l'effet du droit international général, codifié par la convention de 1982, un titre sur les espaces maritimes et que ce titre ne peut pas être remis en doute par la Partie adverse." (*Op. cit.*, pp. 15 et 17.)

Cette argumentation se heurte à une double objection.

En premier lieu, la conception du droit inhérent et *ab initio* qui peut s'exercer sans un processus juridique particulier et sans aucun acte constitutif n'est valable, est-il besoin de le dire, que pour une seule des juridictions maritimes, le plateau continental. C'est au plateau continental que se réfère l'article 2 de la convention de Genève de 1958 aux termes duquel "[l]es droits de l'Etat riverain sur le plateau continental sont indépendants de l'occupation effective ou fictive, aussi bien que de toute proclamation expresse". C'est à cette disposition que la Cour a fait référence dans le célèbre paragraphe 19 de son arrêt de 1969 sur le *Plateau continental de la mer du Nord* qui énonce en des termes qui ont été depuis repris et repris, la théorie du droit inhérent dont, dit la Cour, l'"existence peut être constatée" mais qui "ne suppose aucun acte constitutif".

La convention des Nations Unies de 1982 reprend mot pour mot dans son article 77, qui définit les droits de l'Etat côtier sur son plateau continental, le principe énoncé par la convention de Genève et systématisé par la Cour en 1969. Rien de semblable, nous le savons tous, pour les autres juridictions maritimes. Le contraste est saisissant entre la rédaction des articles 3 et 56 de la convention de 1982 relatifs à la mer territoriale et à la zone économique exclusive et celle de l'article 77 relatif au plateau continental. Ni pour la mer territoriale ni pour la zone économique exclusive il n'est prévu de droit inhérent indépendant de tout acte volontariste. Certes tout Etat côtier a un droit potentiel à une mer territoriale et à une zone économique exclusive, mais ce droit ne

devient réel, effectif que par l'intermédiaire d'un acte de volonté juridique par lequel l'Etat en cause proclame et revendique une mer territoriale d'une largeur donnée (qui ne saurait excéder 12 milles marins) et une zone économique exclusive d'une largeur donnée (qui ne saurait excéder 200 milles marins); en l'absence d'un tel acte de volonté juridique exprès, la mer territoriale et la zone économique exclusive demeurent à l'état de virtualité parce que leur largeur reste indéterminée, contrairement à celle du plateau continental, dont la largeur répond à des critères préexistants fixés par le droit international coutumier et codifiés (au moins jusqu'à un certain point) dans la convention de 1982.

Prétendre que le Honduras a un droit inhérent d'exploration et d'exploitation des eaux dans le golfe et dans le Pacifique n'est donc pas conforme aux données du droit de la mer. Mais il y a plus important et peut-être plus grave. Comme j'ai tenté de l'expliquer dans ma précédente plaidoirie, ce qui est controversé dans la présente affaire, c'est précisément la question de savoir si le Honduras se trouve dans une situation juridique telle qu'il possède des droits qui viendraient chevaucher les droits d'El Salvador, créant ainsi une situation juridique qui appelle une délimitation. A cette question le Honduras apporte une réponse affirmative, et El Salvador une réponse négative fondée, en ce qui concerne le golfe sur le régime spécial du golfe de Fonseca, et en ce qui concerne le Pacifique sur le fait que, selon El Salvador, le Honduras ne possède pas la qualité d'Etat côtier du Pacifique.

C'est ce différend que la Chambre est appelée à trancher. Soutenir, comme l'a fait Paul De Visscher, que le Honduras pourrait proprio motu exercer les droits attachés à son titre sans avoir "besoin de l'autorisation de la Cour" revient en quelque sorte à ignorer (au sens anglais du terme "to ignore") la position opposée d'El Salvador et l'existence d'un différend entre les deux pays et à ériger en axiome que les droits du Honduras ne sont sujets ni à doute ni à discussion.

Est-il besoin de rappeler que, même lorsque le droit international autorise un Etat à proclamer ou à revendiquer unilatéralement des droits maritimes (au moyen par exemple d'une législation interne) même dans ce cas, le principe fermement posé par la Cour dans l'affaire des *Pêcheries* est que la validité de son action dans les rapports avec d'autres Etats "relève du droit international" (*C.I.J. Recueil 1951,* p. 132).

Que le Honduras prétende, soutienne, allègue, qu'il possède dans le golfe ou dans le Pacifique un titre qui entre en concurrence avec celui d'El Salvador, c'est sa prérogative d'Etat souverain. Mais que, en présence du point de vue opposé d'un Etat tiers, en l'espèce El Salvador, et en face par conséquent d'un différend international, le Honduras assimile d'emblée sa prétention à un droit déjà effectivement consacré, cela n'est pas acceptable car cela revient à nier le rôle même du règlement judiciaire international et à réduire à néant la fonction judiciaire de la Chambre.

La thèse du Honduras revient en définitive à ériger en postulat absolu et en dogme infaillible sa prétention de litigant. Son titre sur les espaces maritimes, a affirmé M. Paul De Visscher, je l'ai cité il y a un instant, "ne peut pas être mis en doute par la Partie adverse". A suivre cette thèse, non seulement El Salvador n'a pas le droit de mettre en doute le titre du Honduras, non seulement tout différend sur le titre du Honduras est nié comme une impossibilité juridique, mais la Chambre elle-même n'a plus d'autre rôle que de rendre (je cite Paul De Visscher) "un arrêt déclaratoire ... reconnaissant (au Honduras) sur base du droit international général son titre sur les espaces maritimes". (*Op. cit.*, p. 15.)

Monsieur le Président, El Salvador ne voit pas d'inconvénient à ce que la décision que la Chambre va rendre au sujet de la situation juridique des espaces maritimes du golfe et du Pacifique soit analysée comme un jugement déclaratoire, c'est-à-dire, pour m'inspirer des formules de l'arrêt *Haya de la Torre*, comme un arrêt qui définit les rapports de droit entre les Parties sans comporter pour celles-ci aucune injonction et en laissant aux Parties le soin d'en tirer les conséquences appropriées (*C.I.J. Recueil 1951*, p. 79). Mais ce jugement, la Chambre le prononcera en statuant sur un différend. La mission de la Chambre ne consiste pas à donner son estampille à un titre axiomatique soustrait à toute discussion; sa mission consiste à décider, après examen des données de l'affaire, si, en vertu du droit international, un tel titre, dont l'existence est contestée par l'autre Partie, existe ou n'existe pas. On ne voit pas quelle autre signification pourrait revêtir l'article 2 du compromis aux termes duquel : "Les Parties demandent à la Chambre ... qu'elle détermine la situation juridique ... des espaces maritimes."

Monsieur le Président, Messieurs les Juges, si je me suis autorisé à formuler de telles

évidences, de telles banalités, c'est parce que la thèse nouvelle avancée par le Honduras dans sa réplique orale a des implications lointaines qu'El Salvador ne pouvait pas laisser sans réponse.

Je vous remercie, Monsieur le Président, Messieurs les Juges, de votre patience renouvelée, et je vous prie, Monsieur le Président, de bien vouloir donner la parole au Président Eduardo Jiménez de Aréchaga.

The PRESIDENT: I thank Professor Weil and I give the floor to President Eduardo Jiménez de Aréchaga.

Dr. JIMENEZ DE ARECHAGA: Mr. President, Members of the Chamber, this is the oral rejoinder by El Salvador on the law applicable to the land frontier dispute.

THE LAW APPLICABLE TO THE LAND FRONTIER DISPUTE

The first point made yesterday by Professor Nieto related to the evidentiary value of documents.

El Salvador does not claim that the Formal Title-Deeds to Commons are the only documents to be taken into consideration by the Chamber. Rather El Salvador contends that the Chamber, when comparing the evidentiary value of all the documents relied on by the Parties, should recognize that the Formal Title-Deeds to Commons on which El Salvador is relying are the best possible evidence, the supreme means of proof in relation to the application of the principle of *uti possidetis juris* in this case. In other words, El Salvador is not invoking any exclusivity for the documents upon which it is relying: it is invoking what in other jurisdictions is called "the best evidence rule".

Professor Nieto continued to submit that the Formal Title-Deeds relied on by El Salvador are grants of "ejidos de composición.

He made reference to a list set out in the book of Francisco de Solano entitled *Tierras y Sociedad en el Reino de Guatemala*; this work indeed contains a list of "composiciones" carried into effect in Guatemala. This list is at the disposition of the Chamber in this book which, if it is not readily available to the Members of the Court, El Salvador will file with the Registry of the Court

forthwith. None of the formal title-deeds relied on by El Salvador is to be found in this list. The only Title-Deed mentioned in the course of this litigation which appears on this list as an "ejido de composición" is the title-deed conferring private propietary rights on the Indian community of Jocoara, a title-deed which was relied on by Professor Bardonnet to support the claim of Honduras to Nahuaterique. The only times that the process of "composición" was applied in respect of two of the formal title-deeds relied on by El Salvador were the "composiciones" paid for the "demasias", that is to say the excess portion of land not covered by the formal title-deeds in the cases of Arcatao and of La Palma. But that does not alter the fact that both these formal title-deeds granted "ejidos de reducción" not "ejidos de composición".

For instance, the Formal Title-Deed to the Commons of La Palma (which appear in the Annexes to the Counter-Memorial of El Salvador, Volume II, Annex III.1) was clearly an "ejido de reducción" and not an "ejido de composición". The adjudicating authority granted to the Indian community, represented by its municipal officers, some 40 "caballerias" as Commons. This grant was made gratuitously without any payment being required on the basis of the Laws of the Indies (*ibid* ., at p. 27 (English translation) and at p. 121 (original Spanish)).

The Formal Title-Deed itself asserts that this land settlement amounted to the grant of an "ejido de reducción". The term "reducción" is actually employed in the text of the title-deed (*ibid* ., at p. 25 (English translation) and at p. 111 (original Spanish)).

An additional number of "caballerias" were also granted as an enlargement of the Commons and for this additional area a very moderate payment was demanded by way of "composición".

But what is important is that no distinction or separation was made between the land granted as an "ejido de reducción" and the excess of land, the "demasia" which was adjudicated by the process of "composición".

All the land adjudicated on one or the other basis was submitted to exactly the same legal régime, and that legal régime was the one applied to "ejidos de reducción". All the land was considered as communal property: all of it was to be exploited in common and could not be alienated in whole or in part; all of it formed part of the public domain and so was vested in the

Municipal Council or "Cabildo", "cuyos fueron y serán" as the King said, and consequently all the land was subject to the administrative control of the "Alcadía Mayor" of San Salvador.

The Formal Title-Deed itself expresses the unity and sole identification of the land as a whole by stating that the "demasía" was embraced (the Spanish word used is "comprendidas", literally meaning "comprised") within the Commons (*ibid* ., at p. 29 (English translation) and at p. 124 (original Spanish)).

Professor Nieto quoted certain Royal Orders, concluding that they prove that the process of "composición" was capable of applying to some Indian communities. Of course this is true; an Indian community could purchase an "ejido de composición", just as the Indian community of Jocoara actually did. This is simply because the Indian communities had a right so to do if they wished to obtain a particular piece of land or to enlarge their original Commons.

But the fundamental point is that the original "ejidos de reducción", such as those granted in the Formal Title-Deeds relied on by El Salvador, *could not be subject to the compulsory revision which was conducted in respect of lands subject to the régime of "ejidos de composición"*. The "ejidos de reducción" were exempt from that obligatory régime and this was the case from the very beginning of the Spanish colonial period.

Professor Nieto also recalled the Law in the Recopilación which prohibited the local authorities from modifying on their own, as he said, "la limite des provinces, une prérogative réservée au roi d'Espagne".

However, there is a simple answer to this objection. There is a Royal Order, adopted at El Pardo in 1591 which was annexed in the Memorial of Honduras (Cedulario Indiano No. 133, Annexes to the Memorial of Honduras at pp. 70-71), in which the King empowers the "Real Audiencia" of Guatemala to grant "ejidos" to the Indian communities without this delegated authority being restricted or modified by any requirement to respect the divisions or limits of provinces and districts within the territory governed by the "Real Audiencia" of Guatemala. For instance, the Order of the "Juez Privativo de Tierras" Arredondo, authorizing the sub-delegate judge Jiménez Rubio of Chalatenango to adjudicate the mountain of Tecpangüisir to the Indian community of

Citalá is the best possible answer to Professor Nieto's contention; this Order shows eloquently that such an authorization, totally disregarding existing provincial boundaries, could be validly granted by the "Real Audiencia" of Guatemala. It is important to observe that Honduras has not sought to challenge the validity of the authorization so given.

On this sector Professor Bardonnet pointed out yesterday that it was with respect only to the adjudication of the mountain or Tecpanguisir that the "Juez Privativo de Tierras" in Guatemala gave authority to the sub-delegate judge Jiménez Rubio.

But what is relevant is that, once the Judge so authorized had actually adjudicated the mountain, that area became subject to administrative and judicial control exercised from the "población" of Citalá and was thereby placed within the boundaries of the territorial and municipal jurisdiction of a Salvadorean "población".

It is also important to note that the Royal Order to which reference has just been made receives a somewhat misleading translation in the Annexes to the Memorial of Honduras (at pp. 70-71). The translation into French submitted by Honduras is as follows:

> "je vous confère pouvoir, mission et faculté pour que vous puissiez composer toutes les terres, après avoir réservé en priorité ce qui vous parait nécessaire pour les places, les "ejidos", les terrains communaux, les pâturages et les friches des lieux et conseils municipaux en prenant en considération la situation présente et envisageant la croissance que peut connaître chacun d'entre eux à l'avenir, et en réservant aux Indiens ce dont ils auront besoin pour leurs cultures, travaux et élevages".

Now, the original Spanish text, on the other hand, reads:

> "os doy poder, comisión y facultad para que reservando ante todas cosas lo que os pareciere para plazas, ejidos, propios, pastos y baldíos de los lugares y consejos que están poblados, así por lo que toca al estado presente como al porvenir del aumento y crecimiento que puede tener cada uno, y a los Indios lo que hubieren menester para hacer sus sementeras, labores y crianzas, todo lo demás lo podéis componer".

The final six words of the Spanish text ("todo lo demás lo podéis componer") state, when translated into English, "everything else you can grant out by the process of 'composición'". It is clear from the Spanish text that this Royal Order was giving the "Real Audiencia" of Guatemala power, once all the land necessary for, *inter alia*, the adjudication of "ejidos de reducción" had been reserved, to grant out everything else by the process of "composición". In other words, all the lands needed by the Indian communities had to be reserved before any land was granted out by the process

of "composición". The French translation submitted by Honduras, however, transplants the final six words of the Spanish text to the beginning of the passage cited and thus gives the impression that all land, including that already possessed by the Indians, was prima facie available to be granted out by the process of "composición". This suggests, quite wrongly, that the grant of "ejidos de composición" took priority over the grant of "ejidos de reducción", whereas in reality the position was exactly the reverse.

Professor Nieto also opposed the concept of administrative control by arguing that the municipalities had full autonomy and were thus simply not subjected to any such control. However, the record shows clearly that persistent control over the Indian communities was exercised by the "Alcaldías Mayores", the "Audiencias", and ultimately by the Spanish Crown in order to make the Indian population work, in order to avoid the sale of their lands, and in order to collect their taxes.

El Salvador has said that it accepts the legal distinction between "ejidos de reducción" and "ejidos de composición" as stated by Professor Nieto. But he did not invent this distinction; it emerges from the Spanish legislation and colonial practice. Professor Nieto has now confessed that he regrets "d'avoir introduit dans ce litige les concepts de ejidos de reducción et de ejidos de composición". He neither created these concepts nor was he responsible for their introduction into this litigation; both are a consequence of the Spanish legislation as to Derecho Indiano. However, although El Salvador accepted Professor Nieto's formulation of the legal distinctions between the two different types of "ejidos", El Salvador maintains the view which it has already expressed, namely that Professor Nieto fell into error as soon as he turned his attention to the facts of this case.

If Professor Nieto now appears to repent that he ever introduced this distinction into this litigation, this can only be because he has now realized that the distinction which he has formulated is fatal for the thesis adopted by Honduras. What is more, he has now repudiated the statement which he made in the written Opinion which was presented by Honduras. He stated yesterday that "disons d'emblée que les ejidos de reduction ne peuvent à aucun moment être considerés comme des biens de domaine public". But in his written Opinion (Annexes to the Counter-Memorial of Honduras, pp. 40 and 45) he stated that "the ejidos de reducción constituted lands of public domain".

El Salvador prefers the opinion of Professor Nieto as legal expert to the arguments of Professor Nieto as advocate for Honduras.

In his Opinion, he adduced the correct thesis that "le titulaire de l'ejido de reducción est le Cabildo", that is to say the municipality (*ibid* ., p. XX). Now the relationship created with a municipality is one of public law and public domain because such a relationship of public domain may be established not only vis-à-vis the State or State entities but also vis-à-vis the municipality. Thus an "ejido de reducción" is not merely *owned* by the municipal authorities of the "Cabildo". It is also governed by those authorities; it is they who exercise justice, collect taxes, punish offenders, all these functions being carried out on a territorial and not on a purely personal basis - I myself have found no trace whatever of the personal jurisdiction imagined yesterday by Professor Bardonnet.

More serious is the accusation of Professor Bardonnet of not having furnished "le moindre commencement de preuve" concerning the exercise by the "alcaldes de indios" of powers of policing, of justice, and of jurisdiction. This criticism is unjust because immediately after making this assertion, I referred, in a passage to be found at page 47 of the official transcript of the sitting held on 19 April last, I referred to the publication by Francisco de Solano at pages 322-326 of his *Cedulario de Tierras* largely quoted by Honduras. With your permission, Mr. President, I will quote my own words from the official transcript I referred to:

> "what is called an ordenanza de buen Gobierno in Guatemala (document 163 of the Cedulario). It is sufficient to read the title of the various chapters of that ordenanza to realize that jurisdiction and *imperium* were exercised in the assigned territory by the Cabildos and by their alcaldes de indios. The ordenanza provided for parts of the land being assigned to support sick or indigent Indians: it provided for punishment of offenders, including corporal punishment for those Indians who refused to work; it forbade personal service in the form of encomiendas, similar to serfdom, punishing any authority who permitted them; it ordered the keeping of books of account for the expenses; it forbade the sale of land except with superior authorization, etc. There were also various measures for protection of the Indians and obviously, the exercise of that protection required a certain degree of administrative control. Document 219 at page 501 of the same book, *Cedulario de Tierras*, contains detailed regulations concerning the most typical exercise of jurisdiction: the collection of taxes for the King. The authorities of each población were the alcades de indios. The alcaldes de indios were in charge of that task of collection the taxes and the regulations provided that they should receive a 1 per cent of the amount they collected, as remuneration for their work.
>
> Consequently, these formal title-deeds attribute jurisdiction and administrative control to the municipal authorities of the human settlement favoured by the grant of the Commons in question. Thus, each formal title-deed to Commons, in accordance with the principle of *uti possidetis juris*, becomes a title-deed conferring territorial sovereignty in accordance with international law."

In case this is not sufficient to satisfy Professor Bardonnet, I will now also cite as evidence Document 20 at page 197 of this book by Francisco de Solano again *Tierra y Sociedad en el Reino de Guatemala.* This is a Royal Decree ("Real Cédula") issued at Valladolid on 9 October 1549 directed by the Queen of Spain to the "Presidente" and "Oidores" of the "Real Audiencia de los Confines", which until 1563 had jurisdiction over the whole of what is now Central America. This Royal Decree ordered that:

> "It would be good if they were to create and provide for ordinary mayors ('alcaldes ordinarios'), in order that they should exercise justice in the civil cases, and also aldermen ('regidores cadañeros') and that these should be elected by the Indians themselves, who should have the responsibility for the common good, and they should in the same manner provide for constables ('alguaciles') and any other necessary prosecuting attorneys ('fiscales'), as was done and is accustomed to be done in the province of Tlaxcala and in other parts."

This Royal Decree then went on to provide that each "población" should have a jail for the delinquents and a pound belonging to the Council into which to put any cattle which caused damage or were not adequately controlled.

These documents are some considerable distance from constituting "une projection anachronique ou imaginaire" - the description with which my argument was favoured by Professor Bardonnet yesterday. These documents are Royal Decrees printed in publications which are readily available and, what is more, were referred to by Honduras in the course of its written pleadings and were quoted as recently as yesterday by Professor Nieto. If these document have not been fully considered by counsel for Honduras, that is not the problem of El Salvador. For my part, I believe that I have fulfilled in this respect the onus probandi.

The pleading of Professor Bardonnet, in which he did me the honour of referring continually to my earlier statement to the Chamber, continued to take as its point of departure as an "article de foi" or unassailable dogma the notion that the formal title-deeds to commons relied on by El Salvador only conferred "un droit foncier".

Thus, the whole elegant construction of the pleading of Professor Bardonnet is entirely based on Professor Nieto's distinction between the two types of "ejidos" and his unproven and wholly wrong assertion that the formal title-deeds relied on by El Salvador granted only "ejidos de

composición" or "un droit de propriété foncière".

The leitmotif of the thesis of Professor Bardonnet is the distinction between "limites de jurisdictions et limites de terres". But the formal title-deeds relied on by El Salvador indicate the limits of the jurisdictions of townships and "poblaciones", not "limites de terres". The latter are established by the type of title-deeds conferring private proprietary rights on which Honduras is relying.

Professor Nieto and, after him, Professor Bardonnet, have contended that the Indians were not organized on any geographical or territorial basis but rather "conformément à des critères personnels strictement tribaux". This was simply not the case. The whole process of granting "ejidos de reducción" was designed to concentrate the Indians in towns or "poblaciones" with the spiritual objective of giving them Christian instruction and the equally important material objective of making it easier to collect their taxes. The Cacique, who often also became the "Alcalde", did not exercise his powers on a personal basis but rather on a territorial basis. Professor Bardonnet asserted that the "Alcalde de Indios" did not exercise his functions vis-à-vis the Spanish settlers. This is indeed correct but this was simply because such Spanish settlers were absolutely prohibited from residing in the Indian "poblaciones" (see Francisco de Solano, *Tierra y Sociedad en el Reino de Guatemala*, Document No. 91 at p. 337). The title of this "Real Cédula" "prohibiendo los Españoles, mestizos y mulatos vivir entre los Indios aunque hayan comprado tierras en sus pueblos" - Royal Order prohibiting the Spaniards, "mestizos y mulatos" to live among the Indians even if they have purchased land in their "poblaciones".

So far as concerns the disputed sector of Goascorán, to which Professor Bardonnet made a number of references, I regret that I cannot answer him, not out of any wish to be discourteous to him but for the simple reason that I am not going to be dealing with that particular sector, which will be dealt with by the Agent of El Salvador, Dr. Martínez Moreno. I am, however, informed that the lands of Joateca and Massala, to which he referred, belong to a sector the line of whose boundary has already been settled and which is, for that reason, not before the Chamber. I understand that the problem there is one of demarcation rather than of delimitation.

So far as concerns the disputed sector of Nahuaterique, the issues are much more complicated than their description by Professor Bardonnet suggested. Here again I would prefer to reserve the arguments of El Salvador until after we have had the opportunity of listening to Professor González Campos. I hope that Professor Bardonnet will not interpret this silence as a lack either of responsiveness or of the courtesy which I have for him.

So far as concerns the Viteri letter, relied on repeatedly by Professor Bardonnet, a great deal of water has flowed under the bridges of the rivers of Central America since that letter was written, not just the Cruz-Letona Treaty but also the General Treaty of Peace of 1980 which defined a different and proper application of the principle of *uti possidetis juris*.

Professor Bardonnet did, however, recognize that, in the case concerning the *Arbitration Award of the King of Spain*, Honduras in order to establish as against Nicaragua the area of the Sitio de Teotecacinte had relied on a measurement carried out in 1720. Professor Bardonnet further agreed that the International Court of Justice had taken that measurement into account in its Judgment. It is interesting, Mr. President, to recall this passage, or incident, in the case of the validity of the Award of the King of Spain. One of the arguments which had been advanced by Nicaragua was that the Award was not capable of execution by reason of its omissions, contradictions and obscurities. So the Court, in order to pronounce on the validity of the Award had to go into this question.

On this question, Honduras invoked, in support of its position as to the validity and lack of obscurities of the Award, what is called "la démarcation du Sitio, terrain de Teotecacinte, d'après le bornage effectué en 1720 pour aboutir au Portillo de Teotecacinte". In other words, Honduras invoked a title similar to those El Salvador is invoking in this case. And Honduras said "Le seul document qui puisse être pris en considération est le procès-verbal du bornage effectué en 1720. Ce document est reproduit en annexe à la présente réplique." And the Reply of Honduras in that case annexes what it called "procès-verbal du bornage du Sitio de Teotecacinte" (page 742 of the first volume of the Pleadings in that case).

Now if the Chamber would care to look at this procès-verbal it would recognize the same

features which appear in the titles invoked by El Salvador. The private judge gives authority to a delegate judge, the delegate judge appoints a surveyor, the surveyor proceeds to measure the land with the same system of cords and defines the limits of this place. Now, it is said that Honduras invoked this document called the "demarcation" but really it is a title similar to those of El Salvador, and not only the King of Spain accepted this demarcation as a basis of delimitation, I will read to you what he said. Mr. Bardonnet tried to explain away this case by referring to a passage in the Award of the Arbitrator in which it is stated that the southern part of the Sitio of Teotecacinte "appertained to the jurisdiction of the city of New Segovia." This is only by the way of an illustration of a "población" attracting the jurisdiction of an area of land defined in the formal title-deed. But what is important is the final part of the Award, in which the King of Spain ruled that "the line will follow the line which corresponds to the demarcation of the site of Teotecacinte in accordance with the demarcation made in 1720". So the King of Spain, by speaking of demarcation, meant the formal title-deed describing the course of the measurement, which is similar to the formal title-deeds being relied on by El Salvador in these proceedings. It is important, I think, that none other than the King of Spain applied this formal title-deed, which Professor Bardonnet would undoubtedly describe as a title-deed, as a document establishing only a "limite de terres". However, it was not only the King of Spain but also the International Court of Justice which confirmed and applied the formal title-deed in this way.

What is most significant about this precedent is not only that Honduras cited, its support of the validity of the Award, the fact that the boundary had been fixed exactly on the basis of the area traversed in the course of the measurement of the Sitio, and that, in particular, the formal title-deed had placed the final boundary marker of the Sitio at Cruz sin Brazo so that it was as from this point, in accordance with the intention clearly expressed by the Arbitrator, that the line of demarcation should be established. Honduras also added that the clear intention of the Arbitrator had been that the line of the frontier should coincide with the entire measurement of the Sitio (see *I.C.J. Pleadings*, Vol. I, at p. 543). It is interesting in this connection to look at the arguments of Professor Guggenheim, who was then Advocate for Honduras (*I.C.J. Pleadings*, Vol. II, at pp. 196

et seq.). Then in the oral argument of Honduras one of its advocates, Professor Briggs, said (*ibid* ., at pp. 209-210):

> "The Award, therefore, delimited a frontier line ... with a detour to follow the demarcation of the Sitio.
> the last point mentioned by the surveyor is the south-western extremity of El Sitio.
>
> the point of departure for the Portillo should be Cruz sin Brazo simply because the surveyor stated that he completed plotting the Sitio at that point".

So this form of interpreting the formal title-deed and the measurement recorded therein was indeed accepted by the International Court of Justice, which ratified the decision of the King of Spain as Arbitrator and, consequently, the Court not only reproduced in page 216 of its Judgment this phrase:

> "the line will follow the direction which corresponds to the demarcation of the Sitio of Teotecacinte in accordance with the demarcation made in 1720 to terminate at the Portillo de Teotecacinte (*I.C.J. Reports 1960*, p. 216; see also *UNRIAA*, Vol. XI at p. 117).

Not only did the Court say that, but the Court concluded:

> "the Court does not consider the Award is incapable of execution by reason of any omissions, contradiction and obscurities".

So the Court relies, in making this pronouncement, on a title of the nature of those which we are invoking in this case.

The Court ratified the decision of the King of Spain as Arbitrator and, consequently, ratified his manner of reading and interpreting these formal title-deeds in a manner which coincides with the arguments produced in this litigation by El Salvador.

So far as concerns the various Arbitration Awards mentioned by Professor Bardonnet, which I also cited in my earlier statement, I do not see any point of disagreement between us.

El Salvador has stated that it accepts the concept contained in Article 5 of the Treaty between Per# and Bolivia as to rejecting any possession of fact against "contraire au titre". I therefore do not think that it is relevant in this case to embark on a detailed study of different clauses found in past Special Agreements. Each Special Agreement is special to the case to which it applies. These

provisions show, however, that in each of these instances the Parties felt obliged to spell out the equitable relief or other adjustments which could be made to the basic principle of *uti possidetis juris*. The only observation which I wish to make in this respect is that the Treaty of 1930 which gave rise to the Tribunal of Arbitration presided by Hughes demanded that that Tribunal, before exercising its exceptional powers, should first determine whether it could establish the line of *uti possidetis juris* or whether it was impossible to do so because of the absence of the necessary titles. Thus, the Tribunal had to carry out a two-stage operation. At the risk of stating the obvious, the notion of administrative control would not in any event have been able to operate in those areas where the Tribunal did not succeed in finding the existence of *uti possidetis juris*.

Professor Bardonnet gave numerous examples of what he believes to be the indications of provincial boundaries. The issues in each sector are much more complex than his description suggests. Questions as to the validity and nature of each title-deed may need to be considered; also questions such as the reliability of statements by witnesses presented by one of the Parties. For these reasons, El Salvador believes that any discussion at this stage of these different examples produced by Professor Bardonnet would be premature. El Salvador now proposes to bring to an end this discussion on the general principles of law which are applicable to the land frontier dispute and does not propose to discuss the precise individual boundaries of each disputed sector at this stage. This is not out of any desire to avoid a debate or to escape from the law to the facts: El Salvador simply believes that such discussions should take place at the proper stage of these proceedings in the manner which has already been agreed.

When comparing the present case with other arbitrations where the principle of *uti possidetis juris* has been applied, it is necessary to take into consideration the specific features of the dispute, as well as the differences between it and other arbitrations which have been referred to.

This land dispute concerns a few small isolated mountainous areas, which were during the colonial period inhabited only by Indian communities. It is not a dispute over the establishment of the entire line of the boundary between two countries or even over substantial tracts of land. These factors explain why in this case the formal title-deeds granting "ejidos de reducción" to the Indian

communities which were the sole inhabitants of the sectors in dispute have become of supreme importance and should be utilized as the best or perhaps the only remaining testimony which makes it possible to establish today what was happening in those areas over more than 150 years ago.

By way of my final conclusion to this statement, it seems wholly appropriate and in order to reflect briefly on the significance of the content of my observations. The purpose of applying the principle of *uti possidetis juris* to colonial territories is to apply the best tests which are available of actual historical administration and control to a given situation, in this case that prior to 1821. What could possibly constitute a better test than the elements which I have described? In a part of Central America inhabited largely by Indian communities, the acid test must clearly be the manner in which those Indians were governed by the responsible authorities.

No better evidence of the fulfilment of obligations towards the Indian populations exists than that provided by the institution of the "ejido de reducción" in the part of Central America with which these proceedings are concerned. As such, it must occupy a key, if not conclusive, position in the application of any rule of historic titles.

I wish to thank you Mr. President for your attention and having given this second opportunity to address you.

The PRESIDENT: I thank President Jiménez de Aréchaga. His presentation concludes this second round of oral pleadings and tomorrow we will start the hearings concerning the different sectors of the land boundary, Honduras being the first delegation to address the Chamber. The sitting is adjourned until tomorrow at 10.00 a.m.

The Chamber rose at 11.05 a.m.
