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INTRODUCTION

This is the COUNTER MEMORIAL of El Salvador in the Case Concerning the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras, presented in accordance with the Order of the International Court of Justice of 29 May 1987 as modified by the Order of 12 January 1989 handed down by the Honorable Judge JOSE SETTE-CAMARA, President of the Chamber, in the exercise of the faculties conferred upon him by the Statute and the Regulations of the International Court of Justice, for the purpose of extending the period for the presentation of this Counter Memrorial until this day.

PART I

CHAPTER I

THE OBJECTIVES OF THE LITIGATION

1.1. The objectives of the litigation which the Chamber of the International Court of Justice is called upon to decide are defined by Article 2 of the Special Agreement which forms the basis of the jurisdiction of the Court in the following terms:

"The Parties request the Chamber:

"I. That it delimit the line of the frontier in the zones or sectors not described in Article 16 of the General Peace Treaty (Tratado General de Paz) of 30 October 1980.

"II. That it determine the juridical status of the islands and of the maritime spaces."

1.2. The Government of El Salvador feels compelled to reiterate and to emphasise the clear and precise terms of this fundamental provision which constitutes the basis of this litigation because it is apparent from the fact that the Government of Honduras has asked the Chamber to carry out a delimitation both inside the Gulf of Fonseca and in the maritime spaces outside the mouth of this Gulf that that Government has not correctly understood the scope of the matters that the Parties have agreed to submit to the Chamber for its decision.

1.3. It is obvious from the form and content of the Article of the Special Agreement set out above that the Parties to this litigation have established

a clear distinction between the two different aspects of the dispute between them and that they have agreed to submit to the Chamber two quite distinct questions: on the one hand, the delimitation of the line of the frontier in the zones or sectors in respect of which no delimitation has yet been agreed and, on the other hand, the determination of the juridical status of the islands and of the maritime spaces.

1.4. Before examining more closely the nature of these two concepts, El Salvador believes that it would be useful to recall above all else the supreme importance of the Special Agreement in each and every matter submitted by such an agreement to an International Tribunal and, more particularly, to the International Court of Justice. The Special Agreement fulfils two functions, both linked to what the International Court of Justice has described as the principle of consensus which is at the base of the competence of the Court (1), but which must nevertheless be distinguished. The International Court of Justice has stated that, in a matter submitted by Special Agreement, it is that Special Agreement which contains the consent of the Parties to the solution of their dispute by the Court and which indicates to the Court the scope of its activities (2).

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1. Libya-Malta Continental Shelf Case (Application to Intervene) I.C.J. Reports 1984 Paragraph 37, p. 23.

2. Ibid. Paragraph 3, p. 24.

1.5. The Special Agreement constitutes above all the means by which the consent of the Parties to the judicial settlement of the dispute between them is expressed; in this sense it is one of the means through which it is possible to comply with what the International Court of Justice has described as the fundamental principle which establishes that the jurisdiction of the Court to hear and decide a dispute depends on the consent of the Parties (3). But the Special Agreement equally serves to define the questions in respect of which the Parties have decided to have recourse to a judicial settement and, consequently, the questions which the Court has jurisdiction to decide. In other words, it is the Special Agreement that permits the determination of precisely what are the questions which the Parties have agreed to submit to the Court and, at the same time, the definition of the extent of the jurisdiction of the Court.

1.6. Although the Court does indeed have a certain amount of scope to define the conclusions formulated by the Parties in a matter brought before it as the result of a unilateral claim, in the case of a matter brought before it by Special Agreement the Court takes great care not to exceed the objectives of the litigation which the Parties have defined in that Special Agreement for the simple purpose of avoiding making pronouncements on questions which the Parties have not submitted to it. The Permanent

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3. Ibid. Paragraph 34, p. 31.

Court declared in the Lotus Case (4):

"having obtained cognizance of the present case by notification of a special agreement concluded between the Parties in the case, it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide."

More recently, the International Court of Justice has stated that it attributes great importance to the element of the wishes of the States, expressed in a Special Agreement or other instrument which establishes jurisdiction, for the purpose of defining the scope of a dispute submitted to the Court (5).

1.7. In the light of these general considerations which have been recalled, it is now possible to return to consider each of the two questions in respect of which the Parties have asked the Chamber to pronounce a judgement.

1.8. It emerges from the analysis of the terms of the Special Agreement and of the relevant provisions of the General Peace Treaty of 1980 that the first question submitted to the Court concerns the land frontier between the two countries. This anaylsis equally demonstrates that the Parties have taken full account of and have adopted the distinction, which is generally accepted at the present time,

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4. P.C.I.J. Series A, N° 10, p. 12.

5. Libya-Malta Continental Shelf Case (Application to Intervene) I.C.J. Reports 1984 Paragraph 46, p. 28.

between the delimitation of a frontier, a juridical and political operation which fixes the line of the frontier in principle, and its demarcation, a material and technical operation which consists in carrying out on the ground the terms of the delimitation that has been established. The delimitation of the frontier between El Salvador and Honduras was established in part by the actual General Peace Treaty of 1980 in Article 16 thereof; the sectors of the frontier not so delimited expressly by that Treaty had to be delimited subsequently, either by agreement of the Parties or, failing that, by the International Court of Justice. The demarcation of the frontier had to be carried out immediately by the Joint Boundary Commission in the case of the sectors of the frontier delimited by the Treaty; immediately after the agreement in question in the case of the sectors of the frontier delimited by a subsequent agreement between the Parties; and, by virtue of Article 6 of the Special Agreement, not later than three months after the judicial decision in the case of sectors of the frontier delimited by the International Court of Justice.

1.9. The second objective of the litigation submitted to the Chamber is of a totally different nature. It has nothing to do with the land frontier between El Salvador and Honduras but rather with islands and maritime spaces; and, contrary to what has been provided by the Parties in the case of the land frontier, here the only matter in issue is "the determination of the juridical status", there being no issue either of delimitation or of demarcation. Thus a radical difference has been

established between, on the one hand, the aspects of the dispute concerned with the land frontier, in respect of which the Chamber is asked to "delimit the line of the frontier", and, on the other hand, the aspects of the dispute concerned with the islands and the maritime spaces, in respect of which the Chamber is asked to "determine the juridical status".

1.10. The provisions of the General Peace Treaty of 1980 fully confirm this analysis. In Title IV of the Treaty, Chapter I (concerning the frontier already defined), Chapter III (concerning the demarcation of the frontier already defined), and Chapter IV (concerning the demarcation of the frontier not as yet defined) are all referable to the land frontier, in respect of which they contemplate its delimitation and demarcation. On the other hand, in relation to the islands and the maritime spaces, the Treaty refers to a quite different concept, that of the determination of their juridical status. In this respect, Article 18 is of particular interest in that it charges the Joint Boundary Commission with the following functions (emphases added) :

"1°. The demarcation of the frontier line described in Article 16 of the Treaty;

"2°. The delimitation of the frontier line in the sectors not described in Article 16 of the Treaty;

"3°. The demarcation of the frontier line in the disputed zones, once the delimitation of that line has been concluded; and

"4°. The determination of the juridical status of the islands and of the maritime spaces."

In relation to the judicial settlement, Article 31 contemplates such a procedure in the event that, upon

expiry of the time limit therein indicated:

"No agreement has been reached as to the disagreements over the frontier in the disputed sectors, over the juridical status of the islands, or over the maritime spaces".

In respect of the islands and the maritime spaces, there is no question in the Treaty either of their delimitation or of their demarcation but merely of the determination of their juridical status.

1.11. The preceding discussion makes it possible to define with precision the objectives of the litigation and, consequently, the scope of the function of the Chamber.

1.12. The concept of the <u>delimitation</u> of the land frontier does not give rise to any difficulties. The Chamber has been entrusted with the task of carrying out a judicial delimitation, which the Parties will subsequently complete, in accordance with Article 6 of the Special Agreement, by a demarcation on the ground.

1.13. The concept of the <u>determination of the juridical status</u> is easy to define in so far as the islands are concerned. The Chamber is called upon to decide if the sovereignity over the islands in the Gulf of Fonseca belongs to El Salvador or to Honduras, the determination of which does not involve either a delimitation or a demarcation. So far as the maritime spaces are concerned, the Parties have not asked the Chamber either to trace a line of delimitation or to define the Rules and Principles of Public International Law applicable to a

delimitation of maritime spaces, either inside or outside the Gulf of Fonseca. The dispute between El Salvador and Honduras is concerned with the juridical nature of the relations of the two countries over the maritime spaces concerned, more precisely, with the juridical status of the waters in the interior of the Gulf of Fonseca and with the existence or non-existence of any rights of the two countries in respect of the maritime spaces situated outside the closing line of the Gulf.

1.14. The Memorial of Honduras indicates (6) that in the Joint Boundary Commission proposals relating to a delimitation were put forward on the part of El Salvador in respect of the waters of the Gulf. If this is an argument intended to support a contention that the Chamber has jurisdiction to carry out a delimitation of the maritime spaces, as the Memorial of Honduras indeed subsequently insinuates (7), any such argument is simply unfounded. It is possible during the meetings of a Joint Boundary Commission to formulate conciliatory proposals and to accept solutions, even solutions of non-juridical nature. Indeed Honduras made extremely clear in the Joint Boundary Commission that these proposals for direct negotiation were made:

"sans que celles-ci ni les corrélatives que le Honduras espère que le Salvador formulera .... compromette la position que, du point de vue juridique, défendent

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6. Memorial of Honduras: p. 5.

7. Memorial of Honduras: p. 90.

les deux pays. Ce sont des propositions qui .... no compromettent pas les fondements des droits que les parties se attribuent" (8).

The Memorial of Honduras also affirms (9) that the Chamber is called upon to carry out the task of carrying out a juridical classification of the waters inside and outside the Gulf of Fonseca and, additionally, the task of carrying out a delimitation of these waters. However, the task of carrying out a delimitation, entrusted to the Chamber in respect of the disputed areas of the land frontier, has simply not been entrusted to the Chamber in so far as the maritime spaces are concerned.

1.15. It appears almost unnecessary to reiterate that the interpretation of Article 2 of the Special Agreement cannot in any way be affected by the simplified and abbreviated formula utilized as the Title of the Special Agreement in Spanish:

"Compromiso .... para someter a la decisión de la Corte Internacional de Justicia la controversia fronteriza terrestre, insular y marítima existente entre los dos Estados"

This Spanish version was subsequently translated into the following English version in the Notification of the Special Agreement sent jointly to the Court by the two Governments on 11 December 1986:

"Special Agreement .... to submit the land, island and maritime frontier dispute between the two States to the International Court of Justice"

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8. Memorial of Honduras: Annexes: p. 858.

9. Memorial of Honduras: p. 6.

In the original Spanish version the word "fronteriza" (frontier) applies only to the two words between which it is situated "controversia" (dispute) and "terrestre" (land); consequently only the land dispute ("controversia terrestre") concerns a frontier ("fronteriza") and not the island and maritime dispute ("controversia .... insular y marítima"). It is by virtue of a simple error in translation that in the English version the word "frontier" appears to apply not only to the "land .... dispute" but also to the "island and maritime dispute".

1.16. As has already been stated in the Memorial of El Salvador (10), to apply the concept of "frontier dispute" to the "island dispute" would additionally lead to a manifestly absurd and unreasonable result, since the dispute over the islands concerns the sovereignity of each island as a whole; the dispute has never concerned, either in the past or in the present, any question of any internal delimitation of any of the islands in dispute with a view to the sovereignity of that island being divided between the two States.

1.17. The Government of El Salvador has taken note with satisfaction of the decision adopted by the Court in its Order of 8 May 1987 (11) to consider that the use by the Court "for the sole object of determining the title to be given to the

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10. Memorial of El Salvador: Paragraph 1.11..
11. I.C.J. Reports 1987 Paragraphs 5-6, p. 11.

case" of the terminology adopted by the Parties in their joint letter of 11 December 1986 is "without prejudice to the appropriate interpretation of the provisions of the Special Agreement which define the subject matter of the dispute", that is to say the appropriate interpretation of Article 2 thereof, which is the provision which defines "the questions submitted for decision". As the Court declared in the Libya-Malta Continental Shelf Case (12):

"Since the jurisdiction of the Court derives from the Special Agreement between the Parties, the definition of the task so conferred upon it is primarily a matter of ascertainment of the intention of the Parties by interpretation of the Special Agreement. The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent." (emphasis added)

1.18. In consequence, the interpretation of Article 2 of the Special Agreement in the manner expounded in this Chapter, that is to say applying the normal meaning which should be attributed to the terms employed in the context and in the light of the objectives and ends of the Special Agreement, is what defines the objectives of the litigation and the functions of the Chamber.

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12. I.C.J. Reports 1985 Paragraph 19, p. 23.

CHAPTER II

THE LAW APPLICABLE TO THE DELIMITATION OF THE DISPUTED LAND FRONTIER

2.1. It seems at first sight that the points of view of the two Parties coincide in respect of the Principles of Public International Law which are applicable to the delimitation of the disputed land frontier. Both envisage the application of the fundamental principle of uti possidetis iuris and both accept as the critical date the year 1821, the date of the independence of Central America.

2.2. However, this apparent coincidence of views conceals a radical disagreement both in relation to the force and validity that should be given to the Formal Title Deeds to Commons ("Títulos Ejidales") as a firm and decisive proof of uti possidetis iuris and in relation to the manner in which such Formal Title Deeds to Commons should be interpreted and applied.

2.3. The position of Honduras in relation to the greater part of the disputed sectors is based on a supposed distinction which the Memorial of Honduras formulates in the following manner (1): "la distinction entre le conflit sur les limites de terre entre deux communautés et le différend sur les limites territoriales entre les deux Républiques".

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1. Memorial of Honduras: p. 198.

Honduras argues that the secular disputes between the indigenous communities as to their boundaries should be separated from and made quite independent of the delimitation of international frontiers and that the boundaries of the lands of an indigenous community indicated by the boundary markers and boundary stones set out in the Formal Title Deeds to the Commons of these indigenous communities "ne coïncident pas nécessairement avec les limites du territoire national sur lequel se trouve cette communauté" (2).

2.4. On the other hand, the position of El Salvador, as is indeed repeatedly recognised by the Memorial of Honduras (3), is that the present litigation as to the line of the frontier ought to be decided on the basis that the land boundaries defined by the Formal Title Deeds to the Commons of the indigenous communities, which include the Royal Landholdings situated within the same jurisdiction, are absolutely identical with the international boundaries of the territories of each State.

2.5. This difference of opinion is the crucial issue, in this litigation as to the disputed land frontier; El Salvador insists that the position of Honduras is not consistent with the correct interpretation of the fundamental principle of uti

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2. Memorial of Honduras: p. 200.

3. Memorial of Honduras: pp. 211-212, 256 & 267-268.

possidetis iuris and that in addition the supposed distinction proposed by Honduras, although it could conceivably have been discussed in the initial period of the dispute from 1861 until 1880, has at the present time been wholly abandoned and is indeed superseded by the principles laid down by the Parties for the purpose of deciding this present frontier dispute. These two points will be considered in turn."

I. The Correct Interpretation of the Principle of Uti Possidetis Iuris in relation to Formal Title Deeds to Commons

2.6. The correct significance of the Principle of uti possidetis iuris was defined with complete precision in the judgement of the Tribunal which decided the Arbitration between Guatemala and Honduras in a passage transcribed in the Memorial of Honduras (4) (the quotations from this passage which follow are taken from the original judgement (which was produced both in English and in Spanish) rather than from the French translation thereof used in the Memorial of Honduras). The principal underlying premise of the reasoning of the Tribunal is contained in the following passage (5)

"The ownership of the Spanish monarch had been absolute. In fact and law, the Spanish monarch had been in possession of all the territory of each [of

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4. Memorial of Honduras: pp. 140-142.

5. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) p. 6.

the Parties to the litigation). Prior to independence, each Colonial entity being simply a unit of administration in all respects subject to the Spanish King, there was no possession in fact or law, in a political sense, independent of his possession."

The subsidiary underlying premise of the reasoning of the Tribunal is contained in the passage immediately following that set out above [6]:

"The only possession of either colonial entity before independence was such as could be ascribed to it by virtue of the administrative authority it enjoyed."

The necessary corollary of both these premises, set out in the passage immediately following that set out above, is that [7]:

"The concept of "uti possidetis of 1821" thus necessarily refers to an administrative control which rested on the will of the Spanish Crown. For the purpose of drawing the line of "uti possidetis of 1821" we must look to the existence of that administrative control. Where administrative control was exercised by the colonial entity with the will of the Spanish monarch, there can be no doubt that it was a juridical control, and the line drawn according to the limits of that control would be a juridical line."

Consequently, the Tribunal concluded [8] that, in order to trace the line of "uti possidetis of 1821",

"We are to seek the evidence of administrative control at that time."

2.7. And in the search for this administrative control, it is necessary to take into account a quite fundamental consideration. Once a particular

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6. Ibid. p. 6.

7. Ibid. pp. 6-7.

8. Ibid. p. 7.

Commons had been adjudicated to a particular settlement, it is unquestionable that the administrative control over the whole of these communal lands came to be exercised by and from the jurisdiction appropriate to the particular settlement benefitted. This occured absolutely automatically even when, at the time of the measurement of the Commons in question, the whole or some part of the lands judicially adjudicated, were comprised within the jurisdiction of the adjoining Province. For example, it was the "Alcalde" (Mayor) and the "Cabildo" (Corporation) of Citalá and, through them, the "Alcalde" of San Salvador, who acquired administrative control over the whole of the area adjudicated to Citalá as Commons.

2.8. The reason for this "administrative control" was that the communal character of the Commons made necessary a strict and continuous local administrative control in order to avoid any fundamental alteration of the nature of the institution through the implantation of any individual private properties. The Commons, by reason of its very own particular nature, necessarily remained subject to the administrative control of the authorities of the town or locality to which it had been adjudicated in a continuous and constant form with the object of avoiding the introduction of individualistic tendencies by means of the sale or lease of these lands, actions which were of course prohibited.

2.9. Ots Capdequi in his work entitled "Historia del Derecho Español en América y del Derecho Indiano" states in his chapter entitled "The Communal Property: the Municipal Corporations and the régime

of landholding" ("Los bienes comunales: los Cabildos Municipales y el régimen de tierras" in the original Spanish text) (9):

"The juridical regulation of the communal utilisation of the Commons .... was the task of the Municipal Corporations with the obligatory supervisory control of the superior authorities".

2.10. In Law II, Title XXI, Book VII, of the "Novísima Recopilación", the King of Spain ordered that "all the Commons .... which are taken and occupied by any person whatever in his own name and right or through our charters, must subsequently be restored and returned to the Councils whose property they were and are" (emphasis added).

2.11. "Las Ordenanzas de Descubrimiento y Nueva Población" of 1573, referred to in the Memorial of El Salvador (10), required and presupposed the administrative control of the local authority in question with the object of not prejudicing the indigenous communities.

2.12. The same occured with "La Recopilación de las Leyes de Indias" of 1680, also referred to in the Memorial of El Salvador (11), since the Spanish colonial régime, following the counsels of Francisco Vitoria, established that "the Christians cannot take possession of the properties of the

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9. Op.cit. p. 240.
10. Memorial of El Salvador: Paragraph 4.7..
11. Memorial of El Salvador: Paragraph 4.10..

Indians".

2.13. The "Real Decreto" of 19. September 1798 enacted by King Carlos IV of Spain and the "Decreto" of the Spanish Parliament of 13 September 1813 reiterated the necessity of preserving the communal character of the Commons.

2.14. This continuous administrative control emerged from the Formal Title Deeds themselves, as in the case of the Title Deed to the Commons of Polorós in 1760, which contains in its final section the following passage (this passage is cited in the Annexes to the Memorial of Honduras (12) translated into French, in which form it is also cited here):

"étant entendu que ces terres ne pourront être vendues ou aliénées en totalité ou en partie sous quelque prétexte que ce soit et en cas d'extinction du village en question, ces terres devraient retourner au patrimonie royal et dans ce cadre, ils peuvent y construire des maisons d'habitation, qu'ils fixent du bétail, des enclos, des murs, des fermes y autres édifices nécessaires, semer toutes plantes de castille ou de la terre, avoir et élever du bétail grand et moindre, des bêtes de somme et des chevaux .... et j'ordonne et je commande à chacun des alcades ordinaires de la ville de San Miguel que sur requête présentée avec le présent titre par les indiens de Poloros, ils les aident dans la possession de ces terres concédées, leur bois, leurs eaux et leurs pâturages et leurs abrevoirs et tout ce qui en fait partie de fait et de droit, comme je le fais par la présente; sans accepter qu'ils en soient dépossédés en partie ou en totalité san être d'abord entendu en justice...."

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12. Memorial of Honduras: Annexes: p. 1587.

2.15. In the light of these provisions, there is no room for the distinction advanced by Honduras as the basis of its territorial claims between, on the one hand, disputes between indigenous communities over Commons land and, on the other hand, disputes between States over international frontiers. If all or part of the Commons adjudicated to Citala in the measurement of 1776 carried out in Tecpanguisir, or if the Commons adjudicated to Perquín and Arambala in the measurement of 1769 (subsequently confirmed in 1815), lands identified as such by the Memorial of Honduras as far as the Cerro de la Ardilla, or if the Commons adjudicated to Polorós in the measurement of 1760 as far as the Cerro de Rivitá and the Cerro de López had remained under the administrative control of the Colonial Province of Honduras after the dates of their respective adjudication, these lands would simply have ceased to be the Commons of Citalá, of Perquín and Arambala, and of Polorós respectively.

2.16. It is an incontrovertible fact that, in executing Formal Title Deeds to Commons, the "Jueces de Tierras" (Land Judges) of the "Real Audiencia de Guatemala" (Supreme Civil Tribunal of Guatemala) were able, both as a matter of fact and as a matter of law, to adjudicate as Commons both lands which crossed over the former provincial frontiers and lands well beyond those borders.

2.17. In the Conference held at Guanacastillo in 1888 the delegation of Honduras recognised that "sous le régime unitaire de l'epoque de la Colonie, il n'était pas rare que les Autorités

Supérieures qui résidaient au Guatemala, aliénassent à n'importe quel titre, des terres appartenant aux Provinces, au bénéfice de villages qui n'étaient pas compris dans leur juridiction; comme exemples immédiats .... les "éjidos" concédés à Arambala et Perquin sur la rive droite de la rivière Negro" (13).

2.18. In the Memorial of Honduras (14), the power of the competent judicial authorities, the "Jueces de Tierra" to cross over the former provincial frontiers in their adjudications is questioned on the basis that such an act would have required an alteration of provincial boundaries by means of a "Real Cédula" (15). The reality is that this argument takes no account of the fundamental argument relating to the all-embracing power of the Spanish Monarch to modify as he pleased the boundaries of his colonial possessions (16). The Italian commentator Fiore

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13. Memorial of Honduras: Annexes: p. 237.

14. Memorial of Honduras: pp. 315-316.

15. Memorial of Honduras: p. 315.

16. A document from the "Archivo de Indias" dated 1774 transcribed by Samuel Durán Bachler in "La Doctrina latino-ámericano del uti possidetis" (Concepción, Chile (1977)) states in old Spanish:

"Savida cosa es que en el soberano permanece y subsiste siempre expedita, la potestad de ser árbitro en mudar y alterar las leyes; dividir virreynatos y provincias; establecer jurisdicciones; desmembrar de las ya formadas las que tenga por conveniente; y en una palabra, con causa o sin ella, dar movimiento a lo legal, gubernativo y político, sin conocer superior ni límites a su suprema

demonstrates (17) that the Spanish sovereign enjoyed, by virtue of the right of exclusive dominio to which he was entitled over his colonial possessions, complete autonomy in the regulation of the administrative régime of these colonies, being able to constitute "Capitanías Generales", "Audiencias", "Residencias", "Virreinatos", to determine what territories should be included within each administrative area, and to establish the boundaries and the divisions of these areas. This is confirmed by the judgement of the Tribunal which decided the Arbitration between Guatemala and Honduras which stated in similar vein (18) that "The Crown was at liberty at all times to change its royal commands or to interpret them by allowing what it did not forbid".

2.19. Further if, as is claimed by the Memorial of Honduras (19), a "Real Cédula" is required

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potestad".

(English translation) "It is a well known fact that in the Sovereign there remains and exists always available the power to be arbiter in promoting and altering the laws; in dividing viceroyalties and provinces; in establishing jurisdictions; in separating from those already formed those that he regards as convenient; and, in one word, with or without cause, in bringing about changes in legal, governmental and political matters without being subject to any superior or to any limitation to his supreme power."

17. Révue Générale de Droit Public (1910) p. 251.

18. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) p. 7.

19. Memorial of Honduras: p. 315.

for the Spanish Monarch to delegate his absolute power to modify jurisdictions to the "Jueces de Tierra" of the "Real Audiencia, such a delegation emerges from the two "Reales Cédulas" enacted in El Pardo on 1 November 1591, which were later on incorporated into the "Recopilación" (these "Reales Cédulas" are transcribed in the Annexes to the Memorial of Honduras (20)). By means of these "Reales Cédulas" the Spanish Monarch, worried by the fact that "les plus grande parties des meilleures terres ont été occupées sans que les municipalités et les indigènes ne possèdent ce dont ils ont vraiment besoin", ordered the restitution of the lands improperly acquired by the Spanish colonialists and their subsequent redistribution, "tout en réservant le nécessaire pour ejidos, biens communaux, paturages et terrains en friche des hameaux et municipalités" and so forth, with the objective of "distribuant entre les indigènes les terres suffisantes pour leurs sémences et élevage, leur confirmant ce qu'ils possèdent aujourd'hui et ce dont ils auront besoin demain". With these objectives, the Spanish Monarch gave the necessary authority to the "Real Audiencia" by providing that "tout ce qui sera fait par vous je l'approuve et confirme conformément à cette Real Cedula" (21).

II. The Abandonment and Supercession of the Distinction Advanced by Honduras

2.20. It is possible that at an early moment in

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20. Memorial of Honduras: Annexes: pp. 1964-1966.

21. Memorial of Honduras: Annexes: p. 1966.

the boundary negotiations between El Salvador and Honduras, such as for example the Conference held at the Montaña del Mono in 1861, the distinction advanced by Honduras between, on the one hand, disputes between indigenous communities over Commons land and, on the other hand, disputes between States over international frontiers might have been discussed as a possible principle. This would explain, for example, the phrase in the communication of 14 May 1861 upon which the Memorial of Honduras wishes to base its claims (22). However, this distinction, included in Article 6 of the Treaty of Arbitration of 18 December 1880 (23), did not survive the extinction of this Treaty when the Parties accepted the withdrawal of the President of Nicaragua, who declined to emit the Arbitration Award which had been requested (24). As early as 1880, Francisco Cruz, in his report of 28 June of that year, observed, anticipating the terminology which was subsequently to be adopted by the judgement of the Tribunal which decided the Arbitration between Guatemala and Honduras, that "l'affaire se réduisant à une question de contrôle de terrains communaux en ce qui concerne le Salvador, et à une question de juridiction nationale en ce qui concerne le Honduras" (emphasis added) (25).

2.21. What happened is that, very quickly, it

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22. Memorial of Honduras: p. 200.
23. Memorial of Honduras: Annexes: p. 164.
24. Memorial of Honduras: Annexes: p. 164.
25. Memorial of Honduras: Annexes: p. 109.

came to be understood that this distinction, which would have resulted in the placing of the Commons of, for example, Perquín and Arambala under the political sovereignity of Honduras, did not have the slightest possibilty of leading to a just and pacific solution of the acute conflicts then existing. The awareness of the practical impossibility of such a result arose, for example, from the not unfounded fear that the sovereign authority in question might demonstrate hostility or might favour the communities of its own country to the detriment of the communities of its adversary by, for example, imposing taxes solely on the latter (26). This was the fundamental reason which led to the rejection of the distinction (27).

2.22. The other difficulty which made it impossible to resolve the secular conflicts on the basis of the distinction proposed by Honduras is that it is not possible, either as a matter of fact or as a matter of law, to put the possession of a Formal Title Deed to Commons on the same level as the possession of a title conferring merely a private proprietary interest in land upon a foreign landowner. This is because, as has already been seen, a Formal Title Deed to Commons requires and presupposes the administrative control of the authorities of the locality to which the Commons in question has been

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26. Memorial of Honduras: Annexes: pp. 238 & 154.

27. Records of the Conference of Guancastillo in 1838, transcribed in the Memorial of Honduras: Annexes: p. 238.

adjudicated.

2.23. To give an idea of the insoluble problems which would have been provoked by placing Commons belonging to a settlement of El Salvador under the political jurisdiction of Honduras, or vice versa, as if what was involved was merely a private proprietary interest in land held by a foreign proprietor, it is appropriate to make a comparison. This comparison is not strictly exact and should not, consequently, be taken too literally, but it does produce an idea of the underlying reasons which led to the abandonment of the formulas for a solution envisaged during the negotiations at the Montaña del Mono in 1861 and at the Conference of Nahuaterique in 1869. It is as if, in order to resolve by means of a compromise a dispute between States over international frontiers, it had been proposed to place a national asset of public utility, such as a square, under the ownership of one of the States but subject to the political jurisdiction of the other State.

2.24. The abandonment of the distinction which Honduras now wishes to reintroduce was confirmed in the negotiations between Cruz and Letona in 1884. These negotiations have much greater significance than the others which have taken place between the Parties for the simple reason that they are the only ones which have ever prospered sufficiently to lead to the production of a Treaty signed by Plenipotentiaries of both States; indeed, the Memorial of Honduras seeks to rely on such parts thereof as are in favour of the claims presented

therein (28). Although this Treaty was not in the end ratified by Honduras, the existence of the Treaty prevents Honduras from claiming to be unaware of the existence of certain facts which were duly documented in the Conferences held by the two Plenipotentiaries.

2.25. The International Court of Justice in the Frontier Lands Case, reached this conclusion in relation to the unratified Convention of 1892 between Belgium and the Netherlands, stating that, although this Convention did not create either rights or obligations, its terms and the contemporary events demonstrated that in that epoch Belgium had affirmed its sovereignity over the two pieces of land and that the Netherlands had not been unaware of that (29).

2.26. In the same way, certain undeniable facts emerge from the Conferences held by Cruz and Letona and from the final text of the Treaty agreed between them. The first, and most important, is that from that moment the impracticable distinction between, on the one hand, disputes between indigenous communities over Commons land and, on the other hand, disputes between States over international frontiers was abandoned. The second is that the negotiators agreed to act in the same manner as would a judge, that is to say to study the documents presented by each Party and to determine which document ought to be given preference in relation to each issue in

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28. Memorial of Honduras: pp. 369-371.

29. I.C.J. Reports 1959 p. 229.

dispute. And the third is that the negotiators carried out a personal inspection of the disputed sectors and decided that the demarcation of the boundary which was established should be marked out by the surveyors who accompanied them. (30) The practical consequence of these decisions of principle was that Cruz and Letona, acting together, required the Municipal Corporations of all the towns and villages situated near the frontier to appear before them and duly fixed the line of the frontier after having examined the Formal Title Deeds of their respective Commons and communal lands. It was as a result of this process that Cruz concluded that the Titles of Polorós (31) and of Perquín and Arambala (32) "establish permanent landholdings of traditional accuracy" (33).

2.27. Neither is it correct to state that the Conferences held at the time of the signature of the Cruz-Letona Treaty have subsequently been ignored. The Boundary Convention of Tegucigalpa, signed on 18 September 1886 (34), while indeed containing in Article VI thereof the provision relied on in support of this argument by the Memorial of Honduras to the effect that the status quo then agreed upon would not take in account the frontier line established by Cruz and Letona, did on the other hand provide

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30. These decisions were all taken at their Second Conference.

31. At the Second Conference.

32. At the Fourth Conference.

33. Memorial of El Salvador: Paragraph 4.21.

34. Memorial of Honduras: Annexes: pp. 222-223.

in Article I thereof that:

"Les Gouvernements de Honduras y du Salvador nommeront chacun, un Avocat et un Arpenteur afin que, vu le procès-verbal des conférences qui se sont déroulées entre Messieurs Francisco Cruz et Monsieur le Géneral Lisandro Letona, et les différents documents qui leur seront présentés par l'une et l'autre partie, ils déterminent quelle doit être la frontière entre les deux Républiques" (emphases added).

2.28. The Memorial of Honduras, in its attempt to discredit its own negotiator, Francisco Cruz, insists on drawing attention to certain discrepancies between the arguments presented by Cruz to the Arbitrator of Nicaragua and the frontier line which he subsequently accepted as the result of his Conferences with the negotiator representing El Salvador. However such discrepancies are inevitable if the different circumstances in which Cruz was acting are taken into account; before the Arbitrator of Nicaragua, he was appearing as the advocate of one of the Parties and arguing on the basis of Article VI of the Treaty of Arbitration of 1880, which accepted the distinction which Honduras is now seeking to reintroduce; in the Conferences with the negotiator representing El Salvador, his rôle, as described in the formal records of the Conferences, was of a quasi-judicial nature in that he was examining and assessing the Formal Title Deeds presented by each locality, having already discounted as impracticable the idea of placing the Commons of one indigenous community under the sovereignity of the other State.

2.29. In any event, the principal argument utilised by Cruz in his arguments before the Arbitrator, the President of Nicaragua, was not the

distinction between, on the one hand, disputes between indigenous communities over Commons land and, on the other hand, disputes between States over international frontiers, but rather the invocation of the concept of the "natural frontier" (35). This argument, which appears on a number of occasions in the Memorial of Honduras and the Annexes thereto (36), has for present purposes to be rejected out of hand. Neither in the Special Agreement nor in the General Peace Treaty of 1980 is the Chamber given authority to establish the line of the frontier on the basis of what constitutes the best "natural frontier".

2.30. That is not to say that this criterion has never been employed in the past. Article II, Paragraph 6, of the unsuccessful Convention of Arbitration signed on 3 January 1889 (37), authorised the Arbitrator to "establish frontiers which were, so far as possible, natural frontiers". This provision, which is also found in the Games-Bonilla Treaty of 1889 between Honduras and Nicaragua, was not repeated in subsequent Conventions (the Convention of 1889 having lapsed as a result of its rejection by Honduras) (38). In any event, it is totally inappropriate and excessive to compare these wholly explicable attitude of Cruz with the type of consent given to an

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35. Memorial of Honduras: Annexes: p. 143.

36. Memorial of Honduras: Annexes: p. 134 (the Report by Lazo).

37. Memorial of Honduras: Annexes: p. 270.

38. Memorial of Honduras: pp. 276-277.

inequitable treaty such as that imposed upon a defeated enemy, and to disqualify him as a negotiator by accusing him of treason.

2.31. The definitive abandonment of the distinction which Honduras is now seeking to reintroduce was confirmed in the Conference of Guanacastillo in 1888, in which Cruz took no part. At this Conference the position of El Salvador was stated in a categorical form in the following terms (39):

"les "éjidos" en aucun cas ne peuvent être confondus avec les propriétés territoriales acquises par les Municipalités à d'autres titre, étant donné qu'ils sont une institution politique, inhérente, non seulement au village auquel ils appartiennent, mais aussi à la province donc ils font partie et, que ce point découle du Droit public espagnol et a été retenu dans le Droit de l'Amérique Centrale."

To make matters still more clear, the Delegation of El Salvador added (40):

"les titres des "éjidos" impliquent l'exercice d'actes de souveraineté que les lois préexistantes attribuent à des fontionnaires d'une hiérarchie assez élevée, en géneral gouvernementale, car la nature de l'ordre administratif correspondant l'exige."

As can be appreciated, there was described here what the judgement of the Tribunal which decided the Arbitration between Guatemala and Honduras was later on to call (41) "administrative control .... exercised

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39. Memorial of Honduras: Annexes: p. 235.

40. Memorial of Honduras: Annexes: p. 247.

41. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) — p. 7.

.... with the will of the Spanish monarch".

2.32. And at this Conference at Guanacastillo the Delegation of Honduras, recognising the absence of any juridical basis for its proposition that a distinction should be drawn between, on the one hand, disputes between indigenous communities over Commons land and, on the other hand, disputes between States over international frontiers, based its proposal not on Public International Law but on considerations of equity with the object of arriving at a compromise of the respective interests of the Parties. The Delegation of Honduras stated (42)

"l'affaire de frontière dont il s'agit aujourd'hui pose le problème des frontières nationales et celui de propriété des "éjidos" ou de terrains communaux qu'il ne faut pas perdre de vue pour parvenir à une entente qui soit en accord avec les préceptes de la justice y à une conciliation qui harmonise tous les intérêts."

2.33. Finally, the argument that is absolutely decisive for the rejection of the argument of Honduras is that the provisions which establish the law which is applicable to this frontier dispute - Article 5 of the Special Agreement and Article 26 of the General Peace Treaty of 1980, neither give any scope for nor authorise the distinction proposed by Honduras and, what is more, do not mention the formula which was laid down in Article 6 of the Treaty of Arbitration of 1880. On the contrary, Article 26 of the General Peace Treaty of 1980 inequivocably

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42. Memorial of Honduras: Annexes: p. 237.

disputed area, the Joint Boundary Commission shall take as its basis the documents issued by the Spanish Crown or by any other Spanish authority, civil or ecclesiastical, during the colonial period which indicate the jurisdictions or boundaries of territories or towns" (emphases added).

The principles of law applicable to this litigation submitted to the Chamber of the International Court of Justice, and not now to the Arbitration of the President of Nicaragua, are those established by Article 26 of the General Peace Treaty of 1980, not those established by Article 6 of a Treaty of Arbitration signed a century before in 1880 whose provisions have long since totally lapsed.

2.34. The Tribunal which decided the Arbitration between Guatemala and Honduras could hardly have stated this proposition more clearly in a passage which is fully applicable to the present case (apart, of course, from the different dates of the Treaties referred to) (43)

"The negotiations under the Treaty of 1914 resulted in a deadlock. The Parties were at liberty to reach a new agreement and they did so in the present Treaty of 1930. This Treaty does not refer to the proceedings under the earlier Treaties and establishes its own criteria."

And the Tribunal added, immediately afterwards (44):

"the Tribunal cannot be deemed to be bound by proceedings under earlier Treaties with their particular requirements."

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43. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) p. 47.

44. Ibid..

III. The manner in which Formal Title Deeds to Commons ought to be read and interpreted.

2.35. From the observations that have been made, it follows that what has to be taken into account in relation to Formal Title Deeds to Commons for the purpose of determining the uti possidetis iuris are the precise and defined boundaries which these Title Deeds indicate (45) by virtue of the boundary markers and geographical features described therein rather than paying attention, as the Memorial of Honduras argues, to the recitals which these Title Deeds may possibly contain as to the "ancient frontier" which formerly divided one Province from another in the "Capitanía General" of Guatemala.

2.36. Consequently, the Formal Title Deeds to Commons ought to be read and interpreted taking into account what is established in what it is appropriate to call the dispositive part thereof, that is to say the line of demarcation that is fixed through the boundary markers and geographical features, and not in relation to the preliminary or declaratory part thereof, in which on some occasions it is stated that the adjudication of the Commons has involved a penetration into the adjoining Province or that witnesses have made declarations to this effect. Notwithstanding statements of this type, the whole of the area adjudicated as Commons nevertheless passed

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45. The verb used in Article 26 of the General Peace Treaty of 1980 is precisely "indicate" ("señalar" in the original Spanish text).

automatically into the jurisdiction of the area to which the Commons were adjudicated and from that moment remained subject to the administrative control of that jurisdiction.

2.37. For example, both Parties cite in support of their claims the Formal Title Deed to the Commons of Polorós of 1760. El Salvador bases its claim on the fact that this Title Deed fixes as the most distant boundaries of the Commons of Polorós the Cerro de Rivitá and the Cerro de López and on the boundary markers erected in these places as proof of the fact that the demarcation extended that far (46). Honduras, on the other hand, relies on a casual declaration made by the surveyor who carried out the measurement to the effect that a sector of the land included in the measurement and adjudicated to Polorós was, prior to the carrying out of the measurement, within the jurisdiction of Comayagua, a Province which subsequently became part of Honduras (47).

2.38. Similarly, in relation to Nahuaterique, in respect of which El Salvador relies on the boundaries set out in the Formal Title Deed to the Commons of Perquín and Arambala of 1815, which extend beyond the Rio Negro as far as the Cerro de la Ardilla (48). Honduras, on the other hand, places emphasis on the fact that in the course of the

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46. Memorial of El Salvador: Paragraph 6.52..
47. Memorial of Honduras: p. 254.
48. Memorial of El Salvador: Paragraph 6.40..

measurement it was stated by some witnesses that the *Rio Negro* was the "*ancient frontier*" which separated the Province of San Miguel from the Province of Comayagua (49).

2.39. In both these case, the demarctaion established by the Formal Title Deed to the Commons in question prevails over these type of declarations made incidentally or in the course of the evidence as to what was the "ancient frontier" before the carrying out of the measurement.

2.40. In relation to Tecpangüisir, Honduras has invoked the argument that in the Formal Title Deed to the Commons of Citalá of 1776, the "Juez Principál" (Principal Judge) of the "Real Derecho de Tierras" (Royal Jurisdiction over Land), Oidor Arrendondo, accepted that the jurisdiction over Gracias a Dios corresponded to the jurisdiction of the Judge of Chalatenango, which for Honduras indicates that the area of Tecpangüisir was within the Province of Gracias a Dios in Honduras (50). However, the "Real Audiencia" of Guatemala, with jurisdiction over the whole of that "Capitanía General", authorised the transfer of this jurisdiction, giving the Judge who carried out the measurement authority to grant to Citalá the enlargement of its Commons. Given that the "Real Audiencia" of Guatemala thus established the jurisdiction of the Judge Jiménez Rubio and that

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49. Memorial of Honduras: p. 220.
50. Memorial of Honduras: p. 314.

the latter adjudicated the mountain of Tecpangüisir to the Commons of Citalá, that territory automatically remained subject to the administrative control exercised from Citalá and from San Salvador and, consequently, the territory came to belong to the Province of San Salvador.

2.41. In all these cases, the line of demarcation established in the Formal Title Deed to the Commons in question is, in accordance with the principle of uti possidetis iuris, transformed into the sovereign title to the territory in question in accordance with Public International Law and with Article 26 of the General Peace Treaty of 1980.

2.42. On the other hand, the recitals, incidental comments or declarations of witnesses made in the Formal Title Deeds to Commons in relation to the "ancient frontier" of the Provinces, are in no way able to serve, in the manner argued by Honduras, as the basis for the delimitation which the Chamber is obliged to carry out for the simple reason that these incidental remarks do not indicate precise and well defined boundaries. The Memorial of Honduras recognises, for example, that the boundary line which divided the Departments of Chalatenango and Gracias a Díos was characterized by "l'absence d'indication .... de points géographiques précis", something which "ouvraient la voie à des intérpretations divergentes de la ligne frontière" (51). In the same manner,

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51. Memorial of Honduras: p. 324.

Honduras recognises that the application of the principle of uti possidetis iuris requires "la découverte d'un titre colonial suffisamment clair et précis pour permettre au juge de tracer une ligne frontière" (52) (emphasis added).

2.43. In the Arbitration between Guatemala and Honduras, where similar problems had to be considered, the Tribunal of Arbitration indicated in this respect (53):

"It is necessary again to recur to the fact that while the evidence shows that on the east the district of Chiquimula of Guatemala bordered on the district of Comayagua of Honduras, there is no definition in any royal rescript of the boundary between these districts. This lack of definition cannot be deemed to be supplied by general and ambiguous references to the territory which are found in public documents but which do not attempt to describe the boundary line. Thus, references are found to the district of Chiquimula as bordering on, or neighboring to, Omoa. But such statements do not give any precise delimitation."

2.44. The same requirement of explicit boundaries is formulated in Article 5 of the Constitution of Honduras of 1965. Making reference to the definitive solutions of the frontier problem with El Salvador, it is affirmed that such solutions must be based "sur la documentation coloniale existante jusuq'au [sic] quinze septembre mille huit cent vingt y un, et la documentation postérieure liée au réarpentage des terrains frontaliers, qui explicite

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52. Memorial of Honduras: p. 158.

53. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) pp. 33-34.

les limites des terrains auxquels se réfèrent les titres coloniaux" (54) (emphasis added).

2.45. The Memorial of Honduras, in a manner which is in contradiction with its fundamental thesis, interprets the Formal Title Deeds to Commons in the way in which El Salvador argues that this should be done whenever the position of Honduras appears to be favoured thereby. This is the case, for example, in the sectors of Zazalapa and La Virtud. In such cases, without the slightest concern over incurring in inconsistency, the Memorial of Honduras proposes as the line of the frontier the demarcation established by the successive boundary markers and geographical features.

2.46. Honduras did exactly the same before the International Court of Justice in the Case concerning the Arbitration Award of the King of Spain between Nicaragua and Honduras, in relation to the measurement of the Sitio de Teotecacinte. In this case, Honduras cited, in support of the validity of the decision of the Arbitrator, that the boundary had been fixed exactly on the basis of the area traversed in the measurement of Sitio and, in particular, on the fact that the Formal Title Deed situated the final point of Sitio in Cruz sin Brazo and it is, consequently, as from this point that, in accordance with the intention clearly expressed by the Arbiter, there should be established the line

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54. Memorial of Honduras: Annexes: p. 30.

of demarcation. Honduras added that the clear intention of the Arbitrator had been that the line of the frontier should coincide with the entire measurement of Sitio (55). Further in the oral argument of Honduras, one of its advocates, Professor Briggs, added (56):

"The Award, therefore, delimited a frontier line .... with a detour to follow the demarcation of the Sitio.

".... the last point mentioned by the surveyor is the south-western extremity of El Sitio.

".... the point of departure for the Portillo should be Cruz sin Brazo simply because the surveyor stated that he completed plotting the Sitio at that point."

2.47. This form of interpreting the Formal Title Deed and the measurement recorded therein was indeed accepted by the International Court of Justice, which ratified the decision of the King of Spain as Arbitrator and, consequently, ratified his manner of reading and interpreting these Formal Title Deeds in a manner which coincides with the arguments now produced by El Salvador. The Court stated (57):

".... the line will follow the direction which corresponds to the demarcation of the Sitio of Teotecacinte in accordance with the demarcation made in 1720 to terminate at the Portillo de Teotecacinte in such manner that the said Sitio remains wholly within the jurisdiction of Nicaragua."

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55. I.C.J. Pleadings: Vol. I.: p. 543. See also the arguments of the Advocate of Honduras, Professor Guggenheim: op.cit.: Vol. II: p. 196 et seq..

56. I.C.J. Pleadings: Vol. II: pp. 209 & 210.

57. I.C.J. Reports 1960 p. 216.

CHAPTER III

THE SECTORS OF THE LAND FRONTIER IN DISPUTE

I. Tecpangüisir Mountain

3.1. In this sector, there arises in the purest possible form the central and most crucial issue that arises in this frontier dispute, namely the manner in which Formal Title Deeds to Commons ought to be read and interpreted.

3.2. Both Parties rely on the same Formal Title Deed to Commons, the Deed which in 1776 adjudicated to Citalá, in the then colonial province of San Salvador, Tecpangüisir Mountain as an extension to its Commons (1).

3.3. El Salvador claims that this Formal Title Deed proves conclusively that as from 1776 administrative control over Tecpangüisir Mountain was, with the consent of the Spanish Crown, exercised from Citalá and, consequently, from San Salvador by the "Alcaldes" and the other authorities of those jurisdictions.

3.4. Honduras, on the other hand, has produced two distinct arguments. In the first place, Honduras argues that this Formal Title Deed recognises

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1. This Formal Title Deed is set out in the Memorial of Honduras: Annexes: pp. 1795-1815.

in one of its recitals, that is to say the declaratory part thereof, that the lands so adjudicated to Citalá "se trouvaient "en province étrangère". C'est-à-dire qu'elles se trouvaient dans la juridiction de Gracias a Dios, l'actuelle République du Honduras". (2) It has already been shown, in Chapter II above, that what matters for the purposes of determining the uti possidetis iuris is by whom and from where administrative control over the lands in question was exercised as from the date of their measurement and not in which former colonial province these lands happen to have been situated prior to the date of the measurement. The administrative control over Tecpangüisir Mountain, by virtue of the Formal Title Deed of 1776 and as from that date, was vested in Citalà.

3.5. However, Honduras also formulates a second argument as the basis of its claim to Tecpangüisir Mountain. This argument is also based on the Formal Title Deed to the Commons of Citalá of 1776 and arises out of an incident that took place in the course of the execution of this Formal Title Deed.

3.6. The Judge who had been requested to carry out the measurement observed that "les terres litigieuses se trouvent dans une autre Province" and therefore asked the Principal Land Judge of the

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2. Memorial of Honduras: p. 298. See also at p. 300.

Colonial Kingdom of Guatemala "que Sa Seigneurie augmente mes pouvoirs ou qu'il détermine ce que sera sa décision". The inhabitants of Citalà subsequently requested this Principal Land Judge to amplify the jurisdiction of the Judge who had been requested to act by granting him the necessary jurisdiction to carry out the measurement. He, on 20 Februàry 1776, decided to confer jurisdiction on the Sub-Delegate Judge of the District of Chalatenango, Don Lorenzo Jiménez Rubio, to carry out the formal measurement of Tecpangüisir Mountain "le notifiant au sous-délégué de la Province de Gracias a' Dios pour qu'il prenne connaissance du fait que ce Tribunal Principal s'est introduit dans le domaine de sa compétence". To which notification the Sub-Delegate Judge of Gracias a Dios replied that, having seen the order of the Principal Land Judge of Guatemala "à laquelle j'obéis avec le plus grand respect après en avoir pris acte, et Monsieur le sous-délégué [Jiménez Rubio] procédéra à ce qui lui a été demandé". And a Note at the end states "Ainsi je l'ai décidé dans ce jugement (auto) signé en présence de témoins à défaut de notaire, moi, Don Manuel de Castro juge sous-délégue du Droit Foncier Royal de cette Province de Gracias a Dios et du District de Tencoa, le six mars de mil sept cent soixante seize". (3)

3.7. There thus took place, in a form which was

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3. All these quotations are from the French translation of this Formal Title Deed in the Memorial of Honduras: Annexes: pp. 1795--1815.

both decreed by and in accordance with the law, the transfer of jurisdiction in order to give jurisdiction to the Judge of Chalatenango, who was closer to the lands in question, to proceed with the adjudication of these lands, which was duly carried out in the manner related in the Memorial of El Salvador (4).

3.8. The Memorial of Honduras argues that this transfer of jurisdiction did not modify in any way the boundaries of the colonial provinces since such a modification of boundaries was within the jurisdiction only of the Spanish Crown and so required a "Real Cédula" (Royal Decree) or an order of the "Consejo de Indias" (Council for the Indies) (5). This argument has already been refuted in Chapter II above, where it has been demonstrated that, in so far as concerned Commons granted to the indigenous communities, the "Reales Cédulas" enacted in El Pardo on 1 November 1591 had delegated to the "Real Audiencia" (Supreme Civil Tribunal) of Guatemala the fullest possible faculties to adjudicate and restore lands to the Indian population, including the power to ignore and go beyond the previous boundaries of the colonial provinces.

3.9. The Memorial of Honduras presents a Formal Title Deed of a remeasurement in favour

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4. Memorial of El Salvador: Paragraphs 4.13. & 6.3..

5. Memorial of Honduras: p. 315.

of the inhabitants of Ocotepeque carried out in 1816 (6). However, this Formal Title Deed is of no effect whatever since it merely confirms the Formal Title Deed to the Commons of Citalá of 1776. At the time when the remeasurement of the Commons of Ocotepeque was carried out, the inhabitants of Citalá were summoned to appear (7). The Indian "Alcaldes" of the settlement duly appeared and presented their Formal Title Deed in respect of the measurement carried out in Tecpangüisir Mountain (8) and all the inhabitants agreed with what was stated in that Formal Title Deed (9). Consequently, as is stated in the Formal Decree of 20 March 1817, the measurement passed "par le côteau élevé et arrondi de Tepanguizir, qui constitue la borne de ejidos du village de Citala" (emphasis added) (10).

3.10. In 1881 there took place in La Hermita the first negotiations between Don Luciano Morales and Don Celestino Carranza, the representatives respectively of El Salvador and of Honduras, "afin de commencer la délimitation des terrains communaux de la ville d'Ocotepeque et du hameau de la Hermita du village de Citala, qui délimitent les territoires des deux Républiques" (emphases added) (11). As can

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6. Memorial of Honduras: Annexes: pp. 1768 et seq..
7. Ibid. p. 1703.
8. Ibid. p. 1784.
9. Ibid. p. 1786.
10. Ibid. p. 1788.
11. Ibid. p. 124.

be seen, at that time the distinction advanced by Honduras between, on the one hand, disputes between indigenous communities over Commons land and, on the other hand, disputes between States over international frontiers was clearly abandoned. Despite this, it did not prove possible to reach any agreement on that occasion, there were annexed to the formal records of these negotiations various documents, including a Formal Title Deed of 1740 in favour of Citalá and other documents arising out of the withdrawal of Formal Title Deeds which had been obtained maliciously by the inhabitants of Ocotepeque (12). This Formal Title Deed of 1740 and others of 1702 and 1704, although they refer to sectors of the frontier which have now been delimited and which consequently are no longer in dispute, contain specific references to the possession exercised by the Indian population of Citalá on Tecpangüisir Mountain. These titles will be examined and expounded in the subsequent section of this Chapter dealing with Las Pilas.

3.11. Given that in 1881 the distinction between, on the one hand, disputes between indigenous communities over Commons land and, on the other hand, disputes between States over international frontiers was abandoned, it should not be surprising that in the Seventh Conference between Cruz and Letona that the delegates, after "examinant les documents concernant le problême de frontière entre les villages de Citalá, du Salvador et celui d'Ocotepeque, du

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12. Memorial of Honduras: Annexes: pp. 127-131.

Honduras", agreed to take into account "les données fournies par les documents accréditatifs de la propriété et possession des terrains de Citala, qui sont plus anciens." The delegates Cruz and Letona added at this Meeting that they had also taken into account "les arpentages réalisés sur la ligne en litige en question, par les Arpenteurs, M. le Général Cesar Lopez, de la part du Gouvernement du Salvador, et M. Jean B. Collart, de la part du Honduras, l'année 1801, opération où ils se conformèrent au texte des documents qui furent présentés à cette date-là, et principalement, à ceux de Citala qui ont une plus grande autorité; car, d'après l'enquête effectuée en 1701, on ordonna de démolir les bornes qu'avait établies le Juge d'arpentage, M. Diego Cutino, et de reprendre les dossiers des arpentages réalisés par celui-ci; étant donné que les terrains de Tepanguisir furent adjugés à Citala, dès l'année 1776, et que les opérations de position et autres procès-verbaux qui figurent dans les documents de Citala se réalisèrent à la connaissance d'un sous-délégue, nommé par les Ocotepeques". Consequently, the two delegates fixed the line of the frontier in such a manner as to leave Tecpangüisir Mountain within Honduras (13).

3.12. The Memorial of Honduras itself recognises (14) that in the Conferences of 1884 the Commissioners Cruz and Letona clearly recognised the

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13. Memorial of Honduras: Annexes: p. 173.

14. Memorial of Honduras: pp. 300-301.

unquestionable value of the documents of Citalà (of 1701, 1740 and 1742) and the adjudication of Tecpangüisir Mountain to Citala in 1776 and therefore they delimited the line of the frontier in accordance with these Titles.

3.13. In a similar manner, the Memorial of Honduras recognises (15) that, in the descriptions made by Dr. Santiago Ignacio Barberena in 1890 and in 1897, by the engineer from Honduras José María Bustamente in 1890 and by the engineer from Honduras A.W.W. Cole, the frontier line is described as having been determined in accordance with the Formal Title Deed relating to Tecpangüisir. The Memorial of Honduras also recognises (16) that the maps prepared in Honduras have also always established the line of the frontier in accordance with that indicated in the Formal Title Deed relating to Tecpangüisir.

3.14. It was only in the Conference which preceded the signature of the Convention of Chiquimula of 24 July 1935 that Honduras proposed a frontier line different from that indicated in the Formal Title Deed relating to Tecpangüisir. This Conference was held to give effect to the Decision of 23 January 1933 of the Tribunal of Arbitration which decided the boundary dispute between Honduras and Guatemala. The judgement of the Tribunal of Arbitration had recommended that Honduras and Guatemala should seek

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15. Memorial of Honduras: pp. 301 et seq..
16. Memorial of Honduras: p. 303.

an agreement with El Salvador, which had not been a Party to this Arbitration, as to the place which should constitute the tripartite boundary marker between the three States. The three States therefore met at Chiquimula for this purpose and duly agreed on the Cerro of Monte Cristo as the tripartite boundary marker of the three States. During the Conference, Honduras proposed to El Salvador a frontier line in the sector of Tecpangüisir Mountain by virtue of which approximately 7 Square Kilometres of the land comprised in the Formal Title Deed relating to Tecpangüisir would have been transferred to Honduras. This proposal was of course totally inconsistent with this Formal Title Deed, whose legitimacy had been recognised by Celestino Carranza, the Commisioner representing Honduras at the Conference held at La Hermita on 8 May 1881, by Francisco Cruz, the Commissioner representing Honduras at the Conferences in 1884 which led to the signature of the Cruz-Letona Convention, and by José María Bustamente, the engineer of Honduras, in 1890.

3.15. The delegation of El Salvador, motivated as always by their desires to resolve in an amicable and pacific manner their differences with other States, replied (17) that their powers authorised them only to agree the tripartite boundary marker between the three Republics but that they would accept this frontier line subject to the subsequent approval

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17. Counter Memorial of El Salvador: Annexes: Vol. I, pp. 5-7.

of the Government of El Salvador.

3.16. It is important to note that the proposal thus made by the Delegation of Honduras at Chiquimula thus concerned approximately 7 Square Kilometres of the land comprised in the Formal Title Deed relating to Tecpangüisir; on the other hand, the boundary line claimed by Honduras at the Meeting of the Joint Boundary Commission on 24 & 25 September 1984 concerned no less than 69.6 Square Kilometres of the land comprised in the Formal Title Deed relating to Tecpangüisir. It must be emphasised that this late and wholly unjustified claim by Honduras, which had never been made prior to 1984, is not in any way supported by the Title Deeds of 1580, 1816, 1817 and 1818 presented by Honduras for the first time as Annexes to its Memorial (18); it is sufficient to look at the Maps annexed to the Memorial of Honduras (19) and to the Counter Memorial of El Salvador (20) which interpret these Title Deeds to see that these Title Deeds refer to areas completely outside the sector in dispute with the sole exception of a small area of approximately 2 Square Kilometres known as Peñasco Blanco or Mojón de Tecpangüisir which is introduced in an arbitrary manner inside the area which is clearly delimited by the Formal Title Deed relating to Tecpangüisir.

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18. Memorial of Honduras: Annexes: pp. 1631 et seq..

19. Memorial of Honduras: Map B.4.2..

20. Counter Memorial of El Salvador: Map 3.A..

REPRESENTATION AS A WHOLE OF THE COMMON LANDS OF SAN FRANCISCO CITALÁ (1766), AND OF THE LANDS OF THE INDIANS OF OCOTEPEQUE (1818) AND SANTA ANA (1738)

89°20'

89°10'

14°27'

14°20'

Odita Los Comederos

Camino Real

Mesa Grande

STA. ANA
(Sta. Anita)

El Pedregal

Qda. Quimiquema

Tizalao

Loma de Los Huesos

Loma
de Enmedio

Qda. El Oregano

Vado Ancho

Cont. Qda. El Orégano
con Río Lempa

El Carrizal

Cerro Muyutepeque

Cerro El Potrero del Valle

Cerro
San Antonio

Cabecera de Pomola

Qda. de Pomola

"Qda. de Pomola"

Cerro de Los Cedros

Cerro Piedra Menuda

Río Lempa

OCOTEPEQUE

Peñasco
Blanco

Qda. Taguilapa

Tepangüisir

"Serro Sapotal"

CITALÁ

Conf. Qda. de Gualcho
con Río Lempa

Río Lempa

Conf. Qda. de Poy
con Río Lempa

Peña de Cayaguanca

Minas Viejas de Cobre

Sitio
El Potrero

Loma

Cimiento de Iglesia Antigua

Encuentro de
Ríos Lempa y Nunuapa

"Paraje Las Cruzes"

COMMON LANDS OF SAN FRANCISCO CITALA (1776)

LANDS OF OCOTEPEQUE (1818)

LANDS OF SANTA ANA (1738)

Scale 1:100,000

1 0 1 2 3 4 Kms.

FRONTIER LINE SUPPORTED BY EL SALVADOR

FRONTIER LINE SUPPORTED BY HONDURAS

INSTITUTO GEOGRÁFICO NACIONAL
"INGENIERO PABLO ARNOLDO GUZMÁN"
MINISTERIO DE OBRAS PÚBLICAS
REPÚBLICA DE EL SALVADOR

MAP 3.A

3.17. This latter small intromission is in fact irrelevant for the following reasons. In the Formal Record of the Remeasurement of the Commons of Ocotepeque in 1914 (which is not included in the Annexes to the Memorial of Honduras but was subsequently sent to the Foreign Ministry of El Salvador by the Foreign Ministry of Honduras through the Secretariat of the International Court of Justice) it is stated that the "Comisión Agraria" of Ocotepeque in accordance with Article 31 of the Ley Agraria of Honduras ordered the remeasurement of the Commons of the community of Ocotepeque, declaring that the lands comprised in this remeasurement are those which belong to this community on the basis of the documents presented by them, which demonstrate that the title to these lands was duly executed in their favour during the colonial period. When the remeasurement was carried out, the surveyor in question declared that, in relation to the part of the Commons of Ocotepeque which had a common boundary with the Republic of El Salvador, the remeasurement did not present any difficulty because the boundaries indicated in the remeasurement were those which were regarded as the boundary of the two colonial Provinces. He objected only to the boundary marker of Peñasco Blanco or Tecpangüisir but stated that he had left this out of consideration because it had been fixed by the Boundary Commission of Honduras of 1889, in which, according to the measurement carried out by the engineer Nuñez Castro, this boundary marker was situated inside the territory of El Salvador (21).

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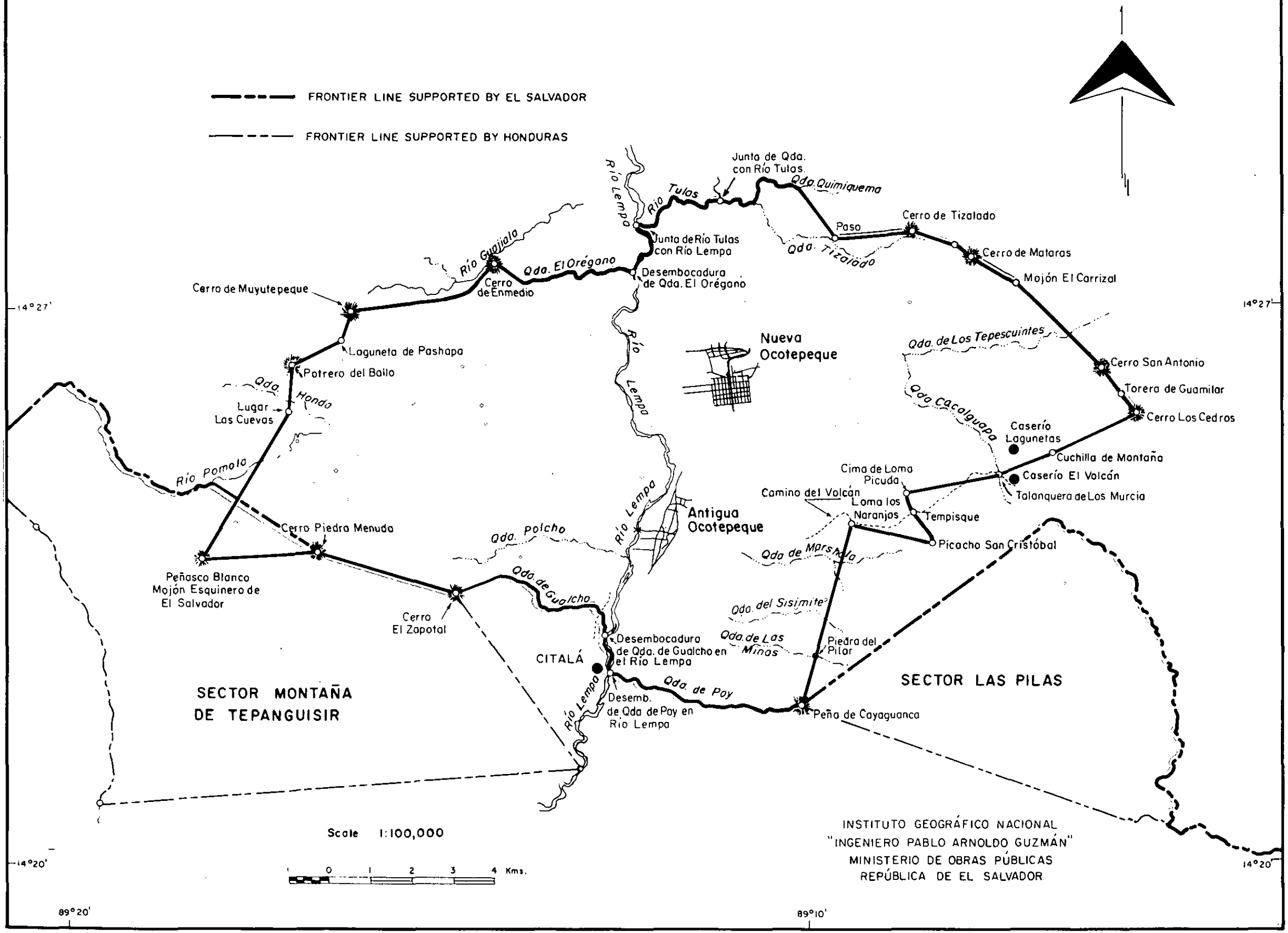
21. Counter Memorial of El Salvador: Map 3.B..

REMEASUREMENT OF THE LANDS OF THE COMMUNITY OF INDIANS OF OCOTEPEQUE (1914)



MAP 3.B

3.18. In all the Title Deeds presented by Honduras in respect of this sector, the boundaries of the Commons of Ocotepeque coincide with the boundaries of the Commons of Tecpangüisir, which fully confirms that the boundary line indicated by the Formal Title Deed presented by El Salvador has constituted the frontier from before 1821 right up until the present day (22).

II. Las Pilas or Cayaguanca

3.19. In this sector, the Memorial of Honduras exhibits considerable confusion, as much from the geographical as from the juridical point of view. Honduras bases its claim to this sector on Title Deeds executed in favour of Citalá in the Province of San Salvador in 1702, 1740 and 1742. However, these Title Deeds refer to the second of the sectors of the frontier delimited by the General Peace Treaty of 1980 and do not have anything whatever to do with the sector of Las Pilas (it should be noted that this is the name utilised by El Salvador for this sector, while Honduras intentionally utilises the name of Cayaguanca Mountain). These three Title Deeds were in fact cited by the Memorial of El Salvador (23) in relation to the sector of Tecpangüisir Mountain because in these Title Deeds it is clearly indicated that the Principal Land Judge of the "Real Audiencia"

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22. Counter Memorial of El Salvador: Maps 3.A., 3.B. & 3.C..

23. Memorial of El Salvador: Paragraphs 6.5., 6.6. & 6.7..

REPRESENTATION AS A WHOLE OF THE TITLE DEED OF COMMON LANDS OF LA PALMA (1,833), COMMON LANDS OF OCOTEPEQUE (1,818),(1,867) AND THE LANDS OF JUPULA (1,740)

89°20'

89°10'

14°27'

14°20'

El Pedregal

Qda. Quimiquemos

Mojón de Tizalao

Loma de Los Huesos

El Carrizal

Cerro San Antonio

Qda. El Orégano

Conf. Qda. El Orégano con Río Lempa

Cerro Muyutepeque

Cerro El Potrero del Valle

Cerro Corral Falso

Plan en el Cerro Corral Falso

Río Lempa

SINUAPA

Río Pomola

"Qda del Mescal"

Pueblo LA COMUNIDAD

Peña Blanca en Cerro El Barreal

Cerro de Los Cedros

"Qda. de Pomola"

Qda. de Pomola

Cerro Las Puertesitos

El Portezuelo

OCOTEPEQUE

Conf. del Río Sumpul con Qda. Copantillo

Peñasco Blanco

Cerro Piedra Menuda

Cerro Tepanguisir

Cerro del Sapotal

Qda. de Gualcho

Río Lempa

Qda. del Sisimite

Qda. Copantillo

Río Sumpul

"Piedra del Pulpito"

Conf. Qda. de Gualcho con Río Lempa

Peñón de Laja

El Pital

CITALÁ

Qda. de Poy

Río Lempa

Conf. Qda. de Poy con Río Lempa

Peña de Cayaguanca

Río Jupula

Nac. de Río Jupula

"Peñasco Blanco"

Encuentro del Río Nunuapa con Río Lempa

Conf. de Qda. Oscura o Chiquita con Río Sumpul

Río Sumpul

Cerro de Llaruconte

Paraje Laguna Seca

Cerro Negro

COMMON LANDS OF OCOTEPEQUE (1,818)

LANDS OF JUPULA (1,740)

COMMON LANDS OF OCOTEPEQUE (1,867)

TITLE DEED OF THE COMMON LANDS OF LA PALMA (1,833)

FRONTIER LINE SUPPORTED BY EL SALVADOR

FRONTIER LINE SUPPORTED BY HONDURAS

Scale 1:100,000

0 1 2 3 4 Kms.

INSTITUTO GEOGRÁFICO NACIONAL
"INGENIERO PABLO ARNOLDO GUZMÁN"
MINISTERIO DE OBRAS PÚBLICAS
REPÚBLICA DE EL SALVADOR

MAP 3.C

of Guatemala ordered that the lands to the west of the River Lempa should be given to the inhabitants of Citalá; these are the lands on Tecpangüisir Mountain, which had been the subject of a visual inspection without the least opposition from the inhabitants of Ocotepeque (24).

3.20. *In these Title Deeds in favour of Citalá,* it is clearly established that the boundary between the jurisdictions of Citalá in the Province of San Salvador and Ocotepeque in the Province of Honduras is determined by the Quebrada of Gualcho and the River Lempa and the Quebrada of Poy or Pacayas as far as the Peña of Cayaguanca and thus the jurisdiction of Ocotepeque extends as far this boundary line. However, the sector of Las Pilas is situated, geographically speaking, outside the lands belonging to Ocotepeque and in no way was affected by the discussion of the boundary between Citalá and Ocotepeque contained in the three Title Deeds mentioned above because, among other reasons, the commissions of the judges in question did not include the sector of Las Pilas. (25)

3.21. Fundamentally, these discussions as to the boundaries between the settlements of Citalá and Ocotepeque in 1702, 1704 and 1742 refer to the lands of Jupula in the Province of San Salvador, which

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24. Counter Memorial of El Salvador: Annexes: Vol. I, pp. 132-133.

25. Counter Memorial of El Salvador: Map 3.C..

constitute the second of the sectors of the frontier delimited by the General Peace Treaty of 1980, as indeed is indicated in both the Memorial of El Salvador (26) and the Memorial of Honduras (27).

3.22. The Title Deed of 1702 contains an account of the support given by the Spanish colonial authorities to the inhabitants of Citalá against the Sub-Delegate Land Judge of Ocotepeque who, without any right whatsoever, had entered onto the lands of Citalá and had marked out a part of its lands in favour of Ocotepeque (28). A commission was given to Captain Francisco Naveda Arce to carry out an inspection of the Commons and other land comprised within the jurisdiction of Citalá and from the information which he thus obtained it was placed on record that:

"The inhabitants of Ocotepeque had usurped the lands belonging to Citalá which are and belong to these native Indians for the reasons, rights, and title established in the formal records and which arise from the documents relating to their long term possession, in which the native Indians of Ocotepeque of the Government of Comayagua have disturbed and interrupted them by virtue of the acts of a Judge Commissioner of that jurisdiction who entered into the jurisdiction of San Salvador exceeding the jurisdiction which had been given to him, on account of which Your Excellency gave a commission to the said Captain Francisco de Naveda, who has established the truth and whose formal report having been approved and he proposes as a measure and ordered and I order that the natives have for the security of their possession that which can be given to them and in the name of His Majesty I give them my protection so that they may not be dispossessed from these lands

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26. Memorial of El Salvador: Paragraph 6.2..

27. Memorial of Honduras: p. 348.

28. Memorial of El Salvador: Paragraph 6.5..

or from any part thereof (29).

The Judge Commissioner proceeded, as ordered in his Commission, to demolish and remove the boundary markers which in the district and territory of Citalá and the jurisdiction of San Salvador the Judge Commissioner of Ocotepeque had ordered to be erected or which the Indians of Ocotepeque had erected under their own authority (30). This document proves that the claim made by Honduras in its Memorial (31) to the effect that the lands of Jupula were measured in 1701 on the basis that they belonged to the jurisdiction of Gracias a Dios has no probative value whatever since, as shown above, the Spanish colonial authorities subsequently in 1702 ordered that these measurements should have no effect because they considered proven the fact that these lands belonged to the jurisdiction of San Salvador.

3.23. Honduras distorts these Title Deeds which refer to a sector which is already delimited, giving them an erroneous interpretation based on partial citations such as that (32) which states that the Title Deed of 1740 executed in favour of Citalá affects the Title Deed of Ocotepeque in respect of "seize caballerias de terre, celle-ci ayant six lieues environ de long dans lesquelles se trouve compris

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29. Counter Memorial of El Salvador: Annexes: Vol. I., p. 46.

30. Counter Memorial of El Salvador: Annexes: Vol. I., pp. 44 & 45.

31. Memorial of Honduras: p. 296.

32. Memorial of Honduras: pp. 297-298.

le village de Citala, qui appartient à la juridiction de San Salvador" (emphasis added). From this quotation Honduras infers the conclusion that the community of Citalá established itself on the lands of Ocotepeque and that this is the explanation why the inhabitants of Citalá were given the lands of Jupula to the east of the River Lempa and the lands of Tecpangüisir to the west of Citalá (33). However, the proceedings carried out in 1702, 1740 and 1742 demonstrate exactly the opposite: in the Title Deed to the lands of Jupula executed in 1740 in favour of Citalá (34) the "Abogado Fiscal" stated "that, in accordance with the information given by the Subdelegate Land Judge of San Salvador, the township of Citalá of the said jurisdiction does not have Commons because the inhabitants of Ocotepeque of the jurisdiction of Gracias a Dios have deprived them of them by virtue of a Title Deed which, according to the report of the Judge, comprises "sixteen caballerías of land with latitude and longtitude of six leagues in which is included the township of Citalá being of the jurisdiction of Gracias a Dios" (emphasis added) (35).

3.24. From the antecedents of this conflict relating to the Title Deed of Jupula of 1740 set out in the Memorial of Honduras (36), there

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33. Memorial of Honduras: p. 298.

34. Memorial of El Salvador: Paragraph 6.6..

35. Counter Memorial of El Salvador: Annexes: Vol. I, p. 101.

36. Memorial of Honduras: pp. 126-131.

emerge two judicially significant facts: first, the lack of veracity and the territorial imperialism of the community of Ocotepeque, on which Honduras is today trying to base its rights; and, secondly, the malice with which the authorities of this community acted.

3.25. It emerges from the very documents assembled by Honduras in the Annexes to its Memorial that the claims of Ocotepeque to the lands of Jupula were categorically rejected by the Judge who heard the case; he stated that "on voit donc, par ce fait, qu'ils n'ont aucun droit aux terres y la malice avec laquelle ils ont procédé" (37). For this reason, the Principal Land Judge ordered that the Formal Title Deed executed in favour of Ocotepeque be revoked (38) and directed the inhabitants of Ocotepeque to remain within their own boundaries without invading the lands of others.

3.26. The Memorial of Honduras claims that, in spite of this judicial order of such a categorical nature, the inhabitants of Ocotepeque nevertheless preserved by some means or other their rights and "persista donc dans son opposition en conservant son titre" (39). What basis is relied on by the Memorial of Honduras in support of this flagrant non-compliance with a judicial order of such an express

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37. Memorial of Honduras: Annexes: p. 128.

38. Ibid. p. 129.

39. Memorial of Honduras: p. 350.

and categorical nature? On the fact that "la sommation ordenée par le Juge de terres de Guatemala" (40) was never carried in effect

3.27. However a judicial document transcribed in the Annexes to the Memorial of Honduras (41) demonstrates the contrary. In this document it is affirmed that "j'ordonnai de venir aux Indiens de ladite Hermita pour qu'ils assistent à la prise de possession, mais ils refusèrent de sortir. Par conséquent, le Juge .... mit les habitants de Citala en possession dudit torrent". This document adds that the inhabitants of Ocotepeque, when they found out that the inhabitants of Citalá had duly appeared, left without waiting to discuss the matter with them. It was precisely as a result of this withdrawal by the inhabitants of Ocotepeque that the Judge deduced "qu'ils n'ont aucune droit aux terres et la malice avec laquelle ils ont procédé". Contrary to what is affirmed in the Memorial of Honduras, the instruction to leave and to abstain from invading the lands of others was notified to the inhabitants of Ocotepeque on two occasions (42). To make matters even more clear, the instruction was communicated to an Indian of Ocotepeque who had not withdrawn (43) and he was instructed to communicate this judicial order to the

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40. Memorial of Honduras: p. 351.

41. Memorial of Honduras: Annexes: pp. 127 et seq..

42. Memorial of Honduras: Annexes: p. 130.

43. Ibid. p. 131.

inhabitants of his village within three days. To claim, as the Memorial of Honduras does, that a judicial order was not executed because the persons to whom it was directed had absented themselves from the proceedings would clearly destroy one of the most elementary basic principles of all judicial proceedings, whether of a domestic or of an international nature.

3.28. The Title Deed of 1740 confirms the Title Deed of 1702 executed in favour of Citalá in which there was ordered the demolition of the boundary markers placed by the Sub-Delegate Judge of Gracias a Dios on the lands of Jupula in the Province of San Salvador. Both these Titles of 1702 and 1740 refer to the second sector of the frontier already delimited by the General Peace Treaty of 1980.

3.29. Finally in 1742, in view of the fact that the natives of Ocotepeque persisted in their desire to deprive the inhabitants of Citalá of their lands, two Sub-Delegate Land Judges were nominated, one from the Province of San Salvador and the other from the Province of Gracias a Dios, to hear the dispute. Both Judges confirmed that the inhabitants of Ocotepeque did not have any right to the lands which they had usurped since these belonged to the natives of Citalá of the Province of San Salvador. In these same proceedings, it was ordered that the mountain situated to the west of these lands (Tecpangüisir Mountain) should be left free for the inhabitants of Citalá and the boundary markers of the lands of Jupula were confirmed. This Title Deed was subsequently confirmed by the "Real Audiencia"

of Guatemala (44).

3.30. The alleged Formal Title Deed relied on by Honduras in respect of this sector arises out of a supposed renewal of the conflict between Ocotepeque and Citalà in relation to the lands of Jupula. The Memorial of Honduras alleges that in 1741-42 the inhabitants of Ocotepeque requested that a new measurement of Jupula should be carried out. This is not correct; it was the natives of Citalá who requested the reconfirmation of their boundary markers in view of the insistence of the inhabitants of Ocotepeque in trying to usurp them and it was for this purpose that two Judges, Díaz de Castillo and Juan Secundino Lanuza, were nominated to deal with the conflict (45). Honduras presents in the Annexes to its Memorial (46) an extremely brief extract consisting of a single page from which it would appear that, as a type of consolation prize to the inhabitants of Ococtepeque for having rejected once again their claim, the Judges acceded to their last minute request "qu'on leur laisse la montagne dite Cayaguanca".

3.31. It is on the basis of this document, executed without any measurement, without any citation of the adjoining landowners, and without any erection or even indication of any boundary markers, that

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44. Counter Memorial of El Salvador: Annexes: Vol. I, pp. 132-135.

45. Counter Memorial of El Salvador: Annexes: Vol. I, p. 130.

46. Memorial of Honduras: Annexes: p. 2069.

Honduras is attempting to found its claim in this sector. However, it is important to remember that the boundary between the settlements of Citalá and Ocotepeque is constituted by, to the west, Tecpangüisir Mountain and, to the East, by the Quebrada of Poy or Pacaya as far as the Peña of Cayaguanca. Thus, Las Pilas is outside this sector; consequently the Sub-Delegate Land Judges did not have the powers to grant, by way of compensation, lands which were outside the jurisdiction of Citalá and Ocotepeque, which were the only areas comprised within their commissions.

3.32. From both formal and substantive points of view, this phrase to the effect that the Judges merely acceded to what had been requested cannot constitute a valid Formal Title Deed for the purposes of the attribution of sovereignity.

3.33. So far as concerns matters of form, it is quite remarkable and must certainly be worthy of comment that Honduras has presented solely an extract consisting of a single page of the record of a judicial action to which it attributes such importance. For example, the Memorial of Honduras (47) affirms that these judicial actions were approved by the Judge Orozco Manrique de Lara but the approval by this superior judge does not appear in the extract presented by Honduras. This is certainly because this approval was rather as follows:

"as a result of judicial proceedings and visual

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47. Memorial of Honduras: p. 335.

inspections, let the possession given to the Indians of the township of Citalá of the lands in litigation with the Indians of the township of Ocotepeque be confirmed, which proceedings should be added to the Title Deed executed on 28 July 1740, with attention to the poverty which they at present suffer and let the inhabitants of Ocotepeque return the Title Deed issued to them and let this dispatch constitute the right so to do. There is one signature. The which provides and duly signs the lawyer Francisco de Orosco Manrique de Lara of the Council of His Majesty, his "Oidor" and "Alcalde" of the Court of the "Real Audiencia" of Guatemala, Sole Judge of the Royal Land Law, and Visitor of the Kingdom, in the town of Santiago de Esquipulas on 23rd February 1742" (emphases added) (48)

The above passage proves comprehensively that only to the inhabitants of Citalá of the Province of San Salvador were confirmed the possession of their lands and the validity of their Title Deeds; on the other hand, no titles whatever were attributed to the inhabitants of Ocotepeque who besides were ordered to return the Title which they had maliciously obtained.

3.34. So far as concerns matters of substance, the supposed adjudication alleged by Honduras satisfies neither the prerequisites nor the safeguards insisted upon by the Spanish administration during the colonial period for a valid attribution of title to Commons. The Memorial of El Salvador (49) contains a full exposition of the meticulous safeguards which

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48. Counter Memorial of El Salvador: Annexes: Vol. I, p. 135.

49. Memorial of El Salvador: Paragraphs 4.11.--4.13. (and in particular the latter).

had to be satisfied for an adjudication of title to Commons to be considered valid. Not even one of these safeguards is satisfied in the case of the so-called Formal Title Deed cited by Honduras (50). The Land Judges did not have the power to adjudicate Commons in this arbitrary manner, without any measurement, without any citation of the adjoining landowners, and without any erection or any indication of the boundary markers which would permit a concrete territorial delimitation to be carried out today.

3.35. A further decisive consideration which evidences the irrelevance of the supposed Formal Title Deed cited by Honduras is the fact that the sector to which it refers does not coincide with the sector which is at present in dispute. The sector upon which the Chamber is called upon to pronounce is the area which extends from the Peña of Cayaguanca in a northerly and north-easterly direction, that is to say towards the Cerro of El Pital and towards the sources of the River Sumpul, in other words the area comprised in the Formal Title Deed which has been presented by El Salvador, which has always been recognised as the territory of El Salvador. (51).

3.36. The Memorial of Honduras itself, in the geographical description which it makes of this sector, confirms the above when it describes the most prominent elevations in the sector of Las

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50. Memorial of Honduras: Annexes: p. 2096.

51. Counter Memorial of El Salvador: Map 3.C..

Pilas, mentioning the Cerro of El Pital, the Monte of Las Nubes, the Monte of Las Flores, and the Monte of Las Cumbres or Las Granadillas. In the same way, mention is made of some of the most elevated plateaux, such as the Valleys of El Centro and Las Cruces or Copantillos, which are the counterparts of the highest peak known as the Cerro of El Pital. However, in no context whatsoever, nor in any map prepared either in Honduras or in El Salvador, does the Peña of Cayaguanca appear in this sector, nor has either of the two States ever claimed that this most elevated point in this sector, the Cerro of El Pital, which has always been recognised as being within the territory of El Salvador,. should be identified as the Peña of Cayaguanca.

3.37. The Memorial of Honduras (52) indicates that on the borders of this sector to the east and south-east are the localities of El Centro, Las Pilas, Las Cruces, Las Cumbres and La Granadilla which, as El Salvador has demonstrated in the Annexes to its Memorial relating to this sector (53), are small farms of the Municipalities of San Ignacio and La Palma in the Department of Chalatenango in the Republic of El Salvador, which are entirely inhabited by citizens of El Salvador (54).

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52. Memorial of Honduras: p. 341.

53. Memorial of El Salvador: Annexes: No. 7.

54. Memorial of El Salvador: Map appended to Chapter 7.

3.38. The Memorial of Honduras recognises [55] that, during the negotiations over the boundary between the settlements of Citalá and Ocotepeque carried out at La Hermita in 1881, the discussions over this boundary never touched on land beyond the Quebrada of Poy or Pacaya and the Peña of Cayaguanca, not even when the Title Deeds of Citalá of 1702, 1740 and 1742 were being discussed; and that in these Conferences Honduras never relied on the Title Deed of 1742 to assert any claim in respect of the sector of Las Pilas, which at that time was recognised by Honduras as forming part of the territory of El Salvador.

3.39. In the same way in the Conferences of 1884 [56], the Commissioners of El Salvador and Honduras discussed the boundary as far as the Peña de Cayaguanca; however, the sector of Las Pilas was never studied at all since both Commissioners expressed the opinion that in this sector the boundaries were recognised without dispute.

3.40. The Memorial of Honduras does not explain how it is possible that, given that the Town Council of Ocotepeque was summoned on the occasion of the measurements of the lands known as River Chiquito and Sesesmiles, which constitute the sector of Las Pilas or Cayaguanca [57], there was no protest

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55. Memorial of Honduras: p. 342.

56. Memorial of Honduras: pp. 340 et seq..

57. Counter Memorial of El Salvador: Annexes Vol. II, p.7.

or opposition on the part of Ocotepeque to this measurement which produced the execution of the Formal Title Deed to the Commons of these lands on 8 February 1833 in favour of the Municipality of the Dulce Nombre de La Palma, in the jurisdiction of Tejutla in the Intendency of the Department of San Salvador.

3.41. Neither does the Memorial of Honduras explain how it is possible that, fifty-five years after the execution of this Title Deed in favour of a Municipality of El Salvador, neither the Commissioners of Honduras who in 1881 studied the Title Deed to the lands of Jupula of 1742 (which Honduras now presents as proof of its rights in this sector) nor the Delegation of Honduras to the Joint Boundary Commission of 1884 invoked this latter Title Deed for the purposes of claiming rights in the sector of Las Pilas.

3.42. The Memorial of Honduras (58) declares that, on the basis of the investigation of the frontier carried out in 1890 by the engineer of Honduras, José María Bustamante, Honduras for the first time situated the Mountain of Cayaguanca in this position; the Memorial duly transcribes the description made by Bustamente of this sector, declaring that the Peña of Cayaguanca is distinct from the Mountain of Cayaguanca, which is to the north of the former. However, if the Mountain of Cayaguanca is, in accordance with the description of Bustamante

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58. Memorial of Honduras: pp. 343-344.

accepted by the Memorial of Honduras, situated to the north of the Peña of Cayaguanca, it cannot possibly be situated within the sector in dispute in Las Pilas, which is to the north-east. This shows the geographical error made by Honduras in relation to this sector.

3.43. In relation to the interpretation made by Bustamante of the Title Deed of Citalá of 1742, it is interesting to consider the opinion of it expressed by Father Antonio R. Vallejo of Honduras who, among other matters, indicated: "I cannot explain to myself how the Commisioner Bustamante, being so well informed and diligent, was not capable of understanding the said documents, above all given that he was actually on the land in question". In order to illustrate his disagreement, Father Vallejo proceeded to transcribe a part of the Title Deed of Citalá of 1742, among others the following passage:

"The Commissioners in order to make the inspection, accompanied by the justices and the principal citizens of both townships, the Notary Public and the witnesses present, positioned themselves on a very high peak, which was said to be called El Zapotal, from where they saw that the natives of Ocotepeque had sufficient lands for their crops within the jurisdiction of Gracias (a Dios), and that the land of the township of Citalá is all rough and unfruitful and that the Title Deeds of the Commons of Ocotepeque comprise all the land surrounded by this township and that the only Commons outside the township are the lands of Jupula which have the following boundary markers:

"From the junction of the stream with the River Lempa, which is the ancient boundary line between the two countries, climbing towards the west to the foot of the Cerro of El Zapotal, which the said stream goes round, and leaving the valley between the peaks, always towards the west, until arriving at the mountain which the inhabitants of Citalá sow, and from there to a stream which is above the mountain referred to (Tecpangüisir Mountain).

"From the meeting of the River Lempa with the Quebrada

de Gualcho as far as the junction of the River Nunuapa with the River Lempa.

"From the junction of the River Nunuapa with the River Lempa, from west to east, as far as the Piedra Cargada.

"From the Piedra Cargada as far as the foot of a mound of white stones, which is on the summit of the mountain called Cayaguanca." (59)

This description transcribed by Father Vallejo is of Tecpangüisir Mountain and of the lands of Jupula, from which it can be seen that the interpretation of the frontier made by Bustamante does not include the present disputed sector of Las Pilas.

3.44. In accordance with the Title Deeds of Citalá of 1702, 1740 and 1742 was delimited the second sector of the frontier settled by the General Peace Treaty of 1980 and Honduras neither made reservations nor denied this delimitation on the grounds that in its view the Title Deed of 1742 justified its claims in the sector of Las Pilas, which paradoxically was not then delimited. It was not until the Meetings of the Joint Boundary Commission in the period from 1980 to 1985 that Honduras presented for the first time three different claims in relation to the sector of Las Pilas, although not even at these Meetings did it base its claims on the Title Deed to Citalá of 1742.

3.45. El Salvador fór its part cites in addition to the documents already referred to the

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59. Counter Memorial of El Salvador: Annexes: Vol. I, p. 152.

measurement carried out in 1829, during the period of the Central American Federal Republic and the Formal Title Deed executed on the basis of this measurement on 8 February 1933. This Formal Title Deed, although obviously subsequent to the date of the independence of Central America, was executed by the competent authorities of the area under the régime of the Central American Federal Republic and in the name of the Sovereign State. In this sense, this is a juridical action which is binding upon Honduras, which was at that time a member of that Federal State. Honduras has not presented any Title Deed which is referable to the Royal Landholdings which were the subject of this measurement of 1829. "In most of the cases involving claims to territorial sovereignity which have come before an international tribunal, there have been two competing claims to the sovereignity, and the tribunal has had to decide which of the two is the stronger" (60). In this case, the superior probative value of the Formal Title Deed which has been presented by El Salvador is indisputable.

3.46. This Title, presented in its original form as an Annex to the Memorial of El Salvador and transcribed in typescript as an Annex to this Counter Memorial (61), is a Formal Title Deed to Commons in favour of the inhabitants of the locality of El Dulce Nombre de la Palma, which relates to an

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60. Eastern Greenland Case P.C.I.J. Series A/B No. 53 p. 46.

61. Counter Memorial of El Salvador: Annexes: Vol. II, pp. 1 et seq..

area of 40 "caballerías"; the same document also confers a private proprietary interest in an area of a little more than 68 "caballerías" upon the inhabitants of the same locality, subject to the payment of "moderate compensation" therefor. This Formal Title Deed records that the representatives of Citalá and of Ocotepeque were summoned to attend for the purposes of the measurement (62). The Title Deed also records that the measurement proceeded upstream along the River Sumpul reaching "as far as the confluence of the Stream of Copantillo with the River Sumpul upstream of the latter", where "a cross with a base of stone was placed as a boundary marker", and from "that point there was a change of direction upstream along the small stream to the South West" "as far as the place known as El Pital, leaving another similar cross and stones as a boundary marker", The following day, 1 August 1829, "following the same direction, the cord was extended as far as the neighbourhood of the peak of Cayaguanca". This Formal Title Deed includes the whole of this disputed sector (63).

3.47. Honduras has presented in the Annexes to its Memorial (64) the Title Deeds to the lands of the community of Ocotepeque and in none of these is included the sector of Las Pilas, which

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62. Counter Memorial of El Salvador: Annexes: Vol. II, p. 7.

63. Ibid. p. 10.

64. Memorial of Honduras: Annexes: pp. 1631 et seq..

Honduras claims is located within the lands of Ocotepeque. Neither in the remeasurement of the Commons of Ocotepeque carried out in 1867 (65) do the boundaries of the lands of Ocotepeque extend sufficiently far to include the sector of Las Pilas or Cayaguanca presently in dispute. Finally, in the remeasurement of the lands of the community of Ocotepeque carried out in 1914 (66) it is indicated clearly that in this remeasurement are included all the lands possessed by the community of Ocotepeque on the basis of the colonial documents presented by them, the sector of Las Pilas presently in dispute being completely outside the boundaries of the lands of this community. These documents prove conclusively that this sector has belonged from the colonial period up until the present day to the district of Tejutla in the colonial Province of San Salvador (today the Department of Chalatenango in the Republic of El Salvador) and that this sector has never belonged either before or after 1821 to the community of Ocotepeque (67).

III. Arcatao or Zazalapa

3.48. In this sector El Salvador has relied on the Formal Title Deed to the Commons of

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65. Counter Memorial of El Salvador: Annexes: Vol. II, p. 129 et seq..

66. Counter Memorial of El Salvador: Paragraph 3.17..

67. Counter Memorial of El Salvador: Maps 3.B. & 3.C..

Arcatao, which is based on a measurement carried out in favour of the indigenous population of Arcatao from 7 - 10 August 1723 (68). In order to facilitate the process of checking the original title, a certified typescript transcription is appended as an Annex to this Counter Memorial (69).

3.49. In the Memorial of El Salvador (70) are indicated the different boundary markers, all perfectly identifiable at the present time, which circumscribe the Commons of Arcatao and which make it possible to carry out the territorial delimitation in this sector in the manner sought by El Salvador. The map included in the Memorial of El Salvador (71) indicates the positions of the various boundary markers and the distances between them measured in cords of 50 "varas" (72).

3.50. In this sector the Memorial of Honduras (73) relies on certain documents executed prior to 1821 which, according to Honduras, "mettent en evidence les limites des anciennes juridictions dans cette zone" (in upper case in the original). Once again Honduras returns to its erroneous theory

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68. Memorial of El Salvador: Paragraphs 6.25. et seq. & Annexes.

69. Counter Memorial of El Salvador: Annexes: Vol. III, pp. 1-48.

70. Memorial of El Salvador: Paragraph 6.28..

71. Memorial of El Salvador: Map 6.3..

72. 1 "vara" = 0.836 metres.

73. Memorial of Honduras: pp. 329 et seq..

that what counts in Formal Title Deeds to Commons are the recitals in the declaratory part of these Deeds relating to "the ancient jurisdictions" of the colonial provinces rather than the boundary markers which precisely delimit the jurisdictions over Commons and over land.

3.51. Nevertheless, the Memorial of Honduras (74) also emphasises in this section various boundary markers which Honduras wrongly believes to support its claim. Honduras thus cites the measurement of a Title Deed to land in San Juan de Lacatao (not a Formal Title Deed to Commons) carried out in 1776 by Cristóbal de Pineda and a supposed remeasurement carried out in 1786 by Manuel de Castro. "De l'ensemble de ces documents" (75), the Memorial of Honduras deduces that certain boundary markers which it lists are identified as boundary markers of the limits of the two jurisdictions.

3.52. However, a close examination of the Title Deed to this land in San Juan de Lacatao shows that, with one sole exception, none of these boundary markers was identified by the inhabitants of Arcatao as marking the limits of the two jurisdictions. The only boundary marker which both the inhabitants of San Juan and the inhabitants of Arcatao recognised as marking the limits of the two jurisdictions was the boundary marker of the Cerro

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74. Memorial of Honduras: pp. 329 et seq..

75. Memorial of Honduras: p. 330.

Caracol (76). This particular boundary marker is mentioned in both Title Deeds and its geographical location makes it possible to determine with exactitude how far to the East the jurisdiction of the Commons of Arcatao reached since at the boundary marker of the Cerro Caracol "(s)ur ce lieu se trouvaient le maire y les habitants du village de San Bartolomé Arcatas (sic) lesquels ayant exposé leur titre ont déclaré que cet endroit était la limite de leurs terres". Further, on one of the maps presented with the Memorial of Honduras (77) in support of its claim, the Cerro Caracol is shown as being located in the same place as on the map presented by El Salvador; this of course concurs with the argument advanced by El Salvador.

3.53. All the remaining boundary markers which the Memorial of Honduras tries to cite in support of its claim were neither recognised nor identified by the inhabitants of Arcatao. Although the Memorial of Honduras adduces that the Portillo de los Lagunetas, where the "Bachiller" (78) Simón de Amaya was waiting with his Title Deed, was recognised as the limit of the two jurisdictions, this Simón de Amaya in fact had nothing whatever to do with the authorities of the community of Arcatao.

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76. Memorial of Honduras: Annexes: pp. 1988-1989.

77. Memorial of Honduras: Map B.5.2..

78. The term "Bachiller" signifies that its holder had obtained the then equivalent of a University Degree.

3.54. The Memorial of Honduras (79) cites the remeasurement of the Hacienda of San Juan de Lacatao of 1766 and, in particular, a further remeasurement of 1786. The Title Deed of this remeasurement was not presented in the Annexes to the Memorial of Honduras but subsequently reached El Salvador through the International Court of Justice. This Title Deed neither constitutes a Formal Title Deed to Commons nor contains the approval of the judicial authorities of Guatemala which is required by the "Reales Cédulas". It is stated in this Title Deed that, when Pineda carried out the previous remeasurement of 1766 on which Honduras bases its claim, he did not review any opposing claims and for this reason returned to his Hacienda without making any citations of adjoining landowners whatsoever (80).

3.55. From this Title Deed of 1786, it emerges that the boundary marker that divided Arcatao, in the Province of San Salvador, from San Juan Lacatao, in the Province of Comayagua, was situated in a mountainous area. The Title Deed states that the surveyor:

"extended the measuring cord through a rocky mountain in the direction north to north-northeast; he began to climb within the said mountain, reached its peak and continued the measurement until he encountered another of the boundary markers .... which divides the lands of Arcatao, a township of the jurisdiction of San Salvador, and the lands which were being measured, and at this boundary marker there were

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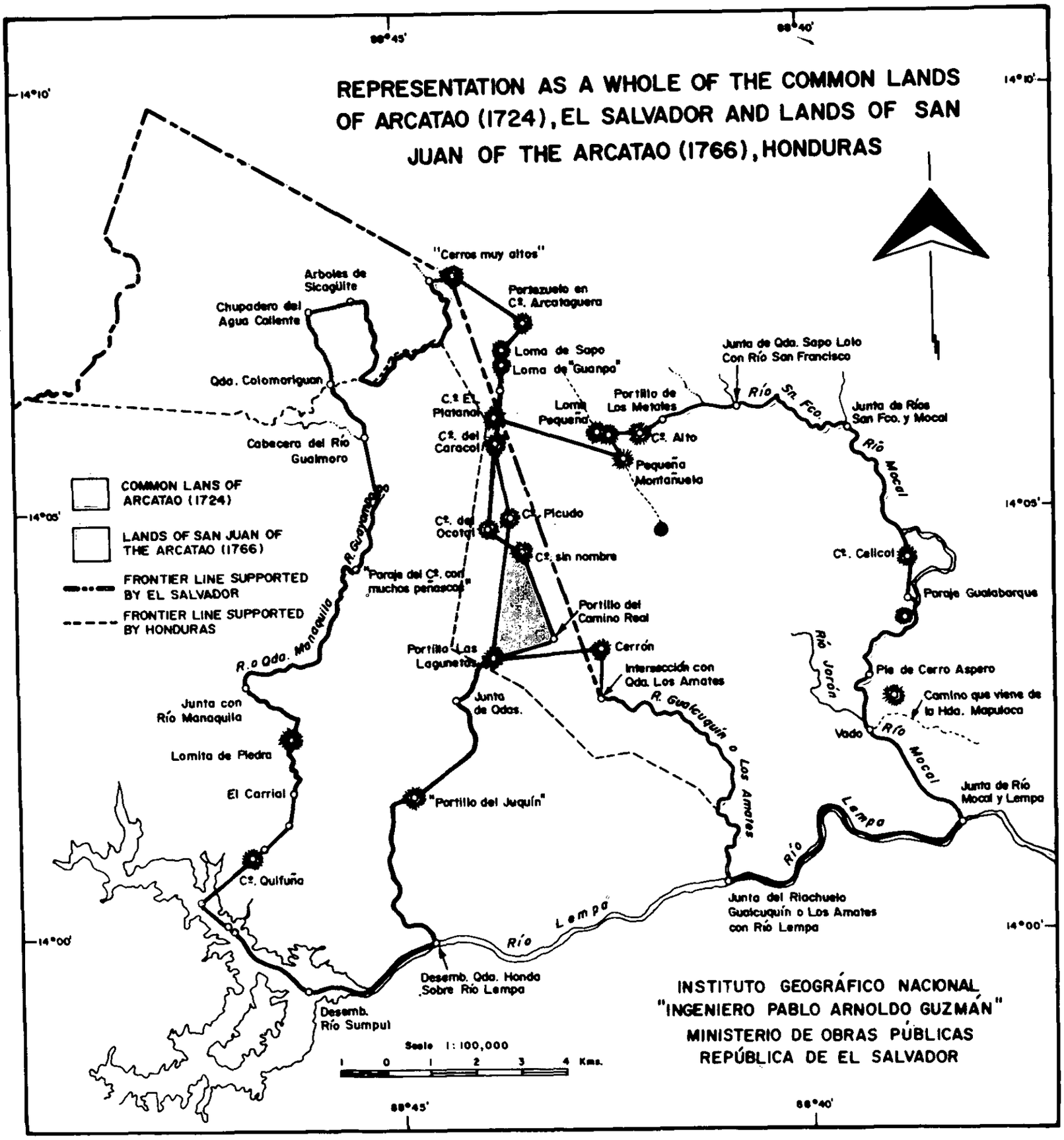
79. Memorial of Honduras: p. 330.

80. Title Deed of 1786 (presented by Honduras): pp. 71-72. See also Counter Memorial of El Salvador: Map 3.D..


REPRESENTATION AS A WHOLE OF THE COMMON LANDS OF ARCATAO (1724), EL SALVADOR AND LANDS OF SAN JUAN OF THE ARCATAO (1766), HONDURAS
89°45'
88°40'
14°10'
14°05'
14°00'
"Cerros muy altos"
Arboles de Sicagüite
Chupadero del Agua Caliente
Pertezuelo en Cª. Arcataguera
Loma de Sapo
Loma de "Guanpa"
Qda. Colomariguan
Cabecera del Río Gualmoro
Cª. El Platanal
Cª. del Caracol
Lomita Pequeña
Portillo de Los Metates
Cª. Alto
Pequeña Montañuela
Junta de Qda. Sapo Loto Con Río San Francisco
Río Sn. Fco.
Junta de Ríos San Fco. y Mocal
Río Mocal
COMMON LANS OF ARCATAO (1724)
LANDS OF SAN JUAN OF THE ARCATAO (1766)
FRONTIER LINE SUPPORTED BY EL SALVADOR
FRONTIER LINE SUPPORTED BY HONDURAS
R. Guaramango
Cª. del Ocotal
Cª. Picudo
Cª. sin nombre
"Paraje del Cª. con muchos penascos"
Portillo del Camino Real
Cerrón
Portillo Las Lagunetas
R. o Qda. Manaquila
Intersección con Qda. Los Amates
Junta de Qdas.
Junta con Río Manaquila
Lomita de Piedra
El Carrial
Cª. Quilfuña
"Portillo del Juquín"
R. Guaicuquín o Los Amates
Cª. Celicol
Paraje Guatabarque
Río Jarón
Pie de Cerro Aspero
Camino que viene de la Hda. Mapuloca
Vado
Río Mocal
Junta de Río Mocal y Lempa
Río Lempa
Junta del Riachuelo Guaicuquín o Los Amates con Río Lempa
Desemb. Qda. Honda Sobre Río Lempa
Desemb. Río Sumpul
Scale 1:100,000
1 0 1 2 3 4 Kms.
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MAP 3.D

present with their title the inhabitants of the said township whose boundary line ran, bordering to the left with the lands of this township, along a royal road which they call Los Trigueros, until this road reached a plantation of sugar cane where the lands of the said township end" (81).

As can be seen, it emerges from this Title Deed that the Commons of Arcatao extended as far as this mountainous area towards the north, exactly as is claimed by El Salvador.

3.56. The Memorial of Honduras also relies on the measurement of the place known as Gualcimaca carried out in 1783 by Manuel de Castro. Once again, this is not a Formal Title Deed to Commons; however, many of the boundary markers recognised and identified in this Title Deed relating to private proprietary interests in land confirm the delimitation which arose from the Formal Title Deed to the Commons of Arcatao, which El Salvador has presented in support of its claim.

3.57. This measurement of Gualcimaca began at the boundary marker which constitutes the tripartite boundary between the jurisdictions of Gualcimaca, San Juan de Lacatao and Arcatao (82). The positioning of the boundary markers contained in this measurement of Gualcimaca presents some difficulties. In general terms it can be said that

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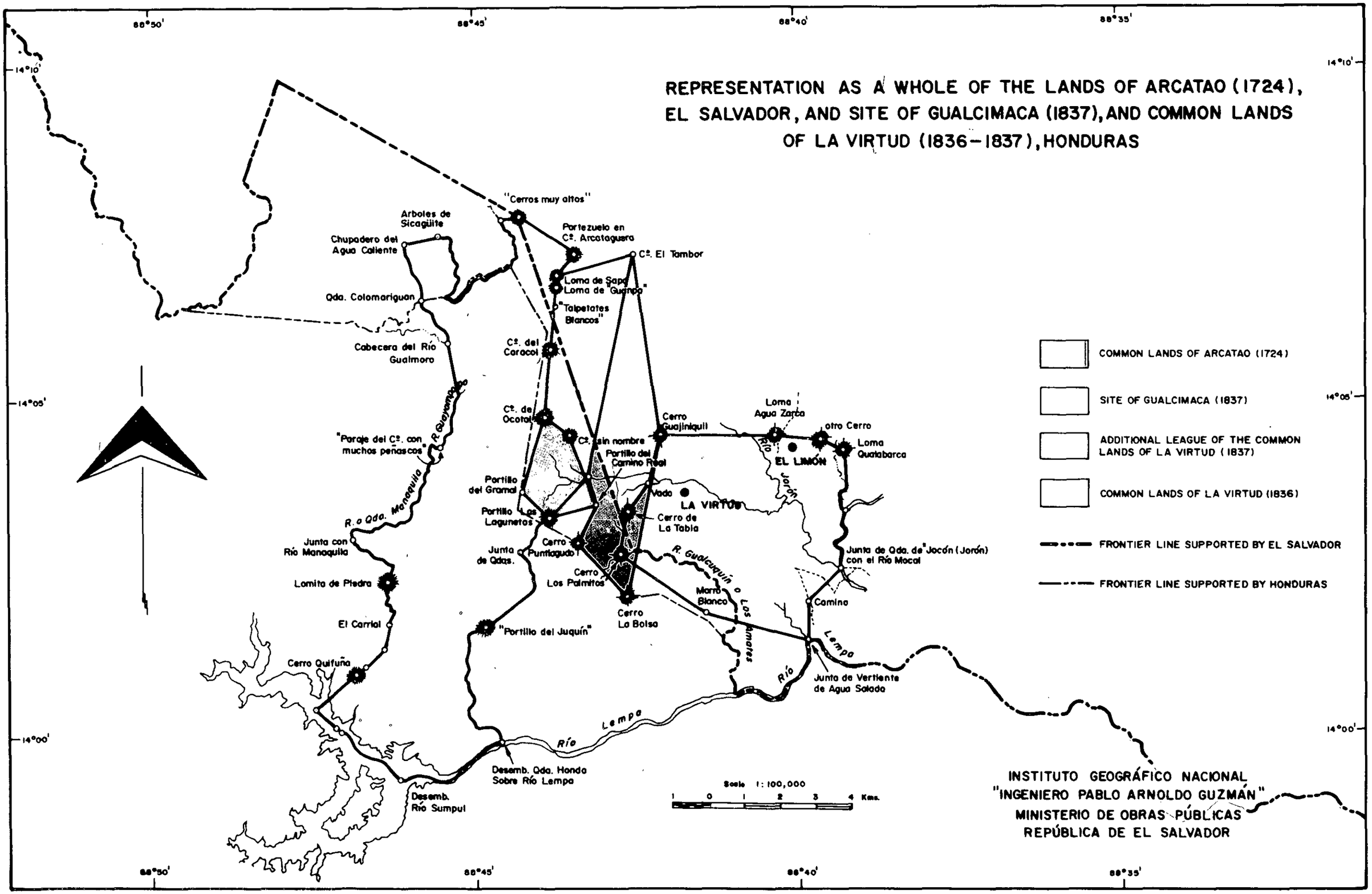
81. Title Deed of 1786 (presented by Honduras): p. 73.

82. Memorial of Honduras: Annexes: p. 1929; Counter Memorial of El Salvador: Map 3.E..

REPRESENTATION AS A WHOLE OF THE LANDS OF ARCATAO (1724), EL SALVADOR, AND SITE OF GUALCIMACA (1837), AND COMMON LANDS OF LA VIRTUD (1836–1837), HONDURAS



MAP 3.E

some of its boundary markers coincide with the boundary markers of the Formal Title Deed to the Commons of San Bartolomé Arcatao in the Province of San Salvador of 1724; examples are the Cerro El Sapo, the Cerro Guanpa, the Cerro Caracol, and the Cerro El Ocotillo. The Memorial of Honduras makes an unacceptable identification of the Cerro El Tambor in one of the maps appended thereto (83), owing to the fact that this map places this boundary marker at the source of a stream and ignores its relationship with the Cerro Caracol, which is situated two kilometres to the north and is mentioned in the description of the Cerro El Tambor (as has already been stated, the Cerro Caracol is correctly located in the maps presented by both El Salvador and Honduras). The Title Deed of Gualcimaca adds that this measurement reached a place called La Laguneta, which constituted the final boundary marker dividing Arcatao and Gualcimaca.

3.58. Honduras has presented another Title Deed to the place known as Gualcimaca, executed in 1837. Although this Deed obviously does not define the uti possidetis iuris of 1821, it does confirm the erroneous geographical location of boundary stones of which the Memorial of Honduras is guilty. The measurement started from the Cerro El Tambor, which cannot be the peak indicated on the map already referred to but another Cerro El Tambor situated to the north of the Cerro Caracol, which is correctly situated on the official maps of Honduras. The reason

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83. Memorial of Honduras: Map B.5.2..

for this conclusion is that, according to this Title, it is necessary to proceed towards the West in order to reach the Cerro El Sapo and the Cerro Caracol. In the course of this measurement, the geographical features and boundary markers which appear in the Formal Title Deed to the Commons of Arcatao are, by common agreement, encountered once again, that is to say, the boundary markers on the hill del Sapo, the heights known as Guanpa, the Cerro Caracol, in whose neighbourhood there are two places where indigo is made, the Ocotillo, finally reaching La Laguneta (84).

3.59. The Memorial of Honduras also relies on another Title Deed, which once again is not a Formal Title Deed to Commons; the measurement of the place known as Colopele in 1779. In this measurement is mentioned the boundary marker of Guanacaste where the inhabitants of Arcatao with their Title Deed were waiting (85). This boundary marker coincides with the boundary marker described in the following way in the Formal Title Deed to the Commons of Arcatao:

"And following the same direction above Zazalapa, which has a boundary with the Province of Gracias a Dios, which are lands of the Hacienda de Zazalapa, until arriving at the summit of some very high peaks, where there is a tree of Guanacaste, and where a cross and a boundary marker of stones were erected." (86)

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84. Memorial of Honduras: Annexes: pp. 1952-1953.

85. Ibid.: p. 1895.

86. Counter Memorial of El Salvador: Annexes: Vol. III, p. 9.

Thus, the Title Deed of Colopele (87) confirms the projection towards the North of the Formal Title Deed to the *Commons of Arcatao*, which extends as far as the confluence of the Rivers Gualquire and Zazalapa and above the River Zazalapa has a boundary with the lands of the Hacienda of that name. (88)

3.60. In the same way the Memorial of Honduras (89) mentions the Title Deed of Zazalapa of 1741, another Title Deed which is not a Formal Title Deed to Commons. From this Title to private proprietary interests in land, it emerges that, by proceeding up the stream of Zazalapa, the measurement began to follow the boundary with Arcatao, as a result of which the stream of Zazalapa was identified as the limit of the two jurisdictions. This constitutes, along with the boundary marker of Guanacaste referred to in the previous paragraph, a further confirmation of the projection towards the North of the Formal Title Deed to the Commons of Arcatao.

3.61. The Memorial of Honduras also adduces as proof the Title Deeds of Concepción de las Cuevas of 1741 (90) and of San Juan de Chapulín of 1766 (91) but in neither of these Titles were the inhabitants of Arcatao either cited or present and

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87. Memorial of Honduras: Annexes: p. 1884.
88. Counter Memorial of El Salvador: Map 3.F..
89. Memorial of Honduras: Annexes: p. 1829.
90. Ibid.: p. 1815.
91. Ibid. p. 1842.

REPRESENTATION AS A WHOLE OF THE LANDS OF GUARITA (1775), SITE OF COLOPELE (1779) AND THE RANCH OF SAN JUAN CHAPULIN (1761)

88°50'

88°40'

14°10'

Portillo de dos Cerros de Ocotal

Camino a Tambla

TAMBLA

Cerro de La Majada

Camino Real que viene del Pueblo de Chucuyuco

Río Cacagual

Río Gualcinga

Qda Chichil

Cerro Aspero Alto

Loma Ecoaera

Río Sumpul

GUARITA

Junta de Qda. Talquesal con Río Gualcinga

Embocadero de Qda Chichil

Junta de Río Sumpul con Río Cacagual

Junta de Qda. deAgua con Río Gualcinga

Cerro El Rodeo

Cabecera de Qda. del Chupadero

Qda de Los Huertos

Pueblo Viejo de Colopele?

EL REPASTADERO

Cerro de La Botija

Qda. El Chupadero?

Qda. sin nombre

Qda. Chalaguaca

Portillo Agua Fría

Cabecera del Río Sazalapa

Junta de Qda. El Chupadero con Río Sumpul (1er Mojón)

Qda El Zapote

Pueblo Cº del Fraile

Cumbre del Cerro Grande

Intersección del Río Pacacio

Cº del Fraile

Pie de un Cerro Grande

Paso del Chupadero de La Piedra Larga?

Cerro Grande y Fragoso

Piedra del Tigre

Cerro Eminente Paraje Guanacaste

Cont. de Qda. de Monte con Río Pacacio

Qda de Monte

SAZALAPA

Río Pacacio

Cerrillo Picudo

Junta de Río Pacacio con Río Sumpul

GUARITA (1775)

SITE OF COLOPELE (1779)

RANCH OF SAN JUAN CHAPULIN (1761)

FRONTIER LINE SUPPORTED BY EL SALVADOR

FRONTIER LINE SUPPORTED BY HONDURAS

Scale 1:100,000

1 0 1 2 3 4 Kms.

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MAP 3.F

as a result these Title Deeds did not fix the jurisdictional boundaries of the two provinces (92).

3.62. Finally, the Memorial of Honduras has presented a document relating to the lands of San Juan de Lacatao executed in 1786, in which it is affirmed categorically that the boundary of the Provinces of Gracias a Dios and San Salvador is constituted by the River Gualgüix, a tributary of the River Jorón or Gualmota, situated two kilometres to the northeast of the frontier at present claimed by El Salvador (93).

3.63. The proof presented by El Salvador in respect of its rights in this sector, namely the Formal Title Deed to the Commons of San Bartolomé Arcatao of 1724, has, by virtue of being a Formal Title Deed to Commons, greater probative value than the Title Deeds to private proprietary interests presented by Honduras, and additionally there remain between the lands delimited by these documents presented by Honduras extensive royal landholdings which at the beginning of the Nineteenth Century were already occupied by natives of the Province of San Salvador.

IV. Nahuaterique and Torola

3.64. The Formal Title Deeds to Commons relied on by El Salvador in this sector are those

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92. Counter Memorial of El Salvador: Map 3.F..

93. Ibid.: Map 3.G..

GEOGRAPHICAL FEATURES MENTIONED IN THE MEASUREMENT OF THE LANDS OF SAN JUAN LACATAO, WHICH ARE STILL IDENTIFIABLE IN PRESENT CARTOGRAFHY (DOCUMENT X.17,1786)

88°45'
88°40'
14°05'
14°00'

Cerro La Cañada
A Cerro El Fraile
Emplazamiento aproximado del SITIO DE ESTANCIA LACATAO
RÍO JORÓN O GUALMOTA
RÍO GUALGÜIX
Frontera Internacional sostenida por El Salvador
Frontera Internacional sostenida por Honduras
LIMIT OF THE PROVINCES OF GRACIAS A DIOS AND OF SAN SALVADOR.
Nacimiento río Gualcuquín o El Amatillo.
Río Gualcuquín o El Amatillo
RÍO MOCAL
Río Lempa
Río Lempa
Río Lempa

1st)– It is not possible to identify the description mentioned in the document, because of its vagueness.

2nd)– The names in Capital Letters are mentioned in the document. All else are included as geographical reference.

3rd)– Unidentified geographical features mentioned in the document: 1st *Cellioco Hill*, 2nd *Zupuzoyo Hill*.

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Scale 1:50,000

1 0 1 2 3 Kms.

Mapa Básico : Hojas Hondureñas

MAP 3.G

relating to the indigenous communities of Arambala, Perquín and Torola, all situated within the colonial province of San Salvador.

3.65. It is not inconvenient for El Salvador to divide this sector into two sub-sectors, as does the Memorial of Honduras; thus it is proposed first to consider the sub-sector of Nahuaterique and, secondly, the sub-sector of Torola.

(A) The Sub-Sector of Nahuaterique

3.66. The claim of El Salvador to the sub-sector of Nahuaterique is established by the Formal Title Deed to the Commons of the twin indigenous communities of Arambala and Perquín. The history and content of this Formal Title Deed to Commons is set out in the Memorial of El Salvador (94).

3.67. This Formal Title Deed to Commons, which was executed by the Spanish Crown in 1745, was subsequently destroyed at the time of the fire which razed the townships of Arambala and Perquín to the ground. As a result of this occurrence, the Municipal Corporations of Arambala and Perquín, situated within the jurisdiction of the Province of San Miguel, within the "Alcaldía Mayor" of San Salvador, appeared before the lawyer Domingo López de Urrelo y Atocha, "Juez Privativo del Real Derecho de Tierras" (Sole Judge of the Royal Land Law) of

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94. Memorial of El Salvador: Paragraphs 6.31.--6.39..

the Colonial Kingdom of Guatemala, to request that their Commons be remeasured and its boundary markers be re-established with the object of obtaining the replacement of their Formal Title Deed to these Commons.

3.68. The appropriate judicial proceedings were entrusted to Don Antonio de Guzman, Delegate Judge for land measurements in the Province of San Miguel. On 26 May 1769, it was decreed that the request should be complied with and that the adjoining landowners should be summoned for the purpose of establishing the boundaries, re-establishing the boundary markers and taking the measurement of these Commons, a task which he in fact delegated to Don Antonio Ignacio de Castro on the grounds of ill health.

3.69. On 6 June 1769, the Judge Commissioner Don Antonio Ignacio de Castro carried out the appropriate "Visual Inspection", in the course of which he duly recorded the boundaries and boundary markers of the lands which comprise the Commons of Arambala and Perquín, within the jurisdiction of the Province of San Miguel. So far as concerns boundaries, this inspection showed that the Commons:

"....in the part to the North have a common boundary with the jurisdiction of Comayagua; in the part to the South border on the township of Torola of this jurisdiction (of San Miguel) and with a "Hacienda" (country estate) which the township of Osicala has on lands of the township of Mianguera; in the part to the East border on the Hacienda of Juateca which the Indians of San Juan Yarula have purchased in this jurisdiction (of San Miguel) and have a common boundary with the other jurisdiction; and in the part to the West have a common boundary with the jurisdiction

of Gracias a Dios." (95)

3.70. On 12 June 1769, the appropriate Judicial Record of the Remeasurement of the Commons of Arambala and Perquín was duly drawn up, in which were recorded the following boundary markers in this order:

1st Boundary Marker:	Cerro de la Ardilla;
2nd Boundary Marker:	Cerro Salalamuya;
3rd Boundary Marker:	Sojoara;
4th Boundary Marker:	Cerro Napansapa;
5th Boundary Marker:	Portillo de Olosicala;
6th Boundary Marker:	Cerro Chagualaca;
7th Boundary Marker:	Loma Guiriri;
8th Boundary Marker:	Roble Negro;
9th Boundary Marker:	Loma Monguetas;
10th Boundary Marker:	Esquingela;
11th Boundary Marker:	Tiemblaca;
12th Boundary Marker:	Agualcaguara;
13th Boundary Marker:	Cerro Limpe;
14th Boundary Marker:	Cerro Sojoal;
15th Boundary Marker:	Cerro Guayanpal;
16th Boundary Marker:	Tierra Colorada;
17th Boundary Marker:	Cerro Pedragoso;
18th Boundary Marker:	Loma Masala;
19th Boundary Marker:	Portillo Equilatina;
20th Boundary Marker:	Cerro Sapamani;
21st Boundary Marker:	Montaña la Isla;
22nd Boundary Marker:	Cerro de la Ardilla.

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95. Counter Memorial of El Salvador: Annexes: Vol. IV, pp. 15-16.

On 17 June 1769, the "Juez Subdelegado del Real Derecho de Tierras" (Sub-delegate Judge of the Royal Land Law) approved this measurement.

3.71. All these boundary markers listed within the Formal Title Deed to the Commons of Arambala and Perquín can still be identified perfectly at the present time and the original place names are still preserved in this area so that the appropriate map can easily be drawn up. This is not the case with the Title Deeds relied on by Honduras; in several of these only one boundary marker is identifiable so that it is not possible for any map to be drawn up.

3.72. On 13 November 1815, the inhabitants of Arambala and Perquín presented a petition to the Judge Prosecutor for the purpose of seeking the approval of the measurements of their Commons and the replacement of their Formal Title Deed. On 16 November 1815, Don José Bustamente Guerra de la Vega Pineda Covo Estrada y Zorlado, President of the "Real Audiencia" (Supreme Civil Tribunal) of Guatemala, in the name of his Majesty the King of Spain and by virtue of the "Real Cédula de Instrucción" (Royal Decree of Instructions) executed in San Lorenzo El Real on 15 October 1754, declared (96):

"..... I decree that the Indians of the townships of Arambala and Perquín should be protected in their age old possession of their Commons subject to the boundaries and boundary markers which are set out

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96. Counter Memorial of El Salvador: Annexes: Vol. IV, p. 32.

in the inserted measurement."

This Title Deed was confirmed in New Guatemala on 15 December 1815.

3.73. As can be seen, this Formal Title Deed to the Commons of Arambala and Perquín satisfies all the formalities required by the Spanish Crown for the establishment of such Formal Title Deeds; consequently, this Formal Title Deed presented by El Salvador is indisputably superior to the Title Deeds relied on by Honduras.

3.74. Further, in this Formal Title Deed to the Commons of Arambala and Perquín, it was established that the lands granted to the inhabitants of Arambala and Perquín as communal property had always formed part of the jurisdiction of the Province of San Miguel and thereby of the Alcaldía Mayor of San Salvador. Since the independence of Central America, these lands have continuously formed part of the National Territory of the Republic of El Salvador, at the present day forming part of the Department of Morazán of that Republic. It was also established in this Formal Title Deed that the river which divides what was then the Province of San Miguel from what was then the Province of Comayagua is the River Negro or Pichigual.

3.75. On the other hand, in relation to the identification of the River Negro, Honduras argues that, in the course of the various meetings held between representatives of the two States, it has been accepted that the dividing line between the colonial provinces of San Salvador and Honduras was

the River Negro or Quiaguara (97). However, what count for the purpose of identifying this river are the Spanish colonial documents. In this respect, the Judicial Record of the Remeasurement of the Commons of Arambala and Perquín drawn up on 12 June 1769 clearly declares that the River Negro referred to in that Formal Title Deed is not, as Honduras argues, the River Negro or Quiaguara but rather the River Negro or Pichigual. This is ratified by the Formal Confirmation of the Judicial Record of this Remeasurement by the "Real Audiencia" of the Colonial Kingdom of Guatemala on 15 November 1815, where it is stated ".... and to the South-West royal landholdings which belong to this jurisdiction because beyond these land is the River Negro which is also called Pichigual which river divides this jurisdiction from the jurisdiction of Gracias a Dios" (98) (emphasis added).

3.76. In this sector, the Memorial of Honduras bases its claim exclusively on the Formal Title Deed to the Commons of Jocoara or Santa Elena, issued in 1770 and confirmed in 1776 (99). But this Formal Title Deed is totally insufficient as a basis for the territorial claim of Honduras in that it only deals with an area of 2 "Caballerías", 201 "Cords", while a Commons of 60 "Caballerías", 58 "Cords", was

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97. Memorial of Honduras: pp. 223-224.

98. Counter Memorial of El Salvador: Annexes: Vol. IV, p. 32.

99. Memorial of Honduras: Annexes: pp. 1242 et seq..

recognised in 1769 and confirmed in 1815 to belong to the inhabitants of Arambala and Perquín, the only area excluded therefrom being the 2 "Caballerías", 201 "Cords", of the Commons of the inhabitants of Jocoara (1).

3.77. On the other hand, this Formal Title Deed to the Commons of Jocoara refers not to the Mountain of Nahuaterique but to Royal Landholdings to the West or South-West of the Mountain. The Memorial of Honduras relates that the community of Jocoara requested in 1769 the measurement of these 2 "Caballerías", 201 "Cords", of land belonging to the Crown, that is to say a Royal Landholding. The Formal Title Deed to the Commons of Arambala and Perquín places on record that to the West and South-West of these Commons were situated Royal Landholdings. From the express recognition of this fact by Honduras, it can be deduced that the 2 "Caballerías", 201 "Cords", adjudicated to Jocoara were situated outside the Commons of Arambala and Perquín and not, as Honduras claims, inside those Commons.

3.78. The invocation by Honduras of the Formal Title Deed to the Commons of Jocoara of 1776 implies the recognition by Honduras of the Formal Title Deed to the Commons of Arambala and Perquín since both Title Deeds are intimately connected in that the former was no more than an incidental matter that was carried through by the inhabitants of Jocoara

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1. Memorial of Honduras: Annexes: p. 52.

in the course of the proceedings for the remeasurement and replacement of the Formal Title Deed to the Commons of Arambala and Perquín. The connection between the two Titles is established in a definitive form by the decision of the "Real Audiencia" of 16 November 1815, the text of which is transcribed in the Annexes to this Counter Memorial (2).

3.79. To sum up, any combined examination of these two Formal Title Deeds establishes beyond dispute the position of the River Negro or Pichigual and the extension of these Commons, that is to say the fact that the administrative control of Arambala and Perquín extended to the North of the River Quiaguara as far as the Cerro de la Ardilla, as is claimed by El Salvador. These two Formal Title Deeds were examined and their scope and their area recognised in the Formal Record of the Negotiations between the Commissioners Sancho and Alvarado, in representation respectively of El Salvador and Honduras, on 1 July 1861 at the Mountain del Mono (3).

3.80. These two Commissioners Sancho and Alvarado proceeded, according to this Formal Record, to delimit on the ground the area of the respective Commons with the assistance of the inhabitants of both localities, fixing their boundaries on the basis of the geographical features and boundary markers

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2. Counter Memorial of El Salvador: Annexes: Vol. IV, pp. 31, 32 & 33.

3. Memorial of Honduras: Annexes: pp. 52-54.

which divided the two Commons. The Formal Record adds that to this effect, they reached a place known as the foot of the Cerro de la Ardilla, where they renewed the boundary marker, and that they subsequently recognised and re-established the boundary markers of La Isla, the Cerro de Saparzani, Sojoara, the Colina de Olasicala, Piedras Gordas, and the Colina of Arambala or El Alumbrador. The delimitation of the Commons in this sector is, as can be seen, clear and precise and was carried out by common agreement of the surveyors nominated by the two Governments with the assistance and participation of the inhabitants of the two indigenous communities who were in dispute. It is impossible to conceive of any proof that could be more categorical in a boundary dispute of this type.

3.81. In the Fourth Meeting between Cruz and Letona held on 28 March 1884, the Commissioners accepted without modifications, as they were indeed bound to do, the line of demarcation of the Commons established by the Formal Record of the Negotiations of 1861, repeating the same geographical features and their boundary markers, namely the Cerro de Sapamani, La Sabaneta or La Isla, the Cerro de la Ardilla, Olasicala, the Cerro del Alumbrador and Alguacil Mayor.

3.82. The Memorial of Honduras recognises (4) that all the points so indicated belong

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4. Memorial of Honduras: p. 203.

""à la ligne de démarcation délimitée par le titre des terains communaux de Arambala, Perquín et San Fernando". Ce qui implique fondamentalment une coincidence entre les limites du titre des terres des communautés salvadoriennes et les limites du territoire d'El Salvador" (original emphasis). This is exactly what El Salvador is arguing (5) and consequently precisely what constitutes the decisive issue in this boundary dispute.

(B) The Sub-Sector of Torola

3.83. In this sub-sector of Torola, El Salvador bases its claim on the Formal Title Deed to the Commons of Santiago Torola issued by the Spanish authorities. This Title Deed was destroyed in a fierce fire which occured in 1734 and which razed to the ground the township of Santiago Torola. Because of this occurence, the town council of Torola requested Captain Juan José de Cañas, Judge Commissioner for Land Measurements in the Province of San Miguel duly authorized as such by the Sole Judge of the Royal Land Law of the Colonial Kingdom of Guatemala, the lawyer Francisco Orozco Manrique de Lara, that their Commons should be remeasured and their boundary markers reconfirmed and, once the necessary legal procedure had been carried out, their Formal Title Deed should be replaced. This remeasurement was authorised on 7 May 1743 and was confirmed that same year by Captain Juan José de Cañas, who duly executed a new Formal

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5. Counter Memorial of El Salvador: Chapter II.

Title Deed to the Commons of Torola.

3.84. This remeasurement of the Formal Title Deed to the Commons of Torola of 1743 because of a subsequent deterioration in its physical state, was protocolised in San Miguel in November 1843 by the Notary Public José Cordova, at the request of the Town Council of the township of Torola in the Republic of El Salvador (6). On 29 February 1844, the Political and Military Government of the Department of San Miguel in the Republic of El Salvador, at the request of the Town Council of Torola and with the intention of avoiding the continuous clashes between the inhabitants of Torola and the adjoining landowners of Colomoncagua, authorized a further remeasurement of the Commons of Torola, taking as boundary markers those established by the Formal Title Deed to the Commons of Torola of 1743; this remeasurement was duly confirmed in Torola on 16 March 1844 and was handed down to the interested parties on 4 March 1846. The Formal Title Deed to the Commons of Torola proves the legitimate rights which El Salvador has in this sector in accordance with the uti possidetis iuris of 1821.

3.85. On 7 March 1743, the Judge Commissioner for Land Measurements in the Province of San Miguel, in the Colonial Province of San Salvador, duly executed the Formal Record of the Remeasurement

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6. Counter Memorial of El Salvador: Annexes: Vol. VI, p. 1.

of the Commons of Torola, from which the following boundary markers emerge:

1st Boundary Marker:	Quebrada de Guespique;
2nd Boundary Marker:	A peak (unnamed);
3rd Boundary Marker:	A peak (unnamed);
4th Boundary Marker:	Portillo de San Diego;
5th Boundary Marker:	Portillo de las Tijeretas;
6th Boundary Marker:	River de las Cañas;
7th Boundary Marker:	The Royal Road which goes from the township of Torola to Colomoncagua;
8th Boundary Marker:	Monte Redondo;
9th Boundary Marker:	A ridge (unnamed);
10th Boundary Marker:	A ridge (unnamed);
11th Boundary Marker:	La Chorrera;
12th Boundary Marker:	La Sirena;
13th Boundary Marker:	Quebrada de Guespique.

All these boundary markers set out in the Formal Title Deed to the Commons of Torola are still perfectly identifiable at the present time and the topography of the area has been preserved, thus facilitating its cartography. It is for this reason that when these Commons were remeasured once again in 1844 all the boundary markers mentioned in the Formal Title Deed of 1743 were taken into account, the only change being that some of these boundary markers which had not had a name in 1743 had acquired one in the meantime.

3.86. On 16 March 1844, the Formal Record of the Remeasurement of the Commons of Torola was duly executed, from which the following boundary markers emerge (the same ones as in 1743):

1st Boundary Marker:	Quebrada de Guespique;

2nd Boundary Marker:	Cerro Chiriqui (this peak previously had no name);
3rd Boundary Marker:	Cerro Portezuelo (this peak previously had no name);
4th Boundary Marker:	Portillo de San Diego;
5th Boundary Marker:	Portillo de las Tijeretas;
6th Boundary Marker:	River de las Cañas or Yuquina;
7th Boundary Marker:	The Royal Road which goes from the township of Torola to Colomoncagua;
8th Boundary Marker:	Monte Redondo;
9th Boundary Marker:	Loma Mongueta (this ridge previously had no name);
10th Boundary Marker:	Loma Esquingla (this ridge previously had no name);
11th Boundary Marker:	La Chorrera and the meeting of the Quebrada del Burro and the Quebrada del Jícaro;
12th Boundary Marker:	La Sirena;
13th Boundary Marker:	El Salto, a place on the River la Chorrera (not previously identified);
14th Boundary Marker:	Agua Caliente, a place on the River La Chorrera (not previously identified);
15th Boundary Marker:	Quebrada de Guespique.

The identical nature of these boundary markers clearly demonstrates the accuracy and juridical consistency of the Title Deeds presented by El Salvador. However, it should be noted that this remeasurement, based on the original Formal Title Deed, encountered the opposition of the inhabitants of Colomoncagua, whoc claimed on the basis of their own Formal Title Deed

to Commons, that the boundary line of the two Commons ran from Las Tijeretas to Los Picachos, while the inhabitants of Torola claimed that the boundary line followed the course of the River de Cañas or Yuquina. Faced with this apparent conflict between two Formal Title Deeds to Commons both issued by the Spanish authorities in the colonial area, the Judge compared the two Formal Title Deeds and discovered that the Formal Title Deed to the Commons of Colomoncagaua itself stated that the boundary was the River Yuquina, that is to say the River de las Cañas (7) and so upheld the claim of the inhabitants of Torola.

3.87. In opposition to the Formal Title Deed to the Commons of Torola presented by El Salvador, the Memorial of Honduras (8) bases its claim in this sub-sector on no less than nine Title Deeds. These are as follows:

(i) The measurement of 1653 carried out by Pedro Romero;

(ii) The measurement of 1663 carried out by Pedro Romero;

(iii) The measurement of 1665 carried out by Pedro Romero;

(iv) The measurement of Las Joyas and Las Jicoaguitas of 1694;

(v) The measurement of 1766 carried out by Pineda;

(vi) The measurement of 1767 carried out by García,

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7. Memorial of El Salvador: Paragraph 6.45..

8. Memorial of Honduras: pp. 231-240.

Jalón;

(vii) The litigation of 1770 brought by La Magdalena;

(viii) The visual recognition of boundary stones of 1793 carried out by Andrés Pérez;

(ix) The Formal Title Deed to the Commons of Santo Domingo of 1812.

3.88. Of the Title Deeds listed above, those numbered (i), (ii) & (iii) do not have any probative effect in this frontier litigation since they are not Formal Title Deeds to Commons and so the inhabitants of Torola were not given the opportunity to raise any objections thereto. The Title Deed numbered (v) was executed by Pineda following a circuit of the sector on horseback and was subsequently annuled by the "Real Audiencia" of Guatemala in 1767 (9). The Title Deeds numbered (vi), (vii) & (viii) were based on excessive unilateral claims made by the inhabitants of Colomoncagua to which the inhabitants of Torola were not given any opportunity to object. In the Title Deed numbered (vi), for example, the Judge "m'en remettant uniquement à ce qu'a dit et ce qu'a signalé la communauté du village mentionné [Colomoncagua]" (10), who indicated as their boundary markers markers which did not belong to them (11). From the Title Deed numbered (vii), it emerges that what was being claimed by the

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9. Memorial of Honduras: Annexes: pp. 1213-1214.

10. Ibid.: p. 1219.

11. Ibid.: p. 1229.

indigenous community of Colomoncagua "n'est pas juste en raison des distances qu'il y a de leur village auxdit domaines" and that these claims arose "de prétextes malicieux qu'ils inventent pour dissimuler la vérité" (12). From the Title Deed numbered (viii) it emerges that the passage cited by Honduras is based "d'après ce qu'ont déclaré ces habitants (de Colomoncagua), ayant égaré leur titre" (13).

3.89. One of the Title Deeds that survives the critical examination made in the previous paragraph, that numbered (iv), on the other hand, confirms the position maintained by El Salvador in that it states that the measurement reached "un grand torrent appelé Yuquina où on a mis une borne" (14). Given that the Yuquina is the River de las Cañas, this Title Deed is in favour of El Salvador (15).

3.90. To confirm still further the position of El Salvador, it is appropriate to mention that, at the Conference held at Nahuaterique in 1869, the Commissioners Sancho and Chaves considered the question of the boundary between Colomoncagua and Torola. In spite of the fact that the Commissioner of Honduras had not actually been given powers to negotiate the boundary in this sector, the General Record of the Conference states (16):

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12. Memorial of Honduras: Annexes: p. 1293.
13. Ibid.: p. 1332.
14. Ibid.: p. 1185.
15. Ibid.
16. Ibid.: p. 64.

"Pourtant, sur la demande et l'insistance des habitants des deux villages sus-mentionnés, nous continuons, après avoir examiné superficiellement les titres de l'une y l'autre partie jusqu'au moment où nos recon--naissons le cour de la rivière dite "Rio de la Canas" qui forme ladite limite en aval. Mais vu que, pour décider la démarcation à partir du point de confluence antérieur jusqu)à la rivière Las Canas, le Délégue du Honduras manque de la susdite autorisation, les deux villages décidèrent que celui de Colomoncagua la réclamará à son Gouvernement et que, pendant ce temps les deux Délégués attendront."

In any event it was clearly recognised by both Commissioners that the boundary extended as far as the River de las Cañas,

3.91. On 15 July 1869 the Conference of Champate was held between the Republics of El Salvador and Honduras with the object of settling the outstanding questions relating to the boundary between the townships of Torola in El Salvador and Colomoncagua in Honduras. At this Conference, the following documents were produced: the Title Deed of Colomoncagua (a remeasurement of all the lands carried out in 1793 by Andrés Pérez), the remeasurement carried out in 1667 of the Title Deed of the Hacienda San Diego, and the remeasurement of 1743 which constituted the Formal Title Deed to the Commons of Torola.

3.92. In the Formal Record of this Conference, the same two Commissioners, Sancho and Cruz, were unable to reach any final agreement, although they did agree to accept certain boundary markers, such as that at Las Tijeretas and the road from Gracias a Dios to San Miguel. It is significant that, although no final agreement was reached, the Commissioner of Honduras, Chaves, indicated in his Report to his

Government that it had not been possible to reach any agreement "parce que je ne possédais pas de documents qui me servent d'appui pour une décision définitive", although he referred to a "document unique qui déclare, pour notre part que la ligne frontière des juridictions est la rivière de las Canas" (17).

3.93. At this Conference, the Commissioner of El Salvador based his claim on the Formal Title Deed to the Commons of Torola and the Title Deed to the Hacienda of San Diego, affirming once again that the River de las Cañas was the boundary of the two Republics, and declared that he considered that the visual inspection carried out by Andrés Pèrez in 1793 "était nul et sans aucune valeur puisqu'il entrait dans les terrains contigus enveloppant même le village de San Fernando qui est très loin" and because "ne correspondait pas du tout aux arpentages qui figurent sur le titre de Colomoncagua" (18).

3.94. Indeed, the Remeasurement of Colomoncagua, authorised by Andrés Pérez in 1793, contains many contradictions and irregularities which deprive it of any probative value. First, on the one hand it is affirmed in one of the passages of the Title that the Villorío of San Fernando is situated within the boundaries of the lands of the settlement of San Pedro Colomoncagua, while on the other hand it is stated that, on the occasion of the instalation of

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17. Memorial of Honduras: Annexes: pp. 85-86.
18. Ibid.: p. 67.

new intendencies, a Villorio called San Fernando was created at the side of the Intendency of San Salvador; as a result the precise location of the Villorio San Fernando remains in doubt according to this Deed, although in reality there is no doubt whatsoever that it belongs to what is now the Department of Morazán in the Republic of El Salvador forming part of the townships included in the Formal Title Deed to the Commons of Arambala and Perquín in El Salvador - it is for this reason that there was opposition from the town council of San Fernando to this remeasurement, as the Deed specifically states.

3.95. Secondly, in the Formal Record of the Remeasurement of 7 March 1793, Andrés Pérez directed the measurer to extend the cord and at that moment appeared Guillermo Reyes, declaring that he was in possession of two pieces of land, La Magdalena and La Negra Vieja, both of which had been given to him by Luis de Abreu on 16 November 1793. How could these lands possibly have been given to him on 16 November 1793 when the measurement was being carried out on 7 March 1793?

3.96. Thirdly, the Title Deed of Remeasurement is so irregular that not even the inhabitants of Guarajambala in what is now the Republic of Honduras wished to accept it; they were opposed to the fact that it was the Intendent-Governor and Commandant--General of the Province of Honduras who issued this Title on the grounds that this should have been done by the "Real Audiencia" of Guatemala, as is stated in the following section of the Title Deed:

"ils (les natifs du village de Guarajambala) ont répondu en présence de toutes les personnes ci-dessus

mentionnées qu'ils n'assisterait pas et qui ne seraient pas présents à l'exécution qui a été ordonnée ni encore moins qu'ils iraient à la ville de Comayagua parce que ce n'était pas une audience et qu'ils iraient plutôt à celle du Guatemala, et comme je les enjoignai pour la deuxième et la troisième fois de la faire, ils ont répondu la même chose" (emphasis added) (19).

It was precisely this irregularity that led the Commissioner of El Salvador to declare this Title to be null and devoid of value in the Formal Record of the Conference of Champate on 15 July 1869.

3.97. Fourthly, yet another irregularity and contradiction in this Title which deprives it of value is the fact that, when on 15 May 1766 the measurement of Colomoncagua had been verified, it was recognised that in the area of Santa Ana in the southern part thereof the dividing line between the Province of Honduras and the Province of San Salvador was such as to leave the River de las Cañas within the Province of El Salvador, whereas in the Remeasurement of 1793 the dividing line was no longer the River de las Cañas but a line well inside the territory of the Province of El Salvador; this is the reason why the inhabitants of Torola objected to the Remeasurement.

(C) Colonial Documents which confirm the Formal Title Deeds to the Commons of Arambala, Perquín and Torola

3.98. The existence of royal landholdings in this

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19. Memorial of Honduras: Annexes: p. 1316; Counter Memorial of El Salvador: Annexes: Vol. VI, p. 105.

sector is corroborated by the document in which the "Bachiller" (graduate) Andrés de Aragón Cura, the beneficiary by royal patronage of the judicial district of San Francisco Gotera in the jurisdiction of San Miguel in the Province of San Salvador, reported that in the townships of Torola and Perquín of that jurisdiction there were royal landholdings as yet uncultivated that belonged to the Crown, thus ratifying the existence of the royal landholdings to which reference is made in the Formal Title Deeds to the Commons of Arambala and Perquín and of Torola (20).

3.99. The destruction by fire of the township of Santiago Torola, in the jurisdiction of San Miguel in the Province of San Salvador, is proven not only by the statements of the inhabitants of that township recorded in their Formal Title Deed, but also by the following documents. First, a document in which the inhabitants of the township of Santiago Torola, in the jurisdiction of San Miguel in the Province of San Salvador, declared that on 14 January 1735 their town, their church, their houses and all their possessions were destroyed by fire and for this reason they asked to be exempted from the payment of taxes (21). Secondly, a document which contained a report as to the decayed state of the royal "Hacienda" of the indians of the township of Santiago Torola, in the jurisdiction of San Miguel in the

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20. Counter Memorial of El Salvador: Annexes: Vol. VI, p. 144.

21. Ibid.: Vol. VI, p. 152.

Province of San Salvador, because of the burning down of their township (22). Thirdly, a document containing a request for the remeasurement of lands in the township of Santiago Torola in the jurisdiction of San Miguel in the Province of San Salvador in favour of Sebastiana de los Reyes and in which it is stated that Captain Juan de Cañas, Subdelegate Judge of the Sole Court of Land Measurements at the request of the inhabitants of the township of Torola carried out the remeasurement of their Commons and their lands because their Titles had been destroyed by the fire which devastated their township (23).

(D) The Validity of the Maps Presented

3.100. In respect of both the Sub-Sector of Nahuaterique and the Sub-Sector of Torola maps have been prepared showing the most important and significant Title Deeds relating thereto. Many of the Title Deeds presented by Honduras cannot be classified as important and significant; either because they relate to areas outside the disputed sectors, as is the case with the Title Deed of El Obraje de Santa María Magdalena of 1629, which relates not to this sector but to the sector of Tecpangüisir Mountain; or because they identify only one boundary marker and thus obviously cannot be mapped; or because the documents in question have fissures or are illegible in part or in whole, as is the case with the Title

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22. Counter Memorial of El Salvador: Annexes: Vol. VI, p. 209.

23. Ibid.: Vol. VI, p. 190.

Deed of Yarula of 1754 and the Title Deed of Joateca of 1682.

3.101. Consequently, following a selective analysis of the Title Deeds presented in relation to this sector, two maps have been drawn up. The first (24) is a representation of the Formal Title Deeds to the Commons of Perquin and Arambala of 1815 and of Torola of 1743, both presented by El Salvador, together with the Title Deeds of San Pedro Colomoncagua of 1793, of Santo Domingo Cotalá of 1812, of Las Joyas and Jicaguites of 1694 and of the Sitio de San Blas of 1746, all presented by Honduras. An analysis of this map demonstrates that the two Formal Title Deeds to Commons presented by El Salvador, the Formal Title Deeds to the Commons of Arambala and Perquín, cover the whole of this disputed sector and that all the boundary markers mentioned therein are still identifiable at the present day; on the other hand, so far as concerns the Title Deeds presented by Honduras, the Title Deeds of the Sitio de San Blas and of Santo Domingo Cotalá are shown to deal with areas which are outside the sector at present under discussion and thus have nothing to do with the matter in hand; the only Title Deed presented by Honduras that apparently deals with the sector at present under discussion is the Remeasurement carried out by Andrés Pérez in 1793 but this Title Deed, as has already been stated in this section of this Counter Memorial, contains many irregularities and contradictions, on

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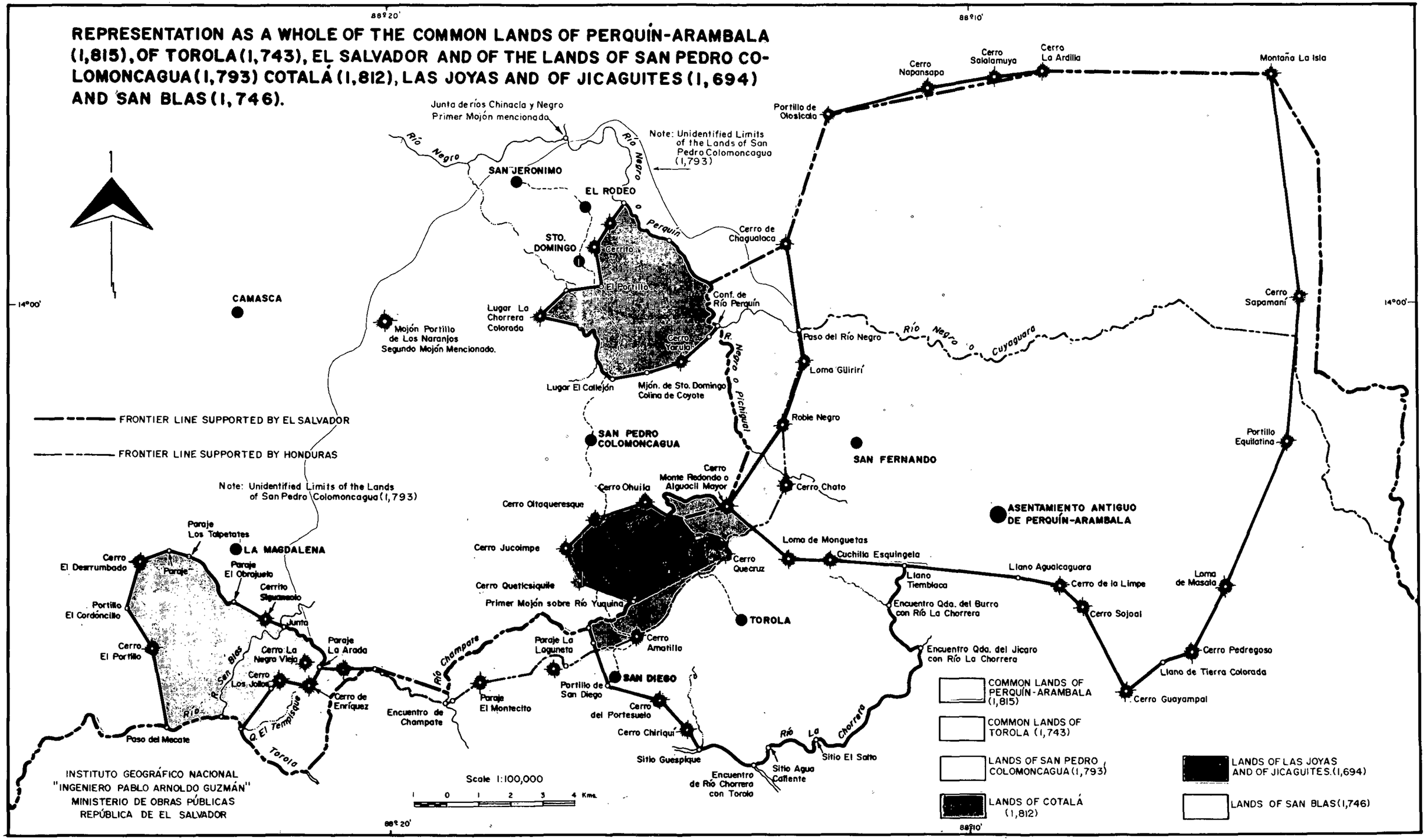
24. Counter Memorial of El Salvador: Map 3.H..

REPRESENTATION AS A WHOLE OF THE COMMON LANDS OF PERQUÍN-ARAMBALA (1,815), OF TOROLA (1,743), EL SALVADOR AND OF THE LANDS OF SAN PEDRO COLOMONCAGUA (1,793) COTALÁ (1,812), LAS JOYAS AND OF JICAGUITES (1,694) AND SAN BLAS (1,746).



MAP 3. H

account of which it has already been declared null and valueless on many occasions; besides there is a fundamental contradiction between this remeasurement of 1793 and that of 15 May 1766, in which the measurements of Colomoncagua were verified, since in this latter remeasurement Honduras accepted that in the area of Santa Ana the dividing line between the Provinces of San Salvador and of Honduras was the River de Cañas, something which, as can be observed on the second map (25), coincides exactly with the Formal Title Deeds presented by El Salvador in that Title Deed relating to the remeasurement of Colomoncagua of 1766 presented by Honduras shows exactly the same boundary between the two provinces as the Formal Title Deeds to the Commons of Arambala and Perquín of 1815 and of Torola of 1743 presented by El Salvador.

V. Dolores, Monteca and Polorós

3.102. The Memorial of Honduras commences by recognising that (26) "le conflit des limites entre El Salvador et le Honduras dans le secteur de Dolores est né à partir d'un différend préalable sur les limites de terres" between two indigenous communities, Polorós in El Salvador and Opatoro in Honduras.

3.103. El Salvador bases its rights on the Formal

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25. Counter Memorial of El Salvador: Map 3.I..
26. Memorial of Honduras: p. 250.

REPRESENTATION AS A WHOLE OF THE COMMON LANDS OF PERQUÍN-ARAMBALA (1,815) AND TOROLA (1,743) OF EL SALVADOR AND OF THE LANDS OF SAN PEDRO COLOMONCAGUA (1,766) OF HONDURAS.

88°20'
88°10'
14°00'

Río Chinacla
Junta de Ríos Chinacla y de Perquín
Río Negro o Perquín
Portillo del Rodeo
Cerro Alto
Hacienda San Gerónimo
Cerro Cotalá
COTALÁ
Cerro Llantepa
Cerro Napansapa
Cerro La Ardilla
Cerro Salalamuya
Montaña La Isla
Portillo de Olosicala
Cerro de Chagualaca
Cerro Sapamaní
CAMASCA
Río Negro o Cuyaguara
Loma Guirlri
Intercepción con camino a Camasca
PARAJE DE SANTA LUCÍA
Nota: En esta Parte no se localizan los puntos mencionados
Cerro Pequeño
SITIO MAL PASO
Encuentro con Qda.
AC° El Carrizal no identificable
Roble Negro
Portillo Equilatina
COLOMONCAGUA
FRONTIER LINE SUPPORTED BY EL SALVADOR
FRONTIER LINE SUPPORTED BY HONDURAS
Intercepción con camino a Torola
Cerro Monte Redondo o Alguacil Mayor
Junta de Qda. con Río Estanzuelas
Río Estanzuelas
Río Sicahuite o Mazire
Loma de Monguetas
Cerro Picudo
Cerro de La Limpe
Loma de Masala
Río Santa Cruz
Encuentro Qda. del Burro con Río La Chorrera
Cerro Sojoal
Cerro Terrero Blanco
HACIENDA DE SANTA ANA
Río de Cañas
Encuentro Qda. del Jicaro con Río La Chorrera
Cerro Pedregoso
Cerro Negra Vieja
Llano de Tierra Colorada
Portillo de San Diego
Cerro del Portesuelo
Cerro Guayampal
COMMON LANDS OF PERQUÍN-ARAMBALA (1,815)
Cerro Chiriquí
Río La Chorrera
COMMON LANDS OF TOROLA (1,743)
Sitio El Salto
Sitio Agua Caliente
LANDS OF SAN PEDRO COLOMONCAGUA (1,766)
Encuentro de Río La Chorrera con Torola
Escala. 1:100,000
1 0 1 2 3 4 Kms.

INSTITUTO GEOGRÁFICO NACIONAL
"INGENIERO PABLO ARNOLDO GUZMÁN"
MINISTERIO DE OBRAS PÚBLICAS
REPÚBLICA DE EL SALVADOR

88°20'
88°10'

MAP 3. I

Title Deed to the Commons of Polorós of 1760 (27) relying, as is recognised by the Memorial of Honduras (28) "sur une identité absolute entre limite de terres selon les titres de propriété des communautés indigènes et limite du territoire de chaque Etat". On the other hand, Honduras alleges that, when carrying out the measurement of the Commons of Polorós, the surveyor made an incidental declaration to the effect that part of the land which he was measuring was within the jurisdiction of Comayagua (29). Once again, the dispute turns on the question considered in Chapter II of this Counter Memorial (30), namely the manner in which Formal Title Deeds to Commons ought to be read and interpreted.

3.104. The Formal Title Deed to the Commons of Polorós of 1760 extends as far as the Cerros of Ribitá and López, as is indeed recognised implicitly in the Memorial of Honduras (31). The Title Deed states that the measurement "reached a hill which divides these lands from those of López .... and continuing in the same direction reached the hill of Ribitá, the boundary with the lands of San Antonio of the other jurisdiction" (32). This boundary was accepted

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27. Memorial of Honduras: Annexes: pp. 1582 et seq..
28. Memorial of Honduras: p. 256.
29. Memorial of Honduras: p. 254 & Annexes: p. 1585.
30. Counter Memorial of El Salvador: pp. 33-39.
31. Memorial of Honduras: p. 257 & Annexes: p. 1585.
32. Counter Memorial of El Salvador: Annexes: Vol. III, p. 54.

during the Meetings between Cruz and Letona (33).

3.105. What are the objections of the Government of Honduras to a Formal Title Deed to Commons which is so clear and categorical? Its arguments can be examined under four headings, which will be considered in turn: (A) The Citation of Titles not previously produced; (B) The Invocation of the Concept of the Natural Frontier and the Identification of the Cerro of Ribitá; (C) The Villatoro Incident; and (D) The Validity of the Maps Presented.

(A) The Citation of Titles not previously produced

3.106. What strikes the attention above all is that the Title Deeds and Documents now relied on by Honduras in its Memorial (34) have not been cited in any of the previous negotiations or discussions carried out over the period of one and a half centuries during which this dispute has lasted. Save for the Formal Title Deed to the Commons of San Antonio de Padua, occasionally mentioned in documents of the last century, the Title Deeds and Documents which now appear on the scene have been produced from the unknown for the purposes of this litigation, something which inevitably makes them highly suspicious.

3.107. They were not cited in 1854 when serious

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33. Memorial of Honduras: Annexes: p. 170.

34. Memorial of Honduras: pp. 276 et seq..

conflicts arose between Opatoro and Polorós; they were not mentioned in the instructions given to Cruz, the Commissioner of Honduras, on 4 May 1880 (35), nor in the negotiations held at Saco on 6 June 1880, when Honduras, without presenting any documents in its support (36), formulated in the course of the negotiations a compromise proposal to divide up the disputed sector, nor in the Report of Cruz to his Government of 28 June 1880 (37), nor in the Pleadings formulated by Cruz before the Arbitrator, the President of Nicaragua, in June 1881 (38), nor in the Third Meeting between Cruz and Letona in March 1884 (39) where, following the examination of the documents relating to Dolores, "ils ont acquis la certitude que la ligne frontière des deux Républiques devra être déterminée suivant le titre des "éjidos" du village de Poloros, car c'est la plus ancien et il se réfère à des lieux très connus".

3.108. Nor were these new Title Deeds which are now being brought into play invoked in the protests made by the inhabitants of Opatoro in 1884 (40), nor in the Conference held at Guanacastillo where there was an intense discussion of this matter on 22 November 1888 and in the course of which the

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35. Memorial of Honduras: Annexes: p. 98.
36. Ibid.: p. 104.
37. Ibid.: p. 107.
38. Ibid.: p. 138.
39. Ibid.: p. 170.
40. Ibid.: pp. 193-195.

only Title Deed cited by the delegation of Honduras was that executed by President Soto of Honduras in favour of Opatoro (41). Nor are they mentioned in the Report of the Commissioner of Honduras, Colidres, of 5 December 1888 (42). Not even Bustamante, who severely criticised the Formal Title Deed to the Commons of Polorós, invoked these documents in 1890. On none of these previous occasions on which intense negotiations took place did anyone speak of the Title of Cacaoterique of 1789 or 1803, unheard of until now, or of the Title to the Commons of the village of San Miguel de Sapigre, which disappeared from the map in the Eighteenth Century.

3.109. An analysis of the document relating to Cacaoterique explains why this document has never previously been mentioned. It is not a Formal Title Deed to Commons but merely the recognition of a series of boundary markers carried out on the basis of a paper in incomprehenible language which was described by Sixto González, the Judge in question, in the following way: "certains papiers rédigés en langue que personne ne connait y sur du papier ordinaire, qui ne ressemble en rien à un titre, ni à un acte de vente publique" (43). Consequently, the Judge limited himself to sending the file to his superior so that the latter could decide what was appropriate. There was not, therefore, any judicial

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41. Memorial of Honduras: Annexes: p. 243.
42. Ibid.: p. 251.
43. Ibid.: p. 1615.

approval of this document All that took place was a recognition of the boundary markers indicated by the petitioners on the basis of this document and, in the case of some of them, such as Brinco del Tigre, there was merely a unilateral comment made as a result of the indications of the petitioners that in certain places existed the boundary markers of the Commons of Polorós. The Judge proceeded to follow these boundary markers on the basis of "la relation faite par l'ancien notable de village et qui se trouve décrit dans le vieux document" (44). On the occasion on which there was a conflict of opinion between the inhabitants of Cacaoterique and the inhabitants of Opatoro, the Judge compared the documents of both parties and discovered "qu'aucun d'eux semble être titre valable et légal. Il s'agit de simples documents et par conséquent ces terrains appartient à Sa Majesté" (45). Basing itself on certain topographical similarities, the Memorial of Honduras affirms that some of these boundary markers, such as Planchaquira and Liumunim, constitute various parts of the Commons of Polorós such as Ocote Manchón and Agua Caliente; however, this comparison is merely speculative. Lastly, the map included in the Memorial of Honduras (46) shows an enormous area of Commons apparently belonging to a hamlet which, according to these documents, did not have more than 243 inhabitants (47); indeed, the

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44. Memorial of Honduras: Annexes: p. 1600.
45. Memorial of Honduras: Annexes: p. 1601.
46. Memorial of Honduras: p. 252: Map B.3.2..
47. Memorial of Honduras: Annexes: p. 1609.

Judge declared that the two hamlets of Opatoro and Cacaoterique "possèdent tous les deux trop de terres" (48).

3.110. Further, the speculations engaged in by Memorial of Honduras reach the incredible extreme of attempting to resurrect the non-existent Title Deed to the Commons of the settlement of San Miguel de Sapigre, which disappeared in the previous century. The Memorial of Honduras obviously cannot present this Formal Title Deed, lost at the time of the disappearance of the settlement, but instead tries to reconstruct it on the basis of the identity of its hypothetical neighbours, engaging in a paroxysm of speculations which it is impossible seriously to take into account. These speculations are constructed upon the basis of the Title of Cacaoterique, whose probative defects and weaknesses have already been considered in the previous paragraph. How is it possible to permit the invention of a Commons of which there is no proof whatsoever. The Memorial of Honduras admits (49) that the boundary line that is being drawn is entirely hypothetical. How can it be possible to base the uti possidetis iuris on a hypothetical line? This questions answers itself. This then is the basis on which Honduras is claiming Monteca? These desperate efforts of the Memorial of Honduras serve only to reinforce the predominant character of the Formal Title Deed to the Commons of Polorós and its extension

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48. Memorial of Honduras: Annexes: p. 1616.
49. Memorial of Honduras: p. 287.

as far as the Cerros of Ribitá and López, exactly as was recognised in the Meetings between Cruz and Letona in 1884.

(B) The Invocation of the Concept of the Natural Frontier and the Identification of the Cerro of Ribitá

3.111. In the pleadings of Honduras in the Arbitration carried out by the President of Nicaragua in 1880, it was recognised that the Formal Title Deed to the Commons of Opataro states that "l'arpentage a débuté au mont de López" (50). But the argument formed by Cruz in his pleadings before the Arbitrator in relation to the identification of the Cerro de Ribitá is that "cela donnera lieu à une brusque rupture de la ligne" .... "en formant un angle auquel répugne la topographie, contraire au cours de la ligne naturelle" (51). In other words, he here invoked the concept of the natural frontier which, as has already been seen in Chapter II of this Counter Memorial (52), does not form part of the principles of law applicable to this litigation.

3.112. This concept also appears in the Report of the Parliamentary Commission which proposed the rejection of the Cruz-Letona Convention (53). This Commission cited the Report of Lazo, to

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50. Memorial of Honduras: Annexes: p. 140.
51. Memorial of Honduras: Annexes: pp. 140-141.
52. Counter Memorial of El Salvador: pp. 28-29.
53. Memorial of Honduras: Annexes: pp. 205-206.

which reference has already been made in Chapter II of this Counter Memorial (54), which is based on the natural frontier line between the two Republics. The Report of Colindrés is also based on the idea that "la rivière Torola, depuis sa source et sur la majeure partie de son cours, est un élément géographique destiné par la nature à servir de frontière entre les deux pays" (55).

3.113. The same idea also inspires the Report of Bustamante who indicates that "la topographie du terrain marque, d'une manière claire et précise, la ligne naturelle permanente" (56). He adds that the boundary which emerges from the Formal Title Deed to the Commons of Polorós "rompt brusquement la direction qu'il avait depuis Mansupucagua, pour faire un grand détour par la butte appelée Lopez, passant ici au nouveau Ribita" (57) and for this reason Honduras rejected "une ligne si irrégulière, suit y soutient comme légitime, juste et naturelle, celle qui détermine la cours ordinaire des eaux" (58).

3.114. What was most inconvenient for Bustamante in the development of his argument is the Cerro of Ribitá and for this reason he developed his theory arguing for a change in the position of this

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54. Counter Memorial of El Salvador: p. 29 (fn.).
55. Memorial of Honduras: Annexes: p. 255.
56. Memorial of Honduras: Annexes: p. 284.
57. Memorial of Honduras: Annexes: p. 288.
58. Memorial of Honduras: Annexes: p. 288.

Cerro and the creation of a new Ribitá or an Arribitu. This argument is adopted by the Memorial of Honduras. This thesis of Bustamante is based on the erroneous and partial transcription which he made of the Formal Title Deed to the Commons of Polorós. He begins by recognising, on two occasions, that this is a document "que je ne connais pas complètement" (59) and that "je ne connais pas le titre sus mentionné" (60). Nevertheless, he does transcribe, extremely badly, the key section of this Title Deed. His transcription is set out below alongside the text of the Title Deed (61), both in the French translation annexed to the Memorial of Honduras.

Title Deed	Bustamante
"et changeant de direc-	"et changeant de direc-
-tion, de l'ouest à l'est	-tion ouest en est
on se dirigeant au nord	on dérivant vers le nord
est, on est arrivé à une	est arrivé à un côteau
côte que divise ces terres	que divise ces terres
avec celles de López, et	d'avec celles des López
l'enclos en question se	où selon le droit se
trouve	trouve la ferme de López,
hors de	cette ferme n'étant pas
l'arpentage et	comprise dans ces terres,
l'on a évalué 70 cuerdas,	on a mesuré 70 cordes;

59. Memorial of Honduras: Annexes: p. 283.
60. Memorial of Honduras: Annexes: p. 285.
61. Memorial of Honduras: Annexes: p. 1585.

et en continuant dans la même direction, on est arrivé à la colline de Ribita, limite les terres de San Antonio, de l'autre jurisdiction et à la rivi--ère de Unire, et l'on a évalué 70 cuerdas...."	et suivant la même direction, on est arrivé à la butte de Ribita, marquant la fron--tière entre les terres de San Antonio, de l'autre jurisdiction et le fleuve de Unire, on a mesuré 70 cordes...."

3.115. On the basis of this passage, which clearly does not coincide with the Formal Title Deed, Bustamante concludes that the measurement of the latter is defective and that the Cerro de Ribitá cannot possibly be located where it actually is and that there must be a new Ribitá and a mountain "arribita". He states, erroneously (62):

"si l'Unire et Ribita ou Arribita, sont un même point des points cardinaux de l'arpentage, comme précisément il doit l'être, il est hors de question, que cette butte ne soit pas celle reconnue par les commissions salvadoriennes, étant donné que celle-ci est distante de Unire de 4.124 m ni plus ni moins".

As can be seen, the omission of one word ("a" in the original Spanish text, "dans" in the French translation above) induced Bustamante to believe that the measurement identified the Cerro of Ribitá with the River Unire, whereas in reality these are two distinct points which the surveyor reached one after the other. The location of the Cerro of Ribitá, which was defined

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62. Memorial of Honduras: Annexes: p. 287.

geographically speaking in the Conferences between Cruz and Letona as the "pic le plus élevé des quatre que forment les alentours de Rivita" (63), was recognised and accepted by Honduras at the Conference of Guanacastillo on 21 November 1888; there, although no final agreement was reached, Honduras accepted that "la ligne de mémarcation arrive jusqu'au sommet du coteau "Rivita"" (64).

3.116. In the Report of Aracil Crespo to the President of Honduras in 1888, the Ribitá is defined as the "source (de la Rivière de Unira) située au pied de la colline Rivita" (65).

3.117. Barbarena describes the Ribitá as "un mont droit et rocaillé de 1.206 mètres" where "se termine la limite orientale et commence la partie boréale de de notre frontière" (66). He adds that the Cerro of López "nommé parce qu'auparavant une famille Lopez y avait une ferme, est un pic isolé et rocailleux" .... "pratiquement de la même altitude que le Ribita" (67).

3.118. The Memorial of Honduras (68) echoes the very grave accusation made by Bustamante

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63. Memorial of Honduras: Annexes: p. 170.
64. Memorial of Honduras: Annexes: p. 241.
65. Memorial of Honduras: Annexes: p. 257.
66. Memorial of Honduras: Annexes: p. 263.
67. Memorial of Honduras: Annexes: p. 264.
68. Memorial of Honduras: p. 265.

against the Canadian surveyor Byrne, who worked for Honduras at the time of the Conferences between Cruz and Letona, that he had destroyed a boundary marker which was in favour of the country which had contracted him. Bustamente based this charge on the notebook kept by Byrne; however, this document has not been presented by Honduras and so serious an accusation should only be made on the basis of documentary evidence.

(C) The Villatoro Incident

3.119. The Memorial of Honduras (69) interprets the fact that Villatoro directed himself to the Government of Honduras in 1854 complaining that the inhabitants of Opatoro were trespassing on the property of Monteca and the fact that the Government of Honduras ordered the indigenous population to withdraw from these lands as the exercise by Honduras of State authority over this territory.

3.120. In turn, El Salvador has interpreted this this incident as indicating, to the contrary, that the Decree issued by Honduras implied a recognition of the sovereignity of the authorities of El Salvador over the territory in question, since the Decree was executed taking into consideration the fact that the Title Deed granting a private property interest to the Villatoro family had been executed by the Government of El Salvador (70).

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69. Memorial of Honduras: p. 254.

70. Memorial of Honduras: Annexes: p. 104.

3.121. Neither of these two arguments is relevant for the purposes of deciding this frontier dispute. Whether or not the Decree of Honduras constituted an exercise of State authority or instead a recognition of sovereignity, the fact that this incident occured in 1854 means that it cannot constitute evidence that, as the Memorial of Honduras argues (71), "l'ancienne province de Comayagua ejerçait sa juridiction au sud de la rivière Torola sur la site de Monteca". For the same reason, the Title Deeds executed in 1856 and 1857 by Honduras and, finally, in 1879 by the President of Honduras in favour of the inhabitants of Opatoro similarly have no relevance whatever to this judicial proceeding.

(D) The Validity of the Maps Presented

3.122. El Salvador has closely examined the maps presented by Honduras with its Memorial (72) and has reached the following conclusions. First, the cartographic interpretation of the Title of Coajiniquil does not have anything to do with the sector in dispute since this Title relates to a sector which has already been delimited by the General Peace Treaty of 1980 signed by both the Parties to this litigation. Secondly, Honduras has presented in an arbitrary manner the cartographic interpretation of a document which refers to the boundaries of the lands of Cacaoterique (73); in the first place this document

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71. Memorial of Honduras: p. 254.
72. Memorial of Honduras: Map B.3.2..
73. Memorial of Honduras: Map 3.J..

is not a Formal Title Deed to Commons and, in the second place, the map purports to show the location of the boundary markers of Planchanquira and Lumunin but incorrectly locates them in the positions of the boundary markers of the Hato de López and the Quebrada de las Ventas. Thirdly, the boundary markers contained in the Formal Title Deed to the Commons of San Juan Polorós of 1760 are perfectly identifiable both in the topography of last century and in the topography of the present time, which proves that the frontier line claimed by El Salvador is completely supported by this Formal Title Deed to the Commons of Polorós of 1760.

VI. The Estuary of the River Goascorán

(A) Los Amates

3.123. El Salvador argues that the line of the frontier in this sector is the oldest and most easterly of the branches of the River Goascorán, which flows into the Gulf of Fonseca opposite the Island of Zacate Grande in the place known as the Estuary of la Cutú, which is within the jurisdiction of Pasaquina, in the Department of La Unión in the Republic of El Salvador. Honduras in its Memorial estimates that the claims of El Salvador in this sector have been made somewhat late in the day and have objectives of a strictly geopolitical nature; this affirmation is not correct, as will be demonstrated in the following paragraphs, since the only reason why El Salvador has not previously discussed this sector is that it was already within its jurisdiction and because there existed acquisecence and recognition

by Honduras that this sector was within the territory of El Salvador.

3.124. Thus, in the period between the Conference of the Mountain El Mono in 1861 and the Conference of Champate in 1869, this sector was the subject neither of controversy nor of discussion since Honduras presented no claims thereto and the sector thus remained outside the dispute. In the Conferences of Saco (now known as Concepción de Oriente) in the Republic of El Salvador from 3 to 7 June 1880, allusion was made to this sector and in the Formal Record thereof of 4 June 1880, the Commissioners of the two Republics, General Lisandro Letona for El Salvador and Dr. Francisco Cruz for Honduras, made the following declarations in this respect:

"and finding that according to the common feeling of the settlements of both countries, the eastern part of the territory of El Salvador is divided from the western part of the territory of Honduras by the River Goascorán, it is agreed to recognise this river as the boundary of both Republics from its mouth in the Gulf of Fonseca in the Bay of La Unión" (emphasis added) (74).

It is important to emphasise that the Commissioners did not at any point specify which mouth of the river they were going to take into account for the purposes of establishing the frontier between the two Republics but, given that the frontier in this sector had never previously been questioned by Honduras, which had in consequence recognised the sovereignity of El Salvador in this area, it is logical to interpret

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74. Counter Memorial of El Salvador: Annexes: Vol. V, p. 1.

that what the Commissioners were recognising as the frontier was the old mouth of the River Goascorán.

3.125. Exactly the same occured in the Conferences of 1884, which were similarly held in the town of Concepción de Oriente between the same two Commissioners, since neither in these Conferences was it determined which mouth of the River Goascorán was to be taken into account and, given that no claim was made by Honduras in this sector, there was recognised as such the old mouth of the River Goascoran. These Conferences established the following:

"As was determined in the said Conferences, the eastern part of the territory of El Salvador is divided from the western part of the territory of Honduras by the River Goascorán which ought to be taken as the frontier of both Republics from its source in the Gulf of Fonseca or Bay of La Unión" (75).

In the same manner, the mouth of the River Goascorán was recognised in the Boundary Convention of 1884, generally known as the Cruz-Letona Convention, which in Article 3 thereof provided:

"The western part of the land boundary begins at the mouth of the Goascorán" (76).

In the Conferences of 1888, this sector of the frontier was not disputed by Honduras.

3.126. Honduras at present is trying to base its position in this sector on the uti possidetis

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75. Counter Memorial of El Salvador: Annexes: Vol. V, p. 3.

76. Counter Memorial of El Salvador: Annexes: Vol. V, p. 5.

iuris of 1821 by establishing that the River Goascorán was the boundary of the jurisdictions of the colonial provinces of Comayagua and San Miguel; it supports this affirmation primarily on the separation of Jerez de Choluteca from the jurisdiction of Guatemala, to which it formerly belonged, and its subjection to the "Alcaldía Mayor" of Tegucigalpa as from 1580. However, this argument is not correct, because in 1580 the "Alcaldía Mayor" of Tegucigalpa was not created as an independant province with its own territory; rather the office of "Alcalde Mayor" of Mines was established by the "Real Audiencia" of Guatemala with the title of "Alcalde Mayor" of Mines in the Province of Honduras with exclusive jurisdiction to hear matters involving mines and with jurisdiction over matters of mines in the jurisdictions of San Miguel and of Choluteca, both within the jurisdiction of the Province of Guatemala. This is demonstrated by the Commission which was given to Juan Cisneros de Reynoso (77).

3.127. Numerous documents prove that this provision executed by the President-Governor of Guatemala in favour of Juan Cisneros de Reynoso, far from adding territory to Honduras, as is claimed, instead removed from the Governor of Honduras his jurisdiction over matters concerning mines, since both the mines of Honduras and the mines of Sam Miguel and Choluteca remained under the administrative control

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77. Counter Memorial of El Salvador: Annexes: Vol. V, pp. 121-122.

of the President-Governor of Guatemala.

3.128. In the Royal "Cédula" executed by the King on 18 November 1581, one year after Cisneros de Reynoso had been appointed as "Alcalde Mayor" of Mines, the King asked the "Real Audiencia" to send him a list of the settlements that existed within its area, both Spanish and Indian, the form in which justice was administered, in which there were established "Corregidores" and "Alcaldes Mayor" and by whom they had been established, and of all the other public offices which had been established in its area (78). Complying with this Royal "Cédula", the Governor of Honduras made a list of all the settlements under his jurisdiction in the year 1582 as well as of the public offices that had been established. In making reference to the "Alcalde Mayor" of Mines, he mentioned the mines in Honduras that had been discovered and populated and complained that:

"The present and past Governors of Honduras put a Lieutenant-Governor who administered justice without any salary and they continued this custom until the lawyer Valverde came as President of the "Real Audiencia" of Guatemala which will have been more or less three years ago. He, perverting this system and custom, established an "Alcalde Mayor" of the said mines with a salary paid from the Royal Exchequer as appears in a document appended to this report in which it is placed on record who the person so established is and the salary that he is paid and the jurisdiction that he has and the officials which he establishes, which information it is requested that Your Majesty sends to be seen by your Royal

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78. Counter Memorial of El Salvador: Annexes: Vol. V, p. 7.

Council of the Indies." (emphases added) (79)

In this passage the Governor, Alonso de Contreras Guevara, clearly stated that he had nominated the Lieutenants for the Mines and that the President of the "Real Audiencia" had deprived him of this power and that the President himself established this office and assigned its salary and jurisdiction by virtue of which the Mines remained outside the control of the Governor of Honduras and, as a result of this, the latter requested or appealed that this matter be considered in the Council of the Indies. Subsequently the Governor made an exhaustive and detailed list of all the settlements that existed in the jurisdiction of Honduras; this extensive list does not include Choluteca and the townships of its jurisdiction which totally destroys the argument advanced by Honduras that the creation of the "Alcaldía Mayor" of Mines of Tegucigalpa annexed Choluteca to the jurisdiction of Honduras (80).

3.129. In the General Archive of the Indies, Guatemala, there is a further Report made by the Governor of Honduras in 1581, in which it is stated that the "Alcalde Mayor" of Mines was usurping the jurisdiction of his Government and not letting him administer justice, arguing that the Governor had no jurisdiction whatever in Honduras because it had been taken away from him by the "Real Audiencia"

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79. Counter Memorial of El Salvador: Annexes: Vol. V, p. 12.

80. Ibid..

of Guatemala (81).

3.130. In a subsequent Report made by Juan de Guerra Ayala in 1608 to the Government of Honduras, he made the following complaint:

"And because my Governor was a miner, they deprived him of the jurisdiction over the mines and put an Alcalde Mayor over them" (emphasis added) (82)

3.131. Thus, although it is true that the "Alcaldía Mayor" of Mines of Tegucigalpa subsequently was transformed in the "Alcaldía Mayor" of Tegucigalpa, it is necessary to clarify that even then in civil and administrative matters it was subject to the jurisdiction of the Government of Guatemala, while in ecclesiastical matters it was subject to the jurisdiction of Bishopric of Guatemala. Finally in 1791 the Alcaldía Mayor of Tegucigalpa was unified with the Intendency of Comayagua, which proves yet again that it was not previously part of Honduras but of Guatemala, and then subsequently in 1816 was separated from the Intendency of Comayagua, thus becoming and remaining independent until the independence of Central America.

(B) The Delta of the River Goascorán

3.132. So far as concerns the geographical problems of this sector, the geographer Bustamante,

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81. Counter Memorial of El Salvador: Annexes: Vol. V, p. 36.

82. Ibid.: Vol. V, p. 27.

quoted on so many occasions by the Memorial of Honduras, observes that (83): "pour être plus basse la côte salvadorienne que celle du Honduras, comme en effet elle l'est, on nourrit la peur qu'avec le temps, le fleuve puisse changer son cours actuel, et laisser en faveur de notre territoire le point appelé La Bahia, entre le Goascoran lui-même et el Pasadero, ainsi que les deux petits coteaux très ressemblants l'un à l'autre appelé Muruguaca". Further, the fact that changes have occured in the course of the river, in particular because of the construction of the dam at Los Amates, is admitted by the Memorial of Honduras (84). It should also be noted that the passage from the Report of Bustamante cited above indicates that changes in the course of the river would inevitably be detrimental to the territorial extension of El Salvador in this sector.

3.133. According to the prevailing principles of Public International Law, the juridical consequences of the different types of change of course are distinct. These principles, following the doctrine of Roman Law, normally distinguish between aluvio and avulsio, depending on whether the addition of new land to one of the banks constitutes a slow and gradual process of erosion or a sudden and violent phenomenon which produces a change in the course of the river. In the former case, these principles consider that the State on whose shore the accretion is produced extends its territorial sovereignity

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83. Memorial of Honduras: Annexes: p. 281.

84. Memorial of Honduras: p. 361.

thereover, so that the course of the river continues to constitute the international frontier. On the other hand, in the latter case, the same does not occur since the prevailing opinion is that the international frontier continues to be the former river bed which has dried up because of the abrupt change of the course of the waters.

3.134. On the other hand, there are prestigious authors such as Anzilotti who criticise this distinction drawing attention to the fact that this alleged rule is merely an opinion as a matter of principle and that the problem ought instead to be resolved in every case depending on what was the intention of the Parties when they fixed the river as their boundary (85). Further, the Brazilian commentator on treaties, Accioly, indicates various cases and various treaties in which the principle that the frontier followed the new course of the river was applied on the basis that the State who lost a portion of its territory had to be indemnified (86).

3.135. Taking into account the uncertainty and lack of definition which exists in relation to this question, no foundation can be attributed to the arguments formulated in the Memorial of Honduras to the effect that over the years acquiescence on the part of El Salvador with respect to the

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85. Scritti di Diritto Internazionale Pubblico: (1956) Tomo I, pp. 693-705.

86. Tratado de Derecho Internacional Público (Spanish translation): Tomo II, pp. 23 et seq..

recognition of the River Goascorán as the frontier of the two States has been built up (87). A river which is exposed to the type of mutations to which the River Goscorán is subject does not constitute a boundary which is sufficiently certain for acquiescence to take place in respect thereof. Acquiescence can only occur after the Parties have reached an agreement or there has been a judicial decision as to what norm has to be followed in the event of mutations or changes in the course of the river.

(C) The Validity of the Maps Presented

3.136. Following as always the criterion of a selective analysis of the different Title Deeds presented by both El Salvador and Honduras in relation to this sector, a map has been drawn up (88) showing those Title Deeds which have been able to be mapped; Honduras, as in the other disputed sectors, has presented Title Deeds which cannot be classified as important either because they relate to areas outside the disputed sector or cannot be mapped because they identify only one or two boundary markers - this is the case, for example, with the Title Deeds relating to the Remeasurement of the Sitio de Mongoya in 1671, to the Sitio de la Estancia or Guayabal of 1691, and to the remeasurement of Mongoya of 1696.

3.137. In this sector El Salvador has presented

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87. Memorial of Honduras: pp. 369 et seq..

88. Counter Memorial of El Salvador: Map 3.K..

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the Title Deed executed in favour of Juan Bautista de Fuentes, resident of the town of San Miguel, in respect of the land known as "Los Amates" in the Province of San Salvador (89). Honduras, on the other hand, has presented many remeasurements of areas situated within the jurisdiction of the "Alcaldía Mayor" of Mines of Tegucigalpa, including among others the Title Deed of the Sitio de la Estancia or Guayabal of 1691 and the Remeasurement of the Mongoya of 1696, and it has been amply proved by the documentation presented by El Salvador with this Counter Memorial that both the "Alcaldía Mayor" of Tegucigalpa and the "Alcaldía Mayor" of Mines of Tegucigalpa were at the relevant times subject to the jurisdiction of the President-Governor of Guatemala in the Province of Guatemala.

3.138. Consequently, a map of this sector has been drawn up (90), consisting of a combined representation of the Title Deeds that can be mapped, those of Langue of 1821, the Isla de Calicanto of 1861, and of Goascoraán of 1821 (First and Second Parts), all presented by Honduras, and that of Los Amates of 1695 in favour of Juan Bautista de Fuentes of 1695, presented by El Salvador. As the map shows, the Title Deed of Goascorán of 1821 (First and Second Parts) relates to an area which has nothing to do with the problem in hand since it is outside the

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89. Counter Memorial of El Salvador: Annexes: Vol. VII, p. 77.

90. Ibid.: Map 3.K..

REPRESENTATION AS A WHOLE OF THE COMMON LANDS OF TOWN OF LANGUE (1821), ISLAND OF CALICANTO (1861 AND 1864), LANDS OF JUAN BAUTISTA DE FUENTES (1695), AND COMMON LANDS OF GOASCORAN MARCH 1821 (1st AND 2nd PARTS).

87°45' 87°40'

13°35' 13°35'

13°30' 13°30'

13°25' 13°25'

GOASCORÁN

Mojón Esquinero del Texar

Portillo de La Cruz

2ª Parte

Q. de La Flor

Goascorán

Portillo del Zapote
1er Mojón

Río

Mojón Portillo de San Antonio

Paso Los Horcones

1ª Parte

Mojón Portillo del Calero

Mojón Esquinero del Zapatero

R. Goascorán

Mojón Esquinero de Mongoya II C.

Paraje El Rebalse

ALIANZA

Scale 1:100,000

1 0 1 2 3 4 Kms.

FRONTIER LINE SUPPORTED BY EL SALVADOR

FRONTIER LINE SUPPORTED BY HONDURAS

COMMON LANDS OF GOASCORAN MARCH (1821) (1st AND 2nd PARTS)

MEASUREMENT OF THE COMMON LANDS OF THE TOWN OF LANGUE (1821)

MEASUREMENT OF THE ISLAND OF CALICANTO 1861 AND 1864

LANDS OF JUAN BAUTISTA DE FUENTES 1695 (SALVADOREAN DOCUMENT)

Mojón del Cubulero

"Entrada a La Isla del Guallaval"

Río Goascorán

Esquina de La Isla

El Desagüe

Estero El Carrizo

Pozo del Carrizo

Actual cauce Río Goascorán

Antiguo cauce Río Goascorán

Los Amates

El Junquillo

El Corozo

Encuentro de Estero La Cutú con Antiguo cauce del Río Goascorán

Río Goascorán

Paraje de Las Pozas

Estero La Cutú

BAHIA DE CHISMUYO

Isla de Los Martínez o Martín León

Mojón en La Isla Cal y Canto

Playa de La Cutú

Puerta de La Isla

GOLFO DE FONSECA

Isla Conejo

87°45' 87°40'

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MINISTERIO DE OBRAS PÚBLICAS
REPÚBLICA DE EL SALVADOR

MAP 3.K

disputed sector; while the Title Deed of Langue of 1821 covers the area to the east of the former channel of the River Goascorán whose mouth is opposite the Island of Conejo and thus overlaps the area claimed by El Salvador between this former mouth of the River Goascorán and the even older mouth of this river opposite the Estuary of La Cutú; and the Title Deed of the Isla de Calicanto of 1861 and 1864 covers an area between these two mouths of the River Goascorán, overlapping partially the lands of the township of Langue and partially (in the southern part) the territory claimed by El Salvador. As can be observed, Honduras does not present any Title Deed capable of being mapped rationally which covers the area between the present mouth of the River Goascorán and its oldest mouth known as Los Amates opposite the Estuary of La Cutú.

CHAPTER IV

ARGUMENTS OF A HUMAN NATURE PRESENTED BY EL SALVADOR IN SUPPORT OF ITS FRONTIER RIGHTS ("EFFECTIVITÉS")

I. THE WIDE RANGE OF METHODS OF PROOF APPLICABLE IN THIS LITIGATION

4.1. It is appropriate to re-emphasise before the Chamber of the International Court of Justice that the litigation which El Salvador and Honduras have brought before the Chamber is of a very special nature in that its dimensions extend well beyond questions of a purely juridical and historical nature. It is for this reason that Article 26 of the General Peace Treaty of 1980, which is incorporated into the Special Agreement, establishes that:

"Account shall equally be taken of other methods of proof and arguments and reasons of a juridical, historical or human nature or of any other kind which may be adduced by the Parties and which are admissible under International Law." (emphasis added)

This provision of the General Peace Treaty of 1980 therefore considered that arguments and reasons of this nature necessarily had to be taken into account in order to verify and ratify the exact scope of the litigation and thus provide the Judges with a sufficient understanding of the issues to permit an appropriate and just decision to be handed down.

4.2. In the course of these proceedings, El Salvador has provided conclusive proof that it has territorial sovereignty over the disputed sectors of the land frontier in that it has presented to the Chamber in the Annexes to its Memorial and

to this Counter Memorial titles superior to those presented by Honduras.

"If a dispute arises as to the sovereignity over a portion of territory, it is customary to examine which of the States claiming sovereignity possesses a title .... superior to that which the other State might possibly bring forward against it" (1).

4.3. However, the scope of Article 26 of the General Peace Treaty of 1980 goes well beyond this; it gives the same probative force and consequently the same probative value to arguments and reasons of a juridical, historical or human nature which the Parties may adduce in evidence before the Chamber. This specific reference in the permitted methods of proof to arguments and reasons of a human nature has an explanation that is self-evident if account is taken of the fact that El Salvador is, in comparison with Honduras, very densely populated and that, consequently, any judicial decision which affects the demarcation of the land frontier or alters the existing status quo of this frontier will have an immediate and profound effect on the lives of the thousands of citizens of El Salvador who live in the disputed sectors.

4.4. At the present time, when the existence and availability of human rights is a matter of concern to the entire International Community both in multilateral international conferences and in

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1. The Island of Palmas Case: Nations Unies, Recueil des Sentences Arbitrales: Vol. II, pp. 838-839.

bilateral international relations, the effect on the individual human beings involved is taken more into account in the consideration given to juridical historical problems such as those affecting frontiers. In this sense the General Peace Treaty of 1980, the appropriate part of whose provisions provide the legal basis for and lay down the law applicable to the future decision of the Chamber, has assimilated both the letter and the spirit of its provisions to the fundamentally human magnitude of the matters in issue; this enables the rights of the human inhabitants of a State so small and so over-populated as El Salvador to be duly taken into account, analysed and protected in a permanent manner.

II. THE ARGUMENTS OF A HUMAN NATURE SUPPLEMENT THE "EFFECTIVITÉS"

4.5. When El Salvador sets out arguments and reasons of a human nature in order to reinforce its written pleadings, it does so not only taking into account that it has been exercising sovereignity and effective jurisdiction over the lands and the settlements of these sectors which legitimately belong to it and which it is defending, but also placing emphasis on the fact that this jurisdictional effectiveness and administrative control constitutes an additional argument in support of the thousands of human beings who have settled permanently in these sectors, who identify themselves as citizens of El Salvador and who, for this reason, take on the personal and social characteristics of this status. Therefore, in addition to the application of the principle of uti possidetis iuris, which is obviously the primary

issue that has to be decided in this case, it is necessary to add the consideration of the configuration of the population of the two States, something which undoubtedly constitutes an aspect of this dispute which cannot possibly be overlooked.

III. NO ARGUMENTS OF A HUMAN NATURE CAN VALIDLY BE ADDUCED BY HONDURAS

4.6. The process of reading the Memorial of Honduras involves the consideration of a repetitive historical exposition, which does not have any internal coherence, and of a tiresome elaboration of juridical arguments which introduce the reader into a labyrinth which produces only confusion and distress. In this discussion no room is found at any point for one fundamental element: reality, which is what shapes the course of history, establishes juridical régimes, and affects human destinies. It is above all this last aspect for which no room is found in the Memorial of Honduras. The human beings involved receive no consideration whatever in the discussion of a matter which basically concerns human beings. Consequently, the geographical discussion appears to deal with dead lands; the historical discussion appears to be an unemotional and unfocused study, and the juridical discussion appears to be a textbook exposition. No reference whatever is made to the fact that what is in issue are inhabited settlements, where people live, work, eat and drink, need medicines and education, and where by tradition and by custom they feel that they have their roots.

4.7. El Salvador emphasises these arguments and

reasons of a human nature, therefore, partly because of the requirements of Article 26 of the General Peace Treaty of 1980 but above all because of the unavoidable demands of justice. In this respect it is also necessary to recall that it is El Salvador that has concerned itself for the development as a whole of the frontier areas, facilitating the creation of services for the population, opening up roads, constructing bridges, encouraging commerce, and developing an entire system of Schools, Medical Centres, Military Posts, Tribunals of Justice, Administrative Offices and other types of structure which demonstrate a full and permanent exercise of sovereignity thereover.

IV. THE GENERAL PEACE TREATY SECURES HUMAN OBJECTIVES

4.8. Article 26 of the General Peace Treaty of 1980 was conceived in order to secure the human objective of orderly international relations between El Salvador and Honduras and in order to secure principles of justice based on the fact that respect for orderly international relations ought to give way when faced with the demands of humanity and of peace. As de Visscher has stated (2):

"There is nothing which better illustrates the profound effect of human values on the establishment of orderly international relations that are ever closer than what has in this respect been established in the course of History between the rules of international law

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2. Teorías y Realidades en el Derecho Inter-nacional Público (Spanish version).

and the exercise of State Sovereignty over its own subjects." (3)

"The territorial situation of a State constitutes one of the bases of political and juridical order .... definitively established .... by the Treaties of Westphalia. .... A firm territorial configuration gives a State a perfectly determined scope for the exercise of its sovereign attributes. .... Such stability is above all a factor of security, a feeling experienced by the population living alongside recognised frontiers and which for them has increased to the extent that their links with the land on which they are settled have been being consolidated in a combination of ambitions and memories." (4)

4.9. There is no doubt, therefore, that when El Salvador relies on arguments and reasons of a human nature in order to prove the extent of the exercise of its sovereignty and of the relation which it has with its subjects in all the territory in dispute, it is because, as the Permanent Tribunal of Arbitration stated in the North Atlantic Fisheries Case, one of the essential hallmarks of sovereignty is that it must be exercised within territorial limits and that, in the absence of proof to the contrary, the territory has the same boundaries as the sovereignty (5); this sovereignty is in all the societies of the world vested in the people.

4.10. El Salvador realises and understands that

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3. Op. cit.: p. 132 (retranslated).

4. Op. cit.: pp. 214-216 & 217 (retranslated).

5. North Atlantic Fisheries Case: Publications of the Carnegie Foundation: p. 164.

as the Tribunal of Arbitration stated in the Island of Palmas Case (6):

"Territorial sovereignity cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian."

V. THE POPULATION AND DEVELOPMENT OF THE SECTORS CLAIMED BY HONDURAS IS ENTIRELY SALVADOREÑAN

4.11. The Annexes to the Memorial of El Salvador (7) contain the proof that the human groups settled in the sectors which Honduras claims from El Salvador are in fact citizens of El Salvador. Both the Birth and Death Certificates filed in the Civil Registries of the "Alcaldías" of Citalá, San Ignacio, Arcatao and Meanguera del Golfo and the rustic immoveable properties in Torola, Perquín, Arambala, Polorós and Meanguera del Golfo duly inscribed as private property or as subject to mortgages in the Property and Mortgage Registries of El Salvador prove evidently that the persons who integrate the Salvadoreñan groups settled in the disputed sectors and who live in the cantons and villages contained within the sectors shown in the maps in these Annexes (7) have recognised and continue to recognise as their sole sovereign El Salvador, to whose jurisdiction

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6. Nations Unies, Recueil des Sentences Arbi--trales: Vol. II, p. 839.

7. Memorial of El Salvador: Annexes: Chapter 7.

and power they submit themselves to the exclusion of that of any other State.

4.12. To El Salvador they have paid and continue to pay the various State and Municipal Taxes relating inter alia to purchases of immoveable property, sales of chattels, and stamp duty. Because of this, El Salvador has guaranteed, by means of the protection of its Armed Forces and the Municipal Police of each sector, the work of each community with a view to furthering the development of each of these communities.

4.13. In order to provide a better standard of living to these human groups so intimately linked to El Salvador, the Government of El Salvador has made monetary loans to enable the families settled in the disputed sectors to pasture livestock and to grow various cereal and vegetable crops; the Government has constructed roads so that these crops can easily be sold in the markets in the interior of the country and has little by little provided mains electricity so as to permit the development of light engineering and of factories (8).

4.14. The people of El Salvador who live in the disputed sectors have carried out all their human activities therein and have settled on the land and developed it as a result of their own strength and efforts; they recognise as sole sovereign El

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8. Memorial of El Salvador: Annexes: Chapter 7: Maps appended in respect of each sector.

Salvador, which has guaranteed them these vital areas and has provided them with all the facilities necessary for them to be able to live in peace both with memories and with ambitions.

4.15. The human groups of citizens of El Salvador who live in these sectors claimed by Honduras comprise thousands of families who have raised various generations of descendants there. Honduras does not have any important settlements in the frontier region; it has not developed any means of communication thereto and the concentration of its population in the Departments of Ocotepeque, Lempira, Intibucá and La Paz, which form the frontier with El Salvador to the North where the disputed sectors are located, is, according to the Census of 1974, less than ten inhabitants per square kilometre.

4.16. The Memorial of El Salvador (9) included six maps in which are shown the cantons and "caseríos" (hamlets) in the six sectors of the land frontier in dispute, that is to say Tecpangüisir Mountain, Las Pilas or Cayaguanca, Arcatao or Zazalapa, Perquín, Sabanetas or Nahuaterique, Monteca or Dolores, and the Estuary of the River Goascorán. It is in those cantons and hamlets that the Salvadoreñan human groups, who recognise as their sovereign the State and Government of El Salvador, have settled.

4.17. This Counter Memorial includes at the end

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9. Memorial of El Salvador: end of Chapter 7.

three maps of Honduras which demonstrate: first, that in the area stretching from the south of Honduras, which is where the sectors in dispute are situated, to well inside that country, only the townships of Nueva Ocotepeque, La Esperanza, Intibucá and Marcala have between two thousand and five thousand inhabitants (10); secondly, that in the southern region of Honduras which has a common boundary with El Salvador, namely the Departments of Ocotepeque, Lempira, Intibucá and La Paz, the Hondureñan population per square kilometre is extremely scanty (11); and, thirdly, that the routes of communication between the south of Honduras and the rest of its territory are extremely scarce (12).

4.18. At this point in this Counter Memorial are included three maps of El Salvador which establish: first, that the sectors situated at the north of the country are densely populated both in the urban and in the rural areas, the population of the different settlements ranging from five hundred to six thousand persons (each dot on the map indicates five hundred inhabitants); secondly, that the population density in the sectors claimed by Honduras is from one hundred to two hundred persons per square kilometre; and, thirdly, that in all the sectors

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10. Map 15, taken from N. Pineda Portillo: Geografía de Honduras (2nd Edition (1984)) p. 163.

11. Map 16, taken from Pineda Portillo: op. cit.: p. 152.

12. Map 25, taken from Pineda Portillo: op. cit.: p. 287.

claimed by Honduras the Government of El Salvador has constructed a network of paved roads constructed on levelled soil which provides communications between the cantons and hamlets where the Salvadoreñan human groups have settled, permitting them to take to the markets in the interior of the country their livestock, their handicrafts and their agricultural products and at the same time facilitating their access to the schools, health centres, hospitals and other public services provided by the Government of El Salvador.

VI. THE MILITARY JURISDICTION

4.19. The Salvadoreñan population of the sectors claimed by Honduras has been protected for many years by the Armed Forces of El Salvador, who have posted Commanders, Deputy Commanders, Corporals and Soldiers to form military patrols which, based in a specific place, have extended their jurisdiction to the other cantons and hamlets shown on the maps already referred to which were included in the Memorial of El Salvador; these maps cover each of the six sectors of the land frontier in dispute. There are appended to this Counter Memorial, in proof of the above statements, Certificates executed by the Ministry of Defence and Public Safety of El Salvador, setting out the names, ranks and postings of the various military personnel who have been given jurisdiction to protect the Salvadoreñan population of the sectors claimed by Honduras (13).

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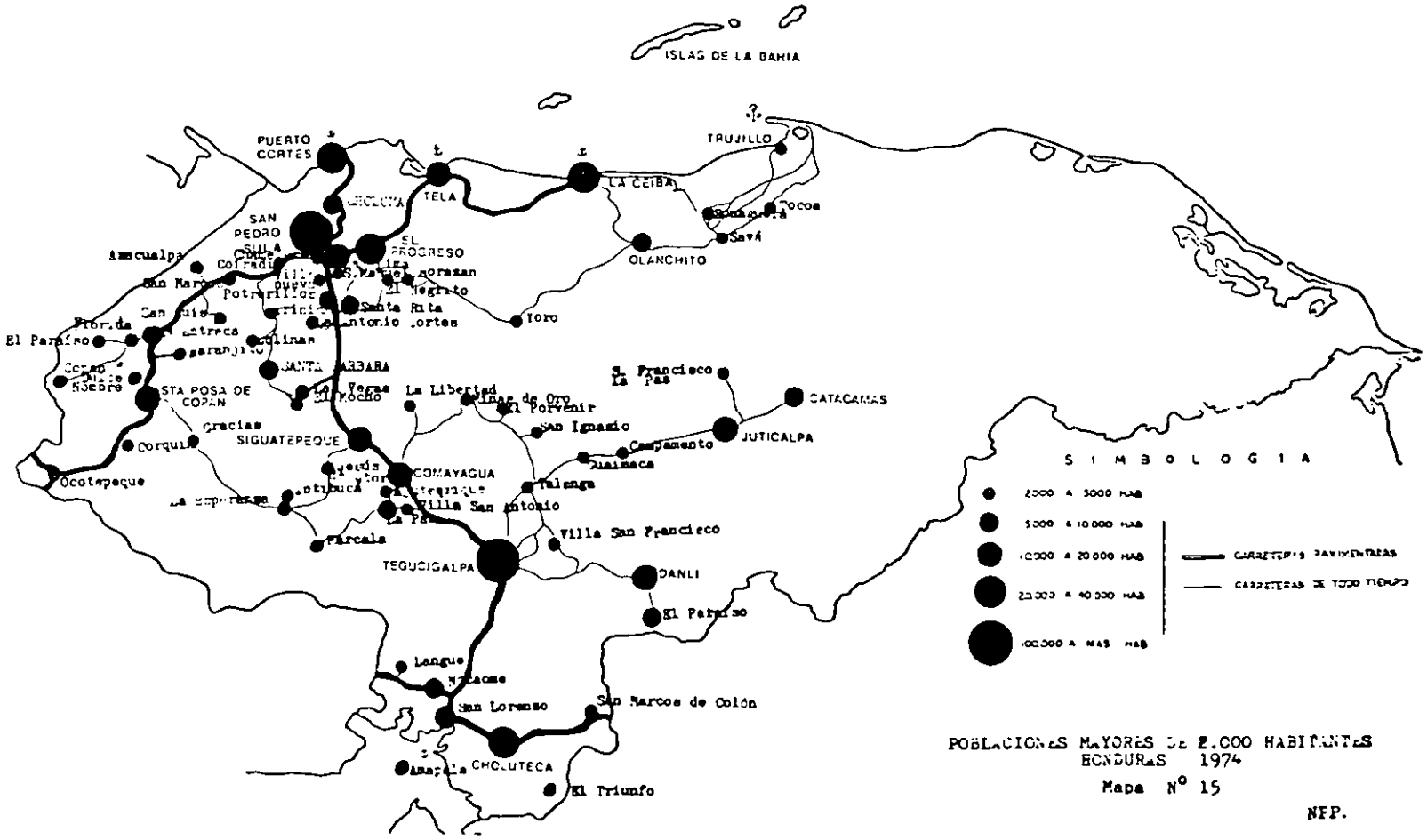
13. Counter Memorial of El Salvador: Annexes: Vol. IX.

VII. THE ETHICAL RELEVANCE OF ARGUMENTS OF A HUMAN NATURE

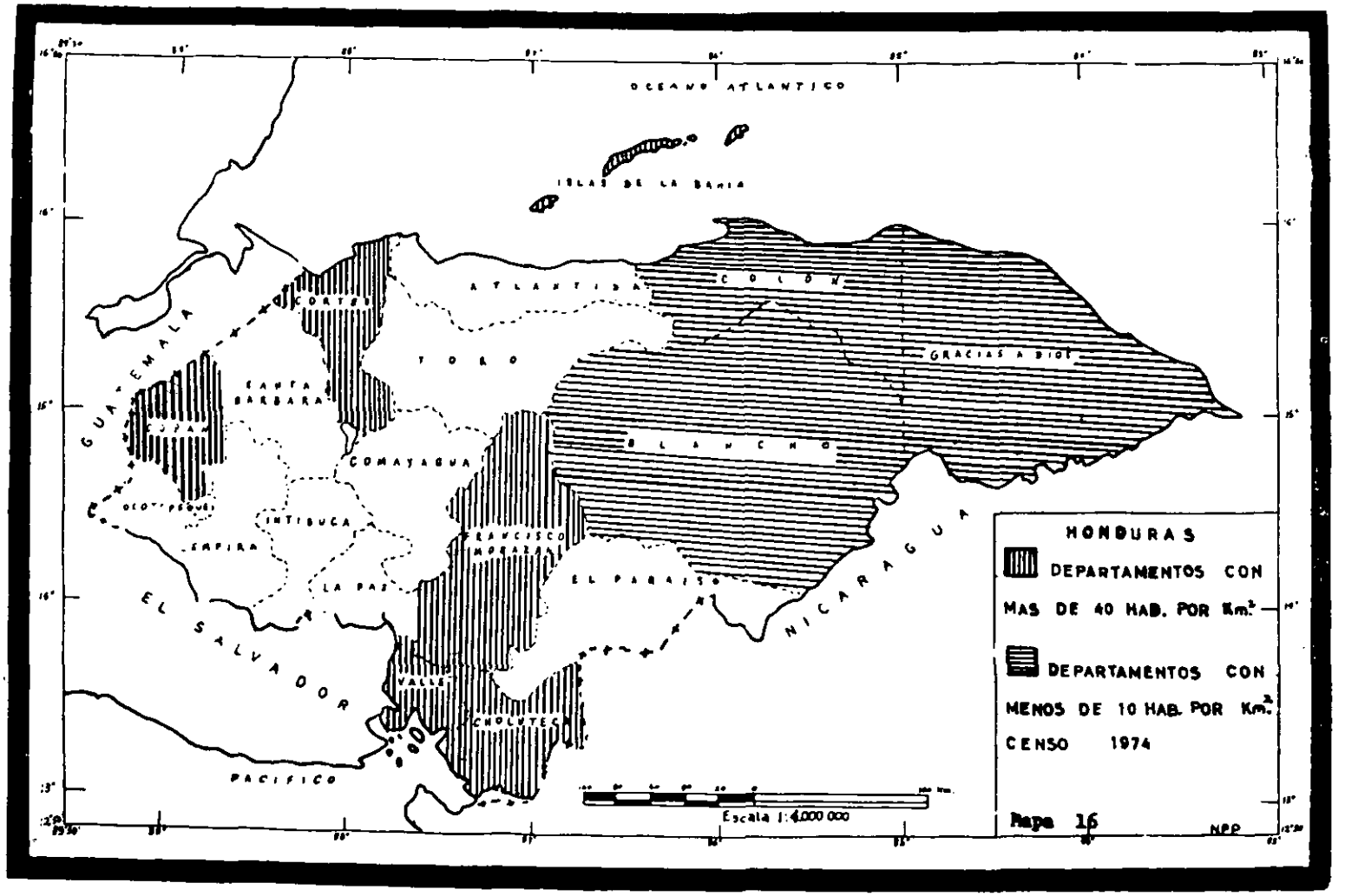
4.20. El Salvador reaffirms that in this litigation reasons of justice are particularly relevant. To uproot a population from its own national identity would be to deprive it of the only definite reality which it possesses. The historical and juridical documentation presented by El Salvador is sufficiently complete to prove its territorial rights; and if to this is added the profound human content of the position of El Salvador, the fundamental decision which has to be made by the Judges becomes glaringly self-evident, especially at this time in which human beings are attaining new levels of importance within the ambit of the law. In a case such as this, the moral and social impact of the decision has an unusual weight. Beyond mere effectiveness, as has already been stated, is the effectiveness of the arguments of a human nature, which enrich the effects of the strictly juridical proofs and assume the magnitude of an unanswerable argument in favour of human dignity. A failure to give due importance to the arguments of a human nature mutilates any understanding of the basis of the problem. For this reason, El Salvador re-emphasises once again the arguments of a human nature and intends to continue doing so until the end.

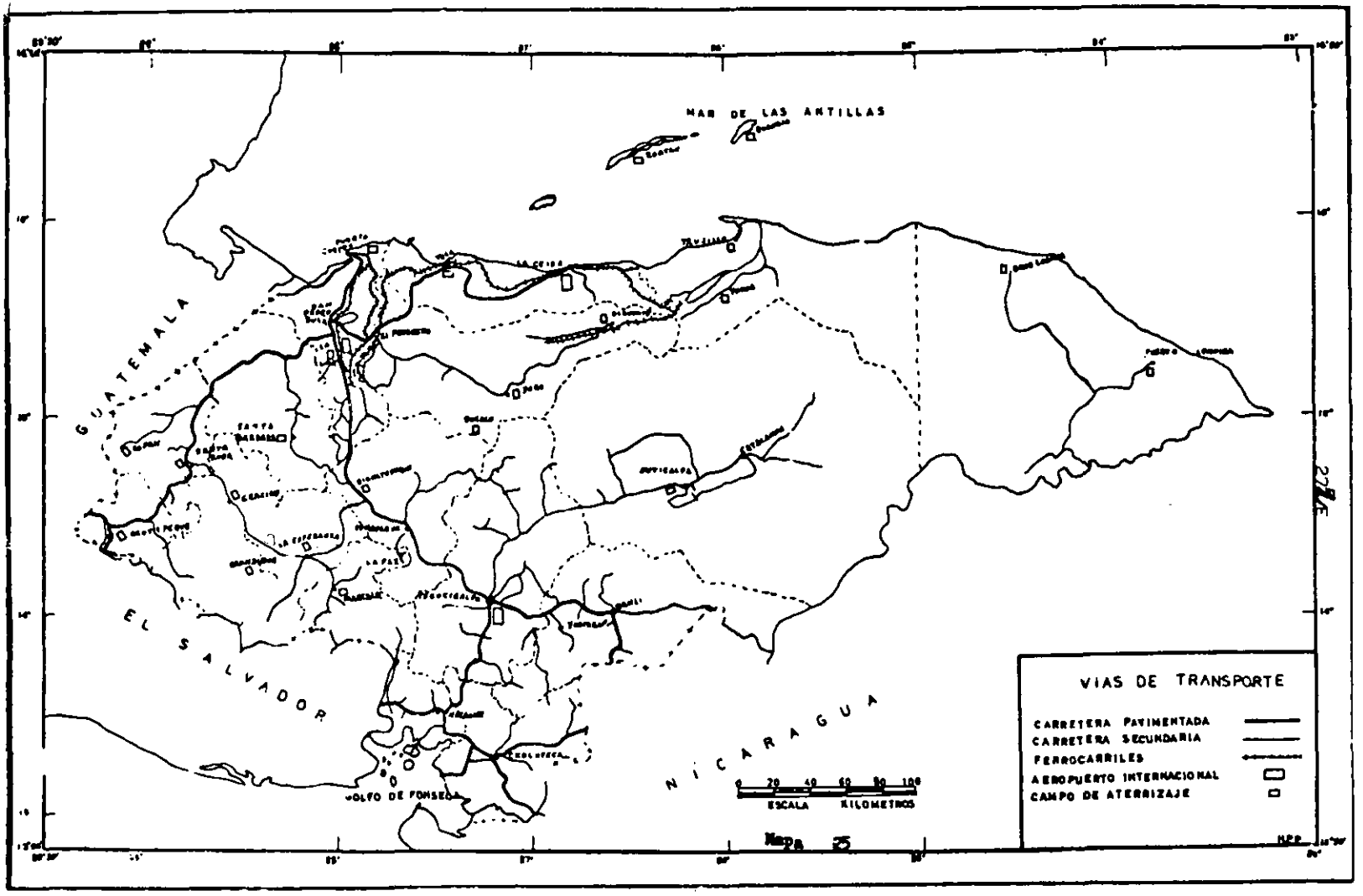


POBLACIONES MAYORES DE 2.000 HABITANTES
HONDURAS 1974

Mapa N° 15

NFP.


OCEANO ATLANTICO
ISLAS DE LA BAHIA
ATLANTIDA
COLON
GRACIAS A DIOS
CORTES
YORO
SANTA BARBARA
COPAN
OCOTEPEQUE
COMAYAGUA
INTIBUCA
LEMPIRA
LA PAZ
FRANCISCO MORAZAN
EL PARAISO
VALLE
CHOLUTECA
GUATEMALA
EL SALVADOR
NICARAGUA
PACIFICO
BLANCHO
HONDURAS
DEPARTAMENTOS CON MAS DE 40 HAB. POR Km.²
DEPARTAMENTOS CON MENOS DE 10 HAB. POR Km.²
CENSO 1974
Escala 1:4.000.000
Mapa 16
NPP


MAR DE LAS ANTILLAS
GUATEMALA
EL SALVADOR
NICARAGUA
GOLFO DE FONSECA
VIAS DE TRANSPORTE
CARRETERA PAVIMENTADA
CARRETERA SECUNDARIA
FERROCARRILES
AEROPUERTO INTERNACIONAL
CAMPO DE ATERRIZAJE
ESCALA
KILOMETROS
Mapa 25

REPUBLICA DE EL SALVADOR

MINISTERIO DE OBRAS PUBLICAS

INSTITUTO GEOGRAFICO NACIONAL
"INGENIERO PABLO ARNOLDO GUZMAN"

AGOSTO 1988

Reproducción autorizada por el Instituto Geográfico Nacional "Ingeniero Pablo Arnoldo Guzmán" en 1988

E X P L I C A C I O N

CAPITAL DELA REPUBLICA
CABECERAS DEDEPARTAMENTOS
CAMINOS PAVIMENTADOS
CAMINOS DE TERRACERIA
CAMINOS VECINALES
FRONTERAS INTERNACIONALES
LIMITE DE DEPARTAMENTOS
PUENTES PISTAS DE ATERRIZAJE

ESCALA 1:500,000

PROYECCION CONICA CONFORME DE LAMBERT

DIVISION ADMINISTRATIVA

ZONA OCCIDENTAL				ZONA CENTRAL				ZONA ORIENTAL	
SANTA ANA				SAN VICENTE				LA UNION	
ATIQUIZAYA	CONCEPCION			APASTEPEQUE				EL CARMEN	
CANDELARIA				GUADALUPE				LA CONCORDIA	
CHALCHUAPA				SAN CAYETANO				MEANGUERA	
COATEPEQUE				SAN ESTEBAN				POLORIOS	
EL CONGO				SANTA CLARA				SAN ALEJO	
METAPAN				SANTO DOMINGO				YUCUAIQUIN	
SAN SEBASTIAN				TECOLUCA					
SANTA ROSA GUACHIPILIN									
SANTIAGO DE LA FRONTERA									
ZONA PARACENTRAL				ZONA CENTRAL				ZONA ORIENTAL	
CHALATENANGO				LA LIBERTAD				LA UNION	
AGUA CALIENTE				ANTIGUO CUSCATLAN				CONCEPCION DE ORIENTE	
CITALA				CHILTIUPAN				EL SAUCE	
COMALAPA				COLON				INTIPUCA	
CONCEPCION QUEZALTEPEQUE				HUIZUCAR				LA UNION	
DULCE NOMBRE DE MARIA				JAYAQUE				MEANGUERA	
EL PARAISO				JICALAPA				POLORIOS	
LA LAGUNA				LA LIBERTAD				SAN ALEJO	
LA PALMA				NUEVA SAN SALVADOR				YUCUAIQUIN	
LA REINA				QUEZALTEPEQUE					
NUEVA CONCEPCION				SACACOYO					
SAN FERNANDO				SAN JOSE VILLANUEVA					
SAN FRANCISCO LEMPA				SAN JUAN OPICO					
SAN IGNACIO				SAN MATEO PERAS					
SAN JOSE LAS FLORES				SAN PABLO TACACHICO					
SAN LUIS DEL CARMEN				TALNIQUE					
SAN MIGUELITO				TEPECOYO					
SANTA RITA				ZARAGOZA					
TEJUTLA									

EL SALVADOR

POPULATION DISTRIBUTION

1,985

INHABITANTS/SQ. KM.

1 – 100	301 – 400
101 – 200	401 – 500
201 – 300	501 or more

Internal Bodies of Water

GUATEMALA

HONDURAS

HONDURAS

PACIFIC OCEAN

Fonseca Gulf

90°00' 89°40' 89°20' 89°00' 88°40' 88°20' 88°00' 87°40'

14°20' 14°00' 13°40' 13°20'

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MINISTERIO DE OBRAS PÚBLICAS
REPÚBLICA DE EL SALVADOR

Scale 1: 750,000

EL SALVADOR
DISTRIBUCION DE LA POBLACION
URBANA Y RURAL
1974 *

CON BASE EN MUNICIPIOS

POBLACION RURAL

• CADA PUNTO EQUIVALE A 500 HABITANTES

HABITANTES
490.000
240.000
120.000
60.000
30.000
12.000
6.000
1.200
0

POBLACION URBANA

* EN BASE AL CENSO DE 1971, CONFORME AL CRECIMIENTO NATURAL

90°00' 89°30' 89°00' 88°30' 88°00' 87°30'

14°30' 14°00' 13°30' 13°10'

GUATEMALA

HONDURAS

CHALATENANGO

SANTA ANA

AHUACHAPAN

SONSONATE

LA LIBERTAD

LA PAZ

CUSCATLAN

CABAÑAS

SAN VICENTE

USULUTAN

SAN MIGUEL

MORAZAN

LA UNION

OCEANO PACIFICO

GOLFO DE FONSECA

REPUBLICA DE EL SALVADOR
MINISTERIO DE OBRAS PUBLICAS
INSTITUTO GEOGRAFICO NACIONAL
"ING. PABLO ARNOLDO GUZMAN"

DATOS PROPORCIONADOS POR
LA DIRECCION GENERAL DE ESTADISTICA Y CENSOS

PART II

CHAPTER V

THE LAW APPLICABLE TO THE DETERMINATION OF THE JURIDICAL STATUS OF THE ISLANDS

I. The Dispute Concerns the Attribution of Territory rather than a Delimitation of Territory

5.1. The Memorial of Honduras coincides with the position adopted by El Salvador in accepting that, in relation to the determination of the juridical status of the islands, "il y va d'un contentieux d'attribution en souveraineté et non de délimitation" (1). Further, on the following page (2), the Memorial of Honduras reiterates that "La mission confiée à la Cour, quant à ces îles, est une mission d'attribution en souveraineté" (original emphasis). Finally (3), the Memorial of Honduras recognises expressly that "A la différence des conflits d'acquisition ou d'attribution de souveraineté, les conflits de délimitation de deux souverainetés pré-existantes dans lesquels il s'agit d'interpréter un titre en vue de tracer une ligne frontière précise, ne soulèvent pas les mêmes difficultés". Nevertheless, in spite of this last comment, the Memorial of Honduras does not arrive at the logical corollary of this distinction between disputes as to the attribution

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1. Memorial of Honduras: p. 4.
2. Ibid.: p. 5.
3. Ibid.: p. 156.

of sovereignity and disputes as to the delimitation of territory.

5.2. The teachings of Publicists of Public International Law have not only drawn this distinction between disputes as to the attribution of territory and disputes as to the delimitation of territory or frontier disputes but have also drawn from this distinction certain consequential conclusions as to the Principles of Law applicable. Paul de Lapradelle, in his classic work on the subject of Frontiers, wrote: (4)

"L'arbitrage de limites possède, en outre, une nature propre, qui le distingue, dans un domaine connexe, de l'arbitrage territorial. Les problèmes territoriaux sont essentiellement des problèmes d'attribution. Une masse territoriale se trouve revendiquée par deux Etats, sur la base de titres constituifs d'acquisition. L'arbitre, après examen des titres invoqués, procède à l'attribution totale ou à la distribution de la masse litigieuse.

"L'arbitrage de limites, au contraire, n'a pas pour objet l'attribution d'une masse, mais l'identification d'une ligne."

5.3. Professor R.Y. Jennings (as he then was) distinguished with complete precision the different juridical principles applicable to, on the one hand, a dispute as to delimitation and, on the other hand, a dispute as to the attribution of territory. In the former case, it is necessary to apply the norms of Public International Law which govern the interpretation of documents (such as, for

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4. La Frontière pp. 140-141.

example, Formal Title Deeds to Commons) while, in the latter case, it is necessary to apply the rules of Public International Law which govern the acquisiton of territory. This commentator states: (5)

"Thus, there are certain features that are peculiar to boundary disputes and which accordingly differentiate it from the kind of question where the essence of the matter is not the determination of a boundary line, but a question of title to an already more or less determined defined parcel of territory. In particular, since all boundary lines are man-made, it follows that the essence of a boundary dispute will be the interpretation of some delimiting instrument. .... consequently the principal element of dispute is not at all one concerning modes of acquisition or loss of territory, but the principles governing interpretation." (original emphasis)

5.4. Charles de Visscher indicated: (6)

"On s'accorde pour admettre une distinction fondamentale entre les questions que posent directement le titre à l'attribution en souveraineté d'une surface ou masse territoriale donnée et celles que soulève la délimitation des surfaces lorsque, dans les régions de confins, le problème se ramène au tracé d'une frontière. C'est en ce sens que l'on parle de conflits territoriaux d'attribution et de conflits territoriaux de délimitation."

And this commentator added (6) that disputes as to the attribution of territory:

"prend tout son relief à ou l'on est en présence d'une zone géographiquement indépendante du domaine reconnu des Etats en litige, encore qu'elle soit voisine de celui-ci."

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5. General Course of International Law: Recueil des Cours Vol. 121 pp. 428-429.

6. Problemes de confins en Droit International Public pp. 25-26.

5.5. Professor Reuter, in his oral pleading to the Court in the Temple Case was the first to indicate the consequences that follow from this distinction: (7)

"Dans le cas particulier du conflit de délimitation, tel que nous l'avons défini, c'est-à-dire, d'un conflit à propos d'une opération de délimitation, et d'un conflit qui ne porte que sur une parcelle géographiquement non autonome, le titre, d'une façon générale a plus de poids que les faits d'exercice effectif de la souveraineté. C'est du moins la leçon qu'il nous emble que l'on peut tirer d'une comparaison que l'on ferait entre l'arrêt rendu par la Cour dans l'affaire des Minquiers et des Echréous, d'une part, et l'arrét rendu par la Cour dans l'affaire des Parcelles Frontières."

5.6. Equally, Professor Blondel in accepting this distinction observed that: (8)

"Cette distinction est importante parce que les modes de solution sont très différents; pour les différends territoriaux proprement dits (pour l'appartenance d'un territoire) c'este essentiellement l'effectivité de l'occupation que est l'élément prépondérant, sinon l'élément déterminant; pour les conflits de limites ce sont les titres chaque fois qu'il y en a, en particulier les accords de délimitation et les cartes."

5.7. Finally, Professor Bardonnet indicates (9) that in the analysis proposed by Professor Reuter:

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7. Temple Case: Plaidoiries: Vol. II, p. 545.

8. La Frontière (a publication of La Societé Francaise pour le Droit International) p. 171.

9. Les Frontiers terrestres: Recueil des Cours Vol. 153 pp. 49-50.

"La notion de conflit de délimitation repose, en effet, selon lui, sur un double critère. Le premier est formal, en ce sens qu'un tel conflit nait des suites d'une procédure de délimitation. Le second est matériel, en ce sens qu'il s'agit d'un conflit "qui porte sur des parcelles qui ne constituent pas une entité géographiquement autonome"."

This commentator adds that it is:

"posible de dégager une tendance génerale.

"Dans les conflits d'attribution, les considérations d'effectivité dans l'exercice des fonctions étatiques tiennent une place particulière.

"Dan les conflits de délimitation, en revanche, ce sont les titres juridiques, c'est-à-dire en pratique les traités, qui l'emportent nécessairement."

5.8. Notwithstanding these various statements of principle and notwithstanding in particular the various Precedents of Courts and Tribunals of Arbitration cited by El Salvador in its Memorial (10), Honduras insists that Article 26 of the General Peace Treaty of 1980, which refers exclusively to the delimitation of the land frontier, is also applicable to the determination of the juridical status of the islands (11). Honduras has apparently forgotten that Article 5 of the Special Agreement which forms the basis of the jurisdiction of the Court gives priority over the provisions of the General Peace Treaty of 1980 to the provisions of Article 38 of the Statute of the International Court of Justice. By virtue of

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10. Memorial of El Salvador: Paragraphs 10.3.--10.10..

11. Memorial of Honduras: pp. 521 & 572.

this provision, the general rules and principles of Public International Law prevail in relation to the attribution of territory and these principles and rules are to be applied as interpreted and established in the decisions of the International Court of Justice and of prestigious Tribunals of Arbitration such as that which decided the Island of Palmas Case.

5.9. The actual text of Article 26 of the General Peace Treaty of 1980 establishes quite categorically that this provision applies exclusively to the delimitation of the land frontier. Article 26 is entitled "The delimitation of the frontier (which is) undefined" ("De la delimitación de la frontera no definida" in the original Spanish text) and commences "For the delimitation of the frontier line in the disputed sectors ...." ("Para la delimitación de la línea fronteriza en las zonas en controversia ...." in the original Spanish text). There is no question of any delimitation of any frontier line in respect of the islands since what is in issue is the attribution of these islands to one or other of the two States.

5.10. In view of the considerations set out above, El Salvador maintains and reiterates the conclusion reached in its Memorial which was as follows:

"It may be concluded from the preceding exposition that, according to established jurisprudence, the determination of the status of the disputed islands in the Golfo de Fonseca involves a decision as to which of the two States has exercised in respect of these islands a continuous and peaceful display of territorial sovereignity and has performed State

functions and exercised State authority, in particular by means of acts of jurisdiction, of administration, and of legislation." (12)

II. The Ecclesiastical Argument considered from a Juridical Point of View

5.11. The Memorial of Honduras, starting from the erroneous premise that Article 26 of the General Peace Treaty of 1980 is applicable to the determination of the status of the islands, reaches the following conclusion: (13)

"La règle énoncée à l'article 25 (sic (14)) du Traité Général de Paix doit ainsi être interprétée et appliquée en relation avec la règle de droit public espagnol selon l'Ordonnance Royale IVa de 1571. D'après elle, dans les circonscriptions administratives coloniales espagnoles, ce qu'on appelle la Gouvernement temporal devait coincider avec la juridiction spirituelle.

"Cela implique, à partir de cette date, la nécessité pour l'espace territorial des diverses circonscriptions d'avoir comme limites celles accordées aux Gobernaciónes, Alcaldías ou Intendances, unifiées avec celles attribuées aux Evéchés, selon un processus d'integration défini et devant s'appliquer avec un caractére obligatoire."

5.12. The Ecclesiastical Argument thus makes its appearance based not only on the argument set out above but also on constitutional provisions

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12. Memorial of El Salvador: Paragraph 10.11..

13. Memorial of Honduras: pp. 521-522; see also op. cit.: p. 23.

14. This is presumably an error for "26".

adopted unilaterally by Honduras (15) which, because of their unilateral nature, prove absolutely nothing. It will be established later on that a consideration of this ecclesiastical argument in the light of the facts produces a result contrary to the interests of Honduras. However, it is first necessary to analyse the basis of this argument from the point of view of Public International Law and of the relevant precedents.

5.13. In the Arbitration between Guatemala and Honduras, it was Guatemala who tried to invoke the argument that the boundaries of the ecclesiastical and the temporal jurisdictions were identical, an argument which Honduras, despite its own constitutional provisions, opposed. The Tribunal of Arbitration presided by Hughes rejected this argument and upheld the view asserted by Honduras. The Tribunal made the following statement (16):

"In fixing the line of uti possidetis of 1821, Guatemala contends that controlling effect should be ascribed to the evidence from ecclesiastical sources in the view that, in the absence of a royal order of specific delimitation, the limits of ecclesiastical jurisdiction are determinative. In support of this view, the Provisions of Law VII, Title II, Book II of the Recopilacion of the Indies are invoked, as follows:

> "That the territory of the Indies may be divided in such manner that the temporal may correspond with the spiritual. * * * We command

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15. Memorial of Honduras: pp. 524-525 & 574.

16. Arbitration between Guatemala and Honduras: Judgement pp. 48-49.

> the members of our Council of the Indies that they shall always take care to divide and distribute all the territory thereof, discovered and to be discovered, for temporal purposes into viceroyalties, provinces of Royal Audiencias and chanceries, and provinces of officials of the Royal Treasury, adelantamientos, governancies, alcaldias mayores, corregimientos, ordinary alcaldias and of the brotherhood, councils of Spaniards and of Indians; and for spiritual purposes into archbishoprics and suffragan bishoprics and abbeys, parishes and tithing districts, provinces of the religious orders and institutions, always taking care that divisions for temporal matters shall conform and correspond with divisions for spiritual matters, insofar as may be possible; archbishoprics and provinces of the religious orders with the districts of the Audiencias; bishoprics with governancies and alcaldias mayores; and parishes and curacies with corregimientos and ordinary alcaldias."

"But it will be noted that absolute correspondence of the limits of temporal and spiritual jurisdiction was not required. The conformity was to be "insofar as may be possible." The Spanish King could fix the limits of civil jurisdiction in his colonial possessions as he saw fit."

Subsequently the Tribunal once again rejected the argument produced by Guatemala in relation to ecclesiastical boundaries, stating (17):

"Apparently the assertion of Guatemala in this respect is based upon her primary contention that the evidence as to ecclesiastical administration must be deemed controlling, a contention which has already been considered."

5.14. This prestigious judgement is valuable not only because it constitutes a precedent; it is appropriate to ask whether it is legitimate for

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17. Ibid. pp. 77-78.

Honduras to adopt this contradictory posture; having obtained for itself the Valley of Copan by successfully criticising the argument of Guatemala that the boundaries of the ecclesiastical and the temporal jurisdictions were identical, Honduras is now trying to invoke in its favour against El Salvador the very argument which both it and the Tribunal of Arbitration rejected. As an English Judge has stated very cogently: "You cannot blow hot and cold at the same time".

5.15. The Arbitration between Guatemala and Honduras is not the only occasion upon which a Tribunal of Arbitration has rejected the Ecclesiastical Argument. In the Arbitration between Honduras and Nicaragua, the Council of State of Spain, in the Report which provided the basis for the Arbitration Award given by the King of Spain and subsequently declared to be valid by the International Court of Justice, made the following statement: (18)

"on ne peut étayer un argument tiré d'une juridiction qui no fut ni délimitée, ni exercée, ni corroborée par des prueves de plus d'autorité. Aucun, donc, de ces textes .... ne prouve que l'évéque du diocése aît exercé sa juridiction sur le territoire disputé et on ne peut davantage en tirer d'argument digne d'être pris en considération en faveur du droit invoqué."

5.16. And in this same case Professor Rolin made the following comments on the Ecclesiastical Argument, having first cited the "Real Cédula" (Royal

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18. Pleadings in the Case concerning the Arbitration Award of the King of Spain Vol. I p. 421.

Decree) of 1571: (19)

"Que dit cette loi? Non pas que la division des territoires découverts va s'effectuer de telle maniére que la division civile soit en conformité, mais le roi ordonne aux membres du Conseil des Indes de:

> "veille à ce que la partage et la division de tout le territoire decouvert et à découvrir se fasse de manière que le pouvoir civil soit divisé en vice-royautés, provinces d'audiencias, etc., le pouvoir ecclésiastique en archevêches, évêches, subfragants, etc., veillant à ce que la division civile soit en conformité, dans la mesure du posible, avec la division ecclsiastique."

"Donc, Messieurs, il faudra une division officielle; elle va autant que possible essayer d'aboutir a une conformité entre les circonscriptions écclesiastiques et les autres; mais il n'est absolument pas question que, automatiquement, les divisions civiles se calquent, se modifient suivant les décisions de messeigneurs les évêques. Même dans un pays aussi catholique que l'Espagne, j'ai tout de même l'impression que l'on aurait considéré que c'était là un étrange empiétement de l'Église sur l'État que de permettre aux évêques de modifier, à leur guise, les circonscriptions civiles simplement par les modifications qu'ils apporteraient aux circonscriptions ecclésiastiques."

III. The Ecclesiastical Argument considered in the light of the Facts and the Precedents

5.17. The Memorial of Honduras affirms that between 1677 and 1692 the Bishopric of Comayagua acquired in a definitive manner its full geographical extension by the incorporation to its spiritual jurisdiction of the Curacy of Choluteca and the Guardania of Macaome "lesquelles avaient sous leur

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19. Ibid. Vol. II p. 371.

juridiction effective des îles du Golfe de Fonseca" (20). This is not correct since this was not the case either before or after the dates indicated in the Memorial of Honduras. This is shown by the following documentary evidence, which may be found in the Annexes to this Counter Memorial.

5.18. In the list produced in 1665 (before the first date indicated in the Memorial of Honduras) of the Religious Institutions of San Francisco, there appears in the section relating to the Province of Guatemala the Priory of San Salvador, the Convent of Amapala and dependent on the latter the Islands of Conchagua, Teca and Miangola. (21)

5.19. In the Memorial and Register produced in 1670 (also before the first date indicated in the Memorial of Honduras) of the Religious Institutions administered by the Bishopric of Guatemala, exactly the same entries are found. (22)

5.20. In a document produced in 1733 (after the second date indicated in the Memorial of Honduras), a series of writs executed in order to remedy the maladministration of certain Curacies and Religious Institutions of the Bishopric of Honduras,

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20. Memorial of Honduras: p. 536.

21. Counter Memorial of El Salvador: Annexes: Vol. VII, p. 1.

22. Counter Memorial of El Salvador: Annexes: Vol. VII, p. 24.

there appears the Curacy of Choluteca and the dependencies of its jurisdiction. None of the Islands of the Gulf of Fonseca is included therein. (23)

5.21. In a document produced in 1765 (also after the second date indicated in the Memorial of Honduras), the Chaplain Joseph Valle makes a complete list of the Curacies of the "Alcaldía Mayor" of Tegucigalpa, providing a full description of Choluteca and Nacaome without any mention being made of any Curacies or other Religious Dependencies on the Islands of the Gulf of Fonseca. (24)

5.22. In a document produced in 1791 (also after the second date indicated in the Memorial of Honduras and very close to the crucial date of the Independence of Central America), when the incorporation of the "Alcaldía Mayor" of Tegucigalpa to the Intendency and Government of Comayagua was approved, there is decisive evidence which constitutes absolute proof that the Bishopric of Comayagua was not exercising spiritual jurisdiction over the Islands of the Gulf of Fonseca. The document in question, which was produced in the Pleadings in the Case concerning the Arbitration Award of the King of Spain, is a "List of Curacies and Parishes which comprise the Bishopric of Comayagua with the names of all the towns and valleys which depend on each Curacy,

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23. Counter Memorial of El Salvador: Annexes: Vol. VII, p. 26.

24. Memorial of Honduras: Annexes: p. 13.

according to the General Administration of the Diocese of Comayagua, sent on 20 October 1891 to the King of Spain by Brother Fernando de Cadiñanos, Bishop of Comayagua" (emphasis added) (25). In this List there duly appear both the Parish of Choluteca (26) and the Parish of Nacaome (27) without there being in either case any mention whatever of any town or valley or curacy in any of the Islands of the Gulf of Fonseca.

5.23. This document was decisive for the Tribunal of Arbitration that decided the litigation between Guatemala and Honduras. The judgement of this Tribunal stated (28):

"it is highly significant that on October 20, 1791, after the above-mentioned royal rescript of July 24, 1791, the Bishop of Comayagua, in an extensive report to the King concerning the districts within his bishopric, gives a description of thirty-five curacies into which the bishopric was divided and makes no

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25. Pleadings in the Case concerning the Arbitration Award of the King of Spain Vol. I pp. 452-457. The document also appears in the Memorial of Honduras: Annexes: Vol I. p. 17 and is cited by the Memorial of Honduras: pp. 392-393. Further in the Memorial of Honduras: p. 30, it is stated that this Bishop of Honduras carried out one of the most complete censi that had ever been made during the colonial period.

26. Pleadings in the Case concerning the Arbitration Award of the King of Spain Vol. I p. 454.

27. Ibid. p. 457.

28. Arbitration between Guatemala and Honduras: Judgement p. 19.

mention of Golfo Dulce or Santo Tomas."

And in the same judgement, it is indicated that (29):

"As shown by the royal rescript of 1791, the territory of the Intendencia of Honduras was intended to correspond to that of the Bishopric of Honduras, but there was no precise delimitation of the extent of that bishopric."

Professor Rolin in his comments to the Court on this judgement stated that the Tribunal of Arbitration (30):

"considère que, dans ces conditions, il faut limiter les effets de 1791 au territoire qui est déterminé par la liste de 35 cures, établie par l'évêque du Honduras."

5.24. All the documents described in the last five paragraphs demonstrate in a conclusive manner that the transfer of the Curacy of Choluteca and the Guardanía of Nacaome to the jurisdiction of the Bishopric of Comayagua had no effect whatever relative to the ecclesiastical and civil jurisdiction over the Islands of the Gulf of Fonseca which continued to be subject to the jurisdiction of San Miguel in the Province of San Salvador. These documents, and

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29. Ibid. p. 18.

30. Pleadings in the Case concerning the Arbitration Award of the King of Spain Vol. II p. 478. The Judgement of the Tribunal of Arbitration between Guatemala and Honduras also emphasised that certain localities were not mentioned in the Report to the King presented in 1804 by Ramón de Anguiano, who had been Governor-Intendent of Honduras since 1790, "a report on the state of affairs in his Intendency with a description of the district of Comayagua and of the sub-delegations into which the Intendency was divided". See infra Chapter VI.

in particular the last document described, an official document produced in 1791 emanating from the Bishop of Comayagua, cannot be successfully contradicted by the documents adduced by Honduras.

5.25. Under no circumstances can such an official document be contradicted by an extract from a private History of the Parish of Choluteca written by a certain Fray Manuel Bendana (31). This extract can in no sense be considered as a document issued by the Spanish Civil or Ecclesiastical authorities and so in any event does not satisfy the requirements laid down by Article 26 of the General Peace Treaty of 1980 if it is indeed the case, as is contended by Honduras, that this provision of the Treaty is applicable to the determination of the status of the islands. What does emerge from this History, on the other hand, is that already in 1816 the Island of Meanguera was inhabited by mariners from San Carlos, in the Province of San Miguel, who earned their living by engaging to sea transport to and from Nicaragua.

5.26. A further document of ecclesiastical origin adduced by Honduras (32) is a Report of the Bishop of Guatemala which concerns the Parish of Conchagua. This document, which was produced in 1770, is in favour of the arguments adduced by El Salvador. Contrary to what is argued by Honduras, it is not affirmed in this document that there is

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31. Memorial of Honduras: Annexes: p. 2296.
32. Memorial of Honduras: p. 556.

one single island dependent on Conchagua but rather that dependent on that ecclesiastical jurisdiction "il y a quelques petites iles et sur l'une d'elles, qui comporte pas mal de terres, il y a un élevage de bétail appartenant à cette paroisse" (33). In other words, what is affirmed is not that only one island belongs to the Parish within the jurisdiction of San Salvador but rather than what belongs to that Parish is the "élevage de bétail" on the said island.

5.27. Honduras similarly adduces the List of Curacies produced in 1804 (34). Once again this document is favourable to El Salvador since it is declared that the islands numbered 1 and 2 on the map appended to the List belong to the Parish of Conchagua; that no island whatever belongs to the inhabitants of the Bishopric of Comayagua; and that a third island belongs to the Bishopric of León in Nicaragua. The Memorial of Honduras argues that this island belonging to the Bishopric of León is Meanguera. If this is the case, this document can hardly serve to support the claim of Honduras to this same Island of Meanguera. The only explanation given by the Memorial of Honduras for this statement is that "L'autorité ecclésiastique se trompe en assignant l'ile de Meanguera a l'Evêché de Leon" (35). Such a comment cannot be taken seriously. The only truly significant aspect of this document is that, according to its terms, no island whatever was assigned to the

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33. Memorial of Honduras: Annexes: p. 2319.
34. Memorial of Honduras: Annexes: p. 2323.
35. Memorial of Honduras: p. 557.

Bishopric of Comayagua, a statement which confirms that Honduras did not enjoy jurisdiction over any of the islands in the Gulf of Fonseca in 1804.

5.28. Thus it can be seen that the Ecclesiastical Argument produced by Honduras breaks down completely, not only from a juridical point of view but also when considered in the light of the facts and the precedents.

IV. The "Real Cédula" (Royal Decree) issued in 1745 in favour of Juan de Vera

5.29. A third juridical argument invoked by the Memorial of Honduras is based on the "Real Cédula" (Royal Decree) executed in 1745 in favour of Juan de Vera (36). The argument which it is attempted to extract from this "Real Cédula" has already been answered in the Memorial of El Salvador (37). To the transcription in the Memorial of El Salvador of the passage from the judgement in the Arbitration between Guatemala and Honduras which rejected this argument it seems appropriate to add this immediately subsequent section of the judgement (38) (39):

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36. Memorial of Honduras: pp. 25-26 & 555.

37. Memorial of El Salvador: Paragraph 12.4.

38. Arbitration between Guatemala and Honduras: Judgement p. 17.

39. See also Pleadings in the Case concerning the Arbitration Award of the King of Spain Vol. I pp. 382 & 384.

"This is indicated by the terms of the royal instructions to Vera to the effect that it was not the royal will to make any change in the political and civil government of the Province of Honduras and that Vera, in executing his special military authority, should be careful to abstain from mixing "in the political and civil government of the Alcaldia of Tegucigalpa nor of any other governancy that may reach to the said coast which may have its Governor or Alcalde Mayor, because that is to remain absolutely as it has been under the Alcalde Mayor or Governor.""

Exactly the same limitation emerges from the detailed instructions given by the King to Colonel Juan de Vera (40).

5.30. In the same way, in the Arbitration between Honduras and Nicaragua, the Council of State of Spain, in the Report which provided the basis for the Arbitration Award given by the King of Spain, emphasised the limited scope of this "Real Cédula" of 1745. In this Report it is stated that it was only for military purposes and by reason of the war which at that time existed that the area subject to the command of Colonel Vera was enlarged and that this did not produce the slightest enlargement of the boundaries of the Colonial Provinces. The Council of State of Spain stated categorically that: (41)

"On peut donc considérer comme certain que les Brevets Royaux de 1745 ne modifièrent point les limites des provinces de Nicaragua ni de Honduras."

5.31. It is appropriate to add, as was indeed

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40. Op.cit. Vol. I pp. 385-391.

41. Op.cit. Vol. I p. 417.

affirmed by the Commission for the Examination of the Titles presided by Santamaría de Paredes (this Commission produced the Opinion on which the Report of the Council of State of Spain was based), that if the "Real Cédula" of 1745 had had the effect claimed by Honduras, this effect would have been entirely transitory since as from 1747 a new "Real Cédula" restored to the new Governor General of Guatemala, Marshall Cajigal de la Vega, the powers which had been temporarily assigned to Vera; indeed Vera was made a subordinate of and subject to the orders of the new Governor General (42). As the Council of State of Spain indicated: (43)

"les pouvoirs du colonel de Vera furent exceptionnels et que, en 1748 déjà, on ne jugeait pas opportun de les conférer à un successeur au Gouvernement de Honduras, mais que au contraire, on avertissait expressément que les choses devaient devenir ce qu'elles étaient à l'époque antérieure à cette accumulation de commandements et attributions à une même personne."

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42. Op.cit. Vol. I p. 682. See also pp. 431-432.

43. Op.cit. Vol. I p. 417. See also p. 682 for the concurring Report of the Commission for the Examination of the Titles which served as the basis for the Opinion of the Council of State and the subsequent Award of the King of Spain.

CHAPTER VI

THE DETERMINATION OF THE JURIDICAL STATUS OF THE ISLANDS

I. The Objectives of the Litigation in respect of the Islands

6.1. The Memorial of Honduras maintains (1) that, notwithstanding the generality of Article 2, Paragraph II, of the Special Agreement which forms the basis of the jurisdiction of the Court, in which the Parties requested the Chamber that "it determine the juridical status of the islands", the only matter which has to be decided in this litigation in relation to the islands is the sovereignty over the Islands of Meanguera and Meanguerita. This argument constitutes yet another unacceptable distortion by Honduras of the provisions of Paragraph II of Article 2 of the Special Agreement. In just the same way as Honduras wishes to introduce into this Paragraph the word "delimitation", which the Parties in fact carefully and deliberately chose to omit from this Paragraph, it also wishes to replace the generic reference to the islands as a whole by a specific reference to the Islands of Meanguera and Meanguerita. This latter aspect of the Special Agreement could hardly be clearer: it requests the Chamber that "it determine the juridical status of the islands", not that "it determine the juridical status of the Islands of

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1. Memorial of Honduras: p. 485.

Meanguera and Meanguerita".

6.2. What the Parties have asked the Chamber to do is to determine, in general, the juridical status of the islands and it is only when this determination has been made that it will emerge which of the islands are actually in dispute between the Parties.

6.3. If, as Honduras argues, the juridical status of the islands is governed by the principle of "uti possidetis iuris" and by the provisions of Article 26 of the General Peace Treaty of 1980, that is to say that the juridical status of the islands is to be determined entirely by the Spanish Colonial Title Deeds executed prior to the date of independence, and in particular by those Deeds closest in time to that date, then the application of this criterion to the facts leads to the conclusion that <u>all the islands of the Gulf of Fonseca belong to El Salvador</u>, for the simple reason that El Salvador has the better titles thereto, and consequently, <u>all the islands of the Gulf of Fonseca are in dispute between the Parties</u>.

6.4. If, on the other hand, as El Salvador argues, the juridical status of the islands is governed by the Principles of Public International Law established by the decisions of the International Court of Justice, that is to say by the display of State authority exercised by the independent Sovereign States as from 1821, then in the light of this second criterion it is for Honduras to prove that it has exercised jurisdiction and sovereignity over some

of the islands of the Gulf of Fonseca; this is because El Salvador, besides the historical Title Deeds which prove that all the islands of the Gulf of Fonseca are its legitimate property, has demonstrated a defined and indisputable display of State authority exercised during more than one and a half centuries over Meanguera and Meanguerita and since, in the view of Honduras, these are the only two islands in dispute, then the application of this second criterion would also lead to the conclusion that all the islands of the Gulf of Fonseca belong to El Salvador.

6.5. With a view to achieving its wish to limit the subject matter of the dispute, Honduras invokes (2) the records of the Joint Boundary Commission. This is non pertinent since it was fully understood by both Parties during the negotiations carried out in the Joint Boundary Commission and, what is more, understood by virtue of a direct request from Honduras, that the conciliatory proposals made during these negotiations could not be invoked subsequently in any judicial proceedings (3). In particular, the proposal put up for negotiation by El Salvador (and subsequently withdrawn in the light of the intransigence of Honduras manifested thereto) was only able to be formulated by virtue of a very considerable sacrifice on the altar of finding a joint solution to the dispute as a whole and with the

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2. Memorial of Honduras: p. 485.

3. Counter Memorial of El Salvador: Annexes: Vol. VII, p. 54.

objective of staving off any necessity for an onerous judicial process.

6.6. In any event, the affirmation made by Honduras to the effect that the history of the negotiations demonstrates that the dispute as to the islands concerns only the Islands of Meanguera and Meanguerita does not rest on a solid base. It is sufficient merely to read through the Formal Minutes of the various Meetings held during the negotiations leading up to the General Peace Treaty of 1980, during the five years in which the Joint Boundary Commission was working, and during the negotiations leading up to the Special Agreement to establish emphatically that at no point were the Islands of Meanguera and Meanguerita referred to as the exclusive subject matter of the dispute as to the islands. The same conclusion is reached by reading other documents connected with these negotiations (4). Before the Special Agreement had been drawn up, El Salvador had in January 1985 stated extremely clearly to Honduras that "toutes les iles se trouvent

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4. See General Peace Treaty of 1980: Article 18, Paragraph 4; the Protest of Honduras of 24 January 1984 (set out in the Memorial of Honduras: Annexes: p. 2263) the final paragraph of which does not contain any specific reference to any individual islands but rather contains a general reference to "la détermination de la situation juridique insular".

en litigie" (5), a statement which ought to have alerted Honduras to the need to propose a change in the draft of the Special Agreement if it really wished to restrict the subject matter of the litigation.

6.7. It is now proposed to examine in two separate sections of this Chapter the juridical status of the islands in the light of the two different juridical criteria which have been claimed to be applicable; first, in the light of the juridical criterion invoked by Honduras, which would decide the dispute on the sole basis of the Spanish Colonial Title Deeds executed prior to the date of independence in 1821 and, subsequently, in the light of the juridical criterion invoked by El Salvador, which would decide the dispute on the basis of the pacific and uninterrupted display of State sovereignity from the date of independence in 1821 up to the present day. It will be seen that the position of El Salvador is correct in the light of both criteria. Considering first the Spanish Colonial Title Deeds, these will be divided into two sub-sections: (A) the Title Deeds and Other Documents of the Sixteenth and Seventeenth Centuries and (B) the Title Deeds and Other Documents of the Eighteenth and Nineteenth Centuries.

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5. The Note of El Salvador of 24 January 1985 (set out in the Memorial of Honduras: Annexes: p. 2270) where it is also affirmed that the Island of El Tigre belongs to El Salvador; it must be emphasised that this Note was sent <u>before</u> the signature of the Special Agreement.

II. The Colonial Spanish Title Deeds relating to the dispute over the Islands

(A) The Title Deeds and Other Documents of the Sixteenth and Seventeenth Centuries

6.8. The Memorial of Honduras affirms emphatically that "Le Honduras fut une entité coloniale qui s'étendait depuis l'Océan Atlantique (Mer des Caraïbes) jusqu'à l'Océan Pacifique (alors appelé Mer du Sud). Depuis le début, étaient comprises dans son territoire les îles adjacentes à ses côtes sur les deux océans" (emphasis added). The Memorial subsequently adds [7]: "Le Honduras se développa donc comme une entité coloniale s'étendant de l'Atlantique au Pacifique sans la moindre contestation" (emphasis added).

6.9. The most direct answer to these affirmations has already been provided by the Government of Honduras itself in another international legal proceeding, its boundary dispute with Nicaragua; this fact illustrates once again the desire of Honduras "to blow hot and cold at the same time"

6.10. In the arguments presented by the Government of Honduras to the Mediator in the dispute with Nicaragua relating to the validity of the Arbitration Award of the King of Spain, the representative of Honduras expressed himself as

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6. Memorial of Honduras: p. 523.
7. Memorial of Honduras: p. 531.

follows:

"The Province of Honduras was constituted when Diego López de Salcedo was nominated its Governor in a "Cédula" of 21st August 1526 (N°. 30) comprising, under the name of Hibueras and Cabo de Honduras the area from the edge of the Atlantic as far as Trujillo. It did not have a coast on the Pacific." (8)

And the representative of Honduras before the Mediator in its boundary dispute with Guatemala cited and presented as Annex IV a Spanish Colonial Document entitled "Demarcation and Division of the Indies", in which it is stated:

"The coast of this Province, in the Northern Sea, because it does not reach the Southern Sea". (9)

These documents completely deprive of authority the affirmation in the Memorial of Honduras (10) to the effect that "Les iles en litige furent découvertes por Gil González Dávila et firent partie de la Gobernación territoriale qui lui fut accordée par Cedula Real de 1524". A territory which did not reach the sea could hardly have had islands.

6.11. These official affirmations of the Government of Honduras in earlier legal proceedings, so contradictory of the affirmation which that Government is now making, are based on two "Reales Cédulas" executed by the King of Spain in 1563 and 1564, both of which are indeed mentioned in the

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8. Memorial of El Salvador: Annexes to Chapter 12, Annex 2.A..

9. Memorial of El Salvador: Annexes to Chapter 12, Annex 2.B..

10. Memorial of Honduras: p. 566.

Memorial of Honduras (11). In the "Real Cédula" of 1563, the King of Spain, speaking in the then customary Royal plural, stated:

"We declare and we provide that the said Government of Guatemala (should have) for boundaries and for district from the Bay of Fonseca inclusive". (12)

The "Real Cédula" of 1564 is still more precise, providing that:

"The said Government of Guatimala (sic) should have for boundaries and for district from the Bay of Fonseca inclusive as far as the Province of Honduras exclusive". (13)

6.12. The representative of the Government of Honduras before the Mediator, this time in the boundary dispute with Guatemala, made these comments on the "Real Cédula" of 1564:

"I do not wish to desist from examining the boundaries of Honduras on the Pacific side in relation to the provisions of the already cited Royal "Cédula" of 1564, although this is not the subject of the present question.

"It is not strange that the King has left the Golfo de Fonseca included in the Province of Guatemala, since at that time and for a long time thereafter, Guatemala extended so far as to connect with the Province of Nicaragua, comprising the territory which today forms the Republic of El Salvador and a strip of the territory of Honduras on the Golfo. This was shown by the maps until the Eighteenth Century and even by some later maps erroneously. Many ancient

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11. Memorial of Honduras: p. 692.

12. Memorial of El Salvador: Annexes to Chapter 12, Annex 3.

13. Memorial of El Salvador: Annexes to Chapter 12, Annex 4.

documents confirm this, among others the document with the title of "Demarcation and Division of the Indies" which I have cited and which constitutes Annex IV." (14)

6.13. Both "Reales Cédulas" coincide in the really fundamental point, which is the fact that the Bay of Fonseca, and in consequence its islands, were included in their totality within the boundaries assigned to the territory of the Government of Guatemala and were excluded in their totality from the boundaries assigned to the territory of the Government of Honduras. It was the Government of Guatemala which had jurisdiction and exercised control over the waters and over all the islands of the Gulf of Fonseca, a jurisdiction and control which was exercised from San Miguel.

6.14. These express recognitions on the part of representatives of Honduras that, on the basis of these "Reales Cédulas", Honduras did not have a coast on the Gulf of Fonseca, caused the representative of Guatemala to make the following declaration to the Mediator:

"The confession of the High Counterparty in this respect relieves Guatemala from having to proceed with the proof rendered to the effect that its rights extend as far as there, and Honduras remains obliged to prove, not by means of suppositions nor by means of the opinions of commentators but by means of Royal "Cédulas" of the Spanish Monarch subsequent to the Eighteenth Century, that all that territory and the Gulf of Fonseca was adjudicated to Honduras by taking it away from Guatemala. As long as these Royal

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14. Memorial of El Salvador: Annexes to Chapter 12, Annex 6.

"Cédulas" are not presented, the rights of Guatemala remain immoveable". (15)

El Salvador is entitled to say exactly the same in relation to the Gulf of Fonseca and its islands. What is more, in no document emanating from the Spanish Monarch which has been presented by Honduras is it stated that the Spanish Crown modified the delimitation in respect of the Gulf of Fonseca established by the "Reales Cédulas" of 1563 and 1564. Honduras argues that the islands of the Gulf passed to the jurisdiction of the Government of Honduras at some date which it does not specify in spite of the fact that it does not present any documentation whatsoever in support of this claim and in spite of the fact that the documentation which would have been necessary for such a transfer of islands from one Government to another would have been a "Real Cédula", as was the case when the islands of the Guanajos in the Atlantic were transferred from the Government of Santo Domingo to the Government of Honduras (16). The fact is that no such "Real Cédula" transferring the islands of the Gulf of Fonseca to Honduras actually exists and, consequently, the claim of Honduras to these islands is unjustified.

6.15. The Memorial of Honduras (17) presents a partial extract of what it describes as

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15. Memorial of El Salvador: Annexes to Chapter 12, Annex 7.

16. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 1.

17. Memorial of Honduras: p. 533.

a "Real Cédula" of 1580 (18) by which Juan Cisneros de Reynoso was appointed "Alcalde Mayor" of Mines of the Province of Honduras, of the town of San Miguel and its jurisdiction, and of "la ville de Choluteca, avec les villages de sa juridiction" (original emphasis). Honduras erroneously classifies as a "Real Cédula" what is no more than a "Real Provisión", which in any event does not contradict or supersede the "Reales Cédulas" of 1563 and 1564 which were executed by the Spanish Crown in order to determine the boundaries of the territories. The "Real Provisión" of 1580 was issued by the President--Governor of Guatemala, Diego García de Valverde, who by virtue of his powers as Governor, had the right exclusively to govern Guatemala and all the area under the jurisdiction of its "Real Audiencia" and as a specific governmental matter was authorised to create public offices; by virtue of this power, he created the "Alcaldía" of Mines, appointing an "Alcalde Mayor" with the jurisdiction corresponding to his office over matters concerning mines in the whole of the area of the "Real Audiencia". In no sense does this imply any aggregation of territory to the Province of Honduras, as is claimed by the Memorial of Honduras. Honduras ought to present this "Real Provisión" of 1580 in its entirety in order to avoid interpretations thereof that are not in accordance with its text.

6.16. Numerous documents prove that this provision executed by the President-Governor of

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18. Memorial of Honduras: Annexes: pp. 2281-2282.

Guatemala in favour of Juan Cisneros de Reynoso, far from adding territory to Honduras, as is claimed, instead removed from the Governor of Honduras his jurisdiction over matters concerning mines, since both the mines of Honduras and the mines of San Miguel and Choluteca remained under the administrative control of the President-Governor of Guatemala through this "Alcalde Mayor" of Mines.

6.17. In the "Real Cédula" executed by the King on 18 November 1581, one year after Cisneros de Reynoso had been appointed as "Alcalde Mayor" of Mines, the King asked the "Real Audiencia" to send him a list of the settlements that existed within its area, both Spanish and Indian, the form in which justice was administered, in which there were established "Corregidores" and "Alcaldes Mayor" and by whom they had been established, and of all the other public offices which had been established in its area (19). Complying with this "Real Cédula", the Governor of Honduras made a list of all the settlements under his jurisdiction in the year 1582 as well as of the public offices that had been established. In making reference to the "Alcalde Mayor" of Mines, he mentioned the mines in Honduras that had been discovered and populated and complained that:

"The present and past Governors of Honduras put a Lieutenant-Governor who administered justice without any salary and they continued this custom until the lawyer Valverde came as President of the "Real Audiencia" of Guatemala which will have been more

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19. Counter Memorial of El Salvador: Annexes: Vol. V, p. 7.

or less three years ago. He, perverting this system and custom, established an "Alcalde Mayor" of the said mines with a salary paid from the Royal Exchequer as appears in a document appended to this report in which it is placed on record who the person so established is and the salary that he is paid and the jurisdiction that he has and the officials which he establishes, which information it is requested that Your Majesty sends to be seen by your Royal Council of the Indies." (20)

In this passage the Governor, Alonso de Contreras Guevara, clearly stated that he had nominated the Lieutenants for the Mines and that the President of the "Real Audiencia" had deprived him of this power and that the President himself established this office and assigned its salary and jurisdiction by virtue of which the Mines remained outside the control of the Governor of Honduras and, as a result of this, the latter requested or appealed that this matter be considered in the Council of the Indies. Subsequently the Governor made an exhaustive and detailed list of all the settlements that existed in the jurisdiction of Honduras and the settlements of Indians and Spaniards that there were in each one of them, mentioning among others Truxillo, which is the modern Puerto de Mar and has the islands of the Guanajos, and also Puerto Cavallos in the Northern Sea (Atlantic Ocean) (21). The extensive list does not include the Gulf of Fonseca and its islands in the Southern Sea (Pacific Ocean) nor Choluteca, although the ports and islands in the Northern Sea

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20. Counter Memorial of El Salvador: Annexes: Vol. V, p. 12.

21. Ibid.: Vol. V, p. 16.

(Atlantic Ocean) which belonged to the jurisdiction of Honduras are indeed included.

6.18. In a subsequent record of the jurisdiction of Honduras made by Juan de Guerra Ayala in 1608, he made the following complaint:

"And because my Governor was a miner, they deprived him of the jurisdiction over the Mines and put an "Alcalde Mayor" over them (22).

In the same way, when Juan de Guerra Ayala made reference to the Province of Honduras, at no point did he list either the Gulf of Fonseca or its islands.

6.19. The preceding discussion explains why, in the proceedings relating to the abandonment of Meanguera, the Indians directed themselves to the President of the "Real Audiencia" of Guatemala since it was he who had given the Commission to the "Alcalde Mayor" of Mines and the Lieutenant of the Captain General to carry out what was necessary (23). This Special Commission is easy to understand since the "Alcalde Mayor" of Mines was under the authority of the President-Governor of Guatemala, who in his turn had jurisdiction over San Miguel and its district. San Miguel has always had jurisdiction over the islands of the Gulf of Fonseca; although Choluteca was for many years subject to the jurisdiction of San Miguel, the islands of the Gulf of Fonseca were never subject to the jurisdiction of Choluteca. Proof of this is

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22. Counter Memorial of El Salvador: Annexes: Vol. V, p. 27.

23. Memorial of Honduras: p. 547.

the "Real Cédula" of 28 February 1590, by which Pedro Girón de Alvarado was appointed "Alcalde Mayor" of San Salvador, San Miguel and the township of Choluteca, their jurisdictions and their districts (24); neither do the many documents subsequent to this date which refer to Choluteca attribute its jurisdiction to Honduras; even in 1674, Choluteca remained subject to the jurisdiction of San Miguel, as is shown in a document relating to the taxes of the Province of San Miguel and of Choluteca (25).

6.20. In the Commission of 1601 in favour of Sebastián de Alcega, "Alcalde Principal" of Mines in Honduras, he was assigned jurisdiction separately over the Province of Honduras and over the "ville de Choluteca de la province du Guatemala" (26) (emphasis added). His successors in this office were always also given the appointment of "Alcalde Mayor" of Mines of Honduras and of Choluteca in the Province of Guatemala". Among others can be mentioned the appointment of Juan de Espinoza Pedruja, who on 22 January 1618 was given the title of "Alcalde Mayor" of the Mines and their Registries in the Province of Honduras and of Acapoco and the township of Choluteca of the Province of Guatemala; the same title was conferred on Joseph de Orosco on 29 November 1634 and on Juan de Alvarado on 12 June 1652 (27). This

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24. Counter Memorial of El Salvador: Annexes: Vol. VII, p. 65.

25. Ibid.: Vol. VII, p. 73.

26. Memorial of Honduras: Annexes: p. 2283.

27. Counter Memorial of El Salvador: Annexes: Vol. VII, pp. 107 et seq..

demonstrates that Choluteca formed part of Guatemala, for which reason the documents executed at this time referring to Choluteca did not attribute jurisdiction to Honduras but to the Province of San Salvador, through Guatemala. This was the case, for example, with the document of 1590 annexed to the Memorial of Honduras (28) which refers to the islands in the Gulf of Fonseca.

6.21. It is this mention of Honduras, constituting a simple generic reference in the formal title of the "Alcaldes Mayores" of Mines, which disappears completely in the Eighteenth Century, when this "Alcaldía Mayor" was transformed into the "Alcaldía Mayor" of Mines of Tegucigalpa, which continued under the administrative control of Guatemala, something which is proved by the appointments of the "Alcaldes Mayores"; for example, on 14 July 1714 Manuel de Amezquita was appointed "Alcalde Mayor" of Mines of Tegucigalpa in the said Province of Guatemala; the same title was conferred on Francisco Barrutia in 1744, on Gerónimo de la Vega Lacayo de Briones in 1765, on Alfonso de Domezain in 1772, and on others (29). However, the islands of the Gulf of Fonseca were never part of the territory of the "Alcaldía Mayor" of Tegucigalpa but were always subject to the jurisdiction of the "Alcalde Mayor" of San Salvador and San Miguel.

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28. Memorial of Honduras: Annexes: pp. 2297-2299.

29. Counter Memorial of El Salvador: Annexes: Vol. VII, pp. 145 et seq..

6.22. The annexion in 1791 of the "Alcaldía Mayor" of Tegucigalpa to the Intendency of Comayagua constitutes complete proof that it did not form part of the jurisdiction of Honduras.(30) Honduras subsequently exercised administrative jurisdiction over the "Alcaldía Mayor" of Tegucigalpa for twenty five years, from 1791 to 1816, when it was ordered by Royal "Cédula" that the "Alcaldía Mayor" of Tegucigalpa should once again be separated from the jurisdiction of Comayagua and should pass once again to the jurisdiction of the President-Governor of Guatemala, thus becoming once again a province quite independent of Honduras and so remaining until the independence of Central America in 1821.(31) That is to say that the person who effectively exercised control in the Province of Tegucigalpa was the President-Governor of the Province of Guatemala and of all the area of its "Real Audiencia". What is most relevant is that, in all the descriptions of the "Alcaldía Mayor" of Tegucigalpa set out by Honduras in its Memorial or by El Salvador in this Counter Memorial, the islands of the Gulf of Fonseca never appear, as Honduras uselessly attempts to prove, either in the jurisdiction of Choluteca nor in the jurisdiction of Nacaome.

6.23. A document executed in 1625 sets out the concession and valuation of the taxes paid by the Indian population of the Island of Amapala

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30. Memorial of Honduras: p. 556.

31. Counter Memorial of El Salvador: Annexes: Vol. V, p. 48.

in the jurisdiction of San Miguel (32).

6.24. In 1667 there took place an incident to which reference is made in a document annexed to the Memorial of Honduras (33). The document in question is a letter addressed to the "Juez Reformador de la Cultura de Maíz" (a functionary charged with the collection of taxes arising out of the cultivation of maize), in which it was stated that his appointment in this capacity in the Province of San Miguel "should not be understood as covering the townships of the Islands of Conchagua, Teca, Miangola and the other islands situated in that sea and that he would not have jurisdiction over these islands". The Memorial of Honduras attempts to extract from this document the conclusion that, by virtue of this order from the local representatives of the Spanish Crown, San Miguel did not have jurisdiction over the islands.

6.25. However, this Order was issued as the result of a petition presented by the Indian Mayors of the Islands of Teca, Conchagua, and Meanguera in which they pleaded that this tax collector should not visit their townships "taking into account that the townships are so poor and so small that there are scarcely enough Indians to carry out the obligations and charges to which they are subject" (34). The "Real Audiencia" of Guatemala, the supreme

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32. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 3.

33. Memorial of Honduras: Annexes: pp. 2300-2301.

34. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 15.

civil authority of that Colonial Kingdom, agreed to this request, for the reasons set out by the Indians, and the manner found of executing this decision was to exclude jurisdiction over the islands from the powers conferred on such tax collectors. This incident in fact demonstrates that the general rule was that jurisdiction over the islands was exercised from San Miguel but, in this case, because of the poverty of the Indians and their express petition to this effect, this particular functionary was prohibited from exercising in the islands his specific jurisdiction to collect taxes. Indeed in their petition the Indians of the Islands of Teca, Conchagua and Meanguera stated that they were subject "to the jurisdiction of the "Alcaldía Mayor" of the City of San Salvador and of San Miguel". This abstention from exercising this specific jurisdiction over the islands in no sense signified that this jurisdiction had been transferred from the Province of San Salvador to the Province of Honduras; it was simply decided not to collect these taxes.

6.26. It was only in 1672 that the ecclesiastical jurisdiction of the Province of Honduras first reached the edge of the sea when the Parish of Choluteca was separated from the Bishopric of Guatemala and transferred to the Bishopric of Honduras. However, as has already been seen in Chapter V (35), this transfer of the ecclesiastical jurisdiction did not signify an automatic transfer or adjustment of

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35. Paragraphs 5.11.-5.16., pp. 147-151.

the civil jurisdiction so as to bring the two jurisdictions into line. This is shown by the document annexed to the Memorial of Honduras (36) which establishes that it was the authorities of the "Alcaldia Mayor" of San Salvador who were until 1688 - 16 years after the transfer of the Parish - responsible for the collection of taxes in the various districts of the township of Choluteca.

6.27. Further a document annexed to this Counter Memorial (37) shows that in 1677 Juan de Miranda wrote to the King of Spain about the collection of taxes in the islands and referred to the payment of the sums owed by the townships of La Teca and Miangola (or Meanguera) "in the Province of San Miguel". This jurisdiction by San Miguel over tax collection in the islands of Teca and Miangola in spite of the transfer of the ecclesiastical jurisdiction over Choluteca shows that Choluteca was not exercising jurisdiction over the islands; consequently, the mention of Choluteca in the document executed in 1682 which is annexed to the Memorial of Honduras (38) did not signify the exclusion of the jurisdiction of San Miguel or of San Salvador.

6.28. The Memorial of Honduras attempts to show that it was the "Alcaldia" of Tegucigalpa which, through Choluteca, had jurisdiction over the

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36. Memorial of Honduras: Annexes: p. 2284.

37. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 49.

38. Memorial of Honduras: Annexes: pp. 2303-2304.

islands of the Gulf of Fonseca. It cites a document executed in 1687 in which the "Alcalde Mayor" de Tegucigalpa certified the inability of the inhabitants of the Island of Miangola, who had not constituted themselves into any townships but had instead dispersed, to pay taxes because of an invasion of pirates and buccaneers. It is natural that this certification of poverty should have been executed by the "Alcalde Mayor" of the area where the displaced inhabitants of Meanguera had sought refuge just as it is logical that this same authority should have been the one which authorized and organized their instalation on "terra firma" and took the consequential measures arising out of this population movement. On the other hand, the Indians directed all the formal documents relating to the abandonment of Meanguera to the President of the "Real Audiencia" of Guatemala and it was the latter who charged the authorities closest to the area where the Indians had taken refuge with the task of taking the measures leading to their re-settlement.

6.29. The same reason, that is to say the territorial character of the exercise of jurisdiction, explains the fact that in 1678 the "Alcalde Mayor" of Tegucigalpa arrested and condemned an Indian who had kidnapped a minor within his jurisdiction and had then escaped to one of the islands (39). In the Minquiers and Ecrehos Case, the International Court of Justice considered that a

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39. Memorial of Honduras: Annexes: p. 2302.

similar measure, the transfer of a fugitive by the police of one island to another place to be tried "cannot be considered as an exercise of jurisdiction in respect of the island" (40).

6.30. The Memorial of Honduras affirms (41) that not only the Parish of Choluteca but also the Guardanía of Nacaome was by Order of the Spanish Crown assigned to the Bishopric of Comayagua in 1676 (42). However, the document presented by Honduras did nothing more than order the preparation of a Report and an Opinion on this possible addition to the jurisdiction. The final decision emerges from a document annexed to the Memorial of El Salvador (43) in which it was stated that "there is no reason to make this addition and the said Guardanía ought to be retained in the Bishopric of Guatemala as it has always been". Consequently the whole of the argument elaborated by the Memorial of Honduras as to the rôle of the Guardanía of Nacaome and its jurisdiction over the Islands of the Gulf of Fonseca rebounds against Honduras and becomes instead a proof of the arguments of El Salvador - this includes the passage from the document written by Fray Manuel Bendana, which has already been discussed in Chapter V (44).

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40. I.C.J. Reports 1953 p. 64.

41. Memorial of Honduras: p. 536.

42. Memorial of Honduras: Annexes: p. 2294.

43. Memorial of El Salvador: Annexes to Chapter 12, Annex 10.

44. Paragraph 5.25., p. 156, commenting on Memorial of Honduras: Annexes: p. 2296.

6.31. Further confirmation of the fact that the Guardanía of Nacaome was not assigned to the Bishopric of Comayagua in 1676 is provided by the "Real Cédula" executed on 25 January 1713 which states: "the ministry of the District of Nacaome, in the Province of San Miguel, having become vacant, Fray José Cordero is designated as Minister of the Faith" (45) (emphasis added).

6.32. The arguments of Honduras in relation to Choluteca and Nacaome are irrelevant since they never had jurisdiction over the islands. As has already been shown, Honduras did not even have the administrative control of the "Alcaldía Mayor" of Mines of Tegucigalpa during the colonial period up to 1821 but neither is this of any great significance since it was the Province of San Miguel, within the jurisdiction of San Salvador, which always had the administrative control of the islands. This is completely proved by a document of 1676 (46), in which the authorities of San Miguel complained that, in spite of the fact that they had exercised jurisdiction over the Indians of Amapala during time immemorial, the "Alcalde Mayor" of San Salvador was also attempting to exercise this jurisdiction and to this effect had written a letter (which they duly transcribed) to the Indians of Amapala, Teca and Conchagua. Both these documents fully confirm the jurisdiction of San Salvador and San Miguel over the islands.

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45. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 103.

46. Ibid.: Vol. VIII, p. 57.

(B) The Title Deeds and Other Documents of the Eighteenth and Nineteenth Centuries

6.33. The Memorial of Honduras presents [47] a Petition made in 1706 by the inhabitants of the township of La Teca, on one of the Islands of the Gulf of Fonseca, who had also been the victims of an invasion by pirates. The petition, which sought an exoneration from the payment of taxes and permission for the sale of land, was directed to the "Alcalde Principal" of San Miguel and declared that the township was "in the jurisdiction of the town of San Miguel". The "Alcalde" of San Miguel duly processed this request before the "Real Audiencia" of Guatemala, declaring that the whole of the southern coast was subject to his jurisdiction. A report was also sought from Fray Manuel Romero, the priest assigned to the jurisdiction of San Miguel in general and to the townships of Amapala in particular; he asked that the request made by the Indians of La Teca be granted, and this was duly done in San Miguel on 9 April 1706 [48]. This document is a clear affirmation of the jurisdiction of San Miguel, and consequently of San Salvador, over the islands. This is the first of the documents executed in the Eighteenth Century, during which this examination of the Title Deeds and Other Documents approaches the critical and decisive date of the independence of Central America in 1821.

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47. Memorial of Honduras: Annexes: p. 2317.

48. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 113.

6.34. In 1711 a collection of taxes was carried out in the Island of Miangola (Meanguera) and the document in which this is recorded clearly demonstrates that this island was within the jurisdiction of San Miguel (49).

6.35. In a document executed in 1740 (50) the "Alcalde Mayor" of San Salvador produced a description of his Province and, when enumerating the townships of San Miguel, mentioned the township of Santiago Conchagua which "has seventy four Indians, who look after the canoes used for crossing the arm of the sea which divides this Province from the Province of Nicaragua"; he also mentioned the township of Nuestra Señora de las Nieves de Amapala. It emerges clearly from this description of the Province of San Salvador that Conchagua, within the jurisdiction of San Miguel, had a common boundary with the Province of Nicaragua and was a sea port in which a watch was maintained. It is obvious that it was from this point that administrative control was exercised over the islands of the Gulf of Fonseca.

6.36. In 1750 a new count and numeration was made of the Indians of the township of Nuestra Señora de las Nieves de Amapala and the document in which this is recorded clearly states that Amapala was situated within the jurisdiction of San Miguel in the Province of San Salvador (51).

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49. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 219.

50. Ibid.: Vol. VIII, p. 155.

51. Ibid.: Vol. VIII, p. 219.

6.37. In the Case concerning the Arbitration Award of the King of Spain (52) there can be found a description of the Province of Honduras made by the "Alcalde Mayor" of Tegucigalpa, Baltasar Ortiz de Letona in 1743 (53). This was a Report drawn up in response to a "Real Cédula" executed on 19 July 1741 in which the King of Spain commanded that, with the object of obtaining the most detailed information possible as to the true state of his Provinces, the persons charged with their Government should produce the necessary Reports with the precision and detail which might be required for the King to obtain perfect knowledge of the population, number and importance of the townships of each jurisdiction, their inhabitants and their nature, the state and development of the Missions, the conversions and the new Missions created.

6.38. The "Alcalde Mayor" of Tegucigalpa informed the King that his territory had within its jurisdiction the districts of Tegucigalpa ..., Choluteca and Nacaome. When speaking of Choluteca, he mentioned that "Ce bourg est traversé par une rivière qui se jette dans la Mer du Sud six lieues plus loin près d'une île qu'on appelle Garay" (54). This was the only island mentioned in the Report. His references to Nacaome equally did not make the slightest mention of any islands in the Southern Sea

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52. Pleadings: Vol. I, p. 309 et seq..

53. See also Memorial of Honduras: Annexes: pp. 1-6.

54. Pleadings: Vol. I, p. 373.

nor of townships or inhabitants on those islands which were dependent on his jurisdiction. Nevertheless, the "Alcalde Mayor" concluded "On a énuméré en détail dans cette description les distrits ou cures qui forment cette Mairie Principal, les vallées et les villages que l'on trouve dans le territoire de chacun d'eux (55).

6.39. He added that his jurisdiction comprised a total of twenty-eight valleys, four towns, three townships of negroes, the town of Choluteca and twenty-three townships of Indians. When referring to the agricultural production of the area of his jurisdiction, he stated that it was very scarce "parce qu'ils n'ont pas où vendre ces produits parce qu'il n'y a aucun port de mer où l'on puisse les amener. Ainsi ces produits ne sont nullement estimés de ces gens qui, s'il y avait des ports, seraient portés dans leur propre intérêt à les utiliser" (emphases added) (56). The "Alcalde Mayor" concluded by stating that in his Report "se trouvent examinés tous les points au sujet desquels on m'a ordonné d'informer, sauf celui qui a trait à l'état et au développement des missions" (57).

6.40. This Report coincides with what Professor Rolin expressed in his arguments to the Court in the Case concerning the Arbitration Award

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55. Pleadings: Vol. I, p. 375.

56. Ibid.: p. 377.

57. Ibid.: p. 378.

of the King of Spain (58). Professor Rolin stated, referring to the "Alcaldía" of Tegucigalpa,

"la côte est étrangère à cet Alcaldía".

6.41. The Memorial of El Salvador presents (59) a Report drawn up in 1752 by the President of the "Real Audiencia" of Guatemala in which the conclusions drawn from the previous document discussed are confirmed. This Report states:

"being distant, as the "Alcaldía Mayor" of Tegucigalpa is thirty leagues distant from the Government of Comayagua referred to, and the said "Alcaldía Mayor" not having a sea port through which it could suffer an enemy invasion" (emphasis added).

This Report, emanating from the highest authority of the Capitanía-General of Guatemala, indicates that the "Alcaldía Mayor" of Tegucigalpa lacked jurisdiction over the islands since there are natural ports in the islands, such as the Port of Amapala in the Island of El Tigre. It would have been very difficult to exercise jurisdiction over islands from a coast which did not have any ports.

6.42. The document of ecclesiastical origin emanating from the Bishop of Guatemala in 1770 which appears as an Annex to the Memorial of Honduras (60) has already been discussed in Chapter V (61). According to this document, the Parish of

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58. Pleadings: Vol. II, p. 373.

59. Memorial of El Salvador: Annexes to Chapter 12, Annex 8.

60. Memorial of Honduras: Annexes: p. 674.

61. Paragraph 5.26..

Conchagua contains some islands in the Southern Sea, which is crossed in order to go to Nicaragua. These islands are the islands which are in dispute, although on only one of them are cattle grazed.

6.43. The Memorial of El Salvador presents a document of the highest importance, very close in date to the critical date of 1821, which sweeps away in a precise and categorical form all the doubts and divergences which could possibly exist as to whether San Miguel or Tegucigalpa exercised jurisdiction over the islands in the Gulf of Fonseca. The document in question is the proceeding commenced by Lorenzo de Irala before the "Juez de Tierras" of San Miguel, which was decided in 1766 on 12 July of that year (62).

6.44. The petitioner appeared before the "Juez de Tierras" of San Miguel and claimed that, off the coast where the township and port of Conchagua are located and opposite the lands and territories of Nacaome, there was an island between the island known as the Colina del Tigre and the Island of El Zacate or the Island of El Ganado, which island was desolate and uninhabited, and he asked that the Judge should proceed to carry out a measurement of this island, declaring that he was disposed to pay the value thereof to the Royal Treasury. This island is the Island of Exposición, very close to what is today the coast of Honduras. The "Juez de Tierras" declared

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62. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 172.

"that he is not certain if the island claimed belongs to this jurisdiction of San Miguel or the jurisdiction of Tegucigalpa, and with the object of not giving occasion for proceedings as to jurisdiction and of not committing an error", he decreed that "the claimant party address himself to the "Juez Principal de Tierras"" in Guatemala in order that the latter should decide the matter (63).

6.45. The Memorial of Honduras carries only as far as this point its reference to this matter, leaving the reader in suspense as to what the "Juez Principal de Tierrras" of the "Real Audiencia" of Guatemala actually decided. The Memorial of El Salvador, on the other hand, completes the picture by including as an Annex (64) the document which comprises the presentation of the matter by Lorenzo de Irala before the "Juez Principal de Tierras" of the "Real Audiencia" in Guatemala, petitioning that the latter Magistrate order the measurement sought from the "Juez de Tierras" of San Miguel. The "Juez Principal de Tierras" of the Real Audiencia in 1766 resolved the question of jurisdiction that had been raised in favour of San Miguel, ordering:

"that there be sent a despatch of assignment to the Sub-delegate Judge of the jurisdiction of San Miguel, in order that he should put into practice all the procedures which it is appropriate to carry out in Crown Lands in respect of which no person will cause

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63. Memorial of Honduras: Annexes: p. 2318.

64. Memorial of El Salvador: Annexes to Chapter 11, Annex 1.

him any impediment or any embarrassment" (65).

6.46. The Memorial of El Salvador (66) emphasises the significance of this judicial pronouncement since the Island in question is situated between the Island of Zacate and the Island of El Tigre. The decision of the "Real Audiencia" signifies that the jurisdiction of San Miguel extended as far as the Island of Exposición. This conclusion is confirmed by the appointments of military officers to exercise delegated authority in Nacaome. Both appointments, in 1769 and 1779 respectively, state that this delegated authority extended only as far as the Island of Zacate, the only mention of any island made in either decree (67).

6.47. The Memorial of Honduras (68) alleges that the islands of the Gulf of Fonseca were not included in the tour of the Province of San Miguel carried out by the functionary Sánchez de León in 1779. However it emerges from the Report of this tour that the functionary visited on foot or on horseback various different parts of the Province. It is therefore comprehensible that he did not attempt to reach, with the means of transport at his disposal, the islands of the Gulf of Fonseca, an omission which

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65. Memorial of El Salvador: Annexes to Chapter 11, Annex 1.

66. Memorial of El Salvador: Paragraph 11.2..

67. Memorial of El Salvador: Annexes to Chapter 11, Annexes 2 & 3.

68. Memorial of Honduras: p. 560.

in any event is totally lacking in significance from the jurisdictional point of view.

6.48. The Memorial of Honduras (69) claims that by means of a "Real Cédula" executed on 24 July 1791 was decided "l'incorporation "à l'Intendence de Comayagua de l'Alcaldía Mayor de Tegucigalpa et de tout le territoire de son Evéche"" (original emphasis). By emphasising the latter part of this quotation the Memorial of Honduras is trying to suggest that the incorporation of all the territory of this Bishopric brought with it all the islands of the Gulf of Fonseca and therefore transferred all these islands to the jurisdiction of Honduras.

6.49. However, as has already been shown in Chapter V (70), this is simply not the case. The Report of the Bishop Cadinaños of 20 October 1791 (71) listed all the Parishes and Curacies which comprised the Bishopric of Comayagua and in this list both the Parish of Choluteca and the Parish of Nacaome appear without any mention whatever of any town or valley or curacy in any of the islands of the Gulf of Fonseca. Neither does the description of the "Alcaldía Mayor" de Tegucigalpa made by Valle in 1763 and mentioned in the Memorial of Honduras (72) include any township or valley on the islands of the Gulf of Fonseca (73).

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69. Memorial of Honduras: p. 556.
70. Paragraph 5.22., p. 153.
71. Memorial of Honduras: Annexes: pp. 17-18.
72. Memorial of Honduras: p. 556.
73. Memorial of Honduras: Annexes: p. 13.

6.50. The Memorial of Honduras also cites (74) the description of the plan which indicated the Parishes of San Miguel made in 1804 by the Bishop of Guatemala. This document indeed contained references to islands but none of them was shown as being subject to the jurisdiction either of Tegucigalpa or of Comayagua. Two islands were shown as belonging to Conchagua and one to the Bishopric of León, something which, according to Honduras, amounted to an error. If there was indeed such an error, the error was to the detriment of San Miguel since that by this date the jurisdiction of San Miguel over the islands of the Gulf of Fonseca was already defined as a result of the decisive pronouncement of the "Juez Principal de Tierras" of the "Real Audiencia" of Guatemala in 1766. On the other hand, El Viejo is a port of Nicaragua situated on the River Estero Real some twenty miles from the Gulf. This demonstrates clearly that jurisdiction over the islands was only able to be exercised from ports such as La Unión in Conchagua and El Viejo in Nicaragua and not from a coast without ports such as that possessed by the "Alcaldía" of Tegucigalpa. This is confirmed by the Report of Gutiérrez Ulloa of 1807 (75), where it was stated that Conchagua was within the jurisdiction of San Miguel and had a common boundary with Nicaragua.

6.51. In the Report presented in 1804 by the

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74. Memorial of Honduras: p. 556.

75. Memorial of El Salvador: Annexes to Chapter 12, Annex 11.

Governor Intendent of the Province of Honduras, Ramón de Anguiano, (76) (this Report was also cited in the judgement in the Arbitration between Guatemala and Honduras (77)) the islands of the Gulf of Fonseca do not appear in the description either of Choluteca or of Nacaome, thus proving decisively that the Province of Honduras never exercised either civil or ecclesiastical jurisdiction over the islands during any part of the colonial period. In this Report, the Governor Intendant produced a detailed study of the whole of the Province of Honduras, indicating each Judicial District with the Spanish and Indian townships comprised within it; no mention whatever was made of the islands in the section describing Choluteca and Nacaome; on the other hand, in the section describing the port of Trujillo on the northern coast of the Province of Honduras, mention was made of the island of Roata.

6.52. Finally, the Memorial of Honduras (78) cites the Proclamation made in 1819 by the Governor of the Province of Honduras in relation to the invasion by pirates of the islands of the Gulf of Fonseca. This Proclamation, into which were insinuated certain reactionary comments contrary to the movement for independence that was already in existence at this time, has absolutely nothing to do with the determination of respective Provincial jurisdictions.

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76. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 195.

77. See Counter Memorial of El Salvador: Paragraphs 5.23.-5.24., pp. 154-155 (footnotes).

78. Memorial of Honduras: Annexes: pp. 2324-2325.

III. The Peaceful and Continuous Display of State Authority

6.53. Although the decision of the "Juez Principal de Tierras" of the "Real Audiencia" of Guatemala in 1766, resolving the question of the jurisdiction over the islands in favour of San Miguel, belonged to the period prior to the date of the Independence of Central America in 1821, a decision of this type, so precise and categorical, could not have failed to have an influence over the physical possession of the islands following the date of Independence. Indeed that is exactly what occured, as much during the period of the Central American Federation as upon its separation into the distinct Central American Republics.

6.54. An international incident occurred in 1847, namely the occupation of the islands ordered by the British Consul Chatfield. This functionary, who was acting under the instructions of the British Foreign Minister, Lord Palmerston, (79) and who was motivated by the strategic importance of being able to dominate the inter-oceanic route, could not possibly have made any mistake in the attribution of sovereignity over the different islands which he was coveting, that is to say the Islands of Meanguera, Zacate Grande and El Tigre. According to the document annexed to the Memorial of Honduras (80), Chatfield

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79. Memorial of Honduras: Annexes: p. 2231.

80. Memorial of Honduras: Annexes: p. 2229.

stated: "tenu du fait que ces deux Etats réclament, à mon avis, ces iles comme étant les leurs, je chercherai à me renseigner sur le façon dont ils considerèrent leur droit respectif". The result of this investigation which was carried out by Chatfield was that, in respect of El Salvador, he took as a pledge in 1849 "all the Islands of this Bay belonging to the actual State of El Salvador, especially Meanguera, Conchagüita, Punta de Zacate and Pérez" (81) and, on the other hand, in respect of Honduras, he limited himself to taking as a pledge in 1849 the Island of El Tigre (82).

6.55. The reaction of Honduras to this measure is very illustrative. Honduras did not appeal against the actions of Chatfield objecting that he had made a mistake in his juridical investigation as to the rights of the two States in respect of the islands and protesting against the attribution to El Salvador of the Islands of Meanguera, Conchagüita, Punta de Zacate and Pérez. Honduras confined itself to trying to recover the Island of El Tigre, not by force (the idea of doing this was discarded (83)) but rather by means of a diplomatic manoeuvre. This consisted of making an offer in 1849 to lease the Island of El Tigre to the United States of America for a period of eighteen months, thus producing a conflict of interests between the two Great Powers

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81. Memorial of El Salvador: Annexes to Chapter 11, Annex 11.

82. Memorial of Honduras: Annexes: p. 2236.

83. Ibid.: p. 2243.

of the day (84). The fact is that Honduras considered that the only territorial violation committed against it by the British was the occupation of the Island of El Tigre.

6.56. Whether or not the opposition between the United States of America and the United Kingdom was the determining reason for the handing back of the islands, the fact was that the British Government at the end of 1849 restored to El Salvador the Islands "belonging to El Salvador" in the Gulf of Fonseca which it had occupied. This was the moment at which Honduras, in the event that it believed that it had sovereignity over Meanguera and Meanguerita, should have formulated the appropriate Protest claiming the possession of these islands which were returned to El Salvador and which thus, in the absence of any controversy in this respect, remained under the peaceful occupation of the Government of El Salvador.

6.57. This was the situation when in 1854 there occured the negotiations for the concession or sale by Honduras of the Island of El Tigre to the Consul of the United States of America, Follin (85). The Memorial of Honduras states (86) that "La publication de ce rapport suscita une protestation d'El Salvador et le premier exposé par ce pays d'une revendication sur l'Ile de Meanguera". This description

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84. Memorial of Honduras: Annexes: pp. 2233 & 2239-2240.

85. Ibid.: pp. 2246-2247.

86. Memorial of Honduras: p. 500.

of what occurred bears no resemblance whatever to what really happened.

6.58. El Salvador protested by Note on 12 October 1854 (and circulated its Note of Protest to the remaining Central American States) against the possible concession or sale of the Island of El Tigre (87) on the grounds that this island belonged to El Salvador and that it considered that such an alienation "would affect the independence of Central America and the port of La Unión" (88). (This Protest was motivated by exactly the same considerations which later on led El Salvador to oppose the Bryan-Chamorro Treaty and gave rise to the Decision of the Central American Court of Justice of 1917.)

6.59. El Salvador did not, as is stated in the Memorial of Honduras, formulate any claim whatsoever to the Island of Meanguera, but quite the opposite. El Salvador, the peaceful and undisputed possessor of the Island of Meanguera since 1833, discovered to its enormous surprise that the Government of Honduras proposed to accept claims for measurement "in relation to the Island of Meanguera and to other islands, which are the recognised and undisputed property of El Salvador". In consequence El Salvador notified whoever might be proposing to carry out this usurpation of Salvadoreñan sovereignity that such actions would not be tolerated. This was stated in

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87. Memorial of Honduras: Annexes: pp. 2249-2251.

88. Ibid.: p. 2251.

terms which left no room for any doubt as to what could happen if these proposals were persisted with:

"In respect of (the islands) which are the property of El Salvador, my Government solemnly protests through me as intermediary against any alienation which may be made of its property, declaring that in order to prevent that action it will not hesitate in taking all the measures required by the situation."

This Note constitutes a categorical act of sovereignty in respect of the islands referred to.

6.60. A similar line was taken by the Commander of the Port of La Unión in his communication sent at this time to the Minister of War of the Government of El Salvador (89). He stated that "through information that I have received from the Island of El Tigre, I have become aware that personnel of the State of Honduras were proceeding to carry out the *measurement of the Islands of Meanguera, Punta de* Zacate and Ylca". He informed his superior that "he had gone in advance on the tenth of that month to the islands in question in order to obtain confirmation of these events and prevent them". The Memorial of Honduras admits (90) that "Finalemente la vente des îles ne se concrétisa pas".

6.61. It was because of these events that in 1854 Governor Guzmán of San Miguel sent to the Minister of External Relations of El Salvador two

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89. Memorial of Honduras: Annexes: p. 2248.

90. Memorial of Honduras: p. 506.

Reports dealing with the islands (91). The sovereignty of El Salvador over Meanguera was energetically affirmed and he stated that that island:

"belongs to this State, it may be on the grounds that what is involved is the immemorial domination by the authorities of this same State, or it may be on the grounds that what is involved is the proximity of our terra firma."

6.62. He added that there was in favour of El Salvador "the right of uninterrupted possession for time immemorial", indicating that on these islands "there are possession of Salvadoreñans, cultivated by them, and these belong to the jurisdiction of the authorities of the town of La Unión". After observing that the Island of Martín Pérez had been sold by the Government of El Salvador to a Salvadoreñan, he added:

"The same Islands of Conchagüita, Meanguera, Punta de Zacate and Ylca have been claimed some time ago by Salvadoreñans before the competent Tribunals of this State and none of these persons has ever thought of validating his action before the Government of Honduras, because of the conviction of all as to the fact that the State of El Salvador has remained with the property and legal possession of these islands".

6.63. Continuing with its policy of creating new settlements, fundamentally necessary in the light of its enormous population density, the Government of El Salvador continued engaging in sales of land on the islands which belonged to it in exactly the same manner as the Reports of Guzmán indicate that it had done previously. The Memorial of El

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91. Memorial of Honduras: Annexes: pp. 2252-2253.

Salvador (92) refers to the claims made in 1855 and 1856 for the judicial measurement and sale of land in the Islands of Punta de Zacate, El Conejo, Ylca, Conchagüita, Meanguera and Los Pericos. The Memorial of Honduras (93) claims that "L'achat de terres à titre privé, par des citoyens salvadoriens, ou de pays tiers, dans des îles du Golfe de Fonseca et l'éventuelle consignation, quoique contestée, desdits achats dans les registres de propriété d'El Salvador impliqueraient, selon lui, un changement de souveraineté. C'est manifestement confondre le transfert de fonds privés et celui de l'administation publique d'un territoire."

6.64. Contrary to what is stated by the Memorial of Honduras, it is not the argument of El Salvador that the judicial measurements and sales of land belonging to the State and the progressive installation of Salvadoreñan families on the islands implies a change of territorial sovereignity, given that the territorial sovereignity of El Salvador over its islands in the Gulf of Fonseca has not changed since this sovereignity has always existed and has always been vested in El Salvador. What El Salvador does argue is that the measurements, the sales and the subsequent registration thereof on the basis of judicial decisions signifies, in relation to land belonging to the State, the exercise of jurisdiction and of normal local administration which, if realised

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92. Memorial of El Salvador: Annexes to Chapter 11, Annexes 4 & 5.

93. Memorial of Honduras: pp. 552-553.

during a prolonged period, demonstrates the exercise and display of State authority over a group of islands.

6.65. This proposition is based on the judgement of the International Court of Justice in the Echreos and Minquiers Case. In reaching its conclusion in favour of the sovereignity of the United Kingdom over this group of islets, the Court took into account the exercise of jurisdictional and legislative activities and the fact that ,"It is established that contracts of sale relating to real property on the Ecrehos Islets have been passed before the competent authorities of Jersey and registered in the public registry of deeds of that island. Examples of such registration of contracts are produced for 1863, 1881, 1884 and some later years" (94). The Court reached the same conclusion in respect of the Minquiers Islets, stating that "It is established that contracts of sale relating to real property in the Minquiers have, as in the case of the Ecrehos, been passed before the competent authorities of Jersey and registered in the public registry of deeds of the Island. Examples of such registration of contracts are given for 1896, 1909 and some later years" (95). In this final case little more than fifty years was sufficient to enable the Court to reach this conclusion.

6.66. In the same manner, the Court took into

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94. I.C.J. Reports 1953 p. 65.

95. Ibid. p. 69.

account the fact that "Since about 1820, and probably earlier, persons from Jersey have erected and maintained some habitable houses or huts on the islets of the Ecrehos" (96), thus concluding that "These various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Ecrehos during a long period of time" (97). On the basis of legislative and jurisdictional activities and of these facts the Court concluded that "British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions in respect of the group" (98).

6.67. In 1878 the "Juzgado General de Hacienda" (the Principal Tribunal for Fiscal Matters) ordered a public auction of available land on the Island of Meanguera (99), something which constitutes a further jurisdictional activity in relation to this island.

6.68. In 1884 the Cruz-Letona Treaty was signed. This Treaty drew a frontier line which left within the jurisdiction of El Salvador the Islands of Meanguera and Meanguerita. As can readily be seen, the islands which Honduras claims are the sole subject matter of the dispute as to the islands were thus

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96. Ibid. p. 65.

97. Ibid. p. 66.

98. Ibid. p. 67.

99. Memorial of El Salvador: Annexes to Chapter 11, Annex 6.

attributed to El Salvador by the Cruz-Letona Treaty. The person who negotiated this Treaty in representation of Honduras, Francisco Cruz, has been the object of numerous bitter criticisms both in the Congress of Honduras and in the Memorial presented by the Government of Honduras. He has been accused of having exceeded the powers conferred upon him, of having contradicted his own earlier claims, of having yielded far too readily to the positions adopted by the other party in respect of the disputed land frontier, and so forth.

6.69. However none of these criticisms makes the slightest mention of Meanguera nor formulates the fundamental objection that he had handed over to El Salvador a part of the Hondureñan national territory. This fact is a conclusive demonstration that the claim of Honduras to Meanguera has been formulated without the slightest basis contrary to the Spanish Colonial Titles and contrary to a display of State activity by El Salvador for more than one and a half centuries and that this claim is not only unfounded but additionally emerged far too late to be relevant, having been produced in a meaningful manner only in the period subsequent to 1884 and in particular following the investigations of an extremely nationalistic form produced by Vallejo in 1899.

6.70. In 1893, continuing with its policy of populating and educating the inhabitants of the Islands, the Executive Power of El Salvador established a School for Girls on the Island of Meanguera in the Salvadoreñan Department of La Unión

(1). It would be really absurd if the sovereignity over an island, instead of depending on the exercise of peaceful and legitimate activities of State authority, were to be determined, as Honduras claims, by the purely fortuitous circumstance that more than three centuries ago, in 1604, it was the "Alcalde" of Tegucigalpa who charged a Spaniard who could not even sign his own name with the task of burning down dwellings, blocking up wells of drinking water, cutting down fruit trees and dismantling the Church on Meanguera, above all taking into account the fact that this "Alcalde" of Tegucigalpa, as has been shown in this Counter Memorial (2), was subject to the jurisdiction of the Governor of Guatemala and outside the jurisdiction of the Government of Honduras.

6.71. In 1894 the Government of El Salvador captured some armed forces of Honduras who had risen in insurrection against the Government of Honduras and had taken refuge in the Island of Meanguera. The Government of El Salvador declared that these armed forces had penetrated "onto the territory of the Republic", disarmed them and, in proof of the cordial relations maintained with the Government of Honduras of the day, placed at the disposition of that Government the arms and other munitions that had been confiscated. The Government of Honduras accepted these arms and ammunition without

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1. Memorial of El Salvador: Annexes to Chapter 11, Annex 7.
2. Paragraphs 6.15.-6.20, pp. 170-176.

making the slightest comment (3)

6.72. In 1899 Vallejo presented his Report to the Government of Honduras in which he argued the thesis which the Memorial of Honduras is now seeking to defend, namely that the islands of the Golfo de Fonseca belong to Honduras. The starting point and fundamental premise of his thesis was "Que les côtes du Golfe de Fonseca avec leurs îles adjacentes appartiennent au Honduras ab initio" (4). This phrase, the starting point of the thesis of Vallejo, is completely demolished by the declarations made in 1925 by Policarpo Bonilla when, as the official representative of Honduras in the Mediation with Guatemala, he recognised that, at the time of the constitution of the Province of Honduras, it did not have a coast on the Pacific (5).

6.73. The Twenty-Seventh Conclusion stated by Vallejo (6) is that "L'Ordre royal émis le 8 mai 1821 a confirmé en totalité les démarcations territoriales primitives du Honduras, et l'on voit ainsi la confirmation des limites de la province de Hibueras et Honduras de Gil Gonzalez Davila, primi occupantis". If this conclusion of Vallejo were correct, Honduras would still even today not possess

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3. Memorial of El Salvador: Annexes to Chapter 11, Annex 8.

4. Memorial of Honduras: p. 576; Memorial of Honduras: Annexes: p. 2341.

5. Memorial of El Salvador: Annexes to Chapter 12, Annex 2.B..

6. Memorial of Honduras: Annexes: p. 2332.

any coast which could give it access to the Golfo de Fonseca. The reality is that Vallejo ignored, among many other matters, the Royal "Cédulas" of 1563 and 1564.

6.74. All that now remains is to mention various actions by El Salvador displaying State authority during the course of this Century.

6.75. In April 1914, the Legislature of El Salvador approved a Law which authorised the Executive to open a Free Port on one of the islands of the Gulf of Fonseca (7). In May 1914, the Legislature of El Salvador similarly approved the contract for the construction and maintenance of this Free Port on the Island of Meanguera (8).

6.76. A further Law adopted in 1916 also referring to the territory of the Island of Meanguera converted into a township the Cantón of the Island of Meanguera of the Department of La Unión, under the name of Meanguera del Golfo, declaring that its jurisdiction would consist of the whole of that Island. The same Law also provided that in respect of judicial and administrative matters the new township would belong to the Judicial District of La Unión (9).

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7. Memorial of El Salvador: Annexes to Chapter 11, Annex 9A.

8. Memorial of El Salvador: Annexes to Chapter 11, Annex 9B.

9. Memorial of El Salvador: Annexes to Chapter 11, Annex 10.

6.77. Reference is made to this matter in the Judgement of the Central American Court of Justice in 1917 where "the establishment of a Free Port which the Government of El Salvador has decreed on the Island of Meanguera" is mentioned (10).

6.78. In the Minquiers Ecrehos Case, the International Court of Justice, in exactly the same way as had the Permanent Court of Justice in the Eastern Greenland Case, considered that the adoption of legislation referring to a particular territory constitutes the most conclusive proof possible of the display of State Authority. The Court stated in the Minquiers Ecrehos Case that it "attributes, in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation" (11). Referring to the inclusion of the Rocks of Ecrehos within the boundaries of the Port of Jersey, the Court stated that "this legislative Act was a clear manifestation of British sovereignity" (12). Exactly the same can appropriately be said in relation to these Laws of 1914 in relation to Free Ports.

6.79. Finally, as has been indicated by the Memorial of El Salvador (13), in 1966, by

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10. Judgement of the Central American Court of Justice: p. 704.
11. I.C.J. Reports 1953 p. 65.
12. Ibid. p. 66.
13. Memorial of El Salvador: Paragraph 11.14..

virtue of a Decree signed by the President of Honduras and by its Minister of External Relations, naturalisation was conceded to a person born on the Island of Meanguera in the Department of La Unión, it being expressly stated in this Decree that the petitioner was "Salvadoreñan, having been born in Meanguera, in the Department of La Union, in the Republic of El Salvador" (14). This action of those authorities who occupied the highest possible positions in relation to the international representation of the Republic of Honduras constitutes an undoubted recognition of sovereignity.

6.80. High functionaries of Honduras have recognised the exercise by El Salvador of State authority over Meanguera and Meanguerita. In the newspaper "Tiempo" of 20 January 1984 appeared declarations attributed to General Humberto Montoya, the Commandant of the Naval Forces of Honduras, who declared: "although historically the island belongs to Honduras, I would indicate that practically speaking the authorities are from El Salvador" (15).

6.81. On 24 January 1984, the Hondureñan daily newspaper "La Tribuna" published a report with photographs on this island of El Salvador entitled: "Meanguera: A land where everything is of the flavour of El Salvador." The journalist affirmed

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14. Memorial of El Salvador: Annexes to Chapter 11, Annex 12.

15. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 245.

in his report that (16):

"The influence which El Salvador has exercised in the course of 130 years is felt on a visit to the inhabitants of the island. The neighbouring country has shown concern for the inhabitants of Meanguera, has constructed means of communication, schools, sports facilities, a Municipal "Alcaldía", a Health Centre, and even a small garrison to protect them against anything that might happen.

"Many of the humble islanders said that they felt "proud to have the nationality of El Salvador. In the abandonment in which we have been for many years, only El Salvador has remembered us".

"The reason why the inhabitants of Meanguera engage in more commerce with El Salvador than with Honduras is simple to explain. In the Port of La Unión, in the Province of El Salvador of the same name to which, according to El Salvador, the island belongs, there are no problems from either the civil or the military authorities which prevent these people from travelling from one point to the other to seek their subsistence or on voyages of pleasure."

6.82. In the Hondureñan daily newspaper "La Prensa" of 17 January 1984, the Ambassador of Honduras in El Salvador, Dr. Roberto Suazo Tomé, was stated to have recognised on the previous day that El Salvador exercised a mandate over the island of Meanguera:

""This island is administered by authorities of El Salvador, they have tribunals of justice, there is a garrison, that is to say that at this moment El Salvador is exercising a mandate there", emphasised Suazo Tomé" (17).

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16. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 258.

17. Ibid.: Vol. VIII, p. 251.

6.83. In the Hondureñan daily newspaper "El Heraldo" also of 17 January 1984, when the Ambassador Dr. Suazo Tomé was consulted as to who exercised ownership of the said island, this representative of Honduras was categorical in affirming: "for no one can it be a secret that Meanguera is administered by the authorities of El Salvador, who exercise their mandate to such a degree that there exist police stations and public offices of the government of El Salvador (18).

6.84. In the Hondureñan newspaper "Tribuna" on 6 August 1986 there was published a declaration attributed to the President of the National Congress of Honduras, Carlos Orbin Montoya, who stated:

"The jurisdiction of El Salvador over Meanguera and Meanguerita has existed for approximately 200 years .... if we are reasonable we cannot make a fuss about something lost in the sense that we have not exercised sovereignity over these territories" (19).

6.85. These declarations reinforce the proofs presented by El Salvador in respect of its sovereignity over the islands of the Gulf of Fonseca.

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18. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 248.

19. Ibid.: Vol. VIII, p. 255.

CHAPTER VII

THE JURIDICAL STATUS OF THE GULF OF FONSECA

7.1. The Parties in dispute in this litigation are in agreement in considering the Gulf of Fonseca as an historic bay (1), whose offshore waters constitute exclusive waters for the common use of the three riparian States (2). Consequently, the Gulf of Fonseca constitutes a tri-national bay in which the three riparian States enjoy equal rights, including in particular the right of free access to and from the high seas (3). The Parties are in the same way in agreement that each State has, adjacent to the coast both of its continental mainland and of the islands which belong to it in the Gulf, an area of exclusive jurisdiction of one league or three nautical miles in width (4).

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1. Memorial of El Salvador: Paragraph 13.1.; Memorial of Honduras: pp. 597, 640 & 645.

2. Memorial of El Salvador: Paragraph 13.1.; Memorial of Honduras: pp. 608, 640 & 659.

3. Memorial of El Salvador: Paragraph 13.1.; Memorial of Honduras: p. 595.

4. Memorial of El Salvador: Paragraph 13.1.; Memorial of Honduras: pp. 681 & 685-686. This area of exclusive jurisdiction is described in the judgement of the Central American Court of Justice as territorial waters but, as is observed by Accioly in "Public International Law": Vol. II: Para-graph 940 (note) and as is also admitted by Honduras, this classification has to be attributed to an equivocation of the judges in so far as refers to the terminology employed.

7.2. All these fundamental aspects of the juridical status of the Gulf in respect of which there exists agreement between the Parties have been recognised by and are a result of the judgement of the Central American Court of Justice in 1917; indeed thus far Honduras is substantially in agreement with this judgement. The disagreement of Honduras with the judgement refers solely to the affirmation made by the Court to the effect that there exists a community or co-ownership ("comunidad o con--dominio" in the original Spanish text) over the waters of the Gulf outside the areas of exclusive jurisdiction of three nautical miles in width.

7.3. Nevertheless, the conclusion of the Central American Court of Justice that there exists community or co-ownership over these waters is the inevitable corrollary of the remaining characteristics of the Gulf accepted by Honduras, that is to say that what is under consideration is a tri-national historic bay in which the three riparian States enjoy equal rights and which for more than four and a half centuries has been and still is available for the common use of the riparian inhabitants. These characteristics inevitably lead to the conclusion that the juridical status of the Gulf is only capable of being one of co-ownership by the three riparian States of the waters beyond the areas of exclusive jurisdiction, exactly as was recognised and proclaimed by the Central American Court of Justice.

7.4. Co-ownership or condominium has been defined by El Erian as "joint sovereignity possessed

by two or more States over a defined territory" (5). The co-ownership so defined is a translation into the terminology of Public International Law of the fact that an area of water is used in common or in community by those States which have rights thereover. It is a common phenomemon in historic bays, in joint estuaries, and in frontier rivers and is the case in this litigation that waters are used in common by the riparian States. This signifies that, so far as fishing rights are concerned, any embarcation flying the flag of one of the riparian States is entitled, in common with all such embarcations, to fish in any part of the waters used in common; that, so far as navigation is concerned, embarcations of all flags are entitled to navigate freely, largely through the navigation channels which give access to the ports since "outside these channels navigation is dangerous because of the lack of depth and the existence of sand banks" (6); and that, so far as any problems of jurisdiction are concerned, where the embarcation in question belongs to one of the riparian States jurisdiction is determined by the flag and where this is not the case jurisdiction is determined by the port to which the foreign embarcation is heading or, if it is outward bound to the high seas, by the port from which it has most recently sailed.

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5. A.E. Erian: "Condominium and related situa-tions in International Law" (Cairo, 1952) p. 70.

6. This fact was mentioned in the judgement of the Central American Court of Justice as emerging from a source in Honduras (A.J.I.L. (1917) p. 703).

7.5. The jurisdiction of each State is thus exercised at different places and times without any conflicts arising as to the right thereto. Such a situation does not in practice give rise to any difficulties whatever, as is revealed in the present case by the fact that the Memorial of Honduras fails to mention any maritime incidents or conflicts of jurisdiction which could make either imperative or necessary a jurisdictional delimitation. The above is therefore the de facto situation and, what is more, a situation which is relatively common. Nevertheless the jurist obviously needs to know, in a situation such as this where waters are used in common, who is the sovereign thereof. And in the face of this question, the obvious response cannot be different from that which was given by the Central American Court of Justice: in such cases what is in existence is joint-sovereignity, in other words co-ownership or condominium.

7.6. Despite the above, Honduras denies any form of co-ownership. The fundamental criticism of the conclusion reached by the Central American Court of Justice set out in the Memorial of Honduras is that the concept of co-ownership is an inappropriate and antiquated concept that the Central American Court of Justice took from Private Law and which, consequently, does not exist in Public International Law and that, above all, such co-ownership can only come into existence as the result of a formal agreement which establishes it by means of a binding treaty.

I. Co-ownership in Multinational Bays and Estuaries

7.7. Far from being an inappropriate and

antiquated concept, co-ownership or joint sovereignity is particularly appropriate for and enjoys numerous contemporary applications to multinational gulfs, estuaries and bays; indeed this concept is especially appropriate in cases such as that of the Gulf of Fonseca, whose closing line, drawn from the headland of Punta Coseğüina in Nicaragua to the headland of Punta Amapala in El Salvador, is controlled by only two of the three riparian States, Nicaragua and El Salvador.

7.8. There has been for some time considerable discussion as to whether as a matter of principle it is legitimate according to Public International Law to close off multinational bays, whether or not also historic bays. (It is here appropriate to mention in passing that 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 occured in recent years, the Gulf of Fonseca has been converted into a juridical bay simply because it fulfils the pre-conditions 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.)

7.9. The traditional position as a matter of principle is represented in Oppenheim: "International Law", which, even in its Eighth Edition (edited by Lauterpacht), stated that, contrary to what occurs in the case of bays belonging to a single State, multinational bays cannot be closed off and

that, consequently, the territorial sea of the riparian States has to follow the line of the coast so that the major part of the waters of such bays constitutes high seas (7).

7.10. This traditional position has been opposed by many prestigious commentators by the use of arguments which are extremely difficult to refute. Thus C.C. Hyde states (8):

"When the geographical relationship of a bay to the adjacent or enveloping land is such that the sovereign of the latter, if a single State, might not unlawfully claim the waters as part of its territory, it is not apparent why a like privilege should be denied to two or more States to which such land belongs, at least if they are so agreed."

7.11. The same thesis is expounded in the Commentary to Proposals on Territorial Waters prepared at Harvard, where it is indicated that (9):

"If the same waters were bordered by the territory of one state only, that State would clearly be entitled, under Article 5, to treat all of the waters as inland waters. The power of two or more States should not be smaller than the power of one state in this respect if the states can reach an agreement."

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7. Oppenheim: "International Law" (8th Ed.): Vol. I: pp. 508-509.

8. C.C. Hyde: "International Law, chiefly as as interpreted and applied by the United States" (2nd Ed.): Vol. I: p. 475.

9. "Research in International Law, Harvard School, Territorial Waters": 23 A.J.I.L. (1929) Special Supplement: p. 274.

7.12. These considerations seemed extremely difficult to rebut. But, in contrast to other classical commentators who advanced no reasons whatever to justify the different treatment which they proposed for multinational bays, the French writer Gilbert Gidel did advance an argument which, in his view, justified the discriminatory treatment proposed. Gidel states (10):

"En écartant la construction d'une ligne transversale dans le cas de pluralité de riverains, on ne laisse au-devant des territoires respectifs des Etats riverains et de leurs laisses de basse mer qu'une bande de mer "territoriale" (et non pas d'eaux intérieures): or il est de la nature juridique de la mer territoriale de comporter le droit de "passage inoffensif". La Liberté des communications maritimes avec la mer ouverte des Etats riverains de la baie se trouve ainsi juridiquement assurée. Telle est la raison, simple y décisive, encore que non exposée par les auteurs, pour laquelle il y a lieu d'écarter la détermination de la mer territoriale à l'aide d'une ligne transversale tirée en travers de la baie, lorsque plusieurs Etats sont riverains de cette baie."

7.13. In other words, Gidel justifies the rejection of the territorial nature of multinational bays because of the necessity of securing free access to the sea for all the riparian States. It is obvious that he considers only the situation where the waters in question are not subject to a community or to co-ownership. This is the case, for example, in the Gulf of Aquaba. The two States which control the exit from this bay, Egypt and Saudi Arabia, regard their coastal waters as internal waters of exclusive jurisdiction

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10. G. Gidel: "Droit de la Mer": Vol. III: pp. 595-6.

for each of them. Consequently, Israel and Jordan, whose coasts are situated at the base of the bay, could not reach the high seas without the permission of Egypt and/or Saudi Arabia since in order to reach the high seas their embarcations would have had to cross the internal waters of either or both of these States. This consequence led the major maritime powers to reject the closure of this Gulf and so treat its waters as waters of the high seas, thus justifying the arguments of Gidel (11).

7.14. But in the case of the Gulf of Fonseca the difficulty indicated by Gidel disappears. Embarcations flying the flag of Honduras heading towards or proceeding from the ports of Honduras have free access from or to the high seas since these embarcations are using waters and navigation channels which are of common use and which, consequently, are under joint sovereignity or co-ownership.

7.15. Honduras is insisting on a delimitation but this would not be in its own interests if those interests are properly understood. This is for the following reason. Any delimitation which takes into account the indisputable sovereignity of El Salvador over the Island of Meanguera would inevitably result in the navigation channels which lead to the ports of Amapala and San Lorenzo in Honduras being closed to the shipping of Honduras simply because

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11. See Selik: "A consideration of the legal status of the Gulf of Aquaba": A.J.I.L. (1958) pp. 508-509.

these channels would then be internal waters subject to the exclusive jurisdiction of El Salvador (12).

7.16. If the final objective of a judicial decision is, as is indicated by the Memorial of Honduras (13), to bring to an end an international dispute, any delimitation in this case would, for the reason which has just been expounded, not bring about the disappearance of existing difficulties, since none at present exist, but would rather create difficulties for the future. On the other hand, the solution of this international dispute which would contribute to a truly definitive settlement would be the recognition of the indisputable sovereignty of El Salvador over the Islands of Meanguera and Meanguerita.

7.17. The problems which would arise in the Gulf of Fonseca in the event of a delimitation and those which could or actually do occur in other multinational gulfs and bays explain why, in many of these cases, the solution that has been adopted has also been that of the common use or community of the waters and the consequential joint sovereignty or co-ownership. The Belgian commentator Eric Suy has made the following statement in respect of multinational bays:

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12. Memorial of Honduras: p. 702: Map C-3.
13. Memorial of Honduras: p. 690.

"Si contrairement à l'opinion dominante dans la doctrine, on appliquait également à ces baies le principe de la ligne transversale, il se pose le problème non pas de la condition juridique des eaux situés derrière cette ligne, car ce sont des eaux intérieures, mais de leur attribution aux Etats dont les côtes sont baignées par elles. A ce propos on a proposé deux solutions différentes. La première consiste à partager ces eaux en parts divises entre les Etats côtiers, Cette solution n'a pas trouvé beaucoup d'appui parmi les auteurs, tandis que celle du condominium est plus répandue. Selon cette théorie, tous les Etats riverains auraient le droit de souveraineté sur la totalité des eaux de la baie." (original emphases) (14)

7.18. And the Dutch commentator Bouchez writes in his book entitled "The Régime of Bays in International Law" that (15):

"Adjudgment of a bay enclosed by more than one State implies that there are two possibilities: condominium and division of the bay. If the bay is enclosed by two States and each of them is situated at the entrance, a division may easily be brought about. In this way the objections raised above against the status of condominium are avoided. In all other circumstances, when one of the coastal States is not situated at the entrance, a condominium and division of the waters can have the same significance. In this situation the prevailing circumstances are decisive in the question whether a condominium or a division of the waters must be established. If the only communication of a State with the high seas is via a bay enclosed by more than one State, and the State itself is not situated at the entrance, of which Jordania is an example, the status of condominium is to be preferred. As a result of the status of

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14. E. Suy: "Les Golfes et les Baies en Droit International Public": Die Friedens Warte 34 (1957/58) p. 115.

15. Bouchez: "The Régime of Bays in International Law": p. 196.

condominium free communication with the high seas has been ensured for all coastal States, as in that case a State like Jordania borders immediately on the high seas." (original emphases)

And this commentator, referring to the situation of bays enclosed by more than one State, one of which is not situated at the entrance, subsequently adds that:

"If the coastal States exercise joint sovereignty over the bay there is no real problem concerning the status of the water area involved. In these circumstances the waters of the bay can without any objection be regarded as internal waters." (16)

"If, on the other hand, the waters of the bay are divided, all kinds of problems may arise." (17)

7.19. It therefore ought not to be surprising that the practice of States provides numerous examples of gulfs, bays, and estuaries where the status of co-ownership exists, either as the result of express stipulation or as the result of a long tern practice of joint utilisation of the waters in question. The commentator Bouchez, to whose work reference has already been made, indicates in a section of his work entitled "The Practice of States" various examples of such situations, such as the Estuary of the Rivers Ems and Dollart (18), the Estuary of the Wester Schelde

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16. Ibid. p. 173.

17. Ibid.. See also at p. 182 where he reiterates "If one of the coastal States is not situated at the entrance free communication can be safeguarded: A) when the waters fall under the régime of internal waters: ....; by the status of condominium"; see also at p. 184.

18. Ibid.. pp. 124-130.

(19), the Estuary of Lough Foyle and Lough Carlingford (20), the Bay of Figuier, Hendaye, in relation to Conference Island (21), the Gulf of Menton (22), the Gulf of Trieste (23) at the time that this work was written (in 1963), the Bay of Klek (24) prior to 1918, the Gulf of Sollum in the area of Macao (25), Cowie Bay (26), the Estuary of Sunderbanks (27), the Estuary of Klor Abdullah (28), Honduras Bay (29), the Bay of Manzanillo (30), and the Mouth of Capones (31). This really significant list of examples repudiates completely the contention of Honduras that the concept of co-ownership or joint sovereignity is antiquated, transitional, and solely produced as the result of a war.

7.20. To the list of examples provided by Bouchez it would also have been appropriate, at the time when his work was written (in 1963), to have added the Estuary of the River Plate, which was then

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19. Ibid. pp. 130-135.
20. Ibid. pp. 135-137.
21. Ibid. pp. 137-138.
22. Ibid. p. 138.
23. Ibid. p. 138.
24. Ibid. pp. 138-139.
25. Ibid. pp. 140-141.
26. Ibid. p. 142.
27. Ibid. pp. 142-143.
28. Ibid. p. 144.
29. Ibid. p. 159.
30. Ibid. p. 163.
31. Ibid. p. 168.

also subject to a régime of this kind. This Estuary in fact remained undelimited for a century and a half, during which period its waters were regarded as internal waters which were utilised by Argentina and Uruguay by virtue of a system of common user. The principal obstacle to any delimitation carried out on the basis of the principle of equidistance was the fact that the navigation channels, which constitute the useful part of the river and which have to be dredged frequently, are in one sector close to the coast of Uruguay and in another sector close to the coast of Argentina. This fact also presented difficulties in relation to any application of the criterion of Thalweg. Consequently a system of common user and co-ownership of the waters of this Estuary operated until 1973, when it was replaced by a complex Treaty comprising no less than Ninety-Two Articles. The provisions of this Treaty have certain similarities with the conclusion reached by the Central American Court of Justice in 1917 in that they establish an area of exclusive jurisdiction for each State and a central area whose waters are utilised in common. The Treaty also contains specific provisions relating to the exercise of jurisdiction, based primarily on the flag of the embarcation in question and the effect of the illicit action in question with a residual criterion based on the median line of the estuary. It is provided that, while the navigation channels belong to whichever State had constructed and maintained them, navigation therein is free for embarcations of all flags. Further, fishing rights in the area of common user can be freely enjoyed by embarcations of both riparian States. The Treaty also establishes an Administrative Commission to enforce

the application of its provisions, which apart from those already mentioned include regulations relating to pilotage, contraband, the preservation of human life, salvage, pollution, and scientific research. This lengthy list of provisions clearly illustrates the complexity of any delimitation, albiet of a partial kind, of waters of this type.

7.21. Another example of this type of co-ownership actually exists in Central America in the Bay of San Juan del Norte and the Bay of Salinas between Nicaragua and Costa Rica. This co-ownership was also established by the Central American Court of Justice which stated (32):

"The Bay of San Juan del Norte and of Salinas are common to the two Republics and, consequently, the juridical principle of co-ownership is maintained in both terminal points of a possible canal."

II. The Establishment of a System of Joint Sovereignty or Co-ownership does not require any formal agreement

7.22. The criticism of the decision of the Central American Court of Justice in 1917 which is made most insistently in the Memorial of Honduras is that the establishment of a system of co-ownership such as that upheld by that decision inevitably and undoubtedly requires a formal agreement of all the affected States. The Memorial of Honduras only cites one authority in support of this proposition, namely

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32. Manuel Castro Ramírez: "Cinco años en la Corte de Justicia Centroamericana" (San José, Costa Rica (1918)) p. 124.

the Italian commentator Cavaglieri. However, this commentator is nothing like as radical as the Memorial of Honduras suggests: he does not regard such a formal agreement as actually indispensable since he clearly states that a de facto agreement is quite sufficient. This is demonstrated by the following statement some paragraphs prior to the quotation cited in the Memorial of Honduras (33):

"Il se peut que l'établissement de la frontière sur certains points présente de telles difficultés qu'il soit impossible aux États intéressés d'arriver à un accord. Tant que cet accord n'est pas possible, on soumet le territoire pro indiviso à l'autorité commune des Puissances contestantes." (original emphasis)

7.23. Nor does Accioly share the view expressed by the Memorial of Honduras as to the need for an agreement formally entered into by means of a Treaty. This author writes (34):

"no existe, en tales casos, propiamente una coexistencia de dos soberanías sin únicamente la repartición de atribuciones entre dos o más potencias distintas, o el ejercicio de la competencia de cada uno en momentos diferentes.

"El condominio se funda siempre en un arreglo o tratado, que impide los conflictos de jurisdicción."

(in translation) "there does not exist, in such cases, a co-existence of two sovereignities as such but only a sharing out of jurisdiction between two or more different powers, or the exercise of the competence of each one at different moments.

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33. Cavaglieri: Recueil de Cours de l'Académie de Droit International: Vol. 26: p. 388.

34. Accioly: "Treatment of Public International Law": Vol. I: Paragraph 336: p. 258.

"The condominium is always based on an arrangement or a treaty, which prevents jurisdictional conflicts."

7.24. This fortunate and original intuition of Accioly to the effect that joint sovereignity or co-ownership can suppose the exercise of the competence of each State at different moments and can result not only from a Treaty but also from an informal arrangement is particularly valid in cases of maritime jurisdiction.

7.25. On land, the absence of any delimitation is not, in itself, sufficient to lead to a joint exercise of sovereignity since such an absence of delimitation is generally accompanied by de facto frontiers.

7.26. On the other hand on the sea, where human establishments cannot be set up, the situation is often different. The absence of any delimitation with the consequential absence of beacons, buoys and other means of denoting maritime frontiers together with the principle of free navigation for embarcations of all flags ensure that frequently the navigant or fisherman is not able to determine with precision in which jurisdiction he is or when he has passed from one jurisdiction to another. This in practice inevitably means that the different maritime authorities tolerate the parallel exercise of acts of jurisdiction by one another in different places and, as Accioly states, at different times, depending for example on the flag or the port of destination of the embarcation in question. This situation is translated into a tacit modus viviendi which, in

juridical terms, supposes a situation of joint sovereignity or co-ownership.

7.27. Even the Memorial of Honduras, in spite of its insistence on the need for a formal Treaty, goes so far as to state (35):

"Or on pourrait très éventuellement admettre, en l'absence de convencion formelle, qu'en dépit de son importance, un tel traité, appuyé sur une tradition longue y paisible, résulte d'une attitude concordante des trois Etats en cause, telle qu'elle se manifesterait dans leur législation interne y leur comportement réciproque. On serait alors confronté à une sorte de coutume locale trilatérale, dont le caractére consensuel serait sans doubte avéré."

And it must signify something that both the present Constitution of Honduras (in Article 10) and the 1950 Constitution of El Salvador (in Article 7) coincide in contemplating the possibility that the Gulf of Fonseca may be subject to a special régime ("a un régimen especial" in the original Spanish text).

7.28. An authoritative confirmation of the existence of cases similar to this "coutume locale trilatérale" (to use the words of the Memorial of Honduras) can be found in a work written by a Commander of the United States Navy, Mitchell P. Strohl, entitled "The International Law of Bays" This commentator devotes a chapter of this work to "Bays

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35. Memorial of Honduras: pp. 664-665.

within the Littoral of Two or More States", in other words multinational bays. On the basis of his experience, this Naval Officer affirms (36):

"Each bay of this type is in itself a special situation wherein the practices of the States concerned have usually evolved through the mutual recognition of their combined needs."

Further on he adds (37):

"In coastal waters, and in certain border zones, there is as a practical matter often a good bit of de facto joint sovereignity despite the presence of an actual boundary."

And he concludes by saying (38):

"Such local working arrangements will inevitably come into being whenever there is an undisturbed community of interest."

In the case presently being litigated, these working arrangements and practices do not exactly date only from yesterday!

7.29. In the present case, the informal agreement has been reinforced as a result of the process of succession to pre-existing rights. The utilization in common of the waters by all the riparian inhabitants has been developed over more than three centuries, supported by the unity of the dominio of the Spanish Crown from 1522 to 1821 subsequently followed by the dominio of the Central American Federation from 1821 to 1839. Upon the occurence of the division of that Federation into, for present

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36. Op.cit. p. 376.
37. Op.cit. p. 380 (note).
38. Op.cit. p. 380.

purposes, three Sovereign States, the same utilization in common of the waters continued for a further hundred and fifty years, generating in an automatic way during this period a system of con-dominio. There was no reason why the division of the Central American Federal Republic should have modified the status of these waters.

7.30. This demonstrates that the concept of the historic bay, recognised by both Parties as appropriate in the present case, contains an element of succession of States in Public International Law so far as concerns the juridical status of the Gulf, the status of its waters, and also the individual arrangements for the functioning of the region. It is for this reason difficult to accept the affirmation of Verzjil transcribed by the Memorial of Honduras to the effect that it (39):

"....n'est guère possible de formuler .... des règles de succession territoriale dans une baie qui, par le changement de souveraineté, cesse d'appartenir à un seul Etat, n'est gouvernée ppar aucune règle positive de droit".

7.31. In the first place, there is applicable the principle of Public International Law which establishes the transmission by way of succession of territorial arrangements and of the norms of a dispositive character - that is to say, the norms which impress a territory with a status which is permanently established. And in such a transmission by way of succession is included not only the status of the waters but also their treatment as a whole

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39. Memorial of Honduras: p. 610.

and the utilisation in common to which these waters have been and are subject. For three centuries, from 1522 to 1821, the Gulf was dealt with as a single unit enjoyed in common by all its users under the Spanish Colonial Administration and the same occured during the Federal period from 1821 to 1839. When the Gulf was transferred to the three riparian Central American States, this utilization in common continued, with the parcial exception of the three nautical miles closest to the coasts, and indeed continues up until the present day. Consequently what the Memorial of Honduras wishes to bring to an end is more than four and a half centuries, to be precise four hundred and sixty-eight years, of the arrangements and practices which comprise the utilization in common and the joint sovereignity of the waters. In the Grisbadarne Case, the Tribunal of Arbitration stated that (40):

"que, dans le droit des gens, c'est un principe bien établi, qu'il faut s'abstenir autant que possible de modifier l'état des choses existant de fait y depuis longtemps."

Quieta non movere.

7.32. In spite of this, the Memorial of Honduras persists in its rejection of the decision of 1917 in so far as that decision recognises the existence of a community or co-ownership, that is to say joint sovereignity, save in the case that this is established by a formal Treaty. But what is in

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40. J.B. Scott: "Les Travaux de la Cour Perma--nente d'Arbitrage de La Haye": p. 135.

issue now is not an appeal against that decision nor any correction or confirmation thereof but rather the determination of the extent to which this international precedent, established seventy-two years ago, has contributed to the process of recognising and fixing the present juridical status of the Gulf of Fonseca, which is precisely what has now to be decided by the Chamber of the International Court of Justice. Neither is in issue the replacement of the decision of the Central American Court of Justice, dictated specifically in relation to the Gulf of Fonseca, by the Advisory Opinion of the Permanent Court of Justice in the River Oder Case, repeatedly invoked in the Memorial of Honduras in spite of the fact that it has nothing whatsoever to do with the case in hand since that Opinion concerned the Principles of Public International Law concerning rivers, not the International Law of the Sea, and did not produce, as a result of the decision handed down, either any necessity or any need for any delimitation. It is even less possible to understand the reason for the invocation by Honduras of the Helsinki Rules governing International Drainage Basins which are in any event today rejected by States in general (41).

7.33. The Central American Court of Justice, in establishing for the Gulf of Fonseca a régime

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41. See J. Sette Câmara: "Pollution of Inter-national Rivers": Recueil des Cours: Vol. I: pp. 125 et seq..

in the explicit form of a territorial sea for each of the riparian States and of a maritime area subject to con-dominion, established a juridical definition which was sui generis, derived from the particular individual nature of the said historic bay; a juridical definition whose establishment was indispensable in order to derive therefrom the rights and obligations of the riparian States. This definition is not litigious, but is rather a prerequisite of the actual litigation and, for this reason, is, in every sense, of a declaratory nature.

7.34. El Salvador contends in its Memorial that by reason of the decision of 1917 and on the basis thereof there was created in the Gulf what the writers on Public International Law describe as an Objective Juridical Régime, valid erga omnes, which has been consolidated with the passage of time and which has obtained the recognition by and the acquiescence of States in general and in particular of the Maritime Powers, who have never placed in doubt the character of the Gulf as a Bay exclusively belonging to its three riparian States while at the same time they have benefitted from the right of innocent passage proclaimed by the decision of 1917.

7.35. The teachings of publicists on Public International Law recognises the existence of what is called Objective Juridical Situations or Régimes, destined to establish a permanent state of affairs and characterised by the bringing into existence of rights in rem, valid erga omnes, in respect of territories, maritime zones, sea and river routes of communication, navigation channels,

demilitarised or neutral zones, and so forth. Until not long ago the writers considered these Objective Juridical Régimes in relation to the question of the effect of Treaties on third party States (42).

7.36. However, as from the date of the discussions in the International Law Commission which drew up the Vienna Convention on the Law of Treaties, it has been recognised that today Objective Juridical Régimes go well beyond the field of the Law of Treaties. It was then agreed that such régimes do not originiate exclusively in formal Treaties but can also come into existence as the result of the recognition of established situations, as the result of express or tacit acquiescence, or as the result of the consolidation of a state of affairs which is valid erga omnes on the basis of Customary Law. It was accepted unanimously at the Meeting of the International Law Commission in 1964 (43) that,

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42. For example: McNair: "Law of Treaties": pp. 256-259; Pousseau: "Principles de Droit International": pp. 461-464 & 477-484; Fitzmaurice: "Fifth Report on the Law of Treaties": Yearbook of the Commission of International Law 1960: Vol. II: pp. 72-107.

43. See the discussion of the proposed Article 63 by the Special Rapporteur: Yearbook of the International Law Commission 1964: Vol. I: Paragraph 30, p. 101; Paragraphs 38 & 39, p.102; Paragraph 50, p. 103; Paragraphs 6 & 10, p. 104; Paragraphs 13 & 19, p. 105; Paragraphs 27 & 29, p. 106; Paragraph 40, p. 107; Paragraph 47, p. 108; Paragraph 9, p. 111; Paragraph 28, p. 113; and Vol.II: pp. 26-30.

strictly speaking, these régimes do not constitute exceptions to the Principle pacta tertiis nec nocent but that they can be created as a result of the factors mentioned above when there is agreement on the part of those States who possess specific territorial jurisdiction over the areas affected by the establishment of these Objective Juridical Régimes.

7.37. And the acquiescence or recognition by States, in particular those especially affected, which is the essence of an Objective Juridical Régime, can be given just as much in respect of a situation arising out of a Treaty as in respect of an Objective Juridical Régime which arises out of, for example, a Domestic Law containing a Declaration of Neutrality or an International Judicial Decision, such as the decision of the Central American Court of Justice in 1917. This is so because the acceptance or recognition by the International Community can occur in respect of all Objective Juridical Régimes, whatever may be their source. What is necessary in order to accept the effect erga omnes of an Objective Juridical Régime is not the knowledge of how it originated, whether in a Treaty or in a Judicial Decision, but whether there is tacit or express acceptance by the States involved and in particular by those with specific territorial jurisdiction over the territory or the area affected.

III. The Attitude of Honduras in relation to the Decision of the Central American Court of Justice in 1917

7.38. The discussion carried out in the two

preceding sections of this Chapter necessarily requires an examination of precisely what has been the attitude of Honduras towards the decision of the Central American Court of Justice in 1917.

7.39. Honduras argues in its Memorial that the decision of 1917 cannot be utilised as an argument against Honduras because that State was neither a Party to nor intervened in the proceedings but instead on the contrary sent to the Court a Note of Protest in which Honduras expressed its opposition to the claim of El Salvador as to the existence of co-ownership or joint sovereignity in respect of the waters of the Gulf.

7.40. El Salvador is not arguing that the decision of 1917 is binding upon Honduras by the doctrine of res judicata exactly for this reason, namely that Honduras neither was a Party to nor intervened in the proceedings. What El Salvador is arguing, however, is that, from the moment that El Salvador commenced these proceedings, Honduras adopted positions and attitudes which made extremely clear its acquiescence with the three principal conclusions which resulted from the decision, that is to say that the Gulf has the status of an historic bay, that its waters have the status of internal waters, and that there exists a régime of community, co-ownership or joint sovereignity over such of its waters as lie outside the area of exclusive jurisdiction, that is to say over such of its waters as are more than three nautical miles from the coast.

7.41. In order to define the attitude of Honduras

it is crucial to analyse precisely the scope and subsequent treatment of the Note of Protest sent by Honduras against the claim of El Salvador; this Note was communicated to the Court, who in turn transmitted it to the Parties to the litigation, who duly responded thereto, and its contents were expressly taken into account in the decision subsequently handed down. This Note of Protest by Honduras to El Salvador, presented before the judgement of the Court had been handed down, questioned the extent of the claim of El Salvador, which had requested the Central American Court of Justice to consider all the waters of the Gulf as subject to the régime of co-ownership. In its Protest Honduras stated that "it has not recognised and does not recognise any régime of co-ownership with El Salvador or with any other Republic over the waters which belong to it in the Gulf of Fonseca" (emphasis added) ("no ha reconocido ni reconoce estado de condominio con El Salvador, ni con ninguna otra Republica en las aguas que le corresponden, del Golfo de Fonseca" in the original Spanish text).

7.42. This Protest by Honduras did not have the global effect which the Memorial of Honduras seeks to attribute to it. The reference made by Honduras in making its Protest to "the waters which belong to it" in the Gulf referred merely to the waters covering the area up to three nautical miles from its coasts, not to the remaining waters of the Gulf outside this area of exclusive jurisdiction. As is indicated in the Memorial of El Salvador (44), this

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44. Memorial of El Salvador: Paragraphs 13.6. & 13.7..

limited scope of the Protest of Honduras emerges extremely clearly from official statements of a public nature made at the time both by the Foreign Minister and by the President of the Republic of Honduras.

7.43. The Foreign Minister of Honduras first established that the Court had in its judgement drawn a distinction between two different areas of the Gulf, the area up to one league or three nautical miles from the coasts, which was held to be subject to the exclusive jurisdiction of the appropriate riparian State, and the area outside that limit, which was held to be enjoyed in common under a régime of co-ownership or joint sovereignty. He then declared himself to be satisfied and so in no sense attributed to his Note of Protest the global effect now alleged by the Memorial of Honduras. This clarification of the scope of the Note of Protest was made by the Foreign Minister of Honduras in a statement to the Congress of Honduras, as set out in the actual judgement of the Central American Court of Justice, in which various paragraphs of the Report presented on 5 January 1917 by the Foreign Minister of Honduras to the Congress of that country are transcribed (45). In this Report, the Foreign Minister stated that:

"He believed that he was obliged to protest, as indeed he did, when he became aware that the claim referred to alleged co-ownership over all the waters which comprise the Gulf of Fonseca, considering that the régime of co-ownership between the three riparian

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45. A.J.I.L. (1917) pp. 716-717.

Republics existed even in the waters adjacent to the coasts and islands of Honduras, over which there extends, without dispute, the sovereignity of the Republic, as exclusive owner of the same, and in which it has exercised and is exercising its jurisdiction, which is duly recognised in public documents by the very Government of El Salvador" (emphases added).

"The Government has decided that, whatever may be the juridical status subject to which the Gulf of Fonseca ought definitively be considered to be beyond the territorial waters, in so far as concerns these territorial waters it cannot recognise co-ownership with any other Republic without compromising its territorial integrity" (emphases added).

In the face of this extremely precise clarification in which the Foreign Minister of Honduras restricted the scope of the Protest of Honduras to its three nautical miles of territorial waters, the Court stated:

"This Tribunal cannot do less than give to the Protest the scope clearly expressed by that high funcionary."

7.44. It emerges from the preceding considerations that the formula adopted by the judgement, that is to say an exclusive area of three nautical miles of territorial waters followed beyond that limit by an area of waters enjoyed in common subject to a régime of co-ownership or joint sovereignity, responded to the Protest formulated by Honduras. Honduras presented to the Court an intermediate argument falling between the position of El Salvador alleging total co-ownership and the position of Nicaragua denying any co-ownership whatsoever and the Court, after hearing the arguments of the Parties to the litigation, accepted the point of view of Honduras. It is also clear that Honduras declared, through its Foreign Minister, total indifference as to the definitive juridical status of the area utilised

in common ("whatever may be the juridical status subject to which the Gulf of Fonseca ought definitively be considered to be beyond the territorial waters"), provided that the exclusive nature of the three nautical miles of coastal waters was respected.

7.45. Further, the express and definitive agreement of Honduras with the decision of the Court in its totality emanates from no less a person than the President of that Republic who, in an official document which is annexed to this Counter Memorial (and which, through inadvertence, was not annexed to the Memorial of El Salvador), made the following statements.[46] He first stated that the judgement of the Central American Court of Justice had produced "satisfactory results and [was] in accordance with the objectives of its instituion" and then subsequently stated:

"This Tribunal, in deciding the question raised by the Government of El Salvador against the Government of Nicaragua in respect of the Bryan-Chamorro Treaty, has recognised the rights which correspond to Honduras in the Gulf of Fonseca; a recognition which is in perfect harmony with the Protest of this Government against the claims of El Salvador in relation to the territorial waters up to where the rights of sovereignity of Honduras are extended."

There therefore existed both an acceptance by the Central American Court of Justice of the point of view maintained by the Protest of Honduras and, at the same time, an acceptance on the part of Honduras

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46. Message to Congress published in La Gaceta Oficial of 3 January 1918. Counter Memorial of El Salvador: Annexes: Vol. VIII, p. 276.

of the régime established by the judgement in that the President of Honduras declared that the judgement recognised "the rights which correspond to Honduras in the Gulf of Fonseca".

7.46. As the International Court of Justice stated in the Nuclear Tests Case (47):

"It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific."

Referring in particular to public declarations by the President of a Republic, the Court added (48):

"There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State."

7.47. Further, in the Case relating to the Validity of the Arbitration of the King of Spain, Honduras argued that (49):

"les déclarations dont le Gouvernement du Honduras tire argument sont celles que le Président de la République de Nicaragua y le ministre des Affaires étrangères de ce pays ont faites publiquement, devant l'Assemblée législative de ce pays.

"Ces diverses déclarations .... ne pouvaient être interprétées que comme une confirmation solennelle de l'acquiescement sans réserve donné à la sentence."

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47. I.C.J. Reports 1974: Paragraph 43, p. 267 & Paragraph 45, p. 472.

48. Op.cit.: Paragraph 49, p. 269 & Paragraph 51, p. 474.

49. I.C.J. Pleadings: Vol. I: p. 511.

The Court, on the basis of these declarations, stated:

"De l'avis de la Cour, le Nicaragua, par ses déclarations expresses et par son comportement, reconnu le caractére valable de la sentence et il n'est plus en droit de revenir sur cette reconnaissance pour contester la validité de la sentence." (50)

7.48. If Honduras were really radically opposed to the régime of community, co-ownership or joint sovereignity in the waters utilised in common outside the area of exclusive jurisdiction, it ought immediately to have manifested its rejection to the formula adopted by the judgement. Honduras cannot allege that this régime was unknown to it given that it received the text of the judgement. As the International Court of Justice stated in a comparable situation (51):

"The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations."

And this view permitted the Court to conclude that the system in question could not be opposed by a State which had engaged in a prolonged abstention from making any Protest in a matter which was of interest to it (52). In addition to the above argument, it should also be remembered that the Central American Court of Justice had a Judge from Honduras, who voted in favour of the régime of community or co-ownership and that Honduras was obliged by Article 25 of the

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50. I.C.J. Reports 1960 p. 212.

51. I.C.J. Reports 1951 p. 139.

52. Ibid..

Convention of 20 December 1907 which created the Central American Court of Justice to lend moral support to its decisions.

7.49. Thus, far from repudiating the régime established by the decision of 1917, the Government of Honduras, through the President and the Foreign Minister of that Republic, manifested its welcome of the decision, emphasised that the decision took account of the Protest of Honduras, and showed total indifference in relation to the status of the waters outside the area of three nautical miles of exclusive jurisdiction.

IV. Other Attitudes Adopted by Honduras

7.50. To the above-mentioned acquiesence of Honduras in 1917, it is appropriate to add that during the period of more than seventy years that has passed since 1917, Honduras has not only not formulated any protests or reservations in relation to the juridical régime established by the decision of 1917 but, on the contrary, has continually taken advantage of the communal character of the co-ownership or joint sovereignity of the waters of the Gulf, utilising its navigation channels, even those closest to the mainland and island coasts of El Salvador, as the means of access to its ports of Amapala and San Lorenzo and as the means of access from those ports to the high seas. The utilisation in common of the waters of the Gulf of Fonseca is also apparent in relation to fishing rights and to the policing of smuggling, as is indeed revealed by documents annexed to the Memorial of Honduras.

7.51. So far as concerns access to the internal waters of the Gulf, the position is regulated by the provisions of the Treaty of Peace and Friendship of Central America (Tratado de Paz y Amistad de Centro América) of 20 December 1907. Article IX of this Treaty contains the following provision:

"The Merchant Shipping of the Signatory States will be regarded as national vessels within the seas, coasts and ports of the said States, they will enjoy the same exemptions, franchises and concessions as such national vessels and will not pay any fees nor be subject to any charges other than those which are paid by or to which are subject the embarcations of the State in question."

This Treaty was signed in Washington on the same day as the Convention for the establishment of a Central American Court of Justice and for this reason the Central American Court of Justice was obviously very aware of the Treaty when it handed down its decision in 1917.

7.52. In so far as concerns the problem of controlling smuggling operations, the Convention of 1874 set out in the Annexes to the Memorial of Honduras (53), established well before the decision of 1917, is not in any way inconsistent with that decision but rather coincides exactly with the conclusions contained therein. From this Convention it can be inferred that there existed an area of three nautical miles of exclusive jurisdiction adjacent to the coasts, which area was at that time erroneously described as territorial sea, and the two signatory

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53. Memorial of Honduras: Annexes: p. 2382.

States agreed reciprocal rights of hot pursuit into these areas of exclusive jurisdiction in respect of smuggling operations. The Convention contains no provisions in respect of the waters outside this "territorial sea", something which obviously implies that any pursuit of smugglers in these waters and any subsequent exercise of jurisdiction in respect thereof could be carried out by both States "in different places and at different times" (to use the formula of Accioly), with each State acting in respect of embarcations flying its respective flag.

7.53. The subsequent Convention of 1878, also set out in the Annexes to the Memorial of Honduras (54), carried matters a stage further by providing that the waters of the Gulf were open to both Republics for the purposes of controlling smuggling operations; in other words, an exception was made to the normal régime by virtue of a reciprocal grant of the right to board embarcations flying the flag of the other State. Nowhere in either of these Conventions is there any recognition of "une repartition des zones de compétence" as is claimed in the Memorial of Honduras (55) but quite the contrary; the Convention of 1874 merely conferred a right of hot pursuit of smugglers into waters of exclusive jurisdiction while the Convention of 1878 merely excluded for the specific purpose of controlling smuggling operations the normal rule that jurisdiction

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54. Memorial of Honduras: Annexes: p. 2382.

55. Memorial of Honduras: p. 677.

follows the flag of the embarcation in question both within the area of exclusive jurisdiction and in the area utilised in common.

7.54. Further, in so far as concerns fishing rights, it is clear that in the Note of 1925, set out in the Annexes to the Memorial of Honduras (56), the fisherman of San Alejo sought permission to fish in the waters of Honduras, that is to say in waters within the area of exclusive jurisdiction of three nautical miles which had been recognised by the decision of 1917. Honduras duly granted the permission sought, an action clearly supported by the decision of 1917.

7.55. Similarly, the Note of 1938, also set out in the Annexes to the Memorial of Honduras (57), reveals that the permission to fish was granted by Honduras not as a matter of course but with the prior authorization of the Commander of the Port of Amapala. The fishing in question was carried out within the area of exclusive jurisdiction of three nautical miles. The recognition that both Honduras and El Salvador have such an area of exclusive jurisdiction of three nautical miles is in no way incompatible with the existence of co-ownership or joint sovereignity outside this area of exclusive jurisdiction - to the contrary, the existence of such an area of exclusive jurisdiction is itself based

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56. Memorial of Honduras: Annexes: p. 2385.
57. Memorial of Honduras: Annexes: p. 2386.

on the decision of 1917. The Memorial of Honduras itself recognises (58) that Honduras discounts Article 621 of its Civil Code which provides for an area of exclusive jurisdiction of twelve nautical miles; this recognition amounts to accepting and complying with the decision of 1917 which recognised that Honduras has an area of exclusive jurisdiction of only three nautical miles.

7.56. The Memorial of Honduras, in seeking to oppose the Decision of 1917, even goes so far as to invoke the Cruz-Letona Convention of 1884, which was in any event repudiated in toto by the Congress of Honduras, in spite of the fact that this Convention not only recognised the sovereignity of El Salvador over Meanguera and Meanguerita but is also thirty-three years earlier in time than the decision of 1917.

7.57. What is more, the Memorial of Honduras goes even further by invoking the proposals formulated in 1985 in the Meetings of the Joint Boundary Commission, forgetting completely that the International Court of Justice has repeatedly (59) stated that:

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58. Memorial of Honduras: p. 681.

59. Nuclear Tests Case I.C.J. Reports 1974; Paragraph 54, p. 270 & Paragraph 57, p. 476; Chorzow Factory (Jurisdiction) Case Series A No. 9, p. 19; Factory at Chorzow (Claims for Indemnity, Merits) Series A N° 17, pp. 49 & 62.

"the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement".

And in the Nottebohm Case, the Court stated (60):

"It would constitute an obstacle to the opening of negotiations for the purpose of reaching a settlement of an international dispute or of concluding a special agreement for arbitration and would hamper the use of the means of settlement recommended by Article 33 of the Charter of the United Nations, to interpret an offer to have recourse to such negotiations or to such means, consent to participate in them or actual participation, as implying the abandonment of any defence which a party may consider it is entitled to raise or as implying acceptance of any claim by the other party, when no such abandonment or acceptance has been expressed and where it does not indisputably follow from the attitude adopted."

As Professor Reuter has demonstrated (61):

"si la négociation échoue les parties n'ont pas à craindre de se voir opposer dans une discussion de droit les projets d'accommodements qu'elles auraient consenti aux interêts adverse dans une phase des négotiations."

V. Summary and Conclusions

7.58. The régime of community, co-ownership or joint sovereignity in the historic bay of the Gulf of Fonseca, as duly recognised by the decision of the Central American Court of Justice in 1917, is nothing more than the corrollary and the translation into juridical terminology of the utilisation in common

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60. I.C.J. Reports 1955 p. 20.

61. Recueil des Cours: Vol. 103: p. 632.

of these waters by all the riparian States since 1522.

7.59. The régime of the utilisation in common, co-ownership or joint sovereignity of an area of waters or of part of the same is also applied in other multinational bays, gulfs, and estuaries, especially when one of the riparian States does not control the closing line in question, as a means of assuring free communication with the high seas for all the riparian States.

7.60. In the present case any delimitation, far from resolving existing differences, would in fact create difficulties which do not exist at the moment since such a delimitation would block with the waters of one State the navigation channels which give access to the other State.

7.61. A régime of community, co-ownership, or joint sovereignity does not necessarily have to be established by means of a formal treaty but can arise out of local agreements and practices, backed up by a long and continuous tradition of utilisation in common which has obtained the recognition of the International Community.

7.62. The juridical situation in the interior of the Gulf of Fonseca has been determined by means of a juridical status established over the course of time which fulfils the pre-conditions and possesses the characteristics of an Objective Juridical Régime. The essential (although not exclusive) constitutive element of this Objective Juridical Régime is the decision of the Central American Court of

Justice in 1917, whose contents and juridical scope will be expounded hereafter.

7.63. The said decision recognises in a positive manner that the Gulf of Fonseca constitutes an historic bay with the characteristics of a closed sea in which the rights of the three riparian States co-exist. So far as concerns the nature of these rights, the decision has produced a solution which combines the exclusive right, which was at that time recognised as applying to all coastal States, to an area of territorial sea with the necessity of formalising the community of interest of the three riparian States. This balanced solution consisted in the recognition of an area of exclusive jurisdiction of three nautical miles combined with a régime of co-ownership in the rest of the Gulf. The only exception to this régime of co-ownership is the part of the Gulf which was delimited between Honduras and Nicaragua in 1900; the Treaty of that date constituted for the Central American Court of Justice an established fact which it did not have the power to affect in any way whatsoever. In any event this Treaty, which is of course not binding on El Salvador, leaves outside its scope "a considerable area of waters belonging to the riparian States" (62).

7.64. The juridical scope of the decision of 1917 is that it has produced the basis of an Objective Juridical Régime, the necessary component

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62. A.J.I.L. (1917) p. 710.

elements of which are present - in particular, the acceptance thereof by the States of the region, including Honduras, and also by the great maritime powers, in particular by the United States of America.

7.65. The inherent elements of stability and permanence in respect of maritime frontiers (63) are applicable to this territorial status. The Objective Juridical Régime thus established upon the basis of the decision of 1917 ought not, consequently, to be questioned or be unrecognised today unless it appears to be incompatible with the contemporary Principles of the Law of the Sea. No such incompatibility in fact exists; to the contrary, there exist similar régimes in other multinational bays, estuaries and rivers.

7.66. The geographical, historical, and political reasons which inspired the decision of 1917 and the consequent constitution of the already mentioned Objective Juridical Régime continue to be valid at the present time. The modern Principles of the Law of the Sea are not opposed either to the concept of the historic bay or to the concept of co-ownership in the particular geographical and historical circumstances of the Gulf.

7.67. The Central American Court of Justice could not have failed to have taken into account when defining the juridical status of the Gulf of

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63. Emphasised in the Aegean Sea Case.

Fonseca both its geographical configuration and its historical antecedents and, in this latter respect, the particular characteristic that its three riparian States had previously formed part of a single political entity; this latter factor necessarily leads these three riparian States to consider themselves fiercely united with the same vital interests within the community which they form. The fact is that, as between these three States, to use the words of Sir John Fischer Williams, "persiste toujours cette lutte vers une union fédérale, et dont les rapports mutuels sont, en conséquence, un peu plus qu'internationaux" (64).

7.68. The juridical situation of the Gulf of Fonseca, derived from its particular individual nature, does not permit the dividing up of the waters held in con-dominium precisely because what was in issue was not the recognition of common ownership of an object which is capable of being divided up but rather the definition of an object which had, for geographical reasons, an indivisible character given its configuration and dimensions. The Decision of the Central American Court of Justice recognised a territorial sea within the Gulf, something which is of course capable of being divided up, but the portion held in con-dominium is not, simply because of its own particular nature.

7.69. Since this is the case, it is a logical

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64. Recueil de Cours de l'Académie de La Haie: Vol. 44 (1933): p. 250.

consequence thereof that the declaration contained in the judgement in relation to this matter was binding not only on Honduras but on the whole world simply because it would have no juridical logic whatsoever to establish a con-dominium based on the nature of the object in question and also to leave open the possibilty that one of the co-owners might withdraw from his co-ownership. Consequently, the conclusions reached in the decision of the Central American Court of Justice in 1917 are completely binding on El Salvador as a Party to the litigation. Nicaragua is in exactly the same position. If the decision thus constitutes a res judicata for El Salvador and for Nicaragua, two of the riparian States in the Gulf, how can the decision conceivably be disregarded by Honduras, the third riparian State in the Gulf? For this reason, Honduras can at no time consider itself entitled to evade the consequences of this judgement.

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CHAPTER VIII

THE LEGAL POSITION OUTSIDE THE GULF OF FONSECA

8.1. The present Chapter replies to Chapter XX of the Memorial of Honduras.

I. The Jurisdiction of the Court does not extend to the Delimitation of a Maritime Boundary outside the Gulf of Fonseca

8.2. Chapter XX of the Memorial of Honduras begins with the assertion that:

"les Parties ont nécessairement doté la Cour de la compétence de délimiter les zones de la mer territoriale et la zone économique exclusive qui appartiennent au Honduras et à El Salvador respectivement."

The Government of El Salvador does not accept this assertion.

8.3. There are a number of cogent reasons why this contention is wrong and cannot be accepted.

8.4. First, it runs counter to the clear wording of the Special Agreement. The Government of El Salvador has already set out in Chapter 8 of its Memorial the considerations pertinent to this point and there is no need to repeat these arguments in detail. Suffice it to say, there could in literal terms be no clearer contrast than there is between the words of Question I "delimit the line..." and of Question II "determine the juridical status...".

8.5. Secondly, the Government of Honduras has improperly introduced into the argument a reference to a position taken by a party during negotiations. It is well established in International Law that proposals made by parties in the course of negotiations are entirely without prejudice to their position in subsequent litigation and may not be introduced into legal argument (1).

8.6. In any event, in this particular case the proposal made by El Salvador was advanced as part of a package and was entirely conditional upon acceptance by Honduras of the whole of that package. Honduras did not accept the package and El Salvador then withdrew the proposals (2).

8.7. Thirdly, the contention of Honduras assumes the very conclusion that it has to prove, namely that Honduras has a legitimate claim to some portion of the continental shelf and exclusive economic zone in the Pacific. El Salvador has not accepted that Honduras is legally entitled to any such portion but has been prepared to accept that the question of entitlement thus raised by Honduras should be decided by the Court. That is why the second question before the Court is formulated as it is, namely, as a request for a decision regarding the legal status of the maritime areas and not as a request for delimitation.

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1. Counter Memorial of El Salvador: Paragraph 7.57., pp. 247-248.

2. Memorial of Honduras: Annexes: pp. 917-918.

8.8. Fourthly, 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. As is well established, the Court must in any delimitation process take into account "equitable principles". Among the relevant considerations is the fact that part of the areas claimed by the two Parties may also be claimed by a third party. It is not possible for the Court to decide how much of the area in the Pacific fronting the closing line of the Gulf of Fonseca appertains to Honduras (on a supposition made only for the purpose of arguing this point) vis-à-vis El Salvador without knowing how much of the same area appertains to Nicaragua.

8.9. Fifthly, the claim of Honduras to an area of the Pacific outside the closing line of the Gulf of Fonseca assumes that in some way there is a frontage of the coastline of Honduras extending through the waters and the mouth of the Gulf into the Pacific. This assumption fails to take into account the fact that the Islands of Conchagüita, Meanguera and Meanguerita all belong to El Salvador while the Island of Farallones belongs to Nicaragua. These islands and the waters associated with them effectively deprive Honduras of direct contact with the Pacific through the mouth of the Gulf of Fonseca.

8.10. Finally, it is entirely premature for the Court to proceed to a delimitation in the Pacific having regard to the fact that there has been no negotiation between the Parties on the basis of

knowledge of the correct legal position in the area. Such knowledge is an essential pre-condition of meaningful and relevant negotiation. That is why the question of the legal position of the maritime spaces has been put to the Court. Only if that question is answered (contrary to the contention of El Salvador) in terms that call for some maritime delimitation, can relevant negotiations take place. There is no reason to assume that such negotiations, if they take place upon a correct juridical footing, will fail; but it is only if they do fail that there will be any reason, if the Parties then so agree, for the Court to enter into the question of delimitation.

II. The Rights of Honduras beyond the Gulf of Fonseca

8.11. The next section of the Memorial of Honduras is entitled "Les droits d'accès du Honduras, en tant qu'Etat côtier, aux eaux de la haute mer et par conséquent à ses propres eaux territoriales et zone économique exclusive au-delà de la ligne de fermeture du golfe".

8.12. The Government of El Salvador has not reproduced this heading as the heading of the present section of its Counter Memorial because it obviously cannot subscribe to the assumptions and chain of reasoning implicit in the heading used by Honduras. There is absolutely no self-evident connection between, on the one hand, the admitted rights of Honduras as a coastal State within the Gulf of Fonseca having a right of access to the high seas as acknowledged in the 1917 Judgement and, on the other hand, any claim by Honduras to a territorial

sea and exclusive economic zone beyond the closing line of the Gulf - a line which, it should be said, is merely a "closing" line and is not in any legal sense itself a baseline for the construction of further maritime claims in the Pacific. The use of the words "par consèquent" in the heading in the Memorial of Honduras does not by itself establish the connection and, as will be seen, the substance of the argument in the Memorial of Honduras does not do so either.

8.13. The Government of El Salvador notes that the Government of Honduras cites the Decision of 1917 and rests certain propositions of law thereon (3). The Government of El Salvador is glad that reliance upon, and therefore acceptance of, this Decision of 1917 is a feature common to the cases of both sides. This will certainly simplify the task of the Court in the present case.

8.14. The Government of El Salvador notes the interpretation which the Government of Honduras has put upon the 1917 Judgement to the effect that rights of maritime inspection possessed within the Gulf of Fonseca by El Salvador and Nicaragua do not operate as against Honduras and that Honduras has always traversed the waters of the Gulf of Fonseca as of right (4).

8.15. The Government of El Salvador likewise notes

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3. Memorial of Honduras: p. 711.

4. Ibid..

and confirms the statement made in the next paragraph of the Memorial of Honduras (5) that "en pratique, le Honduras n'a eu à faire face à aucune tentative de la part d'El Salvador de restreindre son accès à la haute mer au-delà du golfe". The Government of El Salvador has never made any such attempt because it has always regarded Honduras as possessing, within those parts of the Gulf of Fonseca lying outside the three-mile belt of littoral waters in which El Salvador, Honduras and Nicaragua each possess exclusive rights, a right as a co-owner which undoubtedly includes the right to free navigation (6).

8.16. Likewise the Government of El Salvador agrees with the Government of Honduras that the "nouveau développements du droit de la mer reflétés dans la Convention du droit de la mer de 1982" (7) have not deprived Honduras of any of its rights in the Gulf.

8.17. But the Government of El Salvador cannot

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5. Memorial of Honduras: p. 712.

6. The Government of El Salvador cannot under--stand the relevance or significance of the concluding phrases of that paragraph of the Memorial of Honduras, in which the Government of Honduras adds: "ni même de soumettre à aucun régime de passage innocent le transit des navires honduriens par l'em--bouchure du golfe .... ce qu'il pourrait se passer si El Salvador considérait ces eaux comme faisante partie de ses eaux territoriales".

7. Memorial of Honduras: p. 712.

accept the correctness of the assertion in the Memorial of Honduras (8), following on the statement that "Honduras a supposé, au cours des longues négociations conduisant à la Convention de 1982, qu'il allait jouir d'une zone contiguë, d'une zone économique et d'un plateau continental sur sa côte Pacifique", that "rien n'a été dit pendant ces négociations qui impliquerait une conclusion contraire". In fact the opposite is true, as is shown by the passage from the statement of the representative of El Salvador, Dr. Galindo Pohl, in the Second Committee of UNCLOS on 14 July 1974 quoted in the Memorial of El Salvador from Paragraph 55 of the Summary Records of the Second Committee of UNCLOS III (9):

"On whatever theory the delineation of either the territorial waters or internal waters was based, Honduras would be deprived of access to the line of entry to the Gulf" (emphasis added).

8.18. There then follows a substantial passage in the Memorial of Honduras arguing that the new developments in the Law of the Sea could not adversely have affected such vested rights as Honduras might already have enjoyed to access to the Pacific (10). The Government of El Salvador does not disagree

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8. Memorial of Honduras: p. 712.

9. The reference for this citation was erro-neously printed as UNCLOS Records, vol. III; it should have been: UNCLOS Records, vol. II, p. 108.

10. Memorial of Honduras: pp..713-714.

with this. The right of Honduras to free passage to the Pacific has never been questioned by El Salvador and remains unquestioned.

8.19. However, what next follows in the Memorial of Honduras cannot be accepted by El Salvador and, indeed, is vigorously contested. At this point Honduras makes an assertion (11) that goes to the heart of the disagreement between the Parties in this case. Honduras seeks to convert its acknowledged right of passage to the Pacific through the Gulf of Fonseca into "importants droits d'accés aux ressources économiques tant des fonds marins et du sous-sol que des eaux surjacentes, jusqu'a 200 milles de la ligne de fermeture du golfe". It also claims in this area exclusive rights to authorize the conduct of research, to construct installations, to control pollution and, above all, to safeguard its security.

8.20. On what grounds does Honduras rest this claim to expanded rights?

8.21. First, Honduras invokes a provision in Decree No. 102 of 7 March 1950, in which the Congress of Honduras claimed that:

"The submarine platform or continental and insular shelf, and the waters which cover it, in both the Atlantic and Pacific Oceans, at whatever depth it may be found and whatever its extent may be, forms a part of the national territory" (12).

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11. Memorial of Honduras: p. 714.

12. See ibid. and Annexes: p. 25.

Thus, says Honduras,

"dès 1950, le Honduras a fait valoir ses droits à un plateau continental dans l'Océan Pacifique, sans protestation d'aucun Etat" (13).

8.22. As to this, El Salvador makes the following comment. The language of the Decree cited is not as geographically extensive as the Memorial of Honduras suggests. It is true that the Decree uses the word "Pacific". However, the significance of that name in the present context is limited in two controlling respects.

8.23. First, the name "Pacific" itself is traditionally used in relation to Honduras to describe the southern side of the country, just as the name "Atlantic" is used to describe the northern side. This is clearly shown by the terms of Decree No. 103 of 7 March 1950 which, though referred to in the Memorial of Honduras (14), is not actually quoted there. In Article 1, the following appears:

"The following belong to Honduras:

"(1) The land situated on the continent within its territorial limits, and all the islands and keys in the Pacific which have been considered Honduran ..."

It is quite beyond question that Honduras does not have any "islands or keys in the Pacific". It claims to have some islands within the Gulf of Fonseca; nothing else on the southern side. So it is quite evident that the name "Pacific" can only have been

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13. Memorial of Honduras: p. 714.

14. Ibid. fn. 1.

to describe the islands which Honduras claims to have within the Gulf of Fonseca, not non-existent islands in the Pacific beyond the closing line of the Gulf.

8.24. Secondly, it is to be observed that both Decrees Nos. 102 and 103 use the words "continental and insular shelf" (emphasis added). The words "insular shelf" relate to the shelf generated by islands. As a glance at the map will show, any shelf that Honduras may possess on its southern side is generated not by the mainland, but by the islands to which it lays claim within the Gulf. There is, therefore, no question of a Hondureñan continental shelf generated by islands lying in the Pacific seawards of the closing line of the Gulf.

8.25. Thirdly, it is to be noted that in Decree No. 25 of 22 January 1951 (15) Honduras, though maintaining in the preamble a reference to the existence of a continental shelf in the Pacific, does not attach any legally operative role to it. This Decree (which was not even mentioned in the Memorial of Honduras), rather than the Decrees of 1950, is the one that matters since it is the one in which the Government of Honduras states the underlying theory of the continental shelf and formally declares that the sovereignity of Honduras extends "to the continental shelf of the national territory".

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15. The text is in UN Legislative Series, Law and Regulations on the Regime of the High Seas: Vol. I (1951), p. 302.

In Article 3 "the protection and supervision of the State is hereby declared to extend in the Atlantic Ocean..." over certain identified waters. But in the substantive articles there is no reference to any claim to the waqters of the Pacific.

8.26. As to the question of protest, the absence of reaction by El Salvador is explicable for a number of reasons.

8.27. First, the language of the Decrees, as just explained, does not substantively involve an assertion of rights in the Pacific Ocean beyond the closing line of the Gulf.

8.28. Secondly, since the language of the Decrees must be understood in the sense just described, there was no point in exacerbating relations between El Salvador and Honduras by unnecessary protest.

8.29. Thirdly, there is no requirement in International Law that a protest should be lodged against legislative provisions prior to an attempt on the part of the legislating State to implement them. No doubt, protest in such circumstances is permissible and often occurs; but it is not required (16). One may recall in this connection the words of Judge Read in the Norwegian Fisheries Case (albeit uttered in a dissenting opinion, but in this

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16. See MacGibbon: 30 British Yearbook of International Law: p. 293 at pp. 299-305.

respect hardly to be regarded as controversial):

"Customary internatinal law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignity over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time.

"The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignity over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration." (17)

Though obviously expressed in a slightly different context, the relevance of Judge Read's views is clear: mere paper assertions do not establish rights and the absence of protest against them does not improve the position of the claimant over the short term. Honduras, it may be noted, does not assert that it has ever taken any action in the period since 1950 to implement its claim to Pacific waters.

8.30. Apart from the 1950 Decree which, as explained above, does not establish the rights beyond the closing line of the Gulf that Honduras now claims, the case for Honduras appears to rest on a petitio principi. "Il ne serait pas suffisant non plus, afin de reconnaître les droits du Honduras, de lui accorder de simples droits de navigation jusqu'à l'Océan Pacifique" (18). This

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17. I.C.J. Reports 1951 p. 116 at p. 191.

18. Memorial of Honduras: p. 714.

assertion is not supported by reasoning. As expressed in the Memorial of Honduras it amounts, in effect, to the contention that if State A enjoys rights of passage through the waters of State B, it is also entitled to share with State B the continental shelf and exclusive economic zone laying seawards of the coasts of State B. Such a proposition would no doubt cause some surprise to Denmark and Norway, who, on this approach, would at the very least find Sweden seeking to share in their continental shelf rights in the North Sea; to Turkey and Greece, who would find Bulgaria, Rumania and the Soviet Union claiming rights in the Aegean; to Egypt and Saudi Arabia, who would find Israel and Jordan claiming rights in the Red Sea; to Oman, Iran and Pakistan, who would find Kuwait, Iraq and other States in the Persian Gulf claiming rights in the Arabian Sea; to Indonesia, who would find Malaysia and Singapore claiming rights in the Indian Ocean; and to Belize and Honduras, who would find Guatemala claiming rights in the Gulf of Honduras.

8.31. And, one might ask, why should the application of the proposition stop at States with a coast? If the right of access to the sea carries with it a claim to title in the continental shelf and the exclusive economic zone of the waters to which it has access, why should not land-locked States which enjoy a right of access to the sea through their neighbouring States also be vested with an entitlement to a specific area of adjacent continental shelf and exclusive economic zone? The answer is, of course, evident. Land-locked States possess no coastline capable of generating maritime rights. Thus they have

no "proprietary" or "sovereign" rights. At best their special position is recognised in Article 69 of the United Nations Convention on the Law of the Sea of 1982, where they are given 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.

8.32. In this, it may be noted, the position of land-locked States is comparable to that of geographically disadvantaged States (GDS). To them also the United Nations Convention on the Law of the Sea of 1982 accords in Article 70 a 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 zone of coastal States of the same sub-region or region. But nothing is said about participation in the non-living resources. And there is no suggestion that such States should possess any "proprietary" or "sovereign" rights in the exclusive economic zone.

8.33. There is value in considering further the relevance to the present case of the concept of the "geographically disadvantaged State". This concept, a new one developed specifically in the framework of the United Nations Convention on the Law of the Sea of 1982, is defined in Article 70 (2) thereof as meaning:

"Coastal States, including 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 sub-region 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 zone of their own."

8.34. This definition, and in particular the specific reference to "States bordering enclosed or semi-enclosed seas", fits Honduras precisely. Once it is shown that Honduras falls within this definition, then the rights accorded to Honduras as a geographically disadvantaged State are exhaustively stated by the Convention of 1982. There remains no juridical basis on which those rights can be enlarged by the pretence that Honduras in some way possesses a coast fronting onto the Pacific and capable of generating for Honduras its own entitlement to continental shelf and exclusive economic zone. The argument advanced by Honduras, however, is to all intents and purposes that the nature of the geographical disadvantage it suffers is of a kind to entitle it to some privilege greater than that of other geographically disadvantaged States, namely, to entitle it actually to claim coastal State rights over waters appurtenant not to itself but to El Salvador and Nicaragua. For such an argument, Honduras produces no support.

III. The Claim of Honduras to a Base-Line comprising a Segment of the Closing Line Across the Mouth of the Gulf

8.35. The Memorial of Honduras (19), following

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19. Memorial of Honduras: p. 715.

the section referred to above, begins a section developing the argument that, as a coastal State, it is entitled to a base-line comprising a segment of the closing line across the mouth of the Gulf. El Salvador disputes this contention.

8.36. First, the contention is, on its face, inherently self-contradictory and contrary to principle. If, as Honduras contends, Honduras is a coastal State, then the base-line from which its entitlement to maritime areas must be measured is determined by the base-line provisions of the Convention of 1982. These appear in Articles 5-13 and cover a specified diversity of situations: Article 5 states the normal rule - the base-line is the low--water line "along the coast"; Article 6 deals with reefs; Article 7 covers deeply indented coasts, fringing islands, deltas and other cases where the coast is unstable; Article 8 deals with the status of internal waters of a single State; Article 9 covers the mouths of rivers; Article 10 covers bays, the coasts of which belong to a single State; while Articles 11, 12 & 13 deal respectively with ports, roadsteads and low-tide elevations. None of these provisions gives any support to the argument of Honduras that it can claim a base-line at the closing line of the Gulf, lying seaward of islands belonging to El Salvador which, together with their associated waters, completely screen Honduras from the Pacific.

8.37. The exhaustive character of these rules relating to baselines is indicated by Article 14 which provides that "the coastal State may determine base-lines in turn by any of the methods provided

for in the foregoing articles to suit different conditions". The Article impliedly excludes recourse to any other method of determining base-lines. Nor has Honduras produced any reason to support any suggestion that these base-line rules are not applicable here.

8.38. The second principal reason why El Salvador disputes the argument of Honduras is that the individual reasons actually given in support of the case of Honduras are in themselves unsound.

8.39. The opening statement in the argument of Honduras is that "Il parait y avoir un accord entre les Parties sur le fait que la ligne de fermeture de l'embouchure du golfe constitue la ligne de base" (20). In truth there is no such agreement.

8.40. In support of its argument that there is such an agreement Honduras refers to the proposals made by El Salvador in May 1975 (21). This reference is, first, inadmissible; and, secondly, it does not support the thesis of Honduras.

8.41. First, the reference is inadmissible because it relates to a proposal advanced in the course of negotiations between the two sides. As already stated, the proposal was part of a package. It was not accepted. It must, therefore, drop out

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20. Memorial of Honduras: p. 715.

21. Memorial of Honduras: Annexes: pp. 899-906.

of consideration for all purposes of the present litigation (22).

8.42. Secondly, the reference does not support the thesis of Honduras. The fact that El Salvador invited Honduras to join in declaring that the Gulf of Fonseca was an historic bay and that its waters are internal waters (23) does not convert the closing line of the bay into a base-line common to both States for the purpose of generating and measuring entitlement to Pacific ocean areas.

8.43. Nor does the proposal which followed (24) regarding development seaward of the closing line by common agreement convert the closing line into a base-line in the technical sense. It is important to observe that the area within which El Salvador was offering to share with Honduras the benefit of its rights in the Pacific was not precisely defined. The proposal, as translated in the Annexes to the Memorial of Honduras (25), speaks of an area

"qui est compris à l'intérieur des lignes qui sont tracées des points sortant de la bouche ou entrée du Golfe de Fonseca, conformement aux règles de l'equidistance, jusqu'à une distance de 200 miles maritimes dans l'Océan Pacifique".

It is not clear from this where those "lines of

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22. Counter Memorial of El Salvador: Paragraphs 7.57., pp. 247-248, & 8.5., p. 255.

23. Memorial of Honduras: Annexes: p. 901.

24. Ibid.: pp. 902-903.

25. Ibid.: p. 903.

equidistance" were intended to run.

8.44. In the absence of any objectively valid legal basis on which to claim a base-line at the mouth of the Gulf of Fonseca, the Memorial of Honduras makes a quantum leap when it suggests (26) that "Le question devient donc de savoir à quel segment de ligne de base El Salvador a droit et, par voie de conséquence, à quel point sur la ligne de base commence le segment hondurien". If El Salvador made any concession to Honduras for the purpose of negotiation in May 1985, it was not on the basis that Honduras could then claim that the closing line of the Gulf was a base-line to be divided between El Salvador and Honduras. Before there can be any question of determining the segment of the base-line to which Honduras may be entitled there is the prior question of deciding whether Honduras is entitled to any share of the Pacific waters. This question is what is now before the Court - and only this question. The identification of any Hondureñan baseline at the mouth of the Gulf is a matter of delimitation which, for reasons already given, is outside the jurisdiction of the Court.

8.45. One point, however, bears repetition. Honduras asserts (27) that:

"La Chambre n'est pas concernée par la détermination de la totalité du segment hondurien. La situation de son point terminal à l'Est, étant évidemment à

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26. Memorial of Honduras: p. 715.

27. Ibid..

négocier entre le Honduras et le Nicaragua, ne rentre pas dans la compétence de la Chambre."

El Salvador agrees that any delimitation between Honduras and Nicaragua is not a matter within the competence of the Chamber. It is precisely for that reason that, even if Honduras were able to establish the existence of rights in the maritime areas seawards of the Gulf closing line, that would not enable the Chamber to delimit the boundary between the respective areas of El Salvador and Honduras. Any such delimitation would require the application by the Chamber of equitable principles. These could not, in this region, be applied as between El Salvador and Honduras without the Chamber at the same time having some knowledge of the maritime area to which Honduras would be entitled as against Nicaragua. In the absence of such knowledge, either (i) the Chamber would be placed in the position of according Honduras either a too large or a too small maritime area or (ii) it would be compelled to reach some conclusions regarding the rights inter se of Honduras and Nicaragua which could prejudice the position of Nicaragua in a future delimitation between those two countries. In any event such a delimitation could not take place within the scope of the present proceedings since the jurisdiction of the Chamber extends only to the determination of the juridical status of the maritime spaces.

IV. The Confusion between Co-ownership of the Waters of the Gulf of Fonseca and the Existence of a Common Base-Line to the Pacific

8.46. The Memorial of Honduras next seeks to argue

that it cannot be consistent with the thesis of El Salvador (that the waters of the Gulf of Fonseca are owned in common by the three riparians) "de nier au Honduras tout titre à ces eaux" (28). This argument is misconceived and unnecessary. El Salvador does not deny Honduras any title to the waters within the Gulf of Fonseca. What El Salvador does deny is the contention of Honduras that Honduras is entitled to extend its undivided share in the waters within the Gulf to a divided share in the waters outside the Gulf.

8.47. As can be seen from a close reading of the Memorial of Honduras at this critical point, that pleading is entirely devoid of any argument to support its contention that Honduras is entitled to a specific delimited portion of the Pacific seawards of the closing line of the Gulf. Thus the assertion that Honduras has an undivided share in the waters within the Gulf is followed immediately, and without argued development, by the proposition that "Le problème devient celui d'accommoder le concept de "Communauté d'intérêts", applicable dans les eaux du golfe, à la nécessité pour chaque Etat riverain d'avoir une ligne de base exclusive pour la projection dans l'Océan Pacifique de ses propres espaces maritimes, mer territoriale, zone contiguë et zone économique exclusive" (29). No explanation is offered of how one moves from the concept of common ownership within the Gulf to "la nécessité pour chaque Etat

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28. Memorial of Honduras: p. 716.

29. Ibid..

riverain d'avoir une ligne de base exclusive" upon which to construct a claim to waters outside the Gulf. Honduras simply assumes that the basic and controlling doctrine that only coasts generate maritime entitlements has in this region been replaced by the concept that undivided ownership of waters generates a divided interest to adjacent oceanic areas - notwithstanding the impact of the claims of coastal States.

8.48. To assert dogmatically, as does the Memorial of Honduras (30), that "La solution à ce problème ne peut se trouver dans la négation à l'un des Etats riverains, le Honduras ("riverain", it should be noted, only in relation to the Gulf, not the Pacific), de ses droits essentiels d'Etat côtier" but that "Elle doit se trouver dans la détermination du point terminal de la ligne de base salvadorienne, sur la ligne de fermeture" is simply to take as the starting point of the argument the very conclusion that has to be established. The argument of Honduras is thus manifestly defective in its most fundamental aspect.

V. The Irrelevance of the Delimitation Argument

8.49. Section III, which constitutes the remainder of Chapter XX of the Memorial of Honduras, is entitled "La ligne de délimitation entre El Salvador et le Honduras qui doit, en droit, produire un résultat

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30. Memorial of Honduras: p. 716.

équitable dans la détermination de leurs zones maritimes respectives au-delà du golfe". This Section develops in detail the manner in which Honduras maintains that the maritime area which it claims in the Pacific should be divided from El Salvador's oceanic entitlement.

8.50. El Salvador absolutely refuses to be seduced into this discussion. It has already given ample reasons why the Chamber does not have jurisdiction to proceed to delimitation in respect of the maritime areas to which Honduras has not yet even established an entitlement and to which, in the submission of El Salvador, Honduras has no entitlement. Discussion of delimitation in respect of any such area is entirely premature.

6.51. No doubt in some cases that come before the Court it would be imprudent for a party to decline to respond to an argument advanced by its opponent on the ground that that argument makes assumptions which the first party does not share and accordingly relates to points that the first party considers cannot be in issue. However, the present case is not such a one. Here, the very reverse is true. It would be imprudent of El Salvador, even for the sake of argument, to appear to suggest acceptance of the Hondureñan distortion of Question II of the Special Agreement and the Hondureñan exaggeration of its maritime claims by responding to the substance of the arguments on delimintation. In consequence, El Salvador will not deal with "Le Droit Applicable" (Sub-Section A of Section III) nor with "Les Facteurs Pertinents" (Sub-Section B of Section III) save in

one respect, namely where the arguments of Honduras have an incidental bearing upon the basic contention of El Salvador that only coasts generate maritime entitlements and that the only coasts relevant to delimitation in the area embracing the ocean seaward of the closing line of the Gulf of Fonseca are those of El Salvador and Nicaragua. This said, it is hardly necessary for El Salvador to add the formal reservation that its silence on questions of delimitation should not be construed as in any way amounting to an admission of the correctness of all or any part of the arguments of Honduras on those issues.

VI. Comments on references made by Honduras to the Coasts of the Riparian States of the Gulf of Fonseca

8.52. It will be convenient to begin these comments by recalling the decisions of the International Court of Justice which so forcefully express the dependence of maritime areas upon the possession of appropriate coastlines.

8.53. The series begins with the following passage in the Anglo-Norwegian Fisheries Case (31):

"Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction

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31. I.C.J. Reports 1951 p. 116 at p. 133.

of the coast.

"Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway."

8.54. The concept was then specifically applied to the continental shelf in the North Sea Cases (32).

"The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all this is the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea."

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32. I.C.J. Reports 1969 p. 4 at p. 51.

8.55. The principle was restated in the Aegean Sea Case (33):

".... a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf. This emerges clearly from the emphasis placed by the Court in the North Sea Continental Shelf cases on "natural prolongation" of the land as a criterion for determining the extent of a coastal State's entitlement to continental shelf as against other States abutting on the same continental shelf (I.C.J. Reports 1969 pp. 31 et seq.); and this criterion, the Court notes, has been invoked by both Greece and Turkey during their negotiations concerning the substance of the present dispute. As the Court explained in the above-mentioned cases, the continental shelf is a legal concept in which "the principle is applied that the land dominates the sea" (I.C.J. Reports 1969 p. 51, para. 96); and it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, ipso jure, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State."

8.56. Once again the point was made in the Tunisia/ /Libya Continental Shelf Case (34):

"It should first be recalled that exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title. As the Court explained in the North Sea Continental Shelf cases the continental shelf is a

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33. I.C.J. Reports 1978 p. 3. at p. 36.

34. I.C.J. Reports 1982 p. 18 at p. 61.

legal concept in which "the principle is applied that the land dominates the sea" (I.C.J. Reports 1969, p. 51, para. 96). In the Aegean Sea Continental Shelf case, the Court emphasised that:

> "it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, ipso jure, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State." (I.C.J. Reports 1978, p. 36, para. 86.)

"As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criteria for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the evolution of the rules of international law.

"74. The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position."

8.57. Lastly, reference may be made to the restatement of the point in the Libya/Malta Continental Shelf Case (35):

"The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime

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35. I.C.J. Reports 1985 p. 13 at p. 41.

front of this landmass, in other words by its coastal opening, that this territorial sovereignity brings its continental shelf rights into effect. What distinguishes a coastal State with continental shelf rights from a landlocked State which has none, is certainly not the landmass, which both possess, but the existence of a maritime front in one State and its absence in the other. The juridical link between the State's territorial sovereignity and its rights to certain adjacent maritime expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline, and not on that of the landmass."

8.58. The first context in which Honduras refers to the character of the coasts of the riparian States of the Gulf of Fonseca is in a Sub-Section entitled: "1. La configuration géographique du golfe lui-même et ses relations avec les côtes des Parties en général" (36).

8.59. This Sub-Section begins with a statement of the ratios of the respective lengths of the coasts of the riparians one to another based upon lines of "direction générale". This is a matter on which El Salvador need make no comment at present.

8.60. However, the point from which El Salvador must dissent in this Sub-Section is the somewhat disingenuous observation that "Néanmoins, en raison de l'extrême concavité du golfe, "la façade côtière" du Honduras sur l'Océan Pacifique est nécessairement limitée" (37). The seeming modesty

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36. Memorial of Honduras: p. 719.

37. Memorial of Honduras: p. 720.

of this statement may beguile the reader into the belief that it contains some element of truth. It scarcely does.

8.61. If, as El Salvador firmly believes to be correct, importance is to be attached to coasts and their effect (an assumption which El Salvador is glad to note that Honduras evidently shares), then importance must be attached to all relevant coasts, only to relevant coasts, and also to real, not conceptual coasts.

8.62. Thus, in relation to the pretence of Honduras that it has any, albeit limited, "frontage" onto the Pacific, it is necessary to make the following observations:

(i) The "coast" which according to Honduras constitutes this frontage consists not of mainland but, to a considerable extent, of islands which belong to El Salvador.

(ii) These islands, and their effect, cannot be disregarded by Honduras in favour of the mainland lying behind them or of some notional coastal front.

(iii) The islands of El Salvador lie between Honduras and the Pacific as does one group of small Nicaraguan islands, Farallones de Cosigüina.

(iv) The islands of El Salvador trend in a North--West to South-East direction that parallels the closing line of the Gulf. Taken together with the Nicaraguan group of Farallones and the three nautical miles of "exclusive" waters which adhere to each of them, they constitute a screen or barrier which both in geographical and legal terms obscures, or cuts

off from the Pacific, the coasts of Honduras within the Gulf.

8.63. It is possible that the statement made by Honduras regarding its alleged, but "limited" "frontage" to the Pacific was also intended to convey the suggestion that the whole of the coastline of Honduras on the Gulf of Fonseca (as reflected in the larger ratio of coastline claimed for Honduras) "fronted" onto the Pacific. Any such suggestion would, almost self-evidently, be incorrect. In order to identify that part of the coast of Honduras which even faces the mouth of the Gulf of Fonseca, despite the screening effect of the intervening islands of El Salvador, one must project north-eastward towards the coast of Honduras the lines of general direction of the coastlines of, on the one side, El Salvador from Punta Amapala to Punta Chiquirín and of, on the other, of Nicaragua from Punta Cosigüina to Punta El Rosario. Once this is done, it can readily be seen that not even a half of the coastline of Honduras in the Gulf can be said to face the islands of El Salvador and Nicaragua which lie in the mouth of the Gulf between Honduras and the Pacific.

8.64. It is not necessary, within the limited task which El Salvador has accepted of commenting upon the references which Honduras has made to the capacity of the coasts of Honduras to generate maritime rights for Honduras in the Pacific, for El Salvador to comment upon the Sub-Section of the Memorial of Honduras entitled: "2. Les longeurs relatives des côtes d'El Salvador et de Honduras

respectivement" (38). This is a matter which is pertinent only to the issue of delimitation - an issue which El Salvador maintains is not before the Chamber. El Salvador does no more in relation to this Sub-Section than recall the observations which it has previously made regarding the inescapable interest that Nicaragua would have in any delimitation of maritime boundaries within the Pacific.

8.65. So the Sub-Section of the Memorial of Honduras to which El Salvador should now pass is that entitled "3. La pertinence des côtes dans le golfe à une délimitation de zones maritimes au-delà du golfe" (39). Again, it needs to be said at the outset that El Salvador embarks upon comment on this section not because of its relevance to delimitation but only because it has some bearing on the question now before the Chamber, namely, the legal status of the maritime spaces.

8.66. El Salvador begins by accepting, indeed adopting, the first of the two propositions which Honduras draws from the 1969 Judgement of the International Court of Justice in the North Sea Cases. El Salvador entirely agrees that the "terre domine la mer" and it agrees also with the reference to the fundamental role of "la configuration géographique des côtes". El Salvador does this in relation to the relevance of these observations to the status of

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38. Memorial of Honduras: p. 720.

39. Memorial of Honduras: p. 723.

maritime areas, not their delimitation, and hence does not need to comment on their applicability to questions of delimitation.

8.67. It remains, then, for El Salvador to comment on the pertinence to the task of the Chamber of the various judicial or arbitral decisions mentioned by Honduras.

8.68. First, in comparing the situation in the North Sea Cases with the present case (40), El Salvador notes that Honduras admits that the geographical position of the Federal Republic of Germany "n'était pas aussi extrême que celle du Honduras" (41). In fact the position of the Federal Republic of Germany was markedly different from that of Honduras. As can be seen from the sketch map included within the judgement (42) and also reproduced here in this Counter Memorial, the coast of the Federal Republic of Germany faced directly onto the North Sea over a distance of some 165 miles. It was not confronted by a narrow opening to the North Sea no wider than less than half of its coastal length. There were no islands belonging to the Netherlands or Denmark lying between the Federal republic of Germany and the North Sea. Even on the approach initially adopted by the Netherlands and Denmark, the Federal Republic of Germany was acknowledged to have some entitlement

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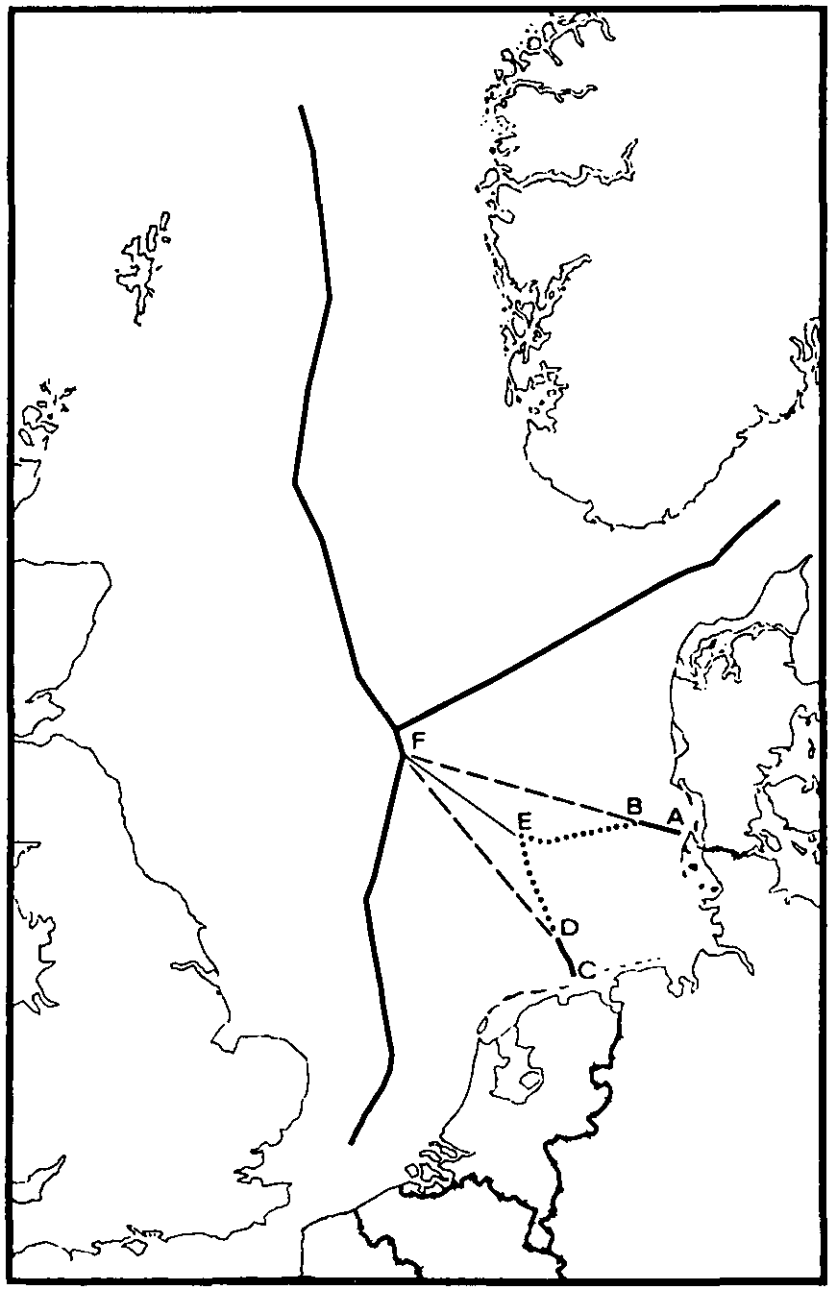
40. Memorial of Honduras: p. 723.

41. Ibid.: p. 724.

42. I.C.J. Reports 1969 p. 15.



Map 3
(See paragraphs 5-9)

The maps in the present Judgment were prepared on the basis of documents submitted to the Court by the Parties, and their sole purpose is to provide a visual illustration of the paragraphs of the Judgment which refer to them.

Carte 3
(Voir paragraphes 5-9)

Les cartes jointes au présent arrêt ont été établies d'après les documents soumis à la Cour par les Parties et ont pour seul objet d'illustrer graphiquement les paragraphes de l'arrêt qui s'y réfèrent.

to continental shelf in the North Sea. The only question was one of quantity. That is not the case here. By reason of the geography of the Gulf of Fonseca, Honduras has no entitlement at all to any maritime zone in the Pacific Ocean.

8.69. The Memorial of Honduras next discusses the UK/France Continental Shelf Case (43) (44). Here, El Salvador feels bound to contradict the statement made in the Memorial of Honduras (45) that:

"les Iles Anglo-Normandes faisaient écran entre la côte française et la partie centrale de la Manche bien plus directement et plus complètement que les pointes de Punta Amapala et Punta Cosiguina, dont on pourrait dire qu'elles font écran entre le Honduras et l'Océan Pacifique."

The comparison is erroneous in two basic respects. First, one cannot compare the effect of the Channel islands with the effect of the two headlands of Amapala and Cosigüina. It is not these points that screen the coast of Honduras from the Pacific. Rather, it is the general configuration of the territories of El Salvador and Nicaragua, closing in the Gulf of Fonseca, coupled with the Islands of Cosigüina, Meanguera, Meanguerita and Farallones, that screens the coast of Honduras from the Pacific. If one is comparing the effect of Punta Amapala and Punta Cosigüina with anything, it must be not with the

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43. Memorial of Honduras: p. 724.

44. Most conveniently reported in 54 International Law Reports p. 6.

45. Memorial of Honduras: p. 724.

North Sea. The only
That is not the case .
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43. Memorial of Honduras p. 724.
44. Most conveniently reported in 54 International Law Reports p. 6
45. Memorial of Honduras p. 724.

Channel Islands but with Cap de la Hague (the north--western point of the Cherbourg Peninsula) and with Sillon de Talbert (the point which marks the north--western end of the coast flanking the western side of the Gulf of St. Malo). As can be seen from the sketch map included here in this Counter Memorial, there is absolutely no comparison between that situation and the situation at the opening of the Gulf of Fonseca.

8.70. The Memorial of Honduras next invokes the decision of a Chamber of the International Court of Justice in the Gulf of Maine Case (46). Honduras suggests:

"C'est là que la situation géographique présente une vraie analogie avec le Golfe de Fonseca parce que la plupart du territoire terrestre des Etats-Unis, et sa côte pertinente, se trouvaient au fond du golfe."

However, one has only to look at the map included within the judgement (47) and also reproduced in this Counter Memorial showing the line adopted by the Chamber to see how dissimilar is the Gulf of Maine from the Gulf of Fonseca. The Gulf of Maine does not in any way present the enclosed characteristic of the Gulf of Fonseca. For one thing, the coasts of the country which lies at the "back" of the Gulf of Maine (the United States of Amaerica) also extend to the south-western point of the Gulf at the locality where it meets the Atlantic Ocean, namely, Cape Cod. Thus, there is no question of the coasts of the United

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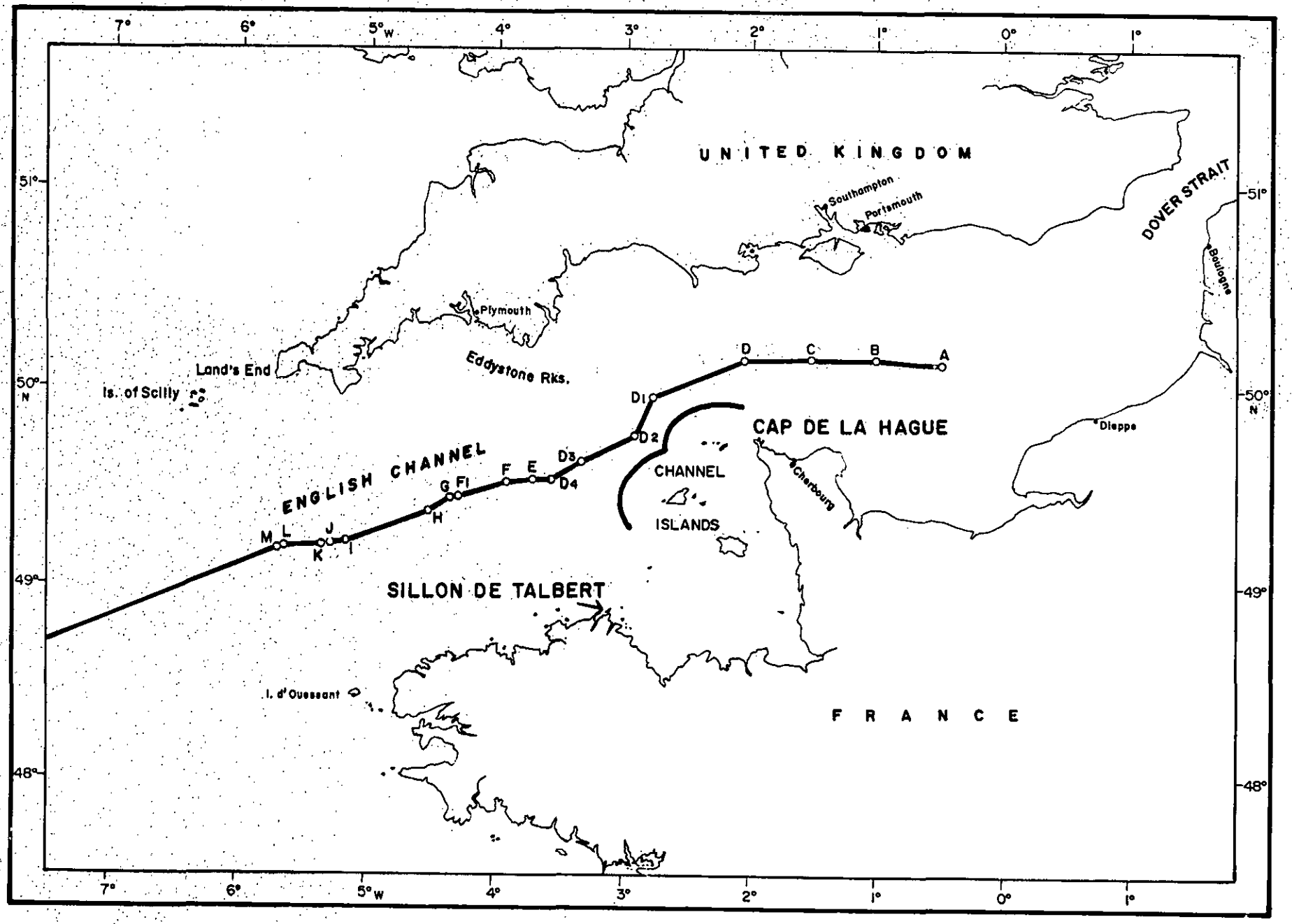
46. Memorial of Honduras: p. 725.

47. I.C.J. Reports 1984 at p. 346.


UNITED KINGDOM
FRANCE
ENGLISH CHANNEL
CHANNEL ISLANDS
DOVER STRAIT
CAP DE LA HAGUE
SILLON DE TALBERT
Land's End
Is. of Scilly
Eddystone Rks.
Plymouth
Southampton
Portsmouth
Boulogne
Dieppe
Cherbourg
I. d'Ouessant
A
B
C
D
D1
D2
D3
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F
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G
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3°
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1°
51°
50° N
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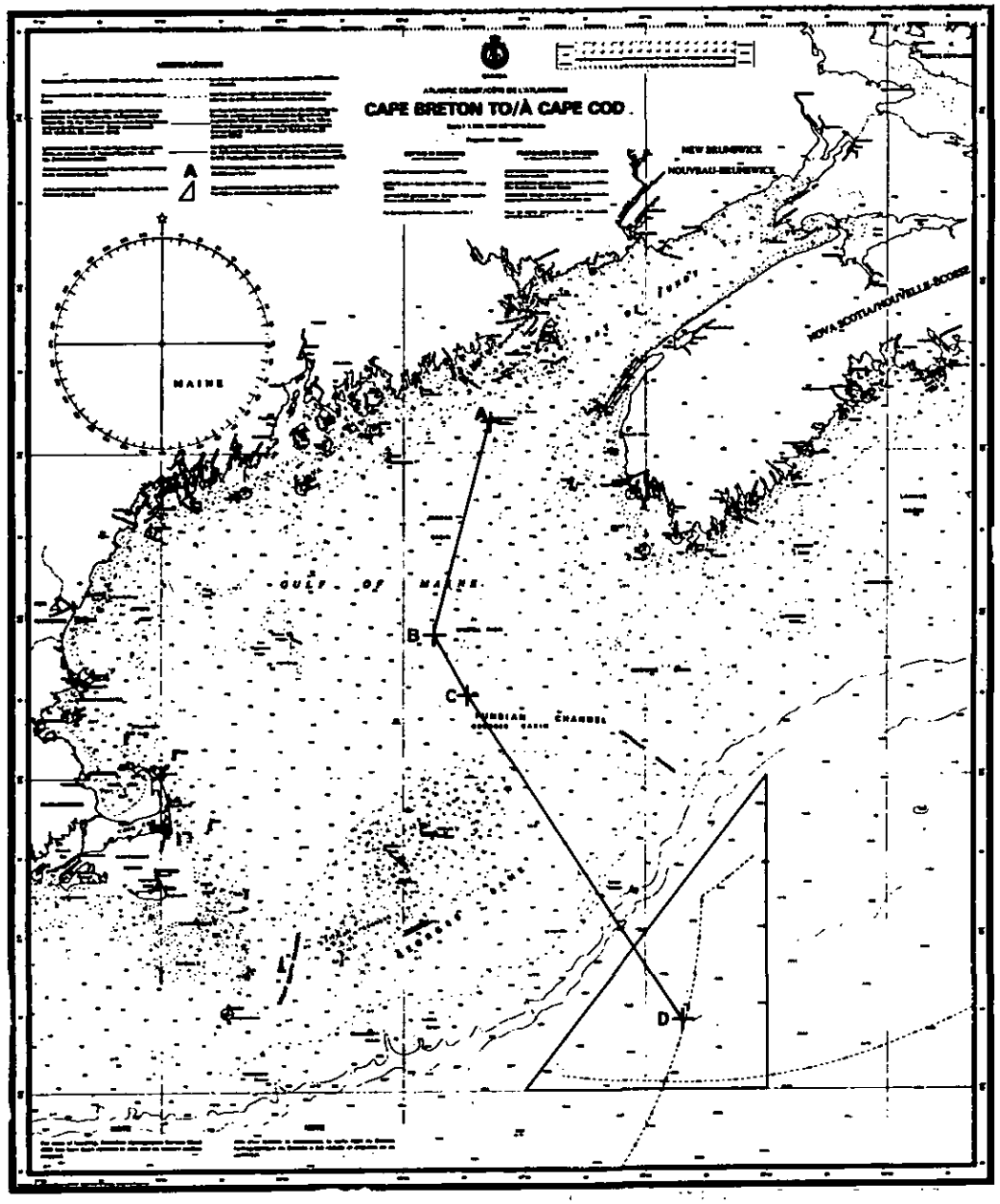
48°



DELIMITATION LINE DRAWN BY THE CHAMBER.

States being closed off from the outer ocean. For another, the actual configuration of the Gulf of Maine differs totally from that of the Gulf of Fonseca in that the coast at the "back" (the coast of the State of Maine) faces full out through the open Gulf to the Atlantic Ocean. The coast is not cut off in any way by inward curving promontories coincident with the termini of the notional closing line; nor are there intervening islands which belong to a different State.

8.71. The remaining case referred to in the Memorial of Honduras is the Guinea/Guinea--Bissau Case (48). Honduras has quoted (49) from the judgement (50) the lines which are underlined in the text that follows:

"When in fact - as is the case here, if Sierra Leone is taken into consideration - there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits. In the present case, that is what would happen to Guinea, which is situated between Guinea-Bissau and Sierra Leone. Both the equidistance lines envisaged arrive too soon at the parallel of latitude drawn from the land boundary between Guinea and Sierra Leone which Guinea has unilaterally taken as its maritime boundary."

Honduras asserts that (51):

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48. Now reported in 77 International Law Reports 636.

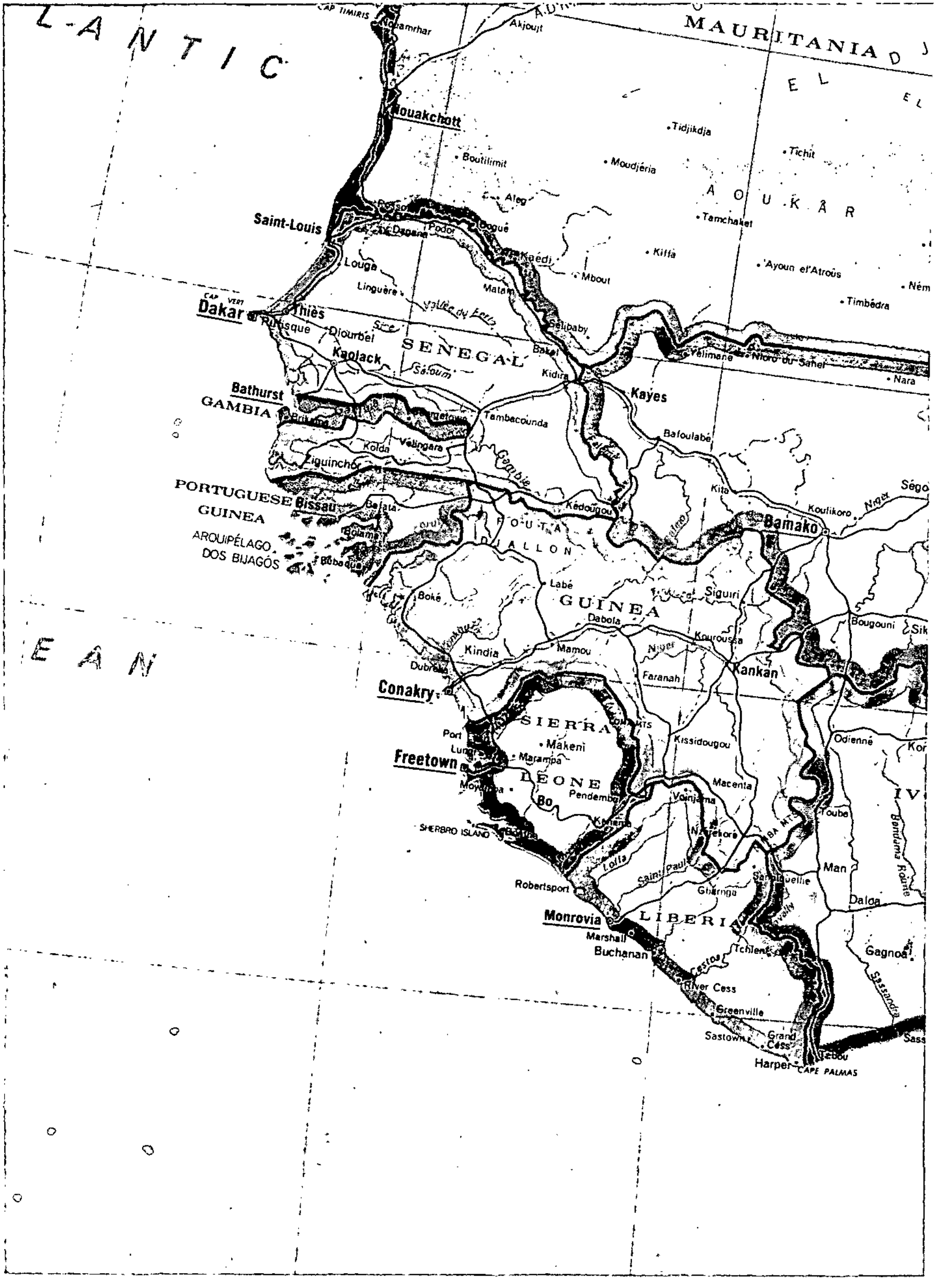
49. Memorial of Honduras: p. 728.

50. From Paragraph 104 thereof.

51. Memorial of Honduras: p. 728.

"Le même raisonnement semble exclure toute méthode qui empêcherait le Honduras de prétendre à des zones maritimes au-delà du golfe et jusqu'à la limite de 200 milles."

8.72. It is difficult to see how the reasoning of the Tribunal of Arbitration in that case can be transferred to the position of Honduras in the present case. The two geographical situations are quite different in both formation and scale. The coast of Guinea-Bissau, taken along its general direction from the seaward terminus of the land frontier between Guinea-Bissau and Senegal in the north to the seaward terminus of the land territory between Guinea and Guinea-Bissau in the south, is about 160 miles long. The coast of Guinea, taken from the point just mentioned to the seaward terminus of the land boundary between Guinea and Sierra Leone, is about 170 miles long. The coast of Sierra Leone is itself about 180 miles long. As can be seen from the map reproduced here in this Counter Memorial, the element of concavity in the coast does not in any degree prevent the coast of Guinea (the middle country, analogous to Honduras) from facing fully and without impediment into the Atlantic Ocean over a distance of 170 miles and thus being capable of directly generating a substantial entitlement of oceanic maritime areas. The only question in the case was one of delimitation; and the lines from the Award quoted by Honduras were directed only to identifying the possibility that equidistance lines drawn as between Guinea and Guinea-Bissau and Sierra Leone respectively might enclave Guinea. But the fact that the Tribunal might exclude the use of a certain method of delimitation because of its potentially enclaving



MAURITANIA
Nouakchott
Akjoujt
Tidjikdja
Tichit
Boutilimit
Moudjéria
Aleg
Tamchaket
Kiffa
'Ayoun el'Atroûs
Timbédra
Saint-Louis
Podor
Bogué
Kaédi
Mbout
Louga
Linguère
Matam
Dakar
Thiès
Rufisque
Diourbel
SENEGAL
Kaolack
Bakel
Kidira
Kayes
Yélimané
Nioro du Sahel
Nara
Bathurst
GAMBIA
Tambacounda
Bafoulabé
Kolda
Vélingara
Ziguinchor
Gambie
Kita
Ségou
PORTUGUESE
GUINEA
Bissau
Bafata
Kédougou
Koulikoro
Niger
Bamako
Bolama
ARQUIPÉLAGO
DOS BIJAGÓS
DJALLON
Labé
Siguiri
GUINEA
Boké
Dabola
Bougouni
Kindia
Mamou
Kouroussa
Faranah
Kankan
Dubréka
Conakry
SIERRA
LEONE
Makeni
Marampa
Port
Loko
Lungi
Freetown
Kissidougou
Odienné
Macenta
Moyamba
Bo
Pendembu
Voinjama
SHERBRO ISLAND
Touba
Bondama
Man
Robertsport
Saint Paul
Gbarnga
Monrovia
LIBERIA
Daloa
Marshall
Buchanan
Tchien
Gagnoa
Cestos
River Cess
Sassandra
Greenville
Sastown
Grand
Cess
Harper
CAPE PALMAS

result does not mean that the Chamber in the present case is entitled so to reconstruct facts as to eliminate a situation in which the geographical structure of the land mass simply does not accord to the coasts of Honduras a frontage to the Pacific Ocean.

8.73. The analysis just presented of the four cases cited by Honduras is, it is submitted, sufficient to dispose of the "principes" which Honduras contends "ressortent de ces affaires" (52). The geographical circumstances of each of these cases are radically different from those of the present case. Moreover, there is nothing in them to suggest that the reduction of the role of "proximity" in relation to the process of delimitation (which is the reason why Honduras refers to them) can have any bearing on the establishment of an entitlement to maritime areas in the absence of an appropriate coastline. These cases are, therefore, quite irrelevant to the present matter.

VII. Conclusions

8.74. In short, the Government of El Salvador restates the principal conclusions reached in this Chapter as follows:

(i) The jurisdiction of the Court does not extend to the delimitation of a maritime boundary outside the Gulf of Fonseca.

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52. Memorial of Honduras: p. 729.

(ii) Rights and jurisdiction over the waters and submarine areas (including the natural resources therein) of the Pacific Ocean in the region of the Gulf of Fonseca are granted exclusively by the relevant coasts of El Salvador and Nicaragua.

(iii) The rights of Honduras within the Gulf of Fonseca do not generate any rights of Honduras outside the closing line of the Gulf of Fonseca.

SUBMISSIONS

I. Delimitation of the Land Frontier

1. The Government of El Salvador ratifies the petition to the Chamber of the International Court of Justice contained in its Memorial that the Chamber delimit the land frontier between El Salvador and Honduras in the disputed sectors in accordance with the line indicated in the Submissions contained in the Memorial of El Salvador.

2. In addition to the arguments set out in the Memorial of El Salvador, the Government of El Salvador has proven:

(i) That the land boundaries defined by the Formal Title Deeds to the Commons of the indigenous communities (which include the Royal Landholdings within the same jurisdictions) presented by El Salvador are absolutely identical with the international frontiers of the territory of each State.

(ii) That El Salvador has completely established in its Memorial and in this Counter Memorial that the Formal Title Deeds to Commons which support the claims of El Salvador were executed by the Spanish Crown in accordance with all the necessary judicial procedures and requirements and, consequently, these Formal Title Deeds to Commons form the fundamental basis of the uti possidetis iuris in that they indicate jurisdictionional boundaries, that is to say the boundaries of territories and settlements.

(iii) That Honduras has presented Title Deeds to private proprietary interests which in no case either

permitted the exercise of administrative control or implied the exercise of acts of sovereignity.

(iv) That the majority of the Title Deeds presented by Honduras relate to lands which are situated either outside the disputed sectors or in sectors which have already been delimited by the General Peace Treaty of 1980.

II. The Juridical Status of the Islands

3. The Government of El Salvador ratifies the petition to the Chamber of the International Court of Justice contained in its Memorial in view of the fact that in Chapters V & VI of this Counter Memorial it has rebutted the arguments contained in the Memorial of Honduras.

4. In addition to the arguments set out in the Memorial of El Salvador, the Government of El Salvador has proven:

(i) That in 1804 none of the islands of the Gulf of Fonseca was assigned to the Bishopric of Comayagua and that, even when the "Alcaldía Mayor" of Tegucigalpa was incorporated to the Intendency and Government of Comayagua subsequently to 1821, neither this "Alcaldía" nor the Bishopric of Comayagua ever exercised either civil or ecclesiastical jurisdiction over the Islands of the Gulf of Fonseca during the colonial period and thus it was the colonial Province of San Salvador, through San Miguel, that exercised both civil and ecclesiastical jurisdiction over the Islands of the Gulf of Fonseca.

(ii) That the colonial Province of Honduras, when

it was constituted, did not have any coast on the Pacific Ocean.

(iii) That the "Reales Cédulas" (Royal Decrees) of 1563 and 1564 left the Gulf of Fonseca within the jurisdiction of the Captain-General of Guatemala and, more specifically, in the jurisdiction of San Miguel in the colonial Province of San Salvador.

(iv) That when the Spanish Crown established jurisdiction over islands, it did so by means of a "Real Cédula" (as in the case of Islands of Guanajas on the Atlantic coast of Honduras) and no such "Real Cédula" was ever executed in favour of Honduras in respect of the Islands of the Gulf of Fonseca.

III. The Juridical Status of the Maritime Spaces

5. The Government of El Salvador petitions the Chamber of the International Court of Justice that it determine the juridical status of the maritime spaces in the following manner:

(i) That, in view of the Principles of the Law of the Sea, it apply within the Gulf of Fonseca the juridical status established by the Decision of the Central American Court of Justice handed down on 9 March 1917.

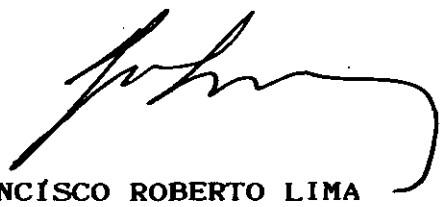
(ii) That, in accordance with the Special Agreement between El Salvador and Honduras, it decide that it has no jurisdiction to delimit the waters of the Gulf of Fonseca.

(iii) That it decline to delimit the maritime spaces outside the Gulf of Fonseca in the Pacific Ocean beyond the closing line of the Gulf on the grounds that its jurisdiction is limited to determining the juridical

status of these maritime spaces.

(iv) That it determine that the rights and the jurisdiction over the waters and maritime spaces (including the natural resources therein) of the Pacific Ocean beyond the closing line of the Gulf of Fonseca are exerciseable exclusively by El Salvador and Nicaragua on the grounds that such rights arise from the relevant coasts which these two States have on the Pacific Ocean.

In The Hague, 10 February 1989



FRANCISCO ROBERTO LIMA
Agent of the Government of
El Salvador