INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

# CASE CONCERNING THE LAND, ISLAND AND MARITIME FRONTIER DISPUTE

(EL SALVADOR/HONDURAS: NICARAGUA intervening)

VOLUME V

Reply of Honduras (Vol. II); Written Observations on the Application for Permission to Intervene, and the related Oral Arguments

COUR INTERNATIONALE DE JUSTICE

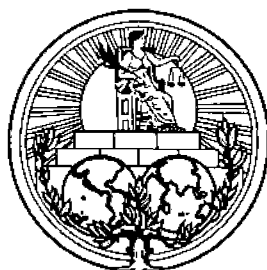
MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

# AFFAIRE DU DIFFÉREND FRONTALIER TERRESTRE, INSULAIRE ET MARITIME

(EL SALVADOR/HONDURAS; NICARAGUA (intervenant))

VOLUME V

Réplique du Honduras (vol. II); observations écrites sur la requête à fin d'intervention, et procédure orale y relative



FIFTH PUBLIC SITTING (8 VI 90, 2 p.m.)

*Present*: [See sitting of 5 VI 90, 11 a.m.]

Mr. ARGÜELLO GÓMEZ: Mr. President, Members of the Chamber. Before initiating my reply to the speeches of the distinguished Agents and advocates of El Salvador and Honduras, I wish to reaffirm the answer given to the question posed by the Chamber to the Agent at the end of the last hearing.

The Chamber is correct in understanding that Nicaragua accepts that it is the Chamber which is properly seised of an application by Nicaragua for permission to intervene before it in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*; and that Nicaragua recognizes that the eventual decision of the Chamber granting or refusing permission to intervene will be binding and final.

I would add that the language used in my first speech and quoted in the question posed by the Chamber had the object of explaining the problem faced by Nicaragua in making the decision to come before a Chamber, formed at the behest of, and with the participation that the 1978 Rules of the Court afford to, the original Parties, and that will give a judgment that will be considered as rendered by the full Court. It was in no way meant to limit the effects of Nicaragua's Application.

The only limitation we have made to our original Application to the full Court was that we are not putting at this moment before the Chamber any request that it reconstitute itself or that it exclude from its own competence *ratione materiae* those aspects of the case that Nicaragua had requested that the full Court exclude from the mandate of this Chamber.

These were petitions originally addressed to the full Court and which we understand cannot be decided at this incidental proceeding on the Application for permission to intervene. In this respect, we quoted the Order of the full Court saying that the matter of intervention was an anterior question that had to be decided by this Chamber. Therefore, what we are putting before the Chamber is the simple and unconditional request to be allowed permission to intervene in the present case based on Article 62 of the Statute, for the reasons which we have given fully in our application, our first oral pleadings and which we will amplify in the present hearing.

This novel problem of intervening before a Chamber has not been faced in the past by potential intervening States. It has made the whole question of intervention — particularly the decision itself on whether to apply for intervention — all the more difficult to take.

El Salvador has sought to take advantage of this dilemma which Nicaragua has been facing, by arguing in its Written Observations to Nicaragua's Application that: "Nicaragua is time barred or estopped from seeking changes in the procedural aspects of the principal proceedings."

We did not pursue this argument at any length in our first pleading because Nicaragua was not putting before the Chamber the question of its reformation or reconstitution. This argument, nevertheless, has been amplified by the distinguished Agent of El Salvador in his opening speech in stating: "Another reason for our opposition to the Application by Nicaragua is that it is untimely." And goes on to say:

"Now El Salvador is fully aware that the time-limits provided by the Statute and the Rules of Court have in the technical sense been complied with by Nicaragua. But we are also aware that the Chamber has a power of evaluation to exercise in considering the Nicaraguan request. We will respectfully request the Chamber to reject the Nicaraguan application, not because it fails to meet a technical requirement of the Rules but because it fails to meet the substantive requirements of the Statute."

Apparently El Salvador now contends that not only is Nicaragua barred from seeking changes in the procedural aspects, but barred or estopped in general from making this application.

I would not have extended any great comment on this point if it had stopped here. After all, Agents are allowed a certain leeway in using arguments that transcend strict legal logic with the purpose of giving a bitter taste to the other side's well. But the same argument was used by Mr. Highet as part of the second point of his address in which he attempts to draw some distinctions between the present case and the previous Malta and Italian intervention cases, presumably — since that is what his speech was about — to demonstrate why a jurisdictional link may not have been necessary then, but was certainly necessary now. The pertinent part of his statement says:

"The second distinction is that, in relative terms, the application of Nicaragua to intervene in this case — which was submitted only shortly before the filing of the final written pleadings — comes, relatively speaking, far later than either the application of Malta or that of Italy to intervene did in the past. These distinctions must surely be of some relevance to the Chamber in the exercise of its powers, based upon prudential discretion, under Article 62, paragraph 2, of the Statute."

Before getting to the bottom of this argument, let us set the historical record straight. Malta's Application for permission to intervene was received in the Registry of the Court on 30 January 1981, that is, three days before the time-limit set for the filing of the last Counter-Memorial on 2 February 1981.

The Italian Application was received in the Registry of the Court on 24 October 1983, that is, two days before the time-limit set for filing the Counter-Memorials on 26 October 1983.

In paragraph 5 of the Judgment on both these cases, the Court had this to say:

"The Special Agreement, however, included a provision for a possible further exchange of pleadings, so that even when the Counter-Memorials of the Parties had been filed, the date of the closure of the written proceedings, within the meaning of the Article 81, paragraph 1, of the Rules of Court, would remain still to be finally determined."

Presumably, the judgment rendered in the present case will contain a similar reminder since the Special Agreement in this case also contains a similar provision.

But the difference of this case from the other two is, firstly, that this application was made on 17 November 1989, one month before the end of the time-limit set for the Replies and, secondly, that on 20 April 1988 Nicaragua had given warning that it had Article 62 of the Statute under active consideration. This communication went further in that it unequivocally conveyed the view

"that Nicaragua has an interest of a legal nature which may be affected by a decision of the Chamber constituted for the purpose of deciding the case . . . between El Salvador and Honduras".

In relation to this general question whether Nicaragua is time barred from intervening generally, or that our intervention is in any way limited by the alleged late day in which it was made, several points must be considered:

1. It is generally conceded that for the lapse of time to estop anything:

> "The basic consideration in such a determination is whether, with regard to the particular circumstances of the case, there has been unreasonable delay; 'the normal measure of unreasonableness of the delay is the disadvantage at which it may be apprehended that the defendant will be placed in establishing his defense'." (*International Arbitration*, Simpson and Fox, London, 1959, at p. 124.)

If Nicaragua were introducing a so-called mainline application, then some mention could be made of a possible disadvantage occasioned to the other parties. As Judge Schwebel said in his dissenting opinion to the Malta intervention, "there is a measure of advantage inherent in the capacity of intervenor" (*I.C.J. Reports 1981*, p. 35).

In the present circumstances, Nicaragua is not seeking to have its rights determined or declared by the Chamber. So, in what disadvantage has El Salvador been placed by Nicaragua having filed its Application on November last? The Parties have not been in ignorance of Nicaragua's alleged rights against them, because Nicaragua is not asking for the declaration of any of its rights with respect to the Parties. Therefore, in any case, Nicaragua would be the only State that needed full and prompt knowledge of the rights that were being claimed in this case in order to protect its interests of a legal nature. In this respect, we are thankful for having been allowed copies of the pleadings and for this reason we did not claim — in this respect of the proceedings — to have been under a disadvantage.

2. The letter of 20 April 1988 gave notice to the Parties of its intention to intervene and the consideration that its legal interests were affected by the case. We can't possibly consider in any serious fashion that there was any delay in the prosecution of this request for intervention. But, even if that had been so, as we can read in the eight edition of the classic treatise of *Oppenheim on International Law*:

> "Delay in the prosecution of a claim once notified to the defendant State is not so likely to prove fatal to the success of the claim as delay in its original notification . . ." (P. 349.)

3. The application was filed within the time limits set by Article 81 of the Rules. This article, far from establishing a preclusion on the filing of applications of interventions after the closing of the written proceedings, that is, a procedural estoppel which is what presumably is trying to be read into the law by El Salvador, expressly allows for exceptional circumstances to be considered even in that eventuality.

4. According to Article 85 of the Rules of Court if an application for permission to intervene is granted, then the intervening State shall be entitled to submit a written statement within a time-limit to be fixed by the Court.

This means that the successful intervening State is allowed just one written shot at the Merits. Under these circumstances, it would have been illogical for Nicaragua to have introduced its application before the Memorials and Counter-

Memorials were filed, when the Replies were pending and, besides, the possibility of Rejoinder was open.

Let us suppose Nicaragua had filed its Application before the Counter-Memorials were filed. Then, if it was admitted, two situations would have presented themselves:

*(a)* Nicaragua would have been given its one shot at a written statement immediately. This would mean that the main Parties would have had the occasion of the Reply and the possibility of a Rejoinder in which to address the questions posed by Nicaragua even if indirectly. And finally, after all this, they would still have the opportunity of answering squarely Nicaragua's one written statement.

*(b)* In order to avoid the disadvantage posed to Nicaragua in the above circumstances, Nicaragua could have been given a chance to present its written statement to coincide with the filing of the Replies. But what would have happened to the possibility of a Rejoinder? Would the Parties have been forced to renounce this right in order not to have an unfair advantage over Nicaragua?

5. And finally on this point, in the present circumstances the Parties are not in agreement as to the object or scope of the Special Agreement. In the present circumstances it is only logical to have waited for a clearer view of the Party's positions in order to determine the object of our intervention and the extent of our legal interests.

My conclusion generally is that it is more logical and fairer for an intervener in the circumstances of Nicaragua to have waited until the end of the written pleadings in order to be perfectly clear what interests, if any, could be affected. The fact that we gave ample notice of our intention — which is not obligatory — should say enough about the good faith with which Nicaragua has proceeded.

Mr. President, we have attempted to explain how Nicaragua views the law on intervention based on Article 62 of the Statute. In defining this position, we were faced with the difficulty that the classical literature on the subject is scant. Dr. Rosenne refers to this fact in his treatise on *The Law and Practice of the International Court of Justice* (2nd ed., p. 431) in the following fashion: "There is no judicial experience of discretionary intervention . . ." And I would add that in so doing and describing it as "discretionary", unwittingly points to the fact that the references to intervention in the standard texts may even be misleading. This is certainly not the fault of bad scholarship, but undoubtedly it is due to the fact that judicial theory and thinking are developed and prompted by judicial experience.

For this reason we have had recourse on numerous occasions to quote what we have considered to be the most knowledgeable and up-to-date opinions on the subject particularly in light of the two cases that have preceded the present one brought by Nicaragua. In many cases, these opinions have been precisely the dissenting opinions of some of the Judges of the Court. Just as Professor Bowett, in discussing the question of a need for a jurisdictional link, felt the need to acknowledge his "indebtedness to the separate opinion of Judge Mbaye in the *Italian Intervention* case", so too I must acknowledge the enormous intellectual debt with his opinion and that of his colleagues in both cases, in shedding light on a most difficult subject.

Having said this, I wish to emphasize that our Application for permission to intervene is not based on a particular interpretation of Article 62 that ignores the previous decisions. Quite the contrary, and in spite of our opinion as to the

logic or fairness of the precedents, we have been very careful not to ignore as irrelevant and much less to purposely fall into the legal traps in which the full Court found both Malta and Italy had fallen.

We have been at pains in keeping our application within the limits set in both previous decisions. In doing this we have tried to adjust as much as possible the definition of the object we seek with this intervention and the indication of the legal interests that would be affected by any decision on this case, to those parameters judged permissible in the previous cases.

I think it has been obvious, particularly in our reaction to the statements of the distinguished Agent of El Salvador and learned counsel, that not only have we stuck to the limits set in those decisions, but that we will not be drawn beyond those bounds.

On behalf of Honduras, Professor Bowett has divided into four the issues involved as between Honduras and El Salvador, and in which Nicaragua has claimed an interest. I will make some brief comments on his assertions.

*(a)* Professor Remiro has stated the legal interests of Nicaragua with reference to the islands in the Gulf of Fonseca. Since Mr. Bowett dismisses this aspect by simply stating that Nicaragua has no interest in the matter, we should recall what Honduras said in its Written Observations to this Application. These observations are dated 23 March 1990 and on page 3 we read:

> "Prima facie, the dispute over the islands concerns only Honduras and El Salvador. Yet the delimitation of the waters in the Gulf may well turn on the decision as to sovereignty over the islands."

Nicaragua does not necessarily agree that any delimitation of the waters in the Gulf will depend on the sovereignty of the islands, yet the argument is not only possible, it is there and plainly pointed out in case we had missed the possibility that this argument could be made and that it could affect — as it certainly would — the legal interests of Nicaragua.

*(b)* Honduras agrees that any decision on whether the waters within the Gulf are subject to a régime of condominium certainly affects Nicaragua.

I would leave this point as self-evident, a text book example of involvement of a legal interest, were it not for the pains taken by Professor Weil to demonstrate the contrary. His original thesis that if the Court affirms the existence of a condominium it would only be stating what — according to El Salvador — is the status of the Gulf as declared by the decision of the Central American Court in a case to which Nicaragua had been a party. If, on the other hand, it declares there is not a condominium, then Nicaragua can rely on the 1900 delimitation with Honduras. Thus, that in both cases Nicaragua comes out without being affected.

I think Professor Bowett made an excellent analysis of why the discussions of any award could not be made without affecting the interests of the parties to that award. This would be enough of an answer, but another point, carefully avoided by both original parties, must be signalled out.

In the division of topics or aspects made by Professor Bowett that we are following here, and that in his view had to be analysed in order to determine if there was any way that they may affect the legal interests of Nicaragua, he does not refer to the Honduran submission to the Chamber, and I quote from the Honduran Reply:

> "to adjudge and declare that the community of interests existing between El Salvador and Honduras by reason of their both being coastal States bordering on an enclosed historic bay produces between them a perfect

> equality of rights, which has nevertheless never been transformed by the same States into a condominium";

and further on in the submissions:

> "to adjudge and declare that the community of interests existing between El Salvador and Honduras as coastal States bordering on the Gulf implies an equal right for both to exercise their jurisdictions over maritime areas situated beyond the closing-line of the Gulf".

It is obvious from these paragraphs that the so-called "community of interests" sought by Honduras to be declared by the Chamber, is not an abstract concept, but one that has very concrete and real effects.

The second paragraph of the previous quote makes this absolutely clear. Honduras wants the Chamber to declare that this so-called "community of interests", and again I quote "implies an equal right for both to exercise their jurisdictions over maritime areas situated beyond the closing-line of the Gulf". In other words, this "community of interests" gives Honduras sovereignty over thousands of square miles of the Pacific Ocean.

I will not try the impossible, that is to think up better arguments than the learned advocate of Honduras, so I will borrow some of his own arguments. Therefore, my allegation then is that all the arguments made by Honduras to the effect that the aspects of this case that refer to the El Salvador contention that there is a condominium necessarily involves Nicaragua are also arguments and good reasons for saying that the contention that there is this thing called a "community of interests" within the Gulf also necessarily involves Nicaragua.

*(c)* Another of the divisions that I am following from Professor Bowett is the point that here both Honduras and El Salvador maintain the position that if the Chamber decides that the Special Agreement calls for a delimitation inside the Gulf, then this process can take place without affecting the interests of Nicaragua.

Just a moment ago, I read some lines from the Honduran Written Observations to this Application to the effect that the attribution of sovereignty over certain islands within the Gulf could affect the delimitation of the Gulf. I hasten to point out that if Honduras thinks that any delimitation in the Gulf could turn on the decision on the sovereignty of some islands, then what of such items as navigation routes in a Gulf whose mouth is less than 20 miles wide and the reasonable security interests of the riparians.

So in spite of the statement from counsel of Honduras that it was no use for the Agent of Nicaragua saying that it was obvious that any delimitation would affect Nicaragua's rights, because it was not obvious at all, the Agent of Nicaragua reaffirms that it is perfectly obvious by just looking at a map. Counsel for Honduras made the following statement of fact which does not reflect reality. He said:

> "The existing Honduran/Nicaraguan delimitation under the 1900 Treaty runs from the terminal point of the land boundary, which is here, following median line principles to Farallones, this group of islands here."

I do not know what is the purpose of this statement. Perhaps to induce on the Chamber the feeling that the 1900 delimitation with Nicaragua practically reaches to the mouth of the Gulf. In any case, the statement is simply not true; it is not even in question. If anything, this type of statement should evince the obvious need for Nicaragua to be permitted to defend its legal interests that are being affected by this case.

*(d)* The final contention of Honduras is that it has an entitlement to a maritime area outside the Gulf and that the Court should determine the delimitation line. El Salvador, of course, denies this; but it also denies, as does Honduras, that this determination and possible delimitation could affect Nicaragua's legal interests.

Since I do not want to use the word "obvious" again, let me point out what any chart shows. Nicaragua and El Salvador are the only riparians situated at the mouth of the Gulf at less than 20 miles of distance from each other. Now comes Honduras with its allegation of a "community of interests" that supposedly gives it a right to launch an enormous protrusion into the Pacific and Nicaragua is supposedly not affected by this curious contention.

If the delimitation in the Pacific were between El Salvador and Guatemala or between Costa Rica and Panama, Nicaragua would be interested in the outcome but its legal interests would not be *ipso facto* affected as they are in this case.

The determination sought by Honduras on this point affects the legal interests of Nicaragua.

Any eventual delimitation affects the legal interests of Nicaragua. Whether the protuberance into the Pacific sought by Honduras hangs to the south into Nicaraguan territorial waters or rises into the north into Salvadorean territory, certainly affects the legal interests of Nicaragua. This point will also be further elucidated by Mr. Brownlie.

After reading what I had written and just finished reading at this moment, I realized that, again, we are clearly pointing out what the legal interests of Nicaragua are, and in what way they can be affected by the case before the Chamber. I point this out because the Agents and advocates of Honduras and El Salvador had failed to see them clearly indicated in our Application and in our first oral pleading, in spite of the efforts by counsel and Agent for Nicaragua.

To end my arguments, there is one very difficult topic which I addressed in my opening speech and at which I will take another stab. It is the matter of the jurisdictional link as a safeguard of the inviolability of the principle of consent.

In this respect, a distinction must be made. There is the consent to a procedure when the agreement of the parties is to go before the Court or to submit a difference to arbitration. The other type of consent is to the subject matter that will be submitted to this procedure.

Those who lock themselves inside the protection of the jurisdictional link are really protecting what we could call the procedural consent. The others who do not see the need for this link when cases are brought before the Court wish to protect the subject matter consent.

If potential parties want to protect both types of consent given in their agreements, they should resort to arbitration. There they will find the consolation of the absolute privacy of their procedure but, if they want the authority of the Court, they must accept that the main concern is to respect the subject matter consent. That is why in my opening speech I said that the consent of the third party — and not that of the original parties — is a necessary must once it is seen that it has legal interests that might be affected by the decision.

I frankly feel that it is bad policy to read into the Statute a protection that is afforded by arbitration. The present instance is a good example. Why did the original Parties choose to come to the Court instead of resorting to arbitration? It can not be because the decision will be more binding between them than an arbitral award. The real reason is that a decision given by the Court will have for third parties — in the present instance, Nicaragua — all the effects provided for

in the Charter and the Statute and that would not be the case if it were a matter of an award.

Mr. President, Members of the Chamber, with this I end my second speech. The order of the speakers will be Mr. Brownlie who will address the principal points of the legal interests of Nicaragua and Professor Remiro the object of our Application; both will generally make comments on the speeches of their colleagues.

## REPLY OF PROFESSOR BROWNLIE

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor BROWNLIE: It is an honour to be able to address this Chamber once again. Indeed, to take part in these proceedings involves the discharge of the responsibilities of counsel in very pleasant circumstances. We are witnesses to the first appearance of the Republic of El Salvador in the International Court and the relations of the various teams have been very friendly and co-operative.

The one qualification I would make to this happy picture is to say that the general character of the oral pleadings of El Salvador and Honduras, but especially the former, has been a little frustrating.

Their counsel have in general failed to use the oral pleadings to advance the arguments in a constructive way and have thus failed to give the necessary assistance to the Chamber.

Counsel for El Salvador and Honduras delivered speeches which appeared to have been previously prepared and the content of which essentially ignored the first speeches of Nicaragua.

Nicaragua would respectfully request the Chamber to take note of the considerable extent to which both El Salvador and Honduras have failed to react to the Nicaraguan arguments on the issue of legal interest.

### THE AUTHORITY TO BE GIVEN TO PREVIOUS DECISIONS OF THE INTERNATIONAL COURT

Mr. President, I shall move on to a second general issue, namely, the significance of judicial precedent in the Court.

My colleague, Mr. Lauterpacht, has emphasized the duty of the Chamber to apply the law as stated by the majority of the Court in a previous decision of the Court (6 June, afternoon).

He has also stressed that the decisions of the International Court have "a special authority" whilst accepting that there is "no formal rule of binding precedent" within the system of the Court.

Mr. President, with your permission, since a major element in my argument involved the authority of the decision in the *Italian Intervention* case, I would like to return to the question of precedent, if only very briefly.

The premise must be that the Chamber has the same degree of flexibility as the full Court in these matters and therefore our position bears no relation to the fact that this is a Chamber case.

That being said, three points call for clarification:

*First*: Counsel for the principal Parties have made no attempt to contradict the specific points made on behalf of Nicaragua concerning either the authority of the decision of 1984 or the perfectly legitimate means available for distinguishing that case in the present proceedings.

El Salvador has avoided detailed response, whilst counsel for Honduras has stated that he is not impressed "by the precedent in the Italian case" (Professor Bowett, 7 June, morning), and offered some criticism of the course of action adopted by the Court in that case.

*Secondly*: As a matter of general principle the process of distinguishing is very well recognized in the practice of the International Court. Thus Judge Sir Hersch Lauterpacht has recognized that: "The Court has not committed itself to the view that it is bound to follow its previous decisions even in cases in which it later disagrees with them."

However, Sir Hersch goes on to state that the Court has adopted a policy of judicial consistency which must co-exist with the process of "distinguishing". In his words: "No legal rule or principle can bind the judge to a precedent which, in all the circumstances, he feels bound to disregard." These are passages from the classic work *The Development of International Law by the International Court*, first published in 1934 and revised and published as a second edition in 1958 (pp. 13-14).

In his work on the Court, Dr. Rosenne presents a similar picture and emphasizes the element of continuity and consistency in the work of the Court.

He then continues:

> "Corresponding to this is the care evinced by the Court not formally to overrule earlier decisions but rather, where necessary, to try to explain away, usually on the ground of some factual particularity, an earlier decision which it feels unable to follow. The attitudes adopted in 1961 and 1964 in the *'Temple of Preah Vihear'* and the *'Barcelona Traction'* cases towards the 1959 decision in the *'Aerial Incident'* case are illustrative of this process, and of the relative character of the requirement of consistency of jurisprudence (which is probably the guiding element in this aspect of the Court's work)."

That is taken from his work, *The Law and Practice of the International Court* (2nd ed., revised and published in 1985, p. 613).

*Thirdly*: it follows from the second point that Nicaragua's modest suggestions as to the possibility of distinguishing the decision of 1984 do not involve any element of novelty either of principle or of practice.

## THE RECOGNITION OF THE EXISTENCE OF LEGAL INTERESTS OF NICARAGUA IN ISSUE

There is another general issue touching directly on the question of Nicaragua's legal interest and that is recognition.

With one exception — Professor Bowett — counsel for the principal Parties have maintained what one may presume to be a deliberate silence on that subject. The principle has not been mentioned and the specific examples given by Nicaragua have not been contradicted.

Professor Weil was completely discreet and we still await his views on this subject.

Professor Bowett, showing a certain amount of real nerve, devoted a whole paragraph to the subject (7 June, morning). In this paragraph he fails to address the very precise way in which the argument was expressed by Nicaragua in the first round. In the result he uses the argument that because Honduras *now claims* that delimitation inside the Gulf does not affect Nicaragua, the actual formulations on the position in the Gulf in the pleadings cannot involve recognition of elements which must impinge directly on Nicaraguan legal interests.

In general, Mr. President, counsel for both El Salvador and Honduras have been remarkably reluctant to face up to the legal implications of the contents of their own written pleadings in this case.

## THE EXISTENCE OF A LEGAL INTEREST: GENERAL ISSUE

Mr. President, I must now deal more directly with the question of legal interest as it was addressed by my friends Prosper Weil and Derek Bowett.

In the first place, neither of these speakers chose to deal with the question of the standard of proof of the existence of legal interest for the purposes of Article 62, and it has to be said that my colleagues on the other side of the Court have cultivated a remarkable insouciance when it comes to questions of proof.

Secondly, Professor Weil, like his other colleagues representing El Salvador, makes the assertion that Nicaragua has failed to provide much concrete information on the danger to its legal interests.

Mr. President, this type of allegation invites a number of responses:

*First*: Nicaragua is seeking to intervene and is therefore only required to indicate circumstances in which, according to the state of the pleadings, the mandate of the Chamber, and other relevant data, the legal interests of Nicaragua will be actually or probably affected by the ultimate decision on the merits.

*Secondly*: A combination of plain geographical data and law of the sea principles produces a result in which a student, let alone an experienced tribunal, could discern the extent to which Nicaraguan legal interests may be affected by the decision on the merits in these proceedings.

*Thirdly*: complaints of a lack of specificity do not sit happily with the situation in which the speeches by the Respondents in the first round paid not too much attention to the speeches on behalf of the applicant State in the first round.

Mr. President, if I can bring this part of my speech to a close, one of the striking peculiarities of the speeches on behalf of the principal Parties has been the almost total absence of reference to considerations of the law of the sea.

It can only be assumed that this sudden onset of amnesia among lawyers fully acquainted with maritime delimitation provides the explanation for their failure to appreciate the reality and substance of the legal interests of Nicaragua.

In general, my friend Professor Weil makes the identification of a legal interest for the purposes of Article 62 into a complicated and learned enquiry.

First, for example, he points to the distinction between an interest and a legal right and then he raises the general issue of legal interest in relation to *locus standi*.

With respect, these interesting questions are irrelevant.

Article 62 refers unequivocally to "a legal interest". Moreover, the application of Article 62 is a matter which is *sui generis* and to be approached in its particular context.

Professor Weil also makes reference to the passage in the Application (para. 18) in which Nicaragua points out that, by analogy with the function of Article 63, in the present circumstances Article 62 is to be applied on the basis that, in the case of a riparian State in the Gulf, intervention is justified "as of right".

This argument is maintained by Nicaragua. And it goes without saying that, even when a certain discretion is being exercised, there are circumstances which virtually dictate the exercise of the discretion in favour of the Applicant.

## THE VARIOUS ELEMENTS OF THE MARITIME DISPUTE

I turn now to the various elements of the maritime dispute.

And before that, I should explain the practical approach.

The analysis will proceed on the basis of the permutations presented in the speeches of my colleagues Professor Weil and Professor Bowett, the purpose being to contravert their assertions that no Nicaraguan legal interest is involved in the proceedings on the basis of the Special Agreement.

However, before the analysis is undertaken, I would like to take up what Professor Weil describes as the first stage, which is the interpretation of the Special Agreement. As the Chamber is aware, El Salvador and Honduras are at odds over the application of Article 2 of the Special Agreement within the Gulf.

Article 2 contains the request to the Chamber to determine the legal status of the islands and the maritime areas.

In parenthesis, I would say that I do not propose to discuss the question of islands which has been referred to by Professor Remiro in the first round and by the distinguished Agent of Nicaragua this afternoon.

In my submission the preferred interpretation of Article 2, that which corresponds with ordinary good sense, is that it includes *both* the issues of overall status of the Gulf *and* the contingent or alternative issue of delimitation. The presumption must be that the clause was intended to be reasonably effective and to comprehend the family — the entire family — of interrelated legal issues.

From this flows a further submission. Given the drafting of Article 2, given the coastal geography of the Gulf, and given the principles of maritime delimitation as they have developed since the Truman Proclamation, there is a very strong presumption in our submission that the issues presented to the Chamber for decision would impinge directly upon the legal interests of Nicaragua.

It must follow that in the precise circumstances of the Gulf, and its ramifications beyond the closing-line, the parties who seek to deny the existence of Nicaraguan interests have the burden of proof.

Moreover, the issues which flow naturally from the provisions of Article 2 of the Special Agreement do not depend, as my friend Professor Weil frequently suggests, on a series of mere hypotheses.

Mr. President, there are hypotheses and hypotheses.

The statement that tomorrow the sun may disappear from the sky is a hypothesis and no more than a figment of the imagination.

The various legal solutions relating to the Gulf involve complex permutations of law and fact. They also can be described as hypotheses but they represent contingencies rooted in realistic analysis of the legal and factual data.

What Counsel for El Salvador refers to as hypotheses are in fact the issues which the Chamber is asked to determine.

Without extreme artificiality, it is difficult to see how resolution of those issues can be carried out without the legal interests of Nicaragua being affected.

Mr. President, I shall now proceed with my analysis of the permutations presented in the speeches of Professor Weil and Professor Bowett.

## I. The Waters within the Gulf in the Presence of a Régime of Condominium

The position of El Salvador is that there is a condominium which affects all three riparians in the Gulf, but that there is no legal effect on Nicaragua because the decision of the Central American Court in 1917 has the effect of *res judicata*.

There is then the alternative thesis that, in any event, the decision of 1917 is binding on El Salvador and Nicaragua *inter se*.

Counsel for Honduras took the same position and made the concession that therefore Nicaragua's legal interest could be said to be affected.

But this was only on the basis that Nicaragua is bound by the decision of 1917 (C4/CR 90/4, pp. 32-93).

Mr. President, Nicaragua's position is that the *arguments* of counsel for El Salvador and Honduras, like their observations, and like their written pleadings, establish beyond any doubt that, in respect of the issue of condominium inside the Gulf, Nicaragua has a legal interest which may be affected for the purposes of Article 62.

However, Nicaragua cannot accept the terms in which the arguments of El Salvador and Honduras are expressed.

The all-important point is to discover what is *in issue* as Professor Weil so rightly emphasizes. The significant point is thus the identification of the legal issues which have to be resolved by the Chamber and which, as a matter of legal essence, as a matter of very subject-matter, involve Nicaragua's legal interest.

The effect of the decision of 1917 in relation to the riparian States of the Gulf is identified by counsel of El Salvador and for Honduras respectively as such an issue.

That is most helpful and Nicaragua is most grateful.

## II. The Waters within the Gulf Subject to Delimitation between Honduras and Nicaragua

The permutation which follows is necessarily that there is no régime of condominium in the Gulf. This is the position of Honduras, although Honduras has a rather mysterious substitute which appears in the pleadings as the community of interests.

It may well be that Nicaragua would wish to argue, if permitted to intervene, that there is no régime of condominium or community of interest obtaining in the Gulf.

In the absence of a condominium within the Gulf, then a delimitation will be necessary between Honduras, El Salvador and Nicaragua.

Mr. President, this proposition is self-evident.

Both El Salvador and Honduras accept the existence of a closing-line in the Gulf and the general significance of this for purposes of delimitation.

El Salvador accepts that Nicaragua alone shares access to the closing-line.

Honduras claims access to the closing-line but also recognizes that Nicaragua has a claim in the mouth of the Gulf.

Both El Salvador and Honduras stress the significance of the line established in 1900 on the basis of agreement between Honduras and Nicaragua.

Mr. President, at this point, I have to point out a strange hiatus in the arguments presented on behalf of El Salvador and Honduras.

There is a quite astonishing inability to refer to the fact that it will be necessary to join some point on the closing-line of the Gulf with the western terminus of the line of 1900.

If Honduras has a corridor to the Pacific then there will be two points on the closing-line of the Gulf and two delimitations marching eastwards. But if Honduras has no such corridor, then there will be a three-sided delimitation and a tripoint somewhere eastwards of the coast of the main islands.

This possibility is probably more realistic than the possibility of Honduras having a corridor to the Pacific. In any event it is a real choice facing a Chamber asked to apply the provisions of Article 2 of the Special Agreement.

Mr. President, there is simply no way in which it can be credibly argued that Nicaragua has no legal interest *which may be affected* by a delimitation within the Gulf.

The fact that *ultimately* Honduras might have a corridor to the Pacific, in which case only Honduras would be involved in the extension of the 1900 line to the closing-line of the Gulf does not alter the case. At the present stage the other possibility is on the agenda.

Honduras has created an imaginary line X (which appears as the midpoint of the closing-line) to Y (on the Honduran coast). And this was demonstrated by my colleague Professor Bowett yesterday.

As lines go it has much to commend it. It has length, it has regularity, it has a continuous bearing.

Its purpose was to establish that Nicaragua has no claim to the western part of the Gulf.

But this concept has no geographical or historical reality, and the line itself is simply a tactical ploy.

From the point of view of the Chamber — and for this purpose also of Nicaragua — it leaves completely intact the delimitation agenda within the Gulf.

Neither Professor Weil nor Professor Bowett confront this issue squarely.

Professor Weil relies on the 1900 Agreement which is, of course, a line forming part of an incomplete agenda of delimitation in the Gulf.

The El Salvador role is to set aside on the basis of the alleged binding effect of the declaration of 1917 the whole question of delimitation. Elsewhere, Professor Weil affirms that El Salvador takes no position on the lines of delimitation as proposed by Honduras (C4/CR 90/3, p. 44).

Professor Bowett has more or less the same difficulty in approaching this question (C4/CR 90/4, pp. 39-41). The relevant passage in his speech relates to the part of his argument on methodology as he calls it.

He refers to the western terminus of the 1900 boundary between Honduras and Nicaragua and incorrectly identifies its location as the Agent for Nicaragua has already had occasion to point out today.

Professor Bowett then says (C4/CR 90/4, p. 39):

> "And indeed, whenever this line is, in the future, extended to the closing-line of the Gulf, whatever its actual course may be, it must surely lie in the eastern sector. So that future line will not be prejudiced."

With respect, this fails to address the real issue, which is that the Chamber will face the problem of completing the delimitation within the Gulf. The 1900 boundary appears to be incomplete and it matters not whether its terminus lies within this or that sector of the Gulf.

Professor Bowett also says that El Salvador "essentially, makes no claim to any delimitation within the Gulf" (C4/CR 90/4, p. 40). But, of course, that is not decisive.

The Chamber will act under the mandate conferred by the Special Agreement. It is perfectly possible that the condominium thesis will not be adopted and indeed Honduras has asked for a delimitation within the Gulf.

Such a delimitation will take place within the framework of the Special Agreement and the pleadings overall.

Moreover, as Nicaragua pointed out in the first round in its Counter-Memorial (pp. 162-164) Honduras has contended that El Salvador cannot rely on a line of strict equidistance in the mouth of the Gulf.

### III. The Waters outside the Gulf Assuming that Honduras is Excluded

I turn to another permutation employed by Professor Weil. This is the situation in which Honduras is excluded from the waters outside the Gulf. In this case counsel for El Salvador states that the rights of Nicaragua vis-à-vis El Salvador "demeurent évidemment intacts" (C4/CR 90/3, p. 45).

With respect to my colleague, this cannot conclude the matter. At the present stage of the pleadings, we do not know whether Honduras will be excluded from the waters outside the Gulf. The fact that Nicaragua has to listen to counsel for Honduras giving such an assurance as to its rights that is Nicaragua's rights is itself evidence that Nicaragua has a legal interest which may be effected in the waters outside the Gulf.

As to the waters outside the Gulf Professor Bowett stresses that the methodology adopted by Honduras deliberately avoids areas relevant to future delimitation between Honduras and Nicaragua (C4/CR 90/4, p. 43).

Even if this be accepted, for the purposes of argument, it is question-begging.

Mr. President, the proposition that Nicaragua's interests are protected on the assumption that Honduras is given access to areas outside the Gulf is far from reassuring. First of all, it is contingent on the Chamber's determination.

But, more importantly, is is simply implausible to argue that the recognition of Honduran rights outside the Gulf will not affect the legal interests of Nicaragua.

For when Counsel for Honduras refers to the mid-point on the closing-line he is speaking of methodology and he is not waiving the rights which might in future be claimed once a presence outside the Gulf had been given legitimacy in principle by a chamber.

In fact Professor Bowett in his speech admits this possibility. As he says "The Court's delimitation will simply determine who is to be Nicaragua's neighbour for purposes of a future delimitation." (C4/CR 90/4, p. 44.)

Professor Weil tends to avoid the problem by relying on the position of El Salvador that the Chamber does not have competence to effect a delimitation either inside or outside the Gulf (C4/CR 90/3, pp. 45-47). And in his view the issue of competence is purely bilateral (*ibid.*, p. 46).

With respect this cannot preclude the issue of how Article 62 is to be applied. On this argument even intervention as such would be excluded whenever jurisdiction was based upon a special agreement.

And, again, the possible prejudice to Nicaragua's interest is no less real because it depends upon a contingency the substance of which is highly problematical.

Mr. President, I have now completed my analysis of the main permutations applicable to the problems which, on a provisional view, fall within the mandate of the Chamber according to the Special Agreement.

By way of conclusion, I would point to several persistent flaws in the arguments presented against Nicaragua on the subject of legal interest.

*First*, counsel on the other side constantly argue on the basis that, if, if certain conclusions are reached, then Nicaragua's legal interests will not be affected.

That is not the point. The question is, on the basis of the Special Agreement and the state of the written pleadings on the merits, what are the legal interests of Nicaragua *which may be affected*.

The concept is one of risk of prejudice and not actual prejudice.

*Secondly*, the other side have failed to address the question of the standard of proof in relation to Article 62.

My friend Professor Bowett has picked up the fact that in the first round it was stated on behalf of Nicaragua that the applicant State need only show a good arguable claim or claims. Of course, this statement was applicable precisely with reference to the content of a legal interest for the purpose of Article 62. The claims concerned are to the existence of legal interests within the terms of Article 62.

Mr. President, I would thank you for your courtesy and that of your colleagues.

## RÉPLIQUE DE M. REMIRO BROTONS

CONSEIL DU GOUVERNEMENT DU NICARAGUA

M. REMIRO BROTONS: Monsieur le président, Messieurs les membres de la Cour, puisque j'ai la possibilité de m'adresser de nouveau à vous, permettez-moi de vous indiquer que pendant ce tour de parole j'aborderai les points, déjà traités dans ma plaidoirie, dans la mesure où les considérations faites par les agents et les avocats des Parties au différend soumis à la Chambre le requièrent. Il ne sert à rien de finasser ni d'occuper le temps des illustres membres de la Cour dans des considérations superflues.

Mon intervention d'aujourd'hui sera plus brève que celle de mardi et, je vous le garantis, elle ne sera pas aussi rapide. Que les interprètes en soient rassurés.

1. Dans le climat de cordialité où se déroule cette instance je dois cependant vous signaler qu'il n'y a pas eu de véritable contradiction quant aux arguments du Nicaragua relatifs à l'objet de l'intervention.

Il n'y a donc aucune raison pour que le Nicaragua modifie la position exposée pendant le premier tour de parole.

El Salvador, le seul à se prononcer sur cette question, considère que le Nicaragua n'a pas dûment précisé l'objet de son intervention. Si cette affirmation, dépourvue de toute base, était exacte, nous devrions admirer l'extraordinaire capacité de l'agent et des conseillers du Nicaragua pour tenir occupés pendant des heures les illustres membres de cette Cour avec de telles banalités, dans un discours vide de contenu. Moi-même, j'ai consacré une bonne partie de ma première allocution à préciser l'objet de l'intervention du Nicaragua. Dans le compte rendu, ce sujet — si M. Lauterpacht nous permet d'utiliser ce synonyme — comprend plus de treize pages (CR, 5 *juin* 1990, CR 90/2, p. 8-22). Je m'étonne en constatant comment nous sommes parvenus à parler autant d'une chose dont nous n'avons rien dit? S'il est vrai que nous avons dit quelque chose.

2. En général, l'exigence de l'article 81, paragraphe 2, alinéa *b)* du Règlement de la Cour est utilisée d'une manière redondante par ceux qui contestent l'intervention. Lorsqu'un requérant est accusé de ne pas avoir précisé l'objet de son intervention, il est en réalité accusé, une fois de plus, d'une absence de précision de ses intérêts.

Tout d'abord, le requérant se voit attribuer qu'il n'a pas démontré des intérêts d'ordre juridique susceptibles d'être mis en cause. Ensuite, dans une deuxième phrase, il est accusé du même fait, mais cette fois-ci, sous une nouvelle couverture. On lui dit qu'il n'a pas précisé l'objet de son intervention parce que, dit-on, il n'a pas précisé ses intérêts. Il semblerait que, dans ce domaine, le *non bis in idem* n'a pas su aboutir.

3. Il existe sans aucun doute, un rapport étroit entre l'intérêt susceptible d'être mis en cause et l'objet de l'intervention. J'oserais même dire qu'il est extrêmement difficile de développer un discours sur l'objet de l'intervention sans se référer aux intérêts juridiques susceptibles d'être affectés. Mais ces deux questions sont, conceptuellement parlant, bien distinctes, raison pour laquelle elles figurent dans des alinéas séparés de l'article 81, paragraphe 2, du Règlement de la Cour et, comme M. Sette-Camara l'a dit:

> «Les deux problèmes sont différents et ne coïncident ni dans leur signification ni dans leur importance pour la décision de la Cour.» (Op. diss., arrêt du 21 mars 1984, par. 52.)

Il me semble évident que l'objet de l'intervention ne peut être accusé d'imprécis en argumentant que les intérêts sont imprécis. Lorsque le Règlement nous demande de préciser l'objet de l'intervention il est en train de nous demander que nous indiquions ce que nous prétendons faire avec des intérêts dont l'existence et l'éventuelle mise en cause sont déjà démontrées. Ceci nous est précisément demandé pour que l'intervention réponde à la nature de cet institut et non point à autre chose. Comme l'a dit M. Ago:

> «Si on l'a fait, c'est évidemment pour s'assurer que l'Etat désireux d'intervenir ne se propose réellement que de protéger l'intérêt allégué contre les atteintes pouvant découler de la décision en l'affaire opposant entre elles les parties principales, sans chercher à introduire — sous apparence d'intervention mais en réalité sur une tout autre base — une instance nouvelle et distincte contre l'une ou l'autre des parties à l'affaire en cours ou contre les deux à la fois.» (Op. diss., arrêt du 21 mars 1984, par. 5.)

Que prétendons-nous ainsi? Informer uniquement la Cour de nos intérêts? Essayer de les protéger en évitant que la Cour se prononce sur un aspect du litige pouvant causer préjudice auxdits intérêts? Peut-être obtenir une décision qui les reconnaisse au détriment des prétentions des parties? En ce qui nous concerne, nous avons déjà indiqué, clairement, ce que nous prétendons: protéger les intérêts juridiques du Nicaragua en empêchant qu'ils soient réellement affectés par la décision quant au fond. Et si en plein jour quelqu'un s'obstine à dire qu'il fait nuit, nous ne pouvons que nous attendre qu'il soit le seul à continuer à le croire.

4. Un conseiller d'El Salvador nous a invité à faire un bref «excursus» sémantique sur la signification en français du terme *objet*; sur ses acceptions et ses synonymes en anglais (cf. CR du 6 juin 1990, p. 68-70). *Objet* en français peut autant signifier «object» que «subject». Bien que je ne sois pas la personne la mieux indiquée pour me prononcer sur la richesse de la langue française, en toute modestie pourrais-je, néanmoins, remarquer qu'en dépit de la polyvalence du terme objet, la langue française connaît aussi un terme «*sujet*» dont le champ sémantique est plus large, équivalant au mot «subject» qui comme nous le constatons n'est pas aussi lointain?

Quoi qu'il en soit, je dois signaler que le Nicaragua a toujours su que lorsque le Règlement de la Cour, dans sa version française, parle de l'objet de l'intervention il se réfère à sa fin, à son propos, à son objectif et non point à la matière sur laquelle il porte. En effet, dans sa requête et lors des audiences orales, le Nicaragua s'est justement et largement référé à la fin de l'intervention, aux propos de l'intervention, à l'objectif de l'intervention.

5. Mais puisque l'*objet* (object) de l'intervention est construit sur l'*objet* (subject) du litige et l'*objet* (object) de l'intervention du Nicaragua n'affecte qu'un seul aspect de l'*objet* (subject) du différend complexe et pluriel entre le Honduras et El Salvador, il s'avérait obligatoire de concrétiser, de préciser, de spécifier, de particulariser, de localiser, de situer et de centrer l'objet de l'intervention du Nicaragua sur le sujet du différend. Voilà tout ce que nous avons fait en limitant d'un point de vue matériel l'objet de notre intervention. J'imagine que la Cour et les deux Parties nous en sont reconnaissantes compte tenu des doutes que suscitait notre intérêt au différend insulaire.

6. Alors que le concept de l'objet de l'intervention paraît être clair pour El Salvador, il l'applique assez mal. Ce qui est gagné sur le dos du diable est dépensé sous son ventre. Et, comme il est bien connu, la foi sans les œuvres est morte en elle-même.

On nous dit que le Nicaragua décrit le sujet de sa requête mais qu'il n'exprime pas ce qu'il prétend (CR du 6 juin 1990, p. 67 et suiv.). S'il en est ainsi pourquoi

se plaignent-ils du fait que l'objet est imprécis en argumentant précisément que le Nicaragua ne se prononce pas sur la situation juridique du golfe et des espaces adjacents, qu'il n'avoue pas s'il est ou non d'accord avec le condominium. Qu'il ne manifeste pas s'il accepte ou non que le Honduras possède des espaces maritimes à l'extérieur du golfe. Et même qu'il ne se prononce pas sur la portée de l'article 2, paragraphe 2, du compromis du 24 mai 1986. Est-ce réellement tout ce que réclame l'article 81, paragraphe 2, alinéa *b)*, du Règlement de la Cour pour El Salvador? Respecte-t-on la logique de l'objet de l'intervention, telle qu'El Salvador la présente, lorsqu'il est dit que l'objet n'est pas précis parce qu'on ne spécifie ni les droits revendiqués ni comment seront-ils mis en cause par l'arrêt à venir?

7. La requête du Nicaragua est-elle réellement critiquée, parce que l'on prétend que le requérant se prononce dès maintenant sur des aspects concernant le fond de l'affaire? Mais l'objet de l'intervention ne peut être ni confondu ni identifié avec un prononcé sur des questions de fond.

Ce ne sera qu'une fois admise à intervenir que la République du Nicaragua pourra prendre légitimement position dans la mesure où cette intervention aurait été autorisée. Comme M. Schwebel l'a dit en se référant à un autre requérant:

> « S'il est vrai que l'Italie, une fois admise à intervenir, aurait eu à prouver le bien-fondé de son intérêt d'ordre juridique pour obtenir satisfaction au fond, cette preuve n'était pas nécessaire pour que sa demande d'intervention fût accueillie. Exiger cette preuve revenait à l'obliger à défendre et soutenir une cause qu'elle n'était pas admise à présenter. » (Op. diss., arrêt du 21 mars 1984, par. 5; cf. aussi M. Sette-Camara, op. diss., *ibid.*, par. 65.)

Devons-nous rappeler une fois de plus que la portée de l'article 2, paragraphe 2, du compromis du 24 mai 1986 est questionnée par les Parties? El Salvador, en tant que coauteur du compromis du 24 mai 1986, n'est vraiment pas en mesure de donner des leçons sur la précision, ce qui doit être certainement compris comme une démonstration de virtuosité diplomatique.

8. Actuellement, il suffit donc que la Cour parvienne à la conviction que *prima facie* des intérêts juridiques du Nicaragua pourraient être mis en cause par sa décision sur le différend lui ayant été soumis.

Pour affirmer cette conviction le Nicaragua a largement fourni les renseignements nécessaires. Si avant-hier, un touriste était entré dans cette magnifique et imposante grande salle de justice, en entendant certains propos ici prononcés, il aurait bien pu penser que le demandeur de l'intervention au différend maritime entre le Honduras et El Salvador est un petit pays insulaire perdu au milieu de l'océan Indien.

Est-ce que nous devons rappeler que le Nicaragua est, avec les Parties au différend, le seul pays riverain d'un golfe de 700 miles de surface et de 19 miles d'embouchure, considéré par les trois Etats comme une baie historique dont les eaux sont qualifiées d'eaux intérieures? Est-ce que nous devons rappeler que l'un des pays riverains affirme la condition de condominium pour le golfe? Et, les intérêts juridiques des trois pays, ne sont-ils pas en jeu lorsqu'une telle chose est affirmée? Existe-t-il un intérêt juridique plus susceptible d'être mis en cause par une décision de la Cour?

9. Le fait qu'El Salvador se base sur la sentence de la Cour centraméricaine du 29 mars 1917 pour affirmer ce régime (ce régime de condominium) et pour argumenter que les intérêts juridiques du Nicaragua ne seront pas affectés, quelle que soit la décision prise par cette Chambre, car selon lui l'arrêt de 1917 est chose jugée entre El Salvador et le Nicaragua (CR du 6 juin 1990, p. 40 et suiv.),

cela rend encore plus urgent et indispensable l'intervention de cette République dans la présente affaire.

El Salvador prétend utiliser la Cour internationale de Justice en l'absence du Nicaragua à fin de faire valoir un arrêt dont la validité a été contestée par le Nicaragua dès le moment où il fut émis. Entre autres choses parce qu'il prétendit établir un régime objectif en l'absence de l'un des pays riverains, le Honduras. Peut-on nier l'intérêt juridique du Nicaragua dans la considération de la Cour sur un arrêt qui constitue la prémisse d'El Salvador pour soutenir son propre concept du régime du golfe? M. Derek Bowett, en tant qu'avocat du Honduras a fait des remarques très intéressantes à ce propos (CR du 7 juin 1990, p. 32 et suiv.).

D'autre part, n'est-ce-pas la République d'El Salvador elle-même qui s'appuie sur les intérêts juridiques du Nicaragua — des intérêts réels — pour refuser une délimitation entre El Salvador et le Honduras dans les espaces adjacents au golfe.

10. El Salvador s'oppose à l'intervention tout simplement parce qu'il estime que le Nicaragua s'oppose au condominium. Mais pas seulement pour cela, en gardant une position aussi rigide nous sommes induits à penser qu'il essaie de gagner une autre bataille sans tirer un seul coup. Je me réfère à la question préalable posée entre les Parties à propos de l'interprétation de l'article 2, paragraphe 2, du compromis du 24 mai 1986, une question qui, peut-être croit-il, pourrait être préjugée si l'intervention du Nicaragua n'était admise.

11. El Salvador s'obstine à dénaturaliser cette instance en entraînant l'intervention proprement dite à une phase qui ne devra s'en tenir qu'à l'autoriser ou à la rejeter. Il est donc inadmissible de soutenir tel qu'il a été soutenu, en dédaignant les préceptes du Statut et les dispositions du Règlement de la Cour, que la limite de l'intervention est le droit de l'Etat tiers à décrire devant la Cour la nature de ses intérêts et la protection qu'elle entend pour eux; premièrement par écrit, et si les Parties contestent la requête, à travers ces audiences orales, en faisant dépendre en tout cas du consentement des Parties l'acceptation de l'intervention. L'on passe ainsi arbitrairement d'une requête à fin d'intervention à une requête *informative* à fin d'intervention et, des plaidoiries orales à des plaidoiries *informatives* (CR du 6 juin 1990, p. 77 et suiv.).

12. El Salvador affirme d'autre part, qu'un lien spécial de juridiction entre le Nicaragua et les Parties au différend soumis à cette Chambre est en tout cas nécessaire. Le Honduras, en considérant l'objet propre et limité de l'intervention requise, n'a pas suivi cette affirmation (CR du 7 juin 1990, p. 8 et suiv., p. 45 et suiv.).

La plaidoirie du professeur Highet, en tant qu'avocat d'El Salvador, a été spécialement orientée à démontrer cette assertion. Il l'a fait en exposant brillamment une série de treize propositions — dont il faudrait d'ailleurs le remercier de ne pas nous avoir fait, pour des raisons esthétiques, un décalogue. Mais de toute façon, les six premières propositions se réfèrent peu à la vérification de l'exigence d'un lien de juridiction.

La première sous le nom de point d'application générale, essaie de miner l'autorité de cette Chambre à l'abri d'un paternalisme gratuit; la deuxième se réfère, avec quelques inexactitudes, au jeu du facteur temps dont l'agent du Nicaragua a déjà fait référence; la troisième consiste en une spéculation sur ce que diraient ou feraient les membres du comité consultatif de juristes et les juges de la Cour permanente s'ils sortaient aujourd'hui de leurs tombes — en fait et puisque nous en sommes aux spéculations, je vais aussi spéculer — les membres du comité consultatif et les membres de la Cour permanente étaient si attachés au caractère judiciaire de la Cour qu'il aurait été difficile de leur faire accepter une réforme

réglementaire comme celle de 1978; et ils se seraient encore moins bien comportés en suivant la manière proposée par le professeur Highet; la quatrième proposition est inappropriée; quant à la cinquième, elle révèle du talent créatif; la sixième joue à l'échange d'absurdités et ce n'est qu'à partir de la septième que l'on articule finalement une thèse contradictoire à celle que soutient le Nicaragua. Il s'agit d'un discours bien connu.

13. Autant les uns que les autres, nous représentons des positions opposées devant la *délicate question*. Et pour répliquer à la thèse soutenue par El Salvador il me suffit de vous renvoyer à l'argumentation soutenue dans la deuxième partie de ma plaidoirie de mardi (CR 90/2 du 5 juin 1990, p. 22 et suiv.) qui bien sûr n'a pas convaincu le professeur Highet, mais je l'espère, convaincra les juges de cette Chambre. Il s'agit maintenant de chercher, de comparer et de choisir.

Néanmoins, je voudrais souligner que derrière chaque position se cachent des conceptions bien distinctes en ce qui concerne la nature et la fonction de la Cour. La nôtre répond, d'une part, à une vision institutionnelle et proprement judiciaire de la Cour et, d'autre part, à la confiance que celle-ci garantit toujours la propriété de l'exercice de la juridiction par-dessus la volonté absolue des Parties au compromis. Peut-être, pour cette raison, tout en étant plus réticents avec la méthode des chambres, nous sommes plus respectueux de leur autorité une fois constituées, que ceux qui prêchent la méthode pour diminuer ensuite la taille de ses applications d'une manière qui n'est pas toujours subtile.

14. L'institut de l'intervention est justement conçu pour permettre l'exercice approprié de la juridiction en conférant à l'Etat tiers la sauvegarde de ses intérêts juridiques au moment où les Parties au compromis ont invité la Cour à leur octroyer ces mêmes intérêts.

Si, vu cet objectif, l'intervention dépendait de la démonstration d'un lien juridictionnel entre l'Etat tiers et les Parties, la Chambre devrait, immédiatement et d'office dans le cas qui nous intéresse, reconnaître l'impropriété de l'exercice de sa juridiction sur le différend maritime entre le Honduras et El Salvador puisque les intérêts juridiques du Nicaragua constituent une partie inséparable de l'objet du litige tel qu'il a été posé, dans la mesure où l'on discute le statut juridique des eaux du golfe et que tout titre à l'extérieur du golfe est conditionné par ce statut.

L'institut de l'intervention strictement limitée à l'objet propre correspondant à sa nature constitue un mécanisme de défense permettant de combattre une utilisation impropre de la Cour. Je voudrais ici rappeler que si la Cour ne s'est pas expressément prononcée sur l'exigence ou non d'un lien spécial de juridiction, ce fait, ne peut être interprété dans le sens que la majorité silencieuse de ses membres soutient cette exigence. Par contre, la majorité des juges — la grande majorité des juges — qui ont émis leur opinion l'ont fait pour la refuser. Une majorité qui ne se limite pas aux juges qui divergèrent du dispositif de l'arrêt du 21 mars 1984.

Et rappelons l'ancien juge, M. Morelli, puisqu'il a été cité par M. Highet (CR du 7 juin 1990, p. 22). L'autorité de M. Morelli, l'un des plus éminents spécialistes du droit procédural international selon les termes de l'ancien président de la Cour, M. Jiménez de Aréchaga (op. diss., arrêt du 21 mars 1984, par. 6), fut déjà invoquée lors de l'affaire de l'intervention de l'Italie autant pour soutenir la thèse de l'exigence du lien juridictionnel que pour la contester (cf. CR du 25 janvier 1984, CR 84/2, p. 54 et suiv., et du 27 janvier 1984, CR 84/5, p. 46 et suiv.). Et même, dans le premier sens, soutenant la thèse de l'exigence du lien de juridiction, l'opinion individuelle de M. Jiménez de Aréchaga recueille une large citation d'un travail de M. Morelli dans la *Rivista di diritto internazionale* publiée en 1982 (cf. op. ind., *cit.*, par. 6) qui a vraiment plu à l'avocat d'El Salvador.

Cependant, si nous lisons directement cette publication et, qu'au lieu de nous arrêter à la page 813, nous poursuivons un peu plus jusqu'à la fin, nous remarquerons facilement que M. Morelli soutient une thèse contraire, si je ne me trompe, qui détruit de fait cette exigence, l'exigence d'un lien juridictionnel spécial.

En effet, d'après son aiguë façon italienne de voir les choses, le compromis des Parties pour recourir à la Cour supposerait, selon M. Morelli, une offre irrévocable pour consentir à l'intervention de l'Etat tiers. Une offre qui serait acceptée par celui-ci en présentant la requête prévue par l'article 62 du Statut. Ainsi, je regrette d'être porteur de mauvaises nouvelles, mais M. Morelli ne figure précisément pas au rang où l'avocat d'El Salvador croit le trouver.

16. Passons maintenant à un autre point. Le Honduras a insisté sur le fait que le Nicaragua n'est pas *partie* et n'entend pas l'être puisqu'il réserve cette qualification aux protagonistes, et non à ce que avons appelé une intervention impropre (CR 90/4 du 7 juin 1990, p. 46). Le Honduras se montre dans ce sens particulièrement préoccupé par les conséquences de l'admission de l'intervention du Nicaragua. Il ne s'oppose pas à une telle intervention — en ce qui concerne le statut des eaux du golfe — mais il ne souhaite pas que, en tant qu'intervenant, le Nicaragua dispose des droits des Parties, en particulier, disons-le clairement, du droit à nommer un juge *ad hoc*.

Malgré l'affirmation expresse que les conséquences de l'intervention n'ajoutent rien au problème central par lequel il faudrait décider si le Nicaragua doit être ou non admis à intervenir (obs., p. 2) le Honduras a consacré une partie de sa plaidoirie à prendre en considération ces conséquences (CR du 7 juin 1990, p. 46 et suiv.), en ignorant délibérément que l'agent du Nicaragua a indiqué, en temps voulu, que de telles conséquences ne faisaient pas partie de la requête d'intervention formulée à la Chambre (CR du 5 juin 1990, p. 16).

17. Vu l'insistance de la part du Honduras, nous devons réitérer ce que nous avons déjà indiqué au cours de la session de mardi dernier (CR du 5 juin 1990, CR 90/2, p. 44-45). Le débat sur les conséquences de l'intervention du Nicaragua ne doit point être anticipé, la discrétion de la Chambre en examinant la requête d'intervention doit être exercée exclusivement en fonction des exigences établies par l'article 62 du Statut. *Et c'est tout* comme l'a dit M. Jennings (op. diss., arrêt du 21 mars 1984, par. 9).

Si le Nicaragua est admis à intervenir dans le différend maritime entre le Honduras et El Salvador il faudra établir — et seulement alors — ses conséquences. Le Nicaragua, naturellement réclamera les droits qu'à son avis le Statut et le Règlement de la Cour reconnaissent à l'Etat intervenant sous l'égide du principe d'égalité et le simple respect procédural. Dans ce sens il a manifesté qu'il se considérera *partie intervenante*. En tout cas, et comme le dit le paragraphe 2 de l'article 62 «la Cour décide».

18. Pour conclure, en ce qui concerne certaines observations qui ont été faites ici par l'une des Parties (cf. CR du 6 juin 1990, p. 80 et suiv.), j'aimerais souligner que la Cour n'a jamais rejeté — jamais rejeté — une requête à fin d'intervention *véritable*, *propre* et *strictement limitée* visant la sauvegarde des intérêts juridiques et, bien sûr, la Cour n'a jamais soutenu que l'acceptation de toute intervention dépende du consentement des parties au différend. Dans ce sens, personne n'a pu apporter une seule référence. Les divergences dans la Cour ont tourné — dans le dernier cas résolu — autour de la qualification de l'intervention demandée comme *véritable, propre* ou *strictement limitée*, ou au contraire *impropre*.

Par sa nature même, la qualification d'une requête d'intervention ne peut être faite que cas par cas, en fonction de ses circonstances particulières.

En conséquence, l'admission de l'intervention du Nicaragua en l'espèce, invoquant l'article 62 du Statut, ne signifierait dans le registre de la Cour rien d'autre que cette Chambre s'est trouvée devant la première possibilité de rendre opérationnel ce précepte.

Le fait que dans les cas précédents — pas très nombreux d'ailleurs — la Cour ait rejeté les requêtes d'intervention, ne signifie pas que les requêtes d'intervention doivent toujours être rejetées.

Au-delà de toute considération la Cour doit tenir compte de son propre Statut, y compris l'article 62. Comme l'a dit M. Sette-Camara:

> «l'intervention ... c'est la voie de recours appropriée pour protéger les intérêts des tiers dans une affaire contentieuse pendante. C'est un instrument indispensable pour la bonne administration de la justice, son opportunité et son efficacité ... il est important et même nécessaire de conserver l'institution...» (op. diss., arrêt du 21 mars 1984, p. 84-86).

Et si un organe de la Cour parvient à la conclusion que les conditions de l'article 62 ont été satisfaites, l'obtention est aussi simple que naturelle: l'intervention devrait être donc autorisée.

Monsieur le président, Messieurs les membres de la Cour, j'arrive à ma fin. J'espère avoir satisfait ce que je vous avais promis, de la clarté et de la concision. Je vous remercie de l'attention que vous avez bien voulu me porter et je tiens à vous manifester tout mon respect dont je fais part aussi à toutes les personnes qui interviennent à ces audiences.

*L'audience, suspendue à 15 h 45, est reprise à 16 heures*

## STATEMENT BY MR. MARTÍNEZ MORENO

AGENT FOR THE GOVERNMENT OF EL SALVADOR

Dr. MARTÍNEZ MORENO: Mr. President, Members of the Chamber. El Salvador does not feel that it is necessary to make any new response to the Reply of Nicaragua. But there were two points made in the address of Professor Bowett on which I would be grateful for your indulgence to comment. What I have to say will take only two minutes.

First, as El Salvador has stated repeatedly in the written pleadings, and as Professor Weil reiterated in his oral pleading on Wednesday, the *determination* of the legal status of the maritime spaces does not extend to *delimitation*. The interpretation of the *compromis* is entirely a matter for the merits and it would not be proper that the Chamber should in any way prejudge that question at this stage of the proceedings by discussing the Honduran arguments relating to delimitation as if they were properly part of the intervention proceedings.

Second, El Salvador does not believe that it is logically possible, in relation to the question of intervention, to divide the issue of the legal status of the waters within the Gulf of Fonseca from that of the legal status of the waters in the Pacific Ocean beyond the closing-line of the Gulf. Although each of the two maritime areas in dispute possesses a legal status quite different from the other, it is clear, from the written pleadings of Honduras, from the demonstration by counsel for Honduras yesterday, and from the statements of Nicaragua today, that the Honduran delimitation argument in the Pacific (out of place though it is) is closely tied to considerations deriving from the status of the waters and coasts within the Gulf.

Therefore, El Salvador is, and remains, opposed to any intervention by Nicaragua in either area. In its view a partial intervention, limited to the status of the waters within the Gulf, is not only illogical but would create insurmountable difficulties. This reaffirms El Salvador's conclusion that no intervention should be permitted at all.

Once again, Mr. President and Members of the Chamber, I thank you on behalf of El Salvador for the patient manner in which you have conducted these proceedings.

## REPLY OF PROFESSOR BOWETT

COUNSEL FOR THE GOVERNMENT OF HONDURAS

Dr. VALLADARES SOTO: Mr. President, I would respectfully ask the Chamber to give the floor to our counsel, Professor Bowett.

The PRESIDENT OF THE CHAMBER: Yes. I give the floor to Professor Bowett.

Mr. BOWETT: Mr. President, I am grateful to you for affording me this opportunity. I will be as brief as possible and I must ask you to excuse any incoherence in my remarks. They come from the difficulty of those listening to interventions and drafting replies to them at one and the same time.

I must start, Mr. President, by expressing a certain disappointment in the answer given by the Agent for Nicaragua as to the Court's question. As I understood that answer, it really leaves open the possibility that Nicaragua will pursue or may pursue a further recourse to the full Court either to reconstitute this Chamber or to seek a division of the subject-matter of this dispute into what Nicaragua terms its "territorial" as opposed to its "maritime" aspects. As I have already indicated, Mr. President, in the view of Honduras, that division is not only artificial — it is quite simply impractical and it will not be possible for the dispute between the two Parties to proceed on the basis of a division of that kind, and it would be my submission, Mr. President, that this Chamber is fully competent, in its eventual judgment, to express its own views about the feasibility or practicability of a division of that kind in the subject-matter of this dispute.

I think there are other matters on which this Chamber is competent to rule and those relate to the incidental rights which any intervenor, such as Nicaragua, has before this Court. In particular, I would submit that it is for this Chamber to indicate its views as to whether a non-party such as Nicaragua, intervening under Article 62, has in fact the right to appoint an *ad hoc* judge and so require a reformation of this Chamber. Those are matters which must surely lie within the competence of this Chamber.

I sense a certain desire to downgrade the Chamber and to, as it were, see the Court as exercising a supervisory role above this Chamber. Mr. President, for the purposes of this case, the Chamber is the Court and I hope that it will, as the Court, rule on all these matters to which I have just referred with finality.

Now, I turn now if I may, to the areas of contest which counsel for the Applicants have raised. Mr. Brownlie rather chided both El Salvador and Honduras by not having faced up to what he had said about recognition. I must say in reply that I did not quite understand what *his* point was. Was he in fact saying that Honduras *has* recognized the legal interests of Nicaragua in the area relevant to any delimitation between Honduras and El Salvador? Was he saying that? If so, he needs to do more than just say it. He needs to demonstrate it and that demonstration was lacking.

But as regards the elements of the maritime dispute in which Nicaragua was keen to show that it had a legal interest, we were told that there is a strong presumption that the decision will affect Nicaragua's legal interest. Well of course, whether the decision will affect those interests must, at this stage, always be a

matter of presumption because we do not know what the decision will be. But there can be no question of a presumption about the legal interests. The obligation on the Applicant, as a would be intervenor, is to demonstrate that it has a legal interest, not to leave it as a matter of presumption — it must demonstrate that fact. And I regret to say that, in everything we have heard this afternoon, that demonstration of legal interests has been totally lacking.

Now, as regards the legal interests of Nicaragua in the issue of delimitation, and it is that that I really want to concentrate on, of course the Court has independent powers to define any relevant area both inside and outside the Gulf so as to protect the interests of a third party. The Court does not have to adopt or accept the definition of the relevant area that Honduras has proffered for purposes of its own pleadings. The Court has absolute freedom to identify its own relevant area so as to give any necessary protection to a third party.

With that in mind, I want to just turn to the issues which have been raised by Nicaragua, both inside and outside the Gulf. Let me start with inside the Gulf. Nicaragua says that any delimitation is bound to depend, upon the islands, therefore, it follows, or is supposed to follow, that a legal interest exists in Nicaragua because Nicaragua is sovereign over some of the islands. Now, of course the island in question is Farallones, here. Now, if the line, the delimitation line, as between El Salvador and Honduras, lies anywhere, *anywhere* in this western sector, then Farallones becomes irrelevant to *that* delimitation. Of course, not to a future delimitation between Nicaragua and whoever is sovereign of the waters between Farallones and the new line. But Farallones is irrelevant to *that* delimitation between El Salvador and Nicaragua.

Then we were referred to the problem of joining the 1900 Treaty line from Farallones to the closing-line, here across the mouth of the Gulf. Now, even assuming that the whole of this relevant area, the whole of it, were to be allocated to El Salvador, the problem of continuing the boundary line from Farallones to the closing-line across the Gulf, it would still be a problem of a delimitation to be effected by agreement between Nicaragua and Honduras. And I stress *by agreement*, because the suggestion was made that it would be somehow the task of this Court. Not at all. Nicaragua is not intervening to have this Court delimit for Nicaragua. That is an entirely future problem for resolution by agreement between the two Parties. And if, of course, even a part of this western sector is allocated to Honduras, then clearly *a fortiori* the problem of determining the remainder of this sector of the 1900 line, up to the closing-line, is a problem for solution by agreement between Nicaragua and Honduras. The only possibility of a tripoint existing here in the area of the Farallones, which was the possibility referred to by Professor Brownlie, would arise if we supposed that the waters of El Salvador came east of this line X-Y, into the eastern part of the Gulf, outside the relevant area; this is certainly not a possibility which Honduras would admit, and is not a claim which El Salvador itself has made, so all that is entirely hypothetical. My conclusion is that, as regards the waters inside the Gulf, provided the problem of delimitation is confined to an area of the Gulf in which Nicaragua makes no claims — and I stress that we have heard no claims; we have heard not a single claim by Nicaragua to any of the relevant areas as I have defined it — on that assumption then, there is no possible conflict with any real legal interest of Nicaragua.

We had a brief mention of navigational interests. What are these navigational interests? Has Nicaragua undertaken the burden of identifying to the Court what these navigational interests are and how they will be affected by your decision? Certainly not. We were not given any explanation as to how navigational interests, unspecified by Nicaragua, will be affected by your decision.

I turn now to the waters outside the Gulf and, again, the crucial question is whether Nicaragua is making any claim to the maritime area being relevant for the purposes of this case between El Salvador and Honduras. Now, the fact is that we have had no such claim. There has been no claim. If there was a real legal interest, there is the obligation upon the intervenor to identify that legal interest to make the claim, as Italy made a claim in the *Libya/Malta* case. We heard no claim of any kind. Is Nicaragua opposing the claim of Honduras to a part of the closing-line even? I am not sure, having listened to counsel for Nicaragua. But what I am clear of is that there has been no express claim to oppose a claim to part of the closing-line by Honduras in the western sector that is west of point X and that is what matters for the purposes of this case. Is there any claim by Nicaragua to a maritime area to the west of that line, the perpendicular projector from point X? We hope not and if that is the case, then there has been identified to you no legal interest which could be jeopardized by your decision, properly limited to the relevant area.

And all of these arguments by Nicaragua fail, not only in not identifying the legal interest which it invokes, but they fail also in that they do not grapple with this Court's inherent powers to safeguard the interests of Nicaragua. And those powers, as I mentioned the other day, derive not only from Article 59, which you may regard as a somewhat formal protection, but they derive most importantly from this Court's power to show and define the relevant area in a delimitation question as to prevent any intrusion, or risk of intrusion, into areas properly claimed by a third State.

Mr. President, that is all I wish to say and I am grateful for patience.

## CLOSING OF THE ORAL PROCEEDINGS

The PRESIDENT OF THE CHAMBER: Since there are no more speakers, I should like to thank the Agents and counsel of the three States represented before the Chamber for the assistance they have given us by their thorough and learned argument on the issues arising out of the Application by Nicaragua for permission to intervene in the case. In accordance with Article 54 of the Statute, the Chamber will now proceed to deliberate on the question whether that Application should be granted and its decision, in the form of a Judgment, will be given as soon as possible. In accordance with the usual practice, I request the Agents of the three States concerned to remain at the disposal of the Chamber for any supplementary information it may need. Subject thereto, I declare the present hearings closed.

*The Chamber rose at 4.20 p.m.*