Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Tuesday 11 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)

VERBATIM RECORD

ANNEE l991

Audience publique de la Chambre

tenue le mardi 11 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))

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

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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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as Co-Agent;

and

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

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Assisted by

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comme conseil.

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

Mr. LAUTERPACHT: Thank you Mr. President. It is my task to reply to the arguments delivered yesterday by Professor Bowett on behalf of Honduras.

In order to assist the Chamber in following my own argument, I venture to place before you an outline which you will find in the folder in front of you. The folder contains two other items in addition to my outline and, I shall come to those items, of course, presently.

The outline, as you will see, takes the form of a list or a set of headings and, in the margin, there is a series of numbers from 1 to 26, identified as item numbers and, from time to time, I shall refer to them so that you know exactly where I have got to in my observations.

I begin, therefore, with some preliminary remarks under the heading of Litigation Tactics versus Litigation Strategy (item 1).

At a certain point yesterday, Professor Bowett described as "litigation tactics" a particular argument of El Salvador, namely, the point about the definition of the inner or smaller Gulf. The point may have been an uncomfortable one for Honduras, but it cannot be disposed of by branding it in some pejorative manner as tactics; it was a proper point to make and remains one that has a bearing on the case, even though Honduras has not met it. But even if it were a point of litigation tactics, it is as nothing compared with the litigation strategy of Honduras.

Let us look for a moment at Question 2 of the compromis as a whole. What do we see? We see Honduras as a State with a coast in the Gulf of Fonseca. On each side of Honduras is a neighbour with a significant land promontory that, in geographical terms, closes Honduras off from the open sea. In addition, there is a belt of islands and islets that straddles the Gulf and, in the language of the 1917 Judgment (p. 707) constitutes a sort of counter-fort that moderates the force of the waves entering the Bay from the outer sea. In this situation Honduras suffers no economic disadvantage. It has, incidentally, a substantial Atlantic coastline. Honduras enjoys all the benefits of access to the open sea. It has freedom of navigation in the Gulf, a freedom that has never been challenged and never interrupted. Honduras has even shown its willingness in the past to negotiate

delimitation agreements within the Gulf. From one of them, the Cruz-Letona Agreement in 1884, it withdrew and the other it concluded with Nicaragua in 1894. Thus in relation to Nicaragua, Honduras ends up with a firm boundary established in a treaty.

But still, the subsequently emerging good fortune of other coastal States seems to have disturbed Honduras and made it restless and anxious for more. It is evidently not satisfied with the riches that it has acquired in the Atlantic. So, it decides to develop the claim that the Court has just heard. A late-conceived, greedy and extravagant claim, in which the flexibility of relevant concepts is exploited to the utmost in the certain knowledge that, no matter how extreme the claim, Honduras can lose nothing by advancing it. It is, as we say in England, a complete try-on. A try-on pressed before this distinguished Court by reason of the Court's known reasonableness, open mindedness and willingness to look at certain aspects, not all aspects and, I will submit, not this aspect, of maritime law in an equitable manner.

Lapsing for a moment into the speculative approach of the kind adopted occasionally by the other side, I suspect that, had we been present at their deliberations at an early stage, we might have heard it said, "Well, let us try. Our eminent counsel will be able to make out a case for us that sounds reasonable and attractive, so let us take the chance, we may strike it lucky. What does it matter if we occasionally indulge in forensic abuse? What does it matter if we repeatedly accuse El Salvador of bad faith? What does it matter if we say that the arguments of El Salvador show startling audacity or even something that we are so polite that we refrain from calling it worse than startling audacity? What does it matter if we fall into inconsistency? What does it matter if we say that our coasts can generate maritime zones but deny that capacity to the coasts of the islands of our opponents? What does it matter if we say that it is not necessary for Honduras to make a formal claim to its continental shelf, but nonetheless challenge El Salvador and Nicaragua to show when they made their claims? What does it matter if we cut corners when measuring the coastlines of El Salvador and Nicaragua in the Gulf? What does it matter if we disregard the rules about the confidentiality of diplomatic negotiations and present evidence of proposals of El Salvador for the general settlement of the dispute between us? What does it matter if we cast doubt upon the sincerity

and generosity of El Salvador in putting forward proposals that would have given us to access to waters where previously we had none?"

The answer is, it does not matter at all. Honduras wants more than it has got. To use the language of the Honduras Reply, "it is no longer acceptable to Honduras to confine the rights of Honduras as a coastal State to mere freedom of navigation". It is in that light, Mr. President, that the Court must see the present part of this case. We are not here concerned with a simple and agreed approach to delimitation. This is a case about entitlement in which Honduras is asking for more than it is entitled to.

I turn, Mr. President, to the task of the Court (item 2). Once again we have to return to the subject of the task of the Chamber. Professor Bowett has argued that notwithstanding the realization by Honduras at the time of the negotiation of the compromis that El Salvador could not sign an agreement expressedly providing for delimitation, Honduras was nevertheless prepared to subscribe to a provision that did not provide for delimitation. And now Honduras pretends that in so doing it really believed that the question, as formulated, covered delimitation. Professor Bowett accused El Salvador of bad faith. But, surely, that is a charge that should be levelled against Honduras. If Honduras knew that El Salvador could not accept delimitation, then clearly El Salvador did not accept it. Foreign Minister, Ricardo Acevedo Peralta, explained in his affadavit why that was so.

There is another respect in which Professor Bowett made a significant contribution to the question of the task of the Court. El Salvador has repeatedly argued that before a dispute relating to delimitation is ripe for settlement by the Court, there must have been a negotiation about it. The requirements of negotiation in the context of continental shelf delimitation are quite clearly laid down in the *North Sea Continental Shelf* Judgment (pp. 47 and 48). And I hope you will forgive me for reading a passage, which I imagine must be familiar to you, but there are so many points in this case that I venture to think it is worthwhile recalling some of the more obvious ones. This is a passage from page 47, where the Court has laid down certain equitable principles in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, and I read sub-paragraph (a):

> "The Parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement. They are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."

And then, at the bottom of the same page, the Court cited authority in the following terms:

> "Defining the content of the obligation to negotiate, the Permanent Court, in its Advisory Opinion in the case of the *Railway Traffic between Lithuania and Poland*, said that the obligation was not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements, even if an obligation to negotiate did not imply an obligation to reach agreement. In the present case, it needs to be observed that whatever the details of the negotiations carried on in 1965 and 1966, they failed of their purpose because the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable in consequence of a rule binding upon the Federal Republic, saw no reason to depart from that rule, and equally, given the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic could not accept the situation resulting from the application of that rule. So far, therefore, the negotiations have not satisfied the conditions indicated in paragraph 85 (a), but fresh negotiations are to take place on the basis of the present Judgment."

Honduras has, it must be recognized, never disputed the obligation to negotiate, but it has said that there was sufficient negotiation in the Joint Commission. It must be plain to the Court, Mr. President, that there never has been negotiation about the delimitation scheme which my learned friend expounded to the Court yesterday. If one compares the proposals made before the compromis with the proposals that are now made, it will be found that they are not the same proposals.

The scheme put before the Court yesterday, by way of delimitation, is a complex one, and Honduras admits that it is not the only possible scheme. My friend said, "I must make it quite clear that what I am illustrating is a method". He never said that that method had been put by Honduras to El Salvador in the negotiations. And it never was. So the Court is being asked to determine a boundary on the basis of an indication of a method that neither in itself nor in its various possible products has been discussed between the Parties.

My friend went on to say "You can - you, the Chamber - can reflect other, less tangible factors, and it is this exercise of judgment which Honduras expects from the Court". That is not the language in which a Party ought to bring a dispute about delimitation to this Court. There should, at

the least, be evidence that the Parties have talked about that approach and have not been able to agree on it or on others in its place.

Finally, in this connection, I should observe that the principle applicable to the interpretation of compromissory clauses is that they are to be interpreted in favour of the Party said to be accepting jurisdiction, and that is, of course, because the Party accepting jurisdiction is to that extent limiting its sovereignty. The burden lies upon the Party alleging the existence of jurisdiction to establish it positively, not upon the Party against which it is asserted to show that it is not subject to the jurisdiction. The burden, therefore, in respect of showing that the Chamber is entitled to proceed to a delimitation, rests upon Honduras, and Honduras has not discharged that burden.

I turn now, Mr. President, to the heading: "Substance: the chronological resumé of the principal elements", which is item 5. It is impossible for me to follow the pattern of argument set by my learned friend yesterday. If I were to attempt to do so, the Court would get a very incomplete picture of the issues that are pertinent at this stage of the case.

Professor Bowett has presented issues in a very partial way, and, in a number of instances, has quite mis-stated the arguments of El Salvador. The simplest thing, therefore, for me to do, in order to present the El Salvador case in a cohesive manner, is to approach it within the framework that I have set out in the outline.

I will proceed by recalling first the principal legal and historical considerations underlying the El Salvador case on the status of the waters in the Pacific. This, Mr. President, is not going to be a general lecture on the Law of the Sea. It will be an attempt to relate the law very specifically to the issues in the present case. In so doing, in dealing with the Pacific, I cannot completely cut off the status of those waters from the status of the waters within the Gulf. And so, to a small extent, I shall have to cover ground that has already been trodden. I will attempt to do so briefly, and I must ask you to forgive me.

I begin by recalling El Salvador's basic position, that there was a condominium in the Gulf of Fonseca from the time of independence. I go on to refer to the Cruz-Letona arrangements. At that time the Gulf of Fonseca was probably viewed as the smaller bay, with a closing-line running on the

north-east side of the islands of Meanguera and Meanguerita. Certainly, the Cruz-Letona delimitation showed what Honduras then regarded as the limits of its oceanic interests.

We come next to the Gamez-Bonilla Treaty of 1894 between Honduras and Nicaragua and the delimitation made thereunder in 1900. In this connection, there are four sub-points. The first is that the waters of the east and central portion of the Gulf of Fonseca were divided between Honduras and Nicaragua on the basis of the configuration of their respective coastlines. In the case of Honduras, this coastline was the real coastline, running from the terminus of the land boundary in the east towards the north-west, running from the terminus of the land boundary on coast there to the north-west, of the real coastline and then curling round to take account of the island of Tigre. When this real coast, used by Honduras in 1900, is compared with the coastal front that Honduras is using for its experiment in delimitation method - what I may call for convenience the "kite" - it will be seen that the length of the real coast actually used is equal to just about two-thirds of the whole coastal front deployed by Honduras as the basis for its claim in the Pacific beyond the closing-line of the Gulf. In other words, and I will be saying it again in a moment, Honduras used up two-thirds of its coast in the process of settling its boundary with Nicaragua in 1900. This division was seen by Honduras and Nicaragua as exhausting the scope for the division of waters between them. The claim of Honduras to waters in the Pacific had, at any rate in relation to Nicaragua, been satisfied in full.

Once this was done, the capacity of the coasts of Honduras to generate maritime rights in that region was exhausted. As Professor Dupuy junior asserted, the coasts could not be used twice and I will read you a few lines from the speech that he made on Tuesday 4 June, which appears in the *compte rendu* in French of that day C 4/CR 91/39 at page 35 of the French text and page 25 of the English text. He said

> "The general consequence of the existence of the line of 1900 for the preceding delimitation is that the Honduran coastline on which it was based cannot be used once again. One could, *a priori*, consider that this is a pity for Honduras since, of the three States within the Gulf, it possesses the longest coastline. But that is the situation. It is not possible to use twice a coastline that, in accordance with the most technical rules of the law of maritime delimitation, is irrelevant here inasmuch as, in any event, it does not face the coast of El Salvador but that of Nicaragua."

Well I am not concerned with that last phrase. I am concerned with the general admission that

the coastline may not be used twice.

Honduras has sought to cast doubt on this by referring to a recent agreement, of which we have never seen the text, with Nicaragua, which, Honduras says, will involve some negotiation about - and it is vaguely put - delimitation. This reference has been made in such a way as to suggest that the delimitation will relate to the Gulf and will somehow extend the 1900 line further to the south - perhaps towards Farallones. This I understand is wrong. The delimitation refers to land boundary delimitation and no development is foreseen in relation to the Gulf and counsel for Nicaragua will no doubt confirm this.

The third sub-point in this connection, that is to say the 1900 delimitation, is that the waters of Honduras and Nicaragua on either side of the 1900 delimitation line are respectively internal waters, territorial sea or contiguous zone, according to their location and their national laws.

And the fourth sub-point is that the 1900 Treaty is a boundary Treaty. As such it falls within the terms of Article 62 of the Vienna Convention on the Law of Treaties of 1979. It is preserved from the effect of fundamental change of circumstances. So the fact that there have been significant developments in the Law of the Sea since 1900, cannot effect the continuing validity of the 1900 Treaty and delimitation. This Treaty must therefore stand as a legal barrier to any south-westerly effect that Honduras may seek to give to the whole expanse of its coasts extending even to the west of point Y at the apex of Honduras's imaginary kite. In other words I am saying that the delimitation between Honduras and Nicaragua that starts there and runs right through to there, effectively screens Honduras from the whole of this side of the Gulf of Fonseca - by this side I mean the eastern and south-eastern part of the Gulf.

This means that if there is to be any entitlement of Honduras to Pacific areas, on the basis of the Honduran coastline in the Gulf of Fonseca, it must be limited to the area of the coast west of the Island of Tigre. In other words it has to be limited to the generative effect, such as it may be, of this bit of coastline in the north-western part of the Gulf of Fonseca. It is a very short section and of course, as immediately will be seen, the effect of that generation is masked by the El Salvador islands of Zacatillo, Martin Pérez, Conchaguita, Meanguera and Meanguerita. A point to which I

shall return later.

And so I come next, Mr. President, to the 1917 Judgment (item 8). Once more I recall very quickly the main points that are pertinent to the status of waters beyond the closing-line. The Judgment recognized that the Gulf of Fonseca is a historic bay with a special régime. Secondly, it held that its waters are subject to condominium. Thirdly, that the condominium is qualified, or limited, by, in the first place, the acknowledgment of exclusive waters regarded by the Central American Court as territorial waters and extending to 3 miles from the coast. And secondly, by acknowledgment of a special jurisdictional zone of 9 miles and thirdly the status of the remaining waters is a matter of controversy. But the better view to which El Salvador subscribes is, that those waters are not internal waters.

And it is I think pertinent to recall in this connection an authority which I am not sure has been cited to the Court. But it is an authority of some weight, both intrinsically and extrinsically, as I will suggest. This is the memorandum prepared by the Secretariat of the United Nations in 1958 on historic bays, which appears in the Official Records of the 1958 Conference on the Law of the Sea, Volume I, Preparatory Documents, and the extract that I am going to read is from page 27 and it is an important extract, so forgive me for the fact that it is a little bit long. Paragraph 132:

> "The status of the Gulf of Fonseca, the waters of which abut on the territories of Nicaragua, Honduras and El Salvador, was settled by the Judgment delivered on 9 March 1917 by the Central American Court of Justice. This Judgment, although confirming that the waters of the Gulf are of a historic character, does not attribute to them the characteristics of internal waters. Rather it tends to class them as territorial sea. The Judgment recognizes that the three riparian States are co-owners of the waters, except as to the littoral marine league which is the exclusive property of each.
>
> This means that the waters of the Gulf are divided into two parts. The first, which begins at the shoreline and continues for a distance of one marine league, is the territorial sea of each of the coastal States. The second, containing all the remaining non-littoral waters of the Gulf, is an area of territorial sea belonging to the three States in common. The Court held that "as to a portion of the non-littoral waters there was an overlapping or confusion of jurisdiction in matters pertaining to inspection for police and fiscal purposes and purposes of national security and that as to another portion thereof, it is possible that no such overlapping and confusion takes place. The Court decided therefore "that as between El Salvador and Nicaragua, co-ownership exists with respect to both portions since they are both within the Gulf. With the express proviso, however, that the rights pertaining to Honduras as co-parcener in those portions, are not effected by that decision.""

And, of course, El Salvador has already suggested that those rights of Honduras are minimal and really probably amount to no more than the general entitlement as a co-riparian to insist that another co-riparian not permit any foreign Power to establish a naval base in the area. But the passage from the memorandum goes on (para. 133):

> "The Judgment of the Central American Court on the status of the Gulf contains two essential points:
>
> 1. As historic waters, the waters of the Gulf belong to the coastal States;
>
> 2. Those waters have the characteristics of the territorial sea and not of internal waters. With reference to this last point - I am still quoting from the memorandum - Gidel, whom both sides recognize as a preeminent authority in the field, remarks:
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> "The Judgment of the Central American Court attributes to the waters of the Gulf the characteristics not of internal waters, which their status as a historic bay would normally have required, but of the territorial sea. Now, this is a truly remarkable departure from the logical rules governing historic bays.""

If I may venture a comment, a departure it was. Now, I said that the quotation from the memorandum was interesting both intrinsically, as you will have just seen, and extrinsically. And by extrinsically I mean in the sense that it appears to have evoked no reaction from either Nicaragua or, more to the point, Honduras. From the way in which my learned friend spoke yesterday about the need for protest at a constitutional provision or legislation, you might have thought that the requirements of protest would have extended then to a statement by the United Nations Secretariat that was so evidently not in conformity with the thinking of Honduras. But so far as I am aware, there never was such a protest. And the fourth sub-point, still under the heading of the qualifications of condominium in the 1917 Judgment, is the acknowledgment of the ability of islands to generate the same rights as mainland coasts.

The fifth point is the acknowledgment that although the waters of riparians mingle, the waters on the Ocean side of Meanguera and Meanguerita fell to be shared between El Salvador and Nicaragua and this, of course, was also the result of the Court's taking account of the 1900 delimitation.

Sixthly, the Court acknowledged that the closing-line of the Bay was not a baseline generative

of a further territorial sea and the contiguous zone outside the Gulf. Now, this is to be gathered, as I suggested earlier, from the terms of Question 13 and the answers thereto. You will remember that Judge Gutierrez Navez, who dissented from the majority in the answer to this question, supported the view that the closing-line was a baseline and the majority did not agree with him. Well, my learned friend, Professor Bowett made no reference at all to this point, but insisted that the closing-line must be a baseline. The proposition that the closing-line of the Gulf of Fonseca is a baseline cannot be supported. As just indicated, the 1917 Judgment rejected that proposition. Honduras assumes also that the waters within the closing-line are internal waters, which there are not. And thirdly, it would create a remarkable situation if the closing-line were a baseline; one would have a situation in which one had an inner belt of territorial waters along the coasts of the riparian States, an outer belt of additional jurisdiction, the remainder of the waters held as territorial waters in common and then a baseline and then further territorial waters, individually held presumably, and then another contiguous zone and then, eventually, the high seas. That would be a very strange concoction.

My friend attached much importance to the concept of a bay closing-line as a baseline, saying that it reflects the coasts that lie behind it. Well whatever may be the truth of this in relation to ordinary bays, surrounded by the territory of a single State, there is no authority that supports its extension to a bay with several riparians.

And so, I pass to sub-heading (e) the evolution of the continental shelf doctrine (item 9).

All are agreed that the concept of the continental shelf was in being in 1950. All are agreed that the concept operates *ipso jure* and that, therefore, there is no need for a formal claim. Nonetheless, for some reason not explained, Honduras takes the view that while it is not under an obligation to make the declaration, El Salvador and Nicaragua were. The truth of the matter is that the rights of all three States, such as they were, came into being simultaneously. Honduras did not acquire any special priority. It was argued yesterday that because Honduras had asserted in its Constitution of 1950 that its territory included the continental shelf in the Atlantic and the Pacific Oceans, it had therefore acquired some kind of priority of right. It was called a vested right or an acquired right, to which international law and the Law of the Sea also attributes a special solemnity.

And it was claimed, in effect, that El Salvador was in some way trying to do Honduras out of a right that Honduras had, a right so it seems of a greater quality than the corresponding rights of El Salvador and Nicaragua. And great stress was laid upon the absence of protests by El Salvador and Nicaragua at this constitutional provision.

Now it is true El Salvador did not immediately protest. And what are the factors relevant to the situation. One is that Honduras was claiming nothing so unusual. The Pacific Ocean. If that had been the only claim made in the Constitution, then it might perhaps have occasioned reaction. But it was the second part of a claim of which the first part was to the Atlantic. And knowing that Honduras's real seaboard lay on the Atlantic, El Salvador was hardly likely to see much cause for concern in the paper linking of a claim in the Pacific. It is part of the hyperbole of sovereignty to be understood in terms of the common ethos shared by the peoples of Central America. Paper claims are known and tolerated, but they do not make for special rights. El Salvador knew perfectly well what Honduras meant by the Pacific. If Honduras wanted to assert continental shelf rights in the Gulf of Fonseca that was okay by El Salvador. There was not much room for it to do so, but the gesture of description in the Constitution was understandable.

The second consideration pertinent here is that there is no rule of international law that requires protest against the mere enactment of legislation only against its implementation. Such claim as may be seen in the Honduras Constitution of 1950 was not accompanied by any activity specifically related to the continental shelf. There was never any announcement of an intention to develop the resources of the continental shelf. There was no opening up of the area to competitive bidding. There was no award of exploration of exploitation licenses, nothing. So there really was nothing to protest against.

The third pertinent factor is the hesitation felt in diplomatic circles the world over at making protests unless there are deemed to be essential. Protests can introduce strain into relationships. They are irritants. El Salvador is a territorially small neighbour of Honduras. It is dependent upon Honduras in a number of important respects, particularly for access to the Atlantic. One only has to look at the collection of maps in the folder presented by Honduras yesterday at Figure 8 to see the

relative territorial positions of the two Parties. That is the map Figure 8 which contains Central America from Mexico to the Equator and you can see in the centre of the map the territory of El Salvador. You can see also the territory of Honduras with its very large Atalantic coastline, and you can see that there is no way in which El Salvador can get to the Atlantic, except most conveniently through the territory of Honduras. And moreover because of the existence of the Gulf of Fonseca, Honduras is an important transit route for El Salvador in reaching Nicaragua. Moreover at that time El Salvador was a partner of Honduras in the Central American Common Market. Therefore El Salvador was disinclined to add to the complications of relationship with a larger neighbour by a protest about a subject that did not at that time have any real content.

In any case one must ask oneself, supposing that protest is required how quickly does one have to protest? Please recall that the 1950 Constitution did not endure for more than seven years. It was replaced by another Constitution in 1957, a Constitution which did not link the claim to the territory of Honduras as including part of the continental shelf in quite the same specific manner as did the 1950 Costitution. Something much more muted was introduced. My friend Professor Bowett did not refer to the replacement of the 1950 Constitution in 1957, and this omission could perhaps have left the Chamber with the impression that the 1950 Constitution remained in place for a long time. It was replaced in 1957 and the 1957 Constitution was replaced in 1965, again in similarly muted terms. It was not until 1982 that we get the first express and blunt assertion of rights by Honduras, through the wording of its Constitution, outside the Gulf of Fonseca. Article 11, paragraph 5, provides

> "So far as the Pacific ocean is concerned the foregoing measurements - that is the measurements of the territorial sea economic zone and continental shelf - shall be taken from the closing-line across the mouth of the Gulf of Fonseca outwards to the open sea."

1982, Mr. President, that was the first time that was said, and the very fact that this provision was then inserted is itself of great significance. Why should it have been necessary for Honduras to insert this provision if this had been the position all along, or if this had been seen as the position all along? Why had Honduras not inserted it in an earlier constitution? The fact of the matter quite

simply is that before 1980 Honduras didn't really care. It saw no advantage in so grossly extending its claims. But in 1980 we see the evidence of its growing appetite eventually reflected in the 1982 Constitution. The 1980 evidence is the law concerning the exploitation of the national resources of the sea of 13 June, which appears in the annexes to the Honduras Memorial II.II.4. Even prior to 1982 El Salvador had expressed its views upon the position. It did so first when Honduras asserted its claim in a multilateral form at the Law of the Sea Conference. Honduras yesterday decried this as if it were an unimportant episode in an unimportant conference. But it was not unimportant in either way. The Law of the Sea Conference was an instrument through which development in the Law of the Sea in favour of coastal States, on which Honduras so strongly relies, was crystallized.

But after 1982 El Salvador had another occasion to protest and this came somewhat later and perhaps may not been seen as of major importance. What is important is the way in which Honduras has presented that episode to this Court or rather, I should say, has *not* presented it to this Court, but has rather suppressed it and suppressed in a manner that can only be seen as deliberate.

The annexes to the Memorial of Honduras (annex V.I.9) contain the text of Minutes of a Meeting of the Joint Commission, and if you were to look at this text you would see that it ends at an item VIII. It ends in such a way, Mr. President, as not to suggest at all but rather to counter-suggest that there was any further relevant content to those minutes. But if one turns to the original in Spanish of those minutes, which is item 2 in the blue-backed folder which has been placed before you, you will see first of all a short extract in English and then you will see the whole of the text of the relevant minutes, and you will see if you turn to page 9 of that typescript in Spanish that there is indeed, after item VIII, an item IX and items X, XI, XII, XIII, until eventually at page 12 you see the signatures of all those present, both Salvadorian and Honduran, who authenticated the text. Mr President, with your leave I would like to read to you from the English translation of item IX which appears in your folder.

> "In its turn, the Salvodorian Section of the Joint Frontier Commission at this meeting places on the record of the meeting its position with respect to what is provided in the Constitution of the Republic of Honduras."
>
> "By Article 18 of the General Treaty . . . it is established as a function of the Joint Frontier Commission 'to determine the juridical situation of the islands and of the maritime spaces'. By Article 37 of the same Treaty a period of five years, expiring on

10 December 1985, was established in order that the Commission, as supreme organ, might resolve this problem, and, in the contrary event, the matter would go to the jurisdiction of the International Court at The Hague."

Now comes the important paragraph.

"Notwithstanding the above, after the said Treaty between El Salvador and Honduras entered into force, Honduras has provided in its Constitution, in a unilateral form, in Article 11, paragraph 5 - the very paragraph I read to you a few minutes ago - that there belonged to the State of Honduras the territorial sea, the contiguous zone, the economic zone, the continental shelf, the bed and subsoil of the Pacific Ocean, as from the mouth of the Gulf of Fonseca, for 200 nautical miles. With this attitude, Honduras has attempted to resolve unilaterally the juridical situation in the Gulf of Fonseca and the maritime spaces in the Pacific Ocean, and has altered the juridical situation of these zones, a situation which was especially indicated by the Judgment of the Central American Court of 1917 by reason of the conflict with Nicaragua over the signing of the Bryan-Chamorro Treaty.

In consequence, the members of the Salvadorian Section of the Joint Frontier Commission at this meeting expressly place on the record their disagreement with the provision in the Constitution of Honduras, in a unilateral form, for rights over these maritime spaces. Something which not only conflicts with the provisions of the General Treaty, taking over the functions of the Joint Frontier Commission, but also amounts to a contradiction of the Constitution of Honduras itself, Article 18 of which requires that, in the event of any conflict between the said Treaty and the law of Honduras, the provisions of the Treaty prevail."

They expressly place on the record their disagreement with the provision in the Constitution of Honduras. Mr. President, could one ask for a clearer protest? And what happened to it? At any rate, what happened to it in the documents presented to this Court by Honduras?

Now, Mr. President, I can move on to item 10, the relevant elements of law relating to the continental shelf. We did not hear much law from Honduras, but this is a case for going back to essentials. There is, of course, a significant jurisprudence on the subject of the continental shelf, as well as two Conventions, those of 1958 and 1982. What are the relevant rules to be derived from the Conventions and cases?

First, there is the definition of the continental shelf (item 11 on my outline). We start with the 1958 Convention on the Law of the Sea, which contains a general definition in Article 1:

"For the purposes of these Articles, the term continental shelf is used as referring to (a) the seabed and subsoil of the submarine areas adjacent to the coast, but outside the territorial sea to a depth of 200 metres or beyond that limit to where the depth of the superjacent waters admit to the exploitation of the natural resources of the said area, and (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

That is the first basic provision.

And then, in the 1982 Convention, we find, at Article 76, a definition, slightly different in terms:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin."

And so on, the rest not being relevant to our immediate needs.

I invite the Chamber to recall the importance that was ascribed to earlier, but similar drafts of the definition in the 1982 Convention, in the separate opinion of the President of this Chamber, Judge Sette-Camara, in the *Libya/Malta* case, the relevant page of which is page 68 in the Court's Reports for 1985.

Passing to item 12, there are certain basic concepts that have evolved in this connection. The first important concept is the distinction between entitlement and delimitation. It is a clear distinction. It has been drawn in the cases as a necessary preliminary to dealing with the task of delimitation. I should emphasize one dominant feature present in all the cases except this one. Every previous case has been avowedly about delimitation and has not raised the question of entitlement. In none of the earlier cases was it ever doubted that each Party had an entitlement, of a material kind, to a continental shelf. Each case started from that position, and one only has to look at the way in which the compromis in each case formulated the question.

Very quickly. The *North Sea Continental Shelf* case: what principles and rules of international law are applicable to delimitation as between the Parties in the area of continental shelf which appertains to each? The *Anglo-French* case: what is the course of the boundary or boundaries between the portions of the continental shelf appertaining to the United Kingdon, the Channel Islands and to France, respectively? *Libya/Tunisia*: what principles and rules may be applied for the delimitation of the area of continental shelf appertaining to Libya and Tunisia? *Gulf of Maine*: what is the course of the single maritime boundary that divides the continental shelf and

fishery zones of Canada and the United States? *Libya/Malta*: what principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to Malta and Libya? *Guinea and Guinea Bissau*: three questions. Did the 1886 Convention between France and Portugal establish the maritime boundary between their respective possessions in West Africa? What judicial effect can be attributed to certain documents? And then, according to the answers to questions one and two, what is the course of the boundary between the maritime territories appertaining, respectively, to Guinea and Guinea Bissau?

So in none of them, Mr. President, was there a question of entitlement. All of them, in express terms, sought an answer on delimitation, a point to be borne in mind in approaching the interpretation of the task of the Court. Would it not be strange if, in the one case where there is no reference to delimitation, the Court should actually have been asked to delimit, in contrast with the way in which the Court was asked to delimit boundaries in the earlier cases?

Nonetheless, despite the fact that these earlier cases are about delimitation, they do shed some light on the general law, especially in two respects. The first of these is the distinction between entitlement and delimitation.

And so I come to item 14. Here, it is pertinent to look once again at the *North Sea Continental Shelf* case. I read from page 22:

> "Having referred to the contentions of the Federal Republic, the Court said it does not feel able to accept them, at least in the particular form they have taken. It considers that having regard both to the language of the Special Agreements and to more general considerations of law relating to the régime of the continental shelf, its task, in the present proceedings, relates essentially to the delimitation, and not to the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State, and not the determination de novo of such an area."
>
> "Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable or even identical."

And I move then to a short passage at the bottom of the same page:

> "The delimitation itself must indeed be equitably effected but it cannot have as its object the awarding of an equitable share or, indeed, of a share as such at all, for the fundamental concept involved does not admit of there being anything undivided to share out."

Now, Mr. President, that is a very important statement. The Chamber will, of course, recall the impressive and strong way in which there was developed on behalf of Germany the argument that it was entitled to a just and equitable share. And it is precisely that proposition that the Court rejected and set the law on its present course. We have often heard it said, perhaps by slip of the tongue, but said nonetheless, in this case, that what Honduras is looking for is an equitable share. I am talking about equitable shares here. All that Honduras is entitled to is, if it can show an entitlement to continental shelf, then it is entitled to a just and equitable share of that entitlement. But it still has to show the entitlement.

And so, I come to the next point, item 15, which is the relation between natural prolongation and proximity.

Here again, we have to look at the *Continental Shelf* case (p. 31), and there is this important passage:

> "What confers the *ipso jure* title, which international law attributes to the coastal States in respect of its continental shelf, is the fact that submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural or the most natural extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of another State, it cannot be regarded as appertaining to that State. Or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension even if it is less close to it."

So, the Court is saying that mere proximity is not enough. The extensions must be natural. I am sure my friend would not dispute that. Let us look for a moment, if we may, at the observations of Judge Sette-Camara in his separate opinion in the *Libya/Malta* case. There are certain passages (pp. 62 and 63) which I should like very briefly to mention.

At the bottom of page 62, the learned Judge said:

> "The 1969 Judgment of the Court certainly continues to be a milestone in the evolution of the concept of the continental shelf."

And then at page 63, he said:

> "The Judgment contains the recognition, moreover, that such a natural prolongation is a fact of nature so that geography cannot be ignored when trying to identify the continental shelf of a given country."

And then he quotes from Paragraph 95 of the 1969 Judgment.

> "The appurtenance of the shelf to the countries in front of whose coastline it lies, is therefore a fact."

I shall come back to the application of those principles presently.

And so I can move to item 16, which is the development in the Law of the Sea, 1958-1982, apart from the continental shelf.

And here I merely need to say that we must notice first the acceptance of the idea of 12 miles of territorial sea. Article 3 of the 1982 Convention provides that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

While I am at this point, I should of course recall that the expression "baseline" as determined in accordance with this Convention covers the case of bays "the coasts of which belong to a single State" (Art. 10, para. 1). These provisions do not apply to historic bays as is laid down in paragraph 6 of Article 10.

One also ought to bear in mind that, for the purposes of continental shelf delimitation and, of course, of entitlement, the 12 miles do not actually have to be claimed. It is the potential to claim 12 miles that matters. This was quite clearly stated by the Court of Arbitration in the *Anglo/French* case (para. 187).

The second development that has to be mentioned in this period is that of the exclusive economic zone, the entitlement to which is governed by Article 55 of the 1982 Convention. It is now, I think, generally recognized that economic zone does not adhere *ipso jure* to the coastal State but must be claimed by it. And the same rule relating to delimitation for the economic zone is

applied as to the continental shelf.

I can now pass on, Mr. President, to the heading of negotiation, the final heading that comes under the chronological resumé of principal elements (item 17).

Here we have to recall the negotiations that took place between the two sides. I should emphasize that I am not focusing on the negotiations as an element claimed by Honduras to be relevant to the determination of the task of the Court. Enough has already been said about that. What I am referring to now is the extraordinary introduction into these proceedings of the proposal made by President Duarte and the use of that action of El Salvador as a basis for a plea of estoppel. And this is on a quite different plane of impropriety to the recourse by Honduras to the negotiations as an element in the interpretation of the *compromis*. That was bad enough; this is very much worse. It represents a deliberate disregard of a fundamental principle of the relationship between negotiation and judicial settlement. Proposals for compromise settlement made during negotiations should not be referred to or invoked in subsequent and related judicial proceedings. I need hardly repeat the reasons for this.

Obviously one cannot undo the element of prejudice that has been caused by the introduction into these proceedings of such material. And no doubt that was fully in the mind of Honduras when it introduced the material. Once in, it cannot be disregarded. But it is open to this Court to refuse to see in the negotiating proposal anything that could give rise to an estoppel. I hope that in so doing the Court will also condemn the impropriety of introducing this material and of using it as Honduras has done. And I hope that the Court too will, by a resounding reaffirmation of the basic principle and of the considerations underlying it, remind States generally of their duties in this connection. Failure by the Court to do this, in a situation which requires a response from the Court, will undoubtedly be noted and commented upon. Such a failure to condemn the action of Honduras would be regarded as a licence to States to introduce such material at will.

Given the primacy accorded to negotiation as a means of settling disputes, the devastating consequences of the realization by States that compromise proposals can later be held against them hardly needs to be spelled out.

Even so, and I come to point 18, a word of response is required to the allegation that the Duarte proposals amount to a recognition of the rights of Honduras in the Pacific.

I recall first the clearly stated, without prejudice, character of the proposal. Second, I recall that it was not an offer of sovereign rights but an offer to share in the use of the waters in question. Third, in direct rejection of what Honduras has said, El Salvador can properly proclaim that the proposal was indeed a gesture of magnaminity and of friendship to a neighbouring State, with which El Salvador has every interest in maintaining close, co-operative and warm relations in loyalty to certain primordial elements in the Central American situation. It may be difficult for some to recognize the value and role of ties of friendship, loyalty and mutual support. But with many, these virtues exist on the diplomatic, no less than on the personal, level, and it was in this spirit of constructive conciliation that the proposals by El Salvador were put forward, and I venture to believe that the Court will recognize them as such.

It would be ironic, indeed, if what El Salvador intended to be a generous and open-handed gesture, intended to bring to an end an irritant in the relationship of the Parties, were now to be turned against it as precluding denial of Honduras's brazen claims in the Pacific.

Well, Mr. President, that would be a convenient point at which to break, if you would permit me to do so.

The PRESIDENT: I thank Professor Lauterpacht. We will take a break for 15 minutes.

The Chamber adjourned from 4.10 p.m. to 4.30 p.m.

The PRESIDENT: Please be seated. The sitting is resumed and I call Professor Lauterpacht again.

Mr. LAUTERPACHT: Mr. President, we come now to the final section of my argument under the heading of substance, the systematic response to the principal contentions of Honduras (item 19).

This will be an attempt to weave together the considerations that I have so far presented into a

systematic response to the case of Honduras in the Pacific.

The case of Honduras is quite simply that it is trying to reconstruct geography. It is trying to equate its geographical position with that of States like Guatemala, El Salvador, Nicaragua, that directly face onto the Pacific. In so doing it invites the Court to disregard the principal element which control this case and make it special. I shall comment on each in turn.

Firstly, the question of coasts, item 21. Honduras rests its case principally on the claimed generative effects of its coasts at the back of the Gulf of Fonseca. I would invite the Court to look at those coasts in figure 1 of the folder that was presented to the Court so helpfully by Honduras yesterday.

I have deliberately used this map because I would like the Court to be aware of the false visual impact that it can make or the impression it conveys. I emphasize that I am not commenting on this map by way of discussing delimitation. I am looking at the map only for the purpose of determining the legal status of the maritime spaces.

The coasts of Honduras do not divide into two in the manner indicated on the map. The map in front of you is the same as the map on the easel. The kite, this construct here, is a geometrical fantasy. The correct way of looking at the coasts of Honduras is, it is true, in two parts. But two parts different from those depicted by the straight lines on the kite. One part, as I have already indicated, is the line of the actual coast running north-west from the terminus of the land boundary as far as Tigre. And then embracing the east and south coasts of the Island of Tigre to the southern-most point of Tigre which was used as the base-point for determining the mid-point between Tigre and Punta San José in the 1900 delimitation.

But, anyway, the first part of the coast reaches as far as the south of Tigre. And the whole of that coast was used in the 1900 delimitation to generate waters that are in part territorial sea, exclusive to Honduras, and in part contiguous zone. The function of this stretch of coast is, as I have already said, exhausted.

So now we come to the other part of the Honduras coast. What remains after we have subtracted the part that I have just described? This part of the coast lies between the island of

Zacate Grande, just to the north of Tigre, and the mouth of the Goascorán River. This part of the Honduran coast has not been used for the purposes of delimitation with Nicaragua - it is, so to speak in delimitation terms, still unused, save for Cruz-Letona, which has not entered into force.

There are of course two possible months of the Goascoran River. If the eastern mouth, for which El Salvador contends, is the correct mouth, then the amount of coast at the back of the Gulf available to Honduras for use as a source of coast-generated rights is very short. If one were to adopt the western mouth of Goascorán as the terminus of Honduras's shore, that would add, perhaps, an extra third to this sector that lies to the west of Zacate Grande. But this additional third, this western addition that covers the disputed area of the Goascoran delta, of course does not face directly into the Gulf. It faces the shores of El Salvador that lie opposite to it. And so they can, in any event, be disregarded in terms of generation of coastal rights out in the Pacific.

So what we are left with is that very short section, very short indeed, between Zacate Grande and approximately the eastern mouth of the Goascoran River.

Two comments need to be made on the potential of this short coast. The first is that, even if it could generate rights in the Pacific Ocean, it could do so only from its actual location: that is to say, at the back of the Gulf of Fonseca. It is from there that the claim, if any, of Honduras must be measured, if it is to be measured at all. The coast cannot be brought forward into the Pacific: that is certainly no part of any task of the Court, to re-fashion geography, either for the purpose of entitlement or even for the purpose of delimitation.

Secondly, this short shore is effectively shielded or masked from the open sea, the open ocean, by the islands of Zacatillo, Isla Martin Pérez, Conchaguita, Meanguera and Meanguerita and even, to some extent, by Farallones.

So one asks how could this sector, which is represented by the spread of my hand on the map, between the eastern mouth of the Goascorán and the Island of Zacate Grande, how can this area of notional Honduras coastline generate rights out into the Pacific Ocean without being confronted by these islands of El Salvador? Nor can it generate rights that are effective by turning in a now entirely different direction, towards Nicaragua, because it would eventually just hit the Nicaraguan

north-western shore.

So my submission is, that the coast there is incapable of generating rights into the Pacific and that is because of the barrier of islands, to which I shall come in a moment. But as I am speaking of coasts as generative of rights, I should, of course, put to you the converse proposition. Just as Honduras relies on its coast to generate rights in the Pacific, so El Salvador and, as I understand it, Nicaragua, rely upon their coasts to generate rights in the Pacific. And, if I may say so, it seems to me that the rights that are generated by these two major promontories or headlands of Nicaragua and El Salvador are much more natural and dominant than are the rights that are generated in so weak a way by the limited relevant shoreline of Honduras.

And so I turn to the islands (item 22).

The islands form part of a chain that is close to and effectively part of the El Salvador mainland. They are, in common parlance, appertenant to El Salvador. And they were so recognized by the experts who were quoted in the 1917 Judgment and, indeed, by the 1917 Judgment itself. What does Honduras want to do? It wants to overleap the islands and to this end, it uses, or seeks to use, the delimitation authorities. It is seeking to use the delimitation authorities for the purpose of establishing an entitlement. Now, that requires showing that the natural prolongation of the Honduras coast passes through, under or beyond the islands in some way. And in geographical terms, it certainly does not do so. The islands are there as an objective physical fact: you cannot get away from them, they are there as a barrier and they are effectively part of El Salvador. Honduras has never attempted to show - quite reasonably, not attempted to show - any lack of unity between the islands and El Salvador, whether geological or geographical. Now, it is true that Honduras has attempted to show that Meanguera and Meanguerita belong to Honduras, but that, to use a favourite phrase of counsel for Honduras, cannot be treated as a very serious argument. But even if one accepts the delimitation material as relevant, that material does not help Honduras. Let us look at the examples that were cited by Professor Bowett yesterday. It is appropriate to note the terms that he actually used. I am reading now from the typescript with which he so kindly provided me and which I have not yet had an opportunity of comparing with the compte-rendu. But he said at a

certain point:

> "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."

Now, he said "there is no reason why a coast at the back of a bay should not be entitled to a natural prolongation". To make his point, he should have said, "there is every reason why a coast at the back of a bay should be entitled to a natural prolongation". But he did not say that, because he would not have been able to sustain it. His authorities fall into two groups: first, those that deal generally with the position of coasts at the back of bays and gulfs, and, second, those that deal specifically with islands in a comparable position.

Let us look first at his authorities on the position at the back of Bays and Gulfs (item 23).

There are two such authorities which he cited yesterday. One is the *North Sea Continental Shelf* case, the other is the *Gulf of Maine* case. Both cases are quite different from the present case. Again, may I invite you to look at the folder that was presented to you yesterday. The *North Sea Continental Shelf* case is illustrated *in part* by Figure 2. The reason why I say *in part* is that this is a sketch provided in the Judgment of the Court to illustrate the position the Court was taking, but it is not a reflection of the agreement that was ultimately reached between, respectively, Germany and The Netherlands and Germany and Denmark. That provided for a somewhat different area. Now it is true that the area did extend to the mid-line of the North Sea, but, as a moment's comparison will show, the area actually settled on by Germany with its neighbours was somewhat smaller than the area that it actually claimed in the proceedings. The simplest place to find this illustrated is in the collection of boundary delimitations that forms part of the Annexes to Libya's Counter-Memorial in the *Libya/Malta* case. There are two volumes of annexes there and the relevant agreements can be found in Part 1. Now the *North Sea Continental Shelf* case involves, as you can see from the sketch in Figure 2, a deep embayment. It is a deep bay. But it is an entirely different shape from the Gulf

of Fonseca. One does not have the promontories of Nicaragua and El Salvador that are the controlling feature of the character of the Gulf of Fonseca. Equally, there are no islands in the North Sea situation. There is simply no comparison between the two cases, either in shape or in width. Again, there was no dispute that Germany was entitled to some continental shelf. The question was what was the proper limit to be placed upon the shelf generated by Germany's coasts. So so much for the *North Sea Continental Shelf* case. It does not advance the position of Honduras.

Let us turn to the *Gulf of Maine* case. This is illustrated by Figure 4 in the folder presented to you yesterday. But, please bear in mind that Figure 4 is a US map. It shows the coastal fronts as the US wanted them to be seen by the Court. It does not show the ultimate resolution of the case, which is somewhat different. And that is why, in the blue-backed folder that we have handed in this afternoon, the Court will find, immediately following my outline, a reproduction of the map in the *Gulf of Maine* case showing the line as eventually determined by the Chamber of the Court.

Now again there is no comparison between the Gulf of Maine case and this case. The Gulf of Maine is a much wider body of water: its width in relation to depth is much greater than in the case of the Gulf of Fonseca. Again, as regards the relevant part of the Gulf of Maine, there are no promontories that really matter. Nova Scotia, although standing, so to speak, in front of or seawards from the Bay of Fundy, is not a pertinent promontory because the delimitation of the Bay of Fundy is not involved, nor is the coastal front of the Bay of Fundy itself being used. So we are talking quite simply about an area of water, a large, open - I insist on open - area of water, that is bounded to the north-west by the American coast, bounded to the north-east by the shores of Nova Scotia, and bounded to the south-west by the continuation and turning of the American coastline. Again, there are no pertinent islands that can serve to obstruct the claims that may be generated on the basis of the coasts. Now Professor Bowett had this to say about the Gulf of Maine case. He said:

> "Think of the Gulf of Maine case: I placed in your folder the illustration used at page 726 of the Honduran Memorial. It shows how the United States argued that the long American coast at the back of the Gulf had a natural prolongation and a legal entitlement to maritime areas in front of that coast and even though, in terms of proximity, the Canadian coast of Nova Scotia was nearer. If you examine the Chamber's judgement 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 third sectors. That could only mean that the coast at the back of the Gulf generated legal title to those areas lying outside the Gulf."

Well I suppose it is possible to represent the case in that way, Mr. President, but the point is that there was no difficulty about taking into account the American coast at the back of the Gulf because of the open character of the Gulf of Maine, and if the Court would be good enough to look at the line that was eventually drawn by the Chamber in that case it will see that in many respects that line is an equidistance line, though slightly modified. But, more to the point, there is nothing in it to suggest that some special treatment has been given to the coasts at the back of the Gulf of Maine. In short, the area of water was so large that it could be treated as a relatively normal delimitation. The Judgement of the Court is a long and complex text, but when you simply look at the end result, as depicted on the map in the Court' s Judgement, you will see that the suggestion that there is some special treatment meted out to the coasts of Maine is not to the point. What really influenced the construction of the line BC, the so-called second sector, was the sense of equidistance between the coast of Nova Scotia and the Cape Cod Peninsula, and likewise the section CD was influenced by that concept. So, Mr. President, I do not think that the Gulf of Maine case takes my friend any further.

What the case does show is that it was the actual position, not the national position, of the back of the Gulf of Maine that played a role in the case, but, as I say, the circumstances in which it did so are quite different from our own.

So I turn now to the second group of materials, the materials relating to islands specifically, and this appears in my outline as the inappropriateness of the alleged leap-frogging of authorities, as item 24, and here there are two items to consider. The first is the Anglo-French decision. It is true, as is illustrated in Figure 3 of yesterday's folder, that France leap-frogged the Channel Islands. To put it another way, the screening effect of the Channel Islands was disregarded as a matter of delimitation. But there are some significant and indeed compelling points of distinction between that case and this case. First of all, the question in the Anglo-French case was truly one of delimitation, not of entitlement. There was no doubt that each party had rights to the continental shelf generated overall by the coasts facing into the channel. No issue was raised as to entitlement: that of course is

not the case here.

But secondly, apart from the Channel Islands, the Court said that there was a balance of geographical circumstances between the two countries, a very important fact in the Court's reasoning. As the Court puts it in paragraph 183: "The presence of these islands in the English Channel in that particular situation disturbs the balance of geographical circumstances which would otherwise exist between the Parties in this region as a result of the broad equality of the coastlines of the mainlands" - disturbs the balance of geographical circumstances. Well this situation is totally unlike that. There is no broad equality of the coastline of the mainland; there is no geographical balance that is disturbed here. In assessing the balance of geographical circumstances, we obviously have to take into account the circumstances in the waters affected by the dispute. These are the waters that lie outside the closing-line of the Gulf of Fonseca; that is what this part of the case is about. In relation to those waters there is no question of any balance of geographical circumstances as between El Salvador and Honduras. Honduras simply is not there. Honduras is not in the running. In short the geographical circumstances of the two situations are quite different and there is no broad equality that is disturbed. A third factor is that of predominant interest in the area. The Court of Arbitration in the Anglo-French case referred in paragraph 188 to what it called navigational, defence and security interests in the region, that is in the region of the Channel Islands. The Court took the view, and I quote, "that they tend to evidence the predominant interest of the French Republic in the southern areas of the English Channel, a predominence which is also strongly indicated by its position as a riparian State along the whole of the Channel's south coast." If that consideration is applied in this case, it is evident that in the waters of the Pacific, Honduras can have no predominant interest. It is not a riparian on the coast of the Pacific. It has no defense or security interest there, certainly none that can be compared to El Salvador and Nicaragua, nor has it a navigational interest greater in kind or degree than its neighbours. Indeed as has been established already, navigation in this area is not in question at all. The fourth, and perhaps the most important distinguishing feature of the Channel Islands situation, is that they were regarded as islands separate from the United Kingdom and therefore as not being enfolded in the United

Kingdom's primary continental shelf. The way the Court of Arbitration put it was this in paragraph 190.

> "In the view of the United Kingdom itself, the question raised by the presence of the Channel Islands close to the coasts of Normandy and Brittany is not, strictly speaking, the question of their effect in this region on the delimitation of the median line between England and France. It is rather the question of their own entitlement to continental shelves as islands *separate* from the United Kingdom. This view of the matter appears to the Court to be correct."

In this respect, the Channel Islands situation is totally different from the position in this case. There is no suggestion that Meanguera and Meanguerita are anything else than islands forming part of El Salvador, except the issue about title, which, as I say, cannot really be seriously taken. There is no suggestion that those islands are in some way a distinct group comparable to the Channel Islands. Indeed, quite the reverse. The Court will recall the statement at page 702 of the 1917 Judgment, where there is a quotation from the report of the engineers Barberena and Alcaine that speaks of Meanguerita as being an integral part of the Salvadorian coast. If Meanguerita is that, so of course is Meanguera, and we have never heard any challenge to this.

I turn next, Mr. President, to the analysis of the Agreement between Australia and Papua New Guinea, which is item 25. It is important not just to look at the figure that has been put in front of you, but to read the Agreement as a whole. It is an important Treaty. That Treaty has to be read and understood against the background of the special relationship that existed between Australia and Papua New Guinea. It was not an arms' length relationship. Australia felt certain special obligations towards Papua New Guinea arising out of Papua New Guinea's former dependence upon Australia; and also upon the evident disparity of wealth between the two countries.

I was aware of these considerations because I was Legal Adviser of the Australian Government in the period just before the final conclusion of the Treaty, and I drafted the earlier drafts. I conceived this idea of what we call the "curtains" principle, which is illustrated on the diagram in front of you by the north-south perpendicular lines which form a curtain around the islands, the nature of which I shall explain in a moment. Now that is important. You have here an agreement - not a judgment - an agreement representing a political settlement between two States in

which one of them felt, if I may put it this way, parental to or avuncular to, the other, and was inclined to give it things that would not have been given in other delimitations at arms' length, as is shown, for example, by the Australian delimitations with Indonesia, or with France, in relation to New Caledonia, or as between Heard and Kerguélen. There, where you do have an arms' length relationship, a position of approximate equality, between the two Parties, a full insistence was made upon Australia's entitlement. Here, there was a lot of giving.

What do we see as being given? It may be useful to have Figure 5 in your hand as I describe it. Basically, what you have is an agreement that the territorial seas of the Australian islands of Boigu, Dauan and Saibai will be limited to 3 miles, and that line is drawn between those islands and the Papua New Guinea coast. Secondly, one has an agreement on the sea-bed. The continental shelf, or sea-bed dividing line, is the line that starts at the extreme left of the diagram and approximately half-way up the page and runs from the west to the east and has a kink just before it reaches the right-hand side, or eastern part, of the page. That represents the northern limit of Australia's continental shelf rights. And, of course, in that sense supports what my learned friend said yesterday about certain islands being ignored. It was possible for Papua New Guinea to leapfrog Boigu, Dauan and Saibai. Not as a matter of law, but as a matter of agreement, which is quite different from our present situation.

Thirdly, there was a fisheries jurisdiction, and that basically gave the islanders of Boigu, Dauan and Saibai special rights to fish within the two vertical curtains and south of the territorial sea limit with Papua New Guinea. And that was a recognition, again, of the special character of the inhabitants and the fact that there was immense dependence upon fisheries.

So the Agreement does not help Honduras. First, the geography is quite different. It is a much more open situation: there is no question of there being a gulf there. Secondly, it was an agreed settlement influenced by political and economic considerations, beneficial - and intended to be beneficial - to Papua New Guinea. Thirdly, the whole negotiation started from Australia's assertion of the full rights generated by the three islands, which was then qualified in the manner I have just described to you.

In theory, that is a solution that could be reached, even in this case, by agreement. But it does not dictate itself and it cannot be introduced as a matter of existing legal obligation.

In this connection, I should just make the point, before leaving the subject of islands, that while my learned friend said yesterday that El Salvador was relying upon Meanguera, Meanguerita and Conchiguita as sources of its rights in the Pacific, that is not accurate. El Salvador does not need to rely on Meanguera, Meanguerita and Conchiguita as base-points for a Pacific delimitation, since their effect is totally overtaken by any construction that stems from a base-point at Punta Amapala, just as, presumably, Nicaragua would base any delimitation of its own in that area on Punta Cosiguina. The islands are capable of generating maritime rights, but it is not necessary, in the geography of the situation, to rely upon them.

And so I come next to item 26, which is the factor of bay closing-lines. Honduras appears, as an alternative, to be attempting to rest its case on the theory that the line which geographically divides the Gulf of Fonseca from the open ocean is to be equated to a bay closing-line and may therefore serve as a baseline upon which one then constructs a further belt of territorial sea, contiguous zone, economic zone and continental shelf. I have five brief comments to make on that point.

First, bay closing-lines do not operate for historic bays. That is clear beyond question.

Secondly, there is no uniform rule for historic bays.

Thirdly, there is absolutely no authority that bears on the position of historic bays in which there are three riparians, and nothing to which one can point to suggest that the geographical closing-line of such a bay can be assimilated to, or identified with, a legal bay closing-line that may stand as a baseline.

Fourthly, even if Honduras were right and the closing-line were a baseline, there could be no delimitation, whether by this Court or anyone else, not to say by the Parties, without the participation of Nicaragua.

Fifthly, Professor Bowett made much play with El Salvador's approach to condominium. He asserted an estoppel. What is the estoppel? How has it operated to the detriment of Honduras?

How, in reliance upon a presumed bay closing-line across the outer mouth of the Gulf of Fonseca, has Honduras altered its position to its detriment? What is the content of this estoppel? Presumably, it feels that the closing-line of the Gulf of Fonseca is a baseline. And El Salvador has repeatedly said that it is not. Professor Bowett has said that he has never come across such an animal as the line that we now suggest exists, which is not a legal bay closing-line. Well, I suppose that one must not allow Professor Bowett's knowledge of the world's fauna to set the limit to the range of legal possibilities. The Gulf of Fonseca is *sui generis* and there is no necessary relation between the geographical limit of the bay depicted by a line and a bay closing-line in the legal sense generative of seaward rights for the riparians. Again, one asks the question, if this geographical closing-line, this line of convenience, remember it is only a line of convenience, the only person who has drawn it has been Honduras for the purpose of forming part of their kite fantasy. But if there is such a line, how many belts of internal waters or territorial sea can the riparians have?

Mr. President, that brings me to the conclusion of my outline. I do not think it is appropriate to try and summarize all that I have said, but I do wish to stress the fact that this is not a case in which one can transpose those in many respects admirable concepts of equitable delimitation into according a State, by reference to some vague concept of equity, an entitlement to waters that it is not entitled to.

Now, just before I conclude, Mr. President, may I, on behalf of my colleague, Mr. Highet, just come back to one point relating to Meanguera that seems to be up in the air and which it is desirable should be mentioned in time for Honduras to respond to it. In the course of his speech on Meanguera, Mr. Highet referred to something called the Meanguera dossier, a substantial collection of materials illustrating acts of sovereignty and jurisdiction by El Salvador in Meanguera. But he actually put in evidence only a limited selection of those documents. And his selection was criticized for its paucity. Now, Mr. Highet then said in his closing speech, well, Honduras should take a position regarding the dossier. Either it should admit that it exists and that there are documents in the dossier comparable to the ones that he already put in, or it should say straight that it does not admit them, in which case he would have to seek the consent of the Court to put them in. Now there

has been no reply by Honduras to that question. And, therefore, it is desirable that Honduras should take the opportunity of telling the Court whether or not it admits the existence and content of the Meanguera dossier, and if it does not admit it whether it will object to El Salvador filing the documents with the Court so that the Court may see for itself what is in that dossier.

Finally, Mr. President, before I resume my place, may I just say this. Speaking as I have from notes rather than from a full text, I am more heavily dependent upon the transcription services of the Court than are those who prefer to present the services with a full written version of their arguments. The services have done an admirable job and I wish to pay them tribute and express my appreciation of their work. At times, unfortunately, I have evidently not expressed myself as clearly as I should have: I may have lapsed into a mumble or two and, as a result, the text of the compte-rendu occasionally reflects such lapses. I have, therefore, very promptly corrected the compte-rendu and submitted it to the Registry, and I should be most grateful if members of the Chamber would bear that in mind and in case of doubt consult the corrected master copy which, I understand, is deposited in the Court's library.

I thank you very much.

Mr. PRESIDENT: I thank Professor Lauterpacht. I would like to know from the Delegation of Honduras when do they intend to speak tomorrow.

Mr. VALLADARES SOTO: Mr. President, Honduras will give the reply tomorrow morning.

Mr. PRESIDENT: Thank you. So we adjourn until tomorrow at 10 o'clock.

The Chamber rose at 5.20 p.m.
