CASE CONCERNING THE LAND, ISLAND AND MARITIME FRONTIER DISPUTE (EL SALVADOR/HONDURAS) (APPLICATION FOR PERMISSION TO INTERVENE)

Judgment of 13 September 1990

The Chamber formed to deal with the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), delivered its Judgment on the Application for permission to intervene in that case filed by Nicaragua under Article 62 of the Statute. It found, unanimously, that Nicaragua had shown that it has an interest of a legal nature which may be affected by part of the Judgment of the Chamber on the merits in the case and decided that Nicaragua was accordingly permitted to intervene in the case in certain respects.

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The composition of the Chamber was as follows: President, Judge Sette-Camara; Judges Oda and Sir Robert Jennings; Judges *ad hoc* Valticos and Torres Bernárdez.

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The complete text of the operative paragraph of the Judgment reads as follows:

"For these reasons,

"THE CHAMBER,

"Unanimously,

"1. *Finds* that the Republic of Nicaragua has shown that it has an interest of a legal nature which may be affected by part of the Judgment of the Chamber on the merits in the present case, namely its decision on the legal régime of the waters of the Gulf of Fonseca, but has not shown such an interest which may be affected by any decision which the Chamber may be required to make concerning the delimitation of those waters, or any decision as to the legal situation of the maritime spaces outside the Gulf, or any decision as to the legal situation of the islands in the Gulf;

"2. *Decides* accordingly that the Republic of Nicaragua is permitted to intervene in the case, pursuant to Article 62 of the Statute, to the extent, in the manner and for the purposes set out in the present Judgment, but not further or otherwise."

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Judge Oda appended a separate opinion to the Judgment. In this opinion the Judge concerned stated and explained

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the position he adopted in regard to certain points dealt with in the Judgment.

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I. *Proceedings and submissions by the Parties* (paras. 1–22)

1. By a joint notification dated 11 December 1986, filed in the Registry of the Court the same day, the Ministers for Foreign Affairs of the Republic of Honduras and the Republic of El Salvador transmitted to the Registrar a certified copy of a Special Agreement in Spanish, signed in the City of Esquipulas, Republic of Guatemala, on 24 May 1986. Its preamble refers to the conclusion on 30 October 1980, in Lima, Peru, of a General Peace Treaty between the two States, whereby, *inter alia*, they delimited certain sections of their common land frontier; and it records that no direct settlement had been achieved in respect of the remaining land areas, or as regards "the legal situation of the islands and maritime spaces".

Article 2 of the Special Agreement, which defines the subject of the dispute, reads, in a translation by the Registry of the Court,

"The Parties request the Chamber:

"1. To delimit the frontier line in the areas or sections not described in Article 16 of the General Peace Treaty of 30 October 1980.

"2. To determine the legal situation of the islands and maritime spaces."

On 17 November 1989 Nicaragua filed a request for permission to intervene under Article 62 of the Statute of the Court in the proceedings instituted by the notification of the Special Agreement.

The Court, in an Order dated 28 February 1990, found that it was for the Chamber formed to deal with the present case to decide whether Nicaragua's request should be granted.

II. *Nature and extent of the dispute* (paras. 23–33)

The Chamber observes that the dispute between El Salvador and Honduras which is the subject of the Special Agreement concerns several distinct though in some respects interrelated matters. The Chamber is asked first to delimit the land frontier line between the two States in the areas or sections not described in Article 16 of the General Peace Treaty concluded by them on 30 October 1980; Nicaragua is not seeking to intervene in this aspect of the proceedings. The Chamber is also to "determine the legal situation of the islands", and that of the "maritime spaces". The geographical context of the island and maritime aspects of the dispute, and the nature and extent of the dispute as appears from the Parties' claims before the Chamber, is as follows.

The Gulf of Fonseca lies on the Pacific coast of Central America, opening to the ocean in a generally south-westerly direction. The north-west coast of the Gulf is the land territory of El Salvador, and the south-east coast that of Nicaragua; the land territory of Honduras lies between the two, with a substantial coast on the inner part of the Gulf. The entry to the Gulf, between Punta Amapala in El Salvador to the north-west, and Punta Cosigüina in Nicaragua to the south-east, is some 19 nautical miles wide. The penetration of the Gulf from a line drawn between these points varies between 30 and 32 nautical miles. Within the Gulf of Fonseca, there is a considerable number of islands and islets.

El Salvador asks the Chamber to find that "El Salvador has and had sovereignty over all the islands in the Gulf of Fonseca, with the exception of the Island of Zacate Grande which can be considered as forming part of the coast of Honduras". Honduras for its part invites the Chamber to find that the islands of Meanguera and Meanguerita are the only islands in dispute between the Parties, so that the Chamber is not, according to Honduras, called upon to determine sovereignty over any of the other islands, and to declare the sovereignty of Honduras over Meanguera and Meanguerita.

The Chamber considers that the detailed history of the dispute is not here to the purpose, but that two events concerning the maritime areas must be mentioned. First, the waters within the Gulf of Fonseca between Honduras and Nicaragua were to an important extent delimited in 1900 by a Mixed Commission established pursuant to a Treaty concluded between the two States on 7 October 1894, but the delimitation line does not extend so far as to meet a closing line between Punta Amapala and Punta Cosigüina.

The second event to be mentioned is the following. In 1916 El Salvador brought proceedings against Nicaragua in the Central American Court of Justice, claiming *inter alia* that the Bryan-Chamorro Treaty concluded by Nicaragua with the United States of America, for the construction of a naval base, "ignored and violated the rights of co-ownership possessed by El Salvador in the Gulf of Fonseca".

Nicaragua resisted the claim contending (*inter alia*) that the lack of demarcation of frontiers between the riparian States did "not result in common ownership". The Decision of the Central American Court of Justice dated 9 March 1917 records the unanimous view of the judges that the international status of the Gulf of Fonseca was that it was "an historic bay possessed of the characteristics of a closed sea", and in its "Examination of facts and law", the Court found:

"Whereas: The legal status of the Gulf of Fonseca having been recognized by this Court to be that of a historic bay possessed of the characteristics of a closed sea, the three riparian States of El Salvador, Honduras and Nicaragua are, therefore, recognized as co-owners of its waters, except as to the littoral marine league which is the exclusive property of each, . . ."

It is claimed by El Salvador in its Memorial in the present case that:

"On the basis of the 1917 judgement an objective legal régime has been established in the Gulf. Even if initially the judgement was binding only in respect of the direct parties to the litigation, Nicaragua and El Salvador, the legal status recognized therein has been consolidated in the course of time[;] its effects extend to third States, and, in particular, they extend to Honduras";

and further that the juridical situation of the Gulf "does not permit the dividing up of the waters held in condominium", with the exception of "a territorial sea within the Gulf", recognized by the Central American Court of Justice. It therefore asks the Chamber to adjudge and declare that:

"The juridical position of the maritime spaces within the Gulf of Fonseca corresponds to the juridical position established by the Judgement of the Central American Court of Justice rendered March 9th 1917, as accepted and applied thereafter."

It also contends that

"So far as the maritime spaces are concerned, the Parties have not asked the Chamber either to trace a line of delimitation or to define the Rules and Principles of Public

International Law applicable to a delimitation of maritime spaces, either inside or outside the Gulf of Fonseca."

Honduras rejects the view that the 1917 Judgement produced or reflected an objective legal régime, contending that in the case of

"a judgment or arbitral award laying down a delimitation as between the parties to a dispute, the solution therein adopted can only be opposed to the parties".

It also observes that

"it is not the 1917 Judgement which confers sovereignty upon the riparian States over the waters of the Bay of Fonseca. That sovereignty antecedes considerably that judgment between two riparian States, since it dates back to the creation of the three States concerned."

Honduras's contention as to the legal situation of the maritime spaces, to be examined further below, involves their delimitation between the Parties. It considers that the Chamber has jurisdiction under the Special Agreement to effect such delimitation, and has indicated what, in the view of Honduras, should be the course of the delimitation line.

As regards maritime spaces situated outside the closing line of the Gulf, Honduras asks the Chamber to find that the "community of interests" between El Salvador and Honduras as coastal States of the Gulf implies that they each have an equal right to exercise jurisdiction over such spaces. On this basis, it asks the Chamber to determine a line of delimitation extending 200 miles seaward, to delimit the territorial sea, the exclusive economic zone and the continental shelf of the two Parties. El Salvador however contends that the Chamber does not, under the Special Agreement, have jurisdiction to delimit maritime areas outside the closing line of the Gulf. El Salvador denies that Honduras has any legitimate claim to any part of the continental shelf or exclusive economic zone in the Pacific, outside the Gulf; it is however prepared to accept that this question be decided by the Chamber.

III. *Requirements for intervention under Article 62 of the Statute and Article 81 of the Rules of Court* (paras. 35–101)

In its Application for permission to intervene, filed on 17 November 1989, Nicaragua stated that the Application was made by virtue of Article 36, paragraph 1, and Article 62 of the Statute. An application under Article 62 is required by Article 81, paragraph 1, of the Rules of Court to be filed "as soon as possible, and not later than the closure of the written proceedings". The Application of Nicaragua was filed in the Registry of the Court two months before the time-limit fixed for the filing of the Parties' Replies.

By Article 81, paragraph 2, of the Rules of Court a State seeking to intervene is required to specify the case to which it relates and to set out:

"(*a*) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;

"(*b*) the precise object of the intervention;

"(*c*) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case".

The Chamber first examines arguments of El Salvador which were put forward as grounds for the Chamber to reject the Application of Nicaragua *in limine*, without there being any need for further examination of its compliance with Article 62 of the Statute of the Court. These arguments, none of which were upheld by the Chamber, related to the formal compliance of the Application with the requirements of Article 81, paragraph 2, of the Rules of Court, to the alleged "untimeliness" of the Application in view of requests contained in it which would be disruptive at the present advanced stage of the proceedings, and to the absence of negotiations prior to the filing of the Application.

(a) *Interest of a legal nature* (paras. 37 and 52–84)

Nicaragua states in its Application that: "As can be appreciated in Article 2 of the Special Agreement . . . , the Government of Nicaragua has an interest of a legal nature which must inevitably be affected by a decision of the Chamber." (Para. 2.) It then proceeds to enumerate the "particular considerations supporting this opinion". The Chamber observes that as the Court has made clear in previous cases, in order to obtain permission to intervene under Article 62 of the Statute, a State has to show an interest of a legal nature which may be affected by the Court's decision in the case, or that *un intérêt d'ordre juridique est pour lui en cause*—the criterion stated in Article 62.

In the present case, Nicaragua has gone further: citing the case concerning *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954*, p. 19), it has argued that its interests are so much part of the subject-matter of the case that the Chamber could not properly exercise its jurisdiction without the participation of Nicaragua. The Chamber therefore examines the way in which the interests of Albania would have formed "the very subject-matter of the decision" in the case concerning *Monetary Gold Removed from Rome in 1943*, and explains that the Court's finding in that case was that, while the presence in the Statute of Article 62 might impliedly authorize continuance of the proceedings in the absence of a State whose "interests of a legal nature" might be "affected", this did not justify continuance of proceedings in the absence of a State whose international responsibility would be "the very subject-matter of the decision". There had been no need to decide what the position would have been had Albania applied for permission to intervene under Article 62. The Chamber concludes that, if in the present case the legal interests of Nicaragua would form part of "the very subject-matter of the decision", as Nicaragua has suggested, this would doubtless justify an intervention by Nicaragua under Article 62 of the Statute, which lays down a less stringent criterion. The question would then arise, however, whether such intervention under Article 62 of the Statute would enable the Chamber to pronounce upon the legal interests of Nicaragua which it is suggested by Nicaragua would form the very subject-matter of the decision. The Chamber will therefore first consider whether Nicaragua has shown the existence of an "interest of a legal nature which may be affected by the decision", so as to justify an intervention; and if such is the case, will then consider whether that interest may in fact form "the very subject-matter of the decision" as did the interests of Albania in the case concerning *Monetary Gold Removed from Rome in 1943*.

The Chamber further observes that Article 62 of the Statute contemplates intervention on the basis of an interest of a legal nature "which may be affected by the decision in the case". In the present case, however, what is requested of the Chamber by the Special Agreement is not a decision on a single circumscribed issue, but several decisions on various aspects of the overall dispute between the Parties. The Chamber has to consider the possible effect on legal interests asserted by Nicaragua of its eventual decision on each of the different issues which might fall to be determined, in order to

define the scope of any intervention which may be found to be justified under Article 62 of the Statute. If a State can satisfy the Court that it has an interest of a legal nature which may be affected by the decision in the case, it may be permitted to intervene in respect of that interest. But that does not mean that the intervening State is then also permitted to make excursions into other aspects of the case; this is in fact recognized by Nicaragua. Since the scope of any permitted intervention has to be determined, the Chamber has to consider the matters of the islands, the situation of the waters within the Gulf, the possible delimitation of the waters within the Gulf, the situation of the waters outside the Gulf, and the possible delimitation of the waters outside the Gulf.

Whether all of these matters are indeed raised by the wording of Article 2, paragraph 2, of the Special Agreement is itself disputed between the Parties to the case. Accordingly, the list of matters to be considered must in this phase of the proceedings be entirely without prejudice to the meaning of Article 2, paragraph 2, as a whole, or of any of the terms as used in that Article. The Chamber clearly cannot take any stand in the present proceedings on the disputes between the Parties concerning the proper meaning of the Special Agreement: it must determine the questions raised by Nicaragua's Application while leaving these questions of interpretation entirely open.

Burden of proof
(paras. 61–63)

There was some argument before the Chamber on the question of the extent of the burden of proof on a State seeking to intervene. In the Chamber's opinion, it is clear, first, that it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of proof; and, second, that it has only to show that its interest "may" be affected, not that it will or must be affected. What needs to be shown by a State seeking permission to intervene can only be judged *in concreto* and in relation to all the circumstances of a particular case. It is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected; it is not for the Court itself—or in the present case the Chamber—to substitute itself for the State in that respect. The Chamber also recalls in this connection the problem that the Parties to the case are in dispute about the interpretation of the very provision of the Special Agreement invoked in Nicaragua's Application. The Chamber notes the reliance by Nicaragua on the principle of recognition, or on estoppel, but does not accept Nicaragua's contentions in this respect.

The Chamber then turns to consideration of the several specific issues in the case which may call for decision, as indicated above, in order to determine whether it has been shown that such decision may affect a Nicaraguan interest of a legal nature.

1. *Legal situation of the islands*
(paras. 65–66)

So far as the decision requested of the Chamber by the Parties is to determine the legal situation of the islands, the Chamber concludes that it should not grant permission for intervention by Nicaragua, in the absence of any Nicaraguan interest liable to be directly affected by a decision on that issue. Any possible effects of the islands as relevant circumstances for delimitation of maritime spaces fall to be considered in the context of the question whether Nicaragua should be permitted to intervene on the basis of a legal interest which may be affected by a decision on the legal situation of the waters of the Gulf.

2. *Legal situation of the waters within the Gulf*
(paras. 67–79)

(i) *The régime of the waters*

It is El Salvador's case that, as between El Salvador, Honduras and Nicaragua, there exists "a régime of community, co-ownership or joint sovereignty" over such of the waters of the Gulf of Fonseca "as lie outside the area of exclusive jurisdiction", an "objective legal régime" on the basis of the 1917 Judgement of the Central American Court of Justice. On that basis, El Salvador considers that the juridical situation of the Gulf does not permit the dividing up of the waters held in condominium. El Salvador also contends that the Special Agreement does not confer jurisdiction to effect any such delimitation. Honduras on the other hand contends, *inter alia*, that "the Gulf's specific geographical situation creates a special situation between the riparian States which generates a community of interests" which in turn "calls for a special legal régime to determine their mutual relations"; that the community of interests "does not mean integration and the abolition of boundaries" but, on the contrary, "the clear definition of those boundaries as a condition of effective co-operation"; and that each of the three riparian States "has an equal right to a portion of the internal waters".

The Chamber considers that quite apart from the question of the legal status of the 1917 Judgement, however, the fact is that El Salvador now claims that the waters of the Gulf are subject to a condominium of the coastal States, and has indeed suggested that that régime "would in any case have been applicable to the Gulf under customary international law". Nicaragua has referred to the fact that Nicaragua plainly has rights in the Gulf of Fonseca, the existence of which is undisputed, and contends that

> "The condominium, if it is declared to be applicable, would by its very nature involve three riparians, and not only the parties to the Special Agreement."

In the opinion of the Chamber, this is a sufficient demonstration by Nicaragua that it has an interest of a legal nature in the determination whether or not this is the régime governing the waters of the Gulf: the very definition of a condominium points to this conclusion. Furthermore, a decision in favour of some of the Honduran theses would equally be such as may affect legal interests of Nicaragua. The "community of interests" which is the starting-point of the arguments of Honduras is a community which, like the condominium claimed by El Salvador, embraces Nicaragua as one of the three riparian States, and Nicaragua must therefore be interested also in that question. The Chamber, therefore, finds that Nicaragua has shown to the Chamber's satisfaction the existence of an interest of a legal nature which may be affected by its decision on these questions.

On the other hand, while the Chamber is thus satisfied that Nicaragua has a legal interest which may be affected by the decision of the Chamber on the question whether or not the waters of the Gulf of Fonseca are subject to a condominium or a "community of interests" of the three riparian States, it cannot accept the contention of Nicaragua that the legal interest of Nicaragua "would form the very subject-matter of the decision", in the sense in which that phrase was used in the case concerning *Monetary Gold Removed from Rome in 1943* to describe the interests of Albania. It follows that the question whether the Chamber would have power to take a decision on these questions, without the participation of Nic-

aragua in the proceedings, does not arise; but that the conditions for an intervention by Nicaragua in this aspect of the case are nevertheless clearly fulfilled.

(ii) *Possible delimitation of the waters*

If the Chamber were not satisfied that there is a condominium over the waters of the Gulf of such a kind as to exclude any delimitation, it might then be called upon, if it were satisfied that it has jurisdiction to do so, to effect a delimitation. The Chamber has therefore to consider whether a decision as to delimitation of the waters of the Gulf might affect an interest of a legal nature appertaining to Nicaragua, in order to determine whether Nicaragua should be permitted to intervene in respect of this aspect of the case also. It does not, however, have to consider the possible effect on Nicaragua's interests of every possible delimitation which might be arrived at; it is for the State seeking to intervene to show that its interests might be affected by a particular delimitation, or by delimitation in general. Honduras has already indicated in its pleadings how, in its view, the delimitation should be effected. El Salvador, consistently with its position, has not indicated its views on possible lines of delimitation. Nicaragua, for its part, has not given any indication of any specific line of delimitation which it considers would affect its interests.

The Chamber examines arguments put forward in the Nicaraguan Application as considerations supporting its assertion of a legal interest; it does not consider that an interest of a third State in the general legal rules and principles likely to be applied by the decision can justify an intervention, or that the taking into account of all the coasts and coastal relationships within the Gulf as a geographical fact for the purposes of a delimitation between El Salvador and Honduras means that the interest of a third riparian State, Nicaragua, may be affected. The Chamber observes that the essential difficulty in which the Chamber finds itself, on this matter of a possible delimitation within the waters of the Gulf, is that Nicaragua did not in its Application indicate any maritime spaces in which Nicaragua might have a legal interest which could be said to be affected by a possible delimitation line between El Salvador and Honduras.

Accordingly the Chamber is not satisfied that a decision in the present case either as to the law applicable to a delimitation, or effecting a delimitation, between Honduras and El Salvador, of the waters of the Gulf (except as regards the alleged "community of interests"), would affect Nicaragua's interests. The Chamber therefore considers that although Nicaragua has, for purposes of Article 62 of the Statute, shown an interest of a legal nature which may be affected by the Chamber's decision on the question of the existence or nature of a régime of condominium or community of interests within the Gulf of Fonseca, it has not shown such an interest which might be affected by the Chamber's decision on any question of delimitation within the Gulf. This finding also disposes of the question, referred to above, of the possible relevance of a decision in the island dispute.

3. *Legal situation of waters outside the Gulf* (paras. 80–84)

The Chamber now turns to the question of the possible effect on Nicaragua's legal interests of its future decision on the waters outside the Gulf. Honduras claims that by the Special Agreement

> "the Parties have necessarily endowed the Court with competence to delimit the zones of territorial sea and the exclusive economic zones pertaining to Honduras and El Salvador respectively"

and asks the Chamber to endorse the delimitation line advanced by Honduras for the waters outside the Gulf as "productive of an equitable solution". El Salvador interprets the Special Agreement as not authorizing the Chamber to effect any delimitation. Both Parties contend that Nicaragua has no legal interest which may be affected by the decision on the "legal situation" of the maritime spaces outside the Gulf and both Parties deny that the carrying out by the Chamber of their respective interpretations of Article 2 could affect Nicaragua's legal interests.

The Chamber notes Honduras' demonstration of a proposed scheme of delimitation designed to avoid any impingement upon waters outside the Gulf which might conceivably be claimed by Nicaragua, upon which the Chamber cannot pass in these incidental proceedings, and before hearing argument on the merits. That demonstration did call for some indication in response, by the State seeking to intervene, of how those proposals would affect a specific interest of that State, or what other possible delimitation would affect that interest. The charted proposition of Honduras thus gave Nicaragua the opportunity to indicate how the Honduran proposals might affect "to a significant extent" any possible Nicaraguan legal interest in waters west of that Honduran line. Nicaragua failed to indicate how this delimitation, or any other delimitation regarded by it as a possible one, would affect an actual Nicaraguan interest of a legal nature. The Chamber therefore cannot grant Nicaragua permission to intervene over the delimitation of the waters outside the Gulf closing line.

(b) *Object of the intervention* (paras. 85–92)

The Chamber turns to the question of the object of Nicaragua's Application for permission to intervene in the case. A statement of the "precise object of the intervention" is required by Article 81, paragraph 2 (*b*), of the Rules of Court.

Nicaragua's indication, in its Application for permission to intervene, of the object of its intervention in the present case, is as follows:

> "The intervention for which permission is requested has the following objects:
>
> "*First,* generally to protect the legal rights of the Republic of Nicaragua in the Gulf of Fonseca and the adjacent maritime areas by all legal means available.
>
> "*Secondly,* to intervene in the proceedings in order to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute. This form of intervention would have the conservative purpose of seeking to ensure that the determination of the Chamber did not trench upon the legal rights and interests of the Republic of Nicaragua . . ."

At the hearings, the Agent of Nicaragua emphasized its willingness to adjust to any procedure indicated by the Chamber. It has been contended, in particular by El Salvador, that Nicaragua's stated object is not a proper object.

So far as the object of Nicaragua's intervention is "to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute", it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention. The use in an Application to intervene of a perhaps somewhat more forceful expression ("trench upon the legal rights and interests") is immaterial,

provided the object actually aimed at is a proper one. Secondly, it does not seem to the Chamber that for a State to seek by intervention "to protect its claims by all legal means" necessarily involves the inclusion in such means of "that of seeking a favourable judicial pronouncement" on its own claims. The "legal means available" must be those afforded by the institution of intervention for the protection of a third State's legal interests. So understood, that object cannot be regarded as improper.

(c) *Basis of jurisdiction: Valid link of jurisdiction* (paras. 93–101)

The Chamber has now further to consider the argument of El Salvador that for Nicaragua to intervene it must in addition show a "valid link of jurisdiction" between Nicaragua and the Parties. In its Application, Nicaragua does not assert the existence of any basis of jurisdiction other than the Statute itself, and expresses the view that Article 62 does not require a separate title of jurisdiction.

The question is whether the existence of a valid link of jurisdiction with the parties to the case—in the sense of a basis of jurisdiction which could be invoked, by a State seeking to intervene, in order to institute proceedings against either or both of the parties—is an essential condition for the granting of permission to intervene under Article 62 of the Statute. In order to decide the point the Chamber must consider the general principle of consensual jurisdiction in its relation with the institution of intervention.

There can be no doubt of the importance of this general principle. The pattern of international judicial settlement under the Statute is that two or more States agree that the Court shall hear and determine a particular dispute. Such agreement may be given *ad hoc*, by Special Agreement or otherwise, or may result from the invocation, in relation to the particular dispute, of a compromissory clause of a treaty or of the mechanism of Article 36, paragraph 2, of the Court's Statute. Those States are the "parties" to the proceedings, and are bound by the Court's eventual decision because they have agreed to confer jurisdiction on the Court to decide the case, the decision of the Court having binding force as provided for in Article 59 of the Statute. Normally, therefore, no other State may involve itself in the proceedings without the consent of the original parties. Nevertheless, procedures for a "third" State to intervene in a case are provided in Articles 62 and 63 of the Court's Statute. The competence of the Court in this matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but from the consent given by them, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute. Thus the Court has the competence to permit an intervention even though it be opposed by one or both of the parties to the case. The nature of the competence thus created by Article 62 of the Statute is definable by reference to the object and purpose of intervention, as this appears from Article 62 of the Statute.

Intervention under Article 62 of the Statute is for the purpose of protecting a State's "interest of a legal nature" that might be affected by a decision in an existing case already established between other States, namely the parties to the case. It is not intended to enable a third State to tack on a new case, to become a new party, and so have its own claims adjudicated by the Court. Intervention cannot have been intended to be employed as a substitute for contentious proceedings. Acceptance of the Statute by a State does not of itself create jurisdiction to entertain a particular case: the specific consent of the parties is necessary for that. If an intervener were held to become a party to a case merely as a consequence of being permitted to intervene in it, this would be a very considerable departure from the principle of consensual jurisdiction. It is therefore clear that a State, which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case.

It thus follows from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party. The Chamber therefore concludes that the absence of a jurisdictional link between Nicaragua and the Parties to this case is no bar to permission being given for intervention.

IV. *Procedural rights of State permitted to intervene* (paras. 102–104)

Since this is the first case in the history of the two Courts in which a State will have been accorded permission to intervene under Article 62 of the Statute, it appears appropriate to give some indication of the extent of the procedural rights acquired by the intervening State as a result of that permission. In the first place, as has been explained above, the intervening State does not become party to the proceedings, and does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law. Nicaragua, as an intervener, has of course a right to be heard by the Chamber. That right is regulated by Article 85 of the Rules of Court, which provides for submission of a written statement, and participation in the hearings.

The scope of the intervention in this particular case, in relation to the scope of the case as a whole, necessarily involves limitations of the right of the intervener to be heard. An initial limitation is that it is not for the intervener to address argument to the Chamber on the interpretation of the Special Agreement concluded between the Parties on 24 May 1986, because the Special Agreement is, for Nicaragua, *res inter alios acta;* and Nicaragua has disclaimed any intention of involving itself in the dispute over the land boundary. The Chamber then summarizes the aspects of the case in respect of which Nicaragua has shown the existence of an interest of a legal nature and those in respect of which it has not, with the consequent limitations on the scope of the intervention permitted.

SUMMARY OF THE SEPARATE OPINION OF JUDGE ODA

While agreeing strongly with the Chamber in permitting Nicaragua to intervene in the case brought to the Court pursuant to the Special Agreement of 24 May 1986 between Honduras and El Salvador, Judge Oda expresses the view that Nicaragua's intervention should not have been restricted to the sole question of the legal régime of the waters within the Gulf. In his view, once it had, if only in very general terms, shown that it had an interest of a legal nature which might be affected by the decision in the case, then (i) Nicaragua, having now been permitted to intervene in respect of the legal régime within the waters of the Gulf, should not have been excluded from expressing its views in due course on any delimitation between El Salvador and Honduras within the

Gulf which may fall to be effected by the Chamber; and, moreover, (ii) Nicaragua should not have been excluded from expressing its views in due course with respect to any delimitation which may fall to be effected outside the Gulf in the event that some title may have been established in favour of Honduras.
