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Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Friday 10 May 1991, at 3 p.m., at the Peace Palace,

Judge Sette-Camara, President of the Chamber, presiding

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

VERBATIM RECORD

ANNEE l991

Audience publique de la Chambre

tenue le vendredi 10 mai 1991, à 15 heures, au Palais de la Paix,

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

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

COMPTE RENDU

Present:

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

Registrar Valencia-Ospina

Présents :

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

M. Valencia-Ospina, Greffier

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as Agent and Counsel;

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

and

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

as Counsel and Advocate.

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

as Counsel;

Assisted by

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

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

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

as Counsel and Advocates;

and

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Lic. Santiago Elías Castro,

Lic. Solange Langer,

Lic. Ana María de Martínez,

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ainsi que :

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comme membres de la Commission de Souveraineté et des frontières.

The PRESIDENT: Please be seated. The sitting is open. We continue hearings on the Naguaterique-Colomoncagua - according to one Party - Nahuaterique-Sabanetas - according to the other Party - sector, and this is the time for the delegation of El Salvador to make its presentation. I give the floor to President Jiménez de Aréchaga.

Dr. JIMENEZ DE ARECHAGA: Thank you, Mr. President. I will divide my statement into two parts: the sub-sector of Nahuaterique first and then the sub-sector of Torola, following the order that was discussed in the written pleadings.

NAHUATERIQUE

I. The Sub-Sector of Nahuaterique

(A) The Fundamental Issue

In the sub-sector of Nahuaterique the fundamental issue consists of determining which of the Parties has the better title to the vast mountainous area of Nahuaterique to the north of the Quiaguara River.

The claim of El Salvador is based on the fact that in 1815 the "Juez Privativo de Tierras" of the "Real Audiencia" of Guatemala confirmed that this area of Nahuaterique mountain constituted the major part of the age old "ejido de reducción" which in 1769 had been adjudicated as Commons to the twin towns of Arambala and Perquín. The "Juez Privativo de Tierras" ruled in 1815 that the only limitation - he said, in Spanish, "el único menoscabo" - menoscabar has been translated in the dictionaries to mean: to impair, to lessen, to make worse, to reduce, to deteriorate - "the only limitation" of these Commons was the existence of a small area of land ("terreno" - a piece of land) comprising two "caballerías" and 201 cords which had been sold in 1773 as an "ejido de composición" to the Honduran settlement of Jocoara - Jocoara is today known by the name of Santa Elena - and it is 25 kilometres distant from the Nahuaterique.

The claim of Honduras, on the other hand, is based on the argument that the Quiaguara River constituted the Spanish colonial provincial boundary and that Honduras is therefore entitled to all the land to the north of that river. This argument involves expanding and inflating the small "terreno" - piece of land - sold to the inhabitants of Jocoara as an "ejido de composición" in 1773 so as to create

the impression that this small "terreno" included the whole of the disputed part of this sub-sector of Nahuaterique.

This attempt by Honduras to transform an "ejido de composición" of such a limited size - two "caballerías, 200 cords - into the legal basis of a claim to the whole area of Nahuaterique mountain is not only wrong as a matter of law but also defies common sense. A judicial decision to sell an area comprising two "caballerías" and 201 cords by the process of "composición" cannot conceivably, by any stretch of the imagination, have had the effect of cutting in half the "ejido de reducción" already adjudicated to the inhabitants of the two towns of Arambala and Perquín.

The decision of the "Juez Privativo de Tierras" of the "Real Audiencia" of Guatemala of 15 December 1815 provided as follows (CMES, Annexes, Vol. IV, Ann. VI, p. 32). I will read the text because every single word of this judicial pronouncement is highly significant. The "Juez Privativo" in Guatemala said:

> "In the name of His Majesty (God bless him) and in virtue of his Royal Cédula of Instruction given in San Lorenzo el Real ... I protect the Indians of the town of Arambala and Perquín and command them to be protected in their age old possession of their Common lands according to the limits and landmarks that are stated in the insert measurement, of which shall only be excluded the field ('terreno' in the original Spanish text) ascribed to those of the town of Jocoara."

As I said, every single word of this judicial pronouncement is highly significant. The "Juez Privativo de Tierras" of the "Real Audiencia" of Guatemala stated that he was acting by virtue of the delegated authority of the King of Spain granted to him over the whole "Capitanía General" of Guatemala, which included the whole of the area which today comprises El Salvador and Honduras, beside Guatemala. He invoked and extended the protection and authority of the King of Spain in respect to the "age old" original "ejido de reducción" of the two Salvadorian settlements of Arambala and Perquín. Significantly, no similar protection was invoked in respect to the "terreno" sold to the inhabitants of Jocoara, which is not described as an "age old" "ejido". The measurement carried out in 1769 of the Commons of Arambala and Perquín was, as it were, revived by the phrase of this judicial pronouncement which defines their "ejido" "according to the limits and landmarks stated in the insert measurement". Finally, the judge emphasized that the "terreno" sold by the process of "composición" to the inhabitants of Jocoara, consisting of two "caballerías" and 201 cords, was the

only part of the whole area of Nahuaterique mountain measured in 1769 which did not form part of the "ejido de reducción" of the two Salvadorian settlements.

In the light of the judicial pronouncement it is necessary, in order to establish the line of *uti possidetis juris* in Nahuaterique, to determine what were the boundaries and boundary markers stated in that measurement of 1769 which was revived and incorporated into the Formal Title-Deed to the Commons of Arambala and Perqu n of 1815 (set out in extenso in the Annexes to the Counter-Memorial of El Salvador, Volume IV, Annex VI, pp. 16 et seq.).

(B) The boundaries of the Commons of Arambala and Perquín established by the Formal Title-Deed of 1815

I come now, Mr. President, to the boundaries of the Commons of Arambala and Perquín established in 1769 and as confirmed and revived in 1815.

It must initially be observed that, while the Formal Title-Deed to the Commons of Arambala and Perquín of 1815 mentions the Negro Pichigual River on two occasions, it does not mention at all the Quiaguara River. This is indeed admitted by Honduras in its Reply (p. 495).

The remeasurement of 1815 began at the boundary marker located "at the skirts of the hill they call of the Ardilla" (CMES, Annexes, Vol. IV, Ann. VI, p. 16). I will ask our cartographer to point out this place.

This map which is part of your Atlas submitted with the Salvadorian Reply transcribes the official Honduran map. You will notice that the Cerro La Ardilla which was the starting point of the measurement occupies exactly the same place in both official maps, eight kilometres to the north of the River Quiaguara.

El Salvador submits that this fact is in itself absolutely incompatible with the contention advanced by Honduras that the Quiaguara River was or is the boundary between the settlements or jurisdictions. That river did not constitute any obstacle to the issuing of the Formal Title-Deed to Commons which transferred administrative control of the area to Arambala and Perquín and, through these twin towns, to San Miguel.

Not only the Cerro La Ardilla but also the other boundary markers which were re-erected to the north of the Quiaguara River paid no attention whatever to the alleged boundary constituted by

that river.

From Cerro La Ardilla the remeasurement proceeded towards the east to a hill known as Salalamuya, the source of the river of that name, located in exactly the same place in those official maps. We will have something to do with this River Salalamuya later, Mr. President.

Next the remeasurement reached a deep hollow called Sojara, which equally appears on both the official Honduran and the official Salvadorian maps at the same location with the respective names of Soleara and Soloara. This agreed location is also 8 kms to the north of the Quiaguara River.

From there the remeasurement proceeded to the hill of Napansapa, also 8 kms to the north of the Quiaguara River, on the same location in both maps, and thereafter to Olosicala, which is today known as Cerro El Alumbrador. The Cerro El Alumbrador appears on both the official Honduran and Salvadorian maps at the same location, 7 kms to the north of the alleged boundary, the Quiaguara River. They are now not exactly in the same location because on the Honduran map filed yesterday, the Cerro El Olosicala or El Alumbrador, which used to be in the same location, has been thrown back from squares 53.69 to 52.70, one and a half kilometres back.

Subsequently, the remeasurement and the re-erection of boundary markers reached the hill of Chagualaca, which also appears in the same location in both the official Honduran and the official Salvadorian maps, 2 kms to the north of the Quiaguara River.

There is complete agreement between the Parties on the names and locations of all these places where boundary markers were re-erected, subject to the observation I just made on the Olosicala or El Alumbrador.

Honduras, yielding to the evidence, admits in its Reply (HR, p. 486): "qu'ont été arpentées, en faveur de Perquín et Arambala, des terres situées au nord de la rivière Negro ou Quiaguara".

All this obviously means that the Quiaguara River was not the boundary of the "ejido de reducción" of the twin towns of Arambala and Perquín.

Honduras, although it criticizes the delegate judges who carried out the remeasurement, does not go so far as to challenge the validity of the Formal Title-Deed of 1815. It could not do so in any event, since the appropriate decision emanated from the highest authority in Guatemala, the "Juez

Privativo de Tierras".

In conclusion, Mr. President, of this section, the last word on the intricate dispute between the inhabitants of Arambala and Perquín and the inhabitants of Jocoara, which we will examine later, the last word was said in Guatemala on 15 December 1815 by the "Juez Privativo de Tierras" of the "Real Audiencia" in the passage which has already been read, in which he made it clear that in granting this "ejido" he was acting on the basis of the "Real Cédula" of San Lorenzo el Real dated 15 October 1754 (MES, Annexes, Vol. IV, Ann. VI, pp. 32-33).

(C) The contentions of Honduras

I will deal now with the contentions of Honduras. Honduras admits that the Commons adjudicated to the inhabitants of Arambala and Perquín included the vast mountainous area of Nahuaterique to the north of the Quiaguara River, with the sole exception of the area of two "caballerías" and 201 cords sold to the inhabitants of Jocoara (CMH, pp. 386-387).

However, Honduras seeks refuge from this incontrovertible fact in its customary legal argument based on the Opinion of Professor Nieto García, namely that the Commons of Arambala and Perquín was only an "ejido de composición" conferring only private proprietary rights ("un droit foncier") and that, consequently, the enormous piece of land adjudicated as a Salvadorian "ejido" should nevertheless be considered as having at all times been under the administrative control of the authorities in Comayagua, and therefore today under the sovereignty of Honduras (CMH, pp. 346-347).

El Salvador has already demonstrated that the two premises, one of fact and one of law, contained within the above argument have no sound foundation. El Salvador has no need to repeat this argument yet again and consequently has no intention of so doing. El Salvador merely wishes to recall that the Commons of Arambala and Perquín constituted an "ejido de reducción", described in the judgment as an age-old "ejido". There was never any "composición". The lands in question were therefore subject to the administrative control of the "Cabildo" of Arambala and Perquín and, through these "Cabildos", to the authorities of the "Alcadía Mayor" de San Miguel.

The fact that the measurement of 1769 which was revived in 1815 had been carried out by delegate and subdelegate judges from San Miguel constitutes additional evidence that the area

adjudicated as Commons to Arambala and Perquín was subject to the jurisdiction of San Miguel. In the words of the Award of the Tribunal of Arbitration presided by Hughes:

> "through these land grants it is possible to trace the area in which each of the colonial entities, and the States which succeeded them, asserted administrative control".

Honduras has contended in its Reply (in para. 99 at p. 488) that the Title-Deed of 1773, included a judicial decision of 1773, and thus the Title-Deed of that date conferred private proprietary rights on the Indian community of Jocoara and declared that the Quiaguara River was the boundary between the ancient Spanish colonial provinces.

The question as to what was the provincial boundary was strongly disputed between the advocates and the witnesses produced in the course of the proceedings which took place in 1773; the inhabitants of Jocoara asserted that the boundary was the Quiaguara River while the inhabitants of Arambala and Perquin asserted that the boundary was further to the North, at the Salalamuya River (MH, Annexes, at pp. 1256 and 1264-1265). The two positions were Quiaguara and the Salalamuya. That was the dispute. This particular difference of opinion, contrary to the contentions of Honduras, was not, however, decided by the Award of 1773. That decision did not pronounce on the issue of the actual provincial boundary and consequently did not identify the Quiaguara River as the boundary.

Professor González Campos said yesterday that this judgment of 1773 "a établi que la limite de juridiction était la rivière Negro ou Quiaguara".

Without accepting that a judicial decision of this nature may establish a boundary, the fact is that one would look in vain at the 1773 judgment for a pronouncement on the question of the boundaries, either as the *ratio decidendi* of the decision or even as *obiter dicta*.

The 1773 decision pronounces in favour of those of Jocoara invoking other grounds for that decision. The judgment relies on the following considerations:

> "Attendu que les habitants de Arambala et Perquín n'ont pas apporté suffisament de preuves selon et comme il leur convenait de faire, et qu'en revanche l'ont fait, ceux de Jocoara, en conséquence je déclare qu'on doit affirmer les droits du village de Jocoara" (MH, Annexes, p. 1266).

[the rights to these two caballerias to have a course.]

Obviously these considerations invoking the judgment concerning the evidence furnished by the Parties cannot refer to the question of the boundary between provinces, which is not a matter of evidence from the Parties but one of administrative regulation known to the authorities.

The declaration in that judgment that the "terreno" was in Comayagua does not signify either that the Quiaguara became the boundary. The "terreno" we will see was located north of the Salalamuya River. So there was no judicial pronouncement to the effect that the Quiaguara was the boundary.

The decision confined itself to declaring that the small piece of land ("terreno") in dispute, of two "caballerias" and 201 cords, was in the Province of Comayagua. But this is not the same thing as asserting that the Quiaguara River was the boundary between the colonial provinces. The "terreno" adjudicated to the inhabitants of Jocoara could well have been in Comayagua and nevertheless in the area of the Nahuaterique mountain, namely beyond the Salalamuya River, or on the other side of the Cerro La Ardilla away from that peak, as indeed was stated in the Formal Title-Deed of 1769 which was endorsed in 1815 (CMES, Annexes, Vol. IV, Ann. VI, at p. 16). I will refer to this point later. Thus the Award of 1773 does not say nor imply that the Quiaguara River was the boundary between the two Spanish colonial provinces. This is "a plus", something which the argument of Honduras has added; Honduras makes the Deed of 1773 say more than it actually did by claiming that (Reply at p. 493) "la décision se fonde sur la constation que la limite entre San Miguel et Comayagua est la rivière Quiaguara". There is no such thing in the judgment.

This argument was not relied on in the judgment as the foundation of the adjudication of two caballerias to Jocoara. Besides the judgment was in any event confirmed only because of the failure of the inhabitants of Arambala and Perquin to maintain their appeal against it. There is therefore certainly no justification for the assertion by Honduras (in its Reply at p. 496) that "la donnée de base est que la rivière Negro ou Quiaguara est la limite des provinces". This was stated only by two complacent witnesses presented by Jocoara and by one of the advocates of Jocoara but was not one of the findings of the tribunal.

But even if that decision of 1773 had by implication determined what Honduras contends,

namely that the Quiaguara River was the provincial boundary, that would not have been the end of the matter. No matter what was allegedly pronounced by way of implication, that was certainly not the final word of the Spanish authorities concerning the boundaries of the relevant "poblaciones" or settlements, to use the terminology of Article 26 of the General Treaty of Peace.

What is decisive in this respect is the subsequent decision, taken in 1815 by the highest authority on land boundaries in Guatemala, the "Juez Privativo de Tierras", who according to the "Real Cédula" of San Lorenzo el Real had faculties delegated from the Spanish Crown and jurisdiction over the whole territory of the Capitanía General and was thus empowered, when awarding Commons to Indian communities, to ignore the provincial boundaries, as he did both here in this case and also, in respect of the Formal Title-Deed to the Commons of Citalá in the sector of Tepanguisir.

The final decision on this matter was thus taken in 1815 and that final decision superseded and derogated whatever consequences as to the location of provincial boundaries may be wrongly inferred by Honduras from the terms of the Award of 1773.

The fact that the "Juez Privativo de Tierras" of the "Real Audiencia" in Guatemala adjudicated 60 "caballerias" situated in the jurisdiction of San Miguel and 2 "caballerias" situated within the jurisdiction of Comayagua explains why he also requested the authorities of Comayagua to protect the rights of the inhabitants of Jocoara.

Professor González Campos yesterday, like Professor Bardonnet before him, tried to draw support for the thesis advanced by Honduras from this very fact, namely that the "Juez Privativo de Tierras" of the "Real Audiencia" of Guatemala ordered not only the judges of San Miguel but also the judges of Comayagua to protect and defend the rights granted in this Formal Title-Deed to Commons.

However, there is a simple explanation for this order of the "Juez Privativo de Tierras". It indicates that the formal title-deed had to be respected as much by the judges of San Miguel, on the grounds that the "ejido de reducción" in question was within their jurisdiction, as by the judges of Comayagua, on the grounds that the Commons so awarded had been frequently invaded by the inhabitants of Jocoara, whose principal settlement was situated within the jurisdiction of Comayagua

in Santa Elena.

Professor González Campos presented yesterday another explanation for the decision assigning responsibilities to the authorities of San Miguel and of Comayagua. He stated that the 1815 decision

> "ne fait aucune différence entre autorités de Comayagua et autorités de San Miguel, l'une et l'autre, en effet, doivent protéger la possession des terres".

[Only the possession the rights of each one will differ because there were two different kinds of "ejidos".]

But the very terms of the operative part of the 1815 decision shows that there was not equality but a marked difference in the responsibilities assigned to the different authorities. The authorities of San Miguel were responsible for protecting the Indians of Arambala and Perquin "in their age-old possession of their common lands", i.e., they were responsible for the supervision of an "ejido de reducción". On their part, the authorities of Comayagua had merely to ensure that the Indians of Jocoara did not go beyond the two "caballerías" of the terreno owned by them by way of purchase and sale. And that terreno was an "ejido de composición" and the only "menoscabo" - if I may be permitted to reiterate the Spanish word - or diminution of the "ejido de reducción" of the Indians of Arambala and Perquín.

So far as concerns the precise location of the two-and-a-half "caballerías" of the inhabitants of Jocoara, Honduras claims that this small "terreno" was inserted within the Commons of Arambala and Perquín as an incrustation within that area (RH, Map IV-I).

El Salvador disagrees and bases its position on the Formal Title-Deed to Commons of 1815, which relates a significant incident which occurred at Cerro La Ardilla. The inhabitants of Jocoara objected to this boundary marker and the judge then asked them for their title, which they produced. The judge then decided:

> "According to these titles, and to what the practitioners explained to me, I found their limits to be far away of this place because between this and the other boundary there are Realengo lands." (CMES, Anns. IV-VI, p. 16.)

This is another factor to take into consideration - a fact; a fact which my distinguished colleague is

so fond of. Jocoara, now Santa Elena, is 25 kms away from Nahuaterique.

In any event, the location of the two-and-a-half caballerías is irrelevant, because this small area of land was sold to the inhabitants of Jocoara by the process of "composición" (ibid., p. 135; CMH, pp. 1268-1269). In accordance with the thesis maintained by Honduras, based on the opinion of Professor Nieto García, an opinion which Honduras has presented in these proceedings, these two-and-a-half "caballerías" constitute an "ejido de composición" which does not serve as a basis for a claim of sovereignty but merely confers a "droit foncier". Even if the two-and-a-half "caballerías" were inserted within the Commons of Arambala and Perquín the boundaries of those Commons would not in any way be altered by that insertion. However, their presence would explain why the authorities of Camayagua were also requested by the "Juez Privativo de Tierras" to protect the ownership rights of the inhabitants of Jocoara.

The previous negotiations between the Parties

I will deal now, Mr. President, with an argument introduced by our adversaries concerning the previous negotiations between the Parties. Honduras has also relied on the records of the negotiations between the Parties in 1861 and 1869, and in particular on various proposals and Notes written in connection with these negotiations.

We do not propose to take the trouble to answer these arguments other than to refer the Chamber to what has already been said in the Counter-Memorial (pp. 23-25) to the effect that the International Court of Justice has reiterated time and time again that proposals and statements made in the course of or at the commencement of unfruitful negotiations are not to be taken into account in defining the legal rights of the Parties. This is simply because negotiations would cease to be a useful method for the peaceful settlement of disputes if States were not subsequently allowed to change the position adopted in negotiations without being confronted with their own earlier proposals and statements.

In particular, it should be observed that the Note of 14 May 1861, so often invoked by our adversaries, was intended to propose and initiate negotiations, as the title of that letter in the Honduran Memorial indicates (MH, Annexes, p. 51); that letter appears under the title "Ouverture de négociations".

It would be contrary to fundamental principles and to established precedents to contend that a State is unable to change its views and is tied down by a proposal made more than a century ago in order to initiate negotiations, a proposal which, furthermore, was never acted upon by either Party.

In any event, the records of such negotiations - even that letter - could not possibly generate territorial rights, simply because the documents in question were obviously not issued by the Spanish colonial authorities, as Article 26 of the 1980 treaty requires.

What is more, the solution suggested in those negotiations, a dual approach envisaging the mountainous area of Nahuaterique as a Salvadorian public property encrusted under Honduran sovereignty, was not workable at the time of these negotiations and would be even more unworkable today.

This is precisely why the negotiations of 1884 and the Cruz-Letona Convention, which was subsequently signed as a result of those negotiations, completely abandoned the dual approach and, in Articles 12 to 17 of that Convention, established as an international boundary the boundaries which were defined in the Formal Title-Deed to the Commons of Arambala and Perquín of 1815 (MH, Annexes, pp. 181-182).

The Royal Landholdings ("Tierras Realengas") and the
Formal Title-Deed to the Commons of Arambala
and Perquín of 1815

The human arguments do not form the basis or support for the claim by El Salvador to a boundary line which goes towards the west, beyond the line measured in the Formal Title-Deed of 1815 and extending as far as the Negro Pichigual River. I will ask the cartographer to indicate that area.

The legal support for this claim continues to be the principle of *uti possidetis juris* based on the Formal Title-Deed of 1815 but in this case with reference to the concept of royal landholdings ("tierras realengas"). As you know, Mr. President, Members of the Chamber, royal landholdings were uncultivated land which had neither been adjudicated as Commons to the Indian communities nor been sold to settlers by the process of "composición". Consequently these lands still belonged to the Spanish Crown in 1821, which is obviously why they were called royal landholdings.

Following independence from Spain and the dissolution of the Central American Federal Republic, the independent republics succeeded to all the rights which the Spanish Crown had formerly enjoyed over these lands. Thus, El Salvador was the successor to such royal landholdings as had existed in the former Spanish provinces of - I would rectify - Honduras was the successor to such royal landholdings as had existed in the former Spanish provinces of Gracias a Dios and Comayagua.

The Formal Title-Deed to the Commons of Arambala and Perquín of 1815 contains the following description of the segment of the boundary of the Commons running from north to south:

> "changing the course from North to South with declination to the south-west were calculated some twenty cords till a hillock they call 'Guiriri' ... being left to the parts of the west and the south-west some Realengo lands belonging to this jurisdiction because being further of the said lands the Negro River which they also call Pichigual, and which divides this jurisdiction from that of Gracias a Dios, which is the one of Comayagua" (CMES, Annexes, Vol. IV, Ann. VI, p. 17).

The key words in this passage are "some Realengo lands belonging to this jurisdiction", that is to say to the jurisdiction of San Miguel.

On the evidence of this Formal Title Deed El Salvador claims that in this segment of this sector the boundary line should reach as far as the Negro Pichigual River, thus including as part of the territory of El Salvador the royal landholdings which the Formal Title Deed described as "belonging to this jurisdiction". In this case not only these lands are described as royal landholdings but a limit is fixed to the extension of these royal lands - which is the Rio Negro Pichigual.

The measurement was then continued as far as a place known as Roble Negro (Black Oak). I will ask the cartographer to indicate Roble Negro. On yesterday's map by Honduras, Roble Negro is somewhat displaced from square 44.68 to 43.68. Here is Roble Negro on the Honduran map. Here it is located on the map submitted yesterday.

In that place the inhabitants of Colomoncagua objected on the grounds that this boundary marker should be "más adentro", that is to say, "further inside", towards the west. The judge asked for their title-deed which they promised to produce within two days. However, because they did not appear with their title-deed as they had promised, the judge subsequently ordered that the boundary marker at Roble Negro should be re-erected (*ibid.*, p. 17). Despite the decision of the judge there

has been this displacement towards the east of Roble Negro.

The Formal Title-Deed of 1815 also contains an observation by the judge (*ibid.*, p. 17) that from Roble Negro to the Negro Pichigual River

> "there was something like a quarter of league and in the said river ends this jurisdiction, according to which the mediating lands are of Realengo condition, which is the same we had had at our right from the landmark of Guiriri".

And these are the royal lands, which in the Pichigual comprise all this area.

Here again, the same royal landholdings of the jurisdiction of San Miguel complete and support the boundary claimed by El Salvador which goes beyond the boundary markers of the Formal Title-Deed to the Commons of Arambala and Perquin as far as the Negro Pichigual River.

With this, Mr. President, I have finished my statement concerning the sub-sector of Naguaterique and I will go on to question of the sub-sector of Torola which was the one first dealt with by Professor González Campos.

II. The Sub-Sector of Torola

(A) The Formal Title-Deed to the Commons of Torola of 1743

The basic document, I will say the only document, defining the *uti possidetis* invoked in these proceedings is the Title-Deed to the Commons of Torola of 1743, invoked by El Salvador. El Salvador have relied on this title-deed which is based on a remeasurement carried out in 1743, in support of its claim that the River de las Cañas or Yuquina constitutes the boundary in the last section of this sector.

The authenticity of this Formal Title-Deed to Commons emerges clearly from the contents of the instrument. It was a remeasurement carried out at the request of the mayor, the aldermen, and the other dignitaries of Torola on the grounds that the Formal Title-Deed to the Commons of their town which they had formerly received from the Spanish Crown had been destroyed in a fire.

The "Juez Privativo de Tierras" of the "Real Audiencia" of Guatemala, one we have already encountered, Francisco Manrique de Lara, acceded to this request and commissioned Captain Juan

José Cañas, Delegate Judge for Land Measurements in San Miguel, to carry out the remeasurement provided that he could confirm the loss of the original instrument. Since this remeasurement was a confirmation of a former Formal Title-Deed to Commons, it did not require any renewal of the approval already given by the highest authorities in Guatemala. The remeasurement was duly carried out by the judge of San Miguel in 1743 after he had heard evidence as to the destruction by fire of the earlier Formal Title-Deed and after he had summoned the adjoining landowners, including the municipal authorities of the Indian community of Colomoncagua.

This document of 1743 was certified in 1843 by a notary public, a procedure similar to that employed in respect of other title-deeds relied on by Honduras, such as for example the Title-Deed to Joyas and Jicaguites submitted as an Annex to the Memorial of Honduras at page 1021.

With respect to this Formal Title-Deed to the Commons of Torola of 1743, Honduras and El Salvador coincide in the designation as boundaries of certain places or boundary markers mentioned in the Formal Title-Deed, such as Las Tijeretas, las Cañas or Yuquina River, the Camino Real which ran from Torola to the town of Colomoncagua, a place known as La Cruz where no boundary marker was in fact placed, and the Monte Redondo, where a boundary marker of stones had been erected. There is a coincidence in the designation but not on the location of these markers.

Honduras, for instance, denies the identification of Monte Redondo with the Cerro del Alguacil and contends that the real boundary is not the River de las Cañas or Yuquina but the Massire River; now this is in open contradiction to what the Formal Title-Deed to the Commons of Torola actually states and we will see that later (RH, paras. 81-82, at pp. 465-466).

(B) The Title-Deeds relied on by Honduras

Honduras makes enormous efforts in its Reply, and yesterday in the oral presentation, to explain away the boundary at the River de las Cañas or Yuquina, clearly established by the Formal Title-Deed to the Commons of Torola of 1743 and recognized by Honduras in the negotiations of 1869 and 1884.

Honduras constructs an alternative boundary by a process of accumulating extracts from various title-deeds conferring private proprietary rights and from various other documents, all of which are pieced together as a sort of jigsaw puzzle in order to try to avoid establishing the las

Cañas or Yuquina River as a boundary.

However, the documents from which these extracts are taken are either not valid title-deeds or do not support the claims of Honduras.

The first document relied on by Honduras is the Formal Title-Deed to the Commons of Joyas and Jicaguites of 1694. Honduras claims in its Memorial (p. 232) that this Formal Title-Deed refers to the las Cañas or Yuquina River as being "au couchant" in French "al poniente" and thus included within the measurement. But the formal title-deed, after referring to the de las Cañas or Yuquina River, states that it was "où l'on a mis une borne". This boundary marker which was placed in the river was both the initial and consequently also the final point of the measurement; this fact indicates that the de las Cañas or Yuquina River did indeed constitute one of the boundaries of these Commons.

Then Honduras relies on an extract from an alleged Formal Title-Deed to the Commons of Colomoncagua of 1766 issued by Cristóbal Pineda. However, this formal title-deed was annulled by the "Real Audiencia" of Guatemala, as is indeed recognized by Honduras in paragraph 60 of its Reply at pp. 436-437. Consequently, nothing of any validity can be extracted from this document.

After that, Honduras relies on another extract from the Formal Title-Deed to the Commons of Colomoncagua of 1767 issued by Garcia Jalón. However, the Reply of Honduras admits (in para. 59 at p. 435) that the inhabitants of Torola were not summoned to attend the measurement and Honduras despite this decisive fact nevertheless tries to rely on this document as evidence to deny that the de las Cañas or Yuquina River was a boundary between the two settlements.

Finally, Honduras relies on the survey of Colomoncagua of 1793 carried out by Andrés Pérez. This was a mere "reconnaissance visuelle" of the boundary markers as claimed by the representatives of the community of Colomoncagua which made no attempt to carry out any adjudication either of Commons or of jurisdictions. The claims of these representatives of Colomoncagua were so extreme that according to them even the Salvadorian town of San Fernando became located inside the Commons of Colomoncagua. You will see that Honduras is not acting on the basis of the title of Andrés Pérez because it is not claiming San Fernando. So even Honduras does not act on the basis of this document; it is not claiming that the Town of San Fernando is part

of Honduras.

Moreover, the 1793 Colomoncagua measurement, on which you heard a lot yesterday, is not a document which fulfils the requirements of Article 26 of the 1980 Treaty since it was not issued by a competent authority. While the Derecho Indiano provides that measurements are to be carried out by delegate judges selected and acting under the authority of the "Real Audiencia" in Guatemala, the 1793 document "reconnaissance visuelle" was ordered by a Lieutenant and interim governor of Comayagua. For this reason, it was not executed by the affected communities including that of San Fernando, as it results from the Annex of Honduras Memorial at page 1316. Mr. President, Members of the Chamber, listen to Andrés Pérez describing the following incident:

> "Comme nous arrivions sur une borne qui se trouve sur le grand rodeo, endroit que se disputent les natifs du village de Guarajambala, je les ai trouvés et je leur ai fait savoir ce que comprenait la dépêche délivrée par le lieutenant et gouverneur par intérim; et ils ont répondu ..., [this is what the Indian community answered to Andrés Pérez], qu'ils n'assisteraient pas et qu'ils ne seraient pas présents à l'exécution qui a été ordonnée ni encore moins qu'ils iraient à la ville de Comayagua parce que ce n'était pas une 'Audiencia' et qu'ils iraient plutôt à celle de Guatemala."

That means that it was a measurement of "reconnaissance visuelle" issued by an incompetent authority. Here we have the contention by Professor González Campos to the effect that an invalid document may be relevant in these proceedings, he said "dans la mesure où il permet d'établir les limites des anciens provinces, non le bien-fondé des droits de propriété des communautés indigènes". I do not think this could be an acceptable argument for the Chamber. Article 26 of the 1980 Treaty where it refers to Spanish authorities as the source of evidence of *uti possidetis juris* must be assumed to require that the Spanish document is a valid one an authentic instrument and not a nullity. I come now, Mr. President, to

(C) The question concerning the de Las Cañas or Yuquina River

Thus the argument so carefully constructed by Honduras falls to the ground. What other considerations are relied on by Honduras in support of its contention that the de Las Cañas or Yuquina River is not the boundary?

It must first be considered what the Formal Title-Deed to the Commons of Torola has to say in this respect.

The Torola title of 1743 says, in the Spanish original, that it "enseña por mojón el Río de Cañas", i.e., it indicates as a marker the River de Cañas. Professor González Campos stated yesterday that this refers not to a line of delimitations, but to a "borne" or marker. But in the present proceedings the lines of delimitation are to be established point after point, by markers and geographical features. Let us see now what the Torola title goes on stating:

> "along the same part (from south to north) ... we came to a ravinelike bank on the Las Cañas River, where, walking eastwards, the cord was extended upwaters and were measured eighty cords till the Royal Road that goes from Torola to the town of Colomoncagua" (CMES, Annexes, Vol. VI, Ann. VIII, p. 7).

At this point, the Reply of Honduras (p. 425), as yesterday Professor González Campos, seriously proposed that references in the formal title-deed to the "de Las Cañas or Yuquina River" should be read as references to the "Massire or las Tijeretas or Picacho River". They base this far-fetched proposal for altering the text of the Formal Title-Deed to Commons on the single word "Eastwards". They alleged (at p. 459) that "on change de direction vers l'orient" and so they conclude:

> "Attendu que l'on change de direction en arrivant à la rivière Las Cañas, pour se diriger ensuite vers l'Est, on n'a pas pu continuer en amont de cette rivière, mais d'une autre qui conflue avec la rivière Las Cañas, à savoir le torrent de Las Tijeretas ou de Picacho" (at p. 460) "ou Massire" (at p. 465).

This is not an acceptable argument. The single word "Eastwards" is not what controlled the direction taken by the remeasurement but the fact that that remeasurement went for eighty cords "upwaters" along the de Las Cañas or Yuquina River, which bends slightly towards the East before adopting a definite orientation towards the north.

"Andando al oriente" may well have been the initial direction taken by the measurement but, when the judge and the other persons accompanying him continued "upwaters" along the river, it is obvious that they must have followed the sinuosities of its course. The original Spanish text leaves no room for doubt; it says "sigue por el curso del río" ("continues along *the course of the river*") (emphasis added).

Professor González Campos tried to explain and temperate this incredible substitution which

consists in Honduras claim that where the title says "Río de Cañas" one should read "Río Massire". The explanation he advanced is that the Massire runs from west to east, while the Cañas runs from south to north. I have discovered that my distinguished colleague is allergic to all rivers running in a south-to-north direction.

Professor Gonzalez Campós added that only, if one goes upwater of the Massire, one encounters the royal road and the marker de La Cruz. These are not convincing arguments: one may cross a road at many points along its course, and one may often encounter crosses in Catholic countries.

It is not serious to propose such an alteration of a perfectly identifiable river on the argument that its course does not match a place such as La Cruz or Qué Cruz, where no marker had been erected. The insistent reference of yesterday to an inexistent "borne La Cruz or Qué Cruz" might be considered as an adequate description of the ordeal both of us are inflicting in these wearisome hearings. Not us, but you, Mr. President and the Members of the Chamber, might say "Qué Cruz!": "What a cross!".

(D) The identification of Monte Redondo with the Cerro del Alguacil

The Reply of Honduras also disputes the location adopted by El Salvador for the tripartite boundary marker between Colomoncagua, Arambala and Perquín, and Torola. While El Salvador places this boundary marker at the Monte Redondo, also known as the Cerro del Alguacil, Honduras places it to the east of this geographical feature and, in order to be able to do so, denies that these two names refer to the same place.

Honduras takes the view that there are two different "cerros": the Cerro del Alguacil is to the south-west of Roble Negro while the Monte Redondo is to the south-east of Roble Negro. Unfortunately we do not have the map "au grand format" which was exhibited yesterday, so it is more difficult to follow, but let us take first Roble Negro, and this is Monte Redondo, or Alguacil Major, described as such on the Honduran map, one, as you see, going south-west and the other going south-east.

According to the Reply of Honduras, the origin and cause of this allegedly erroneous location by El Salvador lies, they say, in a mistaken translation of the Formal Title-Deed to the Commons of

Arambala and Perquín of 1815, where that document indicates the direction taken by the measurement from the Negro Pichigual River towards the tripartite boundary marker. The English text states that the direction of the measurement was "from north to south with declination to the south-west" while, according to Honduras, the Spanish text actually says, "with declination to the south-east" (RH, pp. 467-468).

But the entire construction adopted by Honduras falls to the ground when it is realized that it is Honduras who has made the mistake: the translation into English is in fact correct, since the Spanish original does indeed refer to a declination to the south-west ("sudoeste") (see CMES, Annexes, Vol. IV, Ann. VI, pp. 17 and 91).

Thus the course of the measurement from Guiriri to Roble Negro was in the direction "from north to south with declination towards the south-west" and of course it is in exactly that direction that Roble Negro is located.

According to this official map of Honduras Roble Negro is not here in the map produced yesterday; there is a short alteration: Roble Negro is here, but the proposed boundary has been located here. The location of the Roble Negro has been changed.

It emerges from the Formal Title-Deed to the Commons of Torola of 1743 that the course of the measurement reached "a place called Monte Redondo" where a boundary marker of stones was erected (CMES, Annexes, Vol. VI, Ann. VIII, p. 1). This title adds that the course of the measurement had been going along the boundaries of the lands of Colomoncagua (a fact which by mistake was omitted from the English translation of the title), and then began to go along the boundaries of the Commons of Arambala and Perquín (CMES, Annexes, Vol. IV, p. 7 (English translation) and p. 40 (original Spanish)). This obviously meant that Monte Redondo constituted the tripartite boundary marker between the three settlements. This is confirmed by the other title: the title to the Commons of Arambala of 1815, which validated the measurement of 1769. It emerges from this other title of 1815 that from Roble Negro the course of the measurement followed exactly the same direction "from north to south with declination towards the south-west", and reached an ancient boundary marker of stones which was accepted by the three communities as the tripartite boundary marker (CMES, Annexes, Vol. IV, pp. 17-18).

There is thus a striking coincidence between the terms of the two titles - the one of Torola, the other of Perquín and Arambala. This coincidence between the direction of markers which took place in 1743 and 1769 confirms the authenticity of the title to the Commons of Torola.

Also, the frequent invocation by Professor González Campos yesterday of the 1743 title of Torola shows that it is not possible to deny that this document is authentic and that it dates from 1743. Professor González Campos even declared before the Chamber that Honduras rectified one of its markers, "au confluent des rivières de Cañas et Massire", this rectification being based "dans le respect des documents précités", one of them being the 1743 Torola title.

To end this statement, Mr. President, I would add that Monte Redondo was identified as the Cerro del Alguacil in the Cruz-Letona Convention, which says that it carried both names Alguacil Mayor and Monte Redondo (MH, Annexes, p. 182).

Of course this Cruz-Letona Convention was not ratified and so cannot give rise to any obligations; nevertheless, it provides ample evidence of the synonymity between the two different names which were applied at that time to a single geographical feature.

The Cruz-Letona treaty, and the documents, at the basis of the treaty, makes a further specification. It adds that it is at Alguacil Mayor or Monte Redondo that the River de Cañas has its source. This is a geographical fact easy to verify. It is a fact, and as our adversary is fond of repeating, facts are tenacious.

On the other hand, the Cerro Esquinero or Sirin, where Honduras wishes to locate Monte Redondo, is far away from the River Cañas and is obviously not its source. It is one of the points referred to yesterday: here is Cerro del Alguacil and here is Cerro Esquinero. This is the source of the River Cañas; this cannot be the source of the River Cañas. So this is a fact in support of the [Cruz-Letona treaty as to the] synonymity between the two.

Some of these boundary markers, such as the Las Cañas or Yuquina River, would be easy to locate even today. It would also be easy to determine the location of the soure of this river, and to identify the Monte Redondo or Cerro del Alguacil.

With that, Mr. President, I finish my initial statement concerning Nahuaterique and Torola.

The PRESIDENT: I thank President Jiménez de Aréchaga, and I understand that the delegation of Honduras will be prepared to speak on Monday morning. So the adjournment is until Monday morning at 10 o'clock.

The Chamber rose at 4.15 p.m.

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