C 4/CR 91/43

Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Friday 7 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 vendredi 7 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.

In accordance with the arrangements as to the order of speaking agreed between the Agents of the Parties and the intervening State, and approved by the President of the Chamber, it is now for the representatives of Nicaragua to address the Court. Under Article 85, paragraph 3, of the Rules of Court, the intervening State is entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention. In the present case, that subject-matter was defined by the Chamber's Judgment of 13 September 1990, by which Nicaragua was permitted to intervene in the case.

> By that Judgment the Chamber found that Nicaragua had shown
> "that it has an interest of a legal nature which may be affected by part of the Judgment of the Chamber on the merits in the present case, namely its decision on the legal régime of the waters of the Gulf of Fonseca".

On the other hand, the Chamber also found that Nicaragua had not shown such an interest which might be affected by any decision which the Chamber may be required to make concerning the delimitation of those waters, or any decision as to the legal situation of the maritime spaces outside the Gulf, or any decision as to the legal situation of the islands of the Gulf. The authorization given to Nicaragua to intervene in this case was limited accordingly.

It is thus within that procedural context that I give the floor to the Agent of Nicaragua, Ambassador Argüello.

Mr. ARGUELLO GOMEZ: Mr. President, Members of the Chamber.

It is a renewed honour and privilege for me to be representing the interests of my country in this Great Hall of Justice and to be again pleading before this Chamber composed of distinguished jurists.

It is particularly gratifying for Nicaragua - that does not have the benefit of a judge *ad hoc* - to know that among Members of the Chamber are seated the President and Vice-President of the International Court of Justice and that it is presided by a former Vice-President of that Court.

Our first point in order, relates to:

The constraints placed on Nicaragua's Intervention which we have just heard anew. In the

first place, the State applying for permission to intervene has had to do so in the absence of any authoritative indication of the meaning of the Special Agreement. As the Chamber itself observed in its Judgment:

> "the present case raises a further problem, namely that the Parties to the case are in dispute about the interpretation of the very provision of the Special Agreement - paragraph 2 of Article 2 - which is invoked in Nicaragua's Application ... This difficulty is not only one for the Chamber in considering the present Application .. but also for Nicaragua in framing its Application ..." (*I.C.J. Reports 1990*, p. 118, para. 62.)

These difficulties cannot, with respect, be said to have diminished in the light of the September Judgment.

The scope of the intervention that has been authorized by the Judgment, precludes Nicaragua from addressing the situation outside the Gulf even though the status of the waters within the Gulf will determine the situation outside the Gulf. It is only by determining the nature of the Gulf - its history, its geographical configuration and the legal consequences that can be derived therefrom - that a decision can be reached on the status of the waters outside the Gulf. This is a preliminary step to any decision on delimitation. How, then, can Nicaragua avoid drawing the natural consequences of what it considers to be the legal status of the Gulf and hence of any rights that that status might or might not generate to itself as a riparian outside the Gulf?

Honduras and the Chamber itself are also of the opinion that the status of the waters outside the Gulf depends on the status of the waters within the Gulf.

Paragraph 82 of the Judgment recognizes that:

> "In the present case, the legal régime within the Gulf - whatever it may be found by the Chamber to be - will no doubt also be relevant to any decision delimiting the waters outside the Gulf ..."

Yet the Judgment has segregated legal issues which are essentially interacting in terms of the written pleadings and which will remain subject to argument until the close of these proceedings.

Although the Observations of Honduras on the Written Statement of Nicaragua - pages 1 and 2 - note "with regret" that Nicaragua - from their point of view - did not keep within the limits of intervention authorized by the Judgment, it is clear from reading the Honduran position that in spite of the "regret" with which it receives the Written Statement of Nicaragua the fact is that they

themselves could not avoid drawing, outside the Gulf, the consequences of their theories inside the Gulf. This question is illustrated by the final paragraphs of Honduras' Observations upon Nicaragua's Written Statement.

> "In the present case, the existence within the Gulf of the Honduran coast, its length and its configuration are precisely the relevant circumstances that require to be taken into account in the law of delimitation. They must equally be taken into account if the concept of community of interests is applied. For if El Salvador and Honduras have equal rights, it is not possible to give effect to El Salvador's coast, but ignore that of Honduras. Similarly, as regards the closing line across the mouth of the Gulf, whether one applies 'equitable principles' or equality of rights, it is inconceivable that Honduras should be denied any part of that closing line.
>
> As regards the maritime areas outside the Gulf, similar considerations apply. Equitable principles require that Honduras, as a coastal State, has an entitlement to those maritime zones which attach to its coast. The idea of a community of interests produces an identical result, for there would be no equality of rights if El Salvador had such an entitlement whilst Honduras had none." (Pp. 19-20.)

Professor Pierre-Marie Dupuy has explained to the Chamber what he has called the juridical, material and procedural necessity for a delimitation. We are not allowed to discuss matters of delimitation but it must be pointed out that two of the three reasons he gives - the juridical and material necessity - are based directly and indirectly on the thesis of community of interests and the régimes of the waters of the Gulf.

For its part, the position adopted by El Salvador has placed further constraints on Nicaragua's intervention. It is true that Nicaragua did not go into the details of the proposed delimitation by Honduras as is noted in paragraphs 83 and 84 of the Judgment. But it must be recalled that El Salvador has not proposed any delimitation line and - even though it is a Party and has presented thousands of pages of documents before this Chamber - we have not seen any indication by El Salvador of how any proposed Honduran delimitation would be received by El Salvador. If we read those thousands of pages we will only find a general statement that Honduras has no rights outside the Gulf - only Nicaragua and El Salvador do. This general statement of El Salvador is in accord with the position of Nicaragua and we thought that it was sufficiently clear. The Chamber evidently considered that Nicaragua should have gone beyond what El Salvador has done which is simply to deny that Honduras has any rights at the closing of the mouth of the Gulf. But, if in the course of these hearings El Salvador, which has not proposed any delimitation line or made any

specific claims outside the Gulf, should change its legal course and do so, then Nicaragua considers that it should be granted the right to state its position and comment on these points. This is of greater importance if it is kept in mind that, from Nicaragua's point of view, the only positions pertinent to matters outside the Gulf are the positions of El Salvador and of Nicaragua; that is, the positions of the only riparians at the mouth of the Gulf in the Pacific Ocean. In this respect, it is well to remember that El Salvador has invariably maintained:

> "even if El Salvador were to agree with Honduras that the respective claims of the two Parties in the Pacific should be delimited by the Court, the Court would not be able to proceed to such a delimitation without the participation of Nicaragua" (CMES, p. 256).

On the other hand, this was also the position of Honduras as late as 1978. In the Annexes of the Honduran Memorial (Annex IV.1.44), we have a document that presents the views of Honduras on the boundary questions with El Salvador and points out the need for the intervention of Nicaragua in the maritime aspects of such discussions. We will come back later to this document and the political context of the Honduran claims.

We next refer to

The Effects of the Special Agreement on the Intervening State

This reference will be made within the limits imposed by the Judgment which explicitly barred Nicaragua from addressing argument to the Chamber on the interpretation of the Special Agreement (para. 103).

Professor Paul De Visscher recalls how El Salvador substituted its declaration of acceptance of the compulsory jurisdiction of the Court with a new declaration that excluded from the jurisdiction of the Court territorial or maritime matters. And, consequently

> "il devenait impossible pour le Honduras de saisir la Cour du problème des limites par voie de requête unilatérale" (CR 91/1, p. 42).

It should be recalled that Honduras did exactly the same thing. In 1986 it substituted its declaration of acceptance of the optional clause with a new one containing similar reservations to those made by El Salvador in 1973. This means, as Professor Paul De Visscher points out, that

these two Agreements - the Peace Treaty and the Compromis - "constituent maintenant la source de ... compétence" of the Chamber for the Parties, but it also means that these documents also constitute the link of Nicaragua with the Parties and, hence, they are of the utmost importance also for Nicaragua.

Professor de Visscher considers that since the Special Agreement is the only possible jurisdictional link of the Parties to the Chamber and the Court, then all the more reason that it be given the most comprehensive interpretation. He recalls:

> "Le principe de l'interprétation des compromis en fonction de l'effect utile a été nettement adopté par la Cour permanente dès 1929 ..." (CR 91/6, p. 44.)

An further on, he adds, that the clear intention of the Treaty was to settle ... "mettre fin définitivament, complétement, a tous les différends terrestres, insulaires et maritimes ..." (p. 62).

From Nicaragua's point of view, the agreements of Honduras and El Salvador that have brought them before this Chamber, in so far as they determine the limits of its jurisdiction and competence, must be restrictively interpreted so as not to permit them to be used in a way that could affect Nicaragua's legal interests. It is one thing for a treaty to affect the Parties to the fullest extent the circumstances of a case may demand, but quite another to affect a third party by means of an extensive interpretation. The principle that a treat is res inter alios acta with respect to non-parties would not be absolute if treaties could be interpreted by courts without considering the rights of third parties.

Now I pass to what we understand to be

The Real Maritime Issue Before the Chamber

Professor Pierre-Marie Dupuy told us that for Honduras "l'objet fondamental de la présente affaire" is "la délimitation des espaces maritimes" (CR 91/39, p. 10). Professor De Visscher, for his part, has stated that if the Chamber limits its Judgment to making a determination of the status of the waters and decides to send the Parties back to the negotiating table to settle the rest of the issues, no purpose would be served because it would leave El Salvador "en position de *beatus possidens"* (CR 91/6, p. 20). This is in many senses true. The *beatus possidens* are El Salvador and Nicaragua

precisely because they are the coastal States abutting upon the mouth and lengthy entrance channel of the Gulf of Fonseca. This situation of adjacent sovereignties of the two riparians of the mouth of the Gulf - obvious to the whole world - is precisely what Honduras wants to destroy in the absence of Nicaragua.

From another point of view, these statements have the purpose of playing down the real goal of Honduras. Honduras makes as if to belittle this result calling it "une telle demi-mesure" that would only give Honduras "une simple fiche de consolation" (CR 91/6, p. 16). But this "demi-mesure" is precisely what Honduras wants because it would break the possession, the sovereign rights of the *beatus possidens* of the mouth of the Gulf and of its long channel of entry.

Professor Weil, counsel for El Salvador, explains the importance of any determination made by the Chamber.

> "L'intérêt présenté par la décision que la Chambre prendra sur ce problème sera d'autant plus grand que c'est précisément ce double problème de régime juridique et de titre, et non pas la tracé d'une ligne de délimitation, qui divise au premier chef les deux pays."

But, notwithstanding this appreciation by Salvadorian counsel of the real maritime issue before the Chamber, El Salvador's position is that the Chamber can determine the status of the waters, or clearer yet, what status the waters of the Gulf give to the riparians, without Nicaragua being a Party. This concedes rights to Honduras and El Salvador to the prejudice of Nicaragua. Quite the contrary of what Professor De Vissher says that it would be a poor consolation prize for the Chamber to create rights for Honduras outside the Gulf but not to delimit them, it is quite clear that this would be the most important thing that Honduras could get out of the maritime aspects of this case.

Professor Weil has called the issue of the Honduran maritime projection outside the closing line of the Gulf, "la pomme de discorde essentielle entre les deux pays". I would recall, though, that the apple was disputed among three contenders and not between two; so should it be in the Gulf. The fate of Troy would have been worse if one of the contenders for the apple had not even been

allowed to participate in the contest.

Now I will refer to what we term

The "Inherent Right" of Honduras to a portion of the Closing Line

1. In the first place, Honduras claims rights to maritime spaces based "sur le principe du droit des Etats riverains de la mer à jouir *de plano* de toutes les prérogatives naturelles des espaces maritimes." (CR 91/6, p. 15.) Professor De Visscher goes on to say:

> "En définitive le Honduras soutient qu'il possède hic et nunc par l'effet du droit international général, codifié en 1982, un titre sur les espaces maritimes, et que ce titre ne peut pas être mis en doute par la Partie adverse." (Cr 91/6, p. 17.)

It is not my intention to address this argument au fond, since prudence counsels me that only Professor Brownlie should lock horns with so formidable a counterpart in all matters related with the Law of the Sea. What I think I can remark on, from a more general point of view, is that this argument really appears to beg the question.

The whole question is precisely whether Honduras is to be considered a riparian at the mouth of the Gulf. Certainly, if it was a straightforward matter that Honduras is a riparian in that sense - which both Nicaragua and El Salvador do not accept - then yes, Honduras could enjoy *de plano* what Nicaragua and El Salvador enjoy outside the Gulf. Therefore, this argument is one way of focusing the question: according to international law, do the characteristics of the Gulf of Fonseca give rights to Honduras at the mouth of the Gulf? This is precisely what this intervention is really about. This is precisely "la pomme de discorde".

2. His Excellency, the Agent of Honduras has advanced some thoughts along the lines that if the Chamber decides that Honduras "does not have the right to go up to the closing line of the Gulf" then it would be "place in a position equivalent to a 'land locked' State" (CR 91/1, p. 35). These thoughts are also expressed by Professor De Visscher in recalling that during the conferences that led up to the adoption of the Law of the Sea "le Honduras y a siégé parmi les Etats côtiers et non pas parmi les Etats enclavés ou géographiquement défavorisés" (CR 91/1, p. 56).

The thrust of this argument is that the law has to be interpreted in some way that would not cause what is being portrayed as an inherent unfairness to Honduras: not to have the right to exploit

the natural resources of maritime spaces as if Honduras were a riparian at the mouth of the Gulf. But, in reality, the only situation that could be portrayed as unfair would be if Nicaragua questioned Honduras's right of passage in and out of the Gulf. It is needless to recall that this is not the case. Honduras has rights of passage in and out of the Gulf based on local custom.

On the other hand, to use a phrase from the Fisheries case, there are no "ancient and peaceful usages" (*I.C.J. Reports 1951*, p. 116, para. 142) to attest to rights of the Honduran population to obtain their vital needs outside the Gulf.

3. Honduras has presented a special version of this claim of an "inherent right" to a portion of the closing line of the Gulf under the peculiar heading of *community of interests*. Although this topic is not one that involves technical concepts of the Law of the Sea, I have asked Professor Brownlie to address it, because it is the only basis that Honduras claims for entitlement at the closing line of the Gulf. Furthermore, since in the few years I have studied public international law, I have never come across the notion of a "community of interests" (with quotation marks) that, *per se*, generated territorial rights, I find it very difficult to say anything about it. The idea of a community of interests (without quotation marks) is a general expression that might be used to describe such diverse ideas as, for example, the international community's interest in the environment or the community of interest of the Members of the Chamber in the pursuit of justice. But, to jump from generalities that might have a place in the concepts of "good neighbourliness" to that of "community of interests" (with quotation marks) that, in a sort of collectivist development of international law, would apportion territory among neighbours, is something beyond my ken.

The Observations of Honduras to the Written Statement of Nicaragua (p. 12) refers to a statement made by the Permanent Representative of Nicaragua to the United Nations, Ambassador Mayorga. The French-speaking counsel for Honduras have quoted from the provisional text of the French translation of his statement.

Professor De Visscher makes use of this statement in at least two occasions. One of these references is the following"

> "Le 11 décembre dernier le représentant du Nicaragua auprès des Nations Unies, M. Mayorga Cortes, reprenant les termes utilisés par le Honduras, a déclaré que les eaux du golfe faisaient l'objet d'une 'communauté d'intérêts' entre les trois riverains."

(C 4/CR 91/1, p. 57.)

Professor Pierre-Marie Dupuy made an extensive reference to this in his pleadings.

The hammering at this subject forces me to take the precious time of the Chamber off the subject of international law and into the realm of semantics.

1. The official text of the statement of Ambassador Mayorga is in Spanish. This Spanish text does not use the expression "comunidad de intereses" which is easily understandable - without need of great imagination - in English or French. The French translation, on the other hand, is the one that uses the expression "communauté d'intérêts" but, since Honduras is also a Spanish-speaking country and since the "discovery" of this text is undoubtedly due to its representatives in the Honduran Mission to the United Nations who undoubtedly heard it in Spanish, the real surprise is that Honduras did not use more prudence in advising its francophone counsel on what the text said in Spanish.

2. The French text of Ambassador Mayorga's statement, as quoted by Professor Dupuy (C 4/CR 91/38, p. 68) says:

> "A notre avis, les trois Etats riverains partagent une communauté d'intérêts dans le rétablissement de l'équilibre de la nature et la planification d'un développement continue des ressources du golfe."

This is quite true. We have common interests as riparians in the Gulf. We also have common interests in the contamination of the waters of the Pacific; we have common interests in the future of Central America; we have a common interest in many things.

The simple explanation is that Honduras is playing with words. It is trying to create new institutions of international law by putting quotation marks around ordinary expressions. The whole idea of a "community of interests" (with quotation marks) involves a fishing expedition in the waters of the Gulf.

What this whimsy emphasizes is the absolute vagueness of this concept of community of interests. Perhaps the only thing that might come of this absurd incident is that United Nations translators will, in the future, transfer the innocuous expression "community of interests" to the

section where they file politically-sensitive words.

Locality and geographical circumstances of the Gulf

In the rest of my pleadings, I will have occasion to point to the map of the Gulf of Fonseca behind me. So, at this point it would be convenient to say something about the locality and the geographical circumstances of this Gulf.

In 1917 the Central American Court of Justice adopted the description of the locality and geographical conditions of the Gulf, according to a report of the surveyors Barberena and Alcaine. It is a simple and useful contemporaneous description which I will read in order to evoke an image of what was then, and is again now, under discussion. The Central American Court quotes the description as follows:

> "Paralleling the coast, we have traced on the Salvadorian and Nicaraguan parts that form the gullets or entrance to the Gulf, the two lines (distant 12 miles from the coast) that mark the respective limits of the zone of maritime inspection according to the generally accepted prescriptions in that connection, and it is thus clearly to be seen that those lines intercept or overlap, thus closing the Gulf, which is thereby reduced to an interior bay of purely Central American jurisdiction."

The description continues:

> "We have arrived at the same conclusion by merely considering that the entrance of the Gulf is 35 kilometres, approximately, from Amapala Point, in El Salvador, to Cosiguina Point, in Nicaragua; and that, by measuring 4 marine leagues, or 22,220 metres, from each of those points, the lines traced necessarily meet and dovetail; otherwise the entrance would have to be at least 44,440 metres, or nearly 10 kilometres wider than it is.
>
> If the shortest distance between Meanguerita island - an integral part of the Salvadorian coast - and the Peninsula of Cosiguina be taken as the points of entrance to the Gulf, the width would be 15 kilometres, which is barely equal to 8 miles, and, if the islets known as Farallones be taken as the limit of the Nicaraguan coast on that side, the entrance would be reduced to 7 kilometres, 950 metres, or some 4 miles and a little more than a quarter." (*AJIL* 1917, p. 702.)

This is the Gulf we are talking about, as seen by the surveyors in 1917 and as seen by the Central American Court in 1917.

With this description of the Gulf clearly in the mind, let us look at the claims the Parties are making.

The first subject I will approach is the evolution of the Honduran claims in the Gulf.

The Honduran claims in the Gulf of Fonseca are of recent origin

The recent manufacture of the Honduran claims can be appreciated from a perusal of the documentation it has introduced in the course of the extensive written pleadings and from what has been stated by its representatives in these oral hearings.

1. The nature and extent of Honduran claims in the Gulf of Fonseca at the beginning of this century

First of all the *claims against Nicaragua*

The important element in this context to be considered is the work of the Mixed Boundary Commission that was constituted on the basis of the Gámez-Bonilla Treaty concluded in 1894 by Nicaragua and Honduras. The maritime part of the boundary between Nicaragua and Honduras was recorded in Acta II, agreed on June 1900. The pertinent text of this agreement was translated in paragraph 26 of the Judgment of 13 September 1990 and, after describing the direction, it arrives:

> "To arrive at the centre of the distance between the northern part of Punta Cosiguina and the southern part of Isla El Tigre. The border at that point was fixed at the mid-point between Punta Cosiguina, the northern part of Punta Cosiguina known as Money-Peny, also Punta San José, and the southernmost part of Isla El Tigre."

For its part, Article 9 of the Constitution of the Republic of Honduras of 11 January 1982 defines the territory of Honduras stating that:

> "Its boundaries are: ... 2. With the Republic of Nicaragua, those established by the Mixed Honduran-Nicaraguan Boundary Commission in 1900 and 1901, according to the description of the first section of the dividing line, contained in the second act of June 12, 1900, and in later acts, to Portillo de Teotecacinte and from that place to the Atlantic Ocean in accordance with the Arbitral Award handed down by His Majesty the King of Spain, Alfonso XIII, on December 23, 1906, and declared valid by the International Court of Justice on November 18, 1960." (Annex II.1.18 of the Memorial.)

In connection with this boundary line with Nicaragua, Honduras has made some asseverations in these proceedings, to which I will return later. At this point we are only looking at the Honduran claims at the turn of the century. This was the situation with Nicaragua in 1900.

Claims against El Salvador

The claims against El Salvador are very interesting. Annex III of the Honduran Memorial

contains a few transcriptions of reports of surveyors describing the proposed boundaries with El Salvador. There are several of them, but they all coincide on one thing: the starting point of the Honduran waters inside the Gulf. Let us review two examples:

Annex III.2.10.A, a report of the engineer Vicente Aracil y Crespo to the President of the Republic of Honduras, on the International Boundary Agreement between that Republic and the Republic of El Salvador, in Tegucigalpa, 21 December 1888.

"it was decided that we should begin our operations in the following manner:

> Leaving the Gulf of Fonseca at 13° 12' N latitude and 87° 36' W longitude ... we arrived at the centre of the mouth of the River Goascorán".

You will note carefully, after reading this, that at this point it is very difficult to show the exact place on the map, but you will see that the start of this line is precisely at a point very near the line that was established with Nicaragua in 1900. It starts around here.

Annex III.2.16. There is also another report, of the two I am quoting, the descriptive report of the dividing line between the Republics of Honduras and El Salvador, from the Gulf of Fonseca as far as the Montaña del Brujo, by a surveyor, A.W. Cole, in 1890. He also starts at exactly the same place:

"at latitude 13° 12' N and longitude 87° 36' 0" (of the Greenwich mean) continuing ... as far as the centre of the mouth of the River Goascorán."

All the descriptions given by Honduras in the Annexes presented to its Memorial of their situation, their boundary situation, maritime situation, start at some point very near what eventually became the end-line with Nicaragua. Around this point.

The understanding, at the turn of the century, was that the boundary of Honduras with El Salvador in the Gulf of Fonseca reached to somewhere near the end-point of the line drawn with Nicaragua in 1900.

This understanding is confirmed in a Note sent by Nicaragua in 1917 to its Central American neighbours. The Note (Annex 5 of the Nicaraguan Written Statement) describes the Honduras/El Salvador question in the following terms:

"the project of a boundary line between these countries (i.e. El Salvador/Honduras) is

> set forth in Article 2 of the Boundary Treaties of April 10, 1984, which reads: 'the maritime line between El Salvador and Honduras starts at the Pacific, dividing by half, in the Gulf of Fonseca, the distance existing between the islands of Meanguera, Conchaguita, Martin Perez and Punta Zacate, of El Salvador, and the islands of El Tigre, Zacate Grande, Inglesa and Exposición, of Honduras, and it ends at the mouth of the Goascorán.'" [In other words, it is pointing to a region somewhere around here.] "There is no doubt" - continues the Note of Nicaragua in 1917 - "that this line, which was not approved by the Congress of Honduras, will be the one which sooner or later, with a change of details, will have to constitute in the Gulf the territorial line between El Salvador and Honduras."

This quotation, as I have said, is from a Circular Note sent by Nicaragua to its Central American neighbours protesting, in 1917, the decision of the Central American Court. This understanding of Nicaragua was not contradicted by the recipients of the Note, including Honduras.

(b) The nature and extent of Honduran claims in the period leading up to the war in 1969 and the negotiations that ensued

Now, we jump several decades to see what the situation of the Honduran claims was in the period leading up to the war in 1969 and the negotiations that ensued.

A perusal of the Annexes to the Honduran Memorial reveals information that illuminates the situation before the armed conflict with El Salvador in 1969 and afterwards. The negotiations that took place during that period shed important light on what the Parties understood to be their respective rights at that time. This information demonstrates that the Gulf was not the origin or even part of the territorial conflict with El Salvador and that the claims of Honduran rights at the closure of the Gulf are of very recent origin. They are not from the 1940s or 1950s, when the Latin American nations started claiming larger territorial seas, exclusive economic zones and continental (or epi-continental) shelves, nor yet from the 1960s when this topic continued to be heatedly debated by the nations of the world, but only in the 1970s, and then only as a negotiating leverage with El Salvador, since no official claim based on legal right was made orbi et mundi at the time.

Annex III.2.54 of the Honduran Memorial: "Joint plan for the withdrawal of the regular troops and security forces of the Republics of El Salvador and Honduras, 14 June 1967", which was presented by Honduras.

If we read that document, no mention is made there of conflicts or security forces inside or,

much less, outside the Gulf.

In Annex III.2.56 of the same Memorial: "Report on the Reconnaisance Carried out along the El Salvador/Honduras Frontier by the Joint Military Commission of the Two Countries" (19 July 1967).

Again there is no report of reconnaissance in the Gulf of Fonseca or the waters outside the Gulf.

In Annex III.2.58.B: "Draft of Bases and Procedures for the Negotiation and Signing of a Treaty for the Purpose of Settling Boundary Questions Between Honduras and El Salvador, submitted by the Government of Honduras". Tegucigalpa, 29 November 1967.

The first paragraph of this Draft prepared by Honduras states:

> "1. The Governments of Honduras and El Salvador have decided to settle amicably all the boundary questions pending between the two States with a view to establishing their boundary line in a definitive manner."

I invite the Chamber to peruse this draft in search of any mention of maritime delimitation or special interests in the Gulf of Fonseca. I have found absolutely none.

Annex IV.1.4.B of the Honduran Memorial: "Note dated 12 July 1969 from the Minister for Foreign Relations of Honduras to the Minister for Foreign Relations of Guatemala, Nicaragua and Costa Rica ..."

This Note of the Honduran Government draws the attention of the Commission of Mediation to the boundary problem with El Salvador.

The Note was accompanied by a point by point Reply of Honduras "to the list of proposals submitted by their Excellencies the Mediating Ministers" which can be seen in Annex IV.1.4.C of the Memorial. This Note sent to its Central American colleagues, contained an additional proposal by Honduras to settle the frontier problem and referred to its Draft Bases of a Treaty which it had proposed to El Salvador on 29 November 1967 which we have mentioned above. We may recall that this Draft had no mention of the Gulf of Fonseca, either the waters inside or outside the closing line of the Gulf. *Therefore, up to July 1969 Honduras had no boundary claims relating to or emanating from the Gulf of Fonseca*.

In Annex IV.1.20.B of the Honduran Memorial we see an extract of a meeting in which Honduras, on 18 May 1971, requested that El Salvador should answer the Draft proposal made by Honduras in November 1967 which we have mentioned above. We must recall again that this 1967 proposal makes no mention of the Gulf of Fonseca. This Statement was accompanied by a submission of a Draft Guideline on bases and procedures of the Government of Honduras aiming at establishing definitely the frontier line between Honduras and El Salvador. This Draft corresponds to Annex IV.1.20.C and does not have any mention of the Gulf of Fonseca.

During the following years several meetings were held by the Parties in conflict under the Aegis of the Mediator of the Bilateral Working Group. It is during one of these meetings on 29 November 1973 that the Honduran delegation in the negotiations that had taken place in Mexico City proposed a frontier line between both Republics (Ann. IV.1.25.B). The maritime frontier would have ended, as between Honduras and El Salvador, on the closing line of the Gulf at

> "longitude 87° 50'00" W and latitude 13° 4'00" N, corresponding to a third of the distance between Punta de Amapala in El Salvador and Punta de Cosiguina in Nicaragua, starting from Punta de Amapala".

This is the first attempt to bring into issue in the negotiations a Honduran presence at the closing line of the mouth of the Gulf. Furthermore, and this point is very important, it was made in the bilateral context of ongoing negotiations of peace and should be judged in that light.

In passing, we might point out that the claims of Honduras, based on these negotiations and not on legal rights, have grown even larger at present. In 1973 they wanted a third of the mouth of the Gulf, now they want more than half.

In Annex IV.1.35 of the Memorial of Honduras we find the: "Draft Treaty of Fraternity and Concord submitted by the Salvadorian delegation to the Honduran delegation on 13 and 14 May 1976.

Article 4 of this Draft affirms:

> "Boundary Questions
>
> The Contracting Parties undertake to sign a protocol laying down a method of arriving at a definitive settlement regarding the complete delimitation of the frontier between the two countries and its subsequent demarcation, as well as the status of the Gulf of Fonseca, regard being had also to the special border régime and co-operation in

the border zone."

It is the first time we see in the documents presented by the interested Party, Honduras, that the other Party, El Salvador, mentions the Gulf - May 1976.

In Annex IV.1.44 we find a document presented by Honduras in the context of the Mediation procedure. Its title: "Statement of the views of Honduras on 'Boundary Questions'" and it is from 1978. I will quote this document because it is very interesting in identifying what the position of the Parties was in 1978:

> "II. Extent of the differences, traditionally accepted frontier line and areas in dispute between the two States
>
> 46. Resolution IV, among those approved by the Meeting of Consultation on 27 October 1969, refers generically to 'boundary questions'. It consequently covers the various boundaries in the land areas between the mouth of the River Goascorán and the Cerro Montecristo, and also the maritime areas and the islands situated in the Gulf of Fonseca.
>
> In the course of the negotiations between the two Republics from 1861 to the present day, the attention of the two countries has been concentrated almost exclusively on the land boundaries. Nevertheless, there are disagreements between the two Republics deriving primarily from the claims put forward by El Salvador in 1972 with regard to the mouth of the River Goascorán; should they constitute the boundary of that area, the delimitation of the waters in the Gulf of Fonseca would thereby be affected. Secondly, as the two Republics disagree about sovereignty with respect to certain islands situated in the aforementioned Gulf of Fonseca, there would also be repercussions on the delimitation of the maritime area over which either country can claim sovereignty. Lastly, the two countries differ in their views with regard to the waters of the Gulf of Fonseca, where the Republic of Nicaragua is also a riparian State.
>
> An overall settlement of the boundary questions outstanding must consequently include both the questions relating to the land boundaries and those concerning the maritime boundaries. At the present stage of the mediation, however, the questions relating to the land boundaries will be considered, since this part of the problem forms a unit. It must, moreover, be added that any settlement with regard to maritime boundaries on which the two Republics might reach an agreement must necessarily be affected to some extent by what has just been said, since a third State also borders on the Gulf of Fonseca.
>
> In the opinion of the Government of Honduras, a final solution in this area, by means of an international treaty, necessarily involves two distinct stages, the first being concerned with the settlement of the differences existing between the Republics of Honduras and El Salvador, and the second with arranging for the best possible use of the waters and their resources by all the riparian States, which would necessitate the subsequent intervention of the Republic of Nicaragua."

The statement just quoted was submitted by Honduras in 1978, when it had brought into the

negotiation table the subject of the Gulf of Fonseca. It is interesting to note its coincidence with the views held by Nicaragua and which have been presented in the course of this case.

First of all, the only reference to maritime affairs is "with regard to the waters of the Gulf of Fonseca, where - as Honduras rightfully recognizes - the Republic of Nicaragua is also a riparian". There is absolutely no reference to any other outstanding maritime situation between the two nations. It would be quite surprising if Honduras - as late as 1978 - had believed the situation in the Gulf gave it rights outside the Gulf, to have omitted any reference to this important consideration.

The second aspect that this statement refers to, is the two stages it envisages as the only logical way of going about any settlement of disputes in the area: the second stage, which would involve the waters of the Gulf, Honduras affirms, could not be discussed in the absence of Nicaragua. Perhaps the difference was that in 1978 Nicaragua was not in the same international situation as in 1986 when the compromis was signed: in troubled waters abound fishermen (en aguas revueltas ganancia de pescadores).

The proceedings in The Central American Court of Justice provide a special insight into what was deemed to be the Status of the Gulf of Fonseca in 1917.

As you will see I have passed from the claims of Honduras 100 years ago to the claims of Honduras 12 years ago and now in a different mode I am going to analyse what the Central American Court of Justice believed to be the situation in 1917 and also what the Parties believed to be the situation in that important period.

One initial caveat in dealing with this subject is that in any interpretation of the Judgment of the Central American Court of 1917, careful notice should be taken that in the operative part it states that the Treaty in question before the Court "menaces the national security of El Salvador and violates her rights of co-ownership in the said Gulf, *in the manner and within the limitations, set forth in the Act Recording the Vote of the Court and in Chapter II of the Second Part of this Opinion*" (*AJIL* 1917, p. 730).

Hence, the rights of so called "co-ownership" have to be interpreted in the light of the decision as a whole and, we can certainly add, in the light of the legal concepts based on civil law that were

used by the judges.

Another caveat - I am going back to this decision - was pointed out by His Excellency Dr. José Manuel Pacas Castro, Minister for Foreign Relations of El Salvador. He indicated that:

> "At the outset it must be recognized that even in its original Spanish text, the language and effect of the Judgment are sometimes obscure." (CR 91/39, p. 50.)

In effect, the Judgment suffered from the birth defects of the Central American Court itself. Judge Hudson's appreciation of the Court was that it was doomed to failure from the outset:

> "the justices were given no independent position and ... Contemporary opinion in Central America seems to have regarded the Court not simply as a judicial institution, but also as a political agency ..." (M. Hudson, *The Permanent Court of International Justice*, N.Y., 1943, pp. 69-70.)

The position of Nicaragua was then and is now, that the Judgment of the Court was erroneous. For this reason, the Judgment was never implemented. Apart from the Government of El Salvador, Nicaragua never received any correspondence from the other States party to the Statute of the Court that in any way indicated that the decision was considered to be valid and enforceable and, hence, that Nicaragua should comply with it.

Since I want to make certain relation not only of the validity of the decision itself, but the value it has in presenting the opinion of the Court as to the status of the Gulf in 1917 and, as a matter of fact, the position of the Parties in this period. So in going into this, the first point I will go into is, *how the Central American Court, Nicaragua, El Salvador and Honduras saw the Gulf of Fonseca in 1917*

The Juridical Status of the Gulf

Historic Bay

The Central American Court of Justice coincided with the Parties in calling the Gulf of Fonseca an historic bay. We read in the questionnaire posed to the Court by its President:

> Ninth Question. - Taking into consideration the geographic and historic conditions, as well as the situation, extent and configuration of the Gulf of Fonseca, what is the international legal status of that Gulf?
>
> The judges answered unanimously that it is an historic bay possessed of the characteristics of a closed sea.
>
> Tenth Question. - As to which of those characteristics are the high Parties litigant

in accord?

> The judges answered unanimously that the Parties are agreed that the Gulf is a closed sea." (*AJIL* 1917, p. 693.)

But what was meant by this?

The Judgment of the Court in the *Fisheries* case defined "historic waters" in the following terms:

> "By 'historic waters' are 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." *I.C.J. Reports 1951*, p. 130.)

In declaring that the Gulf of Fonseca was an historic bay, did the Central American Court understand the concept in the way it was defined in this passage?

The question is important, not for any declaratory effect of the Judgment which Nicaragua denies, but because it illustrates at a relevant moment what was understood to be the regime of the Gulf. In the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* the Court said that:

> "Historic titles must enjoy respect and be preserved as they have been by long usage ...
>
> It seems clear that the matter continues to be governed by general international law which does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'." *I.C.J. Reports 1982*, pp. 73-74, para. 100.)

What then is the particular régime of the historic Bay of Fonseca? The answer to the question can be found in the Judgment of that Court.

1. The Court stated that in the Gulf "the merchant vessels of all nations possess(ing), as they do, the right of uso inocente over those waters" (*AJIL* 1917, p. 715). So it is characteristic.

2. The Court considered that the Gulf "combines all the characteristics or conditions ... essential to territorial waters ..." (*AJIL* 1917, p. 705). Second condition.

3. The riparian States are declared to have individual sovereignty over the three marine miles of territorial waters commonly accepted in that period. The Court said:

"the three marine miles that form the littoral on the coasts of the mainland and islands

> which belong to the States separately and over which they exercise ownership and possession both exclusive and absolute" (*ibid*).

4. The fourth characteristic as seen by the Court is that part of the waters of the Gulf are considered to be common to the riparian States but this community does not extend to that part that was delimited between Nicaragua and Honduras in 1900 which is accepted as valid by the Court in the following terms:

> "although there was a division made with Honduras in 1900 ... the line drawn ... only extends as far as a point midway between Tigre Island and Cosiguina Point ... Consequently, it must be concluded that with the exception of that part, the rest of the waters of the Gulf have remained undivided in a state of community between El Salvador and Nicaragua." (AJIL 1917, p. 711).

Finally, the Court considered that the exercise of jurisdiction in undivided areas tied to the vital interests of the riparians imposed a condominium:

> "It is therefore evident that the exercise of jurisdiction in the unpartitioned waters is based on the legal nature of the Gulf, which makes them common, and in the all-important necessity to protect and defend the vital interests of commerce and industry, these being indispensable to national development and prosperity." (*AJIL* 1917, p. 711.).

What principles governed this condominium

The Court recognized the rarity of the concept of community in the relations among States, but considered that "the universal principles that govern community in things are perfectly applicable to the Gulf of Fonseca".

The Court considered that these same principles were found in municipal law:

> "Also from the point of view of various civil laws, among them those of Central America, and especially those of Nicaragua, in the light whereof the question of community in the Gulf may be contemplated." (*AJIL* 1917, p. 713.)

The Court finally concluded its consideration of this question with an analysis of the Nicaraguan Civil Code on the question of co-ownership. This application of civil law concepts to the Gulf of Fonseca gives a clear picture of what the Court had in mind when it considered the existence of a condominium.

The Court quoted several Articles of the Nicaraguan Civil Code which was promulgated in

1904 and which is still in force. I will add another to those Articles quoted by the Court:

> "Article 1703. No one can be forced to remain in community and each co-parcener may request the end of the community."

This Article was based on a similar disposition of the contemporaneous Civil Code of Italy (Article 681) and represents a general quality of the institution of community in civil law terms, its transience. The second section of this same Article - also taken from the Italian Civil Code - limits the possibility of extending the life of a community by agreement to five years only. There were public policy considerations behind these limitations upon hindrances to the disposal of property that were familiar to the Members of the Central American Court such as the prohibition of *morte maines*. It seems evident that the Court was thinking in civil law terms. If this be so, they had no intention of creating a permanent institution for the Gulf. It had in mind a temporary solution to the security interests it saw endangered by the Chamorro-Bryan Pact.

It could be questioned that in the case of sovereign nations, once a condominium was declared, it could not be dissolved at the request of one and not of all the condominia. But one consideration that must have been in the minds of the Members of the Court was that all the Central American countries had accepted the compulsory jurisdiction of the Court - in the special way the Court envisioned this compulsory jurisdiction - and hence could, as any private person in a civil law court, request the end of this community they had declared to exist. Therefore, a particular characteristic of this condominium was that any condominia could request it be ended by means of a delimitation.

What waters were considered to be under condominium?

The Court distinguished three kinds of waters: territorial waters of 1 league, zones of inspection up to 3 more leagues and non-littoral waters outside those limits. Let us read question 14 and its answer carefully:

> "Fourteenth Question. Does the right of co-ownership exist between the Republics of El Salvador and Nicaragua in the non-littoral waters of the Gulf, and in those waters also, that are intermingled because of the existence of the respective zones of inspection, in which those Republics exercise police power and the rights of national security and defence?
>
> Judges Medal, Oreamuno, Castro Ramirez and Bocanegra answered that such

> right of co-ownership does exist, without prejudice, however, to the rights that belong to Honduras in those non-littoral waters; Judge Gutiérrez Navas answered in the negative." (*AJIL* 1917, p. 694.)

The Members of the Court were careful to avoid prejudicing the rights of Honduras *only* in the non-littoral waters, that is, the waters that went beyond the extension of the zones of inspection and police where each Party - Nicaragua and El Salvador - held *imperium*. Why was this? Because Honduras could only have rights to a condominium outside the littoral or jurisdictional waters of the Gulf. And where is this only possible? Only inside the Gulf and not in the entrance channel where

> "the waters of the Gulf have remained undivided and in a state of community between El Salvador and Nicaragua, and that, by reason of the particular configuration of the Gulf, those waters though remaining face to face, were, as declared in the report of the engineers Barberena and Alcaine and as recognized by the High Party defendant, confounded by overlapping" (AJIL 1917, p. 711).

This was what Nicaragua understood the Judgment to mean. In Annex 5 of the Nicaraguan written statement is a Circular Note sent by Nicaragua to the other Central American Governments dated 24 November 1917. It is reproduced and translated into English in *Papers relating to the foreign relations of the United States* (Washington, 1926, pp. 1104-1111). In this Note, Nicaragua points out that if the condominium is only in the non-littoral waters then what the Court has declared to be subject to a condominium is only an insignificant portion of the Gulf. This is Nicaragua writing in 1917 - it is not our interpretation at this moment, it is the position of Nicaragua in 1917.

The observations of this Note of Nicaragua on this point are:

> "From this declaration of the honourable Tribunal, admitting for a moment the classification, it is deduced that the waters in which, in its judgment, the alleged joint dominion and community of possession exist, are situated beyond the 2 leagues of the inspection zone ...
>
> On the other hand, eliminating the territorial part of the Gulf which belongs to Nicaragua by virtue of the division made in 1900 with Honduras and taking into account the project of a boundary line contemplated for some time between El Salvador and Honduras. The reserve of waters to which the Court refers disappears."

Why did Nicaragua state that in those circumstances the reserve of waters would disappear? Did the delimitation of Honduras and El Salvador go up to the closing line of the Gulf? No. The letter continues, with a passage I have read in another context, saying:

> "As a matter of fact, the project of a boundary line between these countries is set forth in Article 2 of the Boundary Treaties of 10 April 1884, which reads: 'the maritime line between El Salvador and Honduras starts at the Pacific, dividing by half, in the Gulf of Fonseca, the distance existing between the islands of Meanguera, Conchaguita, Martin Perez and Punta Zacate, of El Salvador, and the islands of El Tigre, Zacate Grande, Inglesa and Exposición, of Honduras, and it ends at the mouth of the Goascorán'."

As we have pointed out, and I interrupt the quotation for a moment again, this description is starting around this section of the Gulf; in no case outside the Gulf. This was the starting line, very near the closing line between Nicaragua and Honduras, established in 1900, the line projected with El Salvador ended right around the same line. The Nicaraguan Note continues, saying:

> "There is no doubt that this line, which was not approved by the Congress of Honduras, will be the one which sooner or later, with a change of details, will have to constitute in the Gulf the territorial line between El Salvador and Honduras.
>
> "And when this is established, and taking into account the one already drawn in the same waters between Nicaragua and Honduras, where will the reserve of waters be situated which was mentioned in the award of the honourable Tribunal?"

In other words, what Nicaragua was asking, if the line between Nicaragua and Honduras has been fixed and a line is thrown to the Goascorán from the same point, what waters are there to be divided? What waters could be considered a condominium as between Honduras, El Salvador and Nicaragua? This is what Nicaragua was asking in 1917.

The Note does not say that Honduras does not have rights outside the Gulf. It simply takes it for granted that that was the case. It is clear that Nicaragua did not understand that the Judgment gave rights of condominium to Honduras in the entrance Channel to the Gulf because, if that had been the case, a considerable portion of the waters would have been in condominium. This Note represents a contemporaneous understanding of the Judgment and was not challenged by any of the recipients, including Honduras and El Salvador. It is evident that no-one thought that the condominium - to which Honduras could have been a party - extended to the entrance of the Gulf.

The Nicaraguan Treaty with the United States - known in Nicaragua as the Chamorro-Bryan Treaty - which gave rise to this Judgment, was a Treaty that was opposed by all of Nicaragua's neighbours. It gave rise to a case brought against Nicaragua by Costa Rica in the south and the case

brought by El Salvador in the north. Honduras was also against the Chamorro-Bryan Treaty and, as a co-riparian could have joined up with El Salvador in bringing the case against Nicaragua. Why did this not happen? Becuase Honduras knew it had no business in the entrance Channel and that inside the Gulf it already had a delimitation with Nicaragua. The Honduran interest only arose when El Salvador sought to obtain a material advantage inside the Gulf proper; that is, past the line of Points Monney Penny and El Chiquirin and into the Gulf. From Punta El Chiquirin to its frontier with Honduras at the Goascorán, the portion of El Salvador embracing the Gulf if extremely small compared to that of the other two riparians. In presenting a condominium inside of the Gulf, El Salvador was gaining parity of rights inside the Gulf proper to the detriment of its neighbours. That is why this point was hotly disputed by both Nicaragua and Honduras.

Let us consider the situation in terms of the practical interests of the Parties. If the position of El Salvador and the decision of the Court referred to a condominium that included Honduras in the entrance Channel, as well as in the Gulf proper, then it would have been absurd for Honduras to have protested a position so evidently in its interests and against the interests not only of Nicaragua but of El Salvador itself, both then and now.

It is also clear that the Court and the Parties agreed that in the entrance Channel the only overlapping of jurisdictions was between Nicaragua and El Salvador. The following question and its answer by the Court make this clear:

> "Twelfth Question. Are the high parties litigant in accord as to the fact that the waters embraced in the inspection zones that pertain to each, respectively, are intermingled at the entrance of the Gulf?
>
> The Judges answered unanimously that the high parties are agreed that the waters which form the entrance to the Gulf intermingle."

This intermingling was between El Salvador and Nicaragua, the two Parties to the case. The question was addressed as to the position of the two Parties in the case. Are they agreed that the waters intermingle and the Court answered yes.

A reading of the 24 Questions posed to the Members of the Central American Court by its President will show that in the only moment that the Members of the Court considered that the rights

of Honduras had to be respected, a special mention or reservation was made. The answer to question 11 - which I have read above - makes this clear. In the case of question 12, since it is a reference to the entrance only, no mention is made of Honduran rights.

This one point that has been made by the Parties refers to what I have titled the:

Limits of the competence and jurisdiction of the Central American Court

El Salvador has maintained the position that the powers of the Central American Court had a sort of supranational extension. In this respect, His Excellency the Foreign Minister of El Salvador quoted Article 25 of the Statute of the Court (CR 91/39, p. 48). Let us explore this argument further.

The Central American Court of Justice originated in a Conference held in Washington from November 14 to December 20, 1907. Representatives of the five Central American Nations were present and signed several instruments on the last day of the conference. Among these was a convention establishing the Central American Court of Justice (generally, see Hudson, M., *The Permanent Court of International Justice*, N.Y. 1943, pp. 42-70).

The convention establishing the Court (*AJIL* - Supp. 1908-, pp. 231-243) bound the five signatories to submit to it:

> "all controversies or questions which may arise among them, of whatsoever nature and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding" (Art. I).

Article XXII gave the Court power

> "to determine its own jurisdiction interpreting the Treaties and Conventions germane to the matter in dispute, and applying the principles of international law".

The Court understood these two Articles to have given it a cumpolsory jurisdiction over the five nations (*AJIL* 1917, pp. 697-700). Nicaragua denied this competence and addressed an explanatory Note concerning its position to the other Central American States. We have included this correspondence in Annex 5 and more documentation on this subject can be seen in AJIL (Supp. 1917) pages 5 and following.

The current position of Nicaragua on the status of the Judgment has been given in our Written

Statement, pages 49 and 50. The object here is to point out what the Central American Court of Justice interpreted as the limits to its judicial powers, based upon an interpretation and an application of a treaty signed by five nations, among them Honduras. The Court did not consider for one moment that because Honduras was not a party it would not be affected by the decision given. The only argument over the effects the decision could have on third parties was what the Court called

> "the fundamental argument: that the Court has no jurisdiction over the subject-matter of this suit because it involves interests of a third nation *that is not subject to the authority of the Court*" (*AJIL* 1917, p. 698).

The third nation in reference was the United States - the other party to the Chamorro-Bryan Treaty - and not Honduras.

The Court considered that the finding it was giving on the status of the Gulf was opposable *erga omnes* because it referred to property in Central America:

> "The absolute competency of the Court is guaranteed by the fact that the Bryan-Chamorro Treaty relates immediately to the legal order created in Central America, and contracts exclusively respecting property located in Central America over which it is natural that this international court of justice should be the only authority called upon to settle controversies between two or more States arising out of an action that may be called *real*."

The Central American Court, with its juridical roots in municipal law, saw the action in the same light as a dispute brought by a private person involving real estate before a municipal court. Whatever it decided on the ownership of the property was opposable to all. It was, as it said, an *"accion real"*. Honduras was bound by the "legal order" the Court was establishing in that part of Central America called the Gulf of Fonseca. Further to these thoughts, it could be mentioned as a footnote that the Convention that established the Court had no comparable limit to the effects of a decision as that of Article 59 of the Statute of the International Court of Justice.

Nicaragua's position is that this reasoning was incorrect and that the decision was not applicable to Honduras. In saying this, Nicaragua is exercising its privileges as a Party to the Convention that established the Central American Court of Justice and also as a Party to the case in question. Even if the Chamber were in agreement with this opinion, Nicaragua considers that the

Chamber can make no finding on the application of the decision of the Central American Court of Justice if the three parties affected by the decision of the Central American Court - and the Court clearly thought that its finding affected Honduras as a riparian - are not also parties before this Chamber.

The only way to find that the Judgment of the Central American Court doesn't affect Honduras is to determine that the Central American Court exceeded its jurisdiction - this determination not being based on general principles of law - but on an interpretation of the Convention establishing that Court. This finding cannot be made if Nicaragua is not a Party before the Chamber.

Now I will refer to a general topic which I have titled Third Party Interests

It is common for States to show a general interest in the outcome of a case involving a delimitation or one relating to the indication of the principles involved in a delimitation or, like the present case, one involving the status of an area. This interest has been more than a general one in the intervention cases that have involved Malta, Italy and now Nicaragua.

One principal interest in the decision is due to what has been called the "knock-on" effect of any such determination, indication or delimitation. This effect is "a tendency for a delimitation conducted between one pair to influence the placing of a line between another pair of States" (Evans, Malcolm D., *Relevant Circumstances and Maritime Delimitation*, Clarendon Press, Oxford, 1989, p. 236).

Dr. Evans points out

> "Just as the existence of boundaries can affect the placing of subsequent boundaries, so does placing a boundary in an area substantially undelimited have a potential to influence subsequent delimitations - despite the strictly *inter vivo* nature of the agreement."

For its part, the Chamber pointed out in Paragraph 77 of the Judgment:

> "It occurs frequently in practice that a delimitation between two States involves taking account of the coast of a third State; but the taking into account of all the coasts and coastal relationships within the Gulf as a geographical fact for the purpose of effecting an eventual delimitation as between two riparian States - El Salvador and Honduras in the instant case - in no way signifies that by such an operation itself the legal interest of a third riparian State of the Gulf, Nicaragua, may be affected."

It is understable that the possibility of the so called "knock-on" effect has not deterred the Court from acting in past cases. If the possibility of this effect inhibited the Court from acting, it would probably be impossible for it to do so in most cases. These are understandable reasons but they are based on practical considerations and not on *a priori* reasoning. These types of consideration, then, have to be analyzed in each particular case to see that the "practical" part of the consideration holds for the case at hand.

In the hearings on Nicaragua's application for permission to intervene, I stated that if the delimitation was between Costa Rica and Panama or between Guatemala and El Salvador, Nicaragua would have been interested but not to the point necessarily that its interests would be affected.

Now, what is the situation at the mouth of the Gulf of Fonseca. It is under 20 miles wide. The median point of this closing line is 9.5 miles distant from Nicaragua and from El Salvador. Even if Honduras were given entitlement by the Chamber only in what they call the western sector of the closing line of the Gulf, what would be the resulting situation? The so-called "western sector" at the closing line would be approximately 9.5 miles wide. If Honduras were allotted the total width it claims, at the mouth of the Gulf, this would come to 6.5 miles, leaving 3 miles to El Salvador. In that case, this 6.5 miles wide projection running 200 miles into the Pacific would have the biggest knock-on effect in the history of delimitations.

This "knock-on" effect is undoubtedly increased when any delimitation is concluded under the authority of a Chamber of the International Court of Justice. Dr. Evans, in the work we have quoted, considered that the impact of a delimitation made with such authority was kept in mind by the International Court of Justice in the *Malta/Libya* case. He points out that this influence which the fixing of one boundary has on the fixing of other future boundaries:

> "underlines the seemingly extraordinary decision by the Court in the *Malta/Libya* case, determining the boundary of the delimitation area between Malta and Libya, to give effect not to any boundary concluded with Italy, but to claims made by Italy" (p. 238).

Paragraph 73 of the Judgment of the Chamber says

> "It is true that a decision of the Chamber rejecting El Salvador's contention, and finding that there is no condominium in the waters of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all. Similarly, a finding that there is no such 'community of interests' as is claimed by Honduras, between El Salvador and Honduras in their capacity as riparian States of the Gulf, would be tantamount to a finding that there is no such 'community of interests' in the Gulf at all. In either event, such a decision would therefore evidently affect an interest of a legal nature of Nicaragua; but even so that interest would not be the 'very subject-matter of the decision' in the way the interests of Albania were in the case concerning *Monetary Gold Removed from Rome in 1943*." (*I.C.J. Reports 1990*, p. 92, para. 73.)

The Chamber distinguishes between levels in which interests may be affected. The *Monetary Gold* case is the extreme example of a situation that would necessarily affect the interest of a third party if it were adjudged by a court because those interests would be the "very subject-matter of the decision". The position of Nicaragua is that, being a non-party to the case, it cannot be affected even in a minor way in its interests, even if they are not the very subject-matter of the decision.

To end this part of our exposition, I wish to make a short statement on the *Delimitation line of 1900 with Honduras*.

For the purposes of this case, Honduras has claimed that the boundary with Nicaragua is not clearly established in the Gulf of Fonseca and that the clear description of the line given in the second Acta of 1900 should be stretched to Farallones. If the boundary line clearly established in 1900 and completed by the Award of the King of Spain up to the Atlantic, which in its turn was confirmed by the Court, in its recognizing the Honduras Constitution, if this line is not respected, then the whole border situation with Honduras is reopened. In that case, Nicaragua must reserve its rights generally on the whole question of the Nicaraguan-Honduran borders. It is not the interest of Nicaragua to be reopening border questions that have been settled by time, mixed-commissions, treaties, arbitration and even a Judgment of the Court. But if Honduras considers that the starting point of our mutual delimitation is not clearly established, then everything has to be opened for review.

In its Observations to the Written Statement of Nicaragua, Honduras added a footnote on maps. The purpose of this footnote is to try to give weight to its arguments for reopening the border question with Nicaragua. This point has again been in issue in these oral proceedings. Another

point brought up by Professor Pierre-Marie Dupuy is that a certain Nicaraguan/Honduran Commission established last year has a bearing on this case. He also mentioned certain naval patrols. These issues will be addressed properly at the final intervention of Nicaragua. At this point, I will only make reference to the general reservation made by Nicaragua in page 65 of its Written Observations of 14 December 1990:

> "Nicaragua reserves its position generally on all the statements of fact and of law made by the Parties in their several Pleadings."

With that, M. President, I conclude my presentation at this stage of the oral hearings.

At the end of the next sequence of oral hearings Nicaragua intends to present Formal Conclusions and, in so far as this may be necessary, offer further brief reflections on the substantive issues with which the intervention is concerned. At the same juncture H.E. Mr. Enrique Dreyfus Morales, the Foreign Minister of Nicaragua, will address shortly the Chamber.

Professor Brownlie will now deal with the functions of intervention and the related legal issues. Thank you, Mr. President.

The PRESIDENT: I thank Ambassador Argüello, Agent of Nicaragua. The Chamber will take a break of 15 minutes.

The Chamber adjourned from 11.35 to 11.50 a.m.

The PRESIDENT: The sitting is resumed and I give the floor to Professor Brownlie.

Mr. BROWNLIE: Thank you Mr. President.

First of all, I would like to express my pleasure at appearing once again before this distinguished Chamber and I would like to add that that pleasure is enhanced rather than diminished by the number of procedural contingencies which have befallen the Government of Nicaragua.

My repertoire will be founded upon the various aspects of intervention as an institution for the protection of the interests of a third State in cases where the *Monetary Gold* principle has not been held to be applicable. And, of course, my agenda will be restricted by the decision of 13th September last year:

> "that Nicaragua has a legal interest which may be affected by a decision as to the legal regime of those waters, i.e., a decision in favour of the contention of El Salvador, that the waters of the Gulf are subject to a regime of condominium, or a decision in favour of the contention of Honduras, that there exists a community of interests between the three States in the waters of the Gulf" *I.C.J. Reports 1990*, p. 136, para. 104).

The precise function of intervention is a matter to be determined on the basis of common sense and legal principle. It cannot usefully be determined on the basis of the usual sources because both the decision of the Court and the legal literature are almost exclusively devoted to the conditions on which intervention may be permitted. As a result, it is the passport which has attracted most attention, rather than the journey itself. In these unusual conditions counsel has the duty to find the best means of protecting the interests of the State he represents, whilst providing as much assistance as possible to the Chamber.

A. The Informative or Prescriptive Function of Intervention:

Mr. President, there can be no doubt that one function of intervention is to inform the Chamber of the nature of Nicaragua's rights within the Gulf. In his separate opinion in the *Italian Intervention* case, Judge Mbaye emphasized that the aim "is to inform the Court of the nature of the rights" which the intervening State claims to possess "and which are at issue [en cause] in the dispute ..." (*I.C.J. Reports 1984*, p. 45).

In the opinion of Judge Mbaye, this function was concerned with ensuring "the sound administration of justice" and the purpose was to provide information as to the rights of the intervener "to such an extent that the decision to be made might adversely affect them" (*ibid.*).

The Chamber itself has adopted a similar position and in its decision of last year, it observed:

> "So far as the object of Nicaragua's intervention is 'to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention... It seems to the Chamber, however, that it is perfectly proper and, indeed, the purpose of intervention, for an intervener to inform the Chamber of what it regards as its rights or interests, in order to ensure that no legal interests may be 'affected'

without the intervener being heard ..." (*I.C.J. Reports 1990*, p. 130, para. 90.)

And so, for present purposes, my first task must be to report to the Chamber on the incompatibility of the condominium thesis of El Salvador with the legal rights of Nicaragua, in the Gulf. In so far as the condominium thesis is related to the Judgment of the Central American Court of Justice, Mr. Argüello has made all the necessary points. And so, it is my task to draw the attention of the Chamber to certain other aspects of the condominium thesis.

This subject has been rehearsed extensively in Nicaragua's Written Statement and it is necessary only to make certain points by way of emphasis.

In the first place, there is a presumption against the existence of a special regime involving a substantial departure from the normal regime of territorial sovereignty and of entitlement to maritime zones. The small number of examples of the condominium in practice refer to almost entirely to land territory and the presumption against the existence of a condominium is even stronger in the cae of maritime territory.

The presumption against the existence of a condominium is, in fact, reinforced in present circumstances:

(1) There is no special agreement defining the alleged regime.

(2) Two of the alleged participants have steadfastly resisted the claims of El Salvador ever since they were formulated in 1913.

No doubt in theory a regime of condominium could be proved to exist on the basis of a consistent practice and mutual recognition. However, El Salvador has failed to prove that such a legal regime was in place at any time.

In the second place, El Salvador did not advance the condominium thesis in the post-independence period. This silence endured from 1838 until 1913 and it is therefore not surprising to find that Nicaragua and Honduras were unwilling to accept the novel claim when it surfaced abruptly in 1913. In this context, it is also important to recall the failure of El Salvador to react when Nicaragua and Honduras concluded their Delimitation Agreement in 1894. This silence on the part of El Salvador continued during the work of the Mixed Commission which resulted from

the Delimitation Agreement of 1894.

Finally, on the question of the alleged condominium, it is necessary to consider the argument of El Salvador that the decision of the Central American Court of Justice resulted in the creation of an "objective juridical regime". In its Counter-Memorial, El Salvador argues:

> "that by reason of the decision of 1917 and on the basis thereof, there was created in the Gulf what the writers on Public International Law describe as an *'Objective Juridical Regime*', valid *erga omnes*, which has been consolidated with the passage of time and which has obtained the recognition by and the acquiescence of States in general and, in particular, of the maritime powers, who have never placed in doubt the character of the Gulf as a bay exclusively belonging to its three riparian States, while at the same time they have benefitted from the right of innocent passage proclaimed by the decision of 1917" (CMES, p. 233, para. 7.32).

In our submission this argument is untenable. Such a regime would have to have a basis either in the law of Treaties or in a process of general recognition in the international community.

The Law of Treaties provides no basis for such a regime and the Counter-Memorial of El Salvador gives an unfortunately incomplete picture of developments in the International Law Commission and at the Vienna Conference. The final report of the Commission to the General Assembly contains a substantial section devoted to "Treaties and third States" which confirms that the possibility of creating objective regimes by treaty was very problematical (*Yearbook I.L.C.*, 1966, Vol. II, pp. 226-31).

The furthest the Commission would go was to adopt a draft article, Article 34, according to which:

> "Nothing in Articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law." (*Ibid.*, pp. 230-32.)

And in this context the Commission considered the question of "objective regimes" and reached the following conclusion:

> "Since to lay down a rule recognizing the possibility of the creation of objective regimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the Law of Treaties. It considered that the provision in Article 32, regarding treaties intended to create rights in favour of States generally, together with the process mentioned in the present Article, furnish a legal basis for the establishment of treaty obligations and rights valid erga omnes, which goes as far as is at present possible. Accordingly [the Commission continues], it decided not to propose any special

provision on treaties creating so-called objective régimes." (*Ibid*., p. 231.)

That is the end of the quotation from the Report of the Commission to the General Assembly.

The Vienna Convention on the Law of Treaties includes a provision (Art. 38) to the effect that the Articles concerning third States did not preclude "a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, *recognized ad such*" (emphasis added).

The question can now be posed, is there a customary rule, recognized as such, affirming the existence of a condominium in respect of the Gulf of Fonseca. The pertinent criteria concerning the formation of a customary rule are exacting and there is no evidence to be found in the pleadings of El Salvador which would come near to satisfying the criteria for the formation of a rule of custom. Indeed, two or the riparians have consistently resisted the concept of a condominium.

The Counter-Memorial of El Salvador invokes the teachings of publicists in favour of the existence of "objective juridical situations" (pp. 233-234, para. 7.35). This assertion is flawed in at least two respects.

First, it is simply not correct to say that publicists in general recognize a discrete category of objective régimes. In reality, modern publicists tend to reflect the caution evident in the final report of the International Law Commission which I have already quoted and I refer for example to the general work of Podesta Costa and Ruda (*Derecho International Publico*, 1985, II, pp. 97-98).

In the second place, those publicists who do refer to the Gulf of Fonseca and the decision of the Central American Court of Justice signally fail to indicate that the views of the Court have any wider connotation. A good example is the fairly detailed treatment in O'Connell's well regarded treatise on *The International Law of the Sea* (Vol. I, 1985, pp. 436-437). Similarly, Judge Charles De Visscher makes no reference to any objective régime in the relevant passages of his classical study of *Problèmes de confins en droit international public*, 1969, pages 137 and 138.

In our view then, there is no legal justification for the thesis that a condominium has existed at any time in the Gulf of Fonseca.

Mr. President, I turn now to the Honduran argument that the Gulf is subject to a régime based

upon a community of interests. Nicaragua's objections to this argument have been laid out in Part III of our Written Statement and for present purposes it is necessary to stress certain points only.

The question of the status of the waters of the Gulf, in the absence of a régime of condominium is essentially in our submission that of the Law of the Sea modified to some extent by local custom as to innocent passage. The concept of a community of interests, quite simply, does not find a place in the Law of the Sea. The records of the Third United Nations Conference and the provisions of the United Nations Convention on the Law of the Sea do not contain a single reference to the concept. The large study of Professor O'Connell published in two volumes in 1982 and 1984 includes no reference to the concept. Nor does the concept appear in monographic studies of boundary problems such as, and I have mentioned it already, Charles De Visscher's work on *Problèmes de confins en droit international public.*

The passages in the Honduran Memorial (French text, Vol. II, pp. 625-628) on "the emergence of the notion" are very revealing. The evidence presented consists of a diversity of completely unrelated items none of which is concerned with the Law of the Sea. Given the entirely artificial provenance of this concept it is not surprising to find that it lacks definition and content.

Thus the Honduran Government states and restates the formula of the equality of States without defining the entitlements which are supposed to flow from this equality. The Counter-Memorial for example states that "co-operation" is a duty which flows from a community of interests (CMH, French text, Vol. II, pp. 682-683 para. 20) and further that "co-operation presupposes delimitation" (*ibid.*, p. 683, para. 21). These extremely vague assertions are not supported by any legal authority.

The invocation of the concept of "equality of rights" in the submissions of Honduras remains without a legal foundation. As Nicaragua had cause to explain in the Written Statement:

> "In so far as equality has any legal meaning, it has to be applied in the context of a code of some kind relating to a particular subject-matter. In the case of the waters of the Gulf such a code can only derive either from the practice of States or from the principles of general international law relating to the Law of the Sea. The 'community of interests' asserted relates to no State practice or local custom. Consequently the principles of the Law of the Sea are applicable. Indeed, the Government of Honduras asserts that a community of interests 'implies delimitation' and this could only take place in accordance with the relevant Law of the Sea principles." (Written Statement, Part III, para. 12.)

Mr. President, in concluding my remarks on the community of interests argument, I would like to stress that this had not been heard of until the pleadings in this case. The evidence of this includes the fact that the Honduran Government cannot invoke a single one of its own diplomatic documents to support the argument.

The explanation for this in our submission is very straightforward. Honduras does not accept the condominium thesis but needed an acceptable and suitably flexible substitute, which would provide a useful device for seeking to establish a presence on the closing line of the Gulf.

In other words the community of interests is a forensic invention, an extra-legal solecism. As such it is inimical to any genuine conception of equality within the rule of law. It has been specially designed to produce advantages for Honduras which would not be obtainable in accordance with the relevant principles of general international law. The objective in other words is not equality but privilege.

B. The Protective Function of Intervention

In the *Italian Intervention* case the Court recognized that

> "Article 62 of the Statute envisages that the object of the intervening State is to ensure the protection or safeguarding of its 'interest of a legal nature' by preventing it from being 'affected' by the decision." (*I.C.J. Reports 1984*, p. 23, para. 37; see also *ibid*., p. 18, para. 28.)

The Judgment of this Chamber last year adopted a similar position, for example, in the following passage:

> "In the light of these statements, it appears to the Chamber that the object stated first in Nicaragua's Application, namely 'generally to protect the legal interests of the Republic of Nicaragua in the Gulf of Fonseca and the adjacent maritime areas by all legal means available', is not to be interpreted as involving the seeking of a judicial pronouncement on Nicaragua's own claims."

The Chamber continues:

> "The 'legal means available' must be those afforded by the institution of intervention for the protection of a third State's legal interests. So understood, that object cannot be regarded as improper." (*I.C.J. Reports 1990*, p. 131, para. 92; see also p. 129, para. 87.)

In the submission of Nicaragua the protective function is not to be equated with the informative or prescriptive function of intervention characterized so aptly by Judge Mbaye as being concerned with ensuring "the sound administration of justice".

The protective function complements the informative function but provides the intervening State with the opportunity to explain the legitimate interests of the intervener which are placed in issue by the litigation between the Parties.

The function of protection involves a consideration of the objectives of the litigants and the precise modes in which those objectives may affect the legal entitlements of the intervening State.

This function inevitably and appropriately goes beyond the informative function and the issues in the present proceedings provide a perfect illustration of the relation between those two functions.

Nicaragua has been permitted to intervene in order to explain how its legal interest may be affected by a decision in favour of the condominium thesis or a decision in favour of the argument based on the existence of a community of interests.

The passive mode of explaining how its legal interest may be affected involves informing the Chamber that there is no legal justification for either the condominium thesis or the argument based on community of interests.

Obviously, the recognition of such arguments, in spite of the formal protection of Article 59 of the Statute, in the real world of law and politics would "affect" the legal interest of Nicaragua.

Mr. President, there remains a necessity to build up the picture in order to provide an active mode for the effective protection of Nicaragua's legal interest. This active mode has two elements. First, a consideration of the legal entitlements of Nicaragua which would be substantially prejudiced by the recognition of a condominium opposable to Honduras or a community of interests.

Secondly, it is necessary to examine the collateral purposes which would be served by the argument based upon community of interests.

I turn first of all to the legal entitlements of Nicaragua which would be substantially prejudiced.

The governing category is the legal interest which may be affected in terms of Article 62 of the

Statute. There is some analogy here with the concept of a "legally protected interest" in the context of the law of State responsibility and international claims. In that context, as President Sir Robert Jennings recognized in this General Course given to the Hague Academy, an applicant has *locus standi* "only where there is an issue of fact of law between the particular parties in the sense that it affects a legal interest vested in the applicant" (*RCADI*, Vol. 121 (1967-II), p. 507).

Mutatis mutandis for the purposes of intervention in present circumstances the legal interest vested in the intervening State is to be established in the context of the Law of the Sea.

As a coastal State, Nicaragua has legal entitlements both in the waters and sea-bed appurtenant to her coasts.

And so, the nature of these entitlements according to general international law can be summarized as follows:

(i) A coastal State, as such, has attached to it a corresponding portion of maritime territory consisting of a territorial sea. This entitlement arises by operation of law, as Judge Sir Arnold McNair recognized in his dissenting opinion in the *Fisheries* case, *I.C.J. Reports 1951*, p. 160). And in that case the Court itself referred to "the character of territorial waters as appurtenant to the land territory" (*ibid.*, 128).

(ii) By virtue of its status as a coastal State Nicaragua has an entitlement to continental shelf rights. Such rights do not depend on express proclamation and date back to the appropriate stage in the development of the law.

(iii) As far as it may be relevant, a coastal State has the right to establish a zone not greater than 200 miles from the baselines for purposes recognized as falling within the concept of the exclusive economic zone.

This recital is no doubt very familiar to the Chamber but it is necessary to assert the consequences in general international law of Nicaragua's status as a coastal State within the Gulf with sovereignty over a coastal sector some 30 miles in length. The entitlements to territorial sea and

to shelf rights are inherent and exist *ipso facto*.

Moreover, in the maritime areas adjacent to Farallones abutting upon the 12 mile sector of coast facing Meanguera and parallel to the coast of El Salvador, Nicaragua has a predominant interest which is a natural consequence of the legal entitlement of a coastal State, with sovereignty in respect of Farallones and of the geographical framework in general.

In the submission of Nicaragua, these essential legal entitlements should not be overridden by any recognition of either a condominium or a regime of the so-called community of interests.

Mr. President, I move next to an examination of the collateral purposes which would be served by the argument based upon a community of interests.

The pleadings of Honduras involve repeated assertions that the consequences of the establishment of a regime of community of interests include the creation of jurisdictional zones of some unspecified type, both within the Gulf and beyond the closing line of the Gulf (see for example, the Memorial, French text, Vol. II, pp. 687-708, paras. 95-144).

In particular, the submissions presented in the written pleadings reveal that the thesis of a community of interests had the ambitious and radical objective of establishing a jurisdictional zone for Honduras which would necessarily abut upon Nicaragua's maritime entitlements.

In the Honduran Reply, the submissions "concerning the zone subject to delimitation within the Gulf" include several submissions which provide the rationale for the "community of interests" thesis.

> "C. With respect to the maritime dispute:
>
> 1. Concerning the zone subject to delimitation within the Gulf: to adjudge and declare that the community of interests existing between El Salvador and Honduras, by reason of their both being coastal States bordering on an enclosed historic bay produces between them a perfect equality of rights, which has nevertheless never been transformed by the same States into a condominium.
>
> - to adjudge and declare, therefore, that each of the two States is entitled to exercise its powers within zones to be precisely delimited between El Salvador and Honduras; ...
>
> - to adjudge and declare that the community of interests existing between El Salvador and Honduras as coastal States bordering on the Gulf implies an equal right for both to exercise their jurisdictions over maritime areas situated beyond the closing line of the Gulf ..."

It thus appears that the community of interests is really about entitlement to zones of exclusive jurisdiction. And it also appears that there is a chain effect. Thus the inherent rights to a zone of exclusive jurisdiction within the Gulf are assumed to generate inherent rights to maritime areas situated outside the Gulf.

In the context of such radical territorial claims, the issue of delimitation is secondary and the question of entitlement is anterior and fundamental. It is the entitlement alleged to flow from the concept of a community of interests which, in terms of Article 62 of the Statute, may affect the maritime entitlements of Nicaragua, which entitlements represent major legal interests.

The question of entitlement logically results from the Honduran submissions based upon a community of interests. In the interior of the Gulf a significant jurisdictional intrusion would become established. The status of the waters of the Gulf would, in the perception of Honduras, be at one level a community of interests but this would, in fact, involve a partition of the waters, to the disadvantage of Nicaragua.

C. Reviewing Third Party Interests:

Mr. President, I have completed my examination of the protective function of intervention and I move on to another function, which is that of monitoring the interests of third States. Perhaps the two functions reinforce each other, but they are not necessarily identical. Two factors come into play for present purposes. The first is that a substantial body of judicial opinion has recognized that Article 59 of the Statute does not provide direct protection for the legal interests of third States.

If I may quote from your dissenting opinion in the *Italian Intervention* case, Mr. President:

> "In paragraph 42 the Judgment discusses the relationship between Articles 59 and 62 of the Statute, a problem on which there was much to say during the pleadings."

You said:

> "I believe that Article 59 is intended to preserve the relative character of the *res judicata* in a general way. If it would provide sufficient protection for third States in the circumstances under which they are compelled to apply for permission to intervene, Article 62 would have no place in the Statute. If Italy resorted to Article 62 it was not by mere choice, as is said in ... the Judgment, but because it considered that the decision to be given by the Court in the principal case might affect its interests of a legal nature. This is a form of direct protection provided for by Article 62, different from the general principle of Article 59, which confines itself to enunciate the principle that judgments

are *res inter alios acta* for third States." (*I.C.J. Reports 1984*, p. 87, para. 81.)

Four other Judges participating in that case also expressed very serious reservations about the efficacy of Article 59 for present purposes (see *ibid.*, pp. 46-47 (Judge Mbaye); pp. 102-105 (Judge Oda); p. 134, paras. 9-10 (Judge Schwebel); pp. 157-160 (Judge Sir Robert Jennings, as he then was)). Consequently, it is a matter of importance that the position of third States be explained, to some extent at least on their own terms, in order to seek that element of direct protection which Article 62 is expected to provide.

The direct monitoring of the legal interests of third States also involves a second factor. The problems of intervention involve a polarity between the possible refusal to exercise jurisdiction at all in accordance with the principle of the *Monetary Gold* decision and the possibility of "party" or "mainstream" intervention.

Between these two polarities there is a certain grey area in which elements of discretion and judicial propriety can be expected to play a role. This is particularly the case with intervention by virtue of Article 62, that is, in cases of intervention not as of right.

The role of judicial propriety in this context was noted by Judge Fitzmaurice in his commentary on the work of the Court (*British Year Book*, Vol. 34, 1958, pp. 126-127). The issue of propriety was also noticed by Judge Sir Robert Jennings, as he then was, in the *Italian Intervention* case, in which he made the following observations:

> "It is the principle of consensual jurisdiction itself which, even in the absence of a jurisdictional link or other consent of the main parties, requires the possibility of a limited form of intervention when the case between the original parties is about a subject-matter in which a third State has rights which are put in issue, and therefore in jeopardy, by the action. In the absence of a jurisdictional link, that third State is not in a position to protect its interests by an application under Article 40, paragraph 1, of the Statute. Yet neither should the main action result in the Court exercising jurisdiction over a matter in which the third State has material rights, and in the absence of that third State, if it desires to intervene. The impropriety of exercising jurisdiction in the face of a substantial interest of a third State in the same subject-matter, that State not being before the Court is strikingly illustrated by the *Monetary Gold Removed from Rome in 1943 case* (*I.C.J. Reports 1954*, p. 19). It is true that in that case the legal interest of the third State, Albania, was before the Court because of the terms of the compromis itself, by which also Albania was in effect invited to make application to the Court to intervene but did not do so. Yet in the absence of Albania, the Court refused even to pass upon the contingent interests in the same subject-matter of the three States who were before the Court." (*I.C.J. Reports 1984*, p. 148, para. 2.)

The point which thus emerges is that even when the Monetary Gold principle is not considered to be applicable, and intervention is permitted, there is still a residual but significant factor of propriety which remains in play. It would, after all, be strange if it were a case of *Monetary Gold* or nothing. This was certainly not the view of the majority of the Court on the Merits phase of the *Libya/Malta* case when the claims of Italy were allowed to produce extensive limits upon the competence of the Court (*I.C.J. Reports 1985*, pp. 25-27, paras. 21-23). Since this was not the result of an intervention, that limitation could only have been based upon principles concerning certain inherent limits to the judicial function.

In spite of some references to "the special features of the present case" by the Court in 1985 (*I.C.J. Reports 1985*, p. 28, para. 23) it is submitted that the decision of that Court sounds a necessary note of judicial caution. And, of course, the Libya/Malta case was also founded upon a special agreement.

Mr. President, I can now move forward to another aspect of intervention, which is the identification of those interests of third States which form part of the consideration of issues of merits in cases involving maritime territory.

D. Third Party interests recognized in the Law of the Sea

In this respect it is necessary to make a distinction. In the merits phase of the *Libya/Malta* case the Court referred to the interests of a third State as a basis for limiting its judicial function, that is to say its jurisdiction in a broad sense (*I.C.J. Reports 1985*, p. 26, para. 21 *in fine*).

This involved an exercise of the compétence de la compétence.

In contrast a court seised of a case involving title may refer to the legal interest or claims of third States in the region as an element in the judicial reasoning on the merits themselves.

And this is what happened for example in certain adjudications concerning sovereignty over land territory such as the Eastern Greenland case (*P.C.I.J., Series A/B, No. 53*, p. 46). In the case of land territory the question of third party rights is likely to be set aside as essentially irrelevant when the tribunal is asked to decide title only as between the two parties (cf. *Burkino Faso/Republic of*

Malie Frontier Dispute, *I.C.J. Reports 1986*, pp. 576-580, paras. 44-50).

However, in the case of maritime disputes the situation is more complex and this especially in cases involving territorial sea or continental shelf rights.

The point was made with clarity and economy by Judge Oda in 1984. In his words:

> "The subject-matter of this case does not concern claims arising out of an alleged breach of any obligation which one party may have accepted in relation to the other, being thus a matter of concern only to the litigant States. No, what is really disputed between Libya and Malta relates to titles to submarine areas. The claims concerned are thus of a territorial nature and as such are made *erga omnes*. In other words, the titles established may well be asserted not only between Libya and Malta but as regards all other States. It will be recalled that the essentially territorial nature of continental shelf disputes was confirmed by the Court in its Judgment in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978*, paras. 86-90) and indeed formed a main factor in that decision." (*Italian Intervention*, *I.C.J. Reports 1984*, p. 108, para. 37.)

Judge Sir Robert Jennings dealt with the same point in that case.

And the emphasis on the inherent nature of continental shelf rights is also to be found in the same case in the opinion of the President of this Chamber (*ibid*., pp. 87-88, para. 82).

What then are the third paty interests which are recognized in the Law of the Sea and relevant to the task before the Chamber?

There can be no doubt that third party interests may constitute "relevant circumstances" in the context of maritime delimitation and the Court adopted this view in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 64, para. 81). But delimitation is not within my mandate and I shall not pursue that theme.

On the other hand, the purpose and scope of the submissions of Honduras concerning a community of interests within the Gulf are matters on the agenda of intervention today and these Honduran claims create significant threats to the maritime entitlements of Nicaragua.

In the view of Nicaragua, the status of the waters of the Gulf is to be addressed in the light of the pleadings and, in particular, in the light of the submissions of Honduras. Those pleadings and those submissions reveal that Honduras is claiming maritime areas within the Gulf and, on that basis, outside the Gulf also.

These claims, if valid in principle, would involve a process of delimitation and the Honduran

submissions call for delimitation. However, the preliminary and discreet question is that of entitlement. It would be perfectly possible to have an action for a declaration of the validity of certain entitlements on the basis of an application or a special agreement which reserved the question of delimitation. In effect, this is what was done by the parties in the *North Sea* cases.

The distinction between entitlement and delimitation, delimitation being a secondary question, was well recognized by the Court in the *Aegean Sea* case. And, with your permission, I quote a passage from that Judgment which is of particular relevance. The Court said:

> "The contention based on the proposition that delimitation is entirely extraneous to the notion of territorial status appears to the Court to encounter certain difficulties. Above all, it seems to overlook the basic character of the present dispute, clearly stated though it is in the first submission in Greece's application. The basic question in dispute is whether or not certain islands under Greek sovereignty are entitled to a continental shelf of their own and entitle Greece to call for the boundary to be drawn between those islands and the Turkish coast. The very essence of the dispute, as formulated in the application, is thus the entitlement of those Greek islands to a continental shelf, and the delimitation of the boundary is a secondary question to be decided after, and in the light of, the decision upon the first basic question. Moreover, it is evident from the documents before the Court that Turkey, which maintains that the islands in question are mere protuberances on the Turkish continental shelf and have no continental shelf of their own, also considers the basic question to be one of entitlement." (*I.C.J. Reports 1978*, p. 35, para. 83.)

The position of Nicaragua is that the recognition of a Honduran presence in the main body of the Gulf would affect the legal interests of Nicaragua substantially.

In particular, such a presence would disrupt the *status quo* established by the arrangements of 1894 and 1900 between Nicaragua and Honduras.

In addition, the recognition of an Honduran entitlement would involve an Honduran presence at the closing line of the Gulf, with other ramifications of direct concern to Nicaragua.

Mr. President, the community of interests argument is in effect a flag of convenience for the proposing of exclusively spatial claims of Honduras which could not be given credible presentation in terms of the normal principles of the Law of the Sea.

The Law of the Sea issues in this case have had a somewhat tangential relation to the arguments. This has been partly the result of the dispute over the interpretation of the Special Agreement and partly the result of the decision by El Salvador to a large extent to refuse to discuss

entitlement and delimitation as such.

As a consequence, Honduras has been able to present issues of entitlement more or less *sub rosa*, on the basis that they were subsumed under the question of whether there was a community of interests or not. Thus, for example, the submissions and arguments of Honduras present the question of delimitation as a mere corollary of the issue of community of interests.

The preliminary question of entitlement by virtue of general international law is consequently submerged by the artificial claim to a community of interests. The Law of the Sea is, however, invoked to play an ancillary role as a basis for delimitation.

Nicaragua is not permitted to offer observations on the interpretation of the Special Agreement. At the same time, in oder to exercise its rights by virtue of Article 62, it is respectfully submitted, legitimate for the Government of Nicaragua to offer hypotheses which on any view would have relevance to the application of the Special Agreement. And one such hypothesis, which is very modest, involves the assumption that as a part of the judicial function the Special Agreement will be applied in the context of general international law.

This is certainly the assumption of Honduras which invokes general international law in relation to the delimitation of its claims and relies upon decisions like the *North Sea* cases and its successors (see MH, French text, Vol. II, pp. 690-708; and CMH, French text, Vol. III, p. 704).

In the unusual setting created by the Special Agreement and the legal architecture of the pleadings in this case, it is of great importance for Nicaragua that the issues of general international law be given an appropriate role.

Mr. President, if a chart or map of the region of the Gulf of Fonseca is picked up, as it were for the first time, and without the accretions of the pleadings of the Parties in this case, how would the competent international lawyer proceed?

He would first of all examine the claims of the Parties. In the case of the Honduran claims based upon a community of interests, he would, in our submission, first classify the problem as one involving the Law of the Sea. He would, with all respect to our Honduran colleagues, be unlikely to classify the problem as one involving an international river system.

At this stage, the question which presents itself is this. Even if there is such a regime of community of interests it is necessary to set it alongside the pertinent principles of general international law. Indeed, this is clearly the assumption of Honduras, whose written pleadings invoke Law of the Sea materials and concepts, when it suits them.

The nub of the matter is thus clear. If the principles of general international law are applicable, then they are not applicable only at a certain stage and for certain purposes. The Law of the Sea entitlements cannot, in our submission, be elided between the claim of a community of interests and a delimitation phase.

Having picked up a map of the Gulf, and having studied the extent of the maritime claims of Honduras, how would our archetypical international lawyer proceed further?

In our submission, he would not proceed directly to delimitation, but would approach the preliminary question of entitlement as a logical priority.

Entitlement, like delimitation, is approached on the basis of the identification of the coasts actually abutting upon the area to which the claims of the Parties relate. In the present case that would not be too difficult and the geographical and legal framework would include the coasts of Nicaragua.

And it is coasts that provide the basis of title after all. And title reflects both the concept of qualification as a coastal State to possess maritime areas and also the content of the legal interest.

The Truman Proclamation gave emphasis to the concepts of management and control from the coast and in the same connection referred to the element of security in controlling areas lying offshore.

A similar theme appeared in the separate opinion of President Jiménez de Aréchaga in the *Tunisia/Libya* case.

In the context of disagreement between the Parties about the principle of non-encroachment, President Jiménez de Aréchaga stated certain basic principles.

In his words:

> "69. The solution of this disagreement is to be found in the meaning which is to be attributed to the correlative notion of 'natural prolongation'. If, as stated above, the Court used this expression to describe the continuation of the coastal front of every

> coastal State, and not with a geological or geomorphological meaning, then the 'non-encroachment' in front of and close to the coasts of a State is the correct interpretation of the principle. It is true that there may be geographical configurations in which a boundary line cannot avoid 'cutting across' the coastal front of one State or of both. But the principle of non-encroachment, being an equitable principle, is not a rigid one. It admits a corrective element, which is the factor of distance from the coast. If the above-described geographical situation occurs, then the 'cutting off' effect should be allowed to take place at a point as far as it may be possible to go, seawards, from the coastal front of the affected State.
>
> 70. This interpretation is confirmed by the very raison d'être of the institution of the continental shelf as it appeared and developed in the middle of the present century. The reason which explains the wide and immediate acceptance of the doctrine was not so much the possibility it offered of exploiting the natural resources of the shelf, but rather the fact that it authorized every coastal State to object to the exploitation of the sea-bed and subsoil in front of its coasts being undertaken by another State." (*I.C.J. Reports 1982*, pp. 119-120.)

Moreover, the key principles are encapsulated in a passage from the Judgment of the Court in the *Libya/Malta* case which is as much concerned with title as it is with delimitation.

> The Court said this:
>
> "The normative character of equitable principles applied as a part of general international law is important because these principles govern not only delimitation by adjudication or arbitration, but also, and indeed primarily, the duty of Parties to seek first a delimitation by agreement, which is also to seek an equitable result. That equitable principles are expressed in terms of general application is immediately apparent from a glance at some well-known examples: the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, 'equity does not necessarily imply equality' (*I.C.J. Reports 1969*, p. 49, para. 91), nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice." (*I.C.J. Reports 1985*, pp. 39-40, para. 46.)

Mr. President, it is obvious that the principle of non-encroachment, like other principles, is not always easy to apply. Nonetheless, the process of application is informed by the jurisprudence of the Court and of courts of arbitration.

In our submission there can be no doubt that to give recognition to Honduran claims within the Gulf, and their logical corollary elsewhere, would involve a radical departure from existing concepts of entitlement and from the principle of non-encroachment.

To allow an occluded riparian in the situation of Honduras a corridor of intrusion involving major encroachments on the natural prolongations of the other States would in our submission involve the very type of spatial juxtaposition the Law of the Sea has so far been designed to avoid.

Indeed, any radicalism in the law of the sea which has occurred has been aimed in the opposite direction. Thus in the *Anglo-French Arbitration* the Channel Islands were enclaved precisely in order to avoid excessive encroachment on the areas of sea-bed appurtenant to the French Coast (see *Reports of the International Arbitral Awards*, Vol. 18, paras. 180-201). The Honduran thesis, which proposes both encroachment and penetration, would introduce precisely those elements of geographical imbalance which are abhorred by general international law.

Moreover, there is a certain aspect of public order involved because, if existing levels of expectation are abruptly changed, other States may feel justified in presenting new claims on the supposition that the legal position has radically changed.

There are a number of geographically comparable cases which involve one or more occluded riparians and a division of maritime areas in terms of territorial sea and/or continental shelf.

In this respect I would express my appreciation of the examples offered by the distinguished Foreign Minister of El Salvador the other day (C 4/CR 91/39, pp. 68-69). But I would like on behalf of Nicaragua, to refer to some other comparable cases.

(i) Sweden-Denmark-Norway (Skaggerak, Kattegat and North Sea)

One would be the situation involving Sweden, Denmark and Norway, that is the sounds between the North Sea and the Baltic, the Skagerak, Kattegat and North Sea. Here the division of territorial sea has proceeded without any increment being allowed to Sweden on the basis that she is "cut off" from the North Sea. The example is highly relevant, since Sweden lies, like Honduras, at the back of the gulf-like feature formed by the Skaggerak and Kattegat. For present purposes the fact that there is a narrow sound leading into the Baltic makes no difference. The case is the more striking in our submission in view of the fact that there are no non-Swedish islands located within the Skaggerak.

(ii) Israel and Jordan (Gulf of Aqaba and Straits of Tiran) (which was in fact one of the Foreign Minister's examples

I then would like to reiterate one of the Foreign Minister's examples, the case of the Gulf of Agaba and the Straits of Tiran. There is a certain comparability between the position of Israel and Jordan within the Gulf of Aqaba and the situation of Honduras within the Gulf of Fonseca. However, this may be reduced by the relative narrowness and depth of penetration of the Gulf of Aqaba compared with Fonseca. At any rate, no claim has ever been made on behalf of either Israel or Jordan to some compensatory increment of territorial seas and the controversy so far as there has been any, has been confined exclusively to the question of rights of passage.

(iii) Singapore-Indonesia (Straights of Malacca and Singapore)

A third example involves Singapore and Indonesia in relation to the Straights of Malacca and Singapore. Here there is a territorial sea boundary established by an agreement signed on 25 May 1973. The alignment is based upon equidistance and the outcome involves the enclavement of Singapore.

(iv) Ethiopia-Yemen Arab Republic-Jibuti-Yemen P.D. Republic (Red Sea fand Straight of Bab el Mandeb)

Fourth example involves the States of Ethiopia, the Yemen Arab Republic and Jibuti and refers to the Red Sea and the Straight of Bab el Mandeb, the southern end of the Red Sea. Neither Ethiopia nor the Yemen Arab Republic have any claims to territorial sea areas linking their ordinarily appurtenant jurisdictional waters with waters outside the Red Sea in the southern sector of the Straight of Bab el Mandeb.

(v) Chile-Argentina (Eastern Entrance to the Strait of Magellan)

Lastly, I refer to the situation in the Eastern Entrance of the Strait of Magellan, at the Boca oriental of the Strait of Magellan. According to the recently concluded Tratado de Paz y Amistad between Chile and Argentina, Chilean maritime jurisdiction in the vicinity of the eastern entrance of the Strait of Magellan is confined by a boundary line joining the two termini of the land boundaries of the two States on the northern and southern coastal sectors adjacent to the entrance: see Article 10 of the Treaty (*International Legal Materials*, Vol. XXIV (1985), p. 11). No doubt this a negotiated solution with a specialized background, but the outcome is significant nonetheless: a

State controlling the entire littoral - Chile controls the entire littoral within the Boca oriental - was deprived of any kind of "escape" beyond the maritime zones immediately adjacent to its coasts.

In the light of these comparable geographical situations, it would be inimical, in our submission, to the stability of territorial settlements in other parts of the world, if the Chamber were to appear to encourage this type of revisionist claim.

At the end of the day, Mr. President, the maritime claims of Honduras, as presented in these proceedings, are geopolitical and revisionist. The documentary record shows that the claims are of very recent origin. And Mr. Argüello gave some of the detail.

As between Nicaragua and Honduras, the question of maritime delimitation was definitively settled by the Agreements of 1894 and 1900. It is Honduras which seeks to challenge the resulting *status quo*.

The Government of Honduras has used three devices to give some colour of legality to its revisionist enterprise.

1. There is the argument based upon an invented concept of a community of interests, which has no basis in law, and counsel for Honduras, in seeking to provide legal content to the concept, only succeeded in demonstrating its lack of legal content.

By way of example, counsel for Honduras cited various articles from the Convention of the Law of the Sea of 1982. In particular, he referred to Article 123 on "co-operation of States bordering enclosed or semi-enclosed seas". There is, of course, a question whether the Gulf is a semi-enclosed sea. But in any event, the provision concerned refers exclusively to duties of co-operation. There is no reference to a community of interests. Like all the alleged precedents invoked by Honduras, there is no reference to spatial entitlements and delimitation.

2. The second method employed to give legitimacy to extravagant claims is the assertion that, because the Gulf constitutes an historic bay, the waters are "internal waters" and this is assumed to give a justification for the spatial claims formulated by Honduras.

No doubt, the waters are internal in the sense that for non-riparian States, their status is equated to that of internal waters. In the days when the riparians only had a 3-mile territorial sea,

presumably certain areas of the Gulf would have retained the status of high seas, but for the creation of the special status of historic bay.

In any event, it cannot assist the case of Honduras to categorize the waters of the Gulf as internal. In our submission, whether they are classified as internal waters, or territorial sea, or continental shelf, the entitlements of Honduras must be based upon the relevant principles of general international law. The category of internal waters cannot be employed to produce a territorial bonus for Honduras.

On Wednesday afternoon, Professor Pierre-Marie Dupuy attempted to persuade the Chamber that the status of an historic bay excludes the principles of general international law concerning entitlement and delimitation.

No doubt the existence of historic title may be relevant in whole or in part to the determination of the entitlements of coastal States, and this is recognized in the provisions of Article 15 of the Law of the Sea Convention.

However, in the Gulf of Fonseca, the status of historic bay only has a spatial reference vis-à-vis non-riparian States. As between the riparians, it has no spatial connotation.

The written pleadings of Honduras have relied upon the principles and rules of general international law concerning delimitation of shelf areas. But this *modus operandi* cannot be reconciled with claims now based upon historic title.

In fact, Honduras has made no attempt to prove the existence of historic title in any particular location. The formula "historic title therefore internal waters, therefore equal rights for Honduras" cannot help Honduras establish an entitlement in particular locations.

3. The third device used to legitimate Honduran claims is to refuse to recognize that the Agreement of 1900 involved an exclusive delimitation governing the relations of Nicaragua and Honduras. Following the maritime delimitation of 1900 and until these proceedings the Government of Honduras chose not to question the definitive character of the alignment established by the Mixed Commission.

And as late as 1982, the definitive character of the boundary was affirmed in an Honduran

Note (Written Statement of the Republic of Nicaragua, Annex 9).

Mr. President, it is evident that the Law of the Sea has evolved since the Truman Proclamation of 1945, and the development of new concepts in certain circumstances may generate new disputes, as happened between Canada and the United States in the region of the Gulf of Maine.

However, there is no justification for the view that changes in the law may be used *ipso facto* as an excuse to seek the rectification of well-established territorial settlements. As the Court said in the Temple case, with reference to possible errors affecting boundary treaties:

> "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality.
>
> This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered." (*I.C.J. Reports 1962*, p. 34.)

In any case, the relevant principles of contemporary general international law do not provide a justification for Honduran claims to maritime spatial entitlements which would penetrate the central zone of the Gulf and reach out into the Pacific.

In the present case, the issue of Honduran entitlement and its consequences in the sphere of delimitation within the Gulf involves problems of small-distance delimitation. And it can safely be assumed that within narrow seas, the relatively new concepts of the Law of the Sea are not regarded as capable of producing major geopolitical changes of the type proposed by Honduras.

The key to Honduran ambitions is Map C.5 in the Honduran Memorial and it was before the Chamber the other day. This is a very candid piece of cartography. It provides a graphic guide to the essence of the proposed community of interests. That essence consists of a claim to a corridor of maritime territory, which we may call the "Meanguera corridor".

Mr. President, the legal interest of Nicaragua which may be affected if the Chamber gives validity to such a claim consists of the normal entitlements of Nicaragua as a coastal State.

From the point of view of Nicaragua it is not delimitation but the preliminary issue of entitlement to a corridor which is the real question. The alignment proposed on Map C.5 is simply a possible margin of the corridor. It is the principle of the corridor and not its secondary features

which will affect the legal interest of Nicaragua primarily.

Moreover, it is clear that the corridor has considerable dimension in the light of the references by Honduras to a boundary with Nicaragua in the vicinity of Farallones (see C4/CR 90/4, p. 39; and the Observations of the Republic of Honduras to the Written Statement of the Republic of Nicaragua, pp. 7-8).

And so, Mr. President, the corridor would inevitably be given a certain level of apparent legitimacy if the Chamber proceeds to a delimitation even if the delimitation as such would not, of course, be opposable to Nicaragua. In any event, such a corridor would be incompatible with general international law as understood and applied hitherto. And in our submission the corridor would breach the following well-recognized principles of the Law of the Sea:

1. The first principle is that of the inherent rights of the coastal State in respect of maritime territory. This concept, which is that of appurtenance, applies both to territorial sea and to continental shelf.

2. Secondly, there is the principle non-encroachment by one party on the natural prolongation of the other. This principle recognizes the direct relation of title and coastal geography.

3. Thirdly, there is a presumption that the equitable solution is an equal division of the areas of overlap of the continental shelves of the States in dispute.

It is well-known that when the principle of equal division is applied in particular circumstances the median line which reflects the principle may be subject to a process of "correction", as it is sometimes called, or "adjustment" as it may be called on other occasions. But, Mr. President, when this takes place the adjustment is always limited in scale, and the principle of equal division remains the framework for the operation. In the case of narrow seas the principles are equally applicable with the important qualification that departures from the principle of equal division and departures from the principle of non-encroachment are essentially incompatible with the circumstances of small-distance delimitation.

By way of conclusion I will present what are from Nicaragua's point of view the significant elements in the case and I shall do this inevitably in the context of Article 62 of the Statute.

The central question for Nicaragua is the package of claims described by Honduras as a community of interests. A major aspect of this apparently philanthropic concept is an ambitious claim of recent manufacture to spatial entitlements within and outside the Gulf.

The claim illustrated by map C.5 appears first of all as a part of political negotiations in the 1970s.

The claim is impossible to justify in terms of the principles of general international law and consequently the concept of a community of interests has been employed as a substitute basis of entitlement.

In terms of the Law of the Sea the normal order of the issues has been inverted by Honduras and thus delimitation appears, as it were, from nowhere. Entitlement is not explained on the basis of law, we are suddenly asked for a delimitation.

The outcome has placed Nicaragua in an unenviable position. The Special Agreement excludes one of the two riparians in the region of the Gulf from the process of adjudication. The Special Agreement, no doubt for political reasons, has permitted maritime questions of an unspecified character to be placed before the Chamber and has thus given a certain spurious and entirely provisional legitimacy to the these new and extravagant maritime claims. After all, if the Tribunal is asked to deal with claims, they must have some prima facie normality.

In the absence of other options, Nicaragua remains in a procedural situation full of difficulty.

Nicaragua has been permitted the role of non-party intervention in accordance with the Statute of the Court. The purpose of this, the Chamber recognizes, is the protection of Nicaragua's legal interests.

The question, of course, is what practical form such protection may take. Nicaragua has offered various indications and the most important of these, in our submission, is the consideration of judicial propriety.

In the submission of Nicaragua, even if the Monetary Gold principle is not applicable, significant factors of propriety remain operative.

The principal authority for this view of the general principles of procedural law is the decision

in the *Libya/Malta* case. There the Court applied a policy of maximum restraint in favour of the interests of the third State. It is the position of the Nicaraguan Government in this case that a similar policy of judicial restraint would be appropriate in respect of the wholly unreasonable claim of Honduras to an entitlement which is conspicuously incompatible with the legal entitlements of Nicaragua in the region of the Gulf, and which is also incompatible with the territorial *status quo* established by the Agreement between Nicaragua and Honduras in 1900.

And quite apart from judicial restraint, which involves a type of admissibiity, the claim to the Meanguera corridor has, in any event, no basis in law.

Consequently, were the Chamber to see fit to give any level of legitimacy to such revisionist claims, this would be likely to generate threats to the stability of the territorial status quo in other regions of the world.

Normally, such a risk would be purely academic but, in the present case, the tension between the competence of the Chamber and the normal application of the law arises from the extensive provisions of the Special Agreement and also the procedural disadvantages effectively imposed upon Nicaragua.

Mr. President, I have completed my speech. I am very grateful for the courtesy and patience the Chamber has shown. Thank you.

The PRESIDENT: I thank Professor Brownlie and the sitting is adjourned until Monday at 10 o'clock.

The Chamber rose at 1 p.m.
