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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 Wednesday 5 June 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 mercredi 5 juin 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

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. José Antonio Gutiérrez Navas

Mr. Raul Andino,

Mr. Miguel Tosta Appel

Mr. Mario Felipe Martínez,

Mrs. Lourdes Corrales,

as Members of the Sovereignty and Frontier Commission.

The Government of Nicaragua is represented by:

H. E. Mr. Carlos Argüello Gómez

as Agent and Counsel;

H. E. Mr. Enrique Dreyfus Morales, Minister for Foreign Affairs;

Assisted by

Mr. Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford,

as Counsel and Advocate;

and

Dr. Alejandro Montiel Argüello, Former Minister for Foreign Affairs,

as Counsel.

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

comme conseils;

M. Guillermo Bustillo Lacayo,

Mme Olmeda Rivera,

M. José Antonio Gutiérrez Navas

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 Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos Argüello Gómez

comme agent et conseil;

S. Exc. M. Enrique Dreyfus Morales, ministre des affaires étrangères;

assisté par

Mr. Ian Brownlie, Q.C., F.B.A., professeur de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele, Fellow de l'All Souls College, Oxford,

comme conseil et avocat;

et

Dr. Alejandro Montiel Argüello, ancien ministre des affaires étrangères,

comme conseil.

The PRESIDENT: Please be seated. The sitting is open. We continue our hearings on the legal situation of the Gulf of Fonseca. I give the floor to Professor Lauterpacht.

Mr. LAUTERPACHT: I thank you Mr. President. I propose this morning to respond to some aspects of the arguments presented by Professor René-Jean Dupuy and Professor Pierre-Marie Dupuy. And I hope they will not take offense if for convenience I refer to them as Professor Dupuy Senior and Professor Dupuy Junior. I shall refer to both their speeches of 3 June and to Professor Dupuy Junior's speech of yesterday. I shall not attempt to offer an integrated presentation. That would not be appropriate at this stage of the reply. Instead, I will deal with specific aspects of a number of topics. There will be five such topics. One will be that of the status of the Gulf of Fonseca. The second will be a reference to the 1917 Judgment. The third will be a reference to the position of the condominium independently of the 1917 Judgment. The fourth will be a reference to the question of community of interests and the fifth will be a consideration of the task of the Chamber.

And so Mr. President, I start with the status of the Gulf of Fonseca.

A. The Status of the Gulf of Fonseca

This heading is a convenient umbrella to cover a number of points that have been discussed, the most important of which is the position of the Gulf of Fonseca as a historic bay. The Parties are agreed that the Gulf of Fonseca is a historic bay. But it has to be recognized that there is no universally accepted or indeed acceptable definition of the expression "an historic bay". It is therefore necessary for the Chamber to ask itself three questions in relation to the Gulf of Fonseca as it would in relation to any other historic bay. They are as follows: first, the question of when the historic bay was established. Secondly, the question of where it was established; what are its precise limits? And thirdly, what is the content of the historic bay; what in law makes it different from any other body of sea? I put the questions in that order as a matter of convenience.

I look first at the question of when the Gulf of Fonseca came into being as historic bay. There are two possibilities. One is that it came into being by reason of the 1917 Judgment. The other is

that it came into being independently of the 1917 Judgment. As to the first of these possibilities (that it came into being by reason of the 1917 Judgment), this is not accepted by Honduras. But the point is: if the bay did come into being or had a renewed existence by reason of the 1917 Judgment, its existence, as I shall presently develop, must be measured in terms of the content of the 1917 Judgment. I will come back to that presently under the heading of my third question.

[For, as I said earlier, the historic bay came into being independently of the 1917 Judgment.] The other possibilities are that it either came into being before the 1917 Judgment or after it. The probability is that it was before the 1917 Judgment since it is impossible to point to any event after 1917 that could account for its character as an historic bay. And that is the analysis of when the bay came into existence. Either before 1917 and independently of the Judgment; or in 1917 as a result of the Judgment or by way of renovation by the Judgment.

So, then we come to the second question: where did this historic bay come into existence? And there are good reasons for looking at what I may call the geographical scope of the bay. One is it is intrinsic to itself. In other words, we need to know what is the area that we are concerned with. And secondly it is, of course, important by reason of the endeavour by Honduras to use the status of the Gulf of Fonseca as a generator of rights for Honduras in the open Pacific Ocean. And both these items are, of course, affected by the geographical scope of the concept.

Now the scope or geographical scope of the historic bay of the Gulf of Fonseca is in its turn affected by history. It is a well-known phenomenon in international law that, though a particular placename may remain the same, it can move around geographically. Judge Sir Robert Jennings will be familiar with the *Palena* case in which there was an issue between Argentina and Chile as to where a river called the River Encuentro was located. And as a quick perusal of the award of that distinguished arbitration tribunal will show, at one time the Río Encuentro was thought of as being in one place and yet at another time that same name had been transported to a neighbouring river. And it is important that one bears that possibility in mind.

One has to be careful when talking today about the Gulf of Fonseca not to apply to the current Gulf of Fonseca concepts that may have been developed in relation to an earlier Gulf of Fonseca

conceived perhaps in smaller or more restricted geographical terms. And this is particularly important in relation to the question of the use of the Gulf by Honduras as, so to speak, a stepping stone to the Pacific. Needless to say, El Salvador does not see the Gulf as a stepping stone to the Pacific. For them it is important that one realizes that its geographic extent may have varied over time. And the question of where the Gulf of Fonseca is, or of its extent, depends on when the Gulf of Fonseca acquired its historical status. If it acquired its historical status by virtue of the 1917 Judgment then the probability is that the Gulf must be seen in the somewhat broader terms that the Central American Court of Justice attributed to it in that Judgment.

But, if the historic bay owes its historicity to events before the 1917 Judgment, then we must look to the pre-1917 indications to determine its geographical extent.

Now, a word about, what I might call, its original dimensions. Yesterday, His Excellency the Minister for Foreign Affairs of El Salvador referred to the Honduran Note of Protest of 1916 in which, as a starting point, Honduras recited the way in which El Salvador had described the Gulf of Fonseca for the purposes of its claim. And the Minister indicated that the manner in which Honduras referred to that El Salvador description indicated no dissent therefrom by Honduras and, therefore, an acceptance by Honduras that at that time that was the area that Honduras saw as constituting the Gulf.

I merely wish to add a footnote to what the Minister said, by saying that this reference in the El Salvador Note, endorsed by Honduras in 1916, is not the only example of the description of the bay in those more limited terms. The extent of the Gulf needs to be seen against the background of the Cruz-Letona Treaty of 1884. The Treaty provides in Article 1 that

> "The maritime and land boundary delimiting the Republic of Honduras and that of El Salvador shall begin in the Pacific, at the Gulf of Fonseca, Bay of La Unión and come to an end at the Cerro del Brujo, where it shall join the national frontier of the Republic of Guatemala, coming from the mountain of Alotepeque or Merendon." (MH, Annexes, Ann. III.1.54, p. 167.)

I have compared the English with the Spanish text and what is here translated is a very fair, correct, literal rendition of the Spanish. It is "the ... boundary ... shall begin in the Pacific"; the word "at" does not actually appear in the Spanish. It just says "shall begin in the Pacific, the Gulf of

Fonseca, Bay of La Unión".

Then, in Article 2, it goes on and says

> "The maritime boundary between Honduras and El Salvador shall run from the Pacific, bisecting, in the Gulf of Fonseca, the distance between the islands of Meanguera, Conchaguita, Martin Perez and Punta Sacate, of El Salvador, and the islands of Tigre, Sacate Grande, Inglesa and Exposición of Honduras, and shall end at the mouth of the Goascorán." (MH, Annexes, Ann. III.1.54, p. 167.)

It does not make much sense if one reads the word "Pacific" in those two Articles as meaning the "open ocean" because, as you will immediately see, there is no indication of where in the Pacific that boundary begins. It could begin out in the ocean or, if one insists on a conceptualization of a line, it could begin anywhere along the outer line of the bay, or it could, of course, begin somewhere along, what I might call, the inner line of the bay, as demonstrated yesterday by the El Salvador Foreign Minister.

Indeed, when one looks back at the Spanish, as I have, one can see that when they spoke of "Pacific", they did not mean the Pacific Ocean, they meant Gulf of Fonseca, Bay of La Unión. So that really all we are looking at here in the 1884 Treaty is a very limited line that begins somewhere - if one can visualize this - somewhere between Tigre and Meanguera and Meanguerita - a midway point - and then moves north-westwards towards Goascorán.

I am saying all this, Mr. President, in order to suggest that even in 1884 the Gulf of Fonseca was seen in these more restricted terms.

Article 23 of that same Treaty, the Cruz-Letona Treaty, provides that

> "Following the demarcation indicated in the previous Articles, the Honduran engineer has drawn a topographic line which should contain such special and exact data, directions and distances as to provide an incontestable definition of the points through which it is to pass." (MH, Annexes, Ann. III.1.54, p. 170.)

Presumably there exists somewhere that topographic line drawn by a Honduran engineer as described in Article 23 of that unratified Treaty.

El Salvador, having many years ago lost the papers relating to these negotiations, cannot produce such a map. It is to be hoped that, perhaps even now, Honduras could find such a map in its records. El Salvador would certainly have no objection to the production of that map. Either the map will confirm what I have just suggested is the position, or it will not. And if it does not I do not

think the case of El Salvador is particularly harmed. But it would be interesting to know whether the map does exist, and if it does exist, what there is on it.

The same formula regarding the limits of the Gulf of Fonseca appears at another point in the 1917 Judgment as cited to you yesterday. The reference is to the way in which Honduras relied upon the El Salvador statement of claim. We have been unable here to find El Salvador's statement of claim. Nonetheless, at page 679 of the decision as reported in the *American Journal of International Law*, we find that the following - and this is a passage which falls within the section of the Judgment that is setting out the position of El Salvador as claimant State, so it is really quoting an El Salvador position - that, apart from its character as an historic bay, the Gulf of Fonseca presents the particular condition that its entrance between the summits of the islands of Meanguera and Meanguerita on the line traced from Chiquirin Point on the mainland of El Salvador to Rosario Point in the north-east region of the penninsula that forms the Nicaraguan promontory of Cosiguina, is not of an extent greater than the 10 miles fixed generally by the publicists as essential to considering a bay as territorial or closed. And then it goes on.

So there you have, I think, the description on the basis of which Honduras formulated its Note of Protest and, in so formulating it, appeared to accept that description.

Moreover, it is worth bearing in mind that in the course of the mediation process, between 1976 and 1980, each of the sides set out its position in some detail. There was one document, from El Salvador, which appears in the Annexes to the Memorial of Honduras (Ann. IV.1.45), which contains the following statement by El Salvador, referring now to the 1884 Cruz-Letona arrangement and the Commission that was established under it.

> "This Commission duly carried out its work, establishing the line in question from the place where the waters of the Gulf of Fonseca merge with those of the Pacific Ocean as far as the Cerro El Brujo, the point where the boundaries of the three jurisdictions of El Salvador, Guatemala and Honduras respectively come together." (MH, Annexes, Ann. IV.1.45, pp. 211-212.)

So again, El Salvador is reminding Honduras of a particular definition of the Gulf of Fonseca which, if my analysis is correct, refers to the smaller concept of the Gulf rather than the larger one. So what is the importance of all this? It is that it shows what the Gulf of Fonseca is deemed to have

been in the absence of the definition in the 1917 Judgment. So either one takes the 1917 Judgment with the dimensions of the Gulf that it appears to contain or, if one rejects the 1917 Judgment as relevant or authoritative, one has to look for an independent source of the dimensions of the Gulf and those independent sources are, as I have just suggested, the text of the Cruz-Letona Agreement, the El Salvador claim in the 1917 proceedings, the acceptance in 1916 of the El Salvador position by Honduras and now the confirmation in the course of the mediation proceedings.

I can now turn, Mr. President, to the third question that one has to ask in connection with the historic bay, and that is what we had when, we had where, and now we come to what. Mr. President, as I suggested earlier, there is no concept - no uniform, universally accepted concept - of a historic bay. Of course, it is true that most historic bays share certain features, certain geographical features, certain historical features and, in relation to most of them, the acceptance that their waters are internal waters. But, Mr. President, it is not correct to say that there is an automatic, inescapable, universal equation between a historic bay and internal waters. It is important to emphasize this. Professor Dupuy Senior went on repeating the equation as if it were a litany. No doubt in the hope that by so repeating it, it would be accepted. But, Mr. President, the proposition is not acceptable in that absolute form. It has to be qualified. Professor Dupuy Senior referred to the *Fisheries* case of 1951 before this Court, as crystallizing the law relating to historic bays and internal waters. It is, Mr. President, helpful to look at any rate at one passage in the *Fisheries* case that suggests a possibly different approach. I am now reading from the Judgment, at page 130 (and the Court is here dealing with the British argument regarding strait baselines and the conditions which the British Government wishes to attach to their use) and the Court then said:

> "A preliminary remark must be made in respect of this point.
>
> In the opinion of the United Kingdom Government, Norway is entitled, on historic grounds, to claim as internal waters all fjords and sunds which have the character of a bay. She is also entitled on historic grounds to claim as Norwegian territorial waters all the waters of the fjords and sunds which have the character of legal straits, and, either as internal or as territorial waters, the areas of water lying between the island fringe and the mainland."

Then the Court went on:

> "By 'historic waters' are usually (I emphasize the adverb, usually) meant waters which

> are treated as internal waters but which would not have that character were it not for the existence of an historic title."

So I am reading the official Judgment for the purpose of showing that the Court did not regard the equation advanced by Professor Dupuy Senior as a universal equation, "usually" was the adverb, not "always". Now, a historic bay is an exceptional situation. It is dependent upon the facts which give rise to it. It is the product of history, not only in its origin but in its content and if the claim or the conduct which gives rise to the historic character of the waters is not that those waters should be internal in the strict and absolute sense of the word, then internal waters in that sense are not generated. In theory, you could have historic claims of lesser rights; sedentary fisheries, rights of passage, extra width of territorial sea or rights that are not claimed against the whole world.

Professor Dupuy made the point that the status of historic bay resulted from the constant practice of the riparians. That is exactly my point, a historic bay derives from practice and its scope is controlled by that practice. But more than that, Mr. President, one actually ought to look at the words of the 1917 Judgment itself. And I observe that Professor Dupuy Senior did not refer to them. But there is a passage at page 715 of the Judgment, if you have it before you, which is worth looking at. About a third of the way down the page a sentence begins thus:

> "The fact that the waters of the Gulf belong to the three States that surround them has not operated to prevent the existence of a second zone that tends to protect the rights of each State with respect to the others, under regulations, which, as the publicist Don Andrés Bello says 'are concerned more immediately with their prosperity and wellbeing' because, considering their present political organization"

and I now come to the important words:

> "the States contiguous to the Gulf possess among themselves rights and duties of reciprocal application in the use and enjoyment of the non-litoral waters"

and now come the especially important words:

> "and because the merchant vessels of all nations possessing as they do the right of *uso inocente* over those waters, the right of the States to exercise the police power and powers incident to national security and fiscal matters of their respective coasts is correlative to those rights."

The Court is saying there quite clearly that the merchant vessels of all nations possess this right of *uso inocente* or innocent passage, and that the rights of the coastal States are correlatively limited. So we have a passage here that starts with the littoral belt and ends by dealing with the right

of passage. It distinguishes between riparians and non-riparians: the riparians themselves have all the rights of passage but the non-riparians have only the right of innocent passage. So, these words of the Court dispose of the claimed precarious right to navigation. It is not a precarious right, Mr. President, it is a right that is inscribed in the Judgment of the Court.

And secondly these words show that it is not correct to classify the waters of the Gulf as internal waters *simpliciter*. They are not internal waters *simpliciter*. Whatever they are they assure a right of passage to non-riparians.

Now yesterday, or perhaps it was the day before, Professor Dupuy Junior, sought to reform the description that the 1917 Judgment gives of these rights. In order to preserve the idea that the waters within the Gulf are internal waters, he proceeded to an analysis that concluded - and the following is my translation and I apologize for it - "strictly speaking, for foreign ships, it is not a matter of the exercise of the right of innocent passage but an obligation to defer to the wishes of the riparian State for which it is destined".

Now, with great respect, I do not see how this approach can be made consistent with the words that I read to you from page 715 of the Judgment and I will not repeat those words. But there is not a word in page 715 that subjects non-riparian vessels to the wishes of the State of destination - no connection between the State of destination and the vessels of all the world, at any rate in the words of the 1917 Judgment, nor are there any words that subject them to the wishes of the coastal State except in the usual range of territorial sea matters of jurisdiction.

The truth of the matter is that the Gulf of Fonseca is an historic bay with a special régime. That régime has its origin in events before the 1917 Judgment but now takes the form given to it by that Judgment. The Judgment clearly does not accord to the coastal States the amplitude of power and control in relation to navigation that is possessed by a coastal State in its own true internal waters and there is really no point in pretending otherwise.

Now, of course, if the character of the Gulf as a historic bay is to be determined on some basis other than the 1917 Judgment, the content will necessarily be different. But the burden of establishing the difference will rest on the Party that is alleging the difference and that Party will

have to show, not only (1) in what respect it is different but (2) when this different régime was established and (3) where it was established, the larger or the smaller Gulf and (4) why its content is not to be taken as reflected in the 1917 Judgment.

So, Mr. President, I now turn from my first main point to my second one which is the criticism by Professor Dupuy Senior of the reasoning and content of the 1917 Judgment. He had some hard things to say about that Judgment. He spoke about the 1917 Court being embarrassed in determining the consequences of the rights attached to the character of the historical bay. He spoke of unexpected consequences drawn from that character, of the wrong, unsupported and unsupportable conclusions that there is a condominium in the Gulf and he said that the idea of condominium was incorrect and that the Court misunderstood a fundamental principle of international law. That is all pretty strong stuff. Especially when the text that is being criticized is deemed to be totally irrelevant and not binding upon the Party that criticizes it.

So, we have to ask ourselves two questions. Is the criticism of the Judgment relevant and secondly, if the criticism of the Judgment is relevant, is it right? And first as to the relevance of the criticism. One asks oneself, if Honduras takes the view that it is not bound by the 1917 Judgment, why does it criticize it? Or if Honduras is bound by the 1917 Judgment, what is achieved by criticizing it?

Mr. President, this is not a Court of appeal from the Central American Court of Justice. Nor is this Court charged with determining whether by reason of error the Judgment of the Central American Court was invalid. This Court, and the Parties, have to take the 1917 Judgment as an objective fact. It exists, for better or for worse, for clearer or for less clear, till, not death, but till the Parties bring it to an end and the third riparian concurs - if that should ever happen. But for our proceedings at the present time, the Judgment is an objective fact for El Salvador. As the Minister said yesterday, the decision is *res judicata*. El Salvador regards itself as bound by it and takes the view that Honduras is also. So it is incumbent on us to try and make sense of what is, admittedly, a prolix and not entirely lucid Judgment. It is indeed this very lack of clarity which may sometimes explain a certain vacillation in the interpretation placed upon the Judgment by the interested States.

So that is why El Salvador welcomes the opportunity of seeking clarification from this Court, but always on the basis that for El Salvador the decision of 1917 is *res judicata*, binding on it as a matter of international law and one to which El Salvador is constitutionally committed. Needless to say, once this Chamber has pronounced upon the interpretation of the 1917 Judgment it will be the Judgment of this Court that becomes controlling in conjunction with the 1917 Judgment. So much for relevance of criticism.

Now I come to the question of whether the criticisms are correct. The Chamber will, I am sure, be relieved to know that I do not propose to pursue these questions in any detail. I do not see how debating the merits of the 1917 Judgment will assist the Chamber in its present task. But out of fairness and a sense of obligation to the memory and reputations of the Judges of the Central American Court of Justice, I think it is right to respond very briefly to the criticisms made of them for drawing upon private law analogies. Professor Dupuy Senior made it look as if the Judges did so because either they were prehistoric or they were insufficiently educated as international lawyers. My response is that the 1917 Judges were both entitled and correct to draw on private law sources when there were no directly applicable international law rules to hand. That technique was, and more to the point, remains legitimate. It is incorporated in Article 38, paragraph 1(c), of the Statute of this Court. It is constantly used. It was the subject of a dictum of abiding importance of Lord McNair in his Separate Opinion on the *International Status of South West Africa*, and as Judge Oda in particular will recall, counsel in the *North Sea Continental Shelf* case had to rely heavily upon the derivation of rules and principles from private law sources in support of the then novel but now almost classical approach to the role of the ideas of justice and equity in continental shelf delimitations. So I do not think it is right to condemn the Judges of 1917 for having resort to concepts of Roman private law in a situation where there was really no other helpful authority available.

There is a further point on which Professor Dupuy appears to have erred and that is in his analysis of the right of passage as recognized by the Central American Court. [In a sense I have slightly anticipated on what I am about to say, but I will repeat it nonetheless.]

The error lies in the absoluteness of the Professor's two equations. Equation one, historic bay equals internal waters. Equation two, internal waters equal no right of passage. I have already pointed to the passage in the Central American Judgment regarding rights of passage, and they should suffice in this connection. But I should add this: that if we are in a situation where the Judgment does not operate, non-riparian States still enjoy freedom of passage. The reason is this. in this situation there may or may not be a condominium.

If there is a condominium, we are in the presence of a situation of restraint exercised by the riparian States for so long that other States are entitled to rely on its continuance. We are not in the situation of having a precarious right that can be withdrawn at will. We are here in a situation where the right of passage has been so long accorded by the riparian States that they cannot take it away from anybody else; the rights inhere in others, and in each of the riparians towards each other. If there is no condominium, then it is pertinent to recall the law relating to innocent passage through straits, as reflected in Article 45 of the 1982 Law of the Sea Convention.

Now, Mr. President, I turn to a third, different matter. That is the question of whether we have a condominium independently of the 1917 Judgment.

I have not yet dealt with the question of the existence of condominium between El Salvador and Honduras if the view is taken that it does not arise out of, or exist in terms of the 1917 Judgment. Nor, with one exception, need I do so, as the subject is well covered in the written pleadings. The exception is this: El Salvador has said that condominium exists as a matter of international law independently of the 1917 Judgment. In this respect, it relies upon the reasoning of the 1917 Judgment even if the Judgment itself does not operate as a direct source of obligation.

Here there are two principal points: one relates to the insistence of Honduras upon a specific treaty origin for a condominium. Obviously, in any new situation where States are entering - having come into existence already and been in existence for a long time - into some kind of joint relationship, be it a condominium or the establishment of a neutral zone or the creation of a joint venture or such like things, obviously a specific treaty is necessary. No one could rightly dissent from that. Here, however, we are not in that situation.

That brings me to the second point. Here the condominium was found by the 1917 Judgment to arise from the historical background of the three riparian States, and, in effect, to have its origin in State succession. Professor Dupuy Senior has argued that such successorial condominia have only arisen out of war and have been temporary. The identification of those circumstances, even if correct, does not touch the present situation. As a matter of international legal theory there is no reason why a condominium should not result from a succession of States. No reason why two or more States should not jointly inherit what had previously belonged to them when united in one State. No reason why such a condominium should not continue until it is, by agreement or lapse, brought to an end. That theoretical possibility is evidenced by the very examples cited by Professor Dupuy Senior. If the Chamber does not feel that it can apply condominium as a result of the 1917 Judgment, it should not feel precluded from doing so on the basis of succession.

I turn now to the fourth point: the question of community of interest referred to by both Professor Dupuy Senior and Professor Dupuy Junior.

El Salvador has no disposition to question the existence of a community of interest. But that does not exclude either condominium or an historic bay. Community of interest can exist in parallel. As stated yesterday by the Minister as a cardinal point, community of interest relates to functions, conduct, behaviour, action. It has nothing to do with property or sovereignty. The Minister made this point strongly and it deserves full support. But by way of minor amplification and response I venture to refer again to the Law of the Sea Articles mentioned by Professor Dupuy Junior. The Minister pointed out, generally, that the Law of the Sea Articles confirmed the functional rather than the proprietary nature of community interest. I merely want to add a comment on the reference by Honduras to Article 123 of the 1982 Law of the Sea Convention. This is the Article, Mr. President, that deals with co-operation of States bordering enclosed or semi-enclosed seas. It says that:

> "States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
>
> *(a)* to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;
>
> *(b)* to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article."

But, Professor Dupuy said that this Article is an explicit model of the legal régime that the three States should develop between them on the basis of a community of interest. Of course it is, Mr. President, El Salvador welcomes that reference. But one must point out that Article 123 does not replace condominium. Even more to the point, it does not give the riparian State a place on the closing line of the sea. Article 123 is eloquent in what it does *not* say. It could have said that the States bordering an enclosed or a semi-enclosed sea - obviously it does not refer to an enclosed sea - it could have said that States bordering a semi-enclosed sea shall be entitled to a share of the economic zone and continental shelf resources adjacent to the semi-enclosed sea. But it did not. It limited itself to prescriptions of conduct relevant to their behaviour within the sea. And so, by implication, it is not recognizing proprietary rights outside the sea.

It is necessary to sound a note of caution about the desirability of expanding the notion of community of interest. It would be unfortunate if the idea of community of interest were to be so interpreted as to carry with it implications of sovereignty or proprietary rights. This could have an adverse effect upon the promotion of the concept in precisely the contexts in which it is now valuable. In a world of States, all competing for resources, progress is much more likely to be made towards equitable utilization of resources if those who seek to participate in them do not disturb the equilibrium by claiming to be owners as opposed to possible beneficiaries of a shared usufruct.

I move on, Mr. President, to point 5: the task of the Chamber. This was the first part of the speech by Professor Dupuy Junior yesterday, and he began that speech with the task of the Court. He began by speaking of the material need for a delimitation. I shall comment on this, but not on the basis that the need is somehow relevant to the interpretation of the *compromis*. This Chamber is only concerned with the terms of the *compromis*, so that a "need" is not strictly relevant. But, nonetheless as it has been spoken of, I think it is right to react to it. There are two points in this

reaction.

The first relates to the statement that by reason of the absence of delimitation, projects for economic development beneficial to Honduras have been broken off or not proceeded with. With respect, this is a great exaggeration of the relationship between non-development and non-delimitation.

Professor Dupuy Junior invited the Chamber to look at the reports involved. I venture to do the same. They do not leave the impression that non-delimitation is a significant, if at all a, relevant factor. There are three reports that were mentioned and they all appear in the Annexes to the Reply of Honduras, Annex VII. The first one is a report prepared by the Stanford Research Institute in California in 1968. Of course, Mr. President, you realize it is very difficult to prove a negative. Professor Dupuy says that the document says something. I suggest that the documents do not say what he says. And, short of reading the whole document, I cannot prove my point. I do not want to burden you with that reading. Nonetheless, there are just one or two little passages that it is worthwhile noting in each of the documents.

In the first document, the Stanford Report of 1968, one finds this:

> "The potential for the industry in the Pacific, [that is, the fishing industry], south of Honduras, is shared between three zones:
>
> 1. Honduran territorial waters in the Gulf of Fonseca [note the use of territorial waters].
>
> 2. Non-Honduran waters in the Gulf of Fonseca.
>
> 3. The high seas, or international waters, beyond the territorial waters of any individual country."

And it goes on to say that Chapter 4 discussed the fishing rights of Honduran citizens in territorial waters not belonging to Honduras in the Gulf of Fonseca. Some doubts persist concerning the rights of fishermen from Honduras, neighbouring countries and other countries; but for these to be clarified, an exhaustive examination of all the important legal issues is called for, and this lies beyond the framework of the present study. And then certain steps, three of them, are recommended. But Mr. President, there is nothing, and I invite you to look at the report, there is nothing that says you cannot go ahead and develop your fishing industry because there is no delimitation with

El Salvador.

The same, Mr. President, is true of the second report prepared by Messrs. Giudicelli and Wirth in 1979. Here it speaks about possibilities that exist for the development of the sea bream fishing in the northern waters and tuna fishing in the Pacific and then as the recommendations, given the limited surface of the zone under consideration, and the fragile ecological equilibrium, it is in the first place recommended that all types, all types of industrial fishing be avoided. This recommendation also applies to external waters. So, rather than saying you cannot fish because there is no delimitation, its saying you shouldn't fish, parenthetically even if there were a delimitation. "And since national jurisdiction still remains to be determined, the limits of Honduran waters are not known," doesn't make anything of the point. "But it is at all events likely that the Honduran channel of access to the Gulf of Fonseca will prove too narrow and its expanse of continental shelf inadequate for any form of large-scale fishery." Now, that is not something that says you must delimit. It is something that may encourage the State concerned to say: we should have more, but that, Mr. President, it is not a reason for changing the whole basis of delimitation. I will leave those reports, Mr. President, though there is more to be said about them, and I do invite them to receive your close scrutiny. I turn next to another point and that is about the problem of friction in the Gulf. The suggestion has been made that there are incidents that occur in the Gulf and that delimitation would somehow eliminate those incidents. There are three comments to be offered.

A major element in the Honduras complaint is that neither of the two Governments knows what are the limits of the zone of full jurisdiction belonging to each country. This is absurd, with respect. If there is anything that is established and certain under the 1917 Judgment, it is that each riparian has an exclusive zone of 3 nautical miles. No delimitation is required to establish that and no delimitation could fix it more precisely. If there have been problems it may have been because Honduras claims or seems to claim a territorial sea of 12 kilometres. If Honduras maintains that it is not bound by the 1917 Judgment, then it is evident that the dispute is not about delimitation but about the effect of the 1917 Judgment. That is, of course, a further explanation of why El Salvador has consistently maintained that a decision on the status of the waters in the Gulf, including, of

course, the position of the 1917 Judgment, is an essential prerequisite to the process of delimitation. Once the position and effect of the 1917 Judgment is clarified, the process of negotiating a delimitation can commence on a realistic basis.

The second comment. The map which Honduras has filed to illustrate the location of incidents in the area demonstrates that the areas of sensitivity, if that is what they should be called, are entirely remote from the line that Honduras contends represents the proper line of delimitation in the Gulf. The Chamber will recall the map which appears in the Honduras Reply as Map 8.1. And it is a map that has on it a scattering of black marks to indicate where these incidents have occurred. I am sorry not to have a large map to show you, but I merely invite you, in due course, to look at your own pleadings and you will see that those black marks are all well to the north and well to the east in the Gulf. No doubt, Honduras will say that all the incidents are to the north and east of the line that they propose and therefore are in the waters that they regard as being theirs. And that if a line were clearly established, vessels of El Salvador would be less likely to trespass into Honduras waters. But there is an aspect to the map, Mr. President, which Honduras may not have sufficiently considered. It stands to reason that if El Salvador's vessels are present at locations in the Gulf distant from what Honduras believes are El Salvador waters, El Salvador vessels will be present in much larger numbers at locations in the Gulf that are closer to El Salvador territory, including in particular, the waters through which the alleged line claimed by Honduras is to run. Yet, when one looks at the location map and sees the place of the incidents, it is overwhelmingly clear that there is not a single episode illustrated in that vicinity. So what can this mean? It does not mean that El Salvador vessels are not present in the areas close to the El Salvador coast. Rather, it means that Honduras enforcement patrols never go there. In other words, Mr. President, that map, illustrative of incidents, is in large part, but not entirely accurately, a map of where Honduras patrols and it is nowhere near the area that Honduras says the boundary runs in. There could not be any more striking illustration of the entirely fictitious character of the line proposed by Honduras, and the undesirability - and this is the point I must make because I am not concerned with delimitation, I am concerned with the task of the Court - of the Chamber becoming involved in a process of delimitation

not contemplated in the *compromis* and for which the necessary preparatory work has not yet been done by the Parties.

And my third comment, Mr. President: one is bound to ask whether, when one looks at that map with the incidents that occur right up in the north-west corners, in areas which are very likely Honduras areas, what difference delimitation is going to make where El Salvador's civilian fishermen have been so, to use the words of the Honduras Reply, caught in zones situated very deep in Honduran waters, such as the Bay of Chismuyo behind the Honduran island of Zacate Grande. If poor fishermen need to look for resources they will look for them wherever they can find them and regardless of whether the line has been delimited. They must even now surely know that those areas are likely to be in Honduras.

My last comment on this point. Quite a number of the incidents reported in the Honduran Reply have been ones of alleged incursion by El Salvador's naval patrols into what Honduras supposes to be Honduran waters. There is one very simple way to get rid of purely naval encounters which have no productive purpose, in contrast with fishing which at least meets an important economic need. That simple way is to respect the frontier-free character of the waters that are possessed in common. Where an area is held in condominium, where there are no significant boundaries except a perfectly manageable 3-mile exclusive zone, there can be no trespass, no friction, no complaints. Is that not much more sensible than this constant emphasis upon the identification of what belongs to whom in an area that should be one of co-operation?

I go on, Mr. President, to deal with the second point under the heading of the task of the Court. And this is the relationship between title and delimitation. I have only one comment to offer. Professor Dupuy Junior said that "delimitation is the daughter of title". I entirely agree, with respect. But unless the title is clear, there can be no delimitation. Honduras challenges El Salvador's title to Meanguera and Meanguerita.

It is clear that the status of those islands is of central importance in delimiting, if one is to delimit, the waters of the Gulf of Fonseca. The Chamber will recall yesterday's map with the Honduras proposals. The first line assumes that Meanguera and Meanguerita belong to Honduras. There has

never been any real negotiation between the two sides on that basis. Nor, indeed, on the reverse basis, that the islands belong to El Salvador. Each side has considered the matter but only in its own optic and the line now advanced by Honduras is a unilateral fantasy. I emphasize *unilateral*. If I were to comment on the substance of the matter, which I do not do, the emphasis would, of course, be on the word *fantasy*. But what the Court is being asked to consider as part of its role, namely the task of delimitation, is something which it is not in a position to do because the Parties have not negotiated with each other on any meaningful basis in relation to agreement regarding title to a critical controlling element in the delimitation.

I come now to the next sub-point and that is the interpretation of the *compromis*.

Article 2, Professor Dupuy Junior said, was accepted by Honduras because Honduras knew that any other formula would not be accepted by El Salvador. Quite right. But this does not lead to the conclusion that the formula therefore covers delimitation. Instead, it shows two things. First, that Honduras knew that El Salvador was not prepared to proceed to delimitation and second, that Honduras was not prepared to be explicit in its demand that delimitation be covered by the terms of the *compromis*. In effect, Honduras has sought to have delimitation fall within, or brought within, the scope of the Court's competence by the back door.

I turn next to the part of Professor Dupuy Junior's argument in which he talks about the legal need for delimitation. That is really another way of saying that the delimitation is called for by the *compromis*. Now, I do not think that there can be any real argument that, approached in literal terms, the *compromis* does not cover delimitation in the Gulf. So, the argument of Honduras focuses on other elements. A curious thing yesterday was that Professor Dupuy spoke of what he called the "context" of the *compromiso*, and he had in mind - indeed he said so - Article 31 of the Vienna Convention which says, in its first paragraph:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose."

Well, Mr. President, the concept of context as used in the first paragraph of Article 31 of the Vienna

Convention is elaborated, or defined, in the second paragraph, which provides thus:

> "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> *(a)* any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> *(b)* any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

Well, Mr. President, having introduced this notion of context, Professor Dupuy Junior in fact did not apply the definition of context as it appears in the Vienna Convention. He relied on the identity of language between the *compromiso* and the 1980 Treaty and upon the conduct of the Parties under the 1980 Treaty. Well, neither of those elements which he elaborated on in detail satisfies the requirements of context as prescribed in the Vienna Convention. Nonetheless, it is right, I think, just to react to the proposition that because the same words are used in the *compromis*o, the Agreement of 1986, as are used in the 1980 Peace Treaty, therefore whatever meaning may have been given to those words in the earlier Treaty must be transported into the interpretation of the later Treaty. Now, there is no rule that automatically requires that and it is possible to point to authority, to cases, where that proposition has been expressly rejected. Unfortunately I do not have the reference by me, but it clear in my recollection that in the Award of the Arbitral Tribunal in the *Taba case* between Egypt and Israel, the Tribunal expressly rejected the proposition that when words that were used in the Treaty of 1906, relating to the definition of the boundary, appeared in exactly that form in the *compromis* setting up the Arbitration, the meaning of the words in the first Agreement controlled the meaning of the words in the *compromis*. So there is no necessary connection between the two Agreements.

And then, Mr. President, a great deal was said about the conduct of the Parties under the 1980 Treaty. I think it is important to appreciate one thing. Needless to say, El Salvador does not accept that the conduct of the Joint Commission should be treated as an element in the interpretation of the 1986 *compromiso*. But it is important to bear in mind a major difference between the function of the Joint Commission and the function of this Chamber. The Joint Commission was not a

tribunal. It was not a body that could decide upon the frontier. It was only a body that could make recommendations to the two Governments. I think it is important to look at Article 27 of the 1980 Treaty:

> "In a document prepared in triplicate and duly signed by the members of the respective National Sections, of which a copy shall be sent to each Government within three days of its signature, the Joint Frontier Commission shall propose to each of the two Governments the frontier line to be drawn according to the case in one or more of the areas subject to the controversy. Within sixty days from the signature of this document, the two Governments, should they approve the proposal of the Commission, shall proceed to sign the appropriate protocol ..."

So whatever may have been presented in the Commission, whatever may even have been agreed in the Commission, did not bind the Governments. Here the situation is quite different. When this Chamber deals with the matter and judges upon it, that judgment is binding. They are, to use commonplace language, two entirely different ball parks.

But there is another aspect of the work of the Joint Commission that should also be borne in mind in relation to the situation of the islands in the maritime areas. The Chamber has, I know, been referred to Article 18, on the *functions* of the Commission, which included the specification that it shall determine the legal situation of islands and maritime areas. And the Chamber has also been referred to Article 21 of the same Treaty which defines the *tasks* of the Commission. But the definition of the task of the Commission in relation to the islands and maritime areas is in slightly different, but importantly different, terms from the definition of its functions. Article 21, paragraph 4, reads as follows:

> "It [the Commission] shall determine the legal situation of islands and maritime areas following the updating of the cartographic documents and the recognition of the areas, as may be necessary."

I am not certain whether that phrase "and the recognition of the areas" has been drawn to the Chamber's attention in quite the manner that I would like. I think it is important that the significance of those words be pondered. What could they mean "and the recognition of the areas"? It surely must mean an acknowledgment that the Joint Commission, whatever it may think it was doing, could not resolve any question relating to islands and maritime spaces until the recognition of the areas had

been disposed of. I think the point bears, as I say, some consideration.

It is necessary in this connection to say a few words, briefly, about the so-called Duarte Proposal, the Proposal made by President Duarte to the President of Honduras.

Now, Mr. President, let me emphasize that, in mentioning this, I do not accept that it is legally relevant. I do not accept that anything that occurred under the 1980 Treaty can control the interpretation of the 1986 *compromis*, which is a different text and which must be interpreted by itself. But, Honduras has referred to the Duarte Proposal and, because of the way in which that Proposal appears in the Annexes to Honduras, it is desirable that I should say a word about it.

The text that appears in the Honduras Annexes is Annex VII.1 to the Reply of Honduras. Now, I say first, that this document, indeed all the documents relating to the work of the Joint Commission, should not have been brought before the Chamber at all. I certainly do not need to rehearse this Chamber the authorities on the inadmissibility of such material. I need hardly say that the effect of introducing this kind of material will be to undermine the frankness and spirit of *compromis*e in which negotiations of this kind must be conducted. If, in the future, States are to believe that this Court will look at documents of this kind introduced in this manner, those States will simply not be prepared to negotiate in a constructive way, because they will be constantly looking over their shoulders to consider what will happen if the other side improperly produces this material to a tribunal. That is the first comment.

The second comment is this. The Duarte Proposal was, as is, I think, acknowledged, put forward in an eminently conciliatory spirit. Let me, if I may, read the relevant paragraph

> "True to its word, the Salvadorian Section is presenting a new proposal at today's meeting. This is likewise extremely conciliatory, and contains more specific and clear representations of concepts underlying the previous proposal ... With regard to this eminently conciliatory proposal, it is taken for granted that that proposal may not at any time be split up, curtailed or divided by the Section of Honduras at its pleasure, since the proposal presented today by the National Section of El Salvador is a harmonious and unified entity in which each paragraph precisely conditions those preceding and succeeding it. In the event of its not being accepted by Honduras, El Salvador maintains and re-assumes its full sovereignty to defend its territorial rights before the competent international Tribunal."

Now, Mr. President, I am sorry to burden you with what may appear an excessive reading, but it is important that the Chamber should appreciate that the pages which appear in the Honduras

Reply do not represent the whole of the Duarte Proposal. Do not misunderstand me, I am not for a moment suggesting that there has been any improper action by Honduras in suppressing part of the Proposal, not at all, because there appear dots in the text. But it is very easy - certainly it happened to me - on a first reading, to be misled into thinking that somehow or other these pages represent a total proposal. But they do not. These pages represent only those parts of the Duarte Proposal that relate to the maritime and island sector. There is a lot more to the Proposal. The Proposal runs right up to the Tripoint of Montecristo. The way it reads is this: at one point it speaks about the Proposal in relation to the maritime areas as being "in addition to the continental part" and then in the next paragraph it says

> "Accordingly, the present Proposal begins the description of the line proposed by El Salvador at a point located on the entrance line of the Gulf of Fonseca (running from Punta Amapala ... to Point Cosiguina ...) and is situated one-third of the way along that line, measuring eastwards from Punta Amapala. The proposed line comes to an end at the Tripoint of Montecristo and is described in the following terms:."

and then there follows a description of the boundary.

And then, when one looks at the detail of the text, one sees that it is not a comprehensive division of the maritime waters. It makes certain suggestions regarding rights; there is a heading "Area of Sovereign Rights accruing to El Salvador in the Pacific Ocean ..." and then it says in there that "As for the division of these territorial waters between Honduras and El Salvador, it can be effected whenever they think fit." President Duarte was not proposing an immediate division; he says let's negotiate about that. And so it goes on.

This is a wholly exceptional proposal, Mr. President. It does not establish any practice on the 1980 Treaty; it cannot be carried over into the *compromis;* and it emphasizes, in the area outside the Gulf, the prospect of joint activity.

Mr. President, I shall be concluding in just a few moments. I should recall finally the significance once again of the affidavit of Señor Ricardo Acevedo Peralta the Foreign Minister of El Salvador at the time the *compromis* was signed. This makes it clear that he would have felt under a constitional inhibition about signing a *compromis* giving the Court power to delimit the areas. Now, the point that is being made by El Salvador is not one that involves any suggestion of the

superiority of municipal law over international law. Far from it. El Salvador recognizes that whatever its international obligations are they must necessarily override its municipal law situation. But what is being said is that the recognition by the Foreign Minister, at the time he signed the Treaty, of his own domestic law limitations must be a controlling factor in determining what his intentions were at the time that he signed the text.

Mr. President, in international courts, one I think naturally tends to be on the side of the angels in seeking to expand the jurisdiction of a tribunal. Particularly if it is coupled with the plea that the extension of the jurisdiction will somehow, it is believed, end the dispute. But that is not the correct way to approach this case. This is not a case where it is simply a matter of laying down a line (although, of course, whatever line may be laid down and it should not be laid down - or determining rights). It is a matter of producing a decision that is inherently convincing and that will advance the relations of harmony between the two sides. The final result is one that must be the product of proper negotiation.

This Chamber, or this Court, Mr. President, knows how to say no to attempts to expand its jurisdiction beyond the proper limits of the *compromis* and, it is my submission, indeed my earnest hope Mr. President, that in this case, in dealing with the question of its task, the Chamber will reach the conclusion that that task does not extend to delimitation.

Thank you, Mr. President.

The PRESIDENT: Thank you Professor Lauterpacht. The Chamber will take a short break.

The Chamber adjourned from 11.20 to 11.45 a.m.

The PRESIDENT: Please be seated. The sitting is resumed, but it will be very short, as we are about to adjourn until this afternoon at 4 o'clock. The sitting is adjourned.

The Chamber rose at 11.50 a.m.