C 4/CR 91/24

Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Wednesday 15 May 1991, at 3 p.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 mercredi 15 mai 1991, à 15 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

The Government of El Salvador is represented by:

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 :

S. Exc. M. Alfredo Martínez Moreno
comme agent et conseil;

S. Exc. M. Roberto Arturo Castrillo, Ambassadeur,
comme coagent;

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

comme conseil et avocat;

Mme Berta Celina Quinteros, directeur général du Bureau des frontières,

comme conseil;

assistés de :

M. Eduardo Jiménez de Aréchaga, professeur de droit international public à l'Université de l'Uruguay, ancien juge et ancien Président de la Cour internationale de Justice; ancien président et ancien membre de la Commission du droit international,

M. Keith Highet, professeur adjoint de droit international à la Fletcher School de droit et diplomatie et membre des barreaux de New York et du District de Columbia,

M. Elihu Lauterpacht, C.B.E., Q.C., directeur du centre de recherche en droit international, Université de Cambridge, *Fellow* de Trinity College, Cambridge,

M. Prosper Weil, professeur émérite à l'Université de droit, d'économie et de sciences sociales de Paris,

M. Francisco Roberto Lima, professeur de droit constitutionnel et administratif; ancien vice-président de la République et ancien ambassadeur aux Etats-Unis d'Amérique,

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,

Lic. Ana Elizabeth Villata,
as Counsellors.

The Government of Honduras is represented by:

H.E. Mr. R. Valladares Soto, Ambassador of Honduras to the Netherlands,

as Agent;

H.E. Mr. Pedro Pineda Madrid, Chairman of the Sovereignty and Frontier Commission,

as Co-Agent;

Mr. Daniel Bardonnet, Professor at the *Université de droit, d'économie et de sciences sociales de Paris*,

Mr. Derek W. Bowett, Whewell Professor of International Law, University of Cambridge,

Mr. René-Jean Dupuy, Professor at the *Collège de France*,

Mr. Pierre-Marie Dupuy, Professor at the *Université de droit, d'économie et de sciences sociales de Paris*,

Mr. Julio González Campos, Professor of International Law, Universidad Autónoma de Madrid,

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

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

Mr. Paul De Visscher, Professor Emeritus at the *Université de Louvain*,

as Advocates and Counsel;

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

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

Mr. Arias de Saavedra y Muguelar, Minister, Embassy of Honduras to the Netherlands,

Mr. Gerardo Martínez Blanco, Director of Documentation, Sovereignty and Frontier Commission,

Mrs. Salomé Castellanos, Minister-Counsellor, Embassy of Honduras to

the Netherlands,

M. Anthony J. Oakley,

Mme Ana Elizabeth Villata,
comme conseillers.

Le Gouvernement du Honduras est représenté par :

S. Exc. M. R. Valladares Soto, ambassadeur du Honduras à La Haye,

comme agent;

S. Exc. M. Pedro Pineda Madrid, président de la Commission de Souveraineté et des frontières,

comme coagent;

M. Daniel Bardonnet, professeur à l'Université de droit, d'économie et de sciences sociales de Paris,

M. Derek W. Bowett, professeur de droit international à l'Université de Cambridge, Chaire Whewell,

M. René-Jean Dupuy, professeur au Collège de France,

M. Pierre-Marie Dupuy, professeur à l'Université de droit, d'économie et de sciences sociales de Paris,

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

M. Luis Ignacio Sánchez Rodríguez, professeur de droit international à l'Université Complutense de Madrid,

M. Alejandro Nieto, professeur de droit public à l'Université Complutense de Madrid,

M. Paul de Visscher, professeur émérite à l'Université catholique de Louvain,

comme avocats-conseils;

S. Exc. M. Max Velásquez, ambassadeur du Honduras à Londres,

M. Arnulfo Pineda López, secrétaire général de la Commission de Souveraineté et de frontières,

M. Arias de Saavedra y Muguelar, ministre de l'ambassade du Honduras à La Haye,

M. Gerardo Martínez Blanco, directeur de documentation de la Commission de Souveraineté et de frontières,

Mme Salomé Castellanos, ministre-conseiller de l'ambassade du

Honduras à La Haye,

Mr. Richard Meese, Legal Advisor, Partner in Frère Cholmeley, Paris,

as Counsel;

Mr. Guillermo Bustillo Lacayo,

Mrs. Olmeda Rivera,

Mr. Raul Andino,

Mr. Miguel Tosta Appel

Mr. Mario Felipe Martínez,

Mrs. Lourdes Corrales,

as Members of the Sovereignty and Frontier Commission.

M. Richard Meese, conseil juridique, associé du cabinet Frère Cholmeley, Paris,

comme conseils;

M. Guillermo Bustillo Lacayo,

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.

The PRESIDENT: Please be seated. The sitting is open. We proceed with the hearings on the fifth disputed sector of the land frontier, and I give the floor to President Jiménez de Aréchaga.

Dr. JIMENEZ DE ARECHAGA:

POLOROS

I will deal with the sector of Poloros. The claims of El Salvador in this sector are based on the Formal Title-Deed to Commons which were granted to the Indian community of Polorós by the King of Spain, through the "Juez Privativo de Tierras" of the "Real Audiencia" of Guatemala on 5 July 1760.

The strength of the Formal Title-Deed to the Commons of Polorós is such that it has forced Honduras to raise extremely far-fetched arguments and objections in a vain attempt to weaken or affect the decisive force of this formal title-deed.

The arguments and objections raised by Honduras against the Formal Title-Deed to the Commons of Polorós may be dealt with under the following five headings:

First, the alleged Title-Deed to the Commons of Cacaoterique relied on by Honduras;

Secondly, the resurrection of the alleged Title-Deed to the Commons of San Miguel de Sapigre, also relied on by Honduras;

Thirdly, the validity of the Formal Title-Deed to the Commons of Polorós, relied on by El Salvador;

Fourthly, the geographical interpretation of the Formal Title-Deed to the Commons of Polor6s; and finally,

Fifthly, some comments on the statement of Professor González Campos yesterday.

1. The alleged Formal Title-Deed to the Commons of Cacaoterique relied on by Honduras

Against the Formal Title-Deed to the Commons of Polorós of 1760, Honduras has relied on a document filed in the Annexes to its Memorial (pp. 1594 *et seq*.) entitled "Reconnaissance des bornes des terres du village de Santiago de Cacaoterique de 1803".

In the negotiations between the Parties prior to 1897, the representatives of Honduras stated that "they could not produce any title opposing that of Polorós" (MES, Annexes, p. 9). However, in August 1897 after long discussion on the dispute, an Honduran expert, P.H. Bonilla, discovered this document mentioned above (RH, Annexes, p. 325). Honduras now relies upon it, describing it as referring to two different measurements, one carried out in 1789 and the other in 1803, the effect of which is allegedly to penetrate into the Commons of Polorós as measured in 1760.

The first of these two documents, that of 1789, is, according to its own terms "la relation faite par les vieillards de l'ancien village" who enumerated the boundary markers which, according to them, constituted the perimeter of the lands of Cacaoterique (MH, Annexes, p. 1597).

Obviously this is not a formal title-deed, not even a deed conferring private property rights. It is a unilateral claim by the elderly inhabitants, requesting the judge to authorize certain boundary markers, but there is neither any approval nor even any pronouncement by any judicial or other authority.

The Reply of Honduras admits (p. 631) that this document of 1789 "n'est qu'une déclaration faite par la communauté indigène de Cacaoterique sur les bornes de ses terres".

As to the document of 1803, the delegate judge, after carrying out a visual examination, a "vista de ojos", of the boundary markers which were claimed, made the following order:

> "Vu ces actes et vu que les terrains enregistrés dans son circuit sont si vastes pour un si petit village, j'ordonne aux gens de Justice de Santiago de Cacaoterique qu'ils présentent le recensement de la population pour que Monsieur le Gouverneur Intendant de cette Province et Juge du Droit Royal Foncier juge quelles sont les terres qui leur correspond avoir." (MH, p. 1608.)

The results of carrying out the census so ordered were that the total inhabitants of Cacaoterique amounted to 243 Indians (*ibid*, p. 1609).

The judge then suspended the proceedings on 30 November 1803, stating,

> "vu que les habitants de ce village possèdent beaucoup de terres étant donné les dimensions du village et que par ailleurs le document qu'ils présentent n'a pas l'air de titre légal" (*ibid*., p. 1611).

Subsequently the delegate judge who had performed the "vista de ojos" issued an "auto", or judgment in which, without ordering or carrying out any measurement, he decided to refer the matter to his superior, stating"

> Vu cette information et vu qu'il en résulte que les seize bornes des terres dont jouit le petit village de Santiago de Cacaoterique de bonne ou de mauvaise foi, en vertu de certains papiers rédigés en langue que personne ne connait et sur du papier ordinaire, qui ne ressemble en rien a un titre." (*ibid*., p. 1615.)

He decided to transmit the proceedings to the superior judge of the Province "pour qu'elle prenne la décision la plus convenable dans le cas d'espèce".

The record shows that no further action was taken, and consequently no measurement or adjudication ever took place.

> The Reply of Honduras is forced to admit that:
> "les procédures entamées en 1803, elles ont consisté en un 'vista de ojos' ou reconnaissance du terrain et de ses bornes, c'est-à-dire un acte préalable a un nouvel arpentage, *sans que celui-ci ne puisse se faire*" (RH, p. 31, emphasis added).

No measurement was carried out and obviously no adjudication by the judge of the "Real Audiencia" of Guatemala ever took place.

The proceedings were suspended *sine die* by reason inter alia of the absence of any documents which could justify the claims made by the elderly inhabitants of Cacaoterique as to the lands allegedly belonging to them.

El Salvador submits that these Cacaoterique documents cannot be taken into consideration by the Chamber as the basis for a delimitation under the principle of *uti possidetis juris* nor as a factor affecting or weakening the Formal Title-Deed to the Commons of Polorós.

One reason for this submission is simply that these papers do not constitute a "document issued by the Spanish Crown or by any other Spanish authority, civil or ecclesiastical, during the colonial period", as is required by Article 26 of the General Treaty of Peace of 1980.

And these considerations also explain the silence of the Polorós Title of 1760 as to Cacaoterique. Yet Professor González Campos complains of this silence, as of many others.

I come now to my second subject.

II. The Resurrection of the Alleged Formal Title-Deed to the Commons of San Miguel de Sapigre relied on by Honduras

Another far fetched attempt by Honduras to diminish the force and effect of the Formal Title-Deed to the Commons of Polorós is the resurrection of the supposed Commons of an extinct town, San Miguel de Sapigre, which became extinct as a result of an epidemic.

Naturally the actual document which constituted the Formal Title-Deed to the Commons of Sapigre has disappeared with the town. However, Honduras wants to reconstruct this document utilizing the Title-Deeds of some of the neighbouring landowners and, in this unorthodox way, Honduras has managed to round up a huge area which is thus posthumously adjudicated to Sapigre as Commons (see MH, Map B.3.2, p. 252).

In this process of reconstruction, a dominant role is assigned to the two documents of 1789 and 1803 relating to Cacaoterique which we have just discussed above.

These two documents of Cacaoterique are utilized in order to define the western boundaries of the hypothetical area adjudicated to Sapigre, adjudicated by Honduras. These western boundaries are the most important ones because they constitute the means used by Honduras to try to penetrate deeply into the Commons of Polorós north of the Torola River, as could be seen in the Map presented by Honduras yesterday (Map B.3.2).

The Memorial of Honduras thus asserts, as the basis for its claim relating to Sapigre, that "les terres de Cacaoterique avaient des limites communes avec celles de San Miguel de Sapigre" (p. 285), adding "cela est corroboré par les enquêtes de 1803", and in the Counter-Memorial (p. 470) the document of Cacaoterique of 1789 is also relied on in support of the contention that the Commons of Sapigre even extended south of the Torola River.

However, in having recourse to the documents of Cacaoterique in support and corroboration of the hypothetical area adjudicated to Sapigre, the pleadings of Honduras overlook one essential fact, namely that there are in reality no "terres de Cacaoterique". The documents of 1789 and 1803, upon which all this reconstruction is based, are not title-deeds or even deeds conferring private proprietary rights; these documents are devoid of validity. Nothing of any validity can possibly be based on such documents as those of Cacaoterique. Consequently, the attempted reconstruction of

the Commons of Sapigre falls to the ground and is revealed as yet another unfruitful attempt to attack the significance of the Formal Title-Deed to the Commons of Polorós.

In another attempt to reconstruct the former Title of Sapigre, Honduras relies on a Title-Deed of 1739 conferring private rights of a land at Cojiniquil. The Reply of Honduras (p. 598) gives prominence to this Title-Deed - refer the note about that yesterday - contending that this Title-Deed "determine quelles étaient les limites de juridiction de San Miguel et de Tegucigalpa". The argument advanced by Honduras seems to be that this Title-Deed of Cojiniquil shows that "la juridiction de Tegucigalpa s'étendait jusqu'au sud du Torola et à l'ouest de la colline de Coyolar" (*ibid*., p. 657). The only documentary basis for this contention is the fact that this Title-Deed of 1738 refers to a hill called Coyolar, a place "où se forment les limites de cette juridiction ... avec les terres du village de Sapigre" (HM, Annexes, p. 1553) and the opinion and the views, declarations of witnesses - les veillards du village - are brought into consideration.

We find again, as we have heard in Professor González Campos statement, "les vieillards du village" answering this question "where were the limits between the Provinces"?

This is another example showing that the limits between provinces were non-regulated questions of fact not governed by laws or decrees.

In consequence, the Honduran basic theory that the *uti possidetis juris* consists in finding and establishing the limits between provinces, rather than the precise limit between ejidos, falls to the ground.

Now coming back to the Coyolar hill, this hill is situated a considerable distance to the south of the Unire River, which is the terminal point of this sector. I wanted to show you where the Coyolar is placed but it is out of the map. It is around here. And the closing line of the sector is this one (MH, Map B.3.2, immediately after p. 252). Consequently, Coyolar is completely irrelevant to any determination of the boundaries in this sector. In an attempt to avoid this conclusion, the Reply of Honduras (p. 643) makes another "logical supposition", namely they say "il est logique de supposer que les terres de Sapigre continuaient jusqu'au nord-est" (emphasis added). El Salvador submits that decisions as to territorial delimitation cannot be based on suppositions or speculations

of this type.

The argument which Honduras is trying to extract from this hypothetical reconstruction of the Commons of Sapigre is condensed in the statement in its Memorial (p. 290) to the effect that "tant l'arpentage de 1682 que celui de 1738 furent autorisés et effectués par des autorités de la province de Comayagua". This argument, according to Honduras, is supposed to prove that the lands in question "*faisaient partie à cette époque* de la juridiction de la province de Comayagua" (emphasis added) (MH, p. 290). However, as has already been observed, there is a hiatus in this reasoning: there is no evidence that the measurement of the land at Cojiniquil in 1738 referred to land comprised within this disputed sector.

In any case, there is an inconsistency in the contentions of Honduras with respect to Sapigre. On the one hand, Honduras asserts as a fact that the remeasurement of the Commons of Polorós "a été pratiqué ... sur la zone qui correspondait au village de Sapigre" (CMH, p. 423). On the other hand, Honduras states that "les terres de Sapigre se trouvaient au nord et au sud de la rivière Torola" (CMH, p. 469). If both these statements are in fact true, the only conclusion which can be reached is that, contrary to the fundamental claims of Honduras, the Torola River in this sector was never the boundary between either the Indian communities or the ancient Spanish colonial Provinces.

At the end of the day it may fairly be asked what the purpose of such an extraordinar exercise of hypothetical reconstruction and such a cascade of suppositions actually is. What is the purpose?

Honduras admits that, in the event of the disappearance of a town, or a settlement, according to the relevant Spanish legislation, the commons adjudicated to that town reverted to the Spanish Crown. Consequently, it would have been entirely lawful subsequently to adjudicate that same land to another Indian community, as indeed may have occurred in the case of Poloros.

We are not suggesting nor admitting that this was in fact the case because we do not want to engage in pointless speculations as to what happened 230 years ago. However, had the former Commons of Sapigre subsequently been adjudicated to Poloros, this would not only have been completely lawful but also fair and just since the Memorial of Honduras itself recognizes (at p. 284) that some of the families from Sapigre subsequently established themselves in Poloros.

Even if the hypothetical Formal Title-Deed of Sapigre was issued from Comayagua in 1760, the "Real Audiencia" of Guatemala, through the "Juez Privativo de Tierras", who had jurisdiction over the different Spanish colonial provinces, approved the Formal Title-Deed to the Commons of Poloros, disregarding any crossing of provincial boundaries which may have occurred.

The "Real Audiencia" in Guatemala and its "Juez Privativo de Tierras" had exclusive jurisdiction over each and every one of its component Spanish colonial provinces and received directly from the Spanish Crown the power and the faculties to confer commons on the Indian communities; this Royal authority was not qualified or restricted in any way by any requirement to respect vague territorial divisions between the various Spanish colonial provinces governed by the "Real Audiencia" in Guatemala.

The "Real Cédula" of 1745 of El Escorial, granting full powers to the "Audiencias" for the adjudication of "ejidos" constituted by themselves this "Real Cédula", the "autorisation préalable" which yesterday was demanded by Professor González Campos.

III. The validity of the Formal Title-Deed to the Commons of Poloros

Honduras attempts another line of attack against the Formal Title-Deed to the Comons of Poloros, alleging that this document presents certain irregularities when analysed in the light of the Spanish instructions as to how land measurements should be conducted (transcribed in the Annexes to the Counter-Memorial of Honduras at pp. 95 *et seq*.).

However, these instructions, as their title indicates, apply to "la vente et la composition des terres de la Couronne, en vue de corriger la situation des terres irrégulièrement possédées". They do not apply to the grant of "ejidos de reducción", those issued without any payment as was the case with the Title-Deed to the Commons of Poloros. An exceptional treatment was reserved for the "ejidos" of this type, assigned without payment by the aboriginal inhabitants of the territory in accordance with the teachings of Francisco de Vitoria (see the Annexes to the Counter-Memorial of Honduras at pp. 98-99).

In particular, the Reply of Honduras observes that, in the case of the Formal Title-Deed to the

Commons of Poloros, the judge did not transcribe the text of the previous title-deeds held by those requesting the measurement and did not collect the title-deeds of their neighbours, as indicated in a report appearing in the Annexes to the Counter-Memorial of Honduras (at p. 117). However, this report of past practices was not an instruction or regulation but a mere recommendation. Besides, this report itself states that the judge "à défaut" of these documents, in the absence of these documents, should possess "des informations très légales sur les terrains de chacun, les délimitations, bornes et préemptions".

From the Formal Title-Deed to the Commons of Poloros itself, it transpires that the delegate judge carrying out the measurement was perfectly informed of the claims of the inhabitants of Anamoros and of the rights of the inhabitants of Opatoro and the López lands, whose rights, "cuyo derecho", was mentioned and respected. The Formal Title-Deed records that the inhabitants of Poloros presented their Formal Title-Deed to Commons of 1725, that the judge made the usual inspection of the land, and that the adjoining landowners were duly summoned to appear and a defender appointed. When one of these adjoining landowners manifested an objection, the delegate judge stated: "the inhabitants of the township of Anamoros objected and showed me their Royal Title, to which I accorded the due obedience". You will see in the final approval by the authorities in Guatemala that it provides that these inhabitants of the township of Anamoros should recur to justice in order to protect their rights.

At this point it must be recalled that the validity of the Formal Title-Deed to the Commons of Poloros was recognized in the negotiations of 1884 by the delegates and the surveyors of both Parties, who declared that they "ont acquis la certitude que la ligne frontière des deux républiques devra être déterminée suivant le titre des 'ejidos' du village de Poloros, car c'est le plus ancien et il se réfère à des lieux très connus" (Annexes to the Memorial of Honduras at p. 170).

> In another of its suppositions or speculations, the Reply of Honduras asserts (at p. 657) that:
> "si l'on avait fait valoir ces irrégularités devant le 'Juez de Tierras' de la 'Audiencia de Guatemala', cela aurait sans aucun doute affecté la validité du titre concédé aux habitants de Poloros".

This is a mere supposition. The fact is that the "Juez Privativo de Tierras" of the "Real

Audiencia" in Guatemala, approved the title of Poloros, thereby curing any possible defects.

Honduras has admitted, in its Counter-Memorial, that:

> "Ledit titre a été établi le 30 juin [1740] 1946 par la 'Audiencia de Guatemala' et confirmé le 5 juillet de la même année, en vertu de la 'Cédula' Royale dictée à l'Escorial le 15 octobre 1754."

This "Cédula Royale" of San Lorenzo el Real transcribes in its second paragraph (see the Annexes to the Counter-Memorial of Honduras at p. 88) the provisions of the "Cédulas Reales" of El Pardo of 1591 (see the Annexes to the Memorial of Honduras at pp. 1964-1966), which empowered the "Audiencias Reales" to grant or to restitute their Commons to the Indian communities without imposing upon the "Audiencias" any obligation to respect provincial boundaries in the process.

The second "Cédula Real" of El Pardo concludes by stating: "et tout ce qui sera fait par vous je l'approuve et confirme".

IV. The geographical interpretation of the Formal Title-Deed to the Commons of Poloros

The basic issue in this sector is similar to those which have already been encountered in the sectors of the frontier which have already been discussed, namely whether the boundary is the Torola River, as claimed by Honduras, or is instead to the north of that river in the mountains or peaks which constitute the headwaters of the various torrents and gorges which are tributaries of the Torola River, as contended by El Salvador on the strength of the Formal Title-Deed to the Commons of Poloros.

This is by now a familiar type of dispute. However, in this sector a quite unprecedented situation arises, in that Honduras is claiming that the Torola River constitutes a fluvial boundary running from west to east without there being the slightest reference in any Spanish colonial document to this river being in this sector a boundary between rival Indian communities or even a boundary between the former Spanish colonial provinces. El Salvador has not found the slightest reference in any Spanish colonial document suggesting that the Torola River constitutes any kind of boundary in this sector and would therefore be most grateful to the opposing Party if it could point

out any such reference that El Salvador might have overlooked.

The lack of any reference to the Torola River as any sort of boundary, this silence as to the Torola River, has led Honduras to advance a strange argument. According to the Reply of Honduras and also to the statement of Professor González Campos, this complete silence with respect to such an important river must be significant and meaningful. In other words, there must be a reason for this lack of any reference to the Torola River.

In looking for this reason, the Reply of Honduras enters the realms of speculation and supposition and it adopts terminology, which for a legal pleading appears extremely curious. Instead of asserting clear and certain conclusions, the Reply utilizes phrases such as the following: "Il convient de se demander" (at p. 595); "il convient de considerer" (at p. 601); "il y a lieu de penser" (at p. 426).

Professor González Campos put it in the form of a question he addressed to himself:

"Est-ce que la réfèrence du document de 1760 serait erronée et, en fait, au lieu du ravin de Mansupucagua visait en realité la rivière Torola?"

He then gave a positive answer to his rhetorical question.

Thus, we are again in the presence of another substitution of a river, identical to that of the River Massire or Las Tijeretas instead of the River Cañas.

Really, "on exagère" in these confusions and substitutions of rivers. The identity of rivers is a serious question; it is not a question of choice or of convenience; it is a question of fact, of geography.

What then is the speculation or supposition which, in the words of the Reply of Honduras, it is appropriate to ask oneself or to consider as one which provides room for thought?

The unexpected answer contained in the Reply of Honduras, and sustained yesterday, is that the Torola River has been included in the Formal Title-Deed to the Commons of Polorós but under an assumed name. This extraordinary suggestion is made in the following passage:

> "Il convient de demander si le silence du document de 1760 au sujet de la rivière ne signifie pas en fait que c'est à celle ci qu'il est fait référence sur le nom du torrent de Manzupucagua. On peut répondre pour l'affirmative." (Reply of Honduras, para. 37, p. 595.)

"Il y a lieu à penser" if it can be seriously suggested or asserted that there is, in this sector again, a case of mistaken identity of a river and, what is more, of the most important river in the area.

How is it possible to confuse these two water courses when one is a large river running from west to east and the other is a torrent running from north to south? Perhaps the authors of the Reply of Honduras forgot that in the Counter-Memorial of Honduras (p. 454), it admitted that the Manzupucagua

> "est un cours d'eau qui coule, comme les autres au nord de la rivière Torola... Pour arriver au torrent de Manzupucagua, il faut franchir la rivière Torola dont le debit est plus important que celui-ci."

The silence of the Formal Title-Deed to Commons as to the Torola River, in fact, has a perfectly simple explanation, namely that the river was used neither as a boundary nor as a boundary marker in the measurement. The judge and the persons accompanying him were not out for a walk for the purpose of describing the landscape; they were advancing on foot in order to establish or revive boundary markers so as to make clear the perimeter of the Commons.

The Torola River, contrary to the contentions of Honduras, formed no part of that perimeter.

Not only is it physically impossible to confuse two such different water courses; from a legal point of view the separate identity of these two geographical features has been clearly established by the agreement of the Parties. Article 16 of the General Treaty of Peace of 1980, in determining the final point of the sixth sector of the boundary already agreed in the course of the process of mediation, defines that point as follows:

> "en amont de la rivière Torola jusqu'au point où elle reçoit sur sa rive nord le ruisseau de Manzupucagua".

The Commission of Demarcation has established on the ground the boundary markets identifying respectively the Torola River and the Manzupucagua Rivulet. So there can be no possible confusion in this respect.

In order to give an appearance of support to the suggestion that the Formal Title-Deed refers to the Torola River under another name, the Reply of Honduras, and after it Professor González Campos, produce an argument which did not appear in the previous pleadings of Honduras. They

contend that a Spanish phrase in the text of the Formal Title-Deed, "en cuyo derecho", has been wrongly translated and really means "à la droite", "towards the right".

So Honduras contends that, if the land being described is indeed positioned to the right of the boundary line which is being measured, the text makes no sense and, consequently, "il y a lieu à penser" that there must have been a confusion over the water courses.

But this far-fetched argument collapses completely after a perusal of the text of the Formal Title-Deed, in the original Spanish, which is set out *in extenso* in the Annexes to the Counter-Memorial of El Salvador (Vol. III, Ann. V.) Such a perusal shows that, when the judge wanted to indicate that some geographical feature was positioned to the right or to the left of the line of measurement, the text said this clearly and unambiguously, using unequivocal Spanish phrases such as "dejando dicho río a mano derecha" (p. 71), "quedan a la derecha" (p. 72), "quedando a la derecha" (p. 73), "quedando a la izquierda" (p. 74).

What the expression "en cuyo derecho" really refers to is the fact that the native inhabitants of Polorós had granted to the native inhabitants of Opatoro a right or permission by virtue of which ("en cuyo derecho") the latter had the right to carry out the exploitation of an hacienda on the piece of land in question. This, of course, did not alter the fact that the land itself still belonged to the Commons of Polorós and was therefore included within the area which was measured.

Another argument relied on in the Reply of Honduras in support of the suggestion that the judge and the persons accompanying him had mistakenly confused the Torola River with the Manzupucagua Rivulet is the distances between the relevant boundary markers. However, this argument ignores the fact that in this mountainous area all the measurements were necessarily estimations made without the advantages of modern surveying equipment.

Even the distances from the points selected by Honduras (in the Reply, p. 602) do not tally with the actual distances.

Finally, the supposition of Honduras fails to explain another inconsistency, namely that, if the judge and the other persons accompanying him had followed the course of the Torola River while mistakenly calling it the Manzupucagua Rivulet, the direction of the measurement would have been

from west to east with a slight deviation towards the south-east rather than, as stated by the Formal Title-Deed, from west to east "with some deviation north-eastwards (*ibid*., at p. 53).

In its attempts to avoid this inconsistency, the Reply of Honduras (p. 608) goes to the extreme of trying to make corrections to the wording of the Formal Title-Deed to the Commons of Polorós, asserting: "Cela signifie logiquement qu'il n'existe pas de continuité dans le tracé en direction est-nord-est mais une inflexion de celui-ci vers le sud ou le sud-est." Again, their resistance at accepting any boundary marker projected towards the north.

While the formal title-deed specifies "with some deviation north-eastwards", Honduras reads this phrase as "with some deviation south-eastwards". However, north and south are opposite cardinal points of the compass, and it is not obvious why what Honduras alleges to be logical considerations should be able to change a direction which is expressly stated in the formal title-deed by a full 90°.

Another answer to the speculation by Honduras to the confusion between the Torola River and the Manzupucagua Rivulet is that, if the judge had not walked towards the north-east, he could not have reached the next boundary marker, which is the Cerro López.

Honduras contests both the name and the location of the Cerro López. The Reply asserts (p. 606) that "c'est seulement en déformant le document de 1760 que l'on peut transformer un coteau ["loma"] en butte [cerro]". It is true that the Spanish title uses the word "loma", which could apply to a hill from 300 to about 1,000 metres high.

The French text submitted by Honduras, to describe this López place, utilizes the word "coteau". But the text circulated yesterday by Professor González Campos introduces a change - the words "une petite hauteur" - an expression which prejudges the issue.

So there was not a tectonic movement which took place, but an alphabetical movement. The Chamber may judge which side has incurred in a "déformation du titre".

The height of Cerro or Loma López has been established by experts from both countries, in the third conference held on 24 March 1884. Their agreed text states: "On the Cerro López" - note that they use the word "cerro" - "at midday the barometer indicated 1,100 metres at a pressure of

66.80 and a temperature of 78°F (MH, Annexes, p. 170).

Now as to the location of Cerro López. The Reply positions the Cerro López very considerably to the south, once again on the basis of the argument already considered as to the meaning of the Spanish expression "en cuyo derecho". ... They place Cerro López here. We consider that it is located here. Why do we consider that it should be located there, among other reasons?

Contrary to the supposition made in the Reply of Honduras, the formal title-deed does not state that the López lands (the "Jato de los López") were to the right (à la droite") of the boundary line which was being measured.

What the formal title-deed actually states is that the owners of the López lands had a right or permission, by virtue of which ("en cuyo derecho") they were entitled to exploit the "Jato de los López", and that consequently these lands remained outside the Commons of Polorós.

However, the decisive answer to both questions, as to the name and as to the location of the Cerro López, emerges from the Official Honduran Map entitled "Mercedes de Oriente, No. 2657 IV", presented in these proceedings by Honduras. On this map there appears a place called "Los López". It says, in full letters on the Honduran map, "Los López", here in this place, located at the co-ordinates latitude 13° 57' 21" N and longitude 87° 53' 21" W.

Obviously the Cerro López cannot possibly be situated very far from this place called "Los López", since it would be an extraordinary coincidence to claim that, in the words of the Spanish proverb, these were "otros López". Moreover, the Cerro López must similarly not be any great distance from the "Jato de los López", for the simple reason that the judge thought it was necessary to put on record in the formal title-deed the fact that the López lands remained outside the boundaries of the area which was being measured. So there must be proximity between this place, Los López, and the Cerro López.

In map 6.1 presented by Honduras (HCM, pp. 430 *et seq*.) the "Jato de los López" is instead placed by Honduras several kilometres to the south of the Cerro López.

The geographical feature in question may be identified today, and corresponds exactly to the

present toponymy which has been utilized jointly by the cartographical authorities of both States. The Cerro López is therefore situated approximately four-and-a-half kilometres to the north of the Torola River. This location is the most conclusive answer to the claims of Honduras as to the Torola River being the boundary in relation to this sector.

The establishment of the name and location of the Cerro López, thanks to the Official Honduran Map referred to, also makes possible the location of the Cerro Ribitá. The Formal Title-Deed to the Commons of Polorós states that "following the same course" (CMES, Annexes, Vol. III, Ann. 5, p. 51) the judge and those accompanying him reached the Cerro Ribitá.

This means, according to the formal title-deed, that the measurement proceeded from west to east, with a deviation towards the north-east, because that was the same course which was established in the title. Consequently, if there is a measurement from west to east, with a deviation towards the north-east, the Cerro Ribitá could not possibly be located to the south of Cerro López, as is claimed by Honduras. On the contrary, it must be located slightly to the north of the Cerro López, because this is indeed the location established by the title. So the Cerro Ribitá must be placed slightly to the north of Cerro López, around this place called "Salta Tigre", from west to east, with a deviation towards the north-east.

The written pleadings of Honduras disagree with the location assigned by El Salvador to the Cerro Ribitá and instead identify it with the Cerro Unire (RH, p. 614), or with the Cerro Guanacaste (*ibid.*, p. 615).

But the identity and location of the Cerro Ribitá was clearly established at the Third Conference held by the Plenipotentiaries and experts of El Salvador and Honduras in 1884. There the delegates and their surveyors defined the Cerro Ribitá as "the most elevated peak of the four which form the heights of Rivitá which is composed of four peaks counting the first prominent feature which is known as Guanacastillo in the plains of Monteca, of which Rivitá itself its taken to be the most elevated and northern peak which is situated close to the boundary marker or the Commons of San Antonio de Norte in the spot "Robledal". In this place (Rivitá), the Aneroid Barometer, continued the experts, indicated the height of 1,100 meters above sea level with pressure

of 67 at a temperature of 90° Fahrenheit, with the direction North 80° West which the theodolite indicates towards the Cerro de López" (MH, Annexes, p. 170). Further, the Report of the Honduran engineer Aracil Crespo to the President of Honduras in 1888 confirms that the Cerro Ribitá is "le pic le plus élevé des quatre qui se trouvent dans les environs de Rivitá (MH, Annexes, p. 257).

In making references to these geographical indications in the conference of '88, we are not attempting to rely on proposals or admissions made in the course of unfruitful negotiations but we are rather relying on verifications made "sur place" by expert surveyors as to the location and the characteristics of the Cerro Ribitá.

It is certain that, with the benefit of the detailed descriptions to which we have just referred, the process of demarcation would not have the slightest difficulty in locating the real Cerro Ribitá.

These same considerations also demonstrate the lack of foundation of the complaints by Honduras and by Professor González Campos yesterday as to the alleged invention of a "new Ribitá" and as to the supposed ever-increasing "push towards the north" on the part of El Salvador.

It is true that, in the course of the various negotiations carried out between them, both of the Parties have taken less extreme positions than those which were available to them on a strictly legal basis. But these differences between the positions of the Parties during prior negotiations and in the present proceedings are of course understandable because the former were proposals made in the course of negotiations with the intention of reaching an extra-judicial settlement.

If any importance is to be attributed to any of the negotiations between the Parties, then pride of place must clearly be given to the negotiations which took place in 1884 simply because, in contrast to all the other negotiations, these were not unfruitful. The Conferences of 1884 culminated in the signature of a Convention which, in so far as concerns the sector at present under discussion, gave full effect to the Formal Title-Deed to the Commons of Polorós of 1760 (Cruz-Letona Convention of 1884, Arts. 3-54, set out in MH, Annexes, p. 180).

The Reply of Honduras observes that, according to the interpretation of El Salvador, after the Cerro Ribitá, the course of the measurement continued to the general direction east-south-east as far as the headwaters of the Unire River while, according to the Formal Title-Deed, the judge "took from

west to east" (CMH, Annexes, Vol. III, Ann. V, p. 53).

In fact, however, the Former Title-Deed states something different from the reading made by Honduras. It states that the measurement "took from west to east" but *"downwaters of the Unire River"* (emphasis added) (CMES, Vol. III, Ann. V. p. 53.) Obviously the measurement had to proceed downstream along the Unire River and had to follow the direction of its course, which runs towards the south-east.

This fact is confirmed by an unimpeachable witness. The Honduran engineer Aracil Crespo in his Report to the President of Honduras in 1888 stated that, proceeding from the south-east towards the north-west (that is to say, going in the opposite direction to that followed by the measurement), the two surveyors from both Parties continued "par le centre de la rivière, à l'endroit connu sous le nom rivière de Unire, *en suivant les diverses orientations dans le sens nord-ouest, jusqu'à sa source située au pied de la colline Ribitá*" (emphasis added (MH, Annexes, p. 257).

So the Unire River has a significant role in the measurement of the Commons of Polorós because it constituted both the starting point and the finishing point of the measurement - you know the measurement went round, they came back to the original place. From the starting-point of the measurement, the judge and the other persons accompanying him proceeded along the bank of the Unire River for a distance of fifty cords and they arrived back at the starting point after having proceeded along the bank for a further thirty cords. Thus the Unire River constitutes the boundary of the Commons of Poloros for a total distance of eighty cords, that is to say approximately four kilometres. The Unire River is also mentioned as a boundary in another Title-Deed relied on by Honduras, namely the Title-Deed of San Antonio de Padua (MH, p. 290; MH, Annexes, p. 1568).

The Reply of Honduras also points out (p. 614) that the Parties *"sont divisées sur l'identification de la rivière Unire"* since Honduras chooses another branch further to the west. Here again, however, the location of the real Unire River would present no difficulties in a process of demarcation. However, despite the fact that it is clear from the Formal Title-Deed to the Commons of Polorós that the Unire River constitutes the boundary of these Commons for approximately four kilometres, the boundary line claimed by Honduras in these proceedings ignores that river almost

completely, utilizing it only for a very short distance. Honduras thus once again deviates radically from the boundary line adopted in the Title-Deed which it is attempting to interpret geographically.

V. Comments on the Statement of Professor González Campos

To finish my statement, Mr. President, I will make a few comments on the statement of Professor González Campos.

At the end of his long statement yesterday, Professor González Campos gave us a surprise by abandoning or at the very least rectifying the principle of *uti possidetis juris*.
He added a sort of post scriptum to that principle, relying on the principle of the consent of States as an expression of their sovereignty.

I do not propose to discuss at this late stage this interesting and highly novel theory or to examine its coherence with previous statements made to the Chamber by the other counsel of Honduras, who have repeated to the point of satiety the dictum of the Chamber in the *Burkina Faso/Mali* case to the effect that the principle of uti possidetis juris does not permit the clock to be put back.

The purpose of the presentation of this novel theory was obviously in order to be able to contend that there has been a sort of tacit agreement between the Parties to consider the Torola River as a de facto boundary, as would be manifested by the fact that some land grants have been respectively to the north and to the south of the Torola River.

The Government of El Salvador wishes formally to deny the existence of any agreement, either express or tacit, to this effect.

The very fact of the existence of a dispute over this sector and the opposing claims put forward by the Parties in this litigation demonstrates that there is no arrangement of such a kind, either *de jure or de facto*.

Moreover, the suggestion made by Professor González Campos to the effect that the conduct of El Salvador might be able to be interpreted as "acquiescence", a sort of estoppel or a waiver of the full rights conferred on it by the title of Poloros, simply cannot be sustained.

For instance, the 1856 title of Matasanos, Hornos, etc., extensively invoked by

Professor González Campos, was not sold in public auction as the Monteca property was and only summoned those of Opatoro, besides Honduras never brought to the attention of El Salvador during the long negotiations and discussions carried out over a period of one-and-a-half centuries, never invoked this title as a source of rights or as a source of estoppel to the claims of El Salvador.

As an example, in the conference held at Guanacastillo in 1888 the only title-deed invoked by Honduras and brought to the attention of El Salvador was the title which had been executed by President Soto of Honduras in favour of Opatoro.

In these circumstances, such a clandestine document cannot be the starting point of the alleged acquiescence or prescription suggested by Professor González Campos. Hardly could El Salvador protest against a title it ignored. On the other hand, in a document of 1874, which appears in the Annex to the Reply of Honduras at page 285, the authorities of Honduras complained of what they described as "plusieurs incursions de personnes armées au nord du Torola" (HR, Annexes, p. 285).

So, where is the acquiescence? This suggestion is clearly contradicted, among other actions, by the signing of El Salvador in 1884 of the Cruz-Letona Treaty, which fully implemented the boundary established by the Formal Title-Deed to the Commons of Poloros of 1760. The fact that this Treaty is not in force cannot detract from the fact that its signing constitutes State conduct on the part of El Salvador of the most eloquent kind, totally incompatible with the existence of any estoppel or waiver.

Even more eloquent than this is the text of the Third Conference, which constituted the basis for the full recognition in the subsequent treaty of the boundary established on the basis of the Title-Deed to the Commons of Poloros. In this Third Conference, held on 24 March 1884, it was stated that:

> "The Commissioners in the company of the surveyors - it was not only the plenipotentiaries but also the experts appointed by the Parties - ... proceeded to study the documents relating to the first debatable point - which was Poloros - and, once these documents had been examined with the appropriate attention, understanding was reached to the effect that the frontier line of both Republics ought to be determined in accordance with the Formal Title-Deed to the Commons of Poloros, due to the fact that it was the oldest and made reference to very well-known places."

Thank you, Mr. President.

The PRESIDENT: I thank President Jiménez de Aréchaga. I would like to know if the delegation of Honduras will be prepared to speak tomorrow morning?

Mr. VALLADARES SOTO: Mr. President, Honduras will be ready to answer tomorrow morning.

The PRESIDENT: The sitting is adjourned until tomorrow morning at 10 o'clock.

The Chamber rose at 4.10 p.m.