

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

**CASE CONCERNING THE LAND, ISLAND  
AND MARITIME FRONTIER DISPUTE**

(EL SALVADOR/HONDURAS: NICARAGUA intervening)

VOLUME VI

Written Statement of Nicaragua; Written Observations of El Salvador  
and Honduras; Documents; Oral Arguments



COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

**AFFAIRE DU DIFFÉREND FRONTALIER  
TERRESTRE, INSULAIRE ET MARITIME**

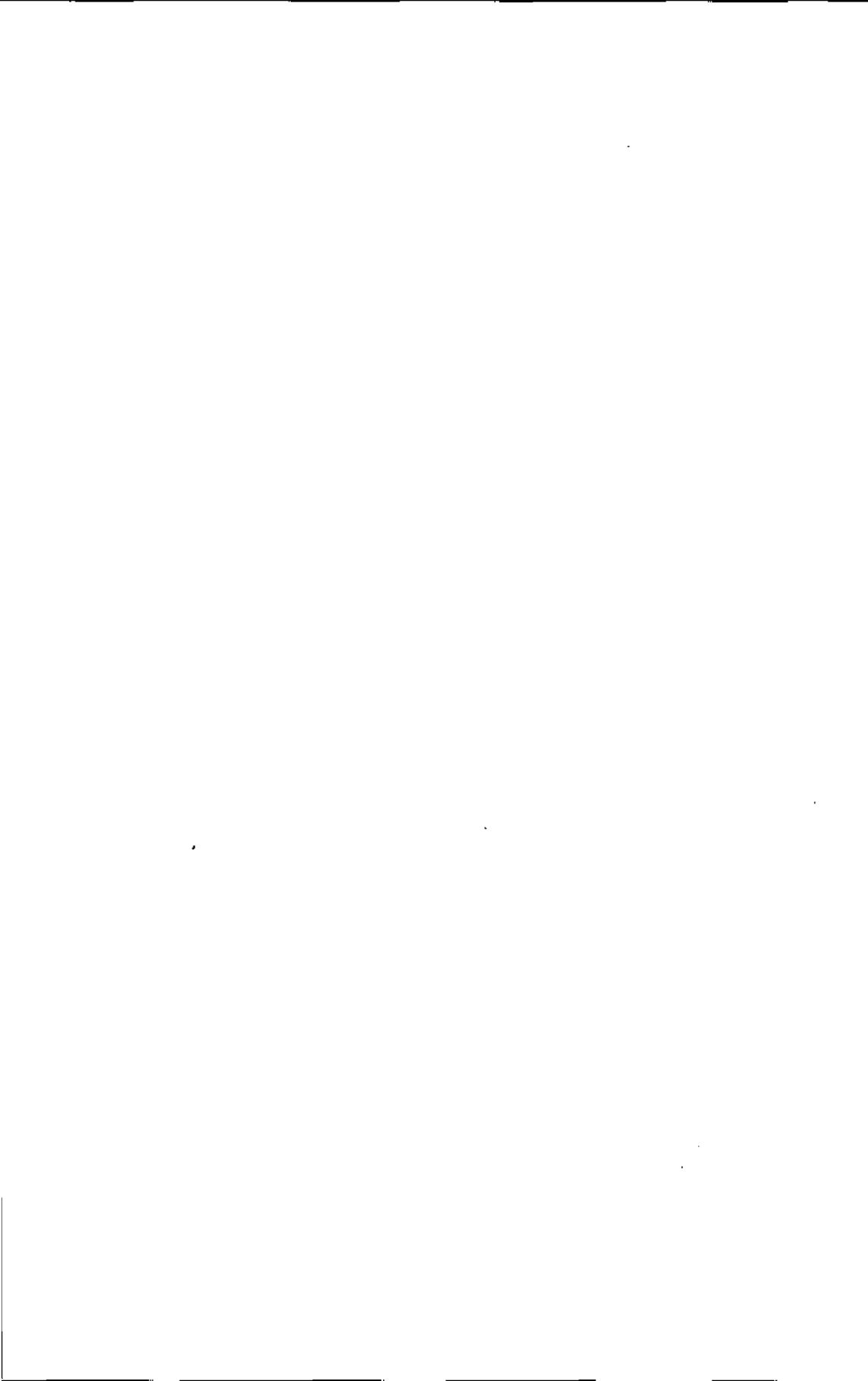
(EL SALVADOR/HONDURAS; NICARAGUA (intervenant))

VOLUME VI

Déclaration écrite du Nicaragua; observations écrites d'El Salvador  
et du Honduras; documents; procédure orale



**WRITTEN STATEMENT OF NICARAGUA**  
**DÉCLARATION ÉCRITE DU NICARAGUA**



## INTRODUCTION

This Written Statement of the Republic of Nicaragua is submitted in accordance with the Order of 14 September 1990 given by the President of the Chamber in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*.

### PART I. PRELIMINARY QUESTIONS

#### Section A. Procedural History

1. Nicaragua initiated this procedure that has brought it before the Chamber by originally addressing a letter to the full Court on 20 April 1988 conveying the view of the Government to the effect that Nicaragua had an interest of a legal nature which could be affected by a decision of this Chamber. In that same letter, Nicaragua, in reliance on the principle of consent, reserved its position generally in relation to the Court's Order of 8 May 1987, that is, the Order that created the Chamber.

2. Consistent with the position it had reserved, Nicaragua filed its Application for permission to intervene on 17 November 1989, not before the Chamber, but before the full Court. In its Order of 28 February 1990 the Court found that it was for the Chamber to decide whether Nicaragua's Application for permission to intervene under Article 62 of the Statute should be granted.

3. Nicaragua duly participated in the procedure ordered by the Chamber of the Court and presented its case of intervention in accordance with Article 62 of the Statute.

4. Oral hearings were held from 5 to 8 June 1990 and, finally, the Chamber rendered its Judgment of 13 September 1990 in which it decided that Nicaragua was permitted to intervene in the case in the manner and within the limits set out in the Judgment. These limitations imposed on the Nicaraguan intervention were based on the unanimous finding of the Chamber:

“that the Republic of Nicaragua has shown that it has an interest of a legal nature which may be affected by part of the Judgment of the Chamber on the merits in the present case, namely its decision on the legal régime of the waters of the gulf of Fonseca, but has not shown such an interest which may be affected by any decision which the Chamber may be required to make concerning the delimitation of those waters, or any decision as to the legal situation of the maritime spaces outside the Gulf, or any decision as to the legal situation of the islands in the Gulf (*I.C.J. Reports 1990*, p. 92, para. 105).

This limitation imposed on the intervention of Nicaragua warrants some preliminary comments.

#### Section B. Nicaragua's Attitude on Intervention

##### 1. Italian Intervention Case

5. In the case of the Italian application to intervene, the Court decided to isolate what it considered to be the “real issue in the case” and concluded that:

"While formally Italy requests the Court to safeguard its rights, it appears to the Court that the unavoidable practical effect of its request is that the Court will be called upon to recognize those rights, and hence, for the purpose of being able to do so, to make a finding, at least in part, on disputes between Italy and one or both of the Parties." (*I.C.J. Reports 1984*, p. 19, para. 33 *in fine*.)

6. Judge Schwebel, in his dissenting opinion, interpreted the Judgment of the Court in the Italian intervention in the following way.

"Since Italy seeks permission to intervene in order to defend claims to certain continental shelf zones to which Malta and Libya lay claim the Court's Judgment holds that in reality Italy seeks to assert claims and thus establish rights against the principal Parties." (*I.C.J. Reports 1984*, p. 139, para. 18.)

7. It is true that several distinguished Members of the Court dissented from this interpretation of the majority decision, including Judge Schwebel. Judge Ago, for example, noted that

"Italy was not seeking to have its rights recognized, but solely to have the fact noted that it considered itself to possess such rights" (p. 122, para. 13).

8. Then Judge Sette-Camara indicated that he did not see how the Judgment can identify in the object of the Italian application a "distinct dispute" (para. 70).

9. For a prospective intervenor in the situation of Nicaragua the fact remained that, in spite of such prominent dissidents, the majority had a different view. Therefore, Nicaragua tried as carefully as possible to remain within the very strict limits imposed in this decision.

10. This precaution was explained in general by the Nicaraguan Agent in the opening statement in the oral hearings of 5 June 1990 (see verbatim record of the public sitting of the Chamber held on 5 June 1990 at 11 a.m., pp. 26-27). Nicaragua explained in the second round of oral pleadings,

"that our application for permission to intervene is not based on a particular interpretation of Article 62 that ignores the previous decisions. Quite the contrary, and in spite of our opinion as to the logic or fairness of the precedents, we have been very careful not to ignore as irrelevant and much less to purposely fall into the legal traps in which the full court found both Malta and Italy had fallen.

We have been at pains in keeping our application within the limits set in both previous decisions. In doing this we have tried to adjust as much as possible the definition of the object we seek with this intervention and the indication of the legal interests that would be affected by any decision on this case, to those parameters judged permissible in the previous cases." (Verbatim record of the public sitting of the Chamber held on 8 June 1990 at 2 p.m., p. 15.)

11. During the oral hearings Nicaragua tried to make it as clear as possible that it was ready to supply the Chamber with any further details:

"In this regard, I would wish to anticipate any possibility of misunderstanding by requesting that the Chamber make use of Article 49 of the Statute and call upon the Agent who will be glad to produce any document or supply any explanations that may be deemed necessary or useful.

Furthermore, if the Chamber should feel that the application of Nicaragua goes too far or remains too limited, Nicaragua would be willing to

adjust to any procedure indicated by the Chamber. The only thing Nicaragua seeks is to protect its legal interests and it will do so in any way the Statute allows." (Verbatim record of the public sitting of the Chamber held on 5 June 1990 at 11 a.m., p. 27.)

12. If the Chamber was not satisfied that Nicaragua had clarified its interests in certain areas, it would have been quite simple for the Chamber to have posed questions to the Nicaraguan Agent in the same way that Judge de Lacharrière had posed a question to the Italian Agent with the object of identifying the location of the Italian interests.

13. Of course, the answer to any such question would have put Nicaragua in much the same position as Italy, but apparently the resulting Judgment of the Chamber would conceivably have been different. Unfortunately for the intervening States the institution of intervention continues "to give rise to contradictory views from the Court", as Judge Ago aptly remarked. (*I.C.J. Reports 1984*, p. 129.)

## 2. Geographical Considerations

### *In general*

14. The Gulf of Fonseca is described by the Chamber in the following manner:

"The Gulf of Fonseca lies on the Pacific Coast of Central America, opening to the ocean in a generally south-westerly direction. The north-west coast of the Gulf is the land territory of El Salvador, and the south-east coast that of Nicaragua; the land territory of Honduras lies between the two, with a substantial coast on the inner part of the Gulf. The entry to the Gulf, between Punta Amapala in El Salvador to the north-west, and Punta Cosigüina in Nicaragua to the south-east, is some 19 nautical miles wide. The penetration of the Gulf from a line drawn between these points varies between 30 and 32 nautical miles. Within the Gulf of Fonseca, there is a considerable number of islands and islets." (*I.C.J. Reports 1990*, p. 92, para. 24.)

15. For Nicaragua it is evident that no decision could be taken inside these narrow waters without affecting its rights. If this remark had been made 70 years ago, when generally accepted principles of international law only admitted a 3-mile territorial sea, it is quite clear that the situation would not have been obvious. Apparently the evolution of international law, as applicable to the Gulf of Fonseca, was not adequately taken into account by the Chamber:

"The contention that in the Gulf of Fonseca 'it would be impossible to carry out a delimitation which took into account only the coasts in the Gulf of two of the three riparian States' would be more convincing were it not for the fact that in 1900 a maritime boundary was defined in the Gulf between Nicaragua and Honduras." (Para. 77.)

16. This reasoning in the Judgment of 13 September 1990 fails to note the difference between delimiting in 1900 inside the Gulf of Fonseca when the 3-mile limit was in force, to delimiting today inside this small gulf when the territorial waters of States are universally considered to go to greater distances.

### *Distances involved inside the Gulf*

17. The distances involved and the nature of the Gulf that is appropriately described as having "a considerable number of islands and islets" are elements

that, of themselves, in other similar situations, have provoked the caution of the courts.

“While the legal position taken up by the Parties in response to the Court’s questions regarding its competence under the Arbitration Agreement oblige the Court to leave the delimitation of the seabed and subsoil boundary in the Channel Islands region to the discretion of the Parties, it believes that certain practical considerations may also favour this course. *In narrow waters such as these, strewn with islets and rocks, coastal States have a certain liberty in their choice of base-points; and the selection of base-points for arriving at a median line in such waters which is at once practical and equitable appears to be a matter peculiarly suitable for determination by direct negotiations between the Parties.*” (Decision of the Court of Arbitration dated 30 June 1977 between the United Kingdom and France on the delimitation of the continental shelf, para. 22 *in fine*, emphasis added.)

18. The importance of the relation between distance and security in delimitation has been taken into account by the Court in previous decisions. In the *Libyal Malta* delimitation the Court observed:

“In any event, the delimitation which will result from the application of the present Judgment is, as will be seen below, not so near to the coast of either Party as to make questions of security a particular consideration in the present case.” (*I.C.J. Reports 1985*, p. 13, para. 51.)

#### *Security interests*

19. The security interests of a riparian State in waters of this magnitude are self-evident. Even in 1917, when the Central American Court of Justice adopted the decision on which El Salvador bases its contentions, and the 3-mile limit was in force, the security implications of any action by a riparian were paramount. The pleadings of the Parties to the case are rife with reference to security interests. How can there be security interests inside the Gulf of only 2 out of the 3 riparians?

20. The United Kingdom and France made frequent reference “regarding their respective navigational defence and security interests” in the English Channel, but the Court of Arbitration found that

“the weight of such considerations in this region is, in any event, somewhat diminished by the very particular character of the English Channel as a major route of international maritime navigation serving ports outside the territories of either of the Parties. Consequently, they cannot be regarded by the Court as exercising a decisive influence on the delimitation boundary in the present case.” (Para. 188.)

21. The reasoning of the Court of Arbitration, *contrario sensu*, would be that in a Gulf with the evident characteristics of the Gulf of Fonseca, the considerations regarding the navigational defence and security interests of the riparians can be regarded “as exercising a decisive influence on the delimitation”.

#### *Alleged Honduran rights near the Nicaraguan Islands of Farallones*

22. During the oral hearings Counsel for Honduras stated that the 1900 delimitation between Nicaragua and Honduras “runs from the terminal point of the land boundary . . . to Farallones” (verbatim record of the public sitting of

the Chamber on 7 June 1990, at 10 a.m., p. 39). The Nicaraguan Agent denied this fact in the public sitting held the following day at 2 p.m. (see page 19 of the verbatim record). A simple perusal of the description of Acta (see Annex 1) shows that the definitive western terminus of the 1900 alignment is not at Farallones but "at the centre of the distance between the northern part of Punta de Cosigüina and the southern part of the island of El Tigre."

23. If this exchange at the oral hearings was an attempt to play on the different names given to places in the Gulf of Fonseca area, then the Chamber should be quite clear — as Honduras undoubtedly is — that the Punta Cosigüina name is given to the whole mass of land where the Cosigüina volcano is situated and that the northern part of this area is known by various names: Money Penny, Rosario and San José.

24. In order to clarify this multiplicity of names it is enough to mention that there is an appended description to the Acta II, signed by the Mixed Boundary Commission (Annex 1), that clarifies that Punta de Cosigüina is also known as Money Penny Point.

25. The same indication can be seen in the Judgment of the Central American Court of Justice of 9 March 1917:

"The division adjusted with Nicaragua (and Honduras) is the only one that still subsists. The line of this division appears on the maps here presented as running to a point midway between the southern part of Tigre Island and the northern part of *Cosigüina Point (Money Penny, or Rosario Point)* . . ." (Emphasis added: see *AJIL*, 1917, p. 710.)

#### *Alleged Honduran rights outside the Gulf*

26. The contention of Honduras that it has rights outside the Gulf trenches on the rights of Nicaragua relative to her maritime territory. If Honduras has sovereignty over parts of the mouth of the Gulf it could only be at the cost of Nicaragua and El Salvador territory. The Honduran mainland is more than 20 miles distant from the mouth of the Gulf, while the distance between Nicaragua and El Salvador at the closing of the Gulf is under 20 miles, as the Chamber has duly noted in paragraph 24 of its Judgment quoted above. Today, almost unanimously the nations of the world accept a 12-mile limit of territorial waters.

27. If the Honduran claim were accepted and — since the position of the riparians is far from clear on this point — the waters of the Gulf are not considered internal waters, then a possible result would be that a claim of a continental shelf or some such right (which would presumably commence somewhere inside the Gulf for Honduras) would have preference over the territorial waters (but, nonetheless, territory proper) of Nicaragua and El Salvador. This contention would have the effect of cutting through Nicaraguan and Salvadoran territorial waters through the mouth of the Gulf, or of separating the waters and rights of the sovereigns at the mouth of the Gulf — like Moses the Red Sea — in order to allow Honduras rights outside the Gulf.

28. The above contention is equally applicable if the waters of the Gulf are considered internal waters. There is no juridical reason for considering that Honduras has some form of preference that extends its sovereign internal waters farther than the internal waters of Nicaragua and El Salvador. If the internal waters of Honduras — in this hypothesis — were to extend to the Pacific, then the Honduran internal waters in the Gulf would extend beyond 20 miles while those of Nicaragua and El Salvador would be limited to some form of seashore or beach of less than 5 miles each.

29. The statements made so far can be clearly deduced from the description of the Gulf of Fonseca which is given by the Chamber in the quoted paragraph, without even resorting to a map. For this reason Nicaragua took the position it adopted at the oral hearings. No need was seen for describing specific rights since these resulted from any description of the Gulf.

*El Salvadoran acceptance of Nicaraguan position*

30. This assumption by Nicaragua of the self-evident nature of its interest is clearly accepted by El Salvador:

“even if El Salvador were to agree with Honduras that the respective claims of the two Parties in the Pacific should be delimited by the Court, the court would not be able to proceed to such a delimitation without the participation of Nicaragua” (Counter-Memorial of El Salvador, p. 256).

“the inescapable interest that Nicaragua would have in any delimitation . . .” (Counter-Memorial of El Salvador, p. 284).

31. The pleadings of El Salvador indicate that it considers that any delimitation inside the Gulf can only take place with Nicaraguan participation. Furthermore, it is clear that El Salvador considers that if there is no condominium of the waters of the Gulf then, in substantial parts of it, the only delimitation possible is between El Salvador and Nicaragua. This was also the thinking of the Central American Court of Justice as can be seen in the passage from the 1917 Judgment quoted by the Chamber in paragraph 29 of its Judgment of 13 September 1990:

“Consequently, it must be concluded that, with the exception of that part [sc., the area delimited between Honduras and Nicaragua], the rest of the waters of the Gulf have remained undivided and in a state of community between El Salvador and Nicaragua, and that, by reason of the particular configuration of the Gulf, those waters, though remaining face to face, were . . . confounded by overlapping.”

32. On the other hand the, in many cases, quaint considerations of the Central American Court cannot obscure the fact — which they acknowledged — that Honduras had no claims against Nicaragua that went beyond the delimitation line of 1900. The modern law of the sea cannot give to Honduras rights that it could only have if Nicaraguan territory were not interposed between it and the Pacific.

33. In this content, it is interesting to note that the thesis of the condominium is, in reality, only halfheartedly upheld by El Salvador. The following passage is significant:

“the Gulf of Fonseca is also today, without prejudice to the fact that it remains an historic bay, a juridical bay. As a result of the evolution in the Law of the Sea that has occurred in recent years, the Gulf of Fonseca has been converted into a juridical bay simply because it fulfils the preconditions laid down in Article 10 of the United Nations Convention on the Law of the Sea of 1982 in that its mouth and its closing line comprise less than twenty-four nautical miles while it amply satisfies the other requirements of that Article.” (Counter-Memorial of El Salvador, p. 216.)

34. It is certainly true that the Law of the Sea has evolved considerably since the days of the Judgment of the Central American Court in 1917 and the delimitation with Honduras in 1900. The fact that El Salvador recognizes that the Gulf

of Fonseca is now a juridical bay is a clear recognition that there is no condominium inside the Gulf since this "condominium" has become a moot question in view of the extent that modern laws allow for territorial waters.

35. The rights of Nicaragua to its waters and shelf inside the Gulf exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land. So also with the rights of El Salvador that now, according to modern law, is a neighbour of Nicaragua with a common border in the waters of the Gulf.

### 3. Nicaragua's Obligations as an Intervenor

36. Paragraph 38 *in fine* of the Judgment of 13 September 1990 has an expression that warrants certain consideration. The Chamber describes Nicaragua's Application for permission to intervene and notes:

"Nicaragua goes on to state that it 'intends to subject itself to the binding effect of the decision to be given' (Application, para. 6). *The Chamber takes note of that statement.*" (Emphasis added.)

37. It is the understanding of Nicaragua that as a non-party in this case, it cannot be affected by the decision of the Chamber on the merits. As a non-party Nicaragua is under the protection of Article 59 of the Statute of the Court and the right it has acquired by having its Application admitted is fundamentally the right to be heard by the Chamber. With respect to Nicaragua, the decision to be rendered by the Chamber on the merits will remain *res inter alios acta*. Nicaragua understands that this is the clear meaning of paragraph 102 of the Judgment of 13 September 1990:

"the intervening State does not become party to the proceedings, and does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law. Nicaragua, as an intervener, has of course a right to be heard by the Chamber."

38. What Nicaragua seeks with its intervention is for the Chamber to be aware where the interests of Nicaragua lie in order that they be fully respected. Since both Honduras and El Salvador have objected the Nicaraguan intervention in one way or another, it is convenient to recall what the Court stated in the case of the Italian Application for permission to intervene:

"If, as Italy has suggested, the decision of the Court in the present case, taken without Italy's participation, had for that reason to be more limited in scope between the Parties themselves, and subject to more caveats and reservations in favour of third States, than it might otherwise have been had Italy been present, it is the interests of Libya and Malta which might be affected and not those of Italy. It is material to recall that Libya and Malta, by objecting to the intervention of Italy, have indicated their own preferences." (*I.C.J. Reports 1984*, p. 27, para. 43.)

39. It is true that this "deference to Italy's claims", as Judge Schwebel called it in his separate opinion to the decision on the merits, was criticized among other things, because:

"it is hard to see how, at the time Libya and Malta opposed Italy's request, they could have known the 'probability' of the restricted scope of a judgment on the merits which had yet to be written" (*I.C.J. Reports 1985*, p. 176).

40. Of course, it should not be lost to sight that neither Honduras nor El Salvador could claim such ignorance of the foreseeable consequences, particularly in a relatively restricted setting such as the Gulf of Fonseca, quite different from the mid-Mediterranean Sea.

41. The fact that the intervention of Nicaragua — unlike the Italian intervention — has been admitted cannot change the situation since Nicaragua has only been admitted as a “non-party”. The Court cannot adjudge on areas that might “appertain” to third States — and Nicaragua as a non-party is such a “third State” to these proceedings. Therefore, the decision must be limited to a geographical area in which no such claims exist. As the Judgment in the merits phase of the *Libyal/Malta* delimitation case avowed:

“The present decision must, as then foreshadowed, be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights.” (*J.C.J. Reports 1985*, p. 13, para. 21.)

42. For this purpose Nicaragua considers it necessary to inform the Chamber of its claims so that the decision of the Chamber be confined to those areas in which Nicaragua has no claims.

43 Therefore, for the public record, Nicaragua considers the situation of the Gulf to be as follows.

### Section C. Nicaragua's Attitude on Delimitation

#### *The situation of the Gulf:*

##### *1. In General*

44. The essential elements in the picture of legal interests within the Gulf are as follows:

- (a) The absence of any régime of condominium.
- (b) The absence of any régime of community of interests.
- (c) The existence of a delimitation between Nicaragua and Honduras in accordance with Acta II of 1900.
- (d) The entitlement of Nicaragua to a delimitation in the western and southern parts of the Gulf on the basis of the pertinent rules and principles of general international law.

##### *2. The Delimitation with Honduras in 1900*

45. This delimitation has a definitive terminus equidistant from the northern part of Punta Cosigüina and the southern part of the island of El Tigre. This is the unequivocal meaning of the text of Acta II agreed on 12 June 1900. The definitive character of this delimitation has remained unchallenged since 1900.

46. The delimitation of 1900 has been recognized by El Salvador. It was not the subject of protest at the time and its validity has not been challenged in the pleadings presented by Honduras in the present case.

47. The text of the Judgment of the Central American Court of Justice of 1917 expressly recognizes the validity of the delimitation of 1900 (*American Journal*, 1917, p. 711). This delimitation was also accepted as a *datum* by the Arbitral Award of the King of Spain of 23 December 1906 (*Reports of Interna-*

*tional Arbitral Awards*, Vol. XI, p. III) and the case concerning the *Arbitral Award Made by the King of Spain* (*I.C.J. Reports 1960*, p. 192 at p. 202).

### 3. *Delimitation within the Gulf*

48. In order to complete the picture and to maintain the sharpness of focus called for in considering the entitlements of States to territorial sovereignty, the Government of Nicaragua will indicate the *principle* of the maritime delimitation which remains to be agreed within the Gulf.

49. In the view of the Government of Nicaragua the western terminus of the delimitation of 1900 with Honduras is definitive. For this and other reasons, there is no basis for any further delimitation involving Honduras in the Gulf unless Honduras is held to be entitled to Meanguera. However, the character of the alignment claimed by Nicaragua within the Gulf is not affected by the contingency that Honduras will be recognized as entitled to Meanguera.

50. For the purposes of an equitable delimitation between Nicaragua and El Salvador and/or Honduras within the Gulf, four data are to be accepted:

- (a) The eastern terminus is constituted by the terminus of the delimitation of 1900.
- (b) The western terminus is constituted by the median point of the closing line of the Gulf of Fonseca.
- (c) Meanguera is to be given full effect but exclusively inside the Gulf.
- (d) Farallones is to be given full effect but exclusively inside the Gulf.

51. Taking these four data into account an equitable solution is to be agreed upon by the pertinent coastal States in accordance with the rules and principles of general international law. The geographical circumstances of the area and the coastal relationships justify an alignment based upon the method of equidistance.

### 4. *Delimitation outside the Gulf*

52. In order to complete the picture the Government of Nicaragua finds it necessary to state that the alignment indicated in the previous paragraph would, in accordance with the principles of general international law applicable to maritime delimitation, continue its course beyond the closing line of the Gulf by means of a segment consisting of a perpendicular to the closing line of the Gulf of Fonseca.

## PART II. THE SALVADORAN CONTENTION THAT THE GULF IS SUBJECT TO A CONDOMINIUM

### 1. *Purpose*

1. The purpose of this part of the present pleading is to refute the contention of the Government of El Salvador that the Gulf of Fonseca is subject to a régime of condominium in accordance with the principles of public international law.

### 2. *The Consequences of the Dissolution of the Central American Federation in 1838*

2. The evidence supports the conclusion that in Latin American practice the succession to Spanish title did not result in a community of rights as between

the successor States. The practice was no different when the Central American Federation was dissolved in 1838. The normal practice was for the riparian States to regulate the status of the gulfs or bays by means of treaties.

3. This conclusion is confirmed by other basic considerations. In the first place, there is no generally accepted rule of customary law to the effect that State succession produces a condominium in the case of bays with two or more riparians (see Verzijl, in *Mélanges Basdevant*, Paris, 1960, pp. 505-506). Secondly, the practice of the riparian States of the Gulf of Fonseca did not indicate the existence of a condominium, with the partial exception of El Salvador, which waited from 1838 until 1913, a period of seventy-five years, before deciding to assert that a condominium existed. The practice of the riparians will be examined in due course.

### 3. *The Consistent Position of the Government of Nicaragua*

4. The consistent position of the Government of Nicaragua throughout the material period has been that no condominium exists in the Gulf. The evidence takes the form of bilateral treaties, successive constitutions, diplomatic notes of the period 1914 to 1917, and diplomatic notes of the period 1981 to 1985. The evidence relates to a very long period and is remarkably consistent.

#### *Bilateral treaties*

5. The Gámez-Bonilla Treaty was concluded on 7 October 1894 by the Governments of Honduras and Nicaragua (*I.C.J. Reports 1960*, p. 199). The two Governments agreed to constitute a Mixed Boundary Commission in order to settle differences and to demarcate the boundary line. The work of this Commission was recorded in a series of separate agreements of which Acta II, agreed on 12 June 1900 (Annex 1), is relevant for present purposes. The text, in pertinent part, reads as follows:

“Desde el punto conocido con el nombre de Amatillo, en la parte inferior del río Negro, la línea limítrofe es una recta trazada en dirección al volcán de Cosigüina, con rumbo astronómico Sur, ochenta y seis grados treinta minutos Oeste (S. 86° 30' O), y distancia aproximada de treinta y siete kilómetros (37 kms) hasta el punto medio de la bahía de Fonseca, equidistante de las costas de una y otra República, por este lado; y de este punto, sigue la división de las aguas de la bahía por una línea, también equidistante de las mencionadas costas, hasta llegar al centro de la distancia que hay entre la parte septentrional de la Punta de Cosigüina y la meridional de la isla de El Tigre.”

This text is translated in paragraph 26 of the Judgment of 13 September 1990 as follows:

“From the point known as Amatillo, in the lower reaches of the River Negro, the delimitation is a straight line drawn in the direction of the volcano of Cosigüina, astronomic bearing south, 86 degrees, 30 minutes west (S. 86° 30' W.), for a distance of approximately thirty-seven kilometres (37 km) to the central point of the Bay of Fonseca, equidistant from the coasts of the two Republics, on this side; and from that point it follows the division of the waters of the bay by a line, also equidistant from the said coasts, to arrive at the centre of the distance between the northern part of Punta de Cosigüina and the southern part of the island of El Tigre.”

6. In the same vein, El Salvador and Honduras concluded a convention intended to establish definitive maritime boundaries in the Gulf in 1884 (see below, para. 15) and there is no record that the Government of Nicaragua considered these intended arrangements (they were not ratified) to be incompatible with a status quo which excluded a condominium.

#### *Constitutions*

7. The successive constitutions of the Republic of Nicaragua provide no evidence of the existence of a condominium. The relevant instruments are as follows:

Constitution of 1858; Article 1; *British and Foreign State Papers*, Vol. 72, p. 1045 (Annex 2).

Constitution of 1893; *ibid.*, Vol. 86, p. 1090 (Annex 2).

Constitution of 1911; Article 1; *ibid.*, Vol. 107, p. 1038 (Annex 2).

Constitution of 1939; Article 3; *ibid.*, Vol. 143, p. 590 (Annex 2).

Constitution of 1948; Article 2; *ibid.*, Vol. 152, p. 678 (Annex 2).

Constitution of 1950; Articles 4 and 5 (Annex 2).

Constitution of 1987; Article 10 (Annex 2).

#### *Diplomatic Notes 1914 to 1917*

8. A central feature of the legal picture concerning the status of the internal waters of the Gulf of Fonseca is the Salvadoran Note to the United States in 1913 (Annex 3), in which for the first time the thesis was advanced that the three riparian States exercised a joint sovereignty over the Gulf. This initiative of El Salvador evoked a formal contradiction on the part of Nicaragua in a Note dated 18 April 1914 addressed to the Government of the United States: see Gobierno de Nicaragua, Ministerio de Relaciones, *Memoria*, 1914, pp. IX-XI, p. 361) (Annex 4).

9. The material passages of the Nicaraguan Note of 1914 refer to the delimitation operations of 1900 to 1904 carried out in accordance with the Gámez-Bonilla Treaty of 1894, and to Acta II adopted by the Mixed Boundary Commission in 1900. The Note points out that the delimitation contradicts the view that there are areas of the Gulf subject to a condominium, or a community of interests of any type, as between Nicaragua and the other two riparian States.

10. In a Circular Note, dated 24 November 1917, Nicaragua explained her position to the other Central American Governments, and in doing so unequivocally rejected the thesis that a condominium existed in the Gulf (*Memoria*, 1917, p. 1033; Annex 5). The key passages in this Note refer to the content of the Note dated 30 September 1916 addressed to El Salvador by the Government of Honduras.

#### *Diplomatic Notes 1981 to 1985*

11. In exchanges of diplomatic Notes with El Salvador in the period 1981 to 1985 the Government of Nicaragua has consistently maintained its legal position according to which no condominium exists over the waters of the Gulf. Moreover, in the relevant exchanges, the Government of El Salvador omitted to invoke the concept of condominium. A typical exchange of notes may be seen in Annex 6 (Note No. 252 from El Salvador, dated 14 August 1981; and the Nicaraguan reply, dated 31 August 1981).

*The legislation of Nicaragua concerning maritime zones and the natural resources of the continental shelf*

12. The legislation of Nicaragua relating to maritime zones and the exploitation of the natural resources of the continental shelf consistently indicates the absence of any régime based upon a condominium in relation to the Gulf. The relevant legislation is as follows:

- (a) Constitutional provisions (see above, para. 7).
- (b) Fishing Decree of 7 October 1925 (Annex 7).
- (c) General Act on the Exploitation of Natural Resources (Decree No. 316 of 12 March 1958; *Gaceta* No. 316 of 17 April 1958) (Annex 7).
- (d) Special Act on the Exploration and Exploitation of Petroleum (Decree No. 372 of 2 December 1958; *Gaceta* No. 278 of 3 December 1958) (Annex 7).
- (e) Special Act on the Exploitation of Fisheries (Decree No. 577 of 20 January 1961; *Gaceta* No. 32 of 7 February 1961) (Annex 7).
- (f) Act No. 205 of 19 December 1979 relating to the Continental Shelf and the Adjacent Sea (Annex 7).

13. Given the practical problems which a régime of condominium would create, the silence of this series of legislative measures on the subject is especially significant.

*4. The Conduct of El Salvador in the Period 1838 to 1913*

14. El Salvador emerged from the Central American Federation as an independent State in 1838. From the time of independence until 1913 the Government of El Salvador by its consistent conduct recognized that no régime of condominium applied to the waters of the Gulf. In its Note dated 21 October 1913 to the Government of the United States (Annex 3), El Salvador for the first time advanced the thesis that the three riparian States in the Gulf exercised a joint sovereignty and had done so since the dissolution of the Central American Federation.

*Bilateral treaties*

15. In the nineteenth century El Salvador concluded a bilateral treaty with Honduras, the purpose of which was to establish a definitive maritime boundary in the Gulf, and which rested upon the premise that there was no condominium in the Gulf.

16. This treaty was known as the Cruz-Letona Treaty and was signed on 10 April 1884 (Honduran Memorial, Annexes, Vol. I, Annex III.1.54). In Article 2 the "maritime frontier" within the Gulf received precise definition. It was as a result of the doubts entertained by the Honduran legislature relating to the nature of the delimitation that the instrument failed to be ratified.

*Constitutions*

17. The successive constitutions of the Republic of El Salvador since the dissolution of the Central American Federation make no reference to a régime based on condominium relating to the Gulf of Fonseca. The relevant instruments are as follows:

Constitution of 1840; Article 1; *British and Foreign State Papers*, Vol. 29, p. 206; Honduran Memorial, Annexes, Vol. I, Annex II.3.2.

Constitution of 1864; Article 3; Honduran Memorial, Annexes, Vol. I, Annex II.3.3.

Constitution of 1871; Article 4; *British and Foreign State Papers*, Vol. 61, p. 1166; Honduran Memorial, Annexes, Vol. I, Annex II.3.4.

Constitution of 1880; Article 2; *British and Foreign State Papers*, Vol. 72, p. 1082; Honduran Memorial, Annexes, Vol. I, Annex II.3.6.

Constitution of 1883; Article 4; *British and Foreign State Papers*, Vol. 75, p. 884; Honduran Memorial, Annexes, Vol. I, Annexes II.3.7.

Constitution of 1886; Article 3; *British and Foreign State Papers*, Vol. 77, p. 1317; Honduran Memorial, Annexes, Vol. I, Annex II.3.8.

Constitution of 1939; Article 4; *British and Foreign State Papers*, Vol. 143, p. 675; Honduran Memorial, Annexes, Vol. I, Annex II.3.9.

18. None of these provisions makes reference to the existence of a condominium in the Gulf, and in fact no reference whatsoever is made to the Gulf as an object of interest. The Political Constitution of 1950, Article 7, does, however, contain the provision according to which: "The Gulf of Fonseca is an historic bay subject to a special régime" (see Honduran Memorial, Annexes, Vol. I, Annex II.3.11).

This reference is equivocal and the special régime may simply be an elaboration of the phrase "historic bay".

*The legislation of El Salvador concerning maritime zones and the natural resources of the continental shelf*

19. Legislation on law of the sea issues is consistent with the constitutional provisions and thus contains no reference to a régime of condominium. The relevant items are as follows:

(a) Civil Code, 1860, Article 574 (Annex 8).

(b) Law of Navigation and Marine, 23 October 1933, Articles 1, 2 and 13; UN Legislative Series. *Law and Regulations on the Regime of the High Seas*, 1951, Vol. I. p. 71 (Annex 8).

*The legal consequences of the conduct of El Salvador in the period 1838 to 1913*

20. In the period 1838 to 1913 the consistent attitude of the Government of El Salvador indicated a lack of claim to the existence of a régime of condominium in the Gulf. In the first place the legislation of El Salvador herself evidences abstention from such a claim. Secondly, El Salvador was willing to negotiate agreements on maritime delimitation with Honduras, the content of which was clearly incompatible with a régime of condominium.

21. Two elements are to be added to this picture. The first is the failure of El Salvador to protest in face of the delimitation agreement of 1894 between Nicaragua and Honduras (*I.C.J. Reports 1960*, p. 199), a silence which continued during the consequential transactions. These included the exchange of instruments of ratification on 24 December 1896 and the work of the Mixed Commission. On 12 June 1900 the Mixed Commission adopted Acta Number II (Annex II), which established a delimitation within the Gulf (see above, para. 5). The second element is the failure of El Salvador to unveil the condominium thesis until 1913, more than seventy years after independence.

22. This prolonged silence on the part of El Salvador cannot fail to have legal consequences. Not only did El Salvador fail to place on record its alleged entitlement, but it failed to do so in face of evidence of a substantially different view on the matter emanating from the legislation and public transactions of the other riparians.

23. In the submission of the Government of Nicaragua the position of El Salvador is essentially the same as that of the United Kingdom in the *Fisheries* case (*I.C.J. Reports 1951*, p. 116). In that case the United Kingdom had failed to make a formal protest concerning the Norwegian practice in respect of baselines until 1933. Norway was held to have applied the particular system of delimitation consistently since 1869. Whilst the Court in the *Fisheries* case did not decide the issues explicitly on the basis of acquiescence, there can be little question that the silence of the United Kingdom constituted a critical element in the decision: see the Judgment at pp. 138-139.

24. In any event, by their conduct in the period 1838 to 1913, the riparian States had recognized that the status quo in the Gulf did not consist of a condominium. The significance of coincident recognition has been accepted by the Court on several occasions. Thus, in the *Temple* case the Court stated that:

“Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line.” (*I.C.J. Reports 1962*, p. 6 at pp. 32-33.)

#### 5. *The Consistent Position of the Government of Honduras*

25. From the time of the dissolution of the Central American Federation the Government of Honduras has consistently maintained the position that the Gulf of Fonseca was not subject to a régime of condominium and that the normal principles of delimitation were applicable.

#### *Bilateral treaties*

26. In the nineteenth century Honduras negotiated the Cruz-Letona Treaty with El Salvador. The instrument was signed on 10 April 1884 (see above para. 15). Its provisions were concerned with the definition of the “maritime-boundary” within the Gulf and, although Honduras failed to ratify the agreement, the reasons for this were unrelated to the principle that delimitation of some kind was called for.

27. In the same vein Honduras was willing to enter into delimitation agreements with Nicaragua and in the Gámez-Bonilla treaty signed on 7 October 1894 the two Governments agreed to constitute a Mixed Boundary Commission in order to settle differences and to demarcate the boundary. The work of this Commission concerning maritime delimitation was recorded in the agreement of 12 June 1900 (Acta II) (see above, para. 5).

28. As the Memorial of Honduras indicates (French text, p. 677, paras. 74-76) Conventions concluded with El Salvador in 1874 and 1878 relating to the smuggling of aguardiente involved the recognition of the division of the Gulf into discrete zones of national jurisdiction.

#### *Constitutions*

29. The successive constitutions of Honduras after independence confirm the Honduran view of the legal régime in the Gulf as one based upon an orthodox division of maritime areas. The relevant instruments are as follows:

Constitution of 1839; Article 4; Honduran Memorial, Annexes, Vol. I, Annex II.1.3.

Constitution of 1848; Article 4; *British and Foreign State Papers*, Vol. 36, p. 1086; Honduran Memorial, Annexes, Vol. I, Annex II.1.4.

Constitution of 1865; Article 5; Honduran Memorial, Annexes, Vol. I, Annex II.1.5.

Constitution of 1873; Article 4; Honduran Memorial, Annexes, Vol. I, Annex II.1.6.

Constitution of 1880; Article 5; *British and Foreign State Papers*, Vol. 71, p. 906; Honduran Memorial, Annexes, Vol. I, Annex II.1.7.

Constitution of 1894; Article 5; Honduran Memorial, Annexes, Vol. I, Annex II.1.8.

Constitution of 1906; Article 5; Honduran Memorial, Annexes, Vol. I, Annex II.1.9.

Constitution of 1924; Article 5; *British and Foreign State Papers*, Vol. 120, p. 590; Honduran Memorial, Annexes, Vol. I, Annex II.1.10.

Constitution of 1936; Articles 4 and 153; *British and Foreign State Papers*, Vol. 140, p. 564; Honduran Memorial, Annexes, Vol. I, Annex II.1.12.

Constitution of 1950; Articles 4 and 153; Honduran Memorial, Annexes, Vol. I, Annex II.1.13.

Constitution of 1957; Article 6; Honduran Memorial, Annexes, Vol. I, Annex II.1.16.

Constitution of 1965; Article 5; Honduran Memorial, Annexes, Vol. I, Annex II.1.17.

Constitution of 1982; Articles 9 to 12; Honduran Memorial, Annexes, Vol. I, Annex II.1.18.

30. If at any juncture in this long history the Government of Honduras had formed the view that a condominium existed in the Gulf, it is inconceivable that this significant status would not have featured in the provisions of the Constitutions, more particularly when it was the custom for such provisions to give careful definition to the territorial dimensions of the State.

*Diplomatic Note of 30 September 1916*

31. In response to the proceedings brought by El Salvador against Nicaragua in the Central American Court of Justice, the Government of Honduras directed a protest to El Salvador (Note dated 30 September 1916, Honduran Memorial, Annexes, Vols. IV and V, Annex XIII.2.40). The key passages (in the English translation) are as follows:

“The Government of Honduras does not intend to discuss the grounds on which the Government of Your Excellency relies, in the claim filed against the Government of Nicaragua, in upholding a right of condominium over the Gulf of Fonseca, and it is not likely that the Central American Court of Justice will rule on a point which affects the Republic of Honduras in a judgment in which this Government will not have played any part.”

“The purpose of the present note, Your Excellency, is to protest on behalf and with the express authorization of my Government, against the alleged right of condominium, which Your Excellency’s Government alleges in the claim filed against the Government of Nicaragua, and to declare, as I do hereby formally declare, that the Government of Honduras has never recognized and does not recognize any state of condominium with El Salvador or any other republic in the waters of the Gulf of Fonseca belonging to it. My Government furthermore declares that the line adopted in 1900 in the waters of the Gulf by the Honduras-Nicaragua Joint Frontier Commission as expressly and clearly determining the lines of their maritime boundaries

has been valid and effective from the moment it was established, as is also the case with the line drawn by this commission as the land boundary, and at no point since this agreement fixing this line was reached has the Government of El Salvador ever raised the slightest objection to the validity of the said agreement."

"The fact that no boundary line was drawn between Honduras and El Salvador does not constitute any joint ownership or condominium over the waters of the Gulf of Fonseca."

32. At the same time representations to the same effect were made to the Central American Court of Justice and to the Government of the United States (*Foreign Relations of the United States*, 1917, pp. 834-835; containing a report of the Honduran President's message to the National Congress on 1 January 1917; Reply of El Salvador, Annexes, Vol. II, Annex 46, p. 349); and Honduran Memorial, Annexes, Vols. IV and V, Annex XIII.2.42).

33. The contents of the response of El Salvador to the Honduran Note are of considerable interest. In its Note dated 16 October 1916 (Honduran Memorial, Annexes, Vol. I, Annex XIII.2.41) the Government of El Salvador recognizes the validity of the delimitation between Honduras and Nicaragua in 1900. This recognition is stated to be "in so far as this only affects legal relations between those two Republics" but it is difficult to see what effect such a proviso could have. If a condominium was in existence such arrangements could have no validity at all unless concluded with the consent of all the States parties to the condominium. Moreover, the Government of El Salvador makes clear the fact the this was the first time it had thought fit to make a reservation concerning the delimitation of 1900 between Honduras and Nicaragua.

#### *The conduct of Honduras since 1900*

34. Since the maritime delimitation of 1900 the Government of Honduras has not questioned the alignment established by Acta II of the Mixed Commission. Thus (for example) the delimitation of 1900 was expressly confirmed in the Honduran Note to Nicaragua dated 23 March 1982 (Annex 9).

35. Moreover, the division of the Gulf into maritime zones in accordance with the normal legal principles is assumed in the Honduran legislation on law of the sea matters. The relevant instruments include the following:

(a) Code of Civil Law of 1906; Article 621; Honduran Memorial, Annexes, Vol. I, Annex II.2.1.

(b) Decree No. 102 of 7 March 1950; Article 153; Honduran Memorial, Annexes, Vol. I, Annex II.1.13.

(c) Amendment of Article 621 of Code of Civil Law by Decree No. 102 of 7 March 1950; Honduran Memorial, Annexes, Vol. I, Annex II.2.1.

(d) Decree No. 25 of 17 January 1951 concerning the continental shelf; Honduran Memorial, Annexes, Vol. I, Annex II.2.2.

(e) Political Constitution of 19 December 1957; Article 6; Honduran Memorial, Annexes, Vol. I, Annex II.1.16.

(f) Constitution of 3 June 1965; Article 5; Honduran Memorial, Annexes, Vol. I, Annex II.1.17.

(g) Constitution of 11 January 1982; Articles 11 and 12; Honduran Memorial, Annexes, Vol. I, Annex II.1.18.

(h) Law Concerning the Exploitation of the Natural Resources of the Sea of 13 June 1980; *La Gaceta* No. 23127, dated 13 June 1980; Honduran Memorial, Annexes, Vol. I, Annex II.2.4.

36. In the nature of things legislation pertaining to the territorial sea, and to other types of right to be found in the law of the sea at different periods, would at least contain some proviso as to the position of Honduras as a co-sovereign participating in a régime of condominium. No references occur and the only reasonable inference is that no such régime was thought to exist.

#### 6. *The General and Conjoint Practice of the Riparian States*

37. Prior to the emergence of the El Salvadoran claim that a condominium existed in 1913, the general and conjoint practice of the riparian States was based on the view that a condominium did not exist. El Salvador has not seen able to adduce any practice indicating the existence of a condominium and no such practice was adduced in the proceedings before the Central American Court of Justice.

38. In fact, the practice which can be adduced provides a substantial contradiction of the condominium thesis. This is especially true of the delimitation of 1884 negotiated between El Salvador and Honduras and the delimitation agreement between Honduras and Nicaragua concluded in 1894 and put into effect by Acta II of 1900.

39. In the pleadings in the present case before the Chamber, the Government of El Salvador has signally failed to produce any practice indicating the existence of a condominium. Chapter 13 of the Memorial, Chapter VIII of the Counter-Memorial, and Chapter VI (Section II) of the Reply, all of these fail to produce any evidence. Moreover, for the practice of the riparian States to be coherent and viable some joint administration would have seen necessary: but no such joint administration has existed at any time.

#### 7. *The Existence of a Condominium Cannot Be Presumed*

40. The failure of El Salvador to produce any substantial evidence of the existence of a condominium is particularly impressive in view of the presumption against the existence of a special régime departing from the normal régime of territorial sovereignty. Whilst this presumption cannot be ornamented with citations, it would seem to arise from ordinary legal logic. The régime is, by definition and historical incidence, exceptional. The historical examples refer to land territory and the presumption against the régime of condominium is surely *a fortiori* in the case of maritime territory.

41. The exceptional character of the legal régime of the condominium is evident from the treatment accorded to it by writers. A fairly typical exposition may be found in the two volume by Professor Podesta Costa and President Ruda. In the third edition of their *Derecho Internacional Público* (1985) the relevant passage is as follows:

“CONDOMINIO. — Existe condominio cuando dos o mas Estados ejercen soberania, de modo indiviso o concurrente, sobre un mismo territorio.

Este regimen se crea por medio de un tratado, y generalmente es el resultado de una transaccion tendiente a solucionar, al menos de modo transitorio, un litigio con respecto a determinada posesion colonial o territorio fronterizo. Pueden citarse como ejemplos el caso del archipiélago de Samoa, que estubo desde 1889 hasta 1899 bajo el condominio de Alemania, Estados Unidos y Gran Bretana; y el condominio de Gran Bretana y Egipto en el Sudan, existente desde 1898 y que finalizo en 1953.

La forma del ejercicio de la soberanía por los Estados condominos depende de las circunstancias del caso y se especifica en el tratado respectivo." (Page 82, para. 36.)

(Translation)

"CONDOMINIUM. — A condominium exists when two or more States, *pro-indiviso* or conjointly, exercise sovereignty over the same territory.

This régime is created by means of a treaty and it is generally the result of a transaction with the aim of solving, at least temporarily, a litigation related to a certain colonial possession or a bordering territory. The following cases may be cited as examples: the Archipelago of Samoa that, during the period from 1889 to 1899, was under the condominium of Germany, United States and Great Britain; the condominium of Great Britain and Egypt in Sudan that started in 1898 and ended in 1953.

The way sovereignty is exercised by States in a condominium depends on the circumstances of the case and is determined in the respective treaty."

42. This passage underlines three elements which increase the potency of the presumption in question. First, the régime is established by treaty; secondly, the régime is normally transitional; and, thirdly, the modalities depend on the circumstances of the case. To establish a condominium on the basis of custom or practice, in the absence of a treaty, would be virtually impossible in legal terms.

43. In seeking to avoid the evident difficulties attaching to the condominium thesis, the pleadings of El Salvador fall back upon some exceptionally weak arguments. Thus the Counter-Memorial (paras. 7.22 *seq.*) asserts that no agreement is necessary but only quotes one writer of substantial authority (Accioly) who does not support the assertion but in fact states: "El condominio se funda siempre en un arreglo o tratado, que impide los conflictos de jurisdicción" (Counter-Memorial, para. 7.23).

44. Having stated that no "formal agreement" is necessary El Salvador then contends that there is an "informal agreement" (paras. 7.24 and 7.29). This position involves further difficulties. If there *were* an agreement it matters not at all whether it is "formal" or "informal" in terms of public international law.

45. In fact various transactions involving all three riparians directly contradict the condominium hypothesis (see the bilateral treaties referred to above, paras. 5.15 and 26). Moreover, in its diplomatic Notes to the United States (in 1913) and to Honduras (in 1916) the Government of El Salvador makes no reference to the existence of an informal agreement.

46. On the basis of the evidence to be found in the three written pleadings presented by El Salvador in the present case before the Chamber, there is no basis on which the presumption against a condominium could be rebutted.

#### *8. The Régime of Condominium Depends upon the Negotiation of an Agreement*

47. The Counter-Memorial of El Salvador, in arguing that an "informal agreement" or "arrangement" exists, admits that there is no "formal agreement" (paras. 7.24 and 7.29). The legal literature provides substantial authority for the view that a treaty is a precondition for existence of a condominium. The Memorial of Honduras (pp. 76-77, para. 8) cites Cavaglieri and Rousseau to this effect and the work by Professor Podesta Costa and President Ruda, quoted above (para. 41) adopts the same position.

48. The cogency of this view is enhanced by the practical consideration that the modalities of application of a régime of condominium would require the existence of some kind of joint administration. It is difficult to envisage a workable joint and bilateral administration in the absence of a negotiated agreement.

#### 9. *The Practice concerning Islands in the Gulf*

49. The practice of the three riparian States of the Gulf has always rested on the assumption that the islands within the Gulf were the subject of allocation to the sovereignty of the individual States. Whilst this datum cannot be conclusive, it militates against any régime involving a joint exercise of sovereignty over the waters of the Gulf. This is particularly the case in the fairly intimate relations of islands and waters in the Gulf.

#### 10. *The Judgment of the Central American Court of Justice Is Neither Opposable to Honduras Nor to Nicaragua*

50. On the assumption that the Judgment of the Central American Court of Justice of 1917 is binding on both El Salvador and Nicaragua (which is not admitted by the Government of Nicaragua), that judgment is in any case not opposable to Honduras. In consequence, if the régime of condominium (as envisaged by the Court) is not opposable to Honduras, the third riparian State, then, as the Chamber has observed, this "would be tantamount to a finding that there is no condominium at all" (*I.C.J. Reports 1990*, p. 122, para. 73).

51. The Judgment of the Central American Court of Justice could not bind a State which was not a party to the proceedings. The Judgment of the Court clearly shows that Honduras was not considered to be subject to the force of the decision. This emerges very clearly from the passage in which the Court states that "the rest of the waters of the Gulf have remained undivided and in a state of community between El Salvador and Nicaragua" (English text, *American Journal*, 1917, p. 711).

The Government of Nicaragua does not accept that a condominium has existed at any time *either* in respect of Nicaragua and El Salvador *or* in respect of the three riparians. Subject to this, the Judgment is invoked to indicate the view of the Central American Court of Justice.

52. The inopposability of the Judgment of 1917 to Honduras must rest primarily upon the concept of *res judicata*, which ranks as a general principle of law and, on the basis of judicial recognition, as a principle of general international law: see, for example, the Advisory Opinion on Effect of Awards of Compensation made by the United Nations Administrative Tribunal (*I.C.J. Reports 1954*, p. 47 at p. 53).

53. In general the position of the Nicaraguan Government on the status of the Judgment of 1917 is as follows. The contemporary reaction of the Government of Nicaragua took the form of two protest notes addressed to the Court (Annex 10), and a Circular Note, dated 24 November 1917, to the Central American Governments (Annex 5). In the opinion of the Nicaraguan Government the Court had exceeded its legal powers. In any event, in the submission of the intervening State, the Judgment of 1917 has not been implemented and no legal régime of the type referred to by the Court has ever existed in fact. Consequently, there is, strictly speaking, no legal régime which could be opposable either to Honduras or to Nicaragua.

*11. In Any Case the Judgment of 1917 Did Not Envisage a Condominium in the Sense of Public International Law*

54. There is a facet of the decision of the Central American Court which is ignored in the literature but is remarkable nonetheless. The reasoning of the Court in relation to condominium is based on civil law ways of thinking and is significantly divorced from the doctrine of public international law. This approach is certainly no matter of surprise. The professional formation of the judges was that of civil lawyers and not that of public international lawyers.

55. As a consequence the Court tended to confuse different concepts and, in particular, to confuse the concept of an undivided patrimony with that of condominium. Within their world of concepts the civil law conception appeared to have universality. The absence of delimitation resulted in a double confusion. First, the Court believed that lack of delimitation resulted in an absence of undivided entitlements and this is incorrect as a matter of public international law (see, for example, the decision of the Court in the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 32, para. 46). Secondly, the Court, integrated by civil law jurists, assumed that a status quo involving undivided territory constituted a condominium.

*12. Summary of Conclusions*

56. The Government of Nicaragua submits that no régime of condominium has ever existed in the Gulf of Fonseca. The legal considerations supporting this submission can be summarized thus:

- (a) By their conjoint and consistent conduct until 1913 the three riparian States recognized that the legal régime in the Gulf did not constitute a condominium.
- (b) The legal status quo was evidenced by the practice of the riparian States and, in particular, in their constitutions and other pertinent legislation.
- (c) The initiative of El Salvador in 1913 was opposed by Honduras and Nicaragua and, in any case, could not have any legal consequences for the other two States. The conduct of El Salvador in the period 1838 to 1913 had created a legal condition of things which could not be upset by its eccentric conduct after such a long time.
- (d) The consistent conduct of Honduras since 1838 provides unnequivocal evidence that Honduras is not a party to any condominium and on this basis no condominium could exist in law.
- (e) The Judgment of 1917 is inopposable to Honduras and consequently no condominium could exist in law.
- (f) In any case the Judgment of 1917 has not been implemented and is, in consequence, not the basis for a legal status quo opposable *either* to Honduras *or* to Nicaragua.

*13. The Consequences of a Decision that the Gulf Is Subject to a Condominium*

57. On a more or less formal basis, and pleaded in the alternative, the Government of Nicaragua submits that if the Chamber saw fit to decide that a régime of condominium obtains within the Gulf such a decision would have only limited consequences so far as the parties to the proceedings are concerned, any such decision could be accompanied by elements of practical implementation, similar, but *mutatis mutandis*, to the process of joint demarcation related to a decision concerning the alignment of a boundary. But, of course, Nicaragua is

not a party to the proceedings and has had no role in relation to the composition of the Chamber.

58. It must follow, in the submission of the Government of Nicaragua, that no procedure of implementation of a decision (that a condominium exists) could be binding on Nicaragua. As a matter of general international law the negotiation of an agreement on the modalities of a condominium would involve Nicaragua only as an independently consenting contracting party.

### PART III. THE HONDURAN CONTENTION THAT THE GULF IS SUBJECT TO A RÉGIME BASED UPON A COMMUNITY OF INTERESTS

#### 1. *The Honduran Contention*

1. The Memorial of Honduras presents a thesis based upon a community of interests in the following passages:

“Clearly, however, Honduras has an equal right, on the same basis as its two neighbours in the Gulf, to free access to the high seas along that maritime coastline.

This equality of rights, in point of fact, has its legal basis in the existence of a relationship of proximity and partial interdependence between the three riparian States of the Gulf of Fonseca.

The link between a *de facto* geographical situation and an inter-State relationship in the context of the rule of law was admirably demonstrated by the Permanent Court of International Justice in its Judgment concerning the Territorial Jurisdiction of the International Commission of the River Oder, and it is characteristic of the existence of a community of interests between the States whose land territory borders on the same natural resource (river or lake, but also the internal waters of a closed bay).

Such a community of interests creates in the first place a strict equality of right between the riparians of the Gulf of Fonseca with regard both to the waters of the Gulf and to its outlet to the seas; secondly, it also creates certain reciprocal duties, for instance, precisely that not to cause prejudice, by unilateral conduct, to the rights of others.” (Honduran Memorial, Vol. II, pp. 595-596.)

2. The relevant passage from the *River Oder* Judgment quoted as follows:

“This community of interests in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian in relation to the others.” (Case concerning the *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A. No. 23, p. 27.*)

3. The pertinent items among the Submissions which accompany the Memorial are as follows:

“C. with respect to the maritime dispute:

1. concerning the zone subject to delimitation within the Gulf:

— to adjudge and declare that the community of interests existing between El Salvador and Honduras by reason of their both being coastal States bordering on an enclosed historic bay produces between them a perfect

equality of rights, which has nevertheless never been transformed by the same States into a condominium;

- to adjudge and declare, therefore, that each of the two States is entitled to exercise its powers within zones to be precisely delimited between El Salvador and Honduras;
- to adjudge and declare that the community of interests existing between El Salvador and Honduras as coastal States bordering on the Gulf implies an equal right for both to exercise their jurisdiction over maritime areas situated beyond the closing line of the Gulf."

4. This thesis is given little or no further elaboration in the pleadings of Honduras and identical submissions are appended to the Reply.

5. The community of interests thesis has two outstanding characteristics. The first is that of novelty. The law of the sea has always attracted, and continues to attract, a substantial literature and yet writers have consistently failed to invoke the concept of community of interests in a maritime context. The second characteristic is its lack of definition. The Honduran Government states, and restates, the formula of the equality of the coastal States without defining the entitlements which flow from this: see the Reply (French text), pp. 682-683 (para. 20). The Reply also states that "co-operation" is a duty which flows from a community of interests and, further, that "co-operation presupposes delimitation" (*ibid.*, p. 684, para. 21).

6. In the submission of the Government of Nicaragua the contentions of Honduras based upon community of interests lack the minimum of specificity required of legal claims to which other States have to respond, whether as parties, or in the role of intervening States by virtue of Article 62 of the Statute.

## 2. *The Relevance of the River Oder Commission Case*

7. The Honduran argument relating to the concept of the community of interests as between the riparians within the Gulf rests exclusively upon a paragraph in the Judgment of the Permanent Court in the case concerning the *Territorial Jurisdiction of the International Commission of the River Oder* (above, paras. 1-2). Whilst there is no doubt that analogy has an enduring role in any process of legal reasoning, the use of analogy must rest upon substantial justification rather than a process of mechanical transposition.

8. The River Oder Commission case was decided in accordance with principles of international fluvial law but within the precise context of the interpretation of particular treaty provisions, namely, certain Articles of the Treaty of Versailles concerning the concept of waterways "having an international character". It was in the context of the relations of riparian States on a navigable waterway that the Permanent Court produced its statement of principle. The relevance of the principle to the issues standing on the actual diplomatic record concerning the Gulf of Fonseca is difficult to discern. Navigability is not an outstanding issue. The Gulf is not an international waterway designated by a multilateral treaty régime like the European waterways affected by the Treaty of Versailles. The Government of Nicaragua is not aware that rights of passage as such are in issue in the present proceedings. The legal position of Honduras is, in simple terms, not analogous, even remotely, to that of an upstream State. In the context of the Gulf of Fonseca there is no legal relationship which is similar to that of Poland and Polish rivers in the River Oder Commission case. It is, consequently, no surprise that the publicists have failed to adopt the analogy optimistically proffered by Honduras.

### 3. *The Consistent Practice of the Three Riparian States*

9. The application of a concept of a "community of interests" to the Gulf of Fonseca was unheard of until the appearance of the Memorial of Honduras in connection with the present proceedings. It is a purely forensic device without any roots in diplomatic or legal reality. Until the preparation of the Memorial the concept had been ignored in the practice of the three riparian States. More to the point, an extensive pattern of constitutional provisions, legislation on law of the sea matters, and diplomatic activity (see Part II above) provides a positive contradiction of the application of a special régime within the Gulf, whether this be described as a condominium, a community of interests, or otherwise. Any references to a "special régime" which are encountered involve the incontrovertible fact that the Gulf is an historic bay.

### 4. *The Honduran Note to El Salvador Dated 30 September 1916*

10. Of special significance is the Note addressed to El Salvador by the Government of Honduras on 30 September 1916 (see Part II, para. 30, above). In this Note, it may be recalled, the Government of Honduras carefully presented its reasons for rejecting the claim by El Salvador that a condominium existed in the Gulf. This was a juncture at which Honduras might reasonably have been expected to refer to the existence of a community of interests. In fact, the concept fails to appear either in this or in other Honduras Notes, for the simple reason that no such régime existed.

### 5. *The Alleged Community of Interests and the Principles of the Law of the Sea*

11. The Submissions of Honduras link a community of interests with the statement that the riparian States enjoy "a perfect equality of rights". It is not clear what in practice the consequences of this "perfect equality" are to be, but in any event it is asserted, also in the Submissions, that the community of interests "implies an equal right" for riparian States "to exercise their jurisdictions over maritime areas situated beyond the closing line of the Gulf".

12. In so far as equality has any legal meaning, it has to be applied in the context of a code of some kind relating to a particular subject-matter. In the case of the waters of the Gulf such a code can only derive either from the practice of States or from the principles of general international law relating to the law of the sea. The "community of interests" asserted relates to no State practice or local custom. Consequently, the principles of the law of the sea are applicable. Indeed, the Government of Honduras asserts that a community of interests "implies delimitation" and this could only take place in accordance with the relevant law of the sea principles.

13. On this basis the reference to "community of interests" ceases to have any possible operation (assuming for the sake of argument that it is a legal entity of some kind). The principles and rules of the modern law of the sea are applicable and it is these principles which supply the code for deciding what is an equitable solution in the geographical circumstances. There is no room for a concept of "perfect equality" imported *ab extra* without any legal justification.

### 6. *The Existence of a Special Legal Régime Cannot Be Presumed*

14. In relation to the contention of El Salvador that a condominium exists in the Gulf, the Government of Nicaragua has had occasion to point out that the

existence of a special legal régime cannot be presumed (Part II, above, paras. 40 to 46). It is obvious that this presumption applies to the so-called "community of interests", which is an even less familiar feature than the condominium in the legal experience. It is ironical that the Reply of the Government of Honduras stresses "the exceptional character of resort to a condominium" (French text, p. 1056, paras. 38 *et seq.*), whilst sponsoring a much more eccentric concept.

#### 7. Summary of Conclusions

15. The Government of Nicaragua submits that no régime of a community of interests has ever existed in respect of the Gulf of Fonseca. The legal considerations supporting this conclusion can be summarized thus:

- (a) The issues presented in the pleadings of El Salvador and Honduras relate to the law of the sea, except in so far as they relate to the question of condominium.
- (b) The relevant principles of maritime delimitation cannot be displaced by the unjustified introduction of a concept of "the perfect equality of States".
- (c) The consistent practice of the riparian States has recognized the absence of any special legal régime within the Gulf, apart from its having the character of an historic bay.
- (d) The contentions of Honduras are designed to produce advantages for Honduras which would not be obtainable by the application of the equitable principles relating to maritime delimitation forming part of general international law. It is not equality but privilege which is the objective.

#### PART IV. GENERAL RESERVATION OF NICARAGUA

Nicaragua reserves its position generally on all the statements of fact and of law made by the Parties in their several Pleadings. Nicaragua also reserves its right to present its case further in accordance with the Order of the Chamber of 14 September 1990, and will introduce evidence, if necessary, with sufficient time before the hearings on the merits or any other procedure scheduled for the case.

14 December 1990,  
The Hague.

(Signed) Carlos ARGÜELLO G.,  
Agent of the Republic of Nicaragua.

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LIST OF ANNEXES<sup>1</sup>

- Annex 1.* Documents of Mixed Commission (Nicaragua-Honduras) that delimited the Gulf in 1900.
- Annex 2.* Nicaraguan Constitutions.
- Annex 3.* Salvadoran Note to the United States in 1913.
- Annex 4.* Nicaraguan Note dated 18 April 1914 addressed to the Government of the United States.
- Annex 5.* Circular Note of Nicaragua dated 24 November 1917 addressed to the other Central American Governments.
- Annex 6.* A typical exchange of Notes. Note No. 252 from El Salvador, dated 14 August 1981; and the Nicaraguan reply, dated 31 August 1981.
- Annex 7.* The legislation of Nicaragua concerning maritime zones and the natural resources of the continental shelf.
- Annex 8.* The legislation of El Salvador concerning maritime zones and the natural resources of the continental shelf.
- Annex 9.* Honduran Note to Nicaragua dated 23 March 1982.
- Annex 10.* Two protest notes addressed to the Central American Court by Nicaragua in 1917.

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<sup>1</sup> Not reproduced. [Note by the Registry.]