

Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

*held on Tuesday 17 May 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 1991

Audience publique de la Chambre

*tenue le mardi 17 mai 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
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Mr. Elihu Lauterpacht C.B.E., Q.C., Director of the Research Centre
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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 :

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S. Exc. M. Roberto Arturo Castrillo, Ambassadeur,
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comme conseils et avocats;

ainsi que :

M. Francisco José Chavarría,

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Mr. Arnulfo Pineda López, Secretary-General of the Sovereignty and
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Mr. Arias de Saavedra y Muguelar, Minister, Embassy of Honduras to
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M. Richard Meese, conseil juridique, associé du cabinet Frère
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Mme Olmeda Rivera,

M. Raul Andino,

M. Miguel Tosta Appel,

M. Mario Felipe Martínez,

Mme Lourdes Corrales,

comme membres de la Commission de Souveraineté et des frontières.

The PRESIDENT: Please be seated. The sitting is open. We will continue our hearings on the fifth disputed sector of the land frontier and I give the floor to President Jiménez de Aréchaga.

Dr. JIMENEZ DE ARECHAGA:

POLOROS

I. Cacaoterique

Thank you Mr. President. I will deal with some of the questions which were raised yesterday by Professor González Campos. First the question of Cacaoterique.

The documents relating to Cacaoterique prove only that a group of elderly people enumerated the boundary markers which would have established the boundaies of the lands which they would have liked to have been awarded to them. This enumeration of boundary markers was the expression of a desire, rather than the expression of a reality, since the lands comprised between these putative boundary markers were never awarded to the Indians of Cacaoterique.

It is possible that a Spanish official recorded the claims of the elderly people of this town; however, the Spanish authorities refused to accede to these claims on the grounds that the area in question was far too large for a township of 243 persons and on the grounds that the document which they had submitted "n'a pas l'air d'un titre légal".

In view of these facts, I fail to see how Honduras is able to contend that the boundary markers of Sisicruz, El Carrizal, El Llano de Camaron, and the others relied on by Professor González Campos may be seriously utilized in order to amend or alter the boundary markers established in a real Formal Title-Deed to Commons like that of Polorós. In other words, I fail to see how it is possible to speak of "l'arpentage de Cacaoterique" when the Reply of Honduras recognized and admitted that that "arpentage" never actually took place.

Thus El Salvador maintains its fundamental objections to these pieces of paper unearthed by Mr. Bonilla a conveniently short time after Honduras had admitted in 1897 that it had no title-deeds capable of opposing the real title-deed to these lands, which is a Formal Title-Deed to the Commons of Polorós of 1760.

II. Sapigre

The Reply of Honduras states (at p. 643), and also Professor González Campos said in these hearings, that El Coyolar (point C on the Map 6.1 from the Counter-Memorial of Honduras - this is the map which Honduras has principally been utilizing during its oral pleadings in respect of this disputed sector), El Coyolar constituted the boundary between Sapigre and Cojiniquil "du côté sud". The Reply of Honduras then adds (*ibid.*) that:

"Plus au nord, on indique que la colline qu'on appelle El Bolillo (point B), celle-ci étant la limite reconnue par les indigènes de Sapigre. Et finalement la rivière Unire (point A)."

These were the hypothetical points where the lands of Sapigre and Cojiniquil had a common boundary. This section runs from point C on the map to point A through point B. So the supposed Commons of Sapigre are supposed to have extended according to the claims of Honduras not only as far as the Torola River but also beyond it (point D), as far as Brinco del Tigre, which is here. If you can read below Rivitá Hill you will see it says Salta Tigre which corresponds also here. That is the contention of Honduras.

So, Professor González Campos claimed that this boundary followed from the title-deeds to the lands of Cojiniquil of 1734. For the purpose of the discussion I will accept this argument, that there was a common boundary here between Cojiniquil and Sapigre. That was the established documented common boundary, if you accept the contentions as to the existence of Sapigre.

However, this is not sufficient to explain how the hypothetical Commons of Sapigre projected further towards the north beyond the Torola River as far as Brinco del Tigre. This cannot be explained. This is the real fact which has been documented but beyond that there is no explanation. Professor González Campos did not actually explain how he arrived at this conclusion that the limits of Sapigre went toward the north beyond the Torola River as far as Brinco del Tigre.

The explanation which was not given here can be found only in the Reply of Honduras (at p. 643). On what basis does Honduras there in the Reply justify this projection of the hypothetical line of Sapigre towards the north?

In the Reply, Honduras attempts to make up for the lack of a boundary marker showing what

it wants to prove by instead relying on considerations of a logical nature; it does so in the following terms (RH, p. 643):

"Enfin, la limite des terres de Cojiniquil étant la rivière Unire ou Guajiniquil (pont A), il est évident que le document de 1734 ne fait pas référence aux terres de Sapigre au nord de ce point [in other words there is no documentary proof that this line projected towards the north beyond point A, and then the Reply adds], mais il est logique de supposer que celles-ci continuaient jusqu'au nord-est jusqu'à Brinco del Tigre [I repeat], mais il est logique de supposer que celles-ci continuaient jusqu'au nord-est jusqu'à Brinco del Tigre." (Emphasis added.)

So you see, Mr. President, Members of the Chamber, that these letters D and E here, beyond this point, and this place here as limits of Sapigre beyond the Torola are based only on a logical supposition that the Commons of Sapigre "continued towards the north-east as far as Brinco del Tigre". No partial evidence. Just a logical supposition.

However, in making this "logical supposition", Honduras has forgotten that in its Reply (at p. 643) it admitted as evident: "que le document de 1734 ne fait plus référence aux terres de Sapigre au nord de ce point".

So you see, there is a vacuum, a hiatus in the evidence and Honduras wants to fill this vacuum and provide the missing evidence by means of a "logical supposition".

As I made it clear in my earlier statement to the Chamber in respect of this disputed sector, El Salvador submits that decisions as to territorial delimitation cannot be based on suppositions of this nature, made for the purpose of providing a substitute for a fact which is simply not known, namely how far the Commons of Sapigre extended to the north of the Unire River.

I must confess to my distinguished colleague, Professor González Campos, that I still fail to understand the exact purpose of the exercise in carrying out this archaeological reconstruction of the Commons of Sapigre.

He has agreed that when a "población" disappeared, its Commons reverted to the Spanish Crown as "tierras realengas" (Royal landholdings) and so could obviously be awarded as Commons to another "población".

So, even in the event that the former Commons of Sapigre had been subsequently adjudicated as Commons to Polorós, that would have been entirely lawful.

He, Professor González Campos, however, said that what was important was the fact that the Formal Title-Deed to the Commons of Sapigre had been issued in Comayagua, a fact which, as will be seen from what I have just said, he did not prove but one which I am willing to accept for the sole purpose of this discussion.

Even on this assumption, however, the "Real Audiencia" of Guatemala subsequently awarded these lands as Commons to Polorós in 1760 and, as we have already shown several times, the "Real Audiencia" of Guatemala had jurisdiction over both the relevant Spanish colonial provinces, that is to say both the Province of San Miguel and the Province of Comayagua. Further, the "Juez Privativo de Tierras" of the "Real Audiencia" had absolute powers from the Spanish Crown to adjudicate Commons. The King of Spain stated in the "Real Cédula" of El Pardo: "tout ce qui sera fait par vous je l'approuve et confirme". This signifies that the powers of the "Juez Privativo de Tierras" and the "Real Audiencia" were not qualified in any way nor restricted by any requirement to respect vague de facto colonial provincial boundaries.

III. "Ejido de reducción"

Yesterday, Professor González Campos stated that the Commons of Polorós constituted an "ejido de composición". Contrary to the assertions made by Professor González Campos, the Commons of Polorós was an "ejido de reducción". No payments by way of "composición" whatsoever were made for the granting of these lands.

The only payment referred to in the Formal Title-Deed to the Commons of Polorós was a payment in respect to judicial expenses, expressed in the following terms; I refer to the original Spanish version (CMES, Annexes, Vol. III, Ann. V, p. 86): "Derechos por mitad 5 pesos aquí una rubrica - Derechos de Cancilleria, y registro 2 pesos", in English: "Judicial expenses for the half 5 pesos (here there is a seal) judicial fees of the Chancery and the Registry 2 pesos".

Both this extract and the small amount of money involved make it obvious that no payment was actually made for the grant of the "ejido" to the inhabitants of Polorós. The Formal Title-Deed adds - and I will again first read the original Spanish and then the English:

"Título de confirmación de el librado por el Sr. Oydor, Juez principal de el Real Derecho de tierras, de veinte y siete Caballerías y cinco Cuerdas, para exidos de el Común de Yndios de el pueblo de San Juan Polorós de la Jurisdicción de San Miguel."

In English:

"Title of Confirmation of the one issued by the 'Sr. Oídor', Principal Judge of Royal Land Rights, of twenty-seven 'caballerías' and five cords, for the Commons of the Indians of the township of San Juan Polorós in the Jurisdiction of San Miguel."

Later on (at p. 88), the Formal Title-Deed states clearly that no further charge was to be made - again I will read first the original Spanish version and then the English:

"por quedar relevadas las partes de los Costos de acudir a mi real persona para las confirmaciones de sus poseciones".

In English:

"The Parties being relieved from the costs of coming before my royal person for the confirmation of their possessions."

So, clearly, there was an "ejido de reducción".

IV. Provincial boundaries

The theory advanced by Honduras that in this case the principle of *uti possidetis juris* has to be applied by determining the boundaries of Spanish colonial provinces rather than by determining the boundaries of "ejidos de reducción" has become more and more discredited as a consequence of the most recent exchanges.

The record of the oral pleadings in this case shows that more and more often Honduras, in order to try to establish the ancient Spanish provincial boundaries, has found it necessary to rely on the testimony of the elderly inhabitants of the "población" in question.

How is the Chamber supposed to establish the line of *uti possidetis juris* in relation to the Spanish provincial boundaries? After all, the elderly witnesses who knew the traditional boundaries of these colonial provinces are obviously no longer available to give evidence to and be examined by the Chamber.

In a more serious vein, this reliance on the testimony of witnesses, as in Nahuaterique, or with "les vieillards du village", as according to Professor González Campos occurred in Cojiniquil, shows eloquently that the exact boundaries between the colonial provinces were not well defined and regulated *de jure* by virtue of laws and decrees but were rather established on a factual basis on the strength of old and half-forgotten traditions.

Consequently, the fundamental thesis relied on by Honduras in this part of the litigation concerning the land frontier, namely that the process of determining the line of *uti possidetis juris* consists of establishing the half-remembered boundaries of the colonial provinces rather than the clear-cut boundaries of the "ejidos de reducción", clearly collapses completely and must therefore undoubtedly be rejected.

V. "En cuyo derecho"

Professor González Campos has relied, in support of his interpretation of the phrase "en cuyo derecho", on the authority of the old and the contemporaneous dictionaries of the Spanish language, as if suggesting that the Chamber is not entitled to adopt any meaning of this expression other than the one stated in these dictionaries.

He thus relies on a "raison d'autorité"; I for my part prefer to rely on "l'autorité de la raison".

A reasonable interpretation of the content of the Formal Title-Deed as a whole undoubtedly produces an interpretation in line with that which has been adopted by El Salvador.

On every occasion upon which the judge wished to make reference to whatever was situated to the right or to the left of the course of the measurement, he made such reference in extremely clear terms: the lands or other geographical feature in question were stated to be to the right or to the left of the line being followed.

It is not remotely reasonable to contend, as Honduras does, that in order to express exactly the same notion the judge would also have resorted to an expression as convoluted as "en cuyo derecho", meaning "in whose right". This phrase must clearly refer to legal rights and to the particular community which possessed them.

VI. Sketch-maps or "croquis"

Once again Honduras has produced an argument based on the location of a particular geographical feature on the basis of a sketch-map or "croquis"; on this occasion an objection to the location of the Cerro Ribitá on the basis of the contents of map 3.J contained in the Counter-Memorial of El Salvador.

Although I have no wish to engage in mindless repetition, I feel bound to repeat the

explanation of the purpose of the presentation of such sketch-maps or "croquis" which I gave in my earlier pleading.

Such sketch-maps or "croquis" constitute a graphic representation as a whole, as the title says, as a whole of the various titles relied on by one or other of the Parties in the particular sector in question. As such, they naturally reflect the contradictions and discrepancies which exist as between the various titles relied on by the two Parties. Consequently, the location of any particular geographical feature shown on a sketch-map or "croquis" of this kind merely represents the location which this geographical feature has according to the particular title which is being represented. The recording of such a location on a sketch-map or "croquis" of this kind in no way implies nor constitutes an admission that the geographical feature in question is really located in the place where it is shown. Its true location is a matter for discussion and argument by the Parties and, subsequently, for decision by the Chamber.

For instance, the location on map 3.J of the lands of San Antonio only reflects graphically the conclusions which may be able to be drawn from the two Title-Deeds of San Antonio de Padua, of 1682 and 1739 respectively, which have been presented to the Chamber by Honduras.

VII. Manzapucagua

My distinguished adversary has maintained a most significant silence with respect to my comments in my first statement in relation to the substitution of one river for another, namely the adoption of the Torola River in place of the Manzapucagua Rivulet. You will remember he represents Manzapucagua here to the north, Torola to the west.

It was once said of a tourist who visited the main churches of England that at the end he was suffering from "cathedral confusion". I think that I could fairly say of my distinguished adversary that he suffered from "river confusion" since he confused the Massire River with the Las Cañas or Yuquina River in the sector of Nahuaterique and in this sector has confused the Torola River with the Manzapucagua Rivulet. His complete silence with respect to a question which he himself had categorized as fundamental is very eloquent.

An equally complete and eloquent silence has been maintained by Honduras in respect of the

challenge which I made to present, or at the very least draw our attention to any Spanish colonial document which actually suggested that the Torola River constituted the boundary in this disputed sector.

These silences, so uncharacteristic of the oral pleadings of Honduras, have been heard in this Chamber.

VIII. Acquiescence

On the subject of acquiescence, Professor González Campos compared his argument as to the Republican Titles presented by Honduras with what I said in the session of 7 May about the Formal Title-Deed to the Commons of La Palma of 1829.

However, there are two important differences between the formal Title-Deed to the Commons of La Palma and the Titles of Matasanos, Hornos, and so forth.

First, the Formal Title-Deed to La Palma was awarded during the period of the Central American Federal Republic, something which both made it easier for Honduras to become aware of the measurement being carried out by another member of the Federation and, secondly, would have made easier the formulation of any complaint or protest, if Honduras had desired to make one.

Secondly, in the case of the Commons of La Palma, the "caballerías" additional to those adjudicated as an "ejido de reducción" were sold in a public auction, thus guaranteeing full publicity for the action which was being taken. On the other hand, the sale of the lands at Matasanos and Hornos in 1856 was a grant to a private individual which was not carried out by means of a public auction and therefore did not satisfy the requirements of the existing legislation. Further, the measurement of Sapualca, although carried out in 1856, did not produce the issue of any Title-Deed, due to the objections by the inhabitants of Opatoro, until over 40 years later in 1899.

It was only in the case of the measurement and public auction of the lands of Dolores in 1877 that the adjudication became a matter of public knowledge and produced an immediate reaction and protest in 1879 on the part of El Salvador. Nothing could be more different from the case of the formal Title-Deed to the Commons of La Palma. It is in fact interesting to look at the Title-Deed to the lands of Dolores (Annexes, Reply of Honduras, pp. 294 *et seq.*), because it shows that far from

relying on a tacit agreement as to the location of the frontier, being the Torola, the authorities of Honduras were full of doubts as to where the frontier actually was.

The Title-Deed to the lands at Dolores (*ibid.*) commenced with what the title calls an "enquête afin de vérifier la nationalité du terrain". This indication of the jurisdictional limits was obtained, yet again, by means of the declaration of witnesses (*ibid.*). Moreover, the Honduran authority ordered "apposer des affiches ... afin de rendre publique la nationalité du terrain appelé 'Los Dolores'". This decision is really most significant, because it reveals the existence of doubts which are totally incompatible with the allegations which were made yesterday of a sort of tacit understanding between the two Parties that the Torola River constituted the international frontier.

IX. Conclusion

That concludes, Mr. President, the oral Rejoinder of El Salvador in respect of the fifth disputed sector of the land frontier.

This also concludes my participation in the oral pleadings of this case and I would therefore like to take this opportunity of thanking you, Mr. President, and the other distinguished Members of the Chamber, for the courtesy and patience with which you have listened both to this and to my previous pleadings in this case. I would also like to thank the interpreters for their work. Reiterating my thanks to you, Mr. President, and to the other distinguished Members of the Chamber, I thus conclude my pleadings.

The PRESIDENT: I thank President Jiménez de Aréchaga and that concludes the hearings on the fifth disputed sector of the land frontier. Since next Monday is going to be a holiday, we will have our next sitting on Tuesday morning and that will be for the beginning of the sixth disputed sector of the land frontier, namely the sector of the Goascorán. I thank you again. The sitting is over and the Chamber adjourned until Tuesday morning at 10 o'clock.

The Chamber rose at 10.30 a.m.
