Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Thursday 13 June 1991, at 10 a.m., at the Peace Palace,

Judge Sette-Camara, President of the Chamber, presiding

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

VERBATIM RECORD

ANNEE l991

Audience publique de la Chambre

tenue le jeudi 13 juin 1991, à 10 heures, au Palais de la Paix,

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

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

COMPTE RENDU

Present:

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

Registrar Valencia-Ospina

Présents :

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

M. Valencia-Ospina, Greffier

The Government of El Salvador is represented by:

Dr. Alfredo Martínez Moreno,
as Agent and Counsel;

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

and

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

as Counsel and Advocate.

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

as Counsel;

Assisted by

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

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

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

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

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

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

as Counsel and Advocates;

and

Dr. Francisco José Chavarría,

Lic. Santiago Elías Castro,

Lic. Solange Langer,

Lic. Ana María de Martínez,

Le Gouvernement d'El Salvador est représenté par :

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

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

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

comme conseil et avocat;

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

comme conseil;

assistés de :

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

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

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

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

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

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

comme conseils et avocats;

ainsi que :

M. Francisco José Chavarría,

M. Santiago Elías Castro,

Mme Solange Langer,

Mme Ana María de Martínez,

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

as Counsellors.

The Government of Honduras is represented by:

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

as Agent;

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

as Co-Agent;

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

Mr. Derek W. Bowett, Whewell Professor of International Law, University of Cambridge,

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

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

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

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

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

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

as Advocates and Counsel;

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

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

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

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

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

the Netherlands,

M. Anthony J. Oakley,
Mme Ana Elizabeth Villata,

comme conseillers.

Le Gouvernement du Honduras est représenté par :

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

comme agent;

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

comme coagent;

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

M. Derek W. Bowett, professeur de droit international à l'Université de Cambridge, Chaire Whewell,

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

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

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

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

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

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

comme avocats-conseils;

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

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

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

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

Mme Salomé Castellanos, ministre-conseiller de l'ambassade du

Honduras à La Haye,

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

as Counsel;

Mr. Guillermo Bustillo Lacayo,

Mrs. Olmeda Rivera,

Mr. José Antonio Gutiérrez Navas

Mr. Raul Andino,

Mr. Miguel Tosta Appel

Mr. Mario Felipe Martínez,

Mrs. Lourdes Corrales,

as Members of the Sovereignty and Frontier Commission.

The Government of Nicaragua is represented by:

H. E. Mr. Carlos Argüello Gómez

as Agent and Counsel;

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

Assisted by

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

as Counsel and Advocate;

and

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

as Counsel.

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

comme conseils;

M. Guillermo Bustillo Lacayo,

Mme Olmeda Rivera,

M. José Antonio Gutiérrez Navas

M. Raul Andino,

M. Miguel Tosta Appel,

M. Mario Felipe Martínez,

Mme Lourdes Corrales,

comme membres de la Commission de Souveraineté et des frontières.

Le Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos Argüello Gómez

comme agent et conseil;

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

assisté par

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

comme conseil et avocat;

et

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

comme conseil.

The PRESIDENT: Please be seated. The sitting is resumed. We continue our hearings on the maritime spaces outside the Gulf and I give the floor to Professor Lauterpacht.

Mr. LAUTERPACHT: Thank you, Mr. President. Once again I have handed in an outline. I hope it is on the table before you and will assist you in following my remarks. I ought to say that I have worked from my notes of what Professor Bowett said yesterday and have not had time to check my recollection of his argument against the transcript that was subsequently available. I am not going to make a point about litigation strategy again. Professor Bowett's answer to me, namely that the Decree of 1950 could not have been made in anticipation of the present litigation, entirely mistakes my point. The decision of Honduras to fly their kite, if I may put it that way, was taken much later.

So, I begin with the question of the Honduras Decrees of 1950 which is item 1 on the outline. Professor Bowett says that El Salvador should have protested against the 1950 Decree of Honduras. It is, I think, desirable that the Chamber should recall that there were actually three Decrees in 1950. Two of them were mentioned in the El Salvador Memorial in paragraph 14.2. The first was the Presidential Decree of 28 January 1950 which was subsequently approved by a Congressional Decree of 17 January 1951 and this defined the continental shelf or the claims to a continental shelf of Honduras in the following words:

> "The protection and supervision of the State is hereby declared to extend in the Atlantic Ocean over all the waters lying within the perimeter formed by the coast of the mainland of Honduras and a mathematical parallel drawn at sea 200 sea miles therefrom."

In that Decree there was no reference whatsoever to the Pacific. There was a subsequent congressional Decree of 16 March 1950 which was headed Amending the Agrarian Law and that contained a reference to the Pacific. One needs to note, therefore, that Honduras started out with a reference to the Atlantic only and therefore the extension to the Pacific was an afterthought. The El Salvador Memorial pointed out the lack of clarity in the relationship of the Presidential Decree of January 1950 and the Congressional Decree 103. But Honduras has not clarified the matter. The only reply that Honduras has given was to refer to the preamble to the Presidential Decree which did

refer to the Pacific Ocean. There is another Decree that Honduras has included in its Memorial which is Decree 102. Why there should be such a plethora of legislation about the continental shelf is not clear.

For our purposes, however, the real question is whether the expression "the Pacific Ocean" as used in these various Decrees was really intended to refer to a claim of Honduras to rights in the open ocean beyond the geographical limits of the Gulf of Fonseca. The submission of El Salvador is that the Pacific Ocean has the same meaning in these Decrees as it has in the Honduras Constitutions. And so it is necessary, for a moment, to look back at those.

The Honduras Constitutions are conveniently set out in the Annexes of the Honduras Memorial II.1 and then a number of subsidiary figures. First we have the Constitution of 1839 II.1.3 which refers to the limit "to the south, the Bay of Conchagua in the Pacific Ocean together with the islands adjacent to its coasts in both seas" - "to the south of the Bay of Conchagua". Now, the only reference I can find to the Bay of Conchagua is in Colton's Map of Central America, 1874, which you will find in the Honduras Memorial Annexes, Vol. VI, the Annexe cartographique (their Atlas) and its map A.13 and there if you look very closely - and you will need a magnifying glass - you will see that it says, just in juxtaposition to the Gulf of Fonseca, "Gulf of Fonseca or Conchagua". So clearly the reference to the Bay of Conchagua in the Pacific Ocean is not a reference that brings the whole of the Bay into Honduras territory any more than the reference elsewhere in the definition of Honduras territory to the Atlantic brings the Atlantic Ocean into Honduras territory. Evidently what is meant in this case is the coast abutting on the main body of water.

The 1839 Constitution is following by the 1848 Constitution II.1.4. It uses the same words "the Bay of Conchagua in the Pacific". And the same is true of the 1865 Constitution and of the 1873 Constitution. Then, in the 1880 Constitution there is a change. It says "the frontiers shall be subject of a legislative act" and this approach to the definition of Honduras's frontiers is repeated in the Constitutions of 1894, 1906, 1924 and 1936. But no legislation is quoted in the Honduras Memorial until a Decree of 1931 which refers simply to the islands and cays in the Gulf of Fonseca

as part of the national reserve zone.

So, in 1950 when Honduras produced its continental shelf decree to which Honduras is saying El Salvador should have protested because it appeared to claim rights in the Pacific Ocean outside the Gulf of Fonseca — so, in relation to that, El Salvador would have been fully justified in reading a reference to "Pacific Ocean" as meaning the Bay of Conchagua or the Gulf of Fonseca because that was the only place where, on the basis of earlier documents, Honduras had ever proclaimed contact with the Pacific Ocean.

And I come now to point 3 in the outline that the decrees did not occasion a need for protest. Professor Honduras assertion of rights beyond the Gulf of Fonseca. But the Constitution of 1957, which is Honduras Memorial, Annex II.1.16, intervenes and this was a point to which Professor Bowett gave no attention in his rejoinder. The 1957 Constitution contains the traditional formula relating to the Pacific.

There is no reference in the 1957 Constitution to a 200-mile claim, only the standard definition of the territory of Honduras prevailing at that time. And the same with the position in the 1965 Constitution. Then we come, as I mentioned earlier, to the novel formula which appears for the first time in the 1982 Constitution, though Professor Bowett has suggested that it appears in the 1980 Constitution. But it matters not whether it was 1980 or 1982, the point is that suddenly there appears a claim by Honduras that rights in the Pacific have to be measured from what it calls the closing-line of the Gulf of Fonseca.

So one asks once again, what was there to protest against? There was no specific claim before 1980 to anything that had not been claimed before. Everything could be read within the framework of Honduras's rights in the Pacific Ocean as always claimed. Well, then we have to ask the question, is protest so important anyway? Is there any good reason why I should follow Professor Bowett down the path of worrying about protest. I think it is necessary to recall his totally unapologetic explanation of the suppression by Honduras of the El Salvador protest of 1983, which as I mentioned to you earlier, was left out of the document that was filed by El Salvador as part of its Memorial. I adhere to the word suppression and I maintain that it was deliberate.

Professor Bowett did not say otherwise. He said that Honduras had annexed what it thought of as relevant. Now apparently Honduras omitted a protest, not thinking it, or not considering it, to be relevant. Why should the presence of a 1983 protest responding to the claim of 1980 or 1982 be regarded as irrelevant if the absence of protest by El Salvador to the 1950 Decrees is in some way regarded as relevant? Either protests are relevant or they are not, and Honduras has taken the line in relation to its non-production of the 1983 protest that it is not relevant.

Finally on the question of protest and "methinks I doth protest too much", even if the 1950 Decrees were a clear and enduring claim to continental shelf in the open waters of the Pacific, why should El Salvador have protested? Honduras admits that rights to the continental shelf adhere ipso jure to the coastal State. So, no claim was needed by El Salvador or Nicaragua in relation to their own rights, so what would the function of a protest by El Salvador against a claim by Honduras have been? Presumably, to prevent any suggestion of acquiescence in the potential of Honduras. Eventually, in 1974, El Salvador stated a position. The speed with which a protest would need to be filed would be directly related to the degree of activity associated with the conduct giving rise to the protest, in this case the assertion by Honduras of claims which Honduras is suggesting are in some way exceptional. Obviously, if there had been immediate activity by Honduras, a reasonably rapid protest would have been required. But in the absence of any activity, and in the light also of the established meaning of the expression Pacific Ocean in Honduras's own Constitutions, there was nothing surprising or novel in the Honduras reference to the Pacific. But also because of two other things: the evidently afterthought character of the introduction in the second 1950 Decree of the reference to the Pacific and, secondly, the knowledge in El Salvador that Honduras did not view the Gulf of Fonseca as a condominium and would therefore have felt that it could acquire additional rights within that Gulf by the assertion of continental shelf rights, within the Gulf. The truth probably is that no-one paid much attention to the action of Honduras because, in relation to the Pacific, it was, on the face of it, *de minimis*.

I may say in passing that Professor Bowett did not contradict my proposition, that mere legislation without more did not require a protest. As I said in my previous argument, on the

11 June, there can be no element of estoppel here. There was no Honduras activity following the Decrees, and Professor Bowett did not assert the contrary in his rejoinder. Why then has Honduras directed so much attention to protest. I really do not know, and I am sorry that I have had to respond to that part of the argument in so much detail.

I turn now to the task of the Chamber, which is item 4 on the outline. I am sorry to have to come back to this subject, but I shall be brief.

I begin by noting that we have rather wandered away from the fundamentals by reason of all the talk that there has been about the 1980 Peace Treaty, the work of the Joint Commission and the speculation - and I emphasize speculation because there is no hard evidence on the point - about the reasons why Honduras accepted the wording of Question 2 in the *compromis*. But the fundamental point that needs to be recalled is really very simple. It is, that the starting-point of the interpretation of treaties is the words themselves read in their ordinary sense. If so read they are capable of concluding the matter, the matter is concluded. There is no need to go behind them. The principal submission of El Salvador is that the words are clear and there is no need to go behind them. Delimitation is a task to be performed under Question 1, in relation to the land boundary. The task under Question 2 is quite differently expressed. It is to determine the legal situation and so on. That is not an invitation to delimit. That understanding of the text is stated in the affidavit of Senor Acevedo Peralta, then the Deputy Foreign Minister of El Salvador and he said that that interpretation controlled the matter for his Foreign Minister, Senor Castillo Claramount, who signed the compromis. He said that for the Foreign Minister to have signed a text with a different meaning from the one understood would have been unconstitutional. And that, as I have always stated, is not to place the constitution above international law, but to use the constitutional powers of the plenipotentiary as a legitimate aid in interpretation, and Honduras has never met that point head on. Instead, Professor Bowett has said that it is well-known practice that, in drafting a compromis one does not include language that would prejudice the position of one of the Parties. For that reason, he asserts, Honduras accepted words that left open the question of whether delimitation was included in the task of the Chamber. There is no evidence that that was the reason why Honduras accepted the

words. The idea is pure speculation. If that had really been the reason, Honduras could always have filed an affidavit by Senor Lopez Contreras to express his understanding, but Honduras has not done so.

There is another consideration. Professor Bowett has evidently not considered the situation, if, in his proposition, one reverses the positions of the Parties. One should ask not why did Honduras refrain from insisting on wording favourable to it, but why did El Salvador refrain from insisting on wording that clearly excluded the possibility of delimitation. Because, to use Professor Bowett's hypothesis, to have done so would have meant prejudicing the position of Honduras. So, El Salvador left the matter alone. In other words, the speculation from one side, from the side of Honduras, can be equally matched with a speculation from the other side. And there is no point in relying upon either speculation.

Why should the negotiating restraint of Honduras serve to support its interpretation any more than a comparable restraint by El Salvador should serve to support its contention? In this situation, we must adhere to the language of the text, rather than indulge in reveries about what the negotiators may have been thinking.

Honduras asks the Chamber to delimit the boundary in the Gulf of Fonseca and in the Pacific waters. El Salvador, of course, says that that is not part of the task of the Chamber. I hope that you will not feel it over-presumptious of me to refer to an idea that I have expressed and developed in the last chapter of a recent small book that I just published (hardly more that just a novella in terms of the literature of international law) where I suggested (pp. 146-148) that having regard to increasing resort by international tribunals to equity and equitable principles, not least in connection with maritime delimitation, there is room for improvement in the procedures. And what I have in mind is, that tribunals should enable the parties to enter into a fuller exchange with them in situations where the tribunals are necessarily exercising a very considerable measure of constructive judicial discretion. Akin, almost, to a legislative performance. Now, if there is any validity in the idea that the procedures should be improved in this respect, it follows a fortiori that a tribunal should refrain from entering into a delimitation where there is genuine disagreement between the parties as to

whether the compromis covers delimitation at all. Because, in such a case, it is quite evident that there can be no proper exchange of views, even between the parties themselves before the tribunal, let alone between the tribunal and the parties.

I turn from the question of the task of the Chamber to the next heading which is prior negotiations, item 5 on the outline.

Professor Bowett very properly and rightly conceded that there had not been any prior negotiations on the specific delimitation proposals that Honduras has developed in these proceedings. And that is really enough to enable the Chamber to hold in favour of El Salvador, that the aspects of delimitation upon which Honduras wants the Court to decide have not reached the stage in which they are ready for judicial consideration even if delimitation is within the competence of the Chamber. But Professor Bowett then went on to argue that the absence of negotiation on the specific approach of Honduras to delimitation does not preclude consideration of new approaches. After all, he argued, international legal counsel are hired in cases precisely to supplement the arguments that the parties may have previously employed in their negotiations between themselves. Be that as it may, and, up to a point Professor Bowett may be right, that approach cannot be applied when the issue is delimitation. Maritime delimitation is, par excellence, an issue on which there can only be a dispute in relation to specific proposals. It is the dispute between the parties as defined by their reaction to each other's specific proposals that is the subject-matter of the litigation. If different or new proposals are put to the Court during proceedings, the case changes its substantive content. There is no way in which the Court can know the reactions of the parties in negotiations to such proposals or the extent and nature, if any, of their differences. So much then for the suggestion by Honduras that it has satisfied the requirement that there should have been prior genuine negotiations directed to the subject-matter of the case.

I turn then to the next heading, which is entering now upon the substance of the case, namely the impermissibility of the use of materials evidencing proposals made during negotiations, item 6. I need not spend any time on it now. The materials to which El Salvador objects have been submitted to the Court, the Court has seen them and the damage, if damage it be, is done, at any rate in terms

of making the Court aware of what did pass between the Parties. But the effect is not disastrous. Putting in the documents was improper and El Salvador maintains its complaint. I venture to reiterate what I submitted earlier, about the importance of the Court condemning such conduct and I respectfully express the hope that the Chamber will not base any legal conclusions upon these documents and will endeavour to put them out of its mind.

I now turn to the subject of coasts.

A sentence first about the question of entitlement as against delimitation. Professor Bowett agreed that delimitation is not an exercise in distributive justice and he agreed that entitlement is based on coasts. And so that is how we come to the specific and central question of coasts. Here I am at item 7 on the outline.

First, Professor Bowett responded to the El Salvador argument that the coasts of Honduras have been, at any rate in large part, used up by the delimitation with Nicaragua under the Gamez-Bonilla Treaty. Professor Bowett responded to this point by saying that it is perfectly permissible in international law and maritime delimitation for the coasts of a State to be used twice for delimitation purposes. He said that there were examples where a particular stretch of coastline had been used for more than one delimitation. Of course, that is quite true. But none of the examples that he mentioned have any bearing on this case. Here we do not have a case like Libya/Malta where the coasts of Libya, having already been used in relation to the delimitation with Tunisia to the west of Libya, were then used for the delimitation with Malta to the north of Libya and in a manner that did not in any way conflict with the pre-established delimitation with Tunisia.

Permit me to recall the essentials of the El Salvador argument on this point. It relates to the area that extends from the Island of Tigre to the west of the central line of the kite that Professor Bowett invoked, running eastwards down the coast to the terminus of the Honduras/Nicaragua land boundary. I think for this purpose, if you have the folder of maps, that you may perhaps look again at figure 1 which is a convenient reference. And, as I said, the coast that we are talking about is the coast of Honduras stretching - I originally put it to you in terms of stretching from east to west - from the land boundary terminus at the eastern end of the Gulf of

Fonseca, north-westwards along the coast, right up as far as the Isla Zacate Grande, and then turning down along the coast of Tigre, to that point on Tigre which is taken as the base-point for determining the mid-point between Tigre and Punta San José or Moneypenny, as it is called, which was the terminus of the Honduras-Nicaragua line.

Now, that Honduras coast was used to determine, on a median line basis, the boundary between Honduras and Nicaragua. The result is that Nicaraguan waters then lie in this area between Honduras and the Pacific, and it is quite evident that there is no way for Honduras to move into the Pacific in this part, that is dominated by the coastline that I have just described, without having to pass through the waters that were delimited between it and Nicaragua and which belong to Nicaragua. Now, that is entirely different, as I said a moment ago, from the kinds of examples, several though they may have been, cited by Professor Bowett. In none of the examples, I emphasize, none, was there any situation that was comparable to this. In all of them, it was a question of using the coastline a second time for the purpose of delimiting an area that had not been delimited previously. But here you have the delimitation that actually stands between the second use of the coastline and the area to which that second use of the coastline relates.

Here the effect of the prior delimitation is completely to block off the relevant part of the Honduras coast from any further influence on a situation. Or to put the point in another way, assume that the issue of delimitation were to arise only as between Honduras and Nicaragua. If Honduras attempts to secure Pacific Ocean waters beyond the Gamez-Bonilla line, Nicaragua would ask on what basis and Honduras would presumably reply, "on the basis of our coasts", and Nicaragua will say, "but your coasts are used up. The generated waters that are now demarcated stand between you and the ocean. You have no further rights, you can not jump over us." Let me say: this is not the Libya/Tunisia, Libya/Malta situation or a Bay of Biscay situation or anything like that at all.

Now, there is one small question of fact in connection with the exhaustive character, as we have suggested, of the Gamez-Bonilla delimitation. Honduras has referred to a recent agreement with Nicaragua, I have stated my understanding of the position, and it is now really a matter for

Nicaragua to confirm to the Court that the understanding I expressed is correct. And, in particular, to comment on the press release that Honduras has sent to the Registry of the Court.

Professor Bowett then went on to consider the status of the waters of the Gulf. But logically that is not the correct way to proceed. Having embarked on coasts as the generator of Pacific rights, he should have stuck to them until that part of the argument was finished. But he did not. So, I will not follow his order but will now deal with his argument relating to the remainder of the coasts on which Honduras presumably would rely.

I come here to point 8 in the outline. The truncated stretch of Honduras coast west of the Island of Tigre. Once again, may I ask you, to look at figure 1 in the folder of maps. So we are now talking about the effect of the coast of Honduras from a point on Isla Zacate Grande, just north of Tigre, and running notionally westwards or north-westwards until it reaches the mouth of the Goascorán. As we know there are two possible mouths, an eastern and a western mouth. If we take the western mouth, the position more favourable to Honduras, it is necessary to observe that a considerable chunk of the line, the part of the line that lies between the eastern mouth and the western mouth, would, in its effect as a generator of rights, be screened from the Pacific by the opposite north-east fronting coast of El Salvador facing onto the Baja de La Union.

So, for all practical purposes, if we are talking about coasts as generators of rights in the Pacific, Honduras is left only with its very small stretch from Zacate Grande to the eastern mouth of the Goascorán River.

Now, that, as I suggested in my previous argument, was all that was left to Honduras by way of generative coast. The interesting aspect of Professor Bowett's response was that he never responded directly to this point. He did not grapple with the consequence of the prior exhaustion of the coast between Honduras and Nicaragua, and he did not grapple with my suggestion that he was left only with this very small stretch. Instead, he concentrated on gettting rid of the islands, and I shall come to that aspect presently, but he never faced up to the imlications in terms of the status of the waters of the Gulf on his own hypothesis that there is no condominium; or in the Pacific on any hypothesis whatsoever; or the fact that Honduras has only a very short bit of coast between Zacate

Grande and the eastern mouth of the Goascorán River. Nor did he ever respond to the point that made was for El Salvador regarding the uselessness of the bit of coast between eastern and western mouths of the Goascorán River. He never even attempted to suggest that this truncated Honduras coastline could produce rights in the Pacific in any way comparable with the general claim of Honduras. A claim which has never been modified in any way. Honduras continues to rely on the whole of its Gulf of Fonseca coastline, as illustrated in the kite. My suggestion is that that kite has flown away into the air and disappeared as an effective element in the case.

Instead Professor Bowett subtly changed his ground and if I understand him rightly, instead of relying upon the actual coast as a direct generator of Pacific Ocean rights, he fell back on the idea that Honduras, as a co-riparian in the Gulf of Fonseca, had a right to share in the maritime areas based upon and calculated from the closing-line of the Gulf of Fonseca.

He did not expressly abandon his former position of direct reliance upon the actual coasts and so I will deal with that first, even though the basic issue in both situations appears to be the same: namely that of the masking or screening effect of the islands. But before I go on to that I should just parenthetically observe that again Professor Bowett never grappled with the question of the effect on the status of the waters of the fact that if effect is to be given to coasts at the back of a Gulf it can be done only in terms of their actual location; the coasts at the rear of the coast cannot be projected forward to stand as it were in the location of the bay closing-line.

And so I turn at this point to the question of the masking effect of the islands which is item 9 on the outline. Professor Bowett began by saying that he did not suggest that the examples he had given where islands had not been accorded a screening effect namely *North Sea Continental Shelf* case, *Anglo-French* case, *Gulf of Maine* and the *Papua New Guinea Delimitation* were identical with the Gulf of Fonseca. He did not assert that. He said only that the legal principles are relevant to the present situation. What were these legal principles as he saw them? In the case of the North Sea Continental Shelf case he said that that showed that the German coast was prolonged into the North Sea notwithstanding the Dutch and Danish coasts.

What is my comment? That we are not confronted here by a case of prolongation. It is just a

recognition of a direct generative effect of a coast in those particular geographical circumstances. True, a more limited effect was accorded to the coasts of Denmark and the Netherlands than the system of equidistance would allow in a delimitation, but when you look at the map of that area you will see that there really is not a comparison in geographical terms between that situation and the present situation and, therefore, the legal principle that Professor Bowett sought to extract from that case does not really relate to the present case.

Take the *Gulf of Maine*; it is of course true that the Judgment in the third sector reflected in part the location of the Maine coastline at the back of the Gulf. But that was not a case of transporting the coast at the back of the Gulf into a different location. It was quite simply the product of the geography of the situation, in which the Court gave effect to the actual coast as a relevant coast in its true geographical position. May I please read to the Chamber two or three paragraphs from the Judgment of the Chamber in in the *Gulf of Maine* case, paragraphs 224 - 226 which appear at pages 337 and 338 of the Court's Reports.

> "There now remains to be determined the course of the third segment of the delimitation line, i.e., the longest portion of its entire course. This is the segment concerning that part of the delimitation area which lies outside and over against the Gulf of Maine. Nevertheless, it appears beyond question that, in principle, the determination of the path of this segment must depend upon that of the two previous segments of the line, those segments within the Gulf which have just been described and whose path *so obviously depended on the orientation of those coasts of the Parties that abut upon the waters of the Gulf*. In fact, the portion of the line now to be determined will inevitably, throughout its length, be situated in the open ocean. From the geographical point of view, there is no point of reference, outside the actual shores of the Gulf, that can serve as a basis for carrying out the final operation required." (*I.C.J. Reports 1984*, p. 337, para. 224; emphasis added.)

I am not sure that I need to read on. That is sufficient for my purposes though I would invite the Court, at its leisure, to look at the paragraphs 225 and 256 that follow. But there is nothing in those words that suggests that some special or extraordinary use was being made of the coast at the back of the Gulf. All that was being said is that the coast at the back of the Gulf, and remember we are talking about a very broad Gulf, more than 200 miles, would play its proper geographical role in the delimitation.

There is one more sentence I should read. It is at paragraph 226. It is the last sentence in that paragraph. Having described that method of delimitation the Chamber concluded "If one were to

seek for a typical illustration of what is meant by the adage 'the land dominates the sea', it is here that it would be found" and that is what was done in the Gulf of Maine case, and that is what we are saying should be done here not in terms of delimitation but in terms of entitlement.

The land that dominates the Pacific is the coasts of El Salvador and of Nicaragua. There is no domination whatsoever by the coasts of Honduras. In addition of course there are the islands which also dominate the sea and also exclude Honduras from the Pacific and there is nothing in the Gulf of Maine that supports any view of leap-frogging the islands.

Let me turn to the next example, the *Anglo-French* example. Now there is not a great deal of difference between Professor Bowett and myself on the position of the Channel Islands. It is true that in a sense the Bay of Granville was given an effect that jumped over some of the islands, and in small measure because it was perfectly possible to construct most of the line found the islands by reference to base-points that were both to the North East and to the South West of the islands. But the geographical circumstances there were entirely different.

If one is to compare El Salvador and Honduras, on the one hand, and the United Kingdom and France, on the other, one must note these totally different geographical circumstances. The theoretical possibility of leap-frogging is there, but not the geographical conditions. In this case we do not have two parallel and broadly similar coasts, with the effect of one disproportionately affected by the islands. Here, we do not have islands in respect of which an attempt is being made to accord them a separate continental shelf. Incidentally, I may mention, Professor Bowett did not attempt to respond to my identification of the Gulf of Fonseca islands as essentially part of El Salvador. These islands are not merely a counter-fort that breaks the swell, but are effectively an appurtenance of the mainland of El Salvador. Professor Bowett did not react to that point at all which, of course, is one of the most striking points of contrast between the islands in the present case and the islands in the *Anglo/French* case. There is just no comparison between the two cases.

We come lastly to his reference to the *Australia/Papua New Guinea* Agreement. I had explained the special circumstances surrounding the generous treatment by Australia of Papua New Guinea and Professor Bowett's sole response was that as parties are meant to negotiate

in accordance with equitable principles, the result suggests that the limited effect given to the islands may reflect such equitable principles. And the answer is, it may or may not. Equitable principles are a broad concept, but an example like this is not one on which to build a case for leap-frogging islands as a matter of law *de lege lata*. That is quite impossible.

So where are we now? I submit that the general case of Honduras on the direct effect of coasts and on the leap-frogging of islands is not made out. And what is left? The arguments of Honduras based on the status of the waters of the Gulf of Fonseca and on the nature of the closing-line of the Gulf. In other words, we leave behind us the whole question of the effective coasts because that has been disposed of and, indeed, as I suggest, implicitly abandoned by Professor Bowett. And what are we left with? We are left with the status of the waters of the Gulf and the nature of the closing-line as in some way a substitute for the coasts as generators of Pacific rights.

These two points are closely linked, in that the legal character of the waters is alleged, by Honduras, to have a bearing on the nature and effect of the closing-line. And so I come to item 10 of the outline, the status of the waters in the Gulf of Fonseca.

The principle Honduras argument, as I perceive it, consists of five elements:

1. That the Gulf of Fonseca is an historic bay.
2. That its waters are internal waters.
3. That the line that can be drawn between Punta de Amapala and Punta Cosiguina is therefore a bay closing-line.
4. It is then possible to construct a territorial sea, contiguous zone, continental shelf and economic zone on that line.
5. The areas thus constructed then fall to be divided between the three riparians.

Expressed in this way - and I am giving it perhaps a more systematic form than those appearing on behalf of Honduras did - expressed in this way the argument is simple and direct. And for that reason, may be seen as attractive. In my submission, however, it over-simplifies the issues.

It is incorrect in its individual parts and, therefore, incorrect in its conclusions. I shall deal with the individual parts in turn.

Firstly the proposition that the Gulf of Fonseca is an historic bay. That is item 11 in the outline.

As a general statement, it is undoubtedly correct to say the Gulf of Fonseca is a historic bay. Both sides agree. But, in what terms or with what content is the bay a historic bay? I need hardly remind the Court of what has been repeatedly said in this case and, I think, is a matter of agreement between the two sides, that there is no single, uniform concept of a historic bay. There are two possibilities in this case which must be kept distinct. One is that it is a historic bay with the content attributed to it by the 1917 Judgment. The other is, that the 1917 Judgment is not applicable and that some other basis must be found for attributing the status of a historic bay to the Gulf of Fonseca. I shall deal with the consequences of the two different starting-points, 1917 Judgment and other than 1917 Judgment under each of the links in the Honduras chain of argument.

But first I am bound to ask, if the Gulf of Fonseca is not a historic bay, with the content attributed to it by the 1917 Judgment, whence derives that status? Whatever may have been the status of the Gulf of Fonseca before 1917, the status accorded to it by that Judgment has quite replaced the amorphous status that it may have had prior to that date. The Judgment has become the basis of all further public discussion of the status of the Gulf. However, Professor Bowett has declared emphatically that Honduras does not accept the Judgment and is not bound by it, and that the position of Honduras should not be prejudiced by the Judgment. So, Honduras must invent some other basis for the historicity of the Gulf of Fonseca, and must satisfy the Chamber that this concept has some content other than that given to it by the 1917 Judgment. And this, it has not done.

I now turn, Mr. President, to the various consequences. This is element two in the list of elements that I understand are involved in the Honduras argument, and so I come to item 12.

First, the Honduras proposition that the waters of the Gulf of Fonseca are internal waters. Now we have to look at it first on the basis that the Gulf of Fonseca is a historic bay in terms of the 1917 Judgment, and then we will look at it in other terms. I have already twice summarized the

effect of the 1917 Judgment and I will not repeat it, but on this point the conclusions are clear. The waters are simply not internal waters in the technical sense. And the invocation, for example, by Professor Dupuy Senior of the *Fisheries* case, does not change the situation. For one thing the *Fisheries* case came 34 years after the 1917 Judgment. As I said, the *Fisheries* case does not suggest that there is an absolute rule that the waters of any historic bay are internal waters. Why is it that the 1917 Judgment does not support the view that they are internal waters? The 1917 Judgment distinguished between the inner and outer belts of jurisdiction and the remaining waters are something else yet. So there is no way in which one can attribute a single character or quality to all the waters of the Gulf, in terms of the 1917 Judgement. And there is a generally held view that the waters are territorial seas, and that view is exemplified in the United Nations memorandum of which Professor Bowett sought to make light. Of course, the 1958 United National Secretariat Memorandum does not bind Honduras in any direct and formal sense, but it was authorative, it emanated from the principal international organization in the international community, it was public, it was widely disseminated and, indeed, you will recall, was incorporated in the official records of the 1958 Conference on the Law of the Sea, and it was influential. All these factors suggest that if one disagreed with it, as Honduras apparently does, then some reaction was called for but Honduras did not react.

So, I move now from the position of the waters of the Gulf under the 1917 Judgment to whatever their position may be other than under the 1917 Judgment, that is to say, on the assumption that Honduras is correct in saying the 1917 Judgment does not apply. What if the Gulf of Fonseca is a historic bay other than in terms of the 1917 Judgment? What is the character of its waters then? Honduras asserts still that they are internal waters. Now, I have gone right back to the Honduras Memorial to identify the basis for this contention that the waters of the Gulf of Fonseca are internal waters, other than by reference to the 1917 Judgment. What Honduras has to say on this subject appears in its Memorial, page 659 in the French text, and page 107 of Volume II of the English translation. And it is a blunt assertion, just a blunt assertions, all the waters in the Gulf are internal waters. This is the most direct consequence of the fact that the Gulf falls into the category of

historic bays but beyond that, the proposition is not reasoned. But why is it of consequence? Only because, presumably, in historic bays, the waters are said to be internal waters. Now this disregards a fundamental and controlling difference between the Gulf of Fonseca and other historic bays. Other historic bays about which the literature of international law has something to say are all *single State* historic bays, Chesapeake Bay, Hudson Bay, Delaware Bay and so on, Bay of Peter The Great.

The main coastline of the State lies on both sides of the bay opening. So, given the necessary conditions, the waters of the bay are assimilated to the territory of the State and are thus internal waters. There is no problem about that, it is perfectly reasonable and natural. In effect, the baseline formed by the coasts on either side of the bay is simply extended across the bay opening and the waters landwards of that line are internal waters. The line serves, like the coastal baselines on either side of it, as the generator of rights in the ocean.

How can this analysis be applied to a bilateral, or more to the point, a trilateral historic bay? Professor Bowett never grappled with that quite cardinal point. How do you get from the one situation to the other when they are so manifestly different? The essence of internal waters is that they must belong to some State - you cannot have internal waters in a vacuum. So the question arises in relation to a bilateral or a trilateral historic bay so-called, to whom do these internal waters belong, which of the States? Either they are divided between the three or they are held in common in condominium. If they are divided between the three, what is the division?

In the case of the Gulf of Fonseca the answer has already been given. First, by Honduras in its delimitation with Nicaragua. The coasts are used to divide the waters on a median line basis. And the same approach was adopted in the Cruz-Letona Agreement. And so if that is the manner in which, the 1917 Judgment apart, one divides the waters of a trilateral historic bay, it is clear that it excludes any acts as to a common closing-line at the mouth of the bay generative of rights in the open ocean.

But supposing you take the other alternative, namely that the waters of the bay are not divided. If they are not divided they must be held in common, that is condominium. But Honduras rejects that emphatically. At the same time Honduras says El Salvador is estopped from claiming

otherwise. El Salvador is bound by its insistence upon condominium and therefore Honduras can take advantage of that. To that I reply by asking "where are the elements of estoppel?" Representation there has been. El Salvador has represented that the Gulf of Fonseca is a condominium. And in what way has that operated to the detriment of Honduras? Never a word said about that. So what is the conclusion of this point. It is that the waters of the Gulf of Fonseca are not internal waters, either by reference to the 1917 Judgment or, assuming the 1917 Judgment not to exist, by reference to a general notions of customary international law.

Once the Chamber reaches that conclusion, this breaks the chain of the reasoning of Honduras. And in logic it is not necessary for me to go on to the other points in the chain of reasoning. However, I will do so in order to make sure that the chain is well and truly broken in its remaining elements.

So we can pass now to the proposition that the line between Punta Amapala and Punta Cosiguina is a bay closing-line, it is item 14 on the outline. My submission is quite simply that that line is not a bay closing-line.

Indeed, one of the possible sources of confusion in this case has been the constant use, by both sides, of phrases like closing line or bay closing-line in relation to this line which is truly only a geographical concept. It is a line depicting the ocean limit of the Gulf of Fonseca. That is a neutral expression which perhaps we ought to have used. And as a line depicting the ocean limit of the Gulf of Fonseca, it is not a bay closing-line in a technical sense. It marks the geographical limit of an area that has three riparians. It is not a line that serves as a basis to extend the special system of the Gulf of Fonseca into the open ocean. But let us look at that proposition again. First in terms of the 1917 Judgment and then in other terms.

And now item 15. It is quite clear that the ocean limit line or the closing line of the Gulf of Fonseca was not intended by the Central American Court of Justice to be a bay closing-line generative of rights in the Pacific Ocean. One may recall the 13th question. I read that question to the Court and the answer thereto, and I pointed to the dissent of Judge Gutierrez Navas - in fact I have done it twice - which so clearly highlights the refusal of the majority in the 1917 Judgment to

treat the line as a bay closing-line generative of additional rights. No comment on that point, no reaction at all from Honduras. It is a very awkward point. Enough said then about the attitude of the 1917 Judgment.

Now, let us look at the situation without the benefit of the 1917 Judgment and that is item 16. On the basis of what authority can one say that the line is a bay closing-line in the technical sense of the word? Geographically it is merely descriptive or definitional. Geography does not require a closing line for any other purpose, so Honduras must somehow show that in law there is authority to distinguish the Gulf of Fonseca from open ocean by reference to a line on the basis of which each riparian having individual coastline rights can nonetheless have rights in the open ocean, as a matter of customary law not as a matter of the 1917 Judgment. But there is no law on this point, just as there is no law in the various other situations of semi-enclosed waters with several riparians, for example the Gulf of Aqaba, the Estonian Gulf, and all the others mentioned by the Minister for Foreign Affairs of El Salvador and also by Professor Brownlie. There is no law that says that the line which serves as the geographical definition of the Gulf or bay is in law a closing line capable of generating rights outside the area.

And so I can come now to the fourth element, which is item 17 on my outline. I can deal with this briefly. That is, if there is a bay closing line serving as a baseline it is then possible to construct further rights that project further outward into the ocean. That is the Honduras contention. The El Salvador answer is quite simple. It is that, as I have already shown, the line is not a bay closing line and it cannot be so used, the fact that El Salvador uses it as a basis for constructing a zone in which it was prepared to offer Honduras limited rights of joint user does not change the legal situation. The proposal was put forward in negotiations as a purely conciliatory gesture, and cannot be invoked now as the sole basis for pretending that there is a bay closing-line across the mouth of the Gulf of Fonseca. There can be no question of an estoppel here either.

And so we do not even get to element 5, there is no outer zone beyond the geographical limit of the Gulf of Fonseca to be divided between the three riparians. Mr. President, this completes what I have to say in reply to Professor Bowett. I hope that I have sufficiently covered the principle points

that he made. It remains only for me to thank you, Mr. President and Members of the Chamber for your patience and courtesy in hearing me.

THE PRESIDENT: I thank Professor Lauterpacht and that concludes our hearings on the maritime space outside the Gulf of Fonseca. This afternoon, as agreed, we are going to hear the final statement by Nicaragua and tomorrow we will have two closing statements of the Parties together with their submissions. The sitting is adjourned until this afternoon at 3 o'clock.

The Chamber rose at 11.15 a.m.