CASE CONCERNING LAND, ISLAND AND MARITIME FRONTIER DISPUTE (EL SALVADOR/HONDURAS: NICARAGUA INTERVENING)

Judgment of 11 September 1992

The Chamber constituted by the Court in the case concerning the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras, Nicaragua intervening, first adopted the course of the boundary line in the disputed land sections between El Salvador and Honduras. It then ruled on the legal status of the islands of the Gulf of Fonseca, as well as on the legal situation of the maritime spaces within and outside the closing line of that Gulf.

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The Chamber was composed as follows: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judges *ad hoc* Valticos, Torres Bernárdez.

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The full text of the operative part of the Judgment is as follows:

"425. For the reasons set out in the present Judgment, in particular paragraphs 68 to 103 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the first sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the international tripoint known as El Trifinio on the summit of the Cerro Montecristo (point A on Map No. I annexed; coordinates: 14°25′10″ N, 89°21′20″ W), the boundary runs in a generally easterly direction along the watershed between the rivers Frío or Sesecapa and Del Rosario as far as the junction of this watershed with the watershed of the basin of the *quebrada* de Pomola (point B on Map No. I annexed; coordinates: 14°25′05″ N, 89°20′41″ W); thereafter in a north-easterly direction along the watershed of the basin of the *quebrada* de Pomola until the junction of this watershed with the watershed between the *quebrada* de Cipresales and the *quebrada* del Cedrón, Peña Dorada and Pomola proper (point C on Map No. I annexed; coordinates: 14°25′09″ N, 89°20′30″ W); from that point, along the last-named watershed as far as the intersection of the centre-lines of the *quebradas* of Cipresales and Pomola (point D on Map No. I annexed; coordinates: 14°24′42″ N, 89°18′19″ W); thereafter, downstream along the centre-line of the *quebrada* de Pomola, until the point on that centre-line which is closest to the boundary marker of Pomola at El Talquezalar; and from that point in a straight line as far as that marker (point E on Map No. I annexed; coordinates: 14°24′51″ N, 89°17′54″ W); from there in a straight line in a south-easterly direction to the boundary marker of the Cerro Piedra Menuda (point F on Map No. I annexed; coordinates: 14°24′02″ N, 89°16′40″ W), and thence in a straight line to the boundary marker of the Cerro Zapotal (point G on Map No. I annexed; coordinates: 14°23′26″ N, 89°14′43″ W); for the purposes of illustration, the line is indicated on Map No. I annexed.

426. For the reasons set out in the present Judgment, in particular paragraphs 104 to 127 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the second sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the Peña de Cayaguanca (point A on Map No. II annexed; coordinates: 14°21′54″ N, 89°10′11″ W), the boundary runs in a straight line somewhat south of east to the Loma de Los Encinos (point B on Map No. II annexed; coordinates: 14°21′08″ N, 89°08′54″ W), and from there in a straight line to the hill known as El Burro or Piedra Rajada (point C on Map No. II annexed; coordinates: 14°22′46″ N, 89°07′32″ W); from there the boundary runs in a straight line to the head of the *quebrada* Copantillo, and follows the middle of the *quebrada* Copantillo downstream to its confluence with the river Sumpul (point D on Map No. II annexed; coordinates: 14°24′12″ N, 89°06′07″ W), and then follows the middle of the river Sumpul downstream to its confluence with the *quebrada* Chiquita or Oscura (point E on Map No. II annexed; coordinates: 14°20′25″ N, 89°04′57″ W); for the purposes of illustration, the line is indicated on Map No. II annexed.

427. For the reasons set out in the present Judgment, in particular paragraphs 128 to 185 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the third sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the Pacacio boundary marker (point A on Map No. III annexed; coordinates: 14°06′28″ N, 88°49′18″ W) along the río Pacacio upstream to a point (point B on Map No. III annexed; coordinates: 14°06′38″ N, 88°48′47″ W) west of the Cerro Tecolate or Los Tecolates; from there up the *quebrada* to the crest of the Cerro Tecolate or Los Tecolates (point C on Map No. III annexed; coordinates: 14°06′33″ N, 88°48′18″ W), and along the watershed of this hill as far as a ridge approximately 1 kilometre to the north-east (point D on Map No. III annexed; coordinates: 14°06′48″ N, 88°47′52″ W); from there in an easterly direction to the neighbouring hill above the source of the Torrente La Puerta (point E on Map No. III annexed; coordinates: 14°06′48″ N, 88°47′31″ W) and down that stream to where it meets the river Gualsinga (point F on Map No. III annexed; coordinates: 14°06′19″ N, 88°47′01″ W); from there the boundary runs along the middle of the river Gualsinga downstream to its confluence with the river Sazalapa (point G on Map No. III annexed; coordinates: 14°06′12″ N, 88°46′58″ W), and thence upstream along the middle of the river Sazalapa to the confluence of the *quebrada* Llano Negro with that river (point H on Map No. III annexed; coordinates: 14°07′11″ N, 88°44′21″ W); from there south-eastwards to the top of the hill (point I on Map No. III annexed; coordinates: 14°07′01″ N, 88°44′07″ W), and thence south-eastwards to the crest of the hill marked on the map as a spot height of 1,017 metres (point J on Map No. III annexed; coordinates: 14°06′45″ N, 88°43′45″ W); from there the boundary, inclining still more to the south, runs through the triangulation point known as La Cañada (point K on Map No. III annexed; coordinates: 14°06′00″ N, 88°43′52″ W) to the ridge joining the hills indicated on the map as Cerro El Caracol and Cerro El Sapo (through point L on Map No. III annexed; coordinates: 14°05′23″ N, 88°43′47″ W) and from there to the feature marked on the map as the Portillo El Chupa Miel (point M on Map No. III annexed; coordinates: 14°04′35″ N, 88°44′10″ W); from there, following the ridge, to the Cerro El Cajete (point N on Map No. III annexed; coordinates: 14°03′55″ N, 88°44′20″ W), and thence to the point

where the present-day road from Arcatao to Nombre de Jesús passes between the Cerro El Ocotillo and the Cerro Lagunetas (point O on Map No. III annexed; coordinates: 14°03′18″ N, 88°44′16″ W); from there south-eastwards to the crest of a hill marked on the map as a spot height of 848 metres (point P on Map No. III annexed; coordinates: 14°02′58″ N, 88°43′56″ W); from there slightly south of eastwards to a *quebrada* and down the bed of the *quebrada* to its junction with the Gualcuquín river (point Q on Map No. III annexed; coordinates: 14°02′42″ N, 88°42′34″ W); the boundary then follows the middle of the Gualcuquín river downstream to the Poza del Cajon (point R on Map No. III annexed; coordinates: 14°01′28″ N, 88°41′10″ W); for purposes of illustration, this line is shown on Map No. III annexed.

428. For the reasons set out in the present Judgment, in particular paragraphs 186 to 267 thereof,

THE CHAMBER,

By four votes to one,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the fourth sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the source of the Orilla stream (point A on Map No. IV annexed; coordinates: 13°53′46″ N, 88°20′36″ W), the boundary runs through the pass of El Jobo to the source of the Cueva Hedionda stream (point B on Map No. IV; coordinates: 13°53′39″ N, 88°20′20″ W), and thence down the middle of that stream to its confluence with the river Las Cañas (point C on Map No. IV annexed; coordinates: 13°53′19″ N, 88°19′00″ W), and thence following the middle of the river upstream as far as a point (point D on Map No. IV annexed; coordinates: 13°56′14″ N, 88°15′33″ W) near the settlement of Las Piletas; from there eastwards over a col indicated as point E on Map No. IV annexed (coordinates: 13°56′19″ N, 88°14′12″ W), to a hill indicated as point F on Map No. IV annexed (coordinates: 13°56′11″ N, 88°13′40″ W), and then north-eastwards to a point on the river Negro or Pichigual (marked G on Map No. IV annexed; coordinates: 13°57′12″ N, 88°13′11″ W); downstream along the middle of the river Negro or Pichigual to its confluence with the river Negro-Quiagara (point H on Map No. IV; coordinates: 13°59′37″ N, 88°14′18″ W); then upstream along the middle of the river Negro-Quiagara as far as the Las Pilas boundary marker (point I on Map No. IV; coordinates: 14°00′02″ N, 88°06′29″ W), and from there in a straight line to the Malpaso de Similatón (point J on Map No. IV; coordinates: 13°59′28″ N, 88°04′22″ W); for the purposes of illustration, the line is indicated on Map No. IV annexed.

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Torres Bernárdez;

AGAINST: Judge *ad hoc* Valticos.

429. For the reasons set out in the present Judgment, in particular paragraphs 268 to 305 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the fifth sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the confluence with the river Torola of the stream identified in the General Treaty of Peace as the *quebrada* de Mansupucagua (point A on Map No. V annexed; coordinates: 13°53′59″ N, 87°54′30″ W), the boundary runs upstream along the middle of the river Torola as far as its confluence with a stream known as the *quebrada* del Arenal or *quebrada* de Aceituno (point B on Map No. V annexed; coordinates: 13°53′50″ N, 87°50′40″ W); thence up the course of that stream as far as a point at or near its source (point C on Map No. V annexed; coordinates: 13°54′30″ N, 87°50′20″ W), and thence in a straight line somewhat north of east to a hill some 1,100 metres high (point D on Map No. V annexed; coordinates: 13°55′03″ N, 87°49′50″ W); thence in a straight line to a hill near the river Unire (point E on Map No. V annexed; coordinates: 13°55′16″ N, 87°48′20″ W), and thence to the nearest point on the river Unire; downstream along the middle of that river to the point known as the Paso de Unire (point F on Map No. V annexed; coordinates: 13°52′07″ N, 87°46′01″ W); for the purposes of illustration, the line is indicated on Map No. V annexed.

430. For the reasons set out in the present Judgment, in particular paragraphs 306 to 322 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the sixth sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the point on the river Goascorán known as Los Amates (point A on Map No. VI annexed; coordinates: 13°26′28″ N, 87°43′25″ W), the boundary follows the course of the river downstream, in the middle of the bed, to the point where it emerges in the waters of the Bahía La Unión, Gulf of Fonseca, passing to the north-west of the Islas Ramaditas, the coordinates of the end-point in the bay being 13°24′26″ N, 87°49′05″ W; for the purposes of illustration, the line is indicated on Map No. VI annexed.

431. For the reasons set out in the present Judgment, in particular paragraphs 323 to 368 thereof,

THE CHAMBER,

1. By four votes to one,

Decides that the Parties, by requesting the Chamber, in article 2, paragraph 2, of the Special Agreement of 24 May 1986, 'to determine the legal situation of the islands . . . ', have conferred upon the Chamber jurisdiction to determine, as between the Parties, the legal situation of all the islands of the Gulf of Fonseca; but that such jurisdiction should only be exercised in respect of those islands which have been shown to be the subject of a dispute;

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Valticos;

AGAINST: Judge *ad hoc* Torres Bernárdez;

2. *Decides* that the islands shown to be in dispute between the Parties are:

(i) by four votes to one, El Tigre;

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Valticos;

AGAINST: Judge *ad hoc* Torres Bernárdez;

(ii) unanimously, Meanguera and Meanguerita;

3. Unanimously,

Decides that the island of El Tigre is part of the sovereign territory of the Republic of Honduras;

4. Unanimously,

Decides that the island of Meanguera is part of the sovereign territory of the Republic of El Salvador;

5. By four votes to one,

Decides that the island of Meanguerita is part of the sovereign territory of the Republic of El Salvador.

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Valticos;

AGAINST: Judge *ad hoc* Torres Bernárdez.

432. For the reasons set out in the present Judgment, in particular paragraphs 369 to 420 thereof,

THE CHAMBER,

1. By four votes to one,

Decides that the legal situation of the waters of the Gulf of Fonseca is as follows: the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf, that is to say, between a point on that line 3 miles (1 marine league) from Punta Amapala and a point on that line 3 miles (1 marine league) from Punta Cosigüina, are subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area be effected;

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Judge *ad hoc* Valticos; Judge *ad hoc* Torres Bernárdez;

AGAINST: Vice-President Oda;

2. By four votes to one,

Decides that the Parties, by requesting the Chamber, in article 2, paragraph 2, of the Special Agreement of 24 May 1986, 'to determine the legal situation of the . . . maritime spaces', have not conferred upon the Chamber jurisdiction to effect any delimitation of those maritime spaces, whether within or outside the Gulf;

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Valticos;

AGAINST: Judge *ad hoc* Torres Bernárdez;

3. By four votes to one,

Decides that the legal situation of the waters outside the Gulf is that, the Gulf of Fonseca being an historic bay with three coastal States, the closing line of the Gulf constitutes the baseline of the territorial sea; the territorial sea, continental shelf and exclusive economic zone of El Salvador and those of Nicaragua off the coasts of those two States are also to be measured outwards from a section of the closing line extending 3 miles (1 marine league) along that line from Punta Amapala (in El Salvador) and 3 miles (1 marine league) from Punta Cosigüina (in Nicaragua) respectively; but entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua; and that any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law.

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Judge *ad hoc* Valticos; Judge *ad hoc* Torres Bernárdez;

AGAINST: Vice-President Oda."

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Vice-President Oda appended a declaration to the Judgment; Judges *ad hoc* Valticos and Torres Bernárdez appended separate opinions; Vice-President Oda appended a dissenting opinion.

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I. *Qualités*
(paras. 1-26)

The Chamber recapitulates the successive phases of the proceedings, namely: notification to the Registrar, on 11 December 1986, of the Special Agreement signed on 24 May 1986 (in force on 1 October 1986) for the submission to a Chamber of the Court of a dispute between the two States; formation by the Court, on 8 May 1987, of the Chamber to deal with the case; filing by Nicaragua, on 17 November 1989, of an Application for permission to intervene in the case; Order by the Court, of 28 February 1990, on the question whether Nicaragua's Application for permission to intervene was a matter within the competence of the full Court or of the Chamber; Judgment of the Chamber of 13 September 1990 acceding to Nicaragua's application for permission to intervene (but solely in respect of the question of the status of the waters of the Gulf of Fonseca); and holding of oral proceedings.

Article 2 of the Special Agreement, which defines the subject of the dispute, reads, in an agreed English translation:

"The Parties request the Chamber:

1. To delimit the frontier line in the areas or sections not described in article 16 of the General Peace Treaty of 30 October 1980.

2. To determine the legal situation of the islands and maritime spaces."

The Judgment then quotes the submissions of the Parties, and the "conclusions" of the intervening State, as formulated at the various stages of the proceedings.

II. *General introduction* (paras. 27-39)

The dispute before the Chamber has three elements: a dispute over the land boundary; a dispute over the legal situation of islands (in the Gulf of Fonseca); and a dispute over the legal situation of maritime spaces (within and outside the Gulf of Fonseca).

The two Parties (and the intervening State) came into being with the break-up of the Spanish Empire in Central America; their territories correspond to administrative subdivisions of that Empire. It was from the outset accepted that the new international boundaries should, in accordance with the principle generally applied in Spanish America of the *uti possidetis juris*, follow the colonial administrative boundaries.

After the independence of Central America from Spain was proclaimed on 15 September 1821, Honduras and El Salvador first made up, together with Costa Rica, Guatemala and Nicaragua, the Federal Republic of Central America, corresponding to the former Captaincy-General of Guatemala or Kingdom of Guatemala. On the disintegration of that Republic in 1839, El Salvador and Honduras, along with the other component States, became separate States.

The Chamber outlines the development of the three elements of the dispute, beginning with the genesis of the island dispute in 1854 and of the land dispute in 1861. Border incidents led to tension and subsequently to armed conflict in 1969, but in 1972 El Salvador and Honduras were able to agree on the major part of their land boundary, which had not yet been delimited, leaving, however, six sectors to be settled. A mediation process begun in 1978 led to a General Treaty of Peace, signed and ratified in 1980 by the two Parties, which defined the agreed sections of the boundary.

The Treaty further provided that a Joint Frontier Commission should delimit the frontier in the remaining six sectors and "determine the legal situation of the islands and the maritime spaces". It provided that if within five years total agreement was not reached, the Parties would, within six months, negotiate and conclude a special agreement to submit any existing controversy to the International Court of Justice.

As the Commission did not accomplish its task within the time fixed, the Parties negotiated and concluded on 24 May 1986 the Special Agreement mentioned above.

III. *The land boundary: introduction* (paras. 40-67)

The Parties agree that the fundamental principle for determining the land frontier is the *uti possidetis juris*. The Chamber notes that the essence of the agreed principle is its primary aim of securing respect for the territorial boundaries at the time of independence, and its application has resulted in colonial administrative boundaries being transformed into international frontiers.

In Spanish Central America there were administrative boundaries of different kinds or degrees, and the jurisdictions of general administrative bodies did not necessarily coincide territorially with those of bodies possessing particular or special jurisdiction. In addition to the various civil jurisdictions there were ecclesiastical ones, which the main administrative units had to follow in principle.

The Parties have indicated to which colonial administrative divisions (provinces) they claim to have succeeded. The problem is to identify the areas, and the boundaries, which corresponded to these provinces, which in 1821 became respectively El Salvador and Honduras. No legislative or similar material indicating this has been produced, but the Parties have submitted, *inter alia*, documents referred to collectively as "titles" (*títulos*), concerning grants of land by the Spanish Crown in the disputed areas, from which, it is claimed, the provincial boundaries can be deduced.

The Chamber then analyses the various meanings of the term "title". It concludes that, reserving, for the present, the special status El Salvador attributes to "formal title deeds to commons", none of the titles produced recording grants of land to individuals or Indian communities can be considered as "titles" in the same sense as, for example, a Spanish Royal Decree attributing certain areas to a particular administrative unit; they are rather comparable to "colonial *effectivités*" as defined in a previous case, i.e., "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period" (*I.C.J. Reports 1986*, p. 586, para. 63). In some cases the grant of a title was not perfected, but the record, particularly of a survey, remains a "colonial *effectivité*" which may serve as evidence of the position of a provincial boundary.

Referring to the seven sectors of the boundary agreed in the General Treaty of Peace, the Chamber assumes that the agreed boundary was arrived at applying principles and processes similar to those urged upon the Chamber for the non-agreed sectors. Observing the predominance of local features, particularly rivers, in the definition of the agreed sectors, the Chamber has taken some account of the suitability of certain topographical features to provide an identifiable and convenient boundary. The Chamber is here appealing not so much to any concept of "natural frontiers", but rather to a presumption underlying the boundaries on which the *uti possidetis juris* operates.

Under article 5 of the Special Agreement, the Chamber is to take into account the rules of international law applicable between the Parties, "including, where pertinent, the provisions of" the Treaty. This presumably means that the Chamber should also apply, where pertinent, even those articles which in the Treaty are addressed specifically to the Joint Frontier Commission. One of these is article 26 of the Treaty, to the effect that the Commission shall take as a basis for delimitation the documents issued by the Spanish Crown or any other Spanish authority, secular or ecclesiastical, during the colonial period, and indicating the jurisdictions or limits of territories or settlements, as well as other evidence and arguments of a legal, historical, human or any other kind, brought before it by the Parties and admitted under international law.

Drawing attention to the difference between its task and that of the Commission, which had merely to propose a frontier line, the Chamber observes that article 26 is not an applicable law clause, but rather a provision about evidence. In this light, the Chamber comments on one particular class of titles, referred to as the "formal title-deeds to commons", for which El Salvador has claimed a particular status in Spanish colonial law, that of acts of the Spanish Crown directly determining the extent of the territorial jurisdiction of an administrative division. These titles, the so-called *títulos ejidales*, are, according to El Salvador, the

best possible evidence in relation to the application of the *uti possidetis juris* principle.

The Chamber does not accept any interpretation of article 26 as signifying that the Parties have by treaty adopted a special rule or method of determination of the *uti possidetis juris* boundaries, on the basis of divisions between Indian *poblaciones*. It was the administrative boundaries between Spanish colonial administrative units, not the boundaries between Indian settlements as such, that were transformed into international boundaries in 1821.

El Salvador contends that the commons whose formal title-deeds it relies on were not private properties but belonged to the municipal councils of the corresponding *poblaciones*. Control over those communal lands being exercised by the municipal authorities, and over and above them by those of the colonial province to which the commons had been declared to belong, El Salvador maintains that if such a grant of commons to a community in one province extended to lands situated within another, the administrative control of the province to which the community belonged was determinative for the application of the *uti possidetis juris*, i.e., that, on independence, the whole area of the commons appertained to the State within which the community was situated. The Chamber, which is faced with a situation of this kind in three of six disputed sectors, has, however, been able to resolve the issue without having to determine this particular question of Spanish colonial law, and therefore sees no reason to attempt to do so.

In the absence of legislative instruments formally defining provincial boundaries, not only land grants to Indian communities but also grants to private individuals afford some evidence as to the location of boundaries. There must be a presumption that such grants would normally avoid straddling a boundary between different administrative authorities, and where the provincial boundary location was doubtful the common boundaries of two grants by different provincial authorities could well have become the provincial boundary. The Chamber therefore considers the evidence of each of these grants on its merits and in relation to other arguments, but without treating them as necessarily conclusive.

With regard to the land that had not been the subject of grants of various kinds by the Spanish Crown, referred to as crown lands, *tierras realengas*, the Parties agree that such land was not unattributed but appertained to the one province or the other and accordingly passed, on independence, into the sovereignty of the one State or the other.

With regard to post-independence grants or titles, the so-called "republican titles", the Chamber considers that they may well provide some evidence of the position in 1821 and both Parties have offered them as such.

El Salvador, while admitting that the *uti possidetis juris* is the primary element for determining the land boundary, also puts forward, in reliance on the second part of article 26, arguments referred to as either "arguments of a human nature" or arguments based on *effectivités*. Honduras also recognizes a certain confirmatory role for *effectivités* and has submitted evidence of acts of administration of its own for that purpose.

El Salvador has first advanced arguments and material relating to demographic pressures in El Salvador creating a need for territory, as compared with the relatively sparsely populated Honduras, and to the superior natural resources said to be enjoyed by Honduras. El Salvador, however, does not appear to claim that a frontier based on the principle of *uti possidetis juris* could be adjusted subsequently (except by agreement) on the ground of unequal population density. The Chamber will not lose sight of this dimension of the matter, which is, however, without direct legal incidence.

El Salvador also relies on the alleged occupation of disputed areas by Salvadorians, their ownership of land in those areas, the supply by it of public services there and its exercise in the areas of government powers, and claims, *inter alia*, that the practice of effective administrative control has demonstrated an "animus" to possess the territories. Honduras rejects any argument of "effective control", suggesting that the concept refers only to administrative control prior to independence. It considers that, at least since 1884, no acts of sovereignty in the disputed areas can be relied on in view of the duty to respect the status quo in a disputed area. It has, however, presented considerable material to show that Honduras can also rely on arguments of a human kind.

The Chamber considers that it may have regard, in certain instances, to documentary evidence of post-independence *effectivités* affording indications of the 1821 *uti possidetis juris* boundary, provided a relationship exists between the *effectivités* and the determination of that boundary.

El Salvador drew attention to difficulties in collecting evidence in certain areas owing to interference with governmental activities due to acts of violence. The Chamber, while appreciating these difficulties, cannot apply a presumption that evidence which is unavailable would, if produced, have supported a particular Party's case, still less a presumption of the existence of evidence not produced. In view of these difficulties, El Salvador requested the Chamber to consider exercising its functions under Article 66 of the Rules of Court to obtain evidence *in situ*. The Parties were, however, informed that the Chamber did not consider it necessary to exercise the functions in question, nor to exercise its power, under Article 50 of the Statute, to arrange for an inquiry or expert opinion in the case, as El Salvador had also requested it to do.

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The Chamber will examine, in respect of each disputed sector, the evidence of post-colonial *effectivités*. Even when claims of *effectivité* are given their due weight, it may occur in some areas that, following the delimitation of the disputed sector, nationals of one Party will find themselves in the territory of the other. The Chamber has every confidence that the necessary measures to take account of this will be taken by the Parties.

In connection with the concept of the "critical date", the Chamber observes that there seems to be no reason why acquiescence or recognition should not operate where there is sufficient evidence to show that the Parties have in effect clearly accepted a variation or an interpretation of the *uti possidetis juris* position.

IV. *First sector of the land boundary* (paras. 68-103)

The first disputed sector of the land boundary runs from the agreed tripoint where the frontiers of El Salvador, Guatemala and Honduras converge (Cerro Montecristo) to the summit of the Cerro Zapotal (see sketch-map A on page 35).

Both Parties recognize that most of the area between the lines they put forward corresponds to the land that was the subject of a *título ejidal* over the mountain of Tepangüisir, granted in 1776 to the Indian community of San Francisco de Citalá, which was situated in, and under the jurisdiction of, the province of San Salvador. El Salvador contends that on independence the lands so granted became part of El Salvador, so that in 1821 the boundary of the two provinces was defined by the north-eastern boundary of the Citalá *ejido*. Honduras, on the other hand, points out that when the 1776 title was granted, those lands included in it were specifically stated to be in the Honduran province of Gracias a Dios, so that the lands became on independence part of Honduras.

The Chamber considers that it is not required to resolve this question. All negotiations prior to 1972 over the dispute as to the location of the frontier in this sector were conducted on the basis, accepted by both sides, that it was the boundary between the *ejidos* of Citalá and Ocotepeque that defined the frontier. The frontier corresponding to Honduras's current interpretation of the legal effect of the 1776 Citalá title was first put forward in negotiations held in 1972. Moreover, a title granted by Honduras in 1914, and the position taken by Honduras in the course of tripartite negotiations held between El Salvador, Guatemala and Honduras in 1934-1935, confirmed the agreement between the Parties that the boundary between Citalá and Ocotepeque defined the frontier between them. After recalling that the effect of the *uti possidetis juris* principle was not to freeze for all time the provincial boundaries, the Chamber finds that Honduras's conduct from 1881 to 1972 may be regarded as acquiescence in a boundary corresponding to that between the Tepangüisir lands of Citalá and those of Ocotepeque.

The Chamber then turns to the question of a triangular area where, according to Honduras, the 1818 title of Ocotepeque penetrated the north-eastern boundary of Citalá, and to the disagreement between the Parties as to the interpretation of the Citalá survey as regards the north-western area.

With regard to the triangular area, the Chamber does not consider that such an overlapping would have been consciously made, and that it should only be concluded that an overlap came about by mistake if there is no doubt that the two titles are not compatible. The identification of the various relevant geographical locations cannot, however, be achieved with sufficient certainty to demonstrate an overlap.

With respect to the disagreement on the boundary of the Citalá title, the Chamber concludes that on this point the Honduran interpretation of the relevant survey record is to be preferred.

The Chamber then turns to the part of the disputed area lying between the lands comprised in the Citalá title and the international tripoint. Honduras contends that since, according to the survey, the land in this area was crown land (*tierras realengas*), and the survey was being effected in the province of Gracias a Dios, these must have been *tierras realengas* of that province and hence are now part of Honduras.

El Salvador, however, claims this area on the basis of *effectivités*, and points to a number of villages or hamlets belonging to the municipality of Citalá within the area. The Chamber notes, however, the absence of evidence that the area or its inhabitants were under the administration of that municipality. El Salvador also relies on a report by a Honduran Ambassador stating that the lands of the disputed area belonged to inhabitants of the municipality of Citalá in El Salvador. The Chamber, however, does not regard this as sufficient since to constitute an *effectivité* relevant to the delimitation of the frontier at least some recognition or evidence was required of the effective administration of the municipality of Citalá in the area, which, it notes, has not been proved.

El Salvador also contends that ownership of land by Salvadorians in the disputed area less than 40 kilometres from the line Honduras claims as the frontier shows that the area was not part of Honduras, as under the Constitution of Honduras land within 40 kilometres of the frontier may only be acquired or possessed by native Hondurans. The Chamber rejects this contention since at the very least some recognition by Honduras of the ownership of land by Salvadorians would have to be shown, which is not the case.

The Chamber observes that in the course of the 1934-1935 negotiations agreement was reached on a particular frontier line in this area. The agreement by the representatives of El Salvador was only *ad referendum*, but the Chamber notes that while the Government of El Salvador did not ratify the terms agreed upon *ad referendum*, neither did it denounce them; nor did Honduras retract its consent.

The Chamber considers that it can adopt the 1935 line, primarily since for the most part it follows the watersheds, which provide a clear and unambiguous boundary; it reiterates its view that the suitability of topographical features to provide a readily identifiable and convenient boundary is the material aspect where no conclusion unambiguously pointing to another boundary emerges from the documentary material.

As regards material put forward by Honduras concerning the settlement of Hondurans in the disputed areas and the exercise there of government functions by Honduras, the Chamber finds this material insufficient to affect the decision by way of *effectivités*.

The Chamber's conclusion regarding the first disputed sector of the land frontier is as follows:[1]

> "It begins at the tripoint with Guatemala, the 'point known as El Trifinio on the summit of the Cerro Montecristo' . . . From this point, the frontier between El Salvador and Honduras runs in a generally easterly direction, following the direct line of watersheds, in accordance with the agreement reached in 1935, and accepted *ad referendum* by the representatives of El Salvador, . . . In accordance with the 1935 agreement . . . , the frontier runs 'along the watershed between the rivers Frío or Sesecapa and Del Rosario as far as the junction of this watershed with the watershed of the basin of the *quebrada* de Pomola' . . . ; 'thereafter in a north-easterly direction along the watershed of the basin of the *quebrada* de Pomola until the junction of this watershed with the watershed between the *quebrada* de Cipresales and the *quebrada* del Cedrón, Peña Dorada and Pomola proper' . . . ; 'from that point, along the last-named watershed as far as the intersection of the centre-lines of the *quebradas* of Cipresales and Pomola' . . . ; 'thereafter, downstream along the centre-line of the

[1]See sketch-map A on page 35; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

quebrada de Pomola, until the point on that centre-line which is closest to the boundary marker of Pomola at El Talquezalar; and from that point in a straight line as far as that marker' . . . From the boundary marker of El Talquezalar, the frontier continues in a straight line in a south-easterly direction to the boundary marker of the Cerro Piedra Menuda . . . , and thence in a straight line to the boundary marker of the Cerro Zapotal . . . "

V. *Second sector of the land boundary*
(paras. 104-127)

The second disputed sector of the land boundary lies between the Peña de Cayaguanca, and the confluence of the stream of Chiquita or Oscura with the river Sumpul (see sketch-map B on page 36). Honduras bases its claim chiefly on the 1742 title of Jupula, issued in the context of the long-standing dispute between the Indians of Ocotepeque, in the province of Gracias a Dios, and those of Citalá, in the province of San Salvador. The principal outcome was the confirmation and agreement of the boundaries of the lands of Jupula, over which the Indians of Ocotepeque claimed to have rights and which were attributed to the Indians of Citalá. It was, however, recorded that the inhabitants of Ocotepeque, having recognized the entitlement of the inhabitants of Citalá to the land surveyed, also requested "that there be left free for them a mountain called Cayaguanca which is above the Jupula river, which is crown land", and this request was acceded to.

The Chamber finds that the Jupula title was evidence that in 1742 the mountain of Cayaguanca was *tierras realengas* and since the community of Ocotepeque, in the province of Gracias a Dios, was to cultivate it, it concludes that the mountain was *tierras realengas* of that province, for which reason the mountain must on independence have formed part of Honduras on the basis of the *uti possidetis juris*.

The Chamber then turns to the location and extent of the mountain, which, according to Honduras, extended over the whole of the disputed area in this sector, a claim disputed by El Salvador. In addition to arguments based on the wording of the 1742 title, El Salvador refers to the 1818 title of Ocotepeque, issued to the community of Ocotepeque to re-establish the boundary markers of its lands, contending that the mountain of Cayaguanca would necessarily have been included in that title if it had truly been awarded to the inhabitants of Ocotepeque in 1742. The Chamber does not accept this argument; it finds that in 1821 the Indians of Ocotepeque, in the province of Gracias a Dios, were entitled to the land resurveyed in 1818, and also to rights of usage over the mountain of Cayaguanca somewhere to the east, and that the area subject to these rights, being *tierras realengas* of the province of Gracias a Dios, became Honduran upon independence.

The problem remains, however, of determining the extent of the mountain of Cayaguanca. The Chamber sees no evidence of its boundaries, and in particular none to support the Honduran claim that the area so referred to in 1742 extended as far east as the river Sumpul, as claimed by Honduras.

The Chamber next considers what light might be thrown on the matter by the republican title invoked by El Salvador, referred to as that of Dulce Nombre de la Palma, granted in 1833 to the community of La Palma in El Salvador. The Chamber considers this title significant in that it showed how the *uti possidetis juris* position was understood when it was granted, i.e., very shortly after independence. The Chamber examines in detail the Parties' conflicting interpretation of the title; it does not accept El Salvador's interpretation whereby it would extend as far west as the Peña de Cayaguanca, and as coterminous with the land surveyed in 1742 for the Jupula title, and concludes that there was an intervening area not covered by either title. On this basis the Chamber determines the course of the north-western boundary of the title of Dulce Nombre de la Palma; the eastern boundary, as recognized by both Parties, is the river Sumpul.

The Chamber then examines three Honduran republican titles in the disputed area, concluding that they do not conflict with the Dulce Nombre de la Palma title so as to throw doubt on its interpretation.

The Chamber goes on to examine the *effectivités* claimed by each Party to ascertain whether they support the conclusion based on the latter title. The Chamber concludes that there is no reason to alter its findings as to the position of the boundary in this region.

The Chamber next turns to the claim by El Salvador to a triangular strip along and outside the north-west boundary of the Dulce Nombre de la Palma title, which El Salvador claims to be totally occupied by Salvadorians and administered by Salvadorian authorities. No evidence to that effect has, however, been laid before the Chamber. Nor does it consider that a passage in the Reply of Honduras regarded by El Salvador as an admission of the existence of Salvadorian *effectivités* in this area can be so read. There being no other evidence to support El Salvador's claim to the strip in question, the Chamber holds that it appertains to Honduras, having formed part of the "mountain of Cayaguanca" attributed to the community of Ocotepeque in 1742.

The Chamber turns finally to the part of the boundary between the Peña de Cayaguanca and the western boundary of the area covered by the Dulce Nombre de la Palma title. It finds that El Salvador has not made good any claim to any area further west than the Loma de los Encinos or "Santa Rosa hillock", the most westerly point of the Dulce Nombre de la Palma title. Noting that Honduras has only asserted a claim, on the basis of the rights of Ocotepeque to the "mountain of Cayaguanca", so far south as a straight line joining the Peña de Cayaguanca to the beginning of the next agreed sector, the Chamber considers that neither the principle *ne ultra petita*, nor any suggested acquiescence by Honduras in the boundary asserted by it, debars the Chamber from enquiring whether the "mountain of Cayaguanca" might have extended further south, so as to be coterminous with the eastern boundary of the Jupula title. In view of the reference in the latter to Cayaguanca as lying east of the most easterly landmark of Jupula, the Chamber considers that the area between the Jupula and the la Palma lands belongs to Honduras, and that in the absence of any other criteria for determining the southward extent of that area, the boundary between the Peña de Cayaguanca and the Loma de los Encinos should be a straight line.

The Chamber's conclusion regarding the course of the frontier in the second disputed sector is as follows:[2]

[2]See sketch-map B on page 36; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

"From . . . the Peña de Cayaguanca, the frontier runs in a straight line somewhat south of east to the Loma de Los Encinos . . . , and from there in a straight line on a bearing of N 48° E, to the hill shown on the map produced by El Salvador as El Burro (and on the Honduran maps and the United States Defense Mapping Agency maps as Piedra Rajada) . . . The frontier then takes the shortest course to the head of the *quebrada* del Copantillo, and follows the *quebrada* del Copantillo downstream to its confluence with the river Sumpul . . . , and follows the river Sumpul in turn downstream until its confluence with the *quebrada* Chiquita or Oscura . . . "

VI. *Third sector of the land boundary*
(paras. 128-185)

The third sector of the land boundary in dispute lies between the boundary marker of the Pacacio, on the river of that name, and the boundary marker Poza del Cajón, on the river known as El Amatillo or Gualcuquín (see sketch-map C on page 37).

In terms of the grounds asserted for the claims of the Parties the Chamber divides the disputed area into three parts.

In the first part, the north-western area, Honduras invokes the *uti possidetis juris* of 1821 on the basis of land titles granted between 1719 and 1779. El Salvador, on the contrary, claims the major part of the area on the basis of post-independence *effectivités* or arguments of a human nature. It does, however, claim a portion of the area as part of the lands of the 1724 title of Arcatao.

In the second part, the essential question is the validity, extent and relationship to each other of the Arcatao title relied on by El Salvador and eighteenth-century titles invoked by Honduras.

In the third part, the south-east section, there is a similar conflict between the Arcatao title and a lost title, that of Nombre de Jesús in the province of San Salvador, on the one hand, and the Honduran titles of San Juan de Arcatao, supplemented by the Honduran republican titles of La Virtud and San Sebastián del Palo Verde. El Salvador claims a further area, outside the asserted limits of the Arcatao and Nombre de Jesús titles, on the basis of *effectivités* and human arguments.

The Chamber first surveys the *uti possidetis juris* position on the basis of the various titles produced.

With regard to the first part of the third sector, the Chamber upholds Honduras's contention in principle that the position of the pre-independence provincial boundary is defined by two eighteenth-century Honduran titles. After first reserving the question of precisely where their southern limits lay, since if the Chamber found in favour of El Salvador's claim based on *effectivités*, it would not have to be considered, the Chamber ultimately determines the boundary in this area on the basis of these titles.

As for the second part of the third sector, the Chamber considers it impossible to reconcile all the landmarks, distances and directions given in the various eighteenth-century surveys: the most that can be achieved is a line which harmonizes with such features as are identifiable with a high degree of probability, corresponds more or less to the recorded distances and does not leave any major discrepancy unexplained. The Chamber considers that three features are identifiable and that these three reference points make it possible to reconstruct the boundary between the province of Gracias a Dios and that of San Salvador in the area under consideration and thus the *uti possidetis juris* line, which the Chamber describes.

With regard to the third part of the sector, the Chamber considers that on the basis of the reconstructed 1742 title of Nombre de Jesús and the 1766 and 1786 surveys of San Juan de Arcatao, it is established that the *uti possidetis juris* line corresponded to the boundary between those two properties, which line the Chamber describes. In order to define the line more precisely the Chamber considers it legitimate to have regard to the republican titles granted by Honduras in the region, the line found by the Chamber being consistent with what it regards as the correct geographical location of those titles.

Having completed its survey of the *uti possidetis juris* position, the Chamber examines the claims made in the whole of the third sector on the basis of *effectivités*. Regarding the claims made by El Salvador on such grounds, the Chamber is unable to regard the relevant material as sufficient to affect its conclusion as to the position of the boundary. The Chamber reaches the same conclusion as regards the evidence of *effectivités* submitted by Honduras.

The Chamber's conclusion regarding the course of the boundary in the third sector is as follows:[3]

"From the Pacacio boundary marker . . . along the río Pacacio upstream to a point . . . west of the Cerro Tecolate or Los Tecolates; from there up the *quebrada* to the crest of the Cerro Tecolate or Los Tecolates . . . , and along the watershed of this hill as far as a ridge approximately 1 kilometre to the north-east . . . ; from there in an easterly direction to the neighbouring hill above the source of the Torrente La Puerta . . . and down that stream to where it meets the river Gualsinga . . . ; from there the boundary runs along the middle of the river Gualsinga downstream to its confluence with the Sazalapa . . . , and thence upstream along the middle of the river Sazalapa to the confluence with the river Sazalapa of the *quebrada* Llano Negro . . . ; from there south-eastwards to the hill indicated . . . , and thence to the crest of the hill marked on maps as being an elevation of 1,017 metres . . . ; from there the boundary, inclining still more to the south, runs through the triangulation point known as La Cañada . . . to the ridge joining the hills indicated on the El Salvador map as Cerro El Caracol and Cerro El Sapo . . . , and from there to the feature marked on the maps as the Portillo El Chupa Miel . . . ; from there following the ridge to the Cerro El Cajete . . . , and thence to the point where the present-day road from Arcatao to Nombre de Jesús passes between the Cerro El Ocotillo and the Cerro Lagunetas . . . ; from there south-eastwards, to the top of the hill . . . marked on the maps with a spot height of 848 metres; from there slightly south of east to a small *quebrada*; eastwards down the bed of the *quebrada* to its junction with the river Amatillo or Gualcuquín . . . ; the boundary then follows the middle of the Gualcuquín river downstream to the Poza del Cajón . . . , the point where the next agreed sector of boundary begins."

[3]See sketch-map C on page 37; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

VII. *Fourth sector of the land boundary* (paras. 186-267)

The fourth, and longest, disputed sector of the land boundary, also involving the largest area in dispute, lies between the source of the Orilla stream and the Malpaso de Similatón boundary marker (see sketch-map D on page 38).

The principal issue in this sector, at least as regards the size of the area concerned, is whether the boundary follows the river Negro-Quiagara, as Honduras contends, or a line contended for by El Salvador, some 8 kilometres to the north. In terms of the *uti possidetis juris* principle, the issue is whether or not the province of San Miguel, which on independence became part of El Salvador, extended to the north of that river or whether on the contrary the latter was in 1821 the boundary between that province and the province of Comayagua, which became part of Honduras. El Salvador relies on a title issued in 1745 to the communities of Arambala and Perquín in the province of San Miguel; the lands so granted extended north and south of the river Negro-Quiagara, but Honduras contends that, north of that river, the lands were in the province of Comayagua.

The Chamber first sets out the relevant events, in particular a dispute between the Indian community of Arambala and Perquín, in the province of San Miguel, and an Indian community established in Jocora or Jocoara in the province of Comayagua. The position of the boundary between the province of San Miguel and that of Comayagua was one of the main issues in the dispute between the two communities, which gave rise to a judicial decision of 1773. In 1815 a decision was issued by the *Real Audiencia* of Guatemala confirming the rights of the Indians of Arambala-Perquín. The Parties made extensive reference to these decisions in support of their contentions as to the location of the boundary; the Chamber is, however, reluctant to base a conclusion, one way or the other, on the 1773 decision and does not regard the 1815 one as wholly conclusive in respect of the location of the provincial boundary.

The Chamber then considers a contention by Honduras that El Salvador had in 1861 admitted that the Arambala-Perquín *ejidos* extended across the provincial boundary. It refers to a note of 14 May 1861 in which the Minister for Foreign Relations of El Salvador suggested negotiations to settle a long-standing dispute between the inhabitants of the villages of Arambala and Perquín, on the one hand, and the village of Jocoara, on the other, and to the report of surveyors appointed to resolve the inter-village dispute. It considers this note to be significant not only as, in effect, a recognition that the lands of the Arambala-Perquín community had, prior to independence, straddled the provincial boundary, but also as recognition that, as a result, they straddled the international frontier.

The Chamber then turns to the south-western part of the disputed boundary, referred to as the sub-sector of Colomoncagua. The problem here is, in broad terms, the determination of the extent of the lands of Colomoncagua, province of Comayagua (Honduras), to the west, and those of the communities of Arambala-Perquín and Torola, province of San Miguel (El Salvador), to the east and south-east. Both Parties rely on titles and other documents of the colonial period; El Salvador has also submitted a remeasurement and renewed title of 1844. The Chamber notes that apart from the difficulties of identifying landmarks and reconciling the various surveys, the matter is complicated by doubts each Party casts on the regularity or relevance of titles invoked by the other.

After listing chronologically the titles and documents claimed by the one side or the other to be relevant, the Chamber assesses five of these documents to which the Parties took objection on various grounds.

The Chamber goes on to determine, on the basis of an examination of the titles and an assessment of the arguments advanced by the Parties by reference to them, the line of the *uti possidetis juris* in the sub-sector under consideration. Having established that the inter-provincial boundary was, in one area, the river Las Cañas, the Chamber relies on a presumption that such a boundary is likely to follow the river so long as its course is in the same general direction.

The Chamber then turns to the final section of the boundary between the river Las Cañas and the source of the Orilla stream (end-point of the sector). With respect to this section, the Chamber accepts the line claimed by Honduras on the basis of a title of 1653.

The Chamber next addresses the claim of El Salvador, based upon the *uti possidetis juris* in relation to the concept of *tierras realengas* (crown land), to areas to the west and south-west of the land comprised in the *ejidos* of Arambala Perquín, lying on each side of the river Negro-Quiagara, bounded on the west by the river Negro-Pichigual. The Chamber finds in favour of part of El Salvador's claim, south of the river Negro-Pichigual, but is unable to accept the remainder.

The Chamber has finally to deal with the eastern part of the boundary line, that between the river Negro-Quiagara and Malpaso de Similatón. An initial problem is that the Parties do not agree on the position of the Malpaso de Similatón, although this point defines one of the agreed sectors of the boundary as recorded in article 16 of the 1980 Peace Treaty, the two locations contended for being 2,500 metres apart. The Chamber therefore concludes that there is a dispute between the Parties on this point, which it has to resolve.

The Chamber notes that this dispute is part of a disagreement as to the course of the boundary beyond the Malpaso de Similatón, in the sector which is deemed to have been agreed. While it does not consider that it has jurisdiction to settle disputed questions in an "agreed" sector, neither does it consider that the existence of such a disagreement affects its jurisdiction to determine the boundary up to and including the Malpaso de Similatón.

Noting that neither side has offered any evidence whatever as to the line of the *uti possidetis juris* in this region, the Chamber, being satisfied that this line is impossible to determine in this area, considers it right to fall back on equity *infra legem*, in conjunction with an unratified delimitation of 1869. The Chamber considers that it can in this case resort to the line then proposed in negotiations, as a reasonable and fair solution in all the circumstances, particularly since there is nothing in the records of the negotiations to suggest any fundamental disagreement between the Parties on that line.

The Chamber then considers the question of the *effectivités* El Salvador claims in the area north of the river Negro-Quiagara, which the Chamber has found to fall on the Honduran side of the line of the *uti possidetis juris*, as well as the areas outside those lands. After reviewing the evidence presented by El Salvador, the Chamber finds that,

to the extent that it can relate various place-names to the disputed areas and to the *uti possidetis juris* boundary, it cannot regard this material as sufficient evidence of any kind of *effectivités* which could be taken into account in determining the boundary.

Turning to the *effectivités* claimed by Honduras, the Chamber does not see here sufficient evidence of Honduran *effectivités* to an area clearly shown to be on the El Salvador side of the boundary line to justify doubting that that boundary represents the *uti possidetis juris* line.

The Chamber's conclusion regarding the course of the boundary in the fourth disputed sector is as follows:[4]

> "from the source of the Orilla stream . . . the boundary runs through the pass of El Jobo to the source of the Cueva Hedionda stream . . . , and thence down the middle of that stream to its confluence with the river Las Cañas . . . , and thence following the middle of the river upstream as far as a point . . . near the settlement of Las Piletas; from there eastwards over a col . . . to a hill . . . , and then north-eastwards to a point on the river Negro or Pichigual . . . ; downstream along the middle of the river Negro or Pichigual to its confluence with the river Negro-Quiagara . . . ; then upstream along the middle of the river Negro-Quiagara as far as the Las Pilas boundary marker . . . , and from there in a straight line to the Malpaso de Similatón as identified by Honduras".

VIII. *Fifth sector of the land boundary* (paras. 268-305)

The fifth disputed sector extends from "the point on the north bank of the river Torola where it is joined by the Manzupucagua stream" to the Paso de Unire in the Unire river (see sketch-map E on page 39).

El Salvador's claim is based essentially on the *título ejidal* granted to the village of Polorós, province of San Miguel, in 1760, following a survey; the boundary line El Salvador claims is what it considers to be the northern boundary of the lands comprised in that title, save for a narrow strip on the western side, claimed on the basis of "human arguments".

Honduras, while disputing El Salvador's geographic interpretation of the Polorós title, concedes that it extended across part of the river Torola, but nevertheless claims that the frontier today should follow that river. It contends that the northern part of the *ejidos* granted to Polorós in 1760, including all the lands north of the river and also extending south of it, had formerly been the land of San Miguel de Sapigre, a village which had disappeared owing to an epidemic some time after 1734, and that the village had been in the jurisdiction of Comayagua, so that those lands, although granted to Polorós, remained within that jurisdiction. It follows, according to Honduras, that the *uti possidetis juris* line ran along the boundary between those lands and the other Polorós lands; but Honduras concedes that as a result of events in 1854 it acquiesced in a boundary further north, formed by the Torola. Alternatively, Honduras claims the Polorós lands north of the river on the basis that El Salvador acquiesced, in the nineteenth century, in the Torola as frontier. The western part of the disputed area, which Honduras considers to fall outside the Polorós title, is claimed by it as part of the lands of Cacaoterique, a village in the jurisdiction of Comayagua.

Noting that the title of Polorós was granted by the authorities of the province of San Miguel, the Chamber considers that it must be presumed that the lands comprised in the survey were all within the jurisdiction of San Miguel, a presumption which, the Chamber notes, is supported by the text.

After examining the available material as to the existence, location and extent of the village of San Miguel de Sapigre, the Chamber concludes that the claim of Honduras through that extinct village is not supported by sufficient evidence; it does not therefore have to go into the question of the effect of the inclusion in an *ejido* of one jurisdiction of *tierras realengas* of another. It concludes that the *ejido* granted in 1760 to the village of Polorós, in the province of San Miguel, was wholly situated in that province and that accordingly the provincial boundary lay beyond the northern limit of that *ejido* or coincided with it. There being equally no evidence of any change in the situation between 1760 and 1821, the *uti possidetis juris* line may be taken to have been in the same position.

The Chamber then examines the claim of Honduras that, whatever the 1821 position, El Salvador had, by its conduct between 1821 and 1897, acquiesced in the river Torola as boundary. The conduct in question was the granting by the Government of El Salvador, in 1842, of a title to an estate that both Parties claim was carved out of the *ejidos* of Polorós and El Salvador's reaction, or lack of reaction, to the granting of two titles over lands north of the river Torola by Honduras in 1856 and 1879. From an examination of these events, the Chamber does not find it possible to uphold Honduras's claim that El Salvador acquiesced in the river Torola as the boundary in the relevant area.

The Chamber goes on to interpret the extent of the Polorós *ejido* as surveyed in 1760, on the face of the text and in the light of developments after 1821. Following a lengthy and detailed analysis of the Polorós title, the Chamber concludes that neither of the interpretations of it by the Parties can be reconciled with the relevant landmarks and distances; the inconsistency crystallized during the negotiations that led up to the unratified Cruz-Letona Convention in 1884. In the light of certain republican titles, the Chamber arrives at an interpretation of the Polorós title which, if not perfectly in harmony with all the relevant data, produces a better fit than either of the Parties' interpretations. As to neighbouring titles, the Chamber takes the view that, on the material available, no totally consistent mapping of the Polorós title and the survey of Cacaoterique can be achieved.

In the eastern part of the sector, the Chamber notes that the Parties agree that the river Unire constitutes the boundary of their territories for some distance upstream of the "Paso de Unire", but disagree as to which of two tributaries is to be regarded as the headwaters of the Unire. Honduras claims that between the Unire and the headwaters of the Torola the boundary is a straight line corresponding to the south-western limit of the lands comprised in the 1738 Honduran title of San Antonio de Padua. After analysing the Polorós title and 1682 and 1738 surveys of San Antonio, the Chamber finds that it is not convinced by the Honduran argument that the San Antonio lands extended westwards across the river Unire and holds that it was the river which was the *uti possidetis juris* line, as claimed by El Salvador.

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[4]See sketch-map D on page 38; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

To the west of the Polorós lands, since El Salvador's claim to land north of the river is based solely on the Polorós title (save for the strip on the west claimed on the basis of "human arguments"), the river Torola forms the boundary between the Polorós lands and the starting point of the sector. With regard to the strip of land claimed by El Salvador on the west, the Chamber considers that, for lack of evidence, this claim cannot be sustained.

Turning finally to the evidence of *effectivités* submitted by Honduras with respect to all six sectors, the Chamber concludes that this is insufficient to justify re-examining its conclusion as to the boundary line.

The Chamber's conclusion regarding the course of the boundary in the fifth disputed sector is as follows:[5]

> "From the confluence with the river Torola of the stream identified in the General Treaty of Peace as the *quebrada* de Mansupucagua . . . the boundary runs upstream along the middle of the river Torola as far as its confluence with a stream known as the *quebrada* del Arenal or *quebrada* de Aceituno . . . ; thence up the middle of the course of that stream as far as [a] point, at or near its source, . . . , and thence in a straight line somewhat north of east to a hill some 1,100 metres high . . . ; thence in a straight line to a hill near the river Unire . . . , and thence to the nearest point on the river Unire; downstream along that river to the point known as the Paso de Unire . . ."

IX. *Sixth sector of the land boundary* (paras. 306-322)

The sixth and final disputed sector of the land boundary is that between a point on the river Goascorán known as Los Amates, and the waters of the Gulf of Fonseca (see sketch-map F on page 40). Honduras contends that in 1821 the river Goascorán constituted the boundary between the colonial units to which the two States have succeeded, that there has been no material change in the course of the river since 1821, and that the boundary therefore follows the present stream flowing into the Gulf north-west of the Islas Ramaditas in the Bay of La Unión. El Salvador, however, claims that it is a previous course followed by the river which defines the boundary and that this course can be traced and reaches the Gulf at Estero La Cutú.

The Chamber begins by examining an argument El Salvador bases on history. The Parties agree that during the colonial period a river called the Goascorán constituted the boundary between the province of San Miguel and the Alcaldía Mayor de Minas of Tegucigalpa, and that El Salvador succeeded on independence to the territory of the province; but El Salvador denies that Honduras acquired any rights over the former territory of the Alcaldía Mayor of Tegucigalpa, which according to El Salvador did not in 1821 belong to the province of Honduras but was an independent entity. The Chamber, however, observes that on the basis of the *uti possidetis juris*, El Salvador and Honduras succeeded to all the relevant colonial territories, leaving no *terra nullius*, and that the former Alcaldía Mayor was at no time after 1821 an independent state additional to them. Its territory had to pass either to El Salvador or to Honduras and the Chamber understands it to have passed to Honduras.

[5]See sketch-map E on page 39; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

The Chamber observes that El Salvador's argument of law, on the basis that the former bed of the river Goascorán forms the *uti possidetis juris* boundary, is that where a boundary is formed by the course of a river and the stream suddenly forms a new bed, this process of "avulsion" does not bring about a change in the boundary, which continues along the old channel. No record of an abrupt change of course having occurred has been brought to the Chamber's attention, but were the Chamber satisfied that the course was earlier so radically different from its present one, then an avulsion might reasonably be inferred. The Chamber notes that there is no scientific evidence that the previous course was such that the river debouched in the Estero La Cutú rather than in any of the other neighbouring inlets in the coastline.

El Salvador's case appears to be that if the change in the river's course occurred after 1821, the river was the boundary which under the *uti possidetis juris* had become the international frontier, and would have been maintained as it was by virtue of a rule of international law; if the course changed before 1821 and no further change took place after 1821, El Salvador's claim to the "old" course as the modern boundary would be based on a rule concerning avulsion which would be one not of international law but of Spanish colonial law. El Salvador has not committed itself to an opinion on the position of the river in 1821, but does contend that a rule on avulsion supporting its claim was part of Spanish colonial law.

In the Chamber's view, however, any claim by El Salvador that the boundary follows an old course of the river abandoned at some time *before* 1821 must be rejected. It is a claim that was first made in 1972 and is inconsistent with the previous history of the dispute.

The Chamber then turns to the evidence concerning the course of the Goascorán in 1821. El Salvador relies on certain titles to private lands, beginning with a 1695 survey. Honduras produces land titles dating from the seventeenth and nineteenth centuries as well as a map or chart of the Gulf of Fonseca prepared by an expedition in 1794-1796, and a map of 1804.

The Chamber considers that the report of the expedition that led to the preparation of the 1796 map, and the map itself, leave little room for doubt that in 1821 the Goascorán was already flowing in its present-day course. It emphasizes that the 1796 map is not one which purports to indicate frontiers or political divisions, but the visual representation of what was recorded in the contemporary report. The Chamber sees no difficulty in basing a conclusion on the expedition report combined with the map.

The Chamber adds that similar weight may be attached to the conduct of the Parties in negotiations in 1880 and 1884. In 1884 it was agreed that the Goascorán river was to be regarded as the boundary between the two Republics, "from its mouth in the Gulf of Fonseca . . . upstream as far as the confluence with the Guajiniquil or Pescado river . . . ", and the 1880 record refers to the boundary following the river from its mouth "upstream in a north-easterly direction", i.e., the direction taken by the present course, not the hypothetical old course of the river. The Chamber also observes that an interpretation of these texts as referring to the old course of the river is untenable in view of the cartographic material of the period, presumably available to the delegates, which pointed overwhelmingly to the river being then in its present course and forming the international boundary.

Referring to a suggestion by El Salvador that the river Goascorán would have returned to its old course had it not been prevented from so doing by a wall or dike built by Honduras in 1916, the Chamber does not consider that this allegation, even if proved, would affect its decision.

At its mouth in the Bay of La Unión the river divides into several branches, separated by islands and islets. Honduras has indicated that its claimed boundary passes to the north-west of these islands, thus leaving them all in Honduran territory. El Salvador, contending as it does that the boundary does not follow the present course of the Goascorán at all, has not expressed a view on whether a line following that course should pass north-west or south-east of the islands or between them. The area at stake is very small and the islets involved do not seem to be inhabited or habitable. The Chamber considers, however, that it would not complete its task of delimiting the sixth sector were it to leave unsettled the question of the choice of one of the present mouths of the Goascorán as the situation of the boundary line. It notes at the same time that the material on which to found a decision is scanty. After describing the position taken by Honduras since negotiations held in 1972, as well as its position during the work of the Joint Frontier Commission and in its submissions, the Chamber considers that it may uphold the relevant Honduran submissions in the terms in which they were presented.

The Chamber's conclusion regarding the sixth disputed sector is as follows:[6]

> "From the point known as Los Amates... the boundary follows the middle of the bed of the river Goascorán to the point where it emerges in the waters of the Bahía La Unión, Gulf of Fonseca, passing to the north-west of the Islas Ramaditas."

X. *Legal situation of the islands* (paras. 323-368)

The major islands in the Gulf are indicated on sketch-map G on page 41. El Salvador asks the Chamber to declare that it has sovereignty over all the islands within the Gulf except Zacate Grande and the Farallones; Honduras asks it to declare that only Meanguera and Meanguerita islands are in dispute between the Parties and that Honduras has sovereignty over them.

In the view of the Chamber, the provision of the Special Agreement that it determine *"la situación jurídica insular"* confers upon it jurisdiction in respect of all the islands of the Gulf. A judicial determination, however, is only required in respect of such islands as are in dispute between the Parties; this excludes, *inter alia*, the Farallones, which are recognized by both Parties as belonging to Nicaragua.

The Chamber considers that prima facie the existence of a dispute over an island can be deduced from the fact of its being the subject of specific and argued claims. Noting that El Salvador has pressed its claim to El Tigre island with arguments in support and that Honduras has advanced counter-arguments, though with the object of showing that there is no dispute over El Tigre, the Chamber considers that, either since 1985 or at least since issue was joined in these proceedings, the islands in dispute are El Tigre, Meanguera and Meanguerita.

Honduras contends, however, that, since the 1980 General Treaty of Peace uses the same terms as article 2, paragraph 2, of the Special Agreement, the jurisdiction of the Chamber must be limited to the islands in dispute at the time the Treaty was concluded, i.e., Meanguera and Meanguerita, the Salvadorian claim to El Tigre having been made only in 1985. The Chamber, however, observes that the question whether a given island is in dispute is relevant, not to the question of the existence of jurisdiction, but to that of its exercise. Honduras also claims that there is no real dispute over El Tigre, which has since 1854 been recognized by El Salvador as belonging to Honduras, but that El Salvador has made a belated claim to it as a political or tactical move. The Chamber notes that for it to find that there is no dispute would require it first to determine that El Salvador's claim is wholly unfounded, and to do so can hardly be viewed as anything but the determination of a dispute. The Chamber therefore concludes that it should determine whether Honduras or El Salvador has jurisdiction over each of the islands of El Tigre, Meanguera and Meanguerita.

Honduras contends that by virtue of article 26 of the General Treaty of Peace the law applicable to the dispute is solely the *uti possidetis juris* of 1821, while El Salvador maintains that the Chamber has to apply the modern law on acquisition of territory and look at the effective exercise or display of State sovereignty over the islands as well as historical titles.

The Chamber has no doubt that the determination of sovereignty over the islands must start with the *uti possidetis juris*. In 1821, none of the islands of the Gulf, which had been under the sovereignty of the Spanish Crown, were *terra nullius*. Sovereignty over them could therefore not be acquired by occupation and the matter was thus one of the succession of the newly independent States to the islands. The Chamber will therefore consider whether the appurtenance in 1821 of each disputed island to one or the other of the various administrative units of the Spanish colonial structure can be established, regard being had not only to legislative and administrative texts of the colonial period, but also to "colonial *effectivités*". The Chamber observes that in the case of the islands the legal and administrative texts are confused and conflicting, and that it is possible that Spanish colonial law gave no clear and definite answer as to the appurtenance of some areas. It therefore considers it particularly appropriate to examine the conduct of the new States during the period immediately after 1821. Claims then made, and the reaction—or lack of reaction—to them may throw light on the contemporary appreciation of what the situation in 1821 had been, or should be taken to have been.

The Chamber notes that El Salvador claims all the islands in the Gulf (except Zacate Grande) on the basis that during the colonial period they were within the jurisdiction of the township of San Miguel in the colonial province of San Salvador, which was in turn within the jurisdiction of the *Real Audiencia* of Guatemala. Honduras asserts that the islands formed part of the bishopric and province of Honduras, that the Spanish Crown had attributed Meanguera and Meanguerita to that province and that ecclesiastical jurisdiction over the islands appertained to the parish of Choluteca and the Guardanía of Nacaome, assigned to the bishopric of Comayagua. Honduras has also presented an array of incidents and events by way of colonial *effectivités*.

[6]See sketch-map F on page 40; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

The fact that the ecclesiastical jurisdiction has been relied on as evidence of "colonial *effectivités*" presents difficulties, as the presence of the church on the islands, which were sparsely populated, was not permanent.

The Chamber's task is made more difficult by the fact that many of the historical events relied on can be, and have been, interpreted in different ways and thus used to support the arguments of either Party.

The Chamber considers it unnecessary to analyse in further detail the arguments each Party advances to show that it acquired sovereignty over some or all of the islands by the application of the *uti possidetis juris* principle, the material available being too fragmentary and ambiguous to admit of any firm conclusion. The Chamber must therefore consider the post-independence conduct of the Parties, as indicative of what must have been the 1821 position. This may be supplemented by considerations independent of the *uti possidetis juris* principle, in particular the possible significance of the conduct of the Parties as constituting acquiescence. The Chamber also notes that under article 26 of the General Treaty of Peace, it may consider all "other evidence and arguments of a legal, historical, human or other kind, brought before it by the Parties and admitted under international law".

The law of acquisition of territory, invoked by El Salvador, is in principle clearly established and buttressed by arbitral and judicial decisions. The difficulty with its application here is that it was developed primarily to deal with the acquisition of sovereignty over *terra nullius*. Both Parties, however, assert a title of succession from the Spanish Crown, so that the question arises whether the exercise or display of sovereignty by the one Party, particularly when coupled with lack of protest by the other, could indicate the presence of an *uti possidetis juris* title in the former Party, where the evidence based on titles or colonial *effectivités* is ambiguous. The Chamber notes that in the *Minquiers and Ecrehos* case in 1953 the Court did not simply disregard the ancient titles and decide on the basis of more recent displays of sovereignty.

In the view of the Chamber, where the relevant administrative boundary in the colonial period was ill-defined or its position disputed, the behaviour of the two States in the years following independence may serve as a guide to where the boundary was, either in their shared view, or in the view acted on by one and acquiesced in by the other.

Being uninhabited or sparsely inhabited, the islands did not arouse any interest or dispute until the years nearing the mid-nineteenth century. What then occurred appears to be highly material. The islands were not *terra nullius* and in legal theory each island already appertained to one of the Gulf States as heir to the appropriate part of the Spanish colonial possession, which precluded acquisition by occupation; but effective possession by one of the States of an island could constitute a post-colonial *effectivité*, throwing light on the contemporary appreciation of the legal situation. Possession backed by the exercise of sovereignty may confirm the *uti possidetis juris* title. The Chamber does not find it necessary to decide whether such possession could be recognized even in contradiction of such a title, but in the case of the islands, where the historical material of colonial times is confused and contradictory and independence was not immediately followed by unambiguous acts of sovereignty, this is practically the only way in which the *uti possidetis juris* could find formal expression.

The Chamber deals first with El Tigre, and reviews the historical events concerning it from 1833 onward. Noting that Honduras has remained in effective occupation of the island since 1849, the Chamber concludes that the conduct of the Parties in the years following the dissolution of the Federal Republic of Central America was consistent with the assumption that El Tigre appertained to Honduras. Given the attachment of the Central American States to the principle of *uti possidetis juris*, the Chamber considers that that contemporary assumption also implied belief that Honduras was entitled to the island by succession from Spain, or, at least, that such succession by Honduras was not contradicted by any known colonial title. Although Honduras has not formally requested a finding of its sovereignty over El Tigre, the Chamber considers that it should define its legal situation by holding that sovereignty over El Tigre belongs to Honduras.

Regarding Meanguera and Meanguerita, the Chamber observes that throughout the argument the two islands were treated by both Parties as constituting a single insular unity. The smallness of Meanguerita, its contiguity to the larger island, and the fact that it is uninhabited allow its characterization as a "dependency" of Meanguera. That Meanguerita is "capable of appropriation" is undoubted: although without fresh water, it is not a low-tide elevation and is covered by vegetation. The Parties have treated it as capable of appropriation, since they claim sovereignty over it.

The Chamber notes that the initial formal manifestation of the dispute occurred in 1854, when a circular letter made widely known El Salvador's claim to the island. Furthermore, in 1856 and 1879 El Salvador's official journal carried reports concerning administrative acts relating to it. The Chamber has seen no record of reactions or protest by Honduras over these publications.

The Chamber observes that from the late nineteenth century the presence of El Salvador on Meanguera intensified, still without objection or protest from Honduras, and that it has received considerable documentary evidence on the administration of Meanguera by El Salvador. Throughout the period covered by that documentation there is no record of any protest by Honduras, with the exception of one recent event, described later. Furthermore, El Salvador called a witness, a Salvadorian resident of the island, and his testimony, not challenged by Honduras, shows that El Salvador has exercised State power over Meanguera.

According to the material before the Chamber, it was only in January 1991 that the Government of Honduras made protests to the Government of El Salvador concerning Meanguera, which were rejected by the latter Government. The Chamber considers that the Honduran protest was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras vis-à-vis earlier *effectivités* reveals some form of tacit consent to the situation.

The Chamber's conclusion is thus the following. In relation to the islands, the "documents which were issued by the Spanish Crown or by any other Spanish authority, whether secular or ecclesiastical", do not appear sufficient to "indicate the jurisdictions or limits of territories or settlements" in terms of article 26 of that Treaty, so that no firm conclusion can be based upon such material, taken in isolation, for deciding between the two claims to an *uti possidetis juris* title. Under the final sentence of article 26, the Chamber is, however, entitled to consider both the effective interpretation of the *uti possidetis juris* by the Parties, in the

years following independence, as throwing light on the application of the principle, and the evidence of effective possession and control of an island by one Party without protest by the other as pointing to acquiescence. The evidence as to possession and control, and the display and exercise of sovereignty, by Honduras over El Tigre and by El Salvador over Meanguera (to which Meanguerita is an appendage), coupled in each case with the attitude of the other Party, clearly shows that Honduras was treated as having succeeded to Spanish sovereignty over El Tigre, and El Salvador to Spanish sovereignty over Meanguera and Meanguerita.

XI. *Legal situation of the maritime spaces* (paras. 369-420)

The Chamber first recalls that Nicaragua had been authorized to intervene in the proceedings, but solely on the question of the legal regime of the waters of the Gulf of Fonseca. Referring to complaints by the Parties that Nicaragua had dealt with matters beyond the limits of its permitted intervention, the Chamber observes that it has taken account of Nicaragua's arguments only where they appear relevant in its consideration of the regime of the waters of the Gulf of Fonseca.

The Chamber then refers to the disagreement between the Parties on whether article 2, paragraph 2, of the Special Agreement empowers or requires the Chamber to delimit a maritime boundary, within or without the Gulf. El Salvador maintains that "the Chamber has no jurisdiction to effect any delimitation of the maritime spaces", whereas Honduras seeks the delimitation of the maritime boundary inside and outside the Gulf. The Chamber notes that these contentions have to be seen in relation to the position of the Parties as to the legal status of the Gulf waters: El Salvador claims that they are subject to a condominium in favour of the three coastal States and that delimitation would therefore be inappropriate, whereas Honduras argues that within the Gulf there is a community of interests which necessitates a judicial delimitation.

In application of the normal rules of treaty interpretation (article 31 of the Vienna Convention on the Law of Treaties), the Chamber first considers what is the "ordinary meaning" of the terms of the Special Agreement. It concludes that no indication of a common intention to obtain a delimitation from the Chamber can be derived from the text as it stands. Turning to the context, the Chamber observes that the Special Agreement used the wording "to delimit the boundary line" regarding the land frontier, while confining the task of the Chamber as it relates to the islands and maritime spaces to "determine [their] legal situation", the same contrast of wording being observed in article 18, paragraph 2, of the General Treaty of Peace. Noting that Honduras itself recognizes that the island dispute is not a conflict of delimitation but of attribution of sovereignty over a detached territory, the Chamber observes that it is difficult to accept that the wording "to determine the legal situation", used for both the islands and the maritime spaces, would have a completely different meaning regarding the islands and regarding maritime spaces.

Invoking the principle of effectiveness, Honduras argues that the context of the Treaty and the Special Agreement militate against the Parties having intended merely a determination of the legal situation of the spaces unaccompanied by delimitation, the object and purpose of the Special Agreement being to dispose completely of a long-standing corpus of disputes. In the Chamber's view, however, in interpreting a text of this kind, regard must be had to the common intention as it is expressed. In effect, what Honduras is proposing is recourse to the "circumstances" of the conclusion of the Special Agreement, which constitute no more than a supplementary means of interpretation.

To explain the absence of any specific reference to delimitation in the Special Agreement, Honduras points to a provision in the Constitution of El Salvador such that its representatives could never have intended to sign a special agreement contemplating any delimitation of the waters of the Gulf. Honduras contends that it was for this reason that the expression "determine the legal situation" was chosen, intended as a neutral term which would not prejudice the position of either Party. The Chamber is unable to accept this contention, which amounts to a recognition that the Parties were unable to agree that the Chamber should have jurisdiction to delimit the waters of the Gulf. It concludes that the agreement between the Parties, expressed in article 2, paragraph 2, of the Special Agreement, that the Chamber should determine the legal situation of the maritime spaces did not extend to their delimitation.

Relying on the fact that the expression "determine the legal situation of the island and the maritime spaces" is also used in article 18 of the General Treaty of Peace of 1980, defining the role of the Joint Frontier Commission, Honduras invokes the subsequent practice of the Parties in the application of the Treaty and invites the Chamber to take into account the fact that the Joint Frontier Commission examined proposals aimed at such delimitation. The Chamber considers that, while both customary law and the Vienna Convention on the Law of Treaties (art. 31, para. 3 (*b*)) allow such practice to be taken into account for purposes of interpretation, none of the considerations raised by Honduras can prevail over the absence from the text of any specific reference to delimitation.

The Chamber then turns to the legal situation of the waters of the Gulf, which falls to be determined by the application of "the rules of international law applicable between the Parties, including, where pertinent, the provisions of the General Treaty of Peace", as provided in articles 2 and 5 of the Special Agreement.

Following a description of the geographical characteristics of the Gulf, the coastline of which is divided between El Salvador, Honduras and Nicaragua (see sketch-map G on page 41), and the conditions of navigation within it, the Chamber points out that the dimensions and proportions of the Gulf are such that it would nowadays be a juridical bay under the provisions (which might be found to express general customary law) of the Convention on the Territorial Sea and the Contiguous Zone (1958) and the Convention on the Law of the Sea (1982), the consequence being that, if it were a single-State bay, a closing line might now be drawn and the waters be thereby enclosed and "considered as internal waters". The Parties and the intervening State, as well as commentators generally, are agreed that the Gulf is an historic bay, and that its waters are accordingly historic waters. Such waters were defined in the *Fisheries* case between the United Kingdom and Norway as "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title" (*I.C.J. Reports 1951*, p. 130). This should be read in the light of the observation in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case that

"general international law . . . does not provide for a *single* 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'" (*I.C.J. Reports 1982*, p. 74).

The Court concludes that it is clearly necessary to investigate the particular history of the Gulf to discover the "régime" resulting therefrom, adding that the particular historical regime established by practice must be especially important in a pluri-State bay, a kind of bay for which there are notoriously no agreed and codified general rules of the kind so well established for single-State bays.

Since its discovery in 1522 until 1821, the Gulf was a single-State bay the waters of which were under the single sway of the Spanish Crown. The rights in the Gulf of the present coastal States were thus acquired, like their land territories, by succession from Spain. The Chamber must therefore enquire into the legal situation of the waters of the Gulf in 1821, for the principle of *uti possidetis juris* should apply to those waters as well as to the land.

The legal status of the Gulf waters after 1821 was a question which faced the Central American Court of Justice in the case between El Salvador and Nicaragua concerning the Gulf in which it rendered its judgement of 9 March 1917. That judgement, which examined the particular regime of the Gulf of Fonseca, must therefore be taken into consideration as an important part of the Gulf's history. The case before the Central American Court was brought by El Salvador against Nicaragua because of the latter's entry into the Bryan-Chamorro Treaty of 1914 with the United States, by which Nicaragua granted the latter a concession for the construction of an interoceanic canal and of a naval base in the Gulf, an arrangement that would allegedly prejudice El Salvador's own rights in the Gulf.

On the underlying question of the status of the waters of the Gulf there were three matters which practice and the 1917 judgement took account of: first, the practice of all three coastal States had established and mutually recognized a 1-marine-league (3-nautical-mile) littoral maritime belt off their respective mainland coasts and islands, in which belt they each exercised an exclusive jurisdiction and sovereignty, though with rights of innocent passage conceded on a mutual basis; second, all three States recognized a further belt of 3 marine leagues (9 nautical miles) for rights of "maritime inspection" for fiscal purposes and for national security; third, there was an Agreement of 1900 between Honduras and Nicaragua by which a partial maritime boundary between the two States had been delimited, which, however, stopped well short of the waters of the main entrance to the bay.

Furthermore, the Central American Court unanimously held that the Gulf "is an historic bay possessed of the characteristics of a closed sea" and that " . . . the parties are agreed that the Gulf is a closed sea . . . "; by "closed sea" the Court seems to mean simply that it is not part of the high seas and its waters are not international waters. At another point the judgement describes the Gulf as "an historic or vital bay".

The Chamber then points out that the term "territorial waters" used in the judgement did not then necessarily indicate what would now be called "territorial sea"; and explains what might appear to be an inconsistency in the judgement concerning rights of "innocent use", which are at odds with the present general understanding of the legal status of the waters of a bay as constituting "internal waters".

The Chamber observes that the rules and principles normally applicable to single-State bays are not necessarily appropriate to a bay which is a pluri-State bay and also an historic one. Moreover, there is a need for shipping to have access to any of the three coastal States through the main channels between the bay and the ocean. Rights of innocent passage are not inconsistent with a regime of historic waters. There is, furthermore, the practical point that since these waters were outside the 3-mile maritime belt of exclusive jurisdiction in which innocent passage was nevertheless recognized in practice, it would have been absurd not to recognize passage rights in these waters, which have to be crossed in order to reach those maritime belts.

All three coastal States continue to claim that the Gulf is an historic bay with the character of a closed sea, and it seems also to continue to be the subject of that "acquiescence on the part of other nations" to which the 1917 judgement refers; moreover, that position has been generally accepted by commentators. The problem is the precise character of the sovereignty the three coastal States enjoy in these historic waters. Recalling the former view that in a pluri-State bay, if it is not historic waters, the territorial sea follows the sinuosities of the coast and the remainder of the waters of the bay are part of the high seas, the Chamber notes that this solution is not possible in the case of the Gulf of Fonseca since it is an historic bay and therefore a "closed sea".

The Chamber then quotes the holding by the Central American Court that " . . . the legal status of the Gulf of Fonseca . . . is that of property belonging to the three countries that surround it . . . " and that " . . . the high parties are agreed that the waters which form the entrance to the Gulf intermingle . . . ". In addition, the judgement recognized that maritime belts of 1 marine league from the coast were within the exclusive jurisdiction of the coastal State and therefore should "be excepted from the community of interests or ownership". After quoting the paragraphs of the judgement setting forth the Court's general conclusions, the Chamber observes that the essence of its decision on the legal status of the waters of the Gulf was that these historic waters were then subject to a "co-ownership" (*condominio*) of the three coastal States.

The Chamber notes that El Salvador approves strongly of the condominium concept, and holds that this status not only prevails but also cannot be changed without its consent. Honduras opposes the condominium idea and accordingly calls in question the correctness of this part of the 1917 judgement, whilst also relying on the fact that it was not a party to the case and so cannot be bound by the decision. Nicaragua is, and has consistently been, opposed to the condominium solution.

Honduras also argues against the condominium on the ground that condominia can only be established by agreement. It is doubtless right in claiming that condominia, in the sense of arrangements for the common government of territory, have ordinarily been created by treaty. But what the Central American Court had in mind was a joint sovereignty arising as a juridical consequence of the 1821 succession. State succession is one of the ways in which territorial sovereignty passes from one State to another and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States. The Chamber thus sees the 1917 judgement as using the term condominium to describe what it regards as the joint inheri-

tance by three States of waters which had belonged to a single State and in which there were no maritime administrative boundaries in 1821 or indeed at the end of the Federal Republic of Central America in 1839.

Thus, the *ratio decidendi* of the judgement appears to be that there was, at the time of independence, no delimitation between the three countries; and the waters of the Gulf have remained undivided and in a state of community which entails a condominium or co-ownership. Further, the existence of a community was evidenced by continued and peaceful use of the waters by all the riparian States after independence.

As regards the status of the 1917 judgement, the Chamber observes that although the Court's jurisdiction was contested by Nicaragua, which also protested the judgement, it is nevertheless a valid decision of a competent court. Honduras, which, on learning of the proceedings before the Court, formally protested to El Salvador that it did not recognize the status of co-ownership in the waters of the Gulf, has, in the present case, relied on the principle that a decision in a judgment or an arbitral award can only be opposed to the parties. Nicaragua, a party to the 1917 case, is an intervener but not a party in the present one. It therefore does not appear that the Chamber is required to pronounce upon the question whether the 1917 judgement is *res judicata* between the States parties to it, only one of which is a Party to the present proceedings, a question which is not helpful in a case raising a question of the joint ownership of three coastal States. The Chamber must make up its own mind on the status of the waters of the Gulf, taking such account of the 1917 decision as it appears to the Chamber to merit.

The opinion of the Chamber on the regime of the historic waters of the Gulf parallels the opinion expressed in the 1917 judgement. The Chamber finds that, reserving the question of the 1900 Honduras/Nicaragua delimitation, the Gulf waters, other than the 3-mile maritime belt, are historic waters and subject to a joint sovereignty of the three coastal States, basing itself on the following reasons. As to the historic character of the Gulf waters, there are the consistent claims of the three coastal States and the absence of protest from other States. As to the character of rights in the waters of the Gulf, these were waters of a single State bay during the greater part of their known history and were not divided or apportioned between the different administrative units which became the three coastal States. There was no attempt to divide and delimit the waters according to the principle of *uti possidetis juris*, this being a fundamental difference between the land areas and the maritime area. The delimitation effected between Nicaragua and Honduras in 1900, which was substantially an application of the method of equidistance, gives no clue that it was in any way inspired by the application of the *uti possidetis juris*. A joint succession of the three States to the maritime area therefore seems to be the logical outcome of the principle of *uti possidetis juris* itself.

The Chamber notes that Honduras, whilst arguing against the condominium, does not consider it sufficient simply to reject it, but proposes an alternative idea, that of "community of interests" or of "interest". That there is a community of interests of the three coastal States of the Gulf is not open to doubt, but it seems odd to postulate such a community as an argument against a condominium, which is almost an ideal embodiment of the community of interest requirements of equality of user, common legal rights and the "exclusion of any preferential privilege". The essential feature of the "community of interests" existing, according to Honduras, in respect of the waters of the Gulf, and which distinguishes it from the *condominio* referred to by the Central American Court or the condominium asserted by El Salvador, is that the "community of interests" does not merely permit of a delimitation but necessitates it.

El Salvador for its part is not suggesting that the waters subject to joint sovereignty cannot be divided, if there is agreement to do so. What it maintains is that a decision on the status of the waters is an essential prerequisite to the process of delimitation. Moreover, the geographical situation of the Gulf is such that mere delimitation without agreement on questions of passage and access would leave many practical problems unsolved.

The Chamber notes that the normal geographical closing line of the bay would be the line Punta Amapala to Punta Cosigüina; it rejects a thesis elaborated by El Salvador of an "inner gulf" and an "outer gulf", based on a reference in the 1917 judgement to an inner closing line, there being nothing in that judgement to support the suggestion that Honduran legal interests in the Gulf waters were limited to the area inside the inner line. Recalling that there had been considerable argument between the Parties about whether the closing line of the Gulf is also a baseline, the Chamber accepts the definition of it as the ocean limit of the Gulf, which, however, must be the baseline for whatever regime lies beyond it, which must be different from that of the Gulf.

As to the legal status of the waters inside the Gulf closing line other than the 3-mile maritime belts, the Chamber considers whether or not they are "internal waters"; noting that rights of passage through them must be available to vessels of third States seeking access to a port in any of the three coastal States, it observes that it might be sensible to regard those waters, in so far as they are the subject of the condominium or co-ownership, as *sui generis*. The essential juridical status of these waters is, however, the same as that of internal waters, since they are claimed *à titre de souverain* and are not territorial sea.

With regard to the 1900 Honduran/Nicaraguan delimitation line, the Chamber finds, from the conduct of El Salvador, that the existence of the delimitation has been accepted by it in the terms indicated in the 1917 judgement.

In connection with any delimitation of the waters of the Gulf, the Chamber finds that the existence of joint sovereignty in all the waters subject to a condominium other than those subject to the treaty or customary delimitations means that Honduras has existing legal rights (not merely an interest) in the Gulf waters up to the bay closing line, subject, of course, to the equivalent rights of El Salvador and Nicaragua.

Regarding the question of the waters outside the Gulf, the Chamber observes that it involves entirely new concepts of law unthought of in 1917, in particular continental shelf and the exclusive economic zone. There is also a prior question about territorial sea. The littoral maritime belts of 1 marine league along the coastlines of the Gulf are not truly territorial seas in the sense of the modern law of the sea, for a territorial sea normally has beyond it the continental shelf, and either waters of the high seas or an exclusive economic zone and the maritime belts within the Gulf do not have outside them any of these areas. The maritime belts may properly be regarded as the internal waters of the

coastal State, even though subject, as indeed are all the waters of the Gulf, to rights of innocent passage.

The Chamber therefore finds that there is a territorial sea proper seawards of the closing line of the Gulf and, since there is a condominium of the waters of the Gulf, there is a tripartite presence at the closing line and Honduras is not locked out from rights in respect of the ocean waters outside the bay. It is only seaward of the closing line that modern territorial seas can exist, since otherwise the Gulf waters could not be waters of an historic bay, which the Parties and the intervening State agree to be the legal position. And if the waters internal to that bay are subject to a threefold joint sovereignty, it is the *three* coastal States that are entitled to territorial sea outside the bay.

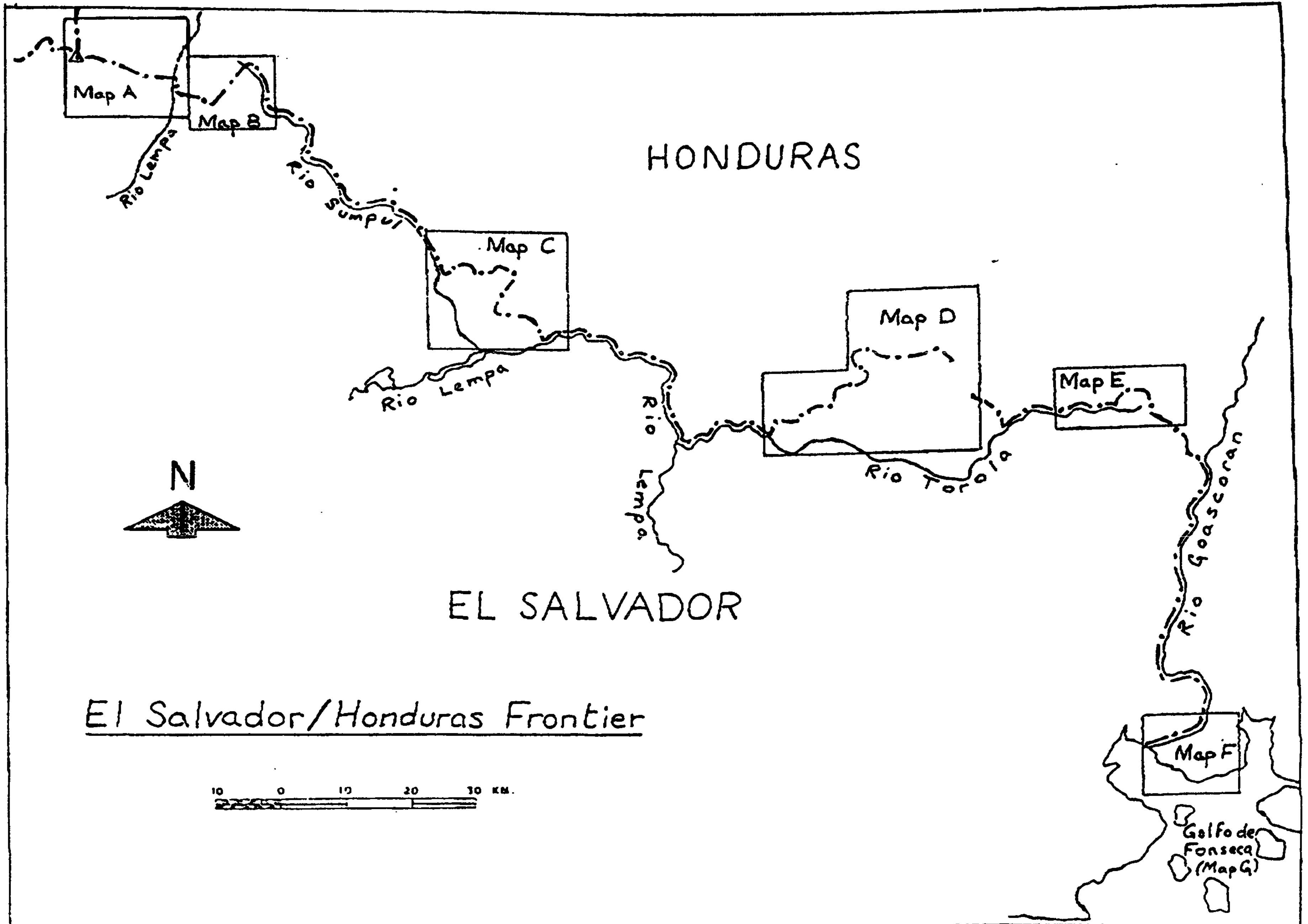
As for the legal regime of the waters, seabed and subsoil off the closing line of the Gulf, the Chamber first observes that the problem must be confined to the area off the baseline but excluding a 3-mile, or 1-marine-league, strip of it at either extremity, corresponding to the existing maritime belts of El Salvador and Nicaragua, respectively. At the time of the Central American Court's decision the waters outside the remainder of the baseline were high seas. Nevertheless, the modern law of the sea has added territorial sea extending from the baseline, has recognized continental shelf as extending beyond the territorial sea and belonging *ipso jure* to the coastal State, and confers a right on the coastal State to claim an exclusive economic zone extending up to 200 miles from the baseline of the territorial sea.

Since the legal situation on the landward side of the closing line is one of joint sovereignty, it follows that all three of the joint sovereigns must be entitled outside the closing line to territorial sea, continental shelf and exclusive economic zone. Whether this situation should remain in being or be replaced by a division and delimitation into three separate zones is, as inside the Gulf also, a matter for the three States to decide. Any such delimitation of maritime areas will fall to be effected by agreement on the basis of international law.

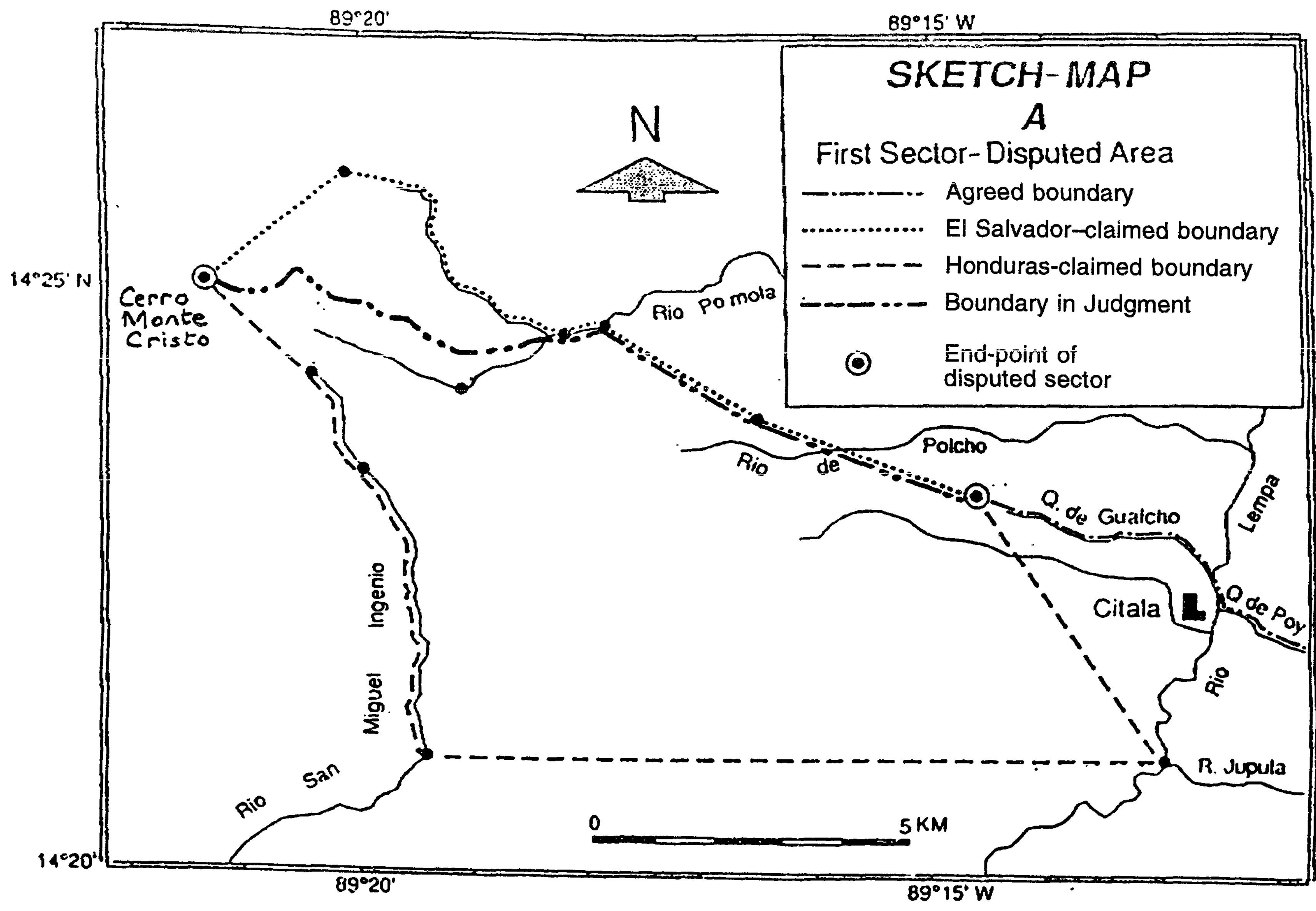
XII. *Effect of Judgment for the intervening State* (paras. 421-424)

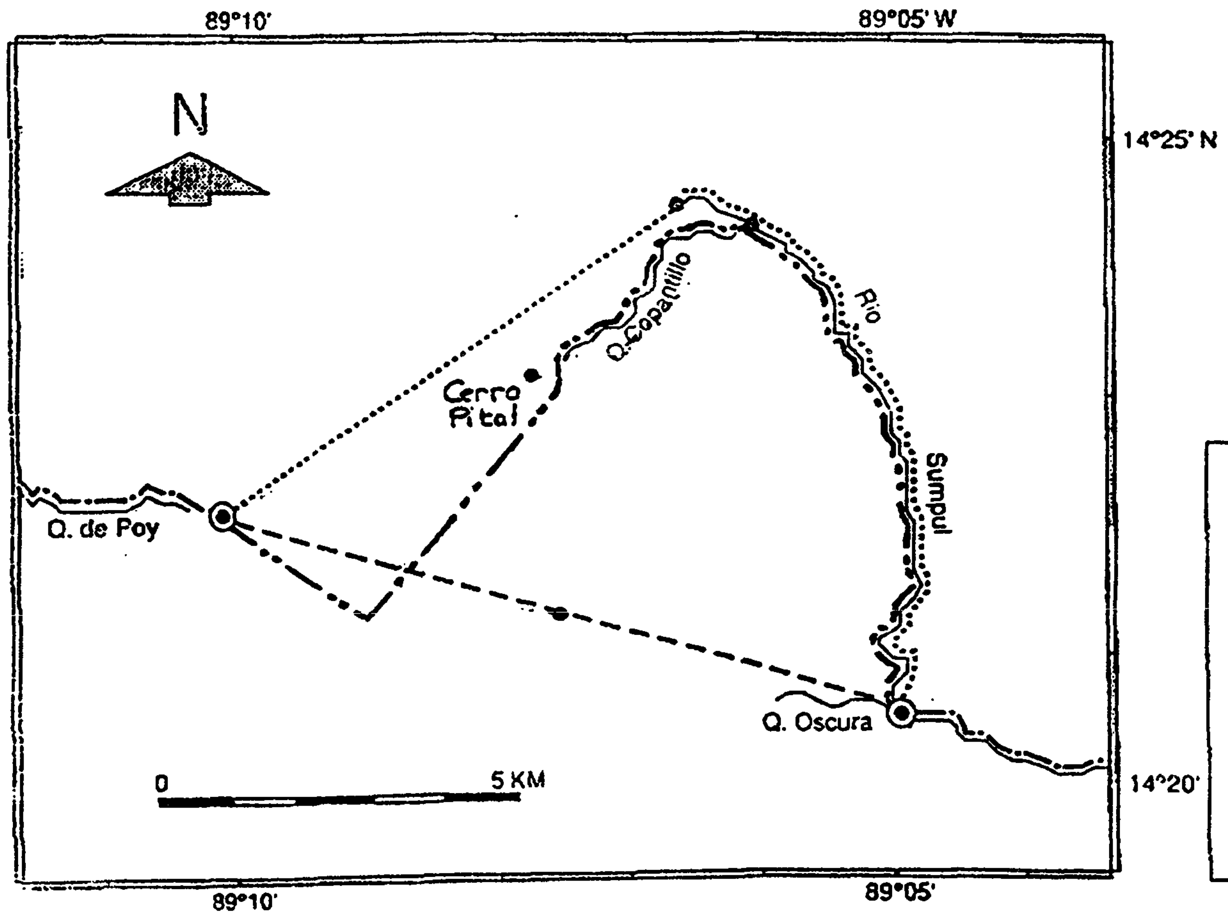
Turning to the question of the effect of its Judgment for the intervening State, the Chamber observes that the terms in which intervention was granted were that Nicaragua would not become party to the proceedings. Accordingly, the binding force of the Judgment for the Parties, as contemplated by Article 59 of the Statute of the Court, does not extend to Nicaragua as intervener.

In its Application for permission to intervene, Nicaragua had stated that it "intends to subject itself to the binding effect of the decision", but from the written statement submitted by Nicaragua it is clear that Nicaragua does not now regard itself as obligated to treat the Judgment as binding upon it. With regard to the effect, if any, of the statement in Nicaragua's Application, the Chamber notes that its Judgment of 13 September 1990 emphasized the need, if an intervener is to become a party, for the consent of the existing parties to the case; it observes that if an intervener becomes a party, and is thus bound by the judgment, it becomes entitled equally to assert the binding force of the judgment against the other parties. Noting that neither Party has given any indication of consent to Nicaragua's being recognized to have any status enabling it to rely on the Judgment, the Chamber concludes that in the circumstances of the case the Judgment is not *res judicata* for Nicaragua.



El Salvador/Honduras Frontier


SKETCH-MAP
A
First Sector-Disputed Area
Agreed boundary
El Salvador–claimed boundary
Honduras-claimed boundary
Boundary in Judgment
End-point of
disputed sector
N
89°20'
89°15' W
14°25' N
14°20'
Cerro
Monte
Cristo
Rio Po mola
Rio de Polcho
Q. de Gualcho
Lempa
Citala
Q de Poy
Rio
R. Jupula
Rio San Miguel Ingenio
0
5 KM



SKETCH-MAP B

Second Sector–Disputed Area

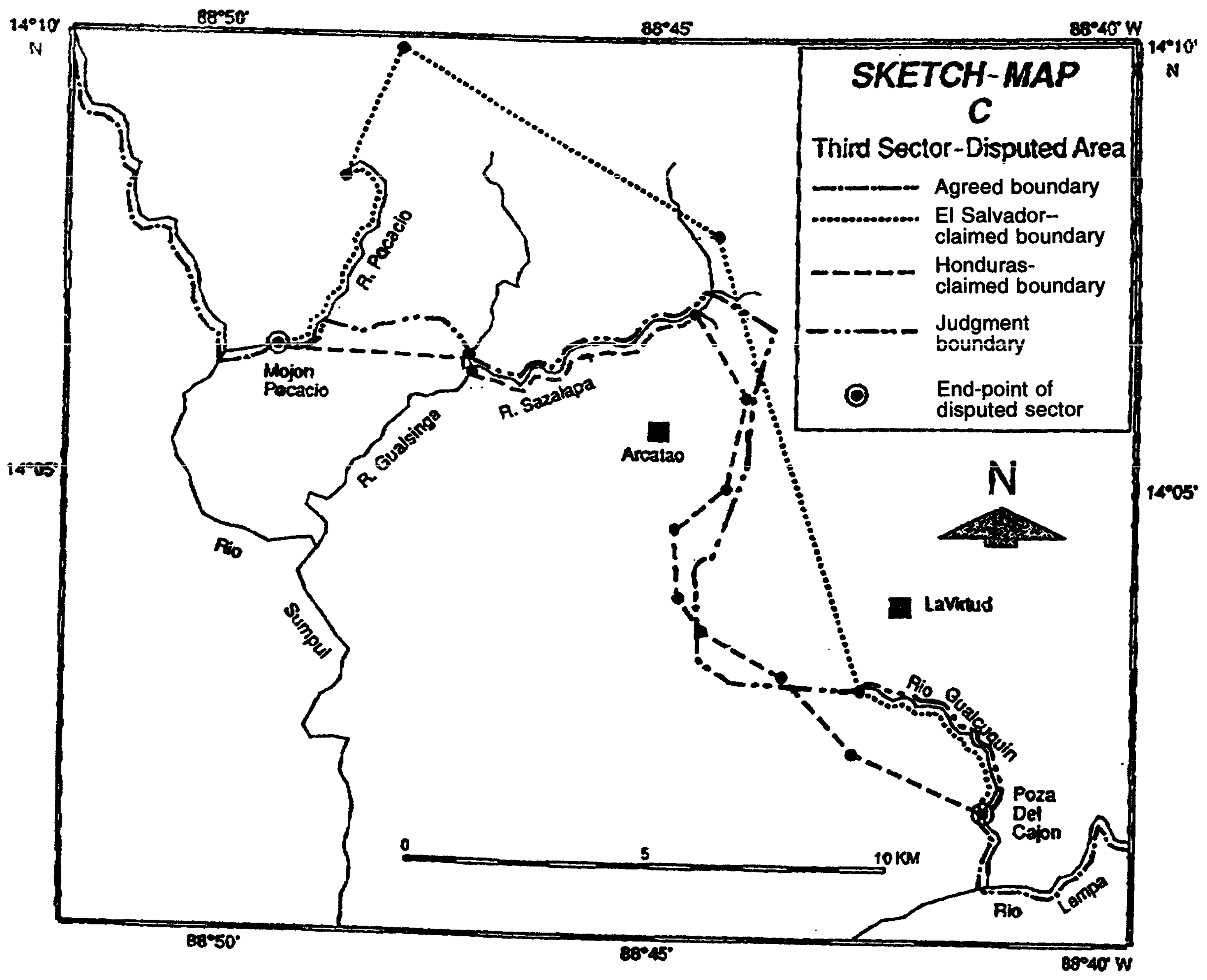
—·—·—·— Agreed boundary

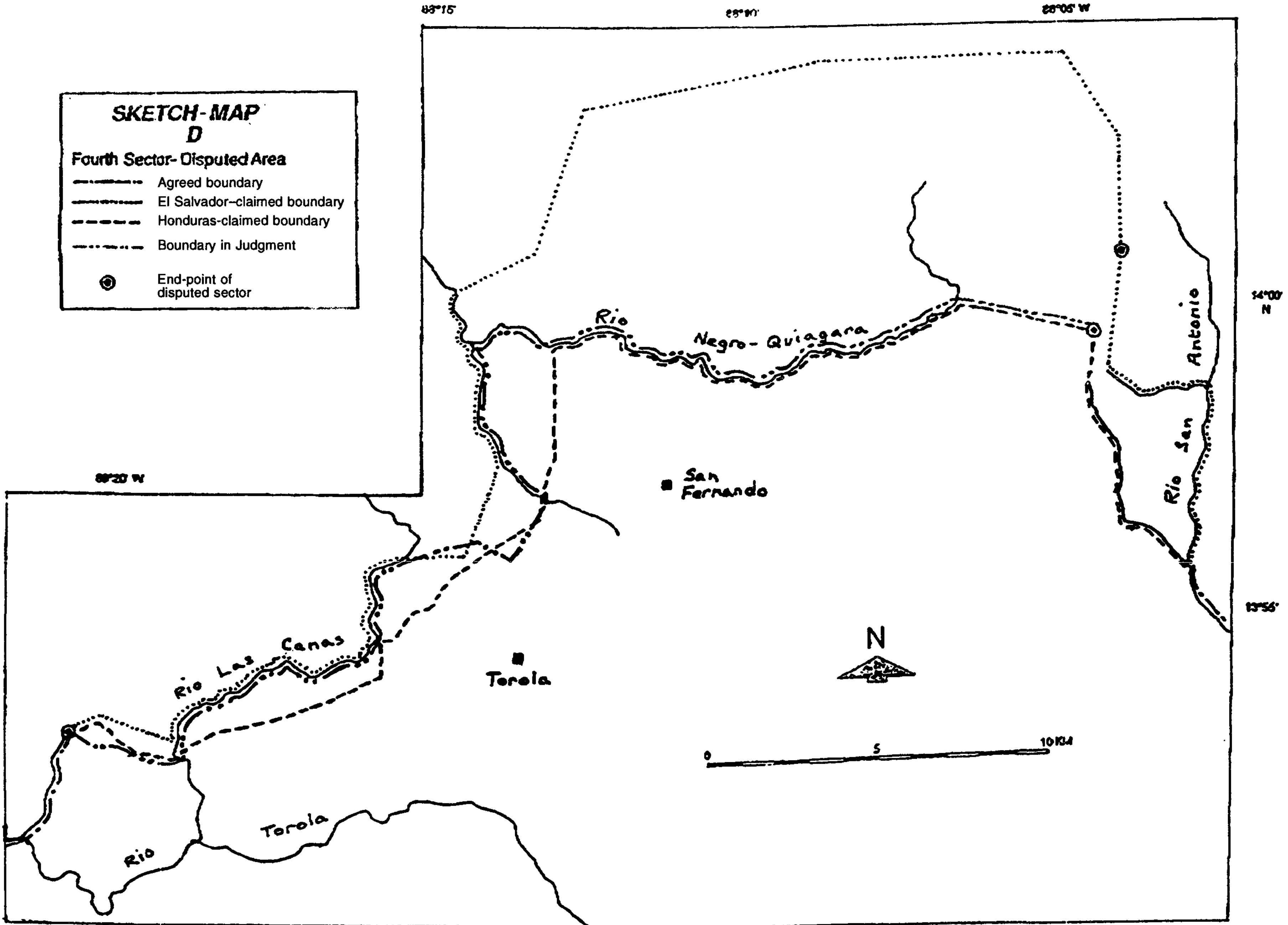
·············· El Salvador–claimed boundary

— — — — Honduras-claimed boundary

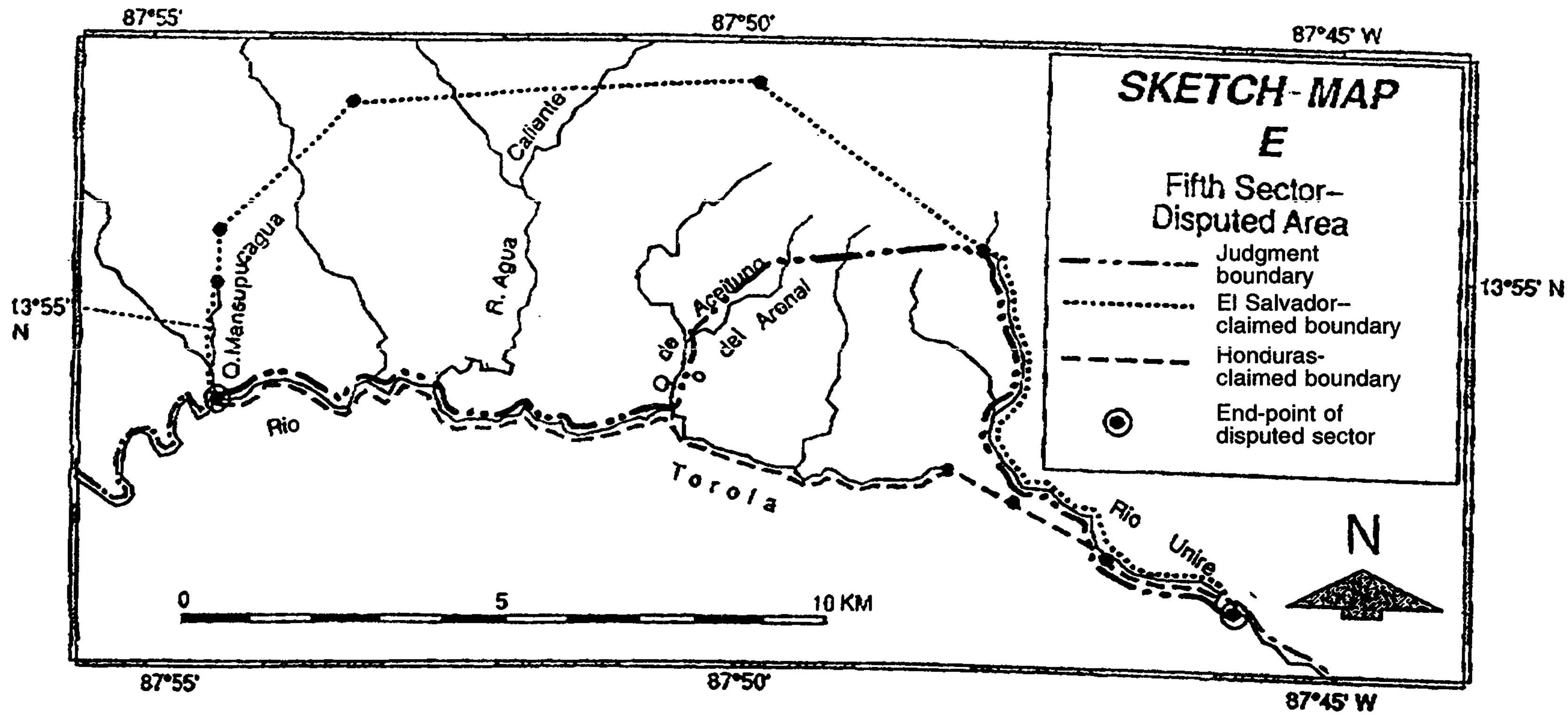
—··——··— Judgment boundary

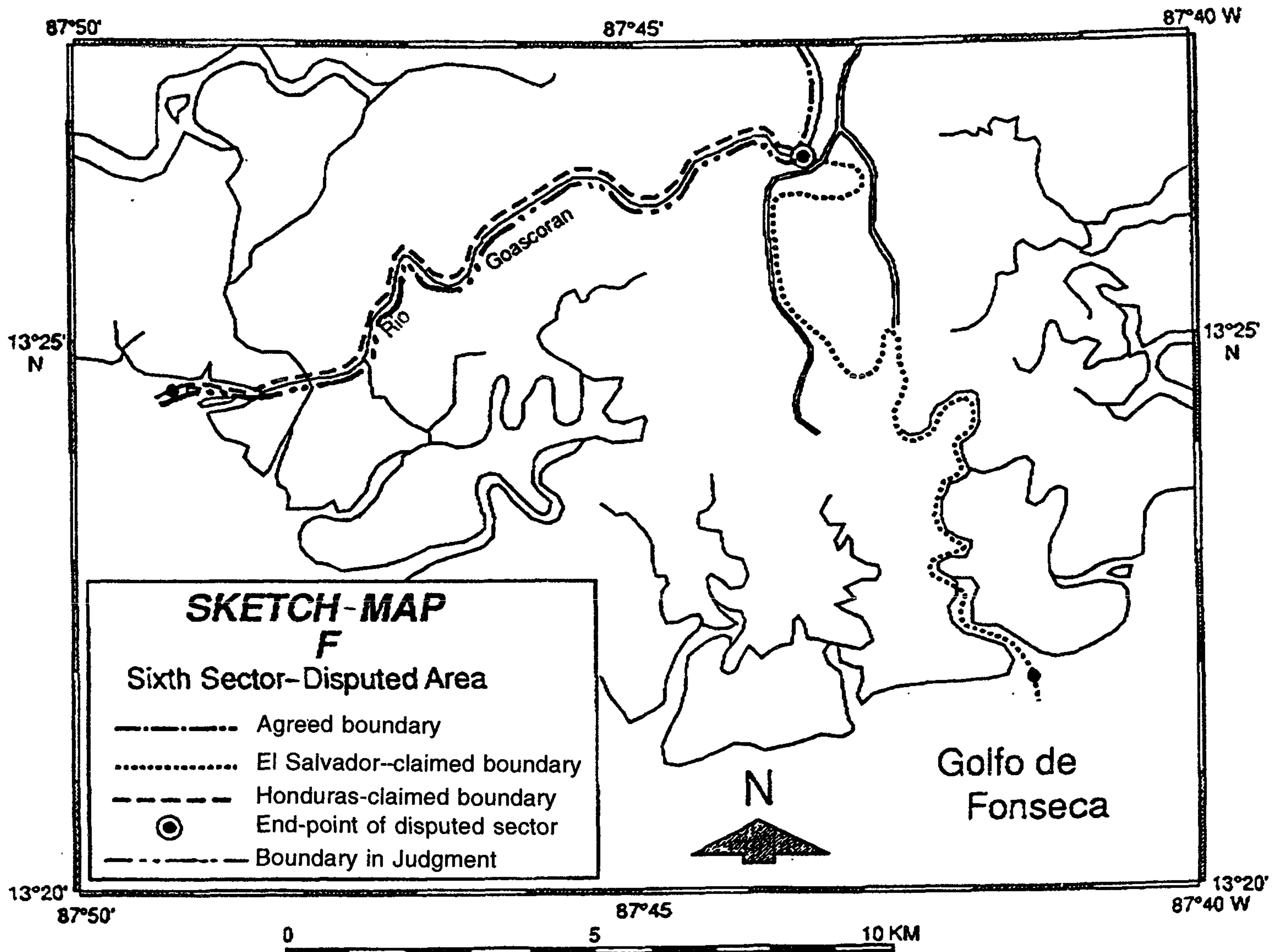
◉ End-point of disputed sector

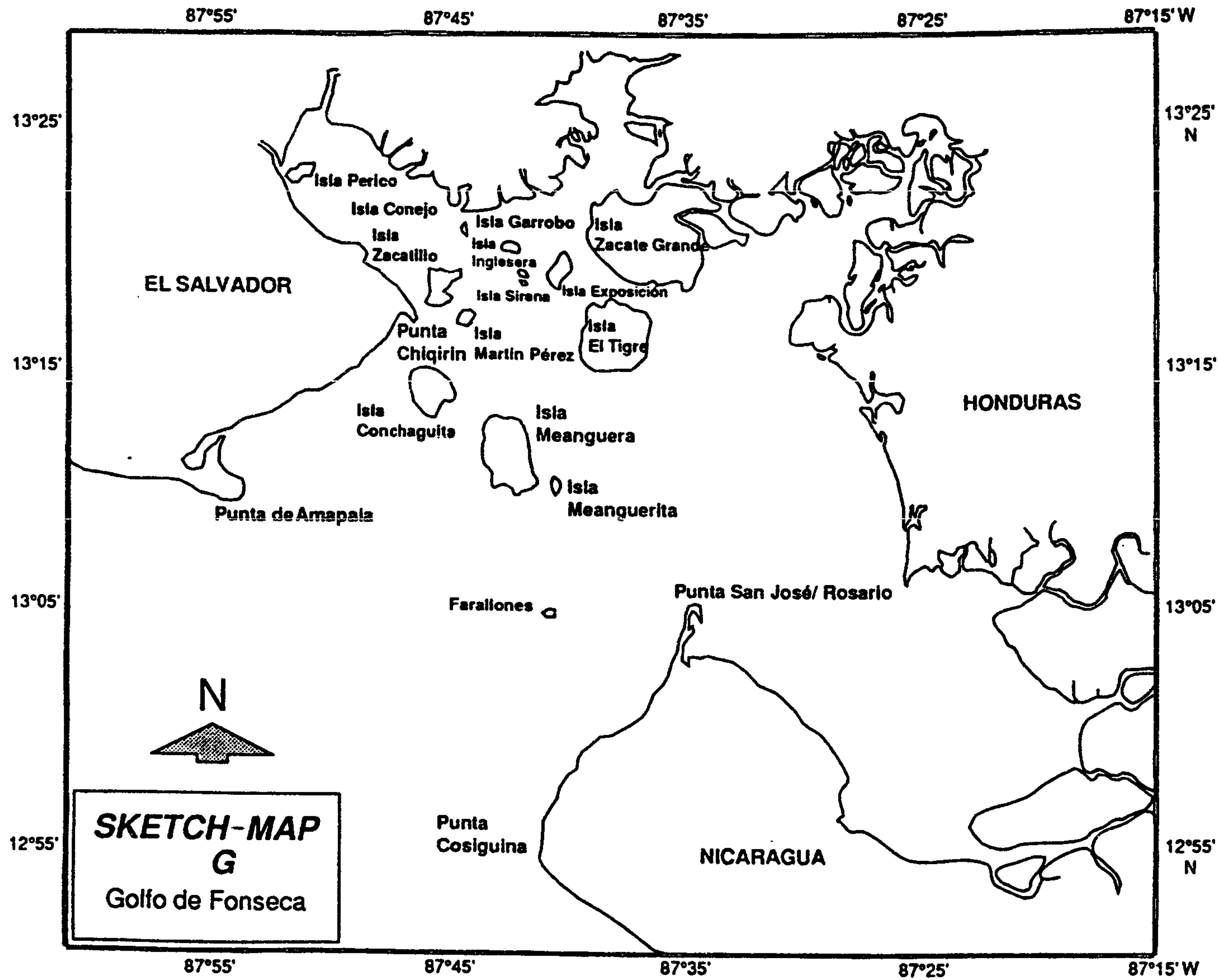

SKETCH-MAP
C
Third Sector-Disputed Area
Agreed boundary
El Salvador-claimed boundary
Honduras-claimed boundary
Judgment boundary
End-point of disputed sector
N
14°10' N
88°50'
88°45'
88°40' W
14°05'
R. Pacacio
Mojon Pacacio
R. Gualsinga
R. Sazalapa
Arcatao
Rio
Sumpul
LaVirtud
Rio Gualcuquín
Poza Del Cajon
Rio Lempa
0
5
10 KM



SKETCH-MAP
D
Fourth Sector- Disputed Area
Agreed boundary
El Salvador–claimed boundary
Honduras-claimed boundary
Boundary in Judgment
End-point of
disputed sector
88°15'
88°10'
88°05' W
88°20' W
14°00'
N
13°56'
Rio
Negro - Quiagara
Rio San Antonio
San
Fernando
Torola
Rio Las Canas
Rio
Torola
N
0
5
10 KM


SKETCH-MAP
E
Fifth Sector–
Disputed Area
Judgment boundary
El Salvador–claimed boundary
Honduras-claimed boundary
End-point of disputed sector
87°55'
87°50'
87°45' W
13°55' N
Q. Mansupucagua
Caliente
R. Agua
Q. de Aceituno
del Arenal
Rio
Torola
Rio
Unire
0
5
10 KM
N


87°50'
87°45'
87°40 W
13°25' N
13°25' N
Rio Goascoran
SKETCH-MAP F
Sixth Sector–Disputed Area
Agreed boundary
El Salvador--claimed boundary
Honduras-claimed boundary
End-point of disputed sector
Boundary in Judgment
N
Golfo de Fonseca
13°20'
87°50'
87°45
13°20'
87°40 W
0
5
10 KM



87°55'
87°45'
87°35'
87°25'
87°15' W
13°25'
13°25' N
13°15'
13°05'
12°55'
12°55' N
Isla Perico
Isla Conejo
Isla Zacatillo
Isla Garrobo
Isla Inglesera
Isla Sirena
Isla Exposición
Isla Zacate Grande
EL SALVADOR
Punta Chiqirin
Isla Martín Pérez
Isla El Tigre
HONDURAS
Isla Conchaguita
Isla Meanguera
Isla Meanguerita
Punta de Amapala
Farallones
Punta San José/ Rosario
N
SKETCH-MAP G
Golfo de Fonseca
Punta Cosiguina
NICARAGUA
0 5 10 15 20 25 KM
5 0 5 10 15 NM

Declaration of Vice-President Oda

On the subject of Nicaragua's intervention, Judge Oda, in an appended declaration, disputes the Chamber's findings as to its Judgment's lack of binding effect upon the intervening State. Though not a party to the case, Nicaragua will in his view certainly be bound by the Judgment in so far as it relates to the legal situation of the maritime spaces of the Gulf, and he refers in that connection to his views on the general subject of the effects of Judgments on intervening States as expressed in two previous cases.

Judge Oda states that, by his declaration, he does not, however, intend to lend his accord to the Chamber's findings on the maritime spaces dispute, the subject of his dissenting opinion.

Separate opinion of Judge ad hoc *Valticos*

The scope of the uti possidetis juris *principle and the* effectivités

The application of the *uti possidetis juris* principle has given rise to difficulties inasmuch as the rights involved could date back several centuries and it has not been easy to determine those that were relevant in determining the boundaries in question. According to the opinion summarized, in view of the conditions in which and the reasons for which they were granted, the issue of *títulos ejidales* could not be disregarded for purposes of delimiting the boundaries.

Furthermore, the role given to the *effectivités* has been insufficient.

In any event, the care the Chamber has taken to resolve the difficulties it has met is worthy of praise.

Tepangüisir sector. While in various respects the author of the opinion concurs with the views of the Chamber, he believes that the boundary drawn to the west of Talquezalar should have run in a north-westerly direction, towards the Cerro Oscuro, before once again turning downward (in a south-westerly direction towards the tripoint of Montecristo).

Sazalapa-Arcatao sector. The Chamber based itself on various questionable titles, as a result of which it cut back El Salvador's claims excessively, particularly with regard to two protrusions to the north-west and the north-east of the area in question, as well as in the central part, at the level of the so-called Gualcimaca title.

Naguaterique sector. The author of the opinion disagrees with the boundary line drawn by the Chamber along the river Negro-Quiagara. He sets forth his reasons for prefering the Cerro La Ardilla line.

Dolores sector. The 1760 title concerning Poloros should take precedence in this regard and the boundary should run to the north of the river Torola. The difficulty is due to the distances and the area mentioned in the title. The Chamber has therefore decided to grant El Salvador, in this area, a quadrilateral considerably smaller than what that State claimed. But this solution has involved a questionable change in the names of the summits and rivers concerned.

The maritime spaces. Despite the serious objections to which they are open, the author of the opinion feels that the arguments endorsed by the majority of the Chamber are acceptable, regard being had to the special character of the Gulf of Fonseca as a historic bay with three coastal States.

With regard to the various other points (concerning the land, the islands and the waters within the Gulf), the author of the opinion concurs fully with the views of the Chamber.

Separate opinion of Judge ad hoc *Torres Bernárdez*

In his separate opinion, Judge Torres Bernárdez gives the reasons for his overall concurrence with the Judgment of the Chamber and for his having voted for all its operative part, with the exception of the decisions concerning the attribution of sovereignty over the island of Meanguerita and the interpretation of article 2, paragraph 2, of the Special Agreement. Following an introduction underlining the unity of the case as well as its fundamental, although not exclusive, State succession character, the considerations, observations and reservations contained in the opinion are presented under the main headings of the three major aspects of the case, namely, the "land boundary dispute", the "island dispute" and the "maritime dispute".

Judge Torres Bernárdez stresses the importance of the *uti possidetis juris* principle as the fundamental norm applicable to the case, examining in this connection the contents, object and purpose of the *uti possidetis juris* as customarily understood by the Spanish-American republics, and the relationship between that principle and the *effectivités* invoked in the case, as well as the question of the proof of the *uti possidetis juris* principle, the evidentiary value of the *títulos ejidales* submitted by the Parties included. Judge Torres Bernárdez approves the Chamber's general concentration on applying the *uti possidetis juris* principle in the light of the fundamental State succession character of the case and the fact that both Parties are Spanish-American republics. However, article 5 of the Special Agreement does not exclude the application, wherever pertinent, of other rules of international law also binding the Parties. The principle of *consent*, including any consent implied by the conduct of the Parties subsequent to the critical date of 1821, is for Judge Torres Bernárdez one of those rules of international law which also applied in the case in various ways (element of confirmation or interpretation of the 1821 *uti possidetis juris*; establishment of *effectivités* alleged; determination of situations of "acquiescence" or "recognition").

Regarding the *land boundary dispute*, Judge Torres Bernárdez considers the overall results of the application by the Chamber of the law described to the six sectors in dispute to be as a whole satisfactory, having regard to the evidence submitted by the Parties; subject to a few specific reservations, the frontier lines defined for each of those sectors by the Judgment are *de jure* lines by virtue either of the 1821 *uti possidetis juris* or of the consent derived from conduct of the Parties, or of both. His specific reservations concern the line between Talquezalar and Piedra Menuda in the first sector (the question of the Tepangüisir boundary marker and corresponding indentation), the line between Las Lagunetas or Portillo de Las Lagunetas and Poza del Cajón in the third sector (the Gualcuquín or El Amatillo river line) and the Las Cañas river line of the frontier in the fourth sector, particularly the segment of that line running from the Torola lands down to the Mojón of Champate. Judge Torres Bernárdez voted, however, in favour of the frontier lines defined by the Judgment for the six sectors, out of the conviction that those lines are "as a whole" *de jure* lines as requested by the Parties in article 5 of the Special Agreement.

So far as the *island dispute* is concerned, Judge Torres Bernárdez upholds the submission of the Republic of Honduras that Meanguera and Meanguerita were the only *islands in dispute* as between the Parties at the current proceedings. He dissociates himself, therefore, from the finding of the majority that El Tigre was also an island *in dispute*, as well as from the reasoning of the Judgment as to the definition of the *islands in dispute*: both the finding and the reasoning in question are contrary to the stability of international relations and do not correspond to basic tenets of international judicial law. A *non-existing dispute* objection formally submitted by a party has an autonomy of its own, should be determined as a preliminary matter on the basis of the objective grounds provided by the case file as a whole and should not be disposed of by subsuming it into the different matters of the existence of jurisdiction and its exercise. Judge Torres Bernárdez stresses his view that, as a consequence of the approach followed by the majority, the Judgment concludes by stating the obvious, namely, that the island of El Tigre is part of the sovereign territory of the Republic of Honduras. Honduras had not requested the Chamber to pronounce any such "confirmation" of its sovereignty of El Tigre, a sovereignty which was not subject to adjudication, because it had been decided over 170 years ago by the 1821 *uti possidetis juris* as well as by the recognition of the Republic of El Salvador and third Powers over 140 years ago.

As to the islands which he considers to be in dispute, namely, Meanguera and Meanguerita, Judge Torres Bernárdez concurs with the other members of the Chamber in the finding that the island of Meanguera is today part of the sovereign territory of the Republic of El Salvador. The path whereby Judge Torres Bernárdez reaches this conclusion differs, however, from the one followed in the Judgment. In his opinion, the island of Meanguera, as well as the island of Meanguerita, belonged in 1821 to the Republic of Honduras by virtue of the *uti possidetis juris* principle. He considers, therefore, that the inconclusive finding of the Chamber in this respect is not supported by the colonial titles and *effectivités* documented by the Parties. He finds, however, that the 1821 *uti possidetis juris* rights of Honduras in Meanguera were at a certain moment in time (well after the dispute arose in 1854) displaced or eroded in favour of El Salvador as a result of the State *effectivités* established by the latter in and with respect to the island and of the related past conduct of the Republic of Honduras at the relevant time vis-à-vis such *effectivités* and their gradual development. On the other hand, similar State *effectivités* on the part of El Salvador and related past conduct of Honduras being absent in the case of Meanguerita, Judge Torres Bernárdez concludes that the 1821 *uti possidetis juris* must needs prevail in the case of that island. This means that today, as in 1821, sovereignty over Meanguerita belongs to the Republic of Honduras. Judge Torres Bernárdez regrets that the Judgment failed to treat the question of sovereignty over Meanguerita on its own merits, and, having regard to the circumstances of the case, he rejects the applicability to Meanguerita of the concept of "proximity" as well as the thesis of its constituting an "appendage" of Meanguera.

Judge Torres Bernárdez endorses *in toto* the reasoning and conclusions of the Judgment concerning the substantive aspects of the "*maritime dispute*" with respect to both the "particular régime" of the Gulf of Fonseca and its waters and the entitlement of the Republic of Honduras, as well as the Republic of El Salvador and the Republic of Nicaragua, to a territorial sea, continental shelf and exclusive economic zone in the open waters of the Pacific Ocean seaward of the central portion of the closing line of the Gulf of Fonseca as that line is defined in the Judgment, delimitation of those maritime spaces outside the Gulf of Fonseca having to be effected by agreement on the basis of international law. Thus, the rights of the Republic of Honduras as a State participating on a basis of perfect equality with the other two States of the Gulf in the "particular régime" of the Gulf of Fonseca, as well as the status of the Republic of Honduras as a Pacific coastal State, have been fully recognized by the Judgment, which dismisses some arguments advanced at the current proceedings aimed at occluding Honduras at the back of the Gulf.

As to the "particular régime" of the Gulf of Fonseca, Judge Torres Bernárdez underlines, in his opinion, that the Gulf of Fonseca is a "historic bay" to which the Republic of Honduras, the Republic of El Salvador and the Republic of Nicaragua succeeded in 1821 on the occasion of their separation from Spain and their constitution as independent sovereign nations. The "historic" status of the waters of the Gulf of Fonseca was there when the "successorial event" took place. This means, in the opinion of Judge Torres Bernárdez, that the sovereign rights of each and every one of the three republics in the waters of the Gulf cannot be subject to question by any foreign Power. But at the moment when the succession occurred the predecessor State had not—administratively speaking—divided the waters of the historic bay of Fonseca between the territorial jurisdictions of the colonial provinces, or units thereof, which in 1821 formed, respectively, one or another of the three States of the Gulf. Thus, Judge Torres Bernárdez concludes that the Judgment is quite right in declaring that the historic waters of the Gulf which had not been divided by Honduras, El Salvador and Nicaragua subsequent to 1821 continued to be held in sovereignty by the three republics jointly, pending their delimitation.

In this connection, Judge Torres Bernárdez emphasizes that the "joint sovereignty" status of the undivided "historic waters" of the Gulf of Fonseca has, therefore, a "successorial origin" as stated in the Judgment. It is a "joint sovereignty", pending delimitation, which results from the operation of the principles and rules of international law governing succession to territory, the "historic waters" of the Gulf of Fonseca entailing, like any other historic waters, "territorial rights". Judge Torres Bernárdez also stresses that the present Judgment limits itself to *declaring* the legal situation of the waters of the Gulf of Fonseca resulting from the above and subsequent related developments, i.e., to declaring the existing "particular régime" of the Gulf of Fonseca as a "historic bay" in terms of contemporary international law, but without adding elements of any kind to that "particular régime" as it exists at present. The Judgment is not therefore a piece of judicial legislation and should not be read that way at all. Nor is it a Judgment on the interpretation and/or application of the 1917 judgement of the Central American Court of Justice. Conversely, that 1917 judgement is not an element for the interpretation or application of the present Judgment, which stands on its own feet.

By declaring the "particular régime" of the historic bay of Fonseca in terms of the international law in force, and not of the international law in force in 1917 or earlier, the Chamber, according to Judge Torres Bernárdez, has clari-

fied a number of legal issues such as the "internal" character of the waters within the Gulf, the meaning of the 1-marine-league belt of exclusive jurisdiction over them, the "baseline" character of the "closing line" of the Gulf, and the identification of those States which participate as equal partners in the "joint sovereignty" over the undivided waters of the Gulf. The individual elements now composing the "particular régime" of the Gulf of Fonseca declared by the Judgment vary, however, in nature. Some result from the succession, others from subsequent agreement or concurrent conduct (implied consent) of the three nations of the Gulf as independent States. In this respect Judge Torres Bernárdez refers to the "maritime belt" of exclusive sovereignty or jurisdiction—considered by the Judgment as forming part of the "particular régime" of Fonseca—as one of those elements of the "particular régime" which possess a "consensual" origin, pointing out that the scope of the States' present consent to the "maritime belt" had not been pleaded before the Chamber. It follows, in his view, that any problems which might arise concerning entitlement to, delimitation of, location, etc., of "maritime belts" are matters to be solved by agreement among the States of the Gulf.

As to the competence of the Chamber to effect "delimitations"—a question relating to the interpretation of paragraph 2 of article 2 of the Special Agreement on which the Parties were greatly at variance—Judge Torres Bernárdez considers that the issue has become "moot" because of the Judgment's recognition of rights and entitlements of the Republic of Nicaragua within and outside the Gulf. As a result of this supervenient "mootness", Judge Torres Bernárdez, invoking the jurisprudence of the Court, considers that the Judgment should have refrained from making any judicial pronouncement on the said interpretative dispute. As to the substance of this dispute, Judge Torres Bernárdez concludes that the Chamber was competent to effect "delimitations" under article 2, paragraph 2, of the Special Agreement, dissociating himself from the finding to the contrary of the majority of the Chamber.

Lastly, Judge Torres Bernárdez expresses his agreement with the tenor of the declaration appended by Vice-President Oda. In the view of Judge Torres Bernárdez, a non-party State intervening under Article 62 of the Statute—like the Republic of Nicaragua in the current proceedings—is under certain obligations of a kind analogous *mutatis mutandis* to that provided for in Article 63 of the Statute, but the Judgment as such is not *res judicata* for Nicaragua.

Dissenting opinion of Vice-President Oda

In his dissenting opinion, Judge Oda states that, while he is in agreement with the Chamber's findings on the disputes concerning the land frontier and the islands, his understanding of both the contemporary and the traditional law of the sea is greatly at variance with the views underlying the Judgment's pronouncements in regard to the maritime spaces. He considers that the concept of a "pluri-State" bay has no existence as a legal institution and that consequently the Gulf of Fonseca is not a "bay" in the legal sense. Neither was the Chamber right to assume that it belonged to the category of a "historic bay". Instead of its waters being held in joint sovereignty outside a 3-mile coastal belt, as the Chamber holds, they consist of the sum of the territorial seas of each State.

In the contemporary law of the sea, Judge Oda explains, waters adjacent to coasts have to be either "internal waters"—the case of (legal) "bays" or of "historic bays" counting as such—or territorial waters: there is no third possibility (excepting the new concept of archipelagic waters, not applicable in the instant case). But the Chamber has obscured the issue by employing vocabulary extraneous to the past and present law of the sea. Its assessment of the legal status of the maritime spaces thus finds no warrant in that law.

Judge Oda supports his position with a detailed analysis of the development since 1894 of the definition and status of a "bay" in international law, from the early work of the Institut de droit international and International Law Association, to the most recent United Nations Conference on the Law of the Sea, passing through arbitral case-law and the opinions of authoritative writers and rapporteurs.

Judge Oda lists five reasons why full weight should not have been given to the conclusions of the Central American Court of Justice in 1917 to the effect that the waters of the Gulf were subject to a condominium, created by joint inheritance of an area which had constituted a unity previous to the 1821 succession, except for a 3-mile coastal belt under the exclusive sovereignty of the respective riparian States, and he points out the exiguity of the area remaining after deduction of that belt. Indeed, the Central American Court appears to have acted under the influence of a sense prevalent among the three riparian States that the Gulf should not remain open to free use by any other State than themselves, and to have authorized a *sui generis* regime based on a local illusion as to the historical background of law and fact. Yet there is no ground for believing that prior to 1821 or 1839 either Spain or the Federal Republic of Central America had any control in the Gulf beyond the traditional cannon-range from the shore. Both the 1917 judgement and the present Judgment depend on the assumption that the Gulf waters prior to those dates not only formed an undivided bay but lay also *as an entirety* within a single jurisdiction. But at those times there did not exist any concept of a bay as a geographical entity possessing a distinct legal status. Moreover, even if in 1821 or 1839 all the waters of the Gulf did possess unitary status, the natural result of the partition of the coasts among three new territorial sovereigns would have been the inheritance and control by each one separately of its own offshore waters, a solution actually reflected in the acknowledgement of the littoral belt. Judge Oda considers that by endorsing that belt and treating it as "internal waters" the Chamber's Judgment has confused the law of the sea. It similarly relies on a concept now discarded as superfluous when it describes the maritime spaces in the Gulf as "historic waters"; this description had been used on occasion to justify the status either of internal waters or of territorial sea, though not both at once, but the concept had never existed as an independent institution in the law of the sea.

As to the true legal status of the waters of the Gulf of Fonseca, Judge Oda finds that there is no evidence to suggest that, as from the time when the concept of territorial sea emerged in the last century, the claims of the three riparian States to territorial seas in the Gulf differed from their claims off their other coasts, though El Salvador and Honduras eventually legislated for the exercise of police power beyond the 3-mile territorial sea and Nicaragua reportedly took the same position, which received general acceptance. Neither did their attitudes in 1917 feature a

common confidence in rejecting the application to all the Gulf waters of the then prevalent "open seas" doctrine, even if they all preferred that an area covered entirely by their territorial seas and police zones should not remain open to free use by other States—a preference behind their common agreement in the instant proceedings to denominate the Gulf (erroneously) as a "historic bay".

The boundary line drawn by the Honduran/Nicaraguan mixed commission in 1900 demonstrated that at any time the waters of the Gulf could be so divided, though as between El Salvador and Honduras the presence of scattered islands would have complicated the task. Whatever the status of such divided waters may earlier have been, the Gulf of Fonseca must now be deemed entirely covered by the respective territorial seas of the three riparian States, given the universally agreed 12-mile limit and the claims of Latin American States that contributed to its acceptance. No maritime space exists in the Gulf more than 12 miles from any of its coasts.

Beyond establishing the legal status of the waters, the Chamber was not in a position to effect any delimitation. Nevertheless, article 15 of the 1982 United Nations Convention on the Law of the Sea, providing for delimitation, failing agreement, by the equidistance method unless historic title or other special circumstances dictate otherwise, should not be ignored. Judge Oda points out that application of the equidistance method thus remains a rule in the delimitation of the territorial sea, even if that of achieving "an equitable solution" prevails in the delimitation of the economic zone and continental shelf of neighbouring States.

Against that background, Judge Oda considers the right of Honduras within and without the Gulf. Within it, Honduras is in his view not entitled to any claim beyond the meeting-point of the three respective territorial seas. Its title is thus locked within the Gulf. In its decision as to the legal status of the waters, the Chamber seems to have been concerned to ensure the innocent passage of Honduran vessels, but such passage through territorial seas is protected for any State by international law. In any case, the mutual understanding displayed by the three riparian States should enable them to cooperate, in keeping with the provisions on an "enclosed or semi-enclosed sea" in the 1982 Convention.

As for the waters outside the Gulf, Judge Oda cannot accept the Chamber's finding that, since a condominium prevails up to the closing line, Honduras is entitled to a continental shelf or exclusive economic zone in the Pacific. That conclusion flies in the face of a geographical reality such as there can never be any question of completely refashioning. Whether Honduras, which possesses a long Atlantic coastline, can be included in the category of "geographically disadvantaged States" as defined by the 1982 Convention is open to question. This does not, however, rule out the possibility of its being granted the right to fish in the exclusive economic zones of the other two States.