

SEPARATE OPINION OF JUDGE ODA

I agree strongly with the Chamber in permitting Nicaragua to intervene in the case brought to the Court pursuant to the Special Agreement of 24 May 1986 between Honduras and El Salvador. The Chamber, however, limits Nicaragua's intervention to the legal régime of the waters within the Gulf of Fonseca, and excludes from the object of intervention the matters of delimitation within the Gulf and the legal situation of the maritime spaces (including any prospective delimitation) outside the Gulf. In my personal view, the grounds for being so restrictive have not been persuasively defined.

The present Judgment is written from the standpoint of the presumption that, to justify intervention under Article 62 of the Statute, a legal interest of a more concrete nature is required than a simple interest in the interpretation of the rules of international law, whether general or specific, which are applicable to the case in hand. This presumption, that a clear distinction can be made between the interpretation of a rule and the nature of its application in a concrete instance, remains, in my view, open to challenge. It raises many difficult problems. Yet since, in this case, I and my colleagues in the Chamber have decided that a more concrete legal interest does indeed exist to justify an intervention by Nicaragua of the kind specified in the Judgment, I find it appropriate to leave aside, for the present occasion, the question of a possibly more general qualifying interest and to confine my observations to the question why, in the circumstances, the area of discussion in which Nicaragua has been permitted to intervene has been so severely restricted.

1. NICARAGUA'S INTEREST OF A LEGAL NATURE

A State may submit a request to the Court — or in the present case, the Chamber — to be permitted to intervene, “should a State consider that it has an interest of a legal nature which may be affected by the decision in the case” (Statute, Art. 62, para. 1) and the application “shall *set out* . . . [such] interest of a legal nature” (Rules of Court, Art. 81, para. 2 (a), emphasis added).

In fact Nicaragua, in its Application for permission to intervene, while evidently seeking to cover *all relevant aspects* relating to the waters both within and without the Gulf, indicated *only in broad terms* the interests of a legal nature which might be affected by the decision of the Chamber:

“The particular considerations supporting this opinion include, but are not confined to, the following items:

- (a) The phrasing of paragraph 2 of Article 2 of the Special Agreement, which refers comprehensively to *‘la situación jurídica insular y de los espacios marítimos’*.
- (b) The title of the Special Agreement which refers to *‘la controversia fronteriza terrestre, insular y marítima existente entre los dos Estados’*.
- (c) The geographical situation in the Gulf of Fonseca and the adjacent maritime areas.
- (d) The essential character of the legal principles, including relevant equitable principles, which would be relevant to the determination of the questions placed on the agenda by the Special Agreement.
- (e) The general recognition by authoritative legal opinion that the issues relating to the Gulf of Fonseca involve a trilateral controversy.
- (f) The leading role of coasts and coastal relationships in the legal régime of maritime delimitation and the consequence in the case of the Gulf of Fonseca that it would be impossible to carry out a delimitation which took into account only the coasts in the Gulf of two of the three riparian States.
- (g) The fact that a possible element in the regulation of the legal situation of maritime spaces, especially in a case like that of the Gulf of Fonseca, would be the designation of one or more zones of joint exploration and exploitation: see the Report of the Conciliation Commission in the *Jan Mayen Continental Shelf* case, *International Law Reports* (ed. E. Lauterpacht), Vol. 62, p. 108.” (Application, II.2.)

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The Chamber, after having examined the oral pleadings by Nicaragua, indicates that

“Nicaragua has shown to the Chamber’s satisfaction the existence of an interest of a legal nature which may be affected by its decision [on the régime governing the waters of the Gulf]” (para. 72),

and concludes that

“Nicaragua has a legal interest which may be affected by a decision as to the legal régime of those waters, i.e., a decision in favour of the contention of El Salvador, that the waters of the Gulf are subject to a régime of condominium, or a decision in favour of the contention of Honduras, that there exists a ‘community of interests’ between the three States in the waters of the Gulf” (para. 104).

Thus the Chamber finds, and I agree with that finding, that Nicaragua “has shown that it has an interest of a legal nature which may be affected by . . . [the Chamber’s] decision on the legal régime of the waters of the Gulf of Fonseca” (para. 105), and has thus provided a basis for the Chamber’s decision that “Nicaragua is permitted to intervene” (para. 105) “in respect of the Chamber’s consideration of the legal régime of the maritime spaces within the Gulf of Fonseca” (para. 104).

On the other hand, the Judgment concludes that

“Nicaragua has not demonstrated to the satisfaction of the Chamber the existence of an interest of a legal nature which may be affected by any decision of the Chamber delimiting the waters of the Gulf of Fonseca between El Salvador and Honduras, or by any decision as to the legal situation of the maritime spaces outside the Gulf, including any decision . . . on delimitation between El Salvador and Honduras, and intervention in those respects has not been justified” (para. 104)

and, in a variant of this language, finds that

“the Republic of Nicaragua . . . has not shown such an interest which may be affected by any decision which the Chamber may be required to make concerning the delimitation of those waters, or any decision as to the legal situation of the maritime spaces outside the Gulf . . .” (para. 105),

thus not permitting Nicaragua to intervene in these respects.

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At the hearings, the representatives of Nicaragua declined to be drawn into a narrow specification of Nicaragua’s legal interest, pointing out their unwillingness to treat the occasion as one for revealing the substance of their intervention. Neither I, nor the other members of the Chamber, have however viewed this as a deficiency so severe as to preclude the granting of permission to intervene on any basis whatsoever. The Judgment, however, finds — as has been seen — that the degree of imprecision in respect of parts of Nicaragua’s claim to a legal interest is excessive and must result in a denial of such permission in relation to certain areas. This distinction I do not find wholly justified.

I find it, in other words, difficult on the evidence to state that Nicaragua, while having *sufficiently* shown interest of a legal nature which may be affected by the decision of the Chamber in the case of the legal régime of the maritime spaces within the Gulf, has *not* done so as concerns the delimitation of the maritime boundaries there and outside the Gulf. The Applicant, after all, although required to show an interest of a legal nature which *may* (but not *will* or *must*) be affected, does not at this stage need to

indicate those positions and considerations which it can be expected to draw to the Chamber's attention in its eventual declaration and any subsequent oral observations. Nor is it required, as the Judgment contends, "to show *in what way* that interest may be affected" (para. 61, emphasis added).

2. MARITIME BOUNDARIES WITHIN THE GULF

The Judgment states that:

"Nicaragua, for its part, has not given any indication of any specific line of delimitation which it considers would affect its interests" (para. 74);

"[Nicaragua] has not shown such an interest [of a legal nature] which might be affected by the Chamber's decision on any question of delimitation within the Gulf" (para. 79).

Here it may be pertinent to recall the issues in dispute between the original Parties in the present case. Honduras has indicated a concrete delimitation line within the Gulf (which it wants to see confirmed by a judgment of the Chamber) on Map C.5 in its Memorial and has given a description of it in its Submission C.1. This line, drawn according to the Honduran terminology in the "western sector" of the Gulf, though not appearing to affect a legal interest of Nicaragua, is based upon the assumption that several islands over which El Salvador claims sovereignty — Meanguera and Meanguerita, in particular — belong to Honduras.

El Salvador, in Submission III.5 of its Counter-Memorial, considers that the legal situation of the Gulf does not permit the dividing-up of the waters and that the Special Agreement does not confer jurisdiction to effect any such delimitation. El Salvador, however, in the Observations on the Application by Nicaragua for permission to intervene, does not deny the existence of a theoretical possibility that the Chamber might eventually proceed to effect a delimitation within the Gulf.

Neither, in fact, does the Chamber, in the present Judgment, rule out the eventuality of a decision effecting a delimitation within the Gulf (para. 74).

In an ensuing paragraph, the Judgment states:

"It occurs frequently in practice that a delimitation between two States involves taking account of the coast of a third State; but the taking into account of all the coasts and coastal relationships within the Gulf as a geographical fact for the purpose of effecting an eventual delimitation as between two riparian States — El Salvador and

Honduras in the instant case — in no way signifies that by such an operation itself the legal interest of a third riparian State of the Gulf, Nicaragua, may be affected.” (Para. 77.)

In my view, however, this observation cannot in the present instance be made with confidence, in view of “the leading role of coasts and coastal relationships in the legal régime of maritime delimitation and the consequence in the case of the Gulf of Fonseca”, as asserted by Nicaragua in its Application, II.2 (*f*).

I would stress that should some islands, Meanguera and Meanguerita in particular, be determined to lie under the sovereignty of El Salvador, the possibility could not be excluded that a delimitation line between El Salvador and Honduras would not reach any closing line of the Gulf and would have to be confined to the “eastern” sector of the Gulf, and that, owing to the geographical situation in the Gulf of which all three States are riparians, Nicaragua would then undoubtedly have a legal interest in the fixing of the point where the delimitation between El Salvador and Honduras terminates — in other words, where its own boundary with Honduras terminates and its own boundary with El Salvador begins.

The Agent of Nicaragua stated in his oral argument on 5 June 1990:

“[I]f the Chamber were to consider the request of Honduras and proceeded to delimit the waters inside the Gulf, it is obvious from looking at any chart that no such delimitation is possible without affecting our interests, if this delimitation involves the whole of the Gulf of Fonseca.”

In his oral reply on 8 June 1990, the Agent of Nicaragua also stated:

“[I]n spite of the statement from counsel of Honduras that it was no use for the Agent of Nicaragua saying that it was obvious that any delimitation would affect Nicaragua’s rights, because it was not obvious at all, the Agent of Nicaragua reaffirms that it is perfectly obvious by just looking at a map.”

Of course, an assertion of what is “obvious” cannot normally be accepted as equivalent to a demonstration. Yet, if what is asserted is in fact “obvious”, the need for demonstration by argument is surely diminished. Even given the normal assumption that such argument is required, I do not consider that counsel are obliged to invent hypotheses. Thus, although Nicaragua did not indicate any specific line of delimitation which it considered would affect its interests, I am satisfied that, under the circumstances explained above, Nicaragua’s assertion with regard to the delimitation within the Gulf cannot be dismissed.

3. MARITIME BOUNDARIES OUTSIDE THE GULF

The Chamber states that the question of whether Honduras is entitled to a territorial sea, an exclusive economic zone and a continental shelf outside the Gulf is one “to be decided by application of the principles and rules of the law of the sea on those matters” (para. 82). I agree that it would not be proper for the Chamber to entertain argument by Nicaragua on the prior question as to whether Honduras is entitled to any maritime zone outside the Gulf, which is a matter not only of legal principle but also of specific circumstances foreign to Nicaragua.

In respect of the delimitation line in this area of the Gulf, the Judgment states that:

“Nicaragua was shown by Honduras both a proposed delimitation line and a proposed line marking off what Honduras calls the ‘relevant maritime area’. The charted proposition of Honduras thus gave Nicaragua the opportunity to indicate how the Honduran proposals might affect ‘to a significant extent’ any possible Nicaraguan legal interest in waters west of that Honduran line. This Nicaragua did not do. Nicaragua failed to indicate how [the] delimitation [proposed by Honduras], or any other delimitation regarded by it as a possible one, would affect an actual Nicaraguan interest of a legal nature [in waters west of the Honduran line] . . .” (Para. 84.)

Honduras claims in its Submission C.2, however, that the Chamber is endowed with the competence to delimit those maritime zones outside the Gulf pertaining to El Salvador and Honduras respectively; El Salvador is aware of the possibility that the Chamber will delimit these zones (para. 81). In fact, the possibility of the Chamber’s dealing with delimitation between Honduras and El Salvador of those maritime zones is not excluded in the event of Honduras being recognized to possess a title to such zones.

Since a delimitation line claimed by Honduras vis-à-vis El Salvador, as shown on Map C.6 in its Memorial, is drawn with a bearing of 216.0°, adjusted from a line drawn with a bearing of 215.5° (a line perpendicular to the general direction of the coast as determined by Honduras while taking account of the coasts of the neighbouring States, including Nicaragua) — that adjustment being made in consideration of the ratio of sea areas to be attributed to El Salvador and Honduras — and since Honduras has based its calculations of its own sea areas on the assumption of the acceptance of a line which would purport to delimit a Honduran boundary with Nicaragua (a line bearing 215.5°), it appears that, if the Chamber were to determine a line delimiting zones outside the Gulf, Nicaragua could reasonably claim to possess a legal interest which may be affected by a Judgment of the Chamber.

The Agent of Nicaragua stated in his pleading on 5 June 1990:

“Outside the Gulf of Fonseca, it is plain from looking at any chart and from the graphics presented by the Parties in their Written Pleadings — particularly those contained in the Honduran Memorial and identified as ‘C-6 and C-7’ — that no such demands can be made in the Pacific Ocean without affecting the legal interest of Nicaragua to a significant extent.”

This statement was criticized by the Judgment when it was observed that “the Chamber does not find the matter so plain” (para. 84). However the Agent of Nicaragua, in his oral reply on 8 June 1990, went on to say that:

“Nicaragua and El Salvador are the only riparians situated at the mouth of the Gulf at less than 20 miles of distance from each other. Now comes Honduras with its allegation of a ‘community of interests’ that supposedly gives it a right to launch an enormous protrusion into the Pacific and Nicaragua is supposedly not affected by this curious contention.

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Any eventual delimitation affects the legal interests of Nicaragua. Whether the protuberance into the Pacific sought by Honduras hangs to the south into Nicaraguan territorial waters or rises into the north into Salvadorian territory, certainly affects the legal interests of Nicaragua.”

In the light of my statements in Section 1 above, I consider that Nicaragua has sufficiently set out, under circumstances which are as plain to it as to the two States Parties to the case, its interest of a legal nature in respect of any eventual delimitation between the two Parties.

4. CONCLUSIONS

In short, I take the view that (i) Nicaragua, having now been permitted to intervene in respect of the legal régime within the waters of the Gulf, should not have been excluded from expressing its views in due course on any delimitation between El Salvador and Honduras within the Gulf which may fall to be effected by the Chamber; and that (ii) Nicaragua should not have been excluded from expressing its views in due course with respect to any delimitation which may fall to be effected outside the Gulf in the event that some title may have been established in favour of Honduras.

(Signed) Shigeru ODA.
