Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

*Public sitting of the Chamber*

*held on Monday 10 June 1991, at 3 p.m., at the Peace Palace,*

*Judge Sette-Camara, President of the Chamber, presiding*

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

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VERBATIM RECORD

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ANNEE l991

*Audience publique de la Chambre*

*tenue le lundi 10 juin 1991, à 15 heures, au Palais de la Paix,*

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

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

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COMPTE RENDU

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*Present:*

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

Registrar Valencia-Ospina

*Présents* :

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

M. Valencia-Ospina, Greffier

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and

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*as Counsel and Advocate.*

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

*as Counsel;*

Assisted by

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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.

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*comme conseil.*

The PRESIDENT: Please be seated. The sitting is open. We start today the hearings on the legal situation of the waters outside the Gulf of Fonseca and I give the floor to Professor Bowett.

Mr. BOWETT: Thank you, Mr. President. Mr. President, Members of the Court, it is my task to address the question of delimitation *outside* the Gulf. There is, of course, a preliminary question which is whether this matter falls within the Court's competence. This is a question which has already been explored in detail, so I can content myself with a few general observations.

1. The Preliminary Question of the Court's competence

The terms of the Special Agreement may not be ideal. The phrase "to determine the legal situation in ... the maritime areas" lacks the precision that we might prefer. But the reason for this lack of precision is absolutely clear. Given El Salvador's commitment to its "condominium thesis", El Salvador could not agree to a Special Agreement which referred expressly to a *delimitation* of the waters of the Gulf: and so the word "delimitation" had to be avoided, to meet the particular needs of El Salvador.

You can understand why Honduras felt able to accept this vagueness. The same vague phrase was used in Article 18 of the 1980 Peace Treaty. It was used there to define the terms of reference of the Mixed Frontier Commission — and the use of the word "delimitation" was avoided in the Peace Treaty for exactly the same reason, namely to avoid embarrassing El Salvador.

*But*, the Parties had been in dispute over the Honduran claim to a delimitation in the Pacific since 1978 (CMH, Vol. II, p. 166); under the Peace Treaty, in Article 3, they had agreed to settle "any difference of whatever kind, (that) may arise in the future between them"; and in 1985, both within and outside the Mixed Commission, the Parties had discussed the Honduran claims in the Pacific. It was clear, to both Parties, that there was a dispute over delimitation, both inside and outside the Gulf.

Now you can see that if, *on the basis of this same vague phrase*, the Parties had discussed the Honduran claims to a maritime area in the Pacific in the past, Honduras felt entitled to assume that the same phrase, used in the Special Agreement, would confer on the Court power to deal with those same claims. After all, if the phrase had not excluded the delimitation dispute from the competence of the Mixed Commission, why should it exclude the dispute from the competence of this Court? It

is a simple matter of consistency. And for El Salvador now to pretend that the phrase excludes any question of delimitation is a serious breach of good faith. It is an argument designed to destroy the clear intent of the Parties and their commitment to resolve *all* their disputes, a commitment contained in Article 3 of the Peace Treaty. It is an argument which, in the submission of Honduras, El Salvador is precluded from making.

I turn, therefore, to the substance of the matter: the Honduran claim to an equitable, maritime area outside the Gulf.

2. The Honduran claim

(i) The Basis of Title

It is perhaps useful to examine this basis for the Honduran claim, a claim to title, in a maritime area outside the Gulf.

Consistently with the jurisprudence, Honduras asserts title on the basis of its coasts. The coasts in question are these — these coasts at the back of the Gulf, a coast over 40 miles in length, over twice as long as that of El Salvador within the Gulf.

So the initial question is this. Can this coast of Honduras generate title to a maritime area outside the Gulf? To answer this question I want first to look at the Honduran positive case — and the reasons why Honduras argues that this coast does generate title. Then I will turn to the counter-arguments of El Salvador.

(ii) The Honduran Positive Case

This is composed of several elements.

*First*, historically, Honduras has long been described as a coastal State in relation to the Pacific. Honduran Constitutions have so described Honduras since 1839, and, in effect, so does the 1987 Constitution of its neighbour, Nicaragua (RH, pp. 288, 294). Indeed, Article 1 of the 1884 San Miguel Boundary Convention signed between Honduras and El Salvador itself recognized that the boundary between the two States "shall begin in the Pacific" (RH, p. 288). Of course, one can anticipate a reply by El Salvador which says "Ah, but that was in the days when the Gulf of Fonseca was regarded as the Pacific." But, Mr. President, if, historically, Honduras was referred to as a coastal State in relation to the Gulf — as part of the Pacific — by what process of law did Honduras

become enclaved, and lose that status? When, as a matter of accepted international practice, did that enclaving occur?

It had certainly not taken place when Honduras, by Congressional Decrees in 1950 and 1951, proclaimed continental shelf rights in the Pacific Ocean (CMH, p. 165; MH, Ann. II, pp. 25-32). And we have no record of any protest against that claim by any State.

Now this morning Mr. Lauterpacht suggested that the Honduran claim in 1950 was confined to the outer Gulf. Imagine a claim to a continental shelf limited to the outer Gulf!

Why would Honduras make so limited a claim when all the Latin American States at that point in time were claiming epi-continental seas and even continental shelves up to 200 miles. And it is useful in assessing the force of Mr. Lauterpacht's argument to look at the actual text of the Honduran legislation. The Decree of 7 March 1950, which you have in the Annexes, in Article 4 says this

> "The limits of Honduras and its territorial division shall be determined by law. The submarine platform or continental and insular shelf and the waters which cover it in both the Atlantic and Pacific Oceans."

Now, I stress the word oceans. Whatever else you may conjure with in terms of whether the outer Gulf was regarded as the Pacific, it was surely never regarded as an ocean. In the 1982 Constitution of Honduras, in Article 11, paragraph 5, which deals with the continental shelf claim, it says "so far as the Pacific Ocean is concerned the foregoing measurements shall be taken from the closing line across the mouth of the Gulf of Fonseca outwards to the open sea". And again, somewhat earlier, in a law concerning the natural resources of the sea of 1980, the Honduran legislature proclaimed that Honduras was to have a 200-mile economic zone from the baselines which it enjoys. Now, a proclamation of a 200-mile economic zone which, under the terms of the 1980 law, is a claim in relation to the two oceans, could not possibly be accommodated within the outer Gulf. You cannot get 200 miles in the outer Gulf, it must be a claim to the Pacific Ocean beyond. So, it is quite clear that in the terms of the Honduran legislation, legislation which has not been protested, these claims have never been limited to the outer Gulf and could not reasonably have been construed to be so limited by other States.

But let us set the text aside. Let us assume that, despite the text, Mr. Lauterpacht's suggestion

has some merit and that because these claims were, as El Salvador assumed, limited to the outer Gulf, therefore no protest was called for. Let us examine that assumption. Here we have an area of the outer Gulf, claimed by Nicaragua apparently as territorial waters. So we are to envisage a claim by Honduras to these same waters as the continental shelf of Honduras, in an area which Nicaragua says is its territorial waters. And yet no protest is made. Or in relation to El Salvador, this area of the outer Gulf is, in the view of El Salvador, not only a condominium but a condominium confined to the two States, El Salvador and Nicaragua. It is an area in which on their thesis Honduras has no rights whatsoever. Yet, we have Honduras making a claim to a continental shelf which El Salvador says, ah, yes, but that is confined to the outer Gulf, the very area in which El Salvador says Honduras has no rights whatever. And they make no protest.

Mr. President, it just is not credible to ask the Court to believe that El Salvador, or any other State, believes that the claims by Honduras to a continental shelf, from 1950 onwards, were confined to the so-called outer Gulf. It makes no kind of sense, either in terms of the text used, or in terms of the arguments now advanced, either by El Salvador or by Nicaragua. There was no protest. And it is not until 1974, nearly 25 years later, that there was any hint that El Salvador was prepared to dispute the Honduran claim to a maritime area in the Pacific. And even that hint of opposition came, not in a formal protest, but in a statement by Mr. Pohl, addressing the Second Committee of UNCLOS III, the Third Conference on the Law of the Sea (CM, p. 166).

The Counter-Memorial of El Salvador (para. 8.39) described the Honduran claim as a mere "paper assertion". There are two replies to that. The first is that, by law, Honduras is not required to make any claim at all: its shelf rights attach *ab initio* and *de jure*, without the need for any express proclamation. And the second reply is that the Honduran claim, once it was contested in 1974, became the subject of real controversy, within the Mixed Commission. So it was certainly no mere "paper assertion".

I turn now to the second element. As a matter of law, there is no reason why a coast at the back of a bay, or gulf, or even a concave coast should not be entitled to a natural prolongation out into the open seas. If such a natural prolongation is consistent with an equitable result, then the coastal State's title merits legal recognition. And that entitlement is not barred by the fact that some

other State's coast might, as a matter of absolute proximity, be closer to the maritime areas in question.

Think of the *North Sea Continental Shelf* cases. Now, Mr. President, in the folder which you all have before you, I have reproduced as Figure 2, the illustration which is found in the Court's Judgment of 1969. There on Figure 2 you see the concavity, and the equitable result was achieved by recognizing the entitlement of Germany, based on the German coasts at the back of the concavity, to shelf areas out to the middle of the North Sea, indeed, up to the median line with the United Kingdom.

The fact that the Dutch and Danish coasts were nearer, was irrelevant. Or think of the United Kingdom/France *Channel Arbitration* in 1977 and, as Figure 3 in your folder, you have the illustration of the line that emerged from that arbitration. The Award accorded title to France, title to shelf areas to the north and north-west of the Channel Islands. The basis of that legal title lay in the French coast at the back of Granville Bay, so that the natural prolongation of the French coast was able to "leap-frog", as it were, over the Channel Islands and find its natural prolongation in areas which were, beyond any question, much closer to English territory, to the Channel Islands. The fact that the Channel Islands were nearer to the disputed area was irrelevant.

Think of the *Gulf of Maine* case — and again, I have placed in your folder the illustration used at page 726 of the Honduran Memorial, an illustration presented by the United States to this Court in that case. Now at Figure 4 you will see how the United States conceived of the argument that the long American coast at the back of the Gulf had a natural prolongation extending out into the sea areas beyond the Gulf. It had a legal entitlement to maritime areas in front of that long coast and even though, in terms of proximity, the Canadian coast of Nova Scotia was nearer. If you examine the Court's Judgment you will see that it was the length of the American coast at the back of the Gulf that determined the course of the boundary in both the second and the third sectors of the delimitation line decided upon by the Court. Now that can only mean that the coast at the back of the Gulf generated legal title to these areas lying outside the Gulf.

Certainly in the Gulf of Fonseca the geographical configuration is more extreme. At its mouth the territories of Nicaragua and El Salvador are closer together than were Cape Cod and Novia

Scotia in the *Gulf of Maine* case, or the territories of Denmark and Holland in the *North Sea* cases. But proximity of coast does not, *per se*, exclude the possibility that the maritime area may, in law and in equity, attach to some other, more distant coast. And there is no doubt that the Honduran coast, within the Gulf, does face directly on to the Pacific. But it does so through a restricted opening: the narrow mouth of the Gulf certainly operates so as to limit the area of the Honduran entitlement. But what the narrow Gulf entrance cannot do is to destroy that entitlement.

(iii) El Salvador's negative case

Now it may be useful at this juncture to turn to El Salvador's negative case, to the arguments used by El Salvador in seeking to deny to Honduras any entitlement to a maritime area in the Pacific. The crux of El Salvador's case lies in the assertion that the mouth of the Gulf is only 19 miles wide; that in 1950 El Salvador claimed a 200-mile territorial sea; and that the closing line of the Gulf is therefore shared by Nicaragua and El Salvador exclusively, with a boundary at the mid-point; and that, therefore, Honduras is entirely blocked off from any maritime claim in the Pacific, beyond this closing-line.

I shall have to deal with this argument in some detail. But I ought, first, to comment on a different thesis which first emerged in El Salvador's Counter Memorial (para. 8.9). This is what I might call the "island screen" thesis, which argues that the islands of Conchaguita, Meanguera and Meanguerita, which belong to El Salvador, and the island of Farallones, which belongs to Nicaragua, operate as a screen. It is suggested that this screen of islands blocks off any Honduran maritime claims to the west of these islands, seawards of these islands.

I cannot treat this as a very serious argument, and I can deal with it fairly briefly by making a few simple points. First, islands do not necessarily block the natural prolongation of mainland coasts. The Channel Islands did not block the French claims to the north of those islands. And, to give one further example, I would refer the Court to the 1978 Agreement between Australia and Papua New Guinea, an Agreement which you have illustrated in Figure 5 in your folder. Now you will see that the Australian islands of Aubusi, Boigu, Dauan, Kaumag and Saibai, lying off the coast of Papua New Guinea, were completely enclaved in a 3-mile territorial sea. They did not "screen" or block off the natural prolongation of the Papuan coast, which continued out to what is a modified

median line. And so it is difficult to see why the small islands in the Gulf of Fonseca, whoever they belong to, should screen and block off the Honduran entitlement based upon 40 miles of coast.

Second, presumably El Salvador does not dispute that, under its own condominium thesis, and assuming the whole of the Gulf to be under a condominium, Honduras has rights in the waters to the west of these islands. So if the so-called "screen" — this screen of islands — is not effective to block off Honduran rights in the waters of the Gulf lying to the west, how is it that they become effective as a screen for the purpose of blocking off Honduran claims even further west in the Pacific?

The Reply of El Salvador indicates a very clear awareness of this difficulty. And so the suggestion made there (paras. 6.105-6.112) is that the area of Gulf, subject to a condominium, ends at a line drawn from Punta Chiquirin to Punta del Rosario — what El Salvador calls the "inner" Gulf. It would, therefore, follow that the area of the "outer" Gulf is capable of national appropriation, and that it is so appropriated by Nicaragua and El Salvador, and that, accordingly, Honduras has no rights in the "outer' Gulf. The island-screen becomes a complete barrier.

The argument to justify the distinction between the "inner" and "outer" Gulf was given by the Foreign Minister of El Salvador last week.

But he admitted that the 1917 Judgment made no such distinction and as Professor Pierre-Marie Dupuy explained last week, it would have been impossible for the Court in 1917 to have made that distinction because in the so-called inner Gulf, if you allow to each Party a 3-mile exclusive zone, there is virtually nothing left in the inner Gulf of waters which could be subject to a condominium. So, clearly, what the Court was talking about was the whole Gulf as a condominium, and a condominium between all three coastal States.

What the Minister relied on was El Salvador's own statement, or statement of claim to the Central American Court, and this statement referred to a line from Punta Chiquirin to Punta del Rosario. And it is true that the Honduran note of protest of 30 September 1916 set out at length the exact terms of the claim of El Salvador, including the reference to this line. But to suggest that Honduras, in protesting, somehow adopted the El Salvadorian definition of the Gulf is really quite wrong. Honduras was concerned to oppose the entire condominium thesis, whatever its geographical

extent.

The fact is that in all the literature the Gulf, as a historic bay, is deemed to comprise the whole bay, the whole Gulf. Throughout the long discussions in the Mixed Commission both Parties refer to the Gulf as one area: there was never any mention by El Salvador of two Gulf's and two areas of condominium, one in and one out, of which only the first, the inner Gulf, concerned Honduras. And indeed, the same is true of the written pleadings of El Salvador in this case, right up to the stage of the Reply when this new thesis of inner and outer Gulfs was concocted.

In brief Mr. President, the argument is simply litigation tactics. It has no relation whatever to El Salvador's actual practice. Indeed, prior to the Reply, all of El Salvador's written pleadings treated the condominium as applying to the entire Gulf — outside the 3 mile limit. There was no "inner" and "outer" Gulf. And if the "outer" Gulf is not subject to the condominium but capable of appropriation by Nicaragua and El Salvador, why place the boundary at the mid-point on the closing-line? Why not carry the boundary through into the outer Gulf?

Mr. President, you will note that El Salvador produces not a single map to show that it has ever made any such claim to an "inner" Gulf as opposed to an "outer" Gulf. My suggestion to you is that you should dismiss this fiction of an "inner" and "outer" Gulf and treat the closing-line across the entrance to the Gulf as the only realistic boundary between the Gulf, whatever its status, and the Pacific beyond.

Now, third and last, it is quite clear from El Salvador's written pleadings that it does not regard the maritime areas outside the Gulf as the natural prolongation of these islands. On the contrary, the claim is, apparently, that El Salvador's maritime areas in the Pacific depends entirely on the mainland coast of El Salvador *outside* the Gulf, the mainland coast. Thus it is the mainland coast of El Salvador, or rather its natural prolongation, which blocks off the Honduran claim. El Salvador's Reply refers to the "actual coast on the Pacific Ocean" (para. 6.110). The "island screen" argument is wholly irrelevant.

So we can now turn to El Salvador's main thesis and this raises a whole series of questions.

First, was the 1950 claim to a 200-mile territorial sea valid? I suggest not. A claim to a 200-mile territorial sea was invalid in 1950, and it is invalid today. In any event, Article 7 of the

1950 Constitution of El Salvador, which is said to be the basis of the claim, said nothing about boundaries. Moreover, it provided expressly that the Gulf of Fonseca is a historic bay, subject to a special régime, and it said not a word about boundaries with either Honduras or Nicaragua. And certainly there is no mention of the territorial sea of El Salvador extending to the mid-point of the closing line. So when was this specific claim made? The Memorial of El Salvador (para. 14.1) tells us that this claim was "restated in the Constitution of 13 December 1983, Article 84 ...". But look at that Article (*Diario Oficial*, Tomo No. 281). It says nothing whatever about a claim to the mid-point of the closing-line. It says, with maximum obscurity, that the limits of El Salvador are, and I use my own free translation:

> "To the east, and for the reaminder, with the Republics of Honduras and Nicaragua in the waters of the Gulf of Fonseca.
>
> And, to the south, with the Pacific Ocean."

So, I have to conclude that, as yet, El Salvador has provided us with no evidence of a formal claim to this boundary with Nicaragua, at the mid-point of the closing-line. That claim has never in fact been made.

Now it is in the light of this fact that some of the evidence of the practice of the Parties begins to make sense. We can now see why El Salvador made no protest to the claims by Honduras to a continental shelf in the Pacific in 1950 and 1951. There was no basis for any such protest: El Salvador had made no claim which was inconsistent with the Honduran claim. We can now see why Honduran vessels, proceeding out into the Pacific — and I mean in the area *outside* the closing-line — had never been subjected to the régime of coastal State control as if they were in innocent passage. They had never been treated by El Salvador as transitting through El Salvador's territorial waters by virtue of a right of innocent passage. The reason is again obvious; El Salvador had made no such claim. The truth is there was no claim.

The first intimation Honduras had of such a claim came only in 1974, with Mr. Pohl's statement in UNCLOS III. It is in the light of this fact that we must turn, now, to examine the validity of El Salvador's claim.

### 3. The Question of the Validity of El Salvador's Claim

(i) The issue of timing: could a claim in 1974 divest Honduras of

existing rights?

If, as we have seen, Honduras claimed shelf rights in the Pacific Ocean in 1950, without protest, then we are entitled to assume that such rights vested in 1950. So the question then becomes "How is it possible for Honduras to be divested of those rights, by an informal claim made during a United Nations Conference nearly 25 years later"? Now, this is not simply an estoppel point. It is a matter of legal principle. For prior rights, publicly-asserted and acquiesced in by the world community, become vested rights. A later, and inconsistent claim by El Salvador, even if in all other respects valid, could not operate to divest Honduras of its vested rights.

(ii) The issue of Estoppel

I turn, now, to a true issue of estoppel. There are, in fact, two elements of El Salvador's own conduct that in my submission operate as an estoppel against El Salvador.

The first is El Salvador's own "condominium" thesis. The closing-line across the mouth of the Gulf is part of the waters of the Gulf. If, therefore, on El Salvador's own argument, these waters are under a condominium, and assuming the Court rejects the argument that the condominium in the "outer" Gulf is restricted to El Salvador and Nicaragua, then it follows that Honduras must have co-riparian rights in those waters. These are the waters across the entrance to the Gulf. It equally follows that two co-riparians, El Salvador and Nicaragua, cannot annex those waters and transform them into their own territorial seas, dividing them equally between them as "sovereign" waters to the exclusion of the third co-riparian, Honduras. And I have already explained why it is not possible for El Salvador to avoid this contradiction by confining the condominium thesis to the waters of the so-called "inner" Gulf. Thus my conclusion is that, on El Salvador's own "condominium" thesis, El Salvador is estopped from contesting that Honduras does have rights in the waters across the closing-line of the Gulf.

The second element of the estoppel is the proposal made by El Salvador to the Mixed Commission in 1985, and that was illustrated on a map prepared by El Salvador, a reproduction of which is now in your folder as Figure 6, and which I would ask the Court to examine.

This is the El Salvadorian proposal. You will note that the red zone, the proposed zone of co-operation, extends for 200 miles from the closing-line across the mouth of the Gulf. This is

significant. First, it illustrates the point I have just made, namely that it was this closing line which, for El Salvador, divided the Gulf from the Pacific: there was no "inner" and "outer" Gulf.

Second, the closing-line is used as a baseline. The 200-mile zone projects from the closing-line. This is a point to which I shall return.

And, third — and this is a point of immediate relevance — it is a clear recognition that Honduras does have rights in the Pacific. It is inconceivable that El Salvador should have proposed a joint zone, connoting equal rights, except on the basis that Honduras had rights. Otherwise, we are being asked to believe that, even though El Salvador considered Honduras to have no legal rights in this maritime area, it was prepared as an act of kindness, as a gesture of magnanimity, to confer equal rights. Is that really credible? I suggest, Mr. President, that it is simply not credible. This proposal clearly demonstrates a recognition by El Salvador that Honduras does have rights in the Pacific. And, on that basis, El Salvador is now estopped from alleging the contrary. And let me add I do not rely solely on this Map. The propositions I have made, on the basis of the Map, are fully confirmed by the records of the meeting of the Mixed Commission on 23 and 24 May 1985. You will also find the text of the El Salvadorian proposal annexed to the letter from President Duarte of El Salvador, addressed to the Honduran President, on 26 September 1985. That proposal deserves careful reading. Not because Honduras seeks to bind El Salvador to that specific proposal, but because of the way that the proposal reveals El Salvador's own thinking at the time about the existence of Honduran rights.

(iii) The issue of the validity of El Salvador's assumption that it is entitled to delimit the closing-line with Nicaragua on the basis of equidistance

It must be clear that El Salvador's claim to a territorial sea, up to the mid-point on the closing line rests on two assumptions. The first is that delimitation of the territorial sea must be on the basis of equidistance. And the second is that El Salvador's right to an equidistance delimitation with Nicaragua overrides, indeed *extinguishes*, the rights of Honduras in the waters at the mouth of the Gulf. In essence, what El Salvador says is this: "The distance across the mouth is only 19 miles, we have a right to a 12-mile territorial sea, *therefore* we are entitled to a territorial sea up to the mid-point of the closing line."

I would ask the Court to examine these assumptions. Let me first make the point that there is nothing axiomatic or inevitable about a median or equidistance boundary between opposite coasts less than 24 miles apart. Article 15 of the 1982 Convention on the Law of the Sea certainly accepts that the median line is the normal solution. But it expressly provides that this does not apply "where it is necessary by reason of historic title or other special circumstances" to delimit in some other way.

What is a historic bay, if it is not an example of historic title? Indeed, El Salvador has recognized that the Gulf is an exceptional situation. I have already referred to El Salvador's claim to territorial waters, in Article 7 of the 1950 Constitution of El Salvador. But that Article provided expressly that: "The Gulf of Fonseca is a historic bay subject to a special régime (U.N. Legislative Series, ST/LEG/SER.B/6, p. 14)". Why, therefore, does El Salvador now insist that the normal rule applies?

And, of course, El Salvador's claim to delimit across the mouth of the Gulf with Nicaragua exclusively simply assumes that Honduras has no rights — which is the very question at issue. But if Honduras has rights in these waters, then the claim of El Salvador necessarily fails, for El Salvador cannot claim an area — or delimit an area — belonging to another State.

There can certainly be no basis for suggesting that the new rule for a 12-mile territorial sea has *extinguished* pre-existing Honduran rights. In its Memorial (p. 137), Honduras pointed to the way in which new delimitation provisions in the United Nations Conventions on the Law of the Sea expressly safeguarded pre-existing rights. We cited Article 7, paragraph 6, on straight baselines, providing that one State may not draw straight baselines where the effect of such baselines would be to cut off the territorial sea of another State from the high seas or an exclusive economic zone. And we cited Article 47, paragraph 5, dealing with archipelagic baselines, which is to the same effect. What we had suggested was that these rules indicate the general policy in the law, not to allow new claims to be made on the basis of the new rules, to the prejudice of existing rights.

Not so, replies El Salvador (RES, para. 6.106): there is no such general policy. Well, the Court will be the judge of that. But I venture to suggest that there is a general policy of the law to protect pre-existing rights. The doctrine of "acquired rights' is no heresy, but rather a basic precept

in many areas of international law.

In the final analysis we face a claim by El Salvador of startling audacity, and really quite alien to the policy of the law. For centuries Honduras has been regarded as a Pacific coastal State. In 1950 it proclaimed its rights to a continental shelf in the Pacific — without protest from anybody. And, throughout the decades of the 1950s, the 1960s and the 1970s, the law has been gradually moving towards an increasing recognition and enlargement of coastal States' rights. But some 25 years after the Honduran claim, in 1974 to be exact, El Salvador comes along and suggests that, by virtue of the new 12-mile limit for territorial waters, it can assert a delimitation across the mouth of the Gulf, based upon the notion of absolute proximity, and deprive Honduras of its rights. And not only the pre-existing rights in the shelf, but also all the new rights that attach to Honduras under the doctrine of the exclusive economic zone. I suggested that it was a claim of startling audacity. On reflection, I think that is perhaps too polite a term.

My argument must proceed, therefore, on the basis that Honduras has not been divested of its entitlement. Its entitlement remains, and the question to which I now turn is that of the method of establishing the area of that entitlement.

Mr. President, I now turn to a different part of my argument. If you wish to have a tea-break now this would be an opportune time.

The PRESIDENT: Thank you, Professor Bowett. We shall now take a break of 15 minutes.

*The Chamber adjourned from 16.00 to 16.25 p.m.*

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The PRESIDENT: Please be seated. The sitting is resumed. I give the floor again to Professor Bowett.

Mr. BOWETT: Thank you Sir.

### 4. The Method appropriate to establishing the area, or limits, of the Honduran entitlement

(i) Honduras's right to an equitable share of the closing-line

The Honduran position can be simply stated. The waters of the Gulf are historic *internal* waters. The fact that, within the Gulf, each riparian State enjoyed an exclusive zone of 3 miles off its coasts does not change that. All it means is that, whilst the waters of the Gulf are generally subject to a community of interests (not to be confused with a condominium) this was not true of the 3-mile belt. But the waters of the Gulf remain *internal* waters, and have been so regarded at least for most of this century.

From this it follows that, for Honduras, the closing-line across the line of the Gulf is a *baseline*. And the territorial seas, continental shelves and economic zones of the riparian States extend from that baseline.

Now the Court will be aware that El Salvador takes a different position. This is, apparently, that the closing-line of the Gulf is just that: it is not a baseline. I want to examine the reasoning behind this rather extraordinary view, and perhaps suggest to you what motives lie behind it.

If this were a normal juridical bay, belonging to one State, then, given that the closing-line is less than 24 miles, it would, without any doubt, be the baseline. And, of course, the function of the baseline, closing a bay, is to represent by a straight line the coasts within that bay. The closing-line, as a baseline, is a form of "coastal front", forming a notional coast just like the low-water mark along a normal coast. Now we have to ask ourselves "Why should it be any different with a historic bay?" It is generally supposed that with a historic bay your closing-line can be even longer than 24 miles. But it remains a true baseline, representing the coasts inside the bay.

There is no doubt that El Salvador itself took that view in 1985. Its proposal to the Mixed Commission, which you have illustrated at Figure 6 in your dossier, and which we have just examined, clearly demonstrates that. But now we are told that is not so: it is just a "closing-line". As I have already suggested, I think it might be useful if the Court were to look at the text of the proposal, as annexed to President Duarte's letter of 26 September 1985 (RH, Ann. VII.1). He there says:

> "El Salvador, dans le cadre de sa souveraineté exclusive, sur les eaux territoriales de l'embouchure ou l'entrée du Golfe ..."

There cannot be much doubt about how President Duarte saw the territorial waters of El Salvador. They began on the closing-line. In other words, he saw the closing-line as a baseline. Now obviously, in 1985, El Salvador had not thought of this new argument whereby you can have a closing-line which is not a baseline.

I confess I have difficulty in identifying this juridical animal, this "closing-line" which is not a baseline. What purpose does it serve, if not a baseline? It cannot be simply a closing-line for the purposes of the semi-circle test one uses to establish a juridical bay. For this is not a juridical bay, and one has no need of the semi-circle test. And if its purpose is simply to divide the historic or internal waters from territorial waters, then it is, in effect, a baseline. So, if not a baseline, what is it?

I am afraid I cannot answer that, Mr. President. You will have to look to El Salvador for help. But what I can do is to offer some thoughts on *why* El Salvador has adopted this extraordinary argument.

I can do this best by using the Illustration VIII.2 from the Honduran Reply — it is Figure 7 in your dossier. Now if you look at Figure 7, you can see that El Salvador's 12-mile territorial sea, on their present view, projects from El Salvador's coast *outside* the Gulf. Of course, it still gets El Salvador out to the mid-point on the closing-line and effectively locks Honduras inside the Gulf.

Now the alternative of using the closing-line as a baseline, and projecting the territorial sea out from that baseline, is far more dangerous for El Salvador. Because El Salvador realizes that the closing-line, as a baseline, represents all the coasts inside the Gulf. And El Salvador equally realizes that, of these coasts inside the Gulf, Honduras has the longest: longer than that of either Nicaragua or of El Salvador within the Gulf. So, if the closing-line, as a baseline, represents those coasts inside the Gulf it is impossible to deny to Honduras part of that baseline. And that is why El Salvador has dropped its 1985 proposal and now wishes to reject the idea that the closing-line is a baseline.

As I have suggested, that is not possible. The moment you accept that the closing-line is a true baseline, *and that its purpose is to represent the coasts inside the Gulf*, it follows inevitably, that Honduras, with the longest coast, has a legal right to the longest section of that baseline.

Because the basis of entitlement to a maritime zone in the Pacific is the Honduran coast. I want to make that point abundantly clear. We do not say, as El Salvador suggests, that the Honduran claim derives from the concept of "community interests" as such. It is rather because of this "community of interests" in the Gulf, that the rights of Honduras to an equitable share of the closing line must be recognized. And it is that equitable share of the closing line that generates the maritime claim, precisely because the share of the closing line represents the Honduran coast within the Gulf.

On Tuesday of last week we heard a new argument by the distinguished Foreign Minister of El Salvador. He ridiculed the Honduran argument that the closing line of the Gulf represents, in part, the coast of Honduras inside the Gulf, and that Honduras is therefore entitled to a maritime zone beyond the closing-line. You will recall that he offered comparisons with the Gulf of Aqaba, the Persian Gulf and the Gulf of Finland — suggesting that it would be ludicrous for States inside those Gulfs to claim a maritime zone outside the closing line of those Gulfs.

Now, as I said this morning, the comparison he offers, just as the comparisons that Nicaragua offered, is, of course, no comparison at all. I do not believe any of the Gulfs he mentioned is a historic bay or Gulf. I do not believe any of them has been treated as internal waters, with a closing line across the entrance. So his argument is without substance, and the Honduran contention remains correct: the closing line across the Gulf of Fonseca is a baseline, and it does represent all of the coasts inside the Gulf, including that of Honduras.

So I turn to the next question. Where, precisely, is the section of the baseline that, in equity, should appertain to Honduras?

And I would ask the Court, at this point, to turn to Figure 1 in your folder, where you have a map of the Gulf itself. Let me begin by emphasizing that we have no wish to encroach upon any section of the baseline which may reasonably be claimed by Nicaragua. Accordingly, we must exclude from our consideration the whole of the line between Punta Cosiguina on the Nicaraguan coast and the mid-point, X, the mid-point on the closing line. For Nicaragua has no reasonable claim to any part west of point X, and has in fact made no such claim. I do not say that the whole line east of point X necessarily belongs to Nicaragua. I simply say that its division is a matter of some future

delimitation between Honduras and Nicaragua.

As to the western half, from Punta Amapala to point X, this is clearly relevant to this delimitation and my submission is that an equitable result is achieved by attributing 3 miles to El Salvador — up to point C — and the remaining 6.5 miles to Honduras. This is, in my view, justifiable for two reasons. The first is that the traditional, exclusive zone claimed by El Salvador has been 3 miles. And the second is that, within the relevant area, it is the Honduran coast that faces directly into the Gulf, towards the closing-line. And by contrast, the coast of El Salvador lies at right angles to the closing-line, shielded, as it were, by the mainland of El Salvador.

A word about this relevant area. As you will see from this map and also from Figure 1 in your dossier, the relevant area is exclusively the *western* half of the Gulf. I have projected a line, perpendicular to the closing line, from point X at the mid-point, back into the Gulf and it reaches the Honduran coast here, at point Y. Within that area, relevant only to a Honduras/El Salvador delimitation, the relevant coasts, measured by lines of general direction are these. For El Salvador from Punta Ampala to this headland, Punta Chiquirin, and then across the Bahia de la Union to the terminal point of the land boundary, marked here as point B. That is a coastal length of 18.3 miles.

The relevant Honduran coast can be measured from the frontier, here, point B, to the limit of the western half, at point Y. And that gives a Hunduran coastal front of 18.9 miles. But although the two coasts are roughly equal within the relevant area, and thus it may be thought justify an equal division of the western half of the closing-line, one has to bear in mind that it is the Honduran coast which faces directly onto the Pacific, directly onto the closing-line. That El Salvador's traditional claim has been only one of 3 miles inside the Gulf and, most important of all, that El Salvador enjoys a long Pacific coast, stretching further to the west. It is for these reasons that Honduras submits that point C — the 3-mile limit — is the proper boundary point in this relevant area.

Having thus determined the equitable share on the closing-line, we can now turn to the question of the equitable boundary as it projects out into the Pacific for some 200 miles.

(ii) The equitable boundary line seawards of the closing-line

Here we must take a broader, a wider look at the geography of the region. For we are now concerned to establish an equitable boundary in the Pacific. We are no longer confined to

establishing an equitable share of the closing-line of the Gulf for Honduras. Accordingly, we are no longer focused on the geography of the Gulf. We must shift our attention to the Pacific coast, in a much wider perspective.

If I can invite the Court to look at this map, which is also figure 8 in your folder, enlarged behind me, I will explain how Honduras sees this relevant area.

Clearly, my concern is to avoid any possible prejudice, either to Guatemala in the west, or to Nicaragua in the east. So we must confine our relevant area so as to exclude maritime areas which properly concern those other neighbouring States.

If we start with Guatemala, there will obviously be a future delimitation between El Salvador and Guatemala. So our reasoning has been that we should reasonably consider that the western half of the coast of El Salvador is relevant to a future delimitation with Guatemala. That is why we have chosen point A, halfway along the coast of El Salvador, as the boundary point between the coast which is relevant to a future delimitation with Guatemala, and the coast of El Salvador relevant to the present delimitation with Honduras. From point A to Amapala is a distance of 68.4 miles.

If we turn to limiting the relevant area, to the west, so as not to include any area relevant only to Guatemala and El Salvador, this limit can be achieved by projecting a line from point A, seawards for 200 miles. The bearing of that line, that is the western boundary to the relevant area, should be as a perpendicular to the coast of El Salvador, and that is why we have shown this limit — the western boundary to the relevant area — as the line from A, seawards for 200 miles, out to AC prime — on a bearing of 195.5$^{o}$ from the coast.

If we turn, now, to the same exercise for Nicaragua, we have already identified point X, the mid-point of the closing-line, as the limit of any reasonable claim by Nicaragua. But we must achieve a similar limit seawards. And our submission is that the eastern limit to the area relevant to the present delimitation between El Salvador and Honduras — or, if you like, the boundary between the area relevant to this present delimitation and the area relevant to a future delimitation between Honduras and Nicaragua — can be achieved in the following way.

We again draw a perpendicular out to 200 miles from point X. But it should be a perpendicular to the coasts. We cannot, therefore, make it a perpendicular to the closing-line of the

Gulf, because the geography is such that the Gulf closing-line does not represent the general direction of the coast. And you will note that the coasts of El Salvador, Nicaragua and the closing-line of the Gulf do not have a uniform direction. So for this reason we followed the approach of the Tribunal in the *Guinea/Guinea Bissau* case and looked at the coastal trend of the region as a whole, in order to establish a general line of coastal direction. You will see this represented on this map by a dashing-line stretching from Guatemala right down to Costa Rica. A perpendicular from point X, perpendicular to that line in the general direction, produces the line XA prime, on a bearing of $215.5^{o}$.

So, we have now defined the relevant area by the two lines, AC prime to the west, and XA prime to the east.

The task now becomes that of identifying an equitable boundary between El Salvador and Honduras, within that relevant area. That task has to be performed in the light of certain legal criteria. These are the following.

First, we must obviously start from point C, which is the point where the boundary within the Gulf reaches the closing-line. There has to be continuity between the boundaries inside and outside the Gulf.

Second, we must take account of boundaries, actual or potential, with third States. We have done that by carefully defining and limiting the relevant area.

Third, we must take account of the security and related interests of the Parties. So the line must not be such as to jeopardize the interests of El Salvador. And, by the same token, it must take account of the interests of Honduras, interests in security, navigation, fishing and access to the resources of the Pacific. So we need a line which will give Honduras reasonable access.

Fourth, to produce an equitable result, the line must be such as to accord to each Party such an area as will be reasonably proportionate to the lengths of its coast within the relevant area. For title is based on these coasts.

It is this last factor of proportionality which can give us most assistance in this case. Perhaps I can now invite you to look at the last illustration in your folder, which is Figure 9. This is now enlarged on the easel behind me.

The claim of Honduras to a maritime area in the Pacific is, as I have explained, based upon its coasts inside the Gulf. As we have seen, within the relevant area, that coast, from B to Y, is some 18.9 miles in length.

El Salvador has much the longer coast: 18.3 miles inside the Gulf and 68.4 miles outside, facing the Pacific — a total of 86.7 miles. That is a ratio of 86.7 to 18.9 in favour of El Salvador, or roughly 4.6:1.

Now our relevant area, as I previously defined it, is approximately 27,1OO square kilometres. If we simply project from point C a strict perpendicular, perpendicular to the general direction of the coast, i.e., exactly parallel to the eastern limit to the relevant area, on the same bearing of 215.5°, Honduras would receive a narrow strip of some 4,3OO sq. km. That is too narrow: translated into areal ratios it is 5.3:1 in favour of El Salvador. Whereas, as we have seen, the true coastal ratio is only 4.6:1 in El Salvador's favour.

So the obvious remedy is to vary the angle of the line, as it projects from point C. In other words, instead of having a strict perpendicular, on a bearing of 215.5°, we can widen the angle a little, so as to increase the area which would attach to Honduras, moving the line slightly westwards.

If the areas strictly reflected the coastal ratios of 4.6:1, Honduras would need an area of 4,800 sq. km as opposed to this 4,300 sq. km.. That can be produced quite easily by widening this angle, so that instead of the line proceeding on a bearing of 215.5° we have a line on a bearing of 216°. I have illustrated this technique diagrammatically — it does not purport to be a precise illustration — but you can see how by varying this angle as the line goes out to sea, one can decrease or increase the maritime area which is dependent upon, and prolonged from, this section of the baseline. I have marked the additional area here as a speckled segment, additional to the hatched segment that I first spoke of.

Now, Mr. President, I must make it quite clear that what I am illustrating is a *method*. Honduras understands full well that proportionality is not a source of title. We accept that: we have, I hope, been quite explicit in arguing that the basis of the Honduran title is the Honduran coast. Equally, we understand full well that the law does not aim at a mathematically exact correlation between coastal lengths and maritime areas. It is precisely for this reason that I have mentioned the

other relevant factors: the interests of Honduras in security, in navigation, in access to resources.

Thus, Honduras does not expect the Court to utilize any mathematical method. My demonstration was simply to show that, by varying the angle of the line, you can reflect the coastal ratios. But you can equally reflect other, less tangible factors, and it is this exercise of judgment which Honduras expects from the Court.

In any event, as the Honduran pleadings show, Honduras has no wildly extravagant expectations. It fully recognizes that, being projected from a short section of the baseline — the closing-line — the Honduran maritime areas will be a modest "corridor" or "fan", sandwiched between the very large maritime areas of its neighbours. But it does expect a corridor. It does expect some recognition by the Court that it *is* a coastal State on the Pacific Ocean. And it does not expect the Court to take a view of "equity" which would lock Honduras inside the Gulf, denying to it any maritime zone in the Pacific and allowing its two neighbours to share exclusively these vast areas that lie in the Pacific.

But, Mr. President, I need not state the obvious and I have taxed the Court quite long enough. Let me close by expressing my thanks to the Court for its patience.

The PRESIDENT: I thank Professor Bowett. The sitting is adjourned now until tomorrow at 3 o'clock in the afternoon.

*The Chamber rose at 17.00 p.m.*

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