SEPARATE OPINION OF JUDGE VALTICOS

[Translation]

The preceding Judgment relates, as will have been seen, to several land sectors (six, to be more precise) and to disputes bearing on the islands and the legal régime of the maritime spaces. On most of the findings of the Chamber I am in agreement with its members — or with the majority of its members — at least with regard to essentials. With respect to other findings, I have been unable to concur fully in the opinion of the majority or have been obliged to express certain reservations — to my regret, of course.

The difficulties encountered by the Chamber, particularly with regard to the land sectors, derive in part from the principle of *uti possidetis juris* that it was required to apply.

It was largely on that subject that I felt unable to subscribe, in certain respects, to the view of the majority of the Chamber and it is accordingly on that subject that I must express an initial opinion.

THE SCOPE OF THE PRINCIPLE OF *UTI POSSIDETIS JURIS*

The development of the principle of *uti possidetis juris* is well known. Initially specific to those American countries that had originally been colonized by Spain, it has, since that time, also been applied in other regions, albeit in connection with decolonizations of a much more recent date and under considerably different conditions, as shown by the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1986*, pp. 565 *et seq.*, paras. 21 *et seq.*).

The application, in the present case, of the principle of *uti possidetis juris*, which, as stated in the Judgment, had, as agreed by the Parties, to guide the work of the Chamber, together with what are known as *"effectivités"* and, more generally, the rules of international law, has encountered serious difficulties.

These difficulties derived, in the first place, from the fact that the principle is not easy to apply when one is dealing with rights that may well date from three or four centuries ago (for, while, in principle, the "critical date" is 1821, the rights and titles invoked by the Parties went back, in general, a great deal further).

It was, however, above all the probative character of those rights that was rendered uncertain by the passage of time. Which of the various rights invoked were those which had to be considered as relevant to the determination of the frontiers? It was neither simple nor sufficient to move back

in time when one could not be certain of the source from which the right had derived and at which the process should therefore be halted. To what extent did one have to reach a decision on the terms of the administrative divisions of the colonial era, when there was a lack of certainty as to both their precise course and their significance, when all authority in fact derived from the King of Spain and lines of "administrative control" were frequently modified?[1] What was, in that uncertain framework, the scope of what were known as *títulos ejidales*, which were granted by the authorities — more particularly to Indian communities, so that they could be settled and "put to work" — and were those titles to have a special effect upon the delimitation of the frontiers? This point was debated at length by the Parties, at least as regards the underlying principle. What I would like quite simply to point out here, in order to explain the view I shall subsequently advance, is that in a very old system, where everything derived from the royal authority, it is difficult to present what in the context of the case mentioned above (which, as I have said, was a very different one[2]), was called "a photograph of the territory", as, in the context with which we are dealing, the image would lie between the blurred and the kaleidoscopic. In the present case, it is impossible to revive completely the structures of the past or, conversely, to transpose to the past certain legal concepts of the present day.

What can reasonably be accepted, at least as far as I am concerned, is that operations like the granting of *títulos ejidales*, which constituted a measure subject to precise conditions, which was decided upon by a higher authority of an administrative as much as a judicial character, which was entrusted to highly responsible officials and scrupulously implemented, after an investigation and survey, according to a complex procedure, which was submitted for the approval of high-ranking authorities, particularly the *Real Audiencia* of Guatemala[3], which had in view important political objectives and which was accomplished as an act of

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[1] The importance of this "administrative control" was stressed, in a general manner, by the Arbitral Tribunal dealing with the case concerning the frontiers between Guatemala and Honduras, presided over by Chief Justice Hughes and also including L. Castro Ureña, of Guatemala, and E. Bello Codesido, of Honduras (United Nations, *Reports of International Arbitral Awards*, Vol. II, 1949, pp. 1322-1324).

[2] Aforementioned case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1986*, p. 568, para. 30).

[3] In this regard, one may note the following passage in an authoritative work by an eminent specialist, Michel Foucher (*Fronts et frontières*, Fayard, Paris, 1988, p. 77):

> "It is accepted that the chain of *audiencias*, the major judicial bodies of the colonial administration, endowed with autonomy at the highest level of the three viceroyalties, provided the framework or rather the kernel of the entities that became independent. But this does not suffice for a definition of the whole framework, as there existed boundary areas that could well 'shift' their allegiances."

Moreover, this author describes as "very involved" the problems of the boundaries between Honduras and El Salvador (*op. cit.*, p. 452).

sovereignty involving the systematic control of the subsequent activities (particularly those of cultivation) of the administrative unit by which the operation had been ordered, that, in short, such operations of major public interest were bound to have had, at least under specific circumstances, a certain effect upon the administrative structures or, in any event, the administrative relationships of the regions considered. This accounts for the importance that has been attached to the scope of the *títulos ejidales*, in any event insofar as those which did not merely grant rights of private ownership are concerned. In the last analysis the *títulos ejidales* cannot, under certain conditions and particularly with respect to their nature, the persons meant to be affected by them, the conditions under which they were drawn up, their authority, their degree of precision and the ways in which they could be influenced by other factors, be left out of account when one is faced with the task of deciding upon the delimitation of the boundaries between El Salvador and Honduras.

In that regard, the position adopted by the Chamber[1] has been to play down, to an extent I consider excessive, the presumable effects upon the course of boundaries of titles emanating from the Spanish authorities and determining the limits of the lands granted, *inter alia*, to collective entities *(poblaciones)* — for which provision is made in Article 26 of the General Peace Treaty of 1980. The position of the Chamber is, of course, tenable and in reality, as it has pointed out, that discussion, and more particularly the distinction drawn between the different kinds of titles invoked *(reducción* or *composición)* were generally more theoretical than practical in their effects upon the way in which particular sectors — or at least most of those sectors — were dealt with. However, that position ultimately led to a complication rather than a simplification of the establishment of the course of the boundaries in that it resulted — at least at the outset — in disregard for the respective importance of the titles, in decisions of very unequal importance being put on the same footing while account was even taken of titles of no legal validity, as in the sector of Sazalapa-Arcatao (see below).

At a different level, apart from the very justified case of Meanguera, the role of *"effectivités"* seems to me to have been unduly reduced, even if one allows for the frequently inadequate nature of the elements invoked in order to justify them.

One must, in any event, pay tribute to the care with which the Chamber endeavoured to bring to light the successive layers of past territorial boundaries, compared the titles submitted to it, scrutinized maps, analysed reports and interpreted the recitals they contained as well as their silences, put itself in the shoes of the surveyors, followed in their footsteps, measured the paths they took, determined — insofar as it could — the rivers they crossed and those they did not seem to the Chamber to have

[1] Judgment, introduction concerning the land boundary, paras. 43-55.

crossed, and identified watercourses and mountains — sometimes even displacing or renaming them. All this involved assessments and options that were not easy, particularly in the not infrequent cases where the evidence was uncertain, its weight was debatable and the arguments of the two Parties seemed to cancel each other out.

It is accordingly not surprising that, given the frequent uncertainty of the situations confronting them, the members of the Chamber were at times unable to reach complete agreement. I shall therefore have to indicate below, in connection with some sectors, the various points on which I disagree, as well as those my concurrence in which has a particular explanation.

First Sector. Tepangüisir

The first sector to be dealt with, that of Tepangüisir, raised several of the significant issues of the dispute submitted to the Chamber: the scope of the *títulos ejidales* — with, in this case, the further complication of their effects from one sector to the other; the directions taken by the surveyors — with the special problem that they were working in a mountainous area where pathways were frequently tortuous, involving changes in direction; the contested location of the principal geographical features, more particularly the top of the hill of Tepangüisir, as well as the course and even the source of the river Pomola.

The elements of those problems are clearly set forth in the corresponding passages of the Judgment. I accordingly see no point in going back to them, other than to say that in various respects — for example the relatively minor matter of the appurtenance of a triangular zone to the lands of Citalá — I unhesitatingly subscribe to the views taken by the Chamber. However, I feel differently about the frontier drawn to the west of Talquezalar and which runs, more or less directly, towards the Cerro Montecristo rather than following a north-westerly direction towards what is most probably the river Pomola (i.e., towards the Cerro Oscuro), before continuing in a south-westerly direction down towards the tripoint of Montecristo. That would have seemed to me more in accordance with the reasons behind the *ejido* of 1776, whereby the lands of the massif of Tepangüisir were granted to the Indian community, namely that the people of Citalá-Tepangüisir should be allowed to cultivate the lands of that area.

The Chamber felt that it should adopt the arguments of Honduras with respect to the course and the location of the source of the river Pomola, although in fact the arguments of both Parties were equivalent, given that the references in the 1766 Title to the high peaks and thick vegetation of the mountain and to the source of the river Pomola being reached "through a deep gully and precipices" reflect, rather, the mountainous area claimed by El Salvador. In short, more weight should have been given to these substantive reasons than to uncertain maps and shifting orientations.

SECOND SECTOR. CAYAGUANCA OR LAS PILAS

On the whole, I can concur with the line adopted.

THIRD SECTOR. SAZALAPA-ARCATAO (OR LA VIRTUD)

This is a complex sector in which a number of more or less solid titles come into conflict — a situation which, first and foremost, raised the question of the relevance of those titles. My main objection to the findings of the Chamber on this point is that it based its reasoning upon titles that are questionable on a number of grounds, such as those of San Juan El Chapulín, Concepción de las Cuevas, Hacienda (or San Francisco) of Sazalapa, Gualcimaca and Colopele. An additional difficulty was the location, frequently various or even multiple, of the various places to which reference was made.

As a consequence, El Salvador's claims were either set aside or limited, particularly to the north and the east of the line fixed.

Moreover, the Chamber decided not to accept El Salvador's claim to a small quadrilateral to the north-west of the area attributed to it — and to the north of the river Sazalapa — with respect to which it deemed the two States' arguments to be of equal weight. One element that the Chamber finally saw as significant to its rejection of the claim was that the surveyor did not expressly state whether he had crossed the Sazalapa river. The argument is of course not without weight, but there are others which strike me as more convincing and go the other way.

The Chamber also found that it could not accept El Salvador's claim to another protrusion, extending to the north-east of that sector as far as the Cerro El Fraile and which seems to correspond, more particularly, to the top of certain very high hills that is mentioned in the title-deed of Arcatao (to say nothing of the somewhat mysterious reference to a "guanacaste" tree).

With respect to the eastern frontier running from north to south, the central (slightly concave) part on the same level as the old "title-deed" of Gualcimaca seems to me to take undue account of that "title-deed" — which I have already mentioned as being invalid, since it was rejected by the Real Audiencia of Guatemala.

Lastly, and with respect to the line located to the south-east, the adopted delimitation is, in my view, acceptable.

In short, the sector that the Chamber has decided to attribute to El Salvador constitutes an appreciably diminished part of that country's claims. I consider that it could properly have been filled out somewhat, but that it corresponds to the essential. That is why I finally gave it my support, albeit not without some hesitation.

FOURTH SECTOR. NAGUATERIQUE

The sector of Naguaterique was the largest in area. The main question was whether that sector should be split up into two parts, divided by the

river Negro-Quiagara, the northern part being attributed to Honduras and the southern one to El Salvador, or whether the whole of that sector — i.e., as from, to the north, the Cerro La Ardilla line — should be attributed to El Salvador.

The majority of the Chamber found — in terms which bear witness to a certain initial hesitation — in favour of a frontier line following the river Negro-Quiagara. I was unable to subscribe to that view, as the title-deed of Arambala-Perquín — which had been the subject (within the framework of the jurisdiction of San Miguel) of a survey effected in 1769 with a view to the replacement of a 1745 title-deed destroyed by fire, and which was expressly confirmed in 1815 by the *Juez Privativo de Tierras* of the Real Audiencia of Guatemala — established the line from the Cerro La Ardilla, where, moreover, the surveyor, Castro, had begun his operations. This solid title-deed should, in my view, have taken precedence over the distinctly less convincing considerations advanced in support of the Río Negro line.

Three elements which were invoked against the Cerro La Ardilla line do not seem to me to be convincing.

In the first place, reference was made to a tract of land known as Jocoara which had been left out of the above-mentioned land grant; but, in addition to being different, the corresponding terms only relate to a distant area of relatively small dimensions (2½ *caballerías*).

Reference was also made to the line of the river Salalamuya, which had been invoked by El Salvador as limiting the Cerro La Ardilla line and which, admittedly, could not be located on any map. The objection is not without weight — but it is not decisive, as the maps submitted by the Parties are far from being accurate in every case. What is more, the doubt that subsists as to the exact course of the boundary should not without more result in a State losing a whole piece of territory.

Lastly, to say nothing of the convenient but sometimes excessive pull that the certainties of watercourses exert, in certain cases, upon whoever has to draw a boundary line, a third consideration advanced in favour of the river boundary was that it had been envisaged during the negotiations of 1861 but rejected shortly thereafter by El Salvador. However, it is accepted that proposals made during negotiations cannot be taken into account when a decision based on law is to be made, and the same should hold good for provisional agreements within the framework of negotiations. In such a context, the notion of acquiescence would be too elusive as well as conditional to be acceptable. The Chamber may not, moreover, reach decisions *ex aequo et bono* — even if one were to consider, although the point is by no means free of doubt, that equity is served by such a decision, which, in addition, takes no account of the presence of Salvadorian nationals with properties in the contested part of the area, whose situation could well become precarious as a result of the attribution of that area to Honduras.

This sector is certainly the one in which I have the greatest reservations about the Chamber's findings.

In a different field, i.e., as regards the south-western section — which raised some particularly complex issues — the solution finally adopted, even though it does not take account of some of the *effectivités* mentioned by El Salvador — as it could have done — does not, as a whole, lack logic, since the available elements were, in the main, scarcely probative.

Fifth Sector. Dolores

A problem to some extent similar to that of Naguaterique arose in the following sector, Dolores. In that sector the Chamber was also confronted by a conflict between, on the one hand, a title-deed of an incontestable legal weight, i.e., the 1760 one relating to Polorós, which was approved by the Real Audiencia of Guatemala but whose geographical scope was uncertain, and, on the other hand, a watercourse — the river Torola — which offered the advantage of convenience but had no strong support in either the title-deeds or practice.

It will suffice in this context to bear in mind that an earlier territory, known as Sapigre, should not be taken into account in the present case as, after its people had died out at the beginning of the 18th century, the territory reverted to the Spanish Crown, which disposed of it as it deemed fit. One cannot, of course, enter here into details concerning the title-deeds of unequal value that were invoked by one and the other Party, but it follows from them that the title-deed of Polorós should be given primacy and that it extends to the north of the river Torola. The question is, then, one of deciding what should be the extent of the territory to be seen as belonging to El Salvador. The latter maintained that that territory, purportedly shaped rather like a trapezium, had as its apex, to the west, the Cerro de López, from whence a straight line would lead, to the east, to the Cerro Ribitá, with the boundary at that point swinging round towards the south-east and then to the south, along the river Unire. This formula raised a number of objections, particularly with respect to the area covered, the distances mentioned in the title-deed of Polorós and the somewhat dubious geographical data. In order to take account of these different factors, the Chamber gave its support to a construction according to which El Salvador would indeed be entitled to a sort of quadrilateral to the north of the river, but in proportions reduced so as to take account of the above-mentioned distances in the title-deed of Polorós.

While this ingenious solution may be deemed satisfactory from the standpoint of principle and of the distances involved, it presents the drawback of entailing changes of names, as compared to the traditional toponymy, with respect to the peaks and rivers in question, and of thus implying an alternative Cerro de López and another river Mansupucagua. This result is not unusual in the present case (as has been noted, in particular, for the third sector), but one has to admit that it is not fully satisfactory. However, for want of a more convincing solution, it has to be accepted as a consequence of the available data.

THE MARITIME SPACES

The issue of the maritime spaces comprises, on the one hand, the question of the waters within the Gulf and, on the other, that of the waters outside it. These are two different problems, each of which raises specific questions, but constitute extensions of each other.

For the waters within the Gulf, I have no difficulty in sharing the Chamber's view.

As for the waters outside the Gulf, the problems that arose were undoubtedly complex ones. They were particularly complex because one was dealing with the extension of a *particular historic bay* having three riparian States, with respect to which the general international law of the sea does not contain any specific norms. The particular situation of that bay and the fact that the coasts of Honduras are located at the back of it — together with the fact that most of those coasts were already taken into account in 1900 in the agreements concluded with Nicaragua —, the screen formed, at least in part, by the island of Meanguera, which the Chamber attributes to El Salvador, and the objections raised against the construction of a closing line of the bay between Cape Amapala and Cape Cosigüina, are so many elements that must carry some weight in the consideration of this problem. All in all, however, those arguments do not strike me as decisive and I take the view that the line of argument of the majority of the Chamber — which need not be recapitulated at this stage — is acceptable from a legal standpoint, given the very peculiar character of the Gulf of Fonseca as an historic bay with three riparians, as has already been pointed out. The conclusions drawn by the Chamber are a consequence of that particular situation and cannot, of course, be given a more general scope in circumstances of a different kind.

(Signed) Nicolas VALTICOS.