C 4/CR 91/47

Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Wednesday 12 June 1991, at 10 a.m., at the Peace Palace,

Judge Sette-Camara, President of the Chamber, presiding

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

VERBATIM RECORD

ANNEE l991

Audience publique de la Chambre

tenue le mercredi 12 juin 1991, à 10 heures, au Palais de la Paix,

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

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

COMPTE RENDU

Present:

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

Registrar Valencia-Ospina

Présents :

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

M. Valencia-Ospina, Greffier

The Government of El Salvador is represented by:

Dr. Alfredo Martínez Moreno,
as Agent and Counsel;

H. E. Mr. Roberto Arturo Castrillo, Ambassador,
as Co-Agent;

and

H. E. Dr. José Manuel Pacas Castro, Minister for Foreign Relations,

as Counsel and Advocate.

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

as Counsel;

Assisted by

Prof. Dr. Eduardo Jiménez de Aréchaga, Professor of Public International Law at the University of Uruguay, former Judge and President of the International Court of Justice; former President and Member of the International Law Commission,

Mr. Keith Highet, Adjunct Professor of International Law at The Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,

Mr. Elihu Lauterpacht C.B.E., Q.C., Director of the Research Centre for International Law, University of Cambridge, Fellow of Trinity College, Cambridge,

Prof. Prosper Weil, Professor Emeritus at the *Université de droit, d'économie et de sciences sociales de Paris*,

Dr. Francisco Roberto Lima, Professor of Constitutional and Administrative Law; former Vice-President of the Republic and former Ambassador to the United States of America.

Dr. David Escobar Galindo, Professor of Law, Vice-Rector of the University "Dr. José Matías Delgado" (El Salvador)

as Counsel and Advocates;

and

Dr. Francisco José Chavarría,

Lic. Santiago Elías Castro,

Lic. Solange Langer,

Lic. Ana María de Martínez,

Le Gouvernement d'El Salavador est représenté par :

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

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

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

comme conseil et avocat;

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

comme conseil;

assistés de :

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

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

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

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

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

M. David Escobar Galindo, professeur de droit, vice-recteur de l'Université "Dr. José Matías Delgado" (El Salvador),

comme conseils et avocats;

ainsi que :

M. Francisco José Chavarría,

M. Santiago Elías Castro,

Mme Solange Langer,

Mme Ana María de Martínez,

Mr. Anthony J. Oakley,
Lic. Ana Elizabeth Villata,

as Counsellors.

The Government of Honduras is represented by:

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

as Agent;

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

as Co-Agent;

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

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Fellow at Queens' College,

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

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

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

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

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

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

as Advocates and Counsel;

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

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

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

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

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

the Netherlands,

M. Anthony J. Oakley,

Mme Ana Elizabeth Villata,

comme conseillers.

Le Gouvernement du Honduras est représenté par :

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

comme agent;

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

comme coagent;

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

M. Derek W. Bowett, C.B.E., Q.C., F.B.A., professeur de droit international à l'Université de Cambridge, Chaire Whewell, Fellow de Queens' College,

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

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

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

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

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

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

comme avocats-conseils;

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

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

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

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

Mme Salomé Castellanos, ministre-conseiller de l'ambassade du Honduras à La Haye,

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

as Counsel;

Mr. Guillermo Bustillo Lacayo,

Mrs. Olmeda Rivera,

Mr. José Antonio Gutiérrez Navas

Mr. Raul Andino,

Mr. Miguel Tosta Appel

Mr. Mario Felipe Martínez,

Mrs. Lourdes Corrales,

as Members of the Sovereignty and Frontier Commission.

The Government of Nicaragua is represented by:

H. E. Mr. Carlos Argüello Gómez

as Agent and Counsel;

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

Assisted by

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

as Counsel and Advocate;

and

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

as Counsel.

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

comme conseils;

M. Guillermo Bustillo Lacayo,

Mme Olmeda Rivera,

M. José Antonio Gutiérrez Navas

M. Raul Andino,

M. Miguel Tosta Appel,

M. Mario Felipe Martínez,

Mme Lourdes Corrales,

comme membres de la Commission de Souveraineté et des frontières.

Le Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos Argüello Gómez

comme agent et conseil;

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

assisté par

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

comme conseil et avocat;

et

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

comme conseil.

The PRESIDENT: Please be seated. The sitting is resumed. We continue the hearings on the legal situation of the zone outside the Gulf of Fonseca and I give the floor to the Agent of Honduras.

Mr. VALLADARES SOTO: Thank you very much, Mr. President. Mr. President, in regard to the question raised yesterday by El Salvador relating to a dossier of Meanguera, Honduras could not give an answer to the admission or not of such a document without knowing its content. And now, when the oral phase of the proceedings will be finished in a few hours, it is too late to present documents and there will be no time for Honduras to analyse, or even read them, and certainly we will have no opportunity to reply to them. So, for this reason, Honduras has no other alternative than to oppose the admission of the Meanguera dossier. Thank you, Mr. President. Now I give the floor to Professor Derek Bowett.

Mr. BOWETT: Mr. President, it falls to me to give the rejoinder to the reply of El Salvador. I want to say a few words about what was called yesterday the litigation strategy of Honduras. The suggestion made yesterday was that Honduras said to itself "Let us try it on; we have nothing to lose". Mr. President, is it likely that in 1950, when Decrees 102 and 103 of 7 March were enacted, decrees under which Honduras claimed a continental shelf in the Pacific Ocean, Honduras was engaged in litigation tactics, was trying it on? In 1950 there was no thought of litigation. Honduras was following a pattern of conduct followed by many Latin American States, in making a claim it believed to be justified, and rightly so, since no protest was made against that claim.

Now that brings me to the question of lack of protest. Mr. Lauterpacht explained the lack of protest by El Salvador to these decrees in 1950 on the basis that the Constitution of Honduras had changed, that it had been replaced by new Constitutions in 1957 and 1965, and the later versions of these Constitutions were, as he described, "muted" on this question of a shelf in the Pacific.

I am afraid there is some misunderstanding here about the nature of Honduran law. The 1950 Decrees were decrees: they were pieces of legislation, distinct from the Constitution. And the validity of those Decrees remained unchanged, despite changes in the Constitution. They were unaffected by changes in the Constitution, and the "muting" to which Mr. Lauterpacht refers in the

later Constitutions — in the 1957 and the 1965 Constitution — is simply, if you look at them, a reflection of the fact that in defining the continental shelf, Honduras in the new Constitutions adopted the definition of the shelf which was then current at the time, being proposed in the Draft Articles on the Law of the Sea, proposed by the International Law Commission, and eventually the definition adopted in Article 1 of the 1958 Convention on the Continental Shelf.

That is what the "muting" was. It was an adoption of that new definition. But the location of that shelf, however defined, remained, as stated in the 1950 Decrees, which remained valid and entirely unaffected by these constitutional changes.

Now it is true that in 1980, and again in 1982, in the new Constitution, reference was made there for the first time to a 200-mile line projecting from the baseline, this baseline being the closing-line across the Gulf of Fonseca. And that was said specifically in the 1980 and 1982 Constitution. Now of course this specific statement about the closing-line came at that time in direct response to the challenge issued by El Salvador in the declaration made by Mr. Pohl, their delegate, in the Third Law of the Sea Conference in 1974. That is why Honduras chose to be specific at that point in time.

But what Honduras was doing in 1980 — 1982 was reaffirming its rights in terms which met that challenge. It is not correct to regard the claims as originating only in 1980 and 1982. They were simply reaffirmed, in express terms designed to meet the new challenge made by El Salvador in Mr. Pohl's statement in UNCLOS III. But the legal basis of the claim — the assertion of the claim — remains the Decrees way back in 195O.

So the question remains: why did El Salvador not protest for nearly 25 years, from 1950 until 1974? It was suggested yesterday that the absence of protest would be justified on a number of reasons. One was that the claims of Honduras were confined to the outer Gulf. The idea is that the Honduran claim to a continental shelf was a claim only to a shelf in the outer Gulf. That is scarcely a satisfactory explanation. The terms of the Decrees are against it. Whatever you may think about the outer Gulf, it is certainly not the Pacific Ocean.

Secondly, it is frankly inconceivable that El Salvador would acquiesce in a claim by Honduras

to a continental shelf in the outer gulf, when El Salvador maintains that in the outer Gulf Honduras has no rights whatsosever. The condominium existing there, on El Salvador's thesis, is a joint condominium between El Salvador and Nicaragua. Honduras has no rights. How can we therefore believe that the reason why El Salvador did not protest was because she believed that the assertion of a shelf right related only to the outer Gulf? Then we were given a second reason, and that was that there was no protest because there was no activity; there was nothing to protest about, and States hesitate to make protests unless they are essential. Well this, too, I find unconvincing. As the Court well knows the right of a coastal State to its continental shelf is not dependent on activity, activity is not a precondition to the validity of those rights, and therefore the risk of failing to protest from the outset and over a period of nearly 25 years must have been apparent to El Salvador. You simply can't assume that that risk was taken voluntarily simply because there was no activity, so I must conclude by suggesting that these reasons for lack of protest are wholly unconvincing and this absence of protest is alone sufficient to destroy the case of El Salvador.

If I may just say a final word about what was alleged yesterday to be "suppression" by Honduras of the evidence of the protest by El Salvador of September 1983. Mr. Lauterpacht provided the Court with an extract from the meetings of the Joint Commission in which that protest was made. The implication was that there was something rather devious or sinister about the deliberate suppression of evidence of this protest. Clearly, Mr. President, Honduras did not purport, in its annexes to its Memorial, to annex the totality of the records of the Mixed Commission. But what it did do was to annex those sections of the minutes which in the view of Honduras it found to be relevant and helpful in presenting the Honduran case and, of course, this was done when the Memorial was filed in June 1988. So El Salvador had in effect 3 years prior to these proceedings in which to make good any omission if it felt the dossier, the record, filed by Honduras was in some way incomplete or damaging. There was nothing whatever to stop El Salvador from filling in its own pleadings the missing part, which it felt ought to be before the Court. If El Salvador thought that that protest was important to its case, by all means let El Salvador file it. But it could scarcely have been some kind of sinister tactical ploy by Honduras to conceal this vital piece of evidence

some 3 years before the oral proceedings.

I turn now, Mr. President, to the question of the task of the Court. Yesterday, on behalf of El Salvador, Mr Lauterpacht made 3 points so I will deal with these in turn.

The first was the argument that Honduras knew that El Salvador could not accept the word "delimitation", in order to define the dispute between the Parties because of the difficulties over its Constitution, and its constitutional commitment to the condominium thesis. Therefore it was argued that the terms of the compromis, indeed the terms of the Peace treaty which were identical, cannot extend to delimitation. That, I suggest, is a non sequitur because it is, as the Court knows well, commonplace for governments in drafting a *compromis*, or indeed any statement which defines disputes between them to do so, in terms which will avoid any clear surrender of the legal position of either of them, so that they will tend to look for terms which are neutral, which do not prejudice the position of either Party. And Honduras understands perfectly well the position of El Salvador in wishing to avoid the word delimitation, in wishing to avoid a word which would seemingly prejudice its legal position. That is exactly why Honduras was able to agree to avoid that word. But, of course, with a formula defining a dispute in a compromis, it is not open to one Party unilaterally, on the basis of its own legal position or its own constitution, to impose an interpretation of the dispute which fits with its own legal thesis. The whole purpose of choosing a compromise formula, which courts will interpret objectively, is to allow scope for both parties to argue their different legal positions in relation to the dispute between them. It is never the purpose of a compromis to pre-judge the legal position, according to the interpretation of one Party.

Now the second point concerns the question of whether there had been adequate, meaningful, prior negotiations, prior to the submission of this dispute to the Court. Purely as question of fact, Mr. President, I am bound to say there have been such negotiations, negotiations not merely in the Mixed Commission but also, as you recall, between the delegates, the personal delegates appointed by the Presidents of the two countries, at a stage when within the Mixed Commission's progress on the maritime dispute was really not being made. The two Presidents were concerned enough about the lack of progress over the maritime dispute to appoint personal presidential delegates to try to

break through this apparent impasse within the Mixed Commission. And indeed the negotiations went even further, they went to the level of the Heads of State themselves, and there was this exchange between the Heads of State with the Salvodorian proposals being made directly by President Duarte himself in the letter to which I have alredy referred. So there were in fact negotiations.

Then Mr. Lauterpacht made another point that there have been many points raised by Honduras in these proceedings, many arguments which were not the subject of negotiations. Therefore, he suggests, there were no negotiations on essential points in the dispute. Well, I am bound to concede that is true. But, of course, El Salvador has raised many arguments during these proceedings which were never made during the discussions or negotiations in the Mixed Commission. We never heard before, in these early negotiations, of this extraordinary division of the Gulf into an inner and outer Gulf. We never heard of this new thesis that the El Salvadorian territorial waters project not from the closing-line, not from the baseline, but rather from the main El Salvadorian coast. And indeed, many of Mr. Lauterpacht's arguments yesterday were novel in the sense that they had never been used in the negotiations between the Parties directly.

But, Honduras makes no complaint about this. The fact is that negotiations between Parties are normally by, what I might call, internal, domestic teams of experts. And at the stage when the dispute has to be handed over for international litigation, States hand over that dispute to their own selected teams of international lawyers, precisely because they hope the international lawyers will be able to invent new arguments. There does not have to be an identity of arguments in the negotiations and in the international legal proceedings. If there would be no new arguments there would not be much point in recruiting these highly paid international lawyers. But new arguments do not mean that there have not been genuine negotiations between the parties prior to the dispute being brought before a court.

Now the third point was really a point of law, that is a principle of law, requiring a restrictive interpretation of the *compromis*. Well, of course, the plea for a restrictive interpretation is really a plea for El Salvador to have its own interpretation. And this so-called principle of law is in fact, in

my submission, no principle at all. What courts will normally do is to seek an interpretation of the compromis, of course consistent with the terms of the *compromis*, but one which fairly allow both parties to present their views of the dispute before the Court. And we must not forget, in this case, that what is in issue is not simply a compromis but also a Peace Treaty, and there is an obligation under that Peace Treaty, which both Parties accepted, to settle *all* their legal disputes. That undertaking to accept to settle all their legal disputes requires a good faith and complete implementation, and it is not to be whittled down on some theory of restrictive interpretation of a *compromis*.

I turn now to the various matters of substance with which El Salvador dealt yesterday. The first is really a grievance, apparently by El Salvador, about the use by Honduras in this litigation of the record of the negotiations between the Parties. You will understand from what I have just said that it was vitally necessary to produce that record before the Court, if only to satisfy the El Salvadorian insistence that there must have been adequate prior negotiations. So, a record of those negotiations was essential if only for that reason. And then the Court will recall the utility of that record, in particular in dealing with the positions of the two Parties in the various parts of the land boundaries. But the complaint is that it is improper to divulge the El Salvadorian proposals for delimitation, both inside and outside the Gulf. And there is apparently great indignation on the part of El Salvador about this impropriety, and concern about the effect of such impropriety on the future course of negotiations between States who know there is some possibility that the matter over which they negotiate will eventually finish up in court.

I suggest, Mr. President, the indigation is somewhat misplaced. You see, El Salvador placed Honduras in a very difficult position because, for the purposes of its litigation, El Salvador made a number of assertions to the Court. For example, the assertion that there had been no negotiations over maritime delimitation; or the assertion that the terms of the compromis could not reasonably be interpreted to encompass the delimitation; or the assertion that Honduras has rights only in the inner Gulf; or the assertion that the status of the waters of the Gulf precluded any possibility of delimitation. There are more, but I give you examples of the kind of assertions which had been made

by El Salvador.

All those assertions, made in the pleadings in this case, are directly contrary to what El Salvador had done or said in the Joint Commission. Indeed, on one view they were demonstrably false. What, therefore, should Honduras do? Should we keep quiet about it? Should we deliberately withhold from the Court evidence to demonstrate that these assertions are false? My own belief is that Parties do have an obligation to this Court in explaining the truth of the matters in issue before the Court, and that to the best of their ability. And that is really why I suggest that the indignation expressed by El Salvador is perhaps misplaced.

I turn now to the discussion of the law. We agree entirely that a matter of maritime delimitation is not simply the exercise of distributive justice, and that there can be no general demand for a just and equitable share. That was rejected by the Court in 1969 and we accept it. Entitlement is based on the coasts of the Parties — we agree. And that is exactly why we have argued our claim to maritime areas on the basis of the Honduran coasts inside the Gulf.

As to this rather sharp distinction drawn between entitlement and delimitation, I am not quite so sure that the distinction is so clear as has been suggested. If you will think of the 1977 Award, the award of the Arbitral Tribunal was concerned with delimitation, but of course it could not proceed to delimitation except on the basis of a finding that France was entitled to the areas of shelf lying to the north and north-west of the Channel Islands. So the finding of entitlement was implicit in the Court's second-stage exercise which was to delimit the respective areas of entitlement by these 12-mile arcs or enclaves. But we agree that the coasts are all important and so I turn to those coasts.

Now, the argument yesterday was that the Honduran coasts inside the Gulf had been mostly used up in the 1900 delimitation with Nicaragua. And therefore it was suggested that having already been used up, its legal power was exhausted and it could no longer generate any claim to a shelf. Of course, as you can readily see from the map, the remainder of the Honduran coasts further west will eventually be used up in relation to a territorial sea delimitation, rather, internal waters delimitation with El Salvador. So, of course, this thesis leads you to the result that since the entirety of the Honduran coasts inside the Gulf will be used up in delimitations inside the Gulf with its two

neighbours, Nicaragua and El Salvador, then having been used up it can no longer generate any claim to shelf outside the Gulf.

Well, the thesis is fallacious. If coasts are used for the purposes of delimiting one maritime space, let us say territorial waters, there is absolutely no reason, in law, why the same coasts should not be used for generating a different maritime space. For example, the shelf or an economic zone. Indeed, in State practice, many existing territorial sea boundaries or even restricted shelf boundaries, restricted because limited in extent by the old definition of the shelf and not going out 200 miles. In the said practice, such boundaries have been extended to the maximum distance by a new or second delimitation and, of course, on the basis of the same coasts. The fact that they have been used for one delimitation does not mean that they are exhausted and have no further power to generate maritime claims.

Now, if I can give you just one example, France and Spain achieved a delimitation in the Bay of Biscay on the basis of the French and Spanish coasts around the bay, they are now engaged in discussions about the extension of that delimitation line further out into the Atlantic, but of course, on the basis of the same coasts. The fact that the coasts had been used for one delimitation does not mean that they cannot be used again to extend the rights of the two States.

Indeed, the Court will know from its own jurisprudence that there are delimitations in which the same coasts can be used in relation to delimitations with different neighbours. You may recall that in the *Tunisia/Libya* case the relevant Libyan coast from Ras Ajdir going eastwards to where the Gulf of Gabès began, was the relevant coast for delimitation with Tunisia. But if you look at the *Malta/Libya* case from three years later, you will see that in relation to Malta the Libyan relevant coast was the same coast. There is no suggestion that that coast having been used up vis-à-vis Tunisia, it could not generate any shelf vis-à-vis Malta. And you may remember also that in relation to Tunisia there had been, in 1971, a delimitation between Tunisia and Italy clearly based upon the Tunisian coast running from the north, southwards down to Ras Kaboudia. And, of course, in the *Tunisia/Libya* case, the relevant Tunisian coast was from Ras Kaboudia down to the frontier at Ras Ajdir. So, in the delimitation with Italy and then the delimitation with Libya, the whole of the

Tunisian coast has now been counted. Now, are we to assume that there is nothing left of that coast now, to generate a claim vis-à-vis Malta? And there can be no delimitation between Tunisia and Malta because the entirety of its coast has already been used up with Italy and Libya?

The notion that coasts can be used once and only once, for one delimitation, is simply not consistent with the law and for very obvious and good reason.

Now, there is one question of fact which, perhaps, needs to be clarified and which arose from the discussion of the 1900 Agreement. It was suggested that the Honduran coasts had not only used up, but that this had been confirmed by the fact that Nicaragua contemplated no further delimitation in the Gulf with Honduras. In other words that the 1900 delimitation was complete, therefore the coast was used up and there can be no question of any further delimitation in the Gulf.

Now, I have to draw the Court's attention to the terms of the Joint Declaration of the two Foreign Ministers of Nicaragua and Honduras of 5 September 1990. In paragraph 2 of that declaration, and if you will permit my free English translation, it says this:

> "The Mixed Commission [that is the Mixed Commission between Honduras and Nicaragua] will consider, as a matter of priority, frontier questions in the maritime areas of the Gulf of Fonseca and the Atlantic coast, and the problems of fishing which stem from the foregoing."

So, the Commission will consider frontier questions in the maritime areas of the Gulf of Fonseca. Now, that does not sound as though the Ministers have ruled out any possibility of discussions about delimitation inside the Gulf. And Honduras takes the view that that clause does anticipate that there will be such discussions, no doubt after the Court's judgment, with a view to extending the 1900 line. Obviously Honduras does not seek to speak for Nicaragua. We do not suggest that that is necessarily Nicaragua's interpretation, but that is our interpretation of that agreement. We do not believe that it is really prudent to go any further at this stage into the implications of that agreement, or into the possibilities that negotiations between the Parties might hold, either as regards the delimitation or indeed over the other related matters which include matters such as fishing, conservation of natural resources, security and the like. These are all matters outside the dispute now before this Court and I think it perhaps does not require me to proceed any further with them.

I turn now to the status of the waters of the Gulf, and here Mr. Lauterpacht made two points. The first was that the waters of the Gulf include a littoral belt of 3 miles of territorial waters. And the importance of that point in his argument was that, if there was a 3-mile belt of territorial waters inside the Gulf, you can't have another belt, a second belt, of territorial waters beyond the closing-line. Therefore the conclusion is that the closing-line is not a baseline. But of course it is the premise, the assumption that there is a 3-mile belt of territorial waters inside the Gulf that is wrong. Of course, El Salvador relies on the 1917 Judgment and certainly you will find in the Judgment terms used to suggest that they are territorial waters, but Honduras does not accept that Judgment. Honduras is not bound by that Judgment, and that Judgment is full of inconsistencies of which that is, in fact, one. It is a confusion between historical internal waters and territorial waters. The position of Honduras in this case should not be prejudiced by the inconsistencies and incoherences in the 1917 Judgment.

Then El Salvador invoked the Secretariat memorandum on historic bays, which of course, as was read out to you, sets out in fair detail and quite accurately a summary of the 1917 Judgment. And the question was asked : Why did not Honduras protest against that Secretariat memorandum? I remember the memorandum well. It was prepared by a colleague of mine Chafic Malik from the Lebanon, and what that memorandum attempted to do was to summarize as accurately as possible the Judgment. It was not that the United Nations was taking a position on the waters. This was a summary of the Judgment and it was a perfectly accurate summary of the Judgment. But it has no more force against Honduras than the Judgment itself. And of course the Secretariat memorandum is not, as it were State practice, something to which the Government of Honduras was bound to have protested. So Honduras is no more bound by the Secretariat memorandum than it is bound by the Judgment itself.

There is a second point on the waters of the Gulf. This of course was the point that in the outer Gulf the waters are of concern only to El Salvador and Nicaragua — this is the thesis of the two-Party condominium in the outer Gulf. Well, I don't really want to repeat myself over this, but the Court will realize that this was not what the Court said in 1917; it is not the thesis of the 1917

Judgment. Their view of the condominium was that it extended over the whole Gulf and it was a condominium for all three Parties. There was no suggestion of an inner Gulf and an outer Gulf and two condominiums. I really think El Salvador might make up its mind whether it wants to rely on this Judgment or oppose it. You cannot sort of "pick and choose" between which bits of the Judgment you like and which you don't like. And I have to remind the Court that this is certainly not the Nicaraguan thesis. El Salvador might say that the outer Gulf is a condominium but that is not the Nicaraguan view, nor is it the Honduran view.

The third point is that, although evidently El Salvador seeks to regard itself as a direct neighbour of Nicaragua in the outer Gulf, and indeed from what Nicaragua said earlier in these proceedings Nicaragua would suggest that this is the relationship, that they are neighbours with a common boundary between them, I must remind the Court that that was not the view of Nicaragua in 1917.

If the Court will look at the 1917 Judgment, I am referring to the English text in the American Journal, there you will find at page 678 the Court citing verbatim the view expressed in writing by the Minister for Foreign Relations of Nicaragua. This is the Nicaraguan Foreign Minister and what he says is this "There exists then no community between Nicaragua and Honduras in the Gulf of Fonseca and El Salvador being neither a neighbour nor a co-boundary State with us, the Republic of Honduras lying in between, that community claimed with Nicaragua and alleged in the Salvadorian protest does not and cannot exist." Now that was the Foreign Minister, and the counsel for Nicaragua in the same case, being well briefed, said exactly the same thing at page 688. In the American Journal you find the Court summarizing the Nicaraguan argument through counsel, and it says this: "Counsel for Nicaragua proceeds to argue that Nicaragua is not co-riparian with El Salvador in the Gulf of Fonseca because the indispensable element of adjacency is absent. The States that are truly riparian" he continues "are Nicaragua with Honduras and Honduras with El Salvador between which the status of being co-boundary States does exist". Well if I may say so that is entirely the present Honduran thesis and it is for Nicaragua to explain why it is that there has been this volte-face in their position.

I turn now to the closing-line of the Gulf. Mr. President, as the case proceeds, I become more and more convinced that this is a key issue. I feel that the Court will contribute greatly to the law by deciding, not only the nature and function of any bay closing-line, but especially the nature and function of a closing-line in so far as it represents the coasts within that bay.

Of course, the Court will also have to consider whether in a historic bay, and especially where there are more than one littoral States within the bay, the role of a closing-line is really any different. But that analysis of the nature and effect of a closing-line is going to be very important.

Mr. Lauterpacht suggested to you that bay closing-lines do not operate as baselines in a historic bay. In my argument I asked: if they do not, what purpose do they serve? I confess I am not clear what the answer was, if there was an answer to that question. It is certainly no answer to say that the closing-line separates internal from territorial waters, which I think is Nicaragua's position, because that makes the closing-line in effect a baseline.

Mr. Lauterpacht's other point was that Fonseca, as a historic bay with three littoral States, is unique. I believe that to be correct, but of course that does not really answer the question. Although it is unique, the real question is: although unique, does the closing-line in a historic bay, even with three littoral States, have a totally different function from a normal closing-line? You do not answer that question simply by saying it is unique.

Thirdly, it was suggested that, if there is such a baseline, then Honduras is the only State to have drawn it. I am not sure that is true because, if I can remind the Court of the 1985 El Salvadorian proposal, as I suggested to the Court, that red box — the area of joint rights — was based on the closing-line. Under the 1985 El Salvadorian proposal there could not really be any mistake but that El Salvador regarded that closing-line as a baseline. And I believe it to be the case that Nicaragua's position, even though different from that of Honduras in many respects, is in this respect identical, that is to say, for Nicaragua the closing-line is a true baseline.

The Honduran contention is that it is a true baseline and it does represent all the coasts within the Gulf. If that is so, it follows from that that the maritime area immediately in front of that baseline — the closing-line, which is a notional coast — that maritime belt stretching out for 200

miles is the prolongation of the baseline. It is not the prolongation of the mainland coasts which lie to the west and the east, as El Salvador would suggest.

Of course, if the Court accepts that view of the matter, the Honduran view, that it is a baseline, and that the waters in front are the prolongation of that baseline, that notional coast, then it follows that if Honduras, as a co-riparian, has a right to a share of that baseline, it equally has a right to a share of the maritime area stretching from that baseline out into the Pacific. The only thing which would bar that right is, of course, the El Salvadorian argument that the projection of the coast of Honduras is not possible, either because it has been "used up", or because its prolongation is barred by this screen of islands.

So that brings me, finally, to the discussion of the islands. We come now, I think, to the three cases which have been at issue, and also the Agreement between Australia and Papua New Guinea. Mr. President, let me be quite clear: I do not suggest to the Court that the situations in these three cases or in this Agreement are identical with that in the Gulf of Fonseca. Of course not. I accept entirely that we are dealing here with a rather unique situation. My argument is not that the situations are geographically similar. My argument is rather that the legal principles, which you see in operation in these cases and in this Agreement, are relevant and can be applied to the present situation before the Court.

If you think of the North Sea, I say simply that the prolongation of the German coast out into the middle of the North Sea was achieved despite the greater proximity of the Dutch and Danish coasts to either side. That is the principle, and that is the principle we rely on.

In the Gulf of Maine, I am perfectly aware that the illustration I used was a United States' illustration — in fact I said so during my oral argument — but the point is that, so far as the Court was concerned, the second and third sectors of the line decided by the Court accepted the United States argument. It must have done, because the lines in the second and third sectors, between points B and C, and C and D, were shifted over so that the starting-point, point B, was not directly in the centre of the closing-line, but rather closer to the Canadian coast. And the reason why the Court shifted it closer to the Canadian coast was in order to reflect the greater United States coast at the

back of the Gulf of Maine. So that long coast at the back of the Gulf certainly affected the location of the lines in the second and third sector, of that there is no doubt, and also, of course, attributed the greater maritime area outside the Gulf to the United States, by virtue of those United States' coasts inside the Gulf. That is the essential point I am making.

As regards the Anglo-French case in 1977, we really cannot avoid the conclusion that France was held to be entitled by law to the shelf areas north and north-west of the Channel Islands, and that that entitlement was based upon the French coast at the back of la baie de Granville. The Channel Islands did not operate as a screen to the French entitlement. Now, certainly the geographical circumstances are different and Mr. Lauterpacht, of course, went on to emphasize the Court's discussion of the balance of geographical circumstances between the two Parties. Of course, there may be some misunderstanding because when the 1977 Arbitral Tribunal talked about the overall equality or balance between the two coasts it was talking about the overall balance, or equality, between the whole of the south-facing coast of England and the whole of the north-facing coast of France. It was not talking about the Channel Islands area, it was talking about the two parallel and broadly similar coasts. That was where the equality lay and that is why the basic methodology adopted throughout the Channel was a median line between these two opposite and broadly similar coasts. But, said the Court, that broad equality is upset by, distorted by, this peculiar configuration of the Channel Islands, so they had to deal with that. So, the Court was not talking about a broad equality in relation to the Channel Islands, but in relation to the main coasts of the parties.

Now, it is equally true, as Mr. Lauterpacht says, that the Channel Islands were more remote from the United Kingdom than are the Salvadorian Islands in the Gulf from El Salvador. Agreed, but I do not really see why that should make any difference to the principle of law which I have just expounded. As regards to the Agreement between Australia and Papua New Guinea, this was held out to us as an "avuncular", a generous agreement, generous on the part of Australia, and not dictated by law. Well, may be, but you know that the parties are supposed to negotiate in accordance with equitable principles. And perhaps all that agreement does show is that the circumstances relevant to producing an equitable result are not confined to geography. There may

be other circumstances of a more intangible kind which are relevant to producing an equitable result and that, of course, is precisely what I suggested to the Court at the close of my first statement.

Now I have a final comment. We have heard very little about the basis of El Salvador's own claim to maritime areas in the Pacific. Of course, we have been told that that claim depends upon the El Salvadorian mainland coast and not on the islands inside the Gulf, not even on the coast inside the Gulf. That is true, but that apart, we are told really very little about the basis of El Salvador's own claim. Now, of course, one understands that, because El Salvador does not want to discuss delimitation outside the Gulf and that is the risk which El Salvador has a right to take in these proceedings. So it does not wish to plead to the point; that is the privilege of El Salvador. But, of course, it may be that the reason why El Salvador is rather discreet about the basis of its claim is that, if it was explicit, it would have to say they were claiming on the basis of equidistance. Their claim is based upon proximity, on absolute proximity. That is a claim which is of very dubious legal foundation and I suspect that that is perhaps why El Salvador does not see fit to declare the basis of its claim in more explicit terms.

Mr. President, I feel I have given the Court all the assistance I can give it and I thank you again for your patience.

The PRESIDENT: I thank Professor Bowett. I would like to ask the delegation of El Salvador when they want to present their oral rejoinder; whether this very morning or this afternoon or tomorrow morning?

Mr. MARTINEZ MORENO: Mr. President, El Salvador will prefer to answer tomorrow morning.

The PRESIDENT: I thank Ambassador Martínez Moreno. As agreed, Nicaragua will make their final statement tomorrow afternoon at 3 o'clock. The submissions and the closing statements of the two Parties, Honduras and El Salvador, in that order, will be, hopefully, heard on Friday morning if that is agreeable to them. So we adjourn now until tomorrow at 10 o'clock.

The Chamber rose at 11.10 a.m.

_____