11 SEPTEMBER 1992

JUDGMENT

LAND, ISLAND AND MARITIME FRONTIER DISPUTE
(EL SALVADOR/HONDURAS: NICARAGUA intervening)

DIFFÉREND FRONTALIER TERRESTRE, INSULAIRE ET MARITIME
(EL SALVADOR/HONDURAS; NICARAGUA (intervenant))

11 SEPTEMBRE 1992

ARRÊT

DISSENTING OPINION OF JUDGE ODA

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I. Introduction. Dissent in Respect of the Legal Situation of the Maritime Spaces of the Gulf of Fonseca

1. I regret that I am unable to share the view of the Chamber with regard to the legal situation of the maritime spaces within and outside the Gulf of Fonseca. My dissent is a result of my understanding of the contemporary as well as the traditional law of the sea, an understanding which seems to be greatly at variance with the views underlying the present Judgment.

2. The Chamber defines the Gulf of Fonseca as "an historic bay" (Judgment, para. 432 (1)). In my view, however, the Gulf of Fonseca is *not* a "bay" as conceived in the law of the sea, since the concept of a "pluri-State bay" which the Chamber employs to characterize the Gulf has *no* existence as a *legal* institution. Neither does the Gulf of Fonseca actually fall into the category of a "historic bay", despite what the Chamber assumes.

3. The decision of the Chamber concerning the legal status of the waters in the Gulf, reading that

> "the waters of the Gulf . . . were . . . held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held . . . but excluding a belt . . . extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State . . ." *(ibid.)*

seems to be totally unfounded. I believe, on the contrary, that the waters in the Gulf of Fonseca off the shores of the three riparian States, El Salvador, Honduras and Nicaragua, constitute, under general rules of the law of the sea (that is, international law itself), the sum of the distinct territorial seas of each respective State.

4. Under the rules of the law of the sea, the sea-waters adjacent to the coasts of States are in principle territorial sea. Some coasts, satisfying certain geographical requirements concerning coastal configuration, form under those rules a "bay", the waters of which constitute "internal waters". It is, however, essential to note that the concept of a "bay" does not immediately denote the legal status of the waters but is meant first to specify the geographical circumstances which allow the waters therein to be "internal waters" instead of territorial sea. The "historic bay" — a concept which emerged only towards the end of the last century in parallel with the new idea of giving special legal significance to the notion of a "bay", and a term used only since the beginning of this century — does *not* exist in a régime *sui generis*, that is, a régime applying rules different from those applicable to a normal "bay". "Historic bays" are those bay-like features (in a geographical sense) which, because of their greater width at the mouth or their lack of penetration into the landmass, could not normally be classified legally as bays but can for historical reasons be given the

same legal status as "bays". The words "historic bay" are certainly *not* meant to suggest that the legal status of the waters concerned is anything other than that of "internal waters" of the coastal State, as in the case of a normal (juridical) "bay". Under the contemporary concept of the law of the sea, the sea-waters adjacent to the coasts of States are either territorial sea or, otherwise, internal waters. There cannot be any other category for such offshore sea-waters [1].

5. In this respect, I am afraid that the Chamber, in defining the Gulf of Fonseca and the legal status of its waters, obscures the proper understanding of the law of the sea. The concepts which the Chamber employs to denominate the area of the Gulf of Fonseca, or the legal status of its waters [2], are all, in differing degrees, extraneous to the law of the sea prevailing for the past century and as it stands today. The traditional and current tenets of the law of the sea, as I understand them, thus offer no support to the considerations advanced by the Chamber, with the aid of those terms, in defining the legal situation of the maritime spaces of the Gulf.

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[1] I must add here the newly emerging concept of archipelagic waters, which I put aside for later comment (cf. para. 43 of this opinion).

[2] I refer specifically to the following expressions: "an historic bay, and . . . the waters of it accordingly historic waters" (Judgment, para. 383), "the maritime belt in a pluri-State bay" (para. 392), "the 3-mile maritime belts of exclusive jurisdiction" (para. 393), "an historic bay that constitutes an enclosed sea entirely within the territory of a single State" (para. 395), "an enclosed pluri-State bay" *(ibid.)*, "an historic bay and therefore a 'closed sea'" *(ibid.)*, "historic waters . . . subject to a joint sovereignty of the three coastal States" (para. 404), "pluri-State historic bay" (para. 412), "the littoral maritime belts subject to the single sovereignty of each of the coastal States, but with mutual rights of innocent passage" *(ibid.)*, "internal waters subject to a special and particular régime, not only of joint sovereignty but of rights of passage" *(ibid.)*, "the waters of the Gulf [being] the subject of the condominium or co-ownership" *(ibid.)*, "internal waters in a qualified sense" *(ibid.)*, "internal waters . . . subject to certain rights of passage" *(ibid.)*, "the area of joint sovereignty [in 1917]" (para. 413), "the 3-mile belt of exclusive jurisdiction enjoyed by each of the States along its coast" *(ibid.)*, "the joint sovereignty in all that area of waters" (para. 414), "the 3-mile maritime littoral belt of exclusive jurisdiction within the Gulf" (para. 415), "the littoral maritime belts of 1 marine league along the coastlines of the Gulf" (para. 416), "the inner littoral maritime belts . . . not territorial seas in the sense of the modern law" *(ibid.)*, "the internal waters of the coastal State, not being subject to the joint sovereignty, and even though subject . . . to rights of innocent passage" *(ibid.)*, "a condominium of the waters of the Gulf" (para. 418), "the exclusive littoral maritime belts . . . limited to 3 miles in breadth" *(ibid.)*, "internal waters subject to a single, exclusive sovereignty" *(ibid.)*, "an historic bay" *(ibid.)*, "the waters internal to [the] bay . . . subject to a threefold joint sovereignty" *(ibid.)*, "the legal situation [being] one of joint sovereignty" (para. 420).

6. To explain my view in full, it is necessary for me to begin with a somewhat detailed outline of both the traditional and the contemporary law of the sea relevant to the present case (Part II of this opinion). I will then show why, in my opinion, the 1917 Judgment of the Central American Court of Justice, upon which the Chamber seems to rely heavily, was seriously misguided in its application of the concept of a "historic bay" to the Gulf. As a result of that Judgment, the status of the Gulf of Fonseca has been misinterpreted by some scholars, and even misrepresented in official documents of the United Nations (Part III). I shall then go on to show how both the 1917 Judgment and the present Judgment are in error in finding, where the legal status of the waters of the Gulf is concerned, that 3-mile belts may be left to each riparian State while the central part remains in condominium or joint ownership. The present Judgment appears to me to misapply the concept of condominium and to misunderstand the concept of "historic waters" (Part IV). After that, I shall expound the legal status which I hold to be correctly applicable to the Gulf of Fonseca, that is, as constituting the sum of the separate territorial seas of the three riparian States (Part V). Lastly I shall consider what rights Honduras, whose territorial sea is bottled up in the Gulf, may be entitled to in the maritime spaces within and outside the Gulf (Part VI).

II. "BAY" OR "HISTORIC BAY": LEGAL CONCEPTS UNDER THE LAW OF THE SEA

1. The Legal Status of a Bay towards the Turn of this Century

7. The parallel régimes of the open seas, free from the control of any State, and of the waters which lie under the territorial sovereignty of coastal States — the territorial waters in the traditional sense —, are centuries old and have not until recent times, when the concepts of the continental shelf and the exclusive economic zone emerged, been placed in doubt. The problem of the way in which the borders of these two parallel régimes were to be drawn involved, as a preliminary issue, the question of the breadth of the coastal maritime belt around or alongside the land. The rule of the range of cannon-shot, which had prevailed in the last century, was about to be replaced by some fixed limits when the régime for territorial jurisdiction over coastal waters extending over a breadth of 1 marine league was emerging in parallel with the 1878 Territorial Waters Jurisdiction Act of Great Britain.

8. The *legal* concept of a "bay" emerged only in parallel with this development as an exception to the régime of 1 marine league territorial jurisdiction. While there would not have been any problem in a case where

opposite headlands at the mouth of a geographical bay were less than 2 marine leagues apart (even when its centre was at a greater distance than 1 marine league from either coast) some slightly wider distances between the headlands, reflecting the real range of cannon-shot at that time, were proposed as permitting the entire waters of a bay to be under the territorial jurisdiction of *a single* riparian State.

9. In 1894 the Institut de droit international, under the Presidency of Louis Renault and with the assistance of Thomas Barclay as Rapporteur, adopted the following rules:

> "Pour les baies, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie dans la partie la plus rapprochée de l'ouverture vers la mer, où l'écart entre les deux côtes de la baie est de douze milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande." (Règles sur la définition et le régime de la mer territoriale, Art. 3, *Annuaire de l'Institut de droit international*, XIII, 1894-1895, p. 329.)

In the year that followed, the International Law Association (Thomas Barclay being the Secretary of the Special Committee on Territorial Waters) adopted the same provision, with the exception that the distance of 12 miles would be replaced by 10 miles (International Law Association, *Report of the Seventeenth Conference*, 1895, p. 109). These ideas are well reflected by Oppenheim, who first published in 1905 his most well-known treatise on international law:

> "*[Territorial Gulfs and Bays]*
>
> It is generally admitted that such gulfs and bays as are enclosed by the land of one and the same riparian State, and whose entrance from the sea is narrow enough to be commanded by coast batteries erected on one or both sides of the entrance, belong to the territory of the riparian State even if the entrance is wider than two marine leagues, or six miles." (L. Oppenheim, *International Law*, Vol. I, 1st ed., 1905, p. 246, para. 191.)

The 10-mile rule was confirmed in the Award given in 1910 by the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries* case (*UNRIAA*, Vol. XI, pp. 167, 199). I am suggesting not that the 10-mile rule had then become established but that the concept of a bay was about to be realized as constituting an exception to the 1-marine-league territorial sea in the case of special configurations of the coast forming a geographical bay.

10. It is further important to note that a riparian State's continued or long-standing usage of the waters in a geographical bay was made a further source of derogation from the rule based on a maximum width of mouth, so that the whole of the waters in a bay characterized by such usage

could be placed, as a unity, under the territorial jurisdiction of the State in question. Some national practice, involving a claim to territoriality over certain bays on the ground of continued or long-standing usage, had been reported. In the case of Delaware Bay in the United States (which is 10 miles across at its entrance and 40 miles long from its entrance to the mouth of the Delaware River), Attorney-General Randolph, in 1793, rendered (in the case of the capture of the British vessel *Grange* by a French frigate) an opinion to the effect that the bay was within the jurisdiction of the United States, and Secretary of State Jefferson took action accordingly. As for Chesapeake Bay (which is 12 miles across at its entrance), its status was considered in 1885 by the Second Court of Commissioners of Alabama Claims in the case of the *Alleganean*, a vessel which had been sunk in the waters of the bay by the Confederate forces, and the Court held that this bay was entirely within the territorial jurisdiction of the United States. In *Regina* v. *Cunningham* in 1859, Chief Justice Cockburn held that the part of the sea in the Bristol Channel (the width of its mouth being slightly more than 10 miles), where wounding of a seaman on board the *Gleaner* had occurred, formed part of the County of Glamorgan. A claim by Great Britain to Conception Bay in Newfoundland (which is 20 miles across at its entrance) was upheld in 1877 by the Privy Council in the case of *The Direct United States Cable Co. Ltd.* v. *The Anglo-American Telegraph Company*.

11. These four cases simply present examples of the practice whereby States claimed exceptions to the geographical requirements governing a bay on the basis of their historic exercise of authority. These examples of national practice, among others, were reported in most of the leading treatises of international law towards the turn of the last century. I quote again, as one example, from Oppenheim's 1905 work:

> "*[Territorial Gulfs and Bays]*
>
> Some writers maintain that gulfs and bays whose entrance is wider than ten miles, or three and a third marine leagues, cannot belong to the territory of the riparian State, and the practice of some States accords with this opinion. But the practice of other countries, approved by many writers, goes beyond this limit. Thus Great Britain holds the Bay of Conception in Newfoundland to be territorial, although it goes forty miles into the land and has an entrance fifteen miles wide. And the United States claim the Chesapeake and Delaware Bays, as well as other inlets of the same character, as territorial, although many European writers oppose this claim." (*Op. cit.*, Vol. I, 1905, para. 191.)

Those bays were given the name "historic bay", probably for the first time, in the 1910 Arbitral Award in the *North Atlantic Coast Fisheries* case (*UNRIAA*, Vol. XI, pp. 167, 197). The term "historic bay" was found in hardly any document prior to 1910.

12. Except as regards bays such as those listed above, the legal rule governing a bay-feature was well expressed by the opinion of the Institut de droit international in 1894, which was partly quoted above, to the effect that "[p]our les baies, la mer territoriale suit les sinuosités de la côte". It should also be noted that, according to Oppenheim (1905),

> "*[Non-territorial Gulfs and Bays]*
>
> Gulfs and bays surrounded by the land of one and the same riparian State whose entrance is so wide that it cannot be commanded by coast batteries, and, further, all gulfs and bays enclosed by the land of more than one riparian State, however narrow their entrance may be, are non-territorial. They are parts of the Open Sea, the marginal belt inside the gulfs and bays excepted." (*Op. cit.*, para. 192.)

13. To conclude, a geographical bay which was bordered by the land of two or more riparian States could not, as one area, be accorded any special status in the law of the sea; thus the waters inside such a bay were left as being the maritime belt (the territorial sea) and the open sea (high seas). One can hardly find any scholar towards the beginning of this century who had ever argued the case of a "pluri-State bay", to use the Chamber's term. In addition, while claims to the territoriality of a bay the mouth of which spanned more than a certain fixed limit (say 10 miles) had been made on grounds of immemorial usage, or for historical reasons, as the examples given above indicate, it is certain that no such claim was ever, or could have been, made in respect of any bay the coast of which was divided among two or more States.

2. The Concept of a Bay throughout the Codification Process of the Law of the Sea

(i) *The 1930 League of Nations Codification Conference*

14. What I explained above may also be verified by scrutinizing the process of codification of the relevant provisions of the law of the sea at the 1930 Conference for the Codification of International Law, convened by the League of Nations, where the subject of territorial waters was one of the three major items discussed. Prior to the Conference, Governments

were requested to provide information on various points, such as *inter alia* Point IV, "Determination of the Base Line for Measurement of the Breadth of Territorial Waters", and Point VIII, "Line of Demarcation between Inland Waters and Territorial Waters" (Conference for the Codification of International Law, *Bases of Discussion*, Vol. II, pp. 35 and 61).

15. Mr. Walther Schücking, Rapporteur of the Committee of Experts for the subject of "Territorial Waters", had already in 1927 drawn up a memorandum and a draft convention (Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation*, 1927, pp. 29 and 39). The text of the draft convention, amended by Mr. Schücking in consequence of the discussions in the Committee of Experts and submitted to the Preparatory Committee in 1929, stated *inter alia*:

> "*Article 4.*
>
> *Bays.*
>
> In the case of bays which are bordered by the territory of a single State, the territorial sea shall follow the sinuosities of the coast, except that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea where the distance between the two shores of the bay is ten marine miles[1], unless a greater distance has been established by continuous and immemorial usage. The waters of such bays are to be assimilated to internal waters.
>
> In the case of bays which are bordered by the territory of two or more States, the territorial sea shall follow the sinuosities of the coast." (Conference for the Codification of International Law, *Bases of Discussion*, Vol. II, p. 193.)

Mr. Schücking had suggested the 10-mile length for the mouth of a bay but had been prepared to recognize an exception in cases of continuous and immemorial usage. He had conceived that the legal concept of a bay would be applicable solely to a single-State bay. The "right of pacific passage" would have been guaranteed only through the "territorial sea" (Art. 7) but not a bay "assimilated to internal waters".

16. In 1929, after examination of the replies and, presumably, of the draft convention drawn up by Mr. Schücking, the Preparatory Committee for the Conference drafted Bases of Discussion for the use of the proposed conference which read *inter alia*

[1] In the original draft of 1927 this distance was fixed at 12 miles, not 10 miles.

"*Limits of the Territorial Waters*

. . . . . .

Basis of Discussion No. 7

In the case of bays the coasts of which belong to a single State, the belt of territorial waters shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles.

Basis of Discussion No. 8

The belt of territorial waters shall be measured from a straight line drawn across the entrance of a bay, whatever its breadth may be, if by usage the bay is subject to the exclusive authority of the coastal State: the onus of proving such usage is upon the coastal State.

Basis of Discussion No. 9

If two or more States touch the coast of a bay or estuary of which the opening does not exceed ten miles, the territorial waters of each coastal State are measured from the line of low-water mark along the coast.

. . . . . .

Basis of Discussion No. 18

The base line from which the belt of territorial waters is measured in front of bays, . . . forms the line of demarcation between inland [now called internal waters] and territorial waters [now called territorial sea]." (Conference for the Codification of International Law, *Bases of Discussion*, pp. 45 and 63[1].)

"Inland waters" would certainly have been differentiated from "territorial waters" in the sense that the right of innocent passage of foreign ships should be guaranteed only in the latter, as stated:

"*Foreign ships passing through territorial waters*

Basis of Discussion No. 19

A coastal State is bound to allow foreign merchant ships a right of innocent passage through its territorial waters . . ." (*Ibid.*, p. 71.)

17. During the course of the Conference from 13 March to 12 April 1930, some delegations presented observations and amendments regard-

[1] The text of the Bases of Discussion was also quoted in *Acts of the Conference for the Codification of International Law*, Vol. III, p. 179, and it is only there that the titles are given.

ing those bases of discussion in the Second Committee (Territorial Waters). A report adopted by the Second Committee on 10 April 1930 (with Mr. J. P. A. François as Rapporteur), disclosed an absence of agreement as to the breadth of the territorial sea, and announced a failure to conclude a convention on the territorial sea mainly for that reason[1]. It read as follows:

> "The absence of agreement as to the breadth of the territorial sea affected to an even greater extent the action to be taken on the Second Sub-Committee's report. The questions which that Sub-Committee had to examine are so closely connected with the breadth of the territorial sea that the absence of an agreement on that matter prevented the Committee from taking even a provisional decision on the articles drawn up by the Sub-Committee. These articles, nevertheless, constitute valuable material for the continuation of the study of the question, and are therefore also attached to the present report." (*Acts of the Conference for the Codification of International Law*, Vol. III, p. 211.)

The draft articles proposed by the Second Sub-Committee, which though not adopted were appended to the Report of the Committee itself, read:

> "*Bays*
>
> In the case of bays the coasts of which belong to a single State, the belt of territorial waters shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles." (*Ibid.*, Vol. III, p. 217; see also Vol. I, p. 131.)

In parallel, the draft articles prepared by the First Sub-Committee were provisionally approved by the Committee. In them it was stated that the

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[1] It is only since the 1930 Codification Conference that the wording "territorial seas" (which were often termed "territorial waters") has been uniformly used to denominate the coastal maritime belt (see *Report of the Second Committee: Territorial Sea* (Rapporteur: Mr. François), Appendix I, Art. 1, Observations; *Acts*, Vol. I, p. 126; Vol. III, p. 213). The relevant passage reads:

> "There was some hesitation whether it would be better to use the term 'territorial waters' or the term 'territorial sea'. The use of the first term, which was employed by the Preparatory Committee, may be said to be more general and it is employed in several international conventions. There can, however, be no doubt that this term is likely to lead — and indeed has led — to confusion, owing to the fact that it is also used to indicate inland waters, or the sum total of inland waters and 'territorial waters' in the restricted sense of this latter term. For these reasons, the expression 'territorial sea' has been adopted."

"right of innocent passage" would be guaranteed to foreign commercial vessels in a belt of sea called the "territorial sea".

18. The draft articles did not, however, include any provision concerning bays bordered by the land of two or more States. If, in these draft articles contained in the Report of the Committee, no rule or regulation was suggested in regard to multi-State bays, this was doubtless because it stood to reason that such cases would be amenable to the general rule whereby the territorial sea of each riparian State is measured from that State's own coastline. Furthermore, the lack of a reference to a historic bay in those draft articles was presumably due to the difficulty of generalizing historical elements that could have justified giving the status of a bay to certain coastal configurations which would otherwise not be regarded as bays because of their larger measurement at the mouth. Though this lack of reference may not, admittedly, be interpreted as meaning that the concept of a "historic bay" was denied, the fact remains that there was never any suggestion that it could be applicable to a "pluri-State bay".

(ii) *The United Nations Conferences on the Law of the Sea*

19. At the United Nations International Law Commission Mr. J. P. A. François, nominated as Special Rapporteur on the subjects of the territorial seas and of the high seas, making his first report in 1952 on the territorial sea, proposed the same provision concerning a bay as that endorsed by the 1930 Codification Conference (*ILC Yearbook*, 1952, II, p. 34). Mr. François's second report in 1953 followed the same lines (*ILC Yearbook*, 1953, II, p. 56). Incorporating the suggestions made by the group of experts on the geographical and technical aspects of the territorial sea, Mr. François in his third report in 1954 submitted a more detailed proposal in which, while the 10-mile width was maintained for a closing-line of a bay, it was specified that the dimensions of a bay should not be smaller than a semi-circle constructed with that closing-line as diameter (*ILC Yearbook*, 1954, II, p. 4). The draft articles on the "Régime of the Territorial Sea" prepared by the International Law Commission in 1955 provided for the first time for the detailed definition of a "bay", the mouth of which would not be more than 25 miles in width, taking into account the then prevailing trend in favour of a 12-mile territorial sea (instead of a 3-mile limit), while the waters within a single-State bay would be considered "internal waters" (Art. 7, paras. 3 and 4; *ILC Yearbook*, 1955, II, p. 36). It was also stated that "the provision laid down in paragraph 4 [concerning the 25-mile rule] [should] not apply to so-called 'historical' bays . . ." (Art. 7, para. 5). It may be added that the 1955 draft articles on the "Régime of the High Seas" provided that there would, apart from the high seas, be only territorial sea or internal waters of a State (Art. 1;

ILC Yearbook, 1955, II, p. 21). The 1956 "Articles concerning the Law of the Sea" followed those of 1955 (combining the two sets of draft articles), except that the width of the mouth of a — juridical — bay was reduced to 15 miles (Art. 7, para. 3; *ILC Yearbook*, 1956, II, p. 268) because it was recognized that the presumption of a 12-mile limit for the territorial sea would at that time be difficult to maintain. This was the text of the draft used as the basis for discussion at UNCLOS I.

20. At UNCLOS I in 1958, a distance of 24 miles as the limit for the mouth of a bay was adopted as Article 7 of the 1958 Convention on the Territorial Sea and the Contiguous Zone on the basis of a recommendation included in a joint proposal submitted by the USSR, Bulgaria and Poland (A/CONF.13/C.1/L.103). Although the Conference failed to fix the limit of the territorial sea, the trend towards a 12-mile limit could not be ignored and the mouth of a bay could not be fixed at a distance shorter than twice the length of that limit. At the same time a proposal presented by Japan to define the term "historic bays" as meaning

> "those bays over which coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practice by foreign States" (A/CONF.13/C.1/L.104)

was withdrawn in favour of a proposal by India and Panama, recommending that "the General Assembly should make appropriate arrangements for the study of the juridical régime of historic waters including historic bays" (A/CONF.13/C.1/L.158/Rev.1), which was adopted by the Conference as a resolution on the "Régime of Historic Waters"[1]. The "historic" bay was thus not defined in clear terms in the Convention, which states in paragraph 6 of Article 7 (as suggested in the 1956 draft of the International Law Commission), that "[t]he foregoing provisions [relating to a bay] shall not apply to so-called 'historic' bays . . .". A proposal by the United Kingdom to insert a new paragraph reading that the provisions concerning a bay "relate[s] only to bays the coasts of which belong to a single State" (A/CONF.13/C.1/L.62) was adopted by

[1] In 1962, pursuant to the resolution adopted by UNCLOS I and General Assembly resolution 1453 (XIV) of 1959 the United Nations Secretariat prepared a note on the "Juridical Régime of Historic Waters, including Historic Bays" (A/CN.4/143; *ILC Yearbook*, 1962, II, p. 1), which it is not necessary to quote here.

28 votes to 21 with 20 abstentions and became paragraph 1 of Article 7 of the 1958 Convention.

21. The subject of a "bay" was barely touched upon in UNCLOS III. The only proposal relating to bays was submitted by Colombia at the fourth session in 1976 and was to the effect that the 24-mile rule of the bay should "not apply to so-called 'historic' bays or to bays the coasts of which belong to more than one State" (A/CONF.62/C.2/L.91). Colombia also proposed another article stating

> "2. A bay the coasts of which belong to two or more States and which satisfies the requirements laid down in paragraph 1 of this article [concerning the demonstration of the sole possession of the waters of the bay continuously, peaceably and for a long time, and the tacit acceptance of that situation by third States] shall be regarded as historic only when there is agreement between the coastal States to that effect." *(Ibid.)*

There is no record indicating that this Colombian proposal was discussed at the meetings of the Conference. In view of the fact that all the debates in that session were considered to be informal negotiations and, for that reason, not placed on record, there is no reason to think that that proposal was not discussed: yet the texts which were successively prepared by the Conference, such as ICNT (Informal Composite Negotiating Text) (1977), ICNT/Rev.1 (1979), ICNT/Rev.2 (1980) and the Draft Convention (1980), were all identical to the relevant text in the 1958 Convention. The provisions of the 1982 United Nations Convention on the Law of the Sea concerning a bay remain practically identical to those of the 1958 Geneva Convention, except that they "do not", instead of "shall not" apply to "so-called 'historic' bays".

3. The Contemporary Concept of a Bay or Historic Bay: the Legal Status of It Being Internal Waters of a Single Riparian State

22. The contemporary law of the sea is as follows. A territorial sea, over which the territorial jurisdiction of the coastal State extends for a 12-mile distance[1], is measured in principle from the baselines of the coast. The

[1] The 12-mile rule is provided for in the 1982 United Nations Convention (Art. 3), which may now properly be considered as having confirmed the norm.

baselines for measuring the breadth of the territorial sea are in principle the "normal baselines", i.e., those that closely follow the configuration of the coast. They can, however, be "straight baselines" in the exceptional cases of "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity", and of the "closing line" for a bay as specifically defined in terms of the breadth of its mouth, its features and the degree of its landward penetration. The waters within such straight baselines of the territorial sea are regarded as "internal waters of the State". These principles are clearly stated in the 1982 United Nations Convention on the Law of the Sea (Arts. 3, 4, 7, 8 and 10), which are practically identical to the relevant provisions of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and may legitimately be considered as expressing customary international law today. Immediate offshore sea-waters are thus either territorial sea or internal waters, both included in the territory of the coastal State but subjected to some conditions (in particular, the right of innocent passage to be granted to foreign commercial vessels in the territorial sea), but cannot be anything else[1].

23. In the case of a "bay", the waters within it are treated as an expanse of "internal waters" and the territorial sea is measured from the bay's closing-line as a baseline. That point has gone undisputed throughout the development of the contemporary law of the sea since the 1930 Codification Conference. As I must repeat, if there has been any uncertainty in this respect, it relates only to the kind of features, geographically or historically, that could constitute criteria for classifying a particular coastal configuration as a "bay", hence as enclosing internal waters of the State where the right of innocent passage is not granted.

24. It may be concluded that the simple outcome of this study of the development of the law of the sea is that there did not and still does not (or, even, cannot) exist any such legal concept as a "pluri-State bay" the waters of which are internal waters. It is not surprising that no rule covering such a pluri-State bay has ever been presented in international law. The very concept of "internal waters", which only appeared — under the term of "inland waters" — in parallel with the fixing of the limit of the territorial waters (sea), implies, as a norm, the enclosure or semi-enclosure of the waters concerned within the embrace of a given jurisdiction. This element

[1] We must also remain aware of the new concept of archipelagic waters, which may not be directly relevant to the present case (cf. footnote 1, p. 734, above).

of embracement is absent or disappears when the shores of a geographical bay are so divided up between States as to render the criteria and rationale of a legal bay incapable of fulfilment. This is tacitly confirmed by the absence of any provision concerning the delimitation or division of internal waters either in the 1958 or the 1982 Conventions; the internal waters of one State cannot abut the internal waters of another State.

25. Some exemptions from the geographical criteria normally required for a (juridical) bay have been justified on historical grounds for certain topographical features, and the contemporary law of the sea admits the concept of a "historic bay". The words used in the 1958 and 1982 Conventions to the effect that the provisions defining a (single-State) bay "shall not apply" or "do not apply" to "so-called 'historic' bays" (1982 Convention, Art. 10, para. 6) are meant to suggest that the geographical criteria serving to define a bay for legal purposes, such as the width of the mouth or the depth of penetration into the landmass, are not in those cases strict conditions of "bayhood".

26. I must mention two points. First, a bay whose shores are divided among two or more States cannot be a bay in the legal sense of the Conventions, that is to say, cannot even belong to the legal category to which, in any event, "historic bays" do not conform [1]. Secondly, the waters of a "historic bay" are nothing other than "internal waters". I must recall that, for the purpose of denoting the status of offshore waters, the only concepts available under the law of the sea are "territorial sea" or "internal waters" (the new concept of archipelagic waters excepted). In other words, such concepts as "an historic bay, and . . . the waters of it are accordingly historic waters" (Judgment, para. 383), "an historic bay that constitutes an enclosed sea entirely within the territory of a single State" (para. 395), "an historic bay and therefore a 'closed sea'" *(ibid.)*, "historic waters . . . subject to a joint sovereignty of the three coastal States" (para. 404), "internal waters subject to a special and particular régime, not only of joint sovereignty but of rights of passage" (para. 412), "the waters of the Gulf [being] the subject of the condominium or co-ownership"

[1] I must add in this respect that some bays named "historic bays" in classical treatises since early this century are now regarded as normal "bays" owing to the enlargement of the distance criterion required for the closing-line of a bay from a rather narrow distance (say 10 miles) to 24 miles under the 1958 Convention on the Territorial Sea and the 1982 United Nations Convention (see para. 43 below).

(para. 412), "internal waters in a qualified sense" *(ibid.)*, "internal waters . . . subject to certain rights of passage" *(ibid.)*, "the area of joint sovereignty [in 1917]" (para. 413), "the joint sovereignty in all that area of waters" (para. 414), "a condominium of the waters of the Gulf" (para. 418), "the waters internal to [the] bay . . . subject to a threefold joint sovereignty" *(ibid.)*, "the legal situation [being] one of joint sovereignty" (para. 420), "the waters . . . subject to the . . . entitlement of all three States" (para. 432 (1)) — all of which concepts are suggested by the present Judgment to define the legal status of the waters of the Gulf — are in no way indicative of that status.

III. The Term "Historic Bay" as Misapplied to the Gulf of Fonseca in the 1917 Judgment of the Central American Court of Justice and in the Present Judgment

1. Impact of the Misapplication of the Term "Historic Bay" in the 1917 Judgment

27. The Gulf of Fonseca appeared for the first time on the legal stage clothed as "a historic bay possessed of the characteristics of a closed sea" in the 1917 Judgment of the Central American Court of Justice (trans. *AJIL*, Vol. 11, p. 716). It was not until the rendering of that Judgment that the Gulf of Fonseca began to be mentioned in any of the treatises of international law. Hardly any scholar of international law prior to 1917 had thought that the Gulf of Fonseca, surrounded by three States, had become a (juridical) bay, whether ordinary or historic, and was thus entitled to some special legal status. (There was no mention of the Gulf of Fonseca even in the eight volumes of Moore's *Digest of International Law* in 1906, or *The Sovereignty of the Sea*, Fulton's classic work, in 1911.) Even the term "historic bay" itself seems never to have been employed in a judicial determination or a scholarly work prior to 1917, except in the 1910 Award of the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries* case, in which the Tribunal

> "recognize[d] that the conventions and established usages might be considered as the basis for claiming as territorial those bays [single-State bays, including Delaware Bay and others] which on this ground might be called historic bays" (*UNRIAA*, Vol. XI, pp. 167, 197).

The Gulf of Fonseca, a bay bordered by the land of the three littoral States,

was certainly not uppermost in the minds of the members of the 1910 Arbitral Tribunal.

28. In contrast, practically all scholars dealing with the law of the sea after 1917 have been in accord in echoing the concept of a "historic bay" employed in the 1917 Judgment solely to define the Gulf of Fonseca, as the present Judgment admittedly notices (see paras. 383, 394). Yet the fact must be faced that the authors of the treatises in question simply gave the name "historic bay" to the Gulf of Fonseca, as a unique case in which the coast belongs to two or more States, solely on the ground that the Central American Court of Justice, in 1917, had passed a Judgment employing that term. Having never suggested any specific régime for even a single-State "historic bay", they *a fortiori* never contended that the rules or regulations established for such a régime should apply to this bay surrounded by three States. This is so even in the case of Oppenheim, since he picked up that Gulf only in his third edition, published in 1920 (*International Law*, 3rd ed., 1920, p. 344, para. 192, n. 4), referring to it as an exception to "[non-territorial] gulfs and bays enclosed by the land of more than one littoral State". Fauchille in 1925 (*Traité de droit international public*, Vol. 1, 2nd Part, 8th ed., 1925, p. 308: in Bonfils' *Manuel de droit international public* edited by Fauchille (5th ed.) in 1908 the Gulf of Fonseca was not mentioned at all); Jessup in 1927 (*The Law of Territorial Waters and Maritime Jurisdiction*, 1927, p. 398); Wheaton in 1929 (*Elements of International Law*, 6th English ed., 1929, p. 365: in his 5th English edition in 1916 no mention was made of the Gulf of Fonseca); Gidel in 1934 (*Le droit international public de la mer*, Vol. III, 1934, p. 604), and others, all followed Oppenheim. These scholars after 1917 who referred to the Gulf of Fonseca as a (juridical) bay never presented any justification for this label outside the fact that the 1917 Judgment had so styled the Gulf. Their statements thus carry little cumulative value.

29. Some United Nations documents supplied in preparation for UNCLOS I in 1958 also referred to the Gulf of Fonseca as a "historic bay", though as a unique case of one bordered by the land of two or more States. In the Memorandum entitled "Historic Bays" (A/CONF.13/1; UNCLOS I, *Official Records*, Vol. I, p. 1) drawn up by the United Nations Secretariat in 1957, this Gulf was the only example given in Part I, Section I ("The Practice of States: Some Examples of Historic Bays"), under sub-section B, "Bays the Coasts of Which Belong to Two or More States", but the explanations given therein did not go beyond a simple reference to the 1917 Judgment. The Gulf similarly appeared again, only with the explanation of the 1917 Judgment, in Part II, Section I ("Legal Status of the Waters of Bays Regarded as Historic Bays"), under sub-section B, "Historic Bays the Coasts of Which Belong to Two or More

States[1]." The writers of the United Nations documents seem to have given that Gulf a somewhat special treatment without offering any sufficiently convincing reasons, and did not suggest that the rules governing a "historic bay", if any, would apply in the particular case of pluri-State bays. Although the application of the term "historic bay" was extended to the altogether unique case of the Gulf of Fonseca, no rule was suggested for pluri-State bays as such. This is not surprising, since a unique case cannot be governed by the rules of a category: it requires the application of general principles.

30. Likewise, in the present case, the two Parties and the intervening State gave the name of "historic bay" to the Gulf of Fonseca simply because the 1917 Judgment so called it. But they never proved any established rules governing a "historic bay" bordered by the land of two or more States, or even that a concept of a "historic bay" covering such a case exists. The three States only concurred in maintaining that, because of its alleged historical background as well as its geographical features, some exceptional rules under international law should be applicable to the Gulf of Fonseca. They did not share any clear picture of the Gulf in spite of the common denomination of the term "historic bay". They showed a total lack of agreement or even of reciprocal understanding as to what elements could constitute a "historic bay" and what really was the concept of a "historic bay". Each of these three States seemed to sketch its own image just from the name "historic bay".

31. The Chamber, in defining the legal status of the waters of the Gulf, seems to depend greatly upon the 1917 Judgment of the Central American Court of Justice, which it

> "should take ... into account as a relevant precedent decision of a competent court, and as, in the words of Article 38 of the Court's Statute, 'a subsidiary means for the determination of rules of law'" (Judgment, para. 403).

[1] The Gulf of Fonseca is also referred to in another United Nations document prepared for UNCLOS I: "A Brief Geographical and Hydrographic Study of Bays and Estuaries, the Coasts of Which Belong to Different States", by Commander R. H. Kennedy (A/CONF.13/15; UNCLOS I, *Official Records*, Vol. I, p. 198) which does not require any explanation here.

The Chamber, relying simply upon the 1917 Judgment, states that "[t]his unanimous finding that the Gulf of Fonseca is an historic bay with the character of a closed sea presents now no great problem" (para. 394) and decides that "the Gulf of Fonseca is an historic bay . . ." (para. 432 (1)). It is hardly necessary for me to repeat that, from the standpoint of the development of the legal concepts of a bay or historic bay (as explained in Part II, above), the Gulf of Fonseca cannot, under the law of the sea, fall into the category of a bay or historic bay, the legal status of the waters of which must be a united body constituting "internal waters" of a single riparian State. By the same token, the Chamber's decision that

> "the waters [of the Gulf] . . . continue to be . . . held [in sovereignty by the three littoral States, jointly], . . . but excluding a belt . . . extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State . . ." (Judgment, para. 432 (1))

is clearly incompatible with the Chamber's description of the Gulf as a "historic bay", which description cannot, *a fortiori*, be used to sustain that decision. This point will be developed later in paragraph 38, below.

2. *The 1917 Judgment Re-examined*

32. How did the Central American Court of Justice proceed in order to characterize the Gulf of Fonseca as "a historic bay possessed of the characteristics of a closed sea" (trans. *AJIL*, Vol. 11, p. 716)? It simply drew its conclusion on the basis of the replies given by each judge of that Court in response to some questionnaires prepared in advance, among which one question read:

> "*Ninth question* — Taking into consideration the geographic and historic conditions, as well as the situation, extent and configuration of the Gulf of Fonseca, what is the international legal status of that Gulf?" (*Ibid.*, p. 693.)

It is also noted that "[t]he judges answered unanimously that [the Gulf of Fonseca] is an historic bay possessed of the characteristics of a closed sea" *(ibid.)*. No ground except for these answers of the judges is to be found in the 1917 Judgment which could justify the contention that the Gulf of Fonseca was a "historic bay", a concept hardly known to international law except in relation to a number of (geographical) bays where the authority of a single coastal State was for some historical reasons exercised even beyond range of cannon-shot (such as Delaware Bay, the Bristol Channel, etc.), and a term rarely used prior to the 1910 Award in the *North Atlantic Coast Fisheries* case.

33. Certainly the Central American Court of Justice did not demonstrate why the concept of a "historic bay", previously applied solely to some single-State bays, should apply in 1917 to the unique case of the Gulf of Fonseca, enclosed by more than one littoral State. It seems to have misinterpreted both the 1910 Award of the Permanent Court of Arbitration, which used the term "historic bay" only in the cases of a single-State bay referred to in many historical documents (as mentioned in paragraph 28 above), and Judge Drago's dissenting opinion appended thereto, which in this respect did not depart from the Award itself (*UNRIAA*, Vol. XI, pp. 167, 203).

34. Does the fact that the five judges of the Central American Court of Justice unanimously agreed that the Gulf of Fonseca was a "historic bay possessed of the characteristics of a closed sea" help us now to ascertain the positive legal status of that Gulf? Whatever respect may be owed to the 1917 Judgment, it seems a needless self-restriction on the part of the Chamber to have refrained from any critical inspection of its contents. Due account should have been taken of the following points in that 1917 Judgment. Firstly, it was delivered in a case between El Salvador and Nicaragua only, a case to which Honduras was not a party. Secondly, that Court was constituted by agreement between five Central American nations, including Honduras. Thirdly, Honduras had earlier lodged its objection to the proceedings before that Court, on the grounds that it had not been invited to participate. Fourthly, Honduras itself expressed its objection to the decision of the 1917 Judgment that the Gulf of Fonseca constituted a condominium, which concept, according to that Judgment, was a logical consequence of the use of the term "historic bay". Lastly, the legal status of the waters of the Gulf as between *all three riparian States* was not, at all events, necessarily at issue in the particular dispute submitted to the Central American Court. These various factors should be taken into account in considering the contention to the effect that the Gulf of Fonseca is now a "historic bay possessed of the characteristics of a closed sea". The most important fact at that time was that the concept of "historic bay = condominium" was introduced mainly in order to buttress El Salvador's contention that the building of a United States naval base on Nicaraguan territory, facing the Gulf, should not be permitted.

IV. The Legal Status of the Waters of the Gulf of Fonseca as Misconceived in the 1917 Judgment and in the Present Judgment

35. The 1917 Judgment suggested that the waters within the closing-line of the Gulf, which was a "historic bay possessed of the characteristics

of a closed sea", were subject to a condominium created by joint inheritance of an area which had been a unity in its entire history previous to the succession in 1821 and, being neither territorial sea nor internal waters, had been the object either of the joint ownership or of a condominium of the three riparian States since 1821. It is important, however, to note that in that Judgment the 1-marine-league belt would be excluded from that régime, the waters of that belt thus being divided between the three respective riparian States. In the concrete terms suggested by the Central American Court of Justice,

> "this Court has held [the Gulf of Fonseca] to belong to the category of *historic bays* and to be possessed of the characteristics of a *closed sea*" (trans. *AJIL*, Vol. 11, p. 707)

and

> "[t]he legal status of the Gulf of Fonseca having been recognized by this Court to be that of a historic bay possessed of the characteristics of a closed sea, the three riparian States of El Salvador, Honduras and Nicaragua are, therefore, recognized as coöwners of its waters, except as to the littoral marine league which is the exclusive property of each . . ." (*ibid.*, p. 716).

Likewise, the present Judgment finds that "the Gulf waters, other than the 3-mile maritime belts, are historic waters and subject to a joint sovereignty of the three coastal States" (para. 404). It also deems the waters of the Gulf to be "the subject of [a] condominium or co-ownership" (para. 412). Thus the Chamber decides that

> "the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by [the three littoral States], jointly, and continue to be so held . . ., but excluding a belt . . . extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, . . ." (para. 432 (1)).

36. This decision of the present Judgment which I have just quoted above (and similarly that of the 1917 Judgment) is the part of the whole Judgment which I find most difficult to understand. Does the Chamber suggest that the Gulf of Fonseca, as a historic bay claimed to have been inherited in 1821 or 1839 by El Salvador, Honduras and Nicaragua from Spain or the Federal Republic of Central America as a condominium without any division among them, is now composed of the (minimal) central part of the waters, which remains subject to the joint sovereignty of three States, while a 3-mile coastal belt along the entire coastline in the Gulf (actually occupying most of the Gulf) is apportioned individually to each of them respectively?

37. Topography and history indicate that, prior to 1821, the Gulf of Fonseca was surrounded by the territory of Spain, as a single State, and then until 1839 by the Federal Republic of Central America. Spain, and subsequently the Federal Republic of Central America, might have exercised a certain authority and control in its offshore waters. Yet there is no ground for believing that at times prior to 1821 or 1839 Spain or the Federal Republic of Central America had any control in the sea-waters beyond the traditionally accepted rule of the range of cannon-shot in the Gulf. Both the 1917 Judgment and the present Judgment depend on the hidden assumption that the maritime area in question was, prior to 1821 or 1839, not only "single and undivided" but also *in its entirety* (as a bay) within the territorial jurisdiction of a single riparian State. They overlook the basic fact that, in 1821 or 1839, there did not at the time exist any concept of a bay defined as a united body of waters in terms of geographical features and of the applicable legal status.

38. Another thesis implicit in the 1917 Judgment and the present Judgment, which heavily relies upon its predecessor, is — in the words of the latter — that "there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States" (Judgment, para. 399). This prompts the question: if the assumption of unitary status for the entire waters in the Gulf had been correct in 1821 or 1839, why should the 1917 Judgment and the present Judgment not have preferred the far more natural interpretation that, once the territory over which a single State, Spain, and later the Federal Republic of Central America, had sovereignty was divided into five States as a result of their independence, the authority over and control of the offshore waters (which had always been considered as appurtenances of the land) might have been divided correspondingly to the divided territories of those newly independent States, and that the three riparian States of El Salvador, Honduras and Nicaragua each inherited authority over and control of their respective offshore waters of their own land territory in the Gulf of Fonseca? Indeed, the 1917 Judgment itself had recognized "the littoral marine league which is *the exclusive property of each* [State]" (trans. *AJIL*, Vol. 11, p. 716; emphasis added), and the present Judgment recognizes

> "a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State" (Judgment, para. 432 (1)).

39. The Central American Court of Justice seems to have contradicted itself in suggesting at one and the same time the concept of "a single and undivided maritime area [having passed] to two or more new States, [thus]

creat[ing] a joint sovereignty" and that of "the littoral marine league which is the exclusive property of each [State]". It appears to me that the 1917 Judgment was based upon a local illusion as concerns the historical background of law and fact. If I may be allowed to add my view, the present Judgment perpetuates an error in depending on the 1917 Judgment and proposing in parallel "the waters of the Gulf . . . held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly" and "a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State" (Judgment, para. 432 (1)).

40. My query continues: what is the legal status of the waters described by the Judgment as follows: "the maritime belt in a pluri-State bay" (para. 392), "the 3-mile maritime belts of exclusive jurisdiction" (para. 393), "the littoral maritime belts subject to the single sovereignty of each of the coastal States, but with mutual rights of innocent passage" (para. 412), "the 3-mile belt of exclusive jurisdiction enjoyed by each of the States along its coast" (para. 413), "the 3-mile maritime littoral belt of exclusive jurisdiction within the Gulf" (para. 415), "the littoral maritime belts of 1 marine league along the coastlines of the Gulf" (para. 416), "the inner littoral maritime belts . . . not territorial seas in the sense of the modern law" *(ibid.)*, "the internal waters of the coastal State, not being subject to the joint sovereignty, and even though subject . . . to rights of innocent passage" *(ibid.)*, "the exclusive littoral maritime belts . . . limited to 3 miles in breadth" (para. 418), "internal waters subject to a single, exclusive sovereignty" *(ibid.)*? After all, what is the 3-mile coastal belt in the concept of the Judgment? I simply believe that the Chamber confuses the law of the sea in applying such unusual concepts.

41. With regard to the concept of condominium (or co-ownership) or of a joint sovereignty, which the Central American Court of Justice and the Chamber employed to define the waters of the Gulf of Fonseca excluding the 3-mile coastal belt (not of the whole area of the Gulf!), it must be noted that Honduras itself denies that the Gulf constitutes a condominium of the three riparian States of Honduras, El Salvador and Nicaragua and refers to the absence of an agreement between the States concerned. I agree that a condominium may be created by the consent of the States concerned with respect to the area to which those States could have originally been entitled. I am not suggesting any general rule that the concept of a condominium should not be applicable in maritime areas. The present Judgment refers to the case of the Baie du Figuier, where there has existed a zone of condominium possessed jointly by France and Spain since 1879 (Judgment, para. 401). This precedent does not, however, give any ground for justifying the status of a condominium for the Gulf of

Fonseca, in connection with which no agreement between the States concerned has ever existed. The rationale underlying the Baie du Figuier solution was that France and Spain agreed to keep the small area in that bay (which itself is so small, the mouth of it being about 3,000 metres across, that it could by the mere distance criterion have been under the jurisdiction of either State) under their joint administration for the common use of the anchorages in the roadsteads therein located (Déclaration pour la délimitation de la juridiction de la France et l'Espagne dans les eaux de la baie du Figuier, 1879, Ministère des Affaires Etrangères, *Traités et conventions en vigueur entre la France et les puissances étrangères*, Second Volume, 1919, p. 141); the question of separate title thus yielded to practicality. It is very evident that in the present case other considerations prevail.

42. I must also refer in this instance to the fact that, while the 1917 Judgment did not use the term, the Chamber alone attempts to rely on the concept of "historic waters" in order to define the waters of the Gulf of Fonseca. I must confess that I am extremely confused as to whether the Chamber is talking of "historic waters" for the whole area of the Gulf or the (minimal) central part of the Gulf excluding "the three-mile maritime belt". The Chamber states: that "[the Gulf of Fonseca] is an historic bay, . . . the waters of it are accordingly historic waters" (Judgment, para. 383), that "[w]hat does present a problem . . . is the precise character of the sovereignty which the three coastal States enjoy in these historic waters" (para. 395), that "[t]he essence of the 1917 decision concerning the legal status of the waters of the Gulf was . . . that these historic waters were then subject to a 'co-ownership' *(condominio)* of the three coastal States" (para. 398), that "the maritime area in question had long been historic waters under a single State's sovereignty" (para. 401), and that "the Gulf waters, other than the 3-mile maritime belts, are historic waters and subject to a joint sovereignty of the three coastal States" (para. 404). The Chamber seems simply to add confusion by its misconception of what constitutes "historic waters".

43. "Historic waters" were defined in the *Fisheries* case of 1951 as meaning "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title" (*I.C.J. Reports 1951*, p. 130). In fact, waters in the situation of those disputed in the 1951 case are by now enclosed as "internal waters" by an application of the new concept of straight baselines under the 1958 and 1982 Conventions, so that their "historic" background has become a superfluous reference. Similarly, a claim to a "historic bay" could have been justified by the status of its waters as "historic waters", but by now most bays known as "historic bays", such as Delaware Bay, Chesapeake Bay, the Bristol Channel or Conception Bay, have become, as I already stated above, ordinary bays because of the new rule of the 24-mile closing-line. Furthermore, some "historic waters" in a rather different situation have also been

the subject of a parallel evolution. In the course of the preparation for UNCLOS III, the delegate of the Philippines introduced a draft article concerning "historic waters" reading that "historic rights or title acquired by a State in a part of the sea adjacent to its coasts shall be recognized and safeguarded" (A/AC.138/SC.II/L.46) and another draft article on "breadth of territorial sea" reading that "the maximum limit [of the territorial sea] shall not apply to historic waters held by any State as its territorial sea" (A/CONF.138/SC.II/L.47/Rev.1). These proposals by the Philippines did not appear in any of the texts which were later brought to UNCLOS III. In fact, the waters which the Philippines intended to claim on grounds of historic rights or titles would have been brought under the jurisdiction of the coastal State in terms of the new concept of "archipelagic waters" under the 1982 Convention, which would have a *sui generis* status similar to that of territorial sea but not, however, to that of internal waters[1]. In other words, the concept of "historic waters" has become irrelevant in the case of the Philippines because of the agreed new concept of archipelagic waters.

44. In sum, the concept of "historic waters" has become practically a redundancy, which is perhaps why it does not appear in either the 1958 or the 1982 Conventions. In fact, it is not so much a concept as a description expressive of the historic title on the basis of which a claim to a particular status for certain waters has been made. Thus, firstly in the 1951 *Fisheries* case a claim to "historic waters" was used to justify the status of internal waters, secondly a claim to "historic waters" for the waters of a bay could have justified a concept of a "historic bay" the waters of which are "internal waters", and thirdly in another instance, i.e., in the case of the Philippines, it has been used to justify only the status of territorial sea, resulting in the emergence of a new *sui generis* concept of archipelagic waters. It follows, therefore, that "historic waters" have no special legal status different from the categories which have long been recognized, that is, either internal waters or territorial sea (or the newly recognized archipelagic waters): in other words, "historic waters" *as such* did not and do not exist as an independent institution in the law of the sea. I have to add this explanation because the essential implications of this terminology seem to have been overlooked in the present Judgment, particularly when I note in the Judgment the presumption that, the Gulf of Fonseca being "[a] historic

[1] The reference to "archipelagic internal waters" in the present Judgment (para. 393) is thus misleading.

bay, ... the waters of it *are accordingly* historic waters" (Judgment, para. 383; emphasis added).

V. The True Legal Status of the Waters of the Gulf of Fonseca: the Waters of the Gulf of Fonseca Consisting of the Territorial Seas of Each of the Riparian States

45. Since the time when the rather vague concept of the territorial waters or the coastal belt first emerged in the last century, the three riparian States of the Gulf of Fonseca had in principle maintained 1 league (3 miles) as the limit of their territorial seas and there was no evidence that their claims to territorial seas in the Gulf differed from their relevant claims elsewhere. In addition, the three riparian States seem to have exercised certain police powers for inspection beyond their respective 1-league territorial seas. El Salvador provided, in its Civil Code of 1860, in addition to the 1-league territorial sea, that police powers should be exercised outside the territorial sea to a distance of 4 leagues from the coast (*United Nations Legislative Series*, Vol. I; ST/LEG/SER.B/1, p. 71). This claim was repeated in the 1933 Navigation and Maritime Act (*ibid.*; see also Vol. VI; ST/LEG/SER.B/6, p. 126). Honduras likewise claimed in its 1906 Civil Code (*ibid.*, ST/LEG/SER.B/1, p. 71), in addition to the 1-league territorial sea, a 4-league belt for the exercise of its police power. Nicaragua is reported to have taken the same position. Such a competence on the part of the coastal State has been generally accepted since World War I, particularly through the new régime of the contiguous zone which the United States initiated in the bilateral treaties that it concluded with a number of States. In such circumstances, no objection by any State has ever been lodged against those three riparian States in connection with their additional claims to exercise police powers beyond the territorial sea.

46. Apart from those territorial claims over the waters of the Gulf, the three riparian States could early in this century have been united in considering that the small expanse of sea represented by the waters of the Gulf — which would in any event be covered by their respective territorial seas and police zones — should not remain open to free use by any State other than themselves. It would not have been surprising if the Gulf of Fonseca had politically been the subject of a common interest of the three riparian States, thus precluding unwished-for use or participation by other States, or if their attitudes in 1917 had featured a common confidence in rejecting the then prevailing "open seas" doctrine as applicable

to the waters of the Gulf of Fonseca. No evidence has been shown that they actually voiced such a rejection, or asserted a corresponding historic claim, jointly, and thus proposed for the Gulf a *sui generis* régime. Yet a tacit implication to that effect led El Salvador then to raise an objection to the establishment of a United States naval base on Nicaraguan territory, and also lent impetus to the Central American Court of Justice in naming the Gulf of Fonseca as a "historic bay" and in consecrating the idea of shared ownership of non-territorial waters. This has also led the three riparian States in the present case to unitedly denominate that Gulf as a "historic bay", even though, as I have suggested, this particular term has been used erroneously to describe the Gulf of Fonseca.

47. Whether or not any precise delimitation of the territorial sea and/or the zone for police powers was needed at any given moment for practical purposes, these waters in the Gulf could undoubtedly have been properly divided by boundary lines and, in fact, a boundary line was adopted in 1900 by a mixed commission established by Nicaragua and Honduras, a line extending an approximate distance of 20 nautical miles to a central point of the Gulf equidistant from the coasts of Honduras (El Tigre) and Nicaragua, which are more than 10 nautical miles apart. It is not known if the Governments either of Honduras or of Nicaragua had any clear idea of the status of the waters they were then dividing. Yet Honduras could certainly have proceeded to the same exercise of drawing a boundary in relation to El Salvador, though this would in practical terms have been more difficult owing to the existence of scattered islands in the western part of the Gulf.

48. In the light of the claims made in the post-war period by the Latin American States to a distance of 12 miles for the territorial sea, and given the universally agreed 12-mile limit to the territorial sea under the new régime of the law of the sea, the Gulf of Fonseca must now be deemed to be totally covered by the territorial seas of the three riparian States. It cannot, moreover, be disputed that the area which had previously been claimed by each of these States for the exercise of its police powers has been completely absorbed in the extended 12-mile territorial sea in the Gulf. Thus I conclude that the waters within the Gulf of Fonseca now consist of the territorial seas of three riparian States, without leaving any maritime space beyond the 12-mile distance from any part of the coasts. This, to my mind, is the legal status of those waters.

49. As to any more specific decision, the Chamber is not in a position to make any delimitation of the territorial sea of these three riparian States in the Gulf (Judgment, para. 432 (2)). Nevertheless, Article 15 of the 1982 United Nations Convention cannot be ignored:

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

In other words, the equidistance method is the rule in delimitation of the territorial sea of the neighbouring States either opposite or adjacent to each other, and the shape of the coast as a baseline is of importance for measuring the territorial sea. I do not see that any historic title or other special circumstances have been advanced by either El Salvador or Honduras which would justify any departure from the application of the general rule of the "equidistance line". In the particular instance of the Gulf of Fonseca, the terminal points of the land boundaries between El Salvador and Honduras, and between Honduras and Nicaragua, are of crucial significance for the delimitation of the respective territorial seas. The Chamber has determined that the terminal point of the territorial boundary between El Salvador and Honduras is north-west of the Islas Ramaditas at the mouth of the river Goascorán. In addition, sovereignty over the islands located in the Gulf is one of the factors to be taken into account, and the islands of Meanguera and Meanguerita are determined by the Chamber as being under the sovereignty of El Salvador.

50. It seems to be clear from the geographical point of view that Honduras, sandwiched between El Salvador and Nicaragua in the Gulf, is not entitled to claim any territorial sea beyond the meeting point somewhere in the Gulf of the respective territorial seas of the three riparian States, which may well be determined, if necessary, by agreement among themselves or by any other means that they may deem fit. I must emphasize at this juncture that, while the delimitation of the exclusive economic zone and the continental shelf between the neighbouring States should be effected "in order to achieve an equitable solution" (1982 United Nations Convention, Arts. 74 and 83), application of the equidistance method remains a rule in the delimitation of the territorial sea.

VI. The Rights of Honduras within and outside the Gulf of Fonseca

(i) *Within the Gulf*

51. It cannot be overlooked that Honduras, whose territorial title to waters in the Gulf is locked within the Gulf itself, has always enjoyed the

right of innocent passage through the traditional 3-mile territorial sea and certainly will also be guaranteed this right through the now expanded territorial seas of the other two riparian States, El Salvador and Nicaragua, which territorial seas meet within the Gulf. The Chamber, in defining the legal status of the waters of the Gulf, seems to be motivated by its concern about the passage of vessels, whether of Honduras or of other foreign nations, to and from the Pacific Ocean, but the right of innocent passage is, in any event, protected by international law even in the territorial sea of any State.

52. I must add, furthermore, that given the large measure of mutual understanding displayed by the three riparian States in respect of the common interest derived from their geographical location bordering on the Gulf, it may be possible (under a new concept enshrined in the 1982 United Nations Convention) for them, as "States bordering an enclosed or semi-enclosed sea", to accept their obligation of "[co-operation] with each other in the exercise of their rights and in the performance of their duties under this Convention", as provided for under Part IX of the 1982 United Nations Convention on the Law of the Sea, entitled "Enclosed or Semi-Enclosed Sea" (Art. 123).

(ii) *Outside the Gulf*

53. I believe that I have sufficiently demonstrated the reasons why I am unable to associate myself with the present Judgment's finding to the effect that, since a condominium of three States extends up to the closing-line of the Gulf, Honduras, as one of the three, is entitled to claim an exclusive economic zone and continental shelf outside the Gulf. Such a finding is hardly tenable in the light of any rule, traditional or contemporary, of the law of the sea. Because of its geographical situation, Honduras cannot lay claim, in the offshore areas of the Pacific coast outside the Gulf, to any territorial title in terms of the territorial sea, the continental shelf or the exclusive economic zone. This is a geographical reality of nature which — if I may adopt the Court's dictum in the *North Sea Continental Shelf* cases — there "can never be any question of completely refashioning" (*I.C.J. Reports 1969*, p. 49, at para. 91).

54. Of course, as I have already stated, Honduras is fully guaranteed access to the high seas of the Pacific Ocean outside the Gulf of Fonseca by the unchallenged concept of innocent passage through the territorial seas of the two neighbouring States both within and without the Gulf.

55. The concept of the continental shelf and the exclusive economic zone has recently been developed to extend coastal jurisdiction to vast offshore areas which had traditionally been regarded as a part of the high

seas. Thus the interests of the coastal State have been strengthened and expanded — albeit at the expense of the general and common interests of the international community to be enjoyed on the high seas — and the general interests capable of being asserted by the international community on the high seas are now diminished (although the navigation interests of non-coastal nations remain unaffected in those expanded areas). In return for that sacrifice, land-locked States and geographically disadvantaged nations are assured, under the 1982 United Nations Convention on the Law of the Sea, of:

> "the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same sub-region or region . . ." (Art. 69, para. 1, and Art. 70, para. 1).

The "geographically disadvantaged States" are meant to include:

> "States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own" (Art. 70, para. 2).

This new concept of the "right to fish" in the exclusive economic zone of the neighbouring State was introduced into the new régime of the seas to compensate geographically disadvantaged States which might otherwise have suffered owing to the expanded coastal jurisdiction of these neighbouring States placed geographically in a better position. I should refrain at this juncture from taking any interpretative position on the question whether, in view of the fact that it has a long coastline on the Atlantic side — thus enabling it to claim its own exclusive economic zone in that region —, Honduras falls within the definition of "geographically disadvantaged States", which would enable it to claim in the Pacific Ocean the rights of "geographically disadvantaged States" under the 1982 United Nations Convention. I would simply suggest that the possibility of Honduras claiming or being granted such a right in the exclusive economic zones in the Pacific of its two neighbouring States may not be excluded.

(Signed) Shigeru ODA.
