SEPARATE OPINION OF JUDGE TORRES BERNÁRDEZ

I have voted for the operative part of the Judgment, except for subparagraph 1, subparagraph 2 *(i)* and subparagraph 5 of operative paragraph 431 and subparagraph 2 of operative paragraph 432. Except with respect to the attribution of sovereignty over the island of Meanguerita, my negative votes concern questions relating to the interpretation of Article 2, paragraph 2, of the Special Agreement.

The considerations and observations included in the present opinion have a threefold purpose. They intend to convey the essentials of my position on: (1) questions with respect to which, to my regret, I was unable to join the majority vote; (2) questions on which I have some reservations notwithstanding my positive vote on the decision concerned as a whole; and (3) main developments in the reasoning which I do not share completely or which would have deserved, in my opinion, further elaboration. After a brief introduction concerning the case as a whole, my considerations and observations 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".

The table of contents thus presents the following synopsis:

INTRODUCTION. THE CASE

1. The present case is fundamentally a "State succession" case. The two Parties in the case, El Salvador and Honduras (as well as the intervening State, Nicaragua), consider themselves successors of a single predecessor State, namely Spain, as historically represented by the Spanish Crown since the establishment of its rule in Central America, in the first part of the 16th century, until 15 September 1821, the date when the former "Spanish intendencies" of El Salvador and Honduras in the Captaincy-General or Kingdom of Guatemala were succeeded in their respective territories by El Salvador and Honduras as States which, together with Costa Rica, Guatemala and Nicaragua, formed the Federal Republic of Central America until the dissolution of the Federation in 1839-1840. While in the Federation, El Salvador and Honduras were distinct federated States or distinct members of that Federation.

2. The first "successorial event", namely the 1821 separation from Spain, could be described today, following contemporary international law terminology, as a "decolonization". The second "successorial event", represented by the disintegration of the Federal Republic of Central America, was clearly the "dissolution of a union of States". This "dissolution" was effected without altering, in any manner relevant for the present case, the "territories" of the Republic of El Salvador and of the Republic of Honduras as they existed on 15 September 1821. In other words, when the Federation dissolved itself in 1839-1840, the Republic of El Salvador and the Republic of Honduras were deemed to have respectively the same "territory", as well as the same "boundaries", as the former "Spanish intendencies" of El Salvador and Honduras had had on 15 September 1821.

3. From the start, the first Constitutions of the Central American Republics defined their respective "national territories" by a broad reference to the 1821 *uti possidetis juris*. This principle has been also invoked at international level by Central American Republics, including the Parties to the present case, as a principle applicable, following emancipation, vis-à-vis foreign Powers as well as between themselves in solving the territorial and boundary questions which began to emerge in the middle of the 19th century. The *uti possidetis juris* created and formulated about 1810 by the then newly independent Spanish-American Republics as a principle governing inter-State relations was therefore already established when El Salvador and Honduras separated from Spain in 1821, and well established when in 1839-1840 the Federal Republic of Central America was dissolved. The fact that both Parties have at the current proceedings invoked this *uti possidetis juris* as the fundamental principle or norm to be applied by the Chamber underlines further the fundamental "State succession" character of the present case, because that principle or norm operates in the relations between Spanish-American Republics in connec-

tion with or with respect to the "successorial events" represented by their separation from Spain.

4. The Judgment is, therefore, right to have taken duly into account the "State succession" dimension of the case. I concur likewise with the Judgment that the same overall characterization of the case applies not only to its "land boundary" and "island" aspects but also to its "maritime" aspect, particularly so far as the historic bay of the Gulf of Fonseca is concerned. Within each of its aspects, however, the dispute as referred by the Parties to the Chamber embraces several controversies which began to manifest and establish themselves, i.e., to become "existing disputes", either progressively from the second half of the 19th century onwards (the disputed land-boundary sectors and the island dispute), or at the end of that century and the beginning of the 20th century (the régime of the waters of the Gulf of Fonseca) or only a few years ago as a result of developments in the law of the sea subsequent to the Truman Proclamation, the Geneva Conventions and the negotiations leading to the conclusion of the Montego Bay Convention (the maritime spaces in the Pacific Ocean seawards of the closing line of the Gulf of Fonseca). During this whole period norms of general international law applicable between the Parties evolved and the Parties themselves held successive sets of negotiations and concluded agreements or understandings on matters relating, *inter alia*, to subjects of litigation before the Chamber. Moreover, on some specific questions before the Chamber, the Parties during the same period adopted concurrent or divergent lines of unilateral conduct which required also to be borne in mind in the adjudication of the present case.

5. In other words, the clock did not stop on 15 September 1821 so far as the development of international law and of relations between the Republic of Honduras and the Republic of El Salvador is concerned. This has occasionally had an impact on the 1821 *uti possidetis juris* situation that the present Judgment, adopted in 1992, could not ignore, particularly because of the definitions given in Articles 2 and 5 of the Special Agreement as to the subject of the litigation and the applicable law. The determination, for example, of the legal situation of the maritime spaces outside the Gulf of Fonseca has in itself little to do with the "successorial events" which took place in 1821 and 1839-1840. The applicable law provision of the Special Agreement has taken care of the situation described to the extent that it does not confine "the rules of international law applicable between the Parties", general or particular, to rules governing the succession of States.

6. Thus, while, as I have said, the case is *fundamentally* a State succession case, it is not *exclusively* a State succession case. Elements unrelated to succession are also part and parcel of the case. The Judgment could not, therefore, deal only with the principles and elements relating to succession but had also to take account of others. The *uti possidetis juris* receives

in the Judgment as a whole the attention and priority in application that the fundamentally successor State character of the case commands. But, at the same time, the Judgment also applies other principles and rules whenever required by the matter at issue. For example, the conduct of the Parties subsequent to 1821 is taken into account by the Judgment not only as an element of confirmation or interpretation of the 1821 *uti possidetis juris* or in connection with the establishment of the *effectivités* alleged by the Parties, but also with respect to the determination of any situations of "acquiescence" or "recognition" through an application of the *principle of consent*, or rather of implied consent by conduct, binding the Parties as it would any other State.

7. It is to be regretted, however, that the Judgment has not provided a stricter and deeper analysis of some points of law relevant to the ascertainment, for example, of the existence of a given *effectivité* or of a situation susceptible of being qualified as "acquiescence". In this respect, it should have explored further the effects of agreed "status quos" contemporary with the *effectivité* or conduct concerned, as well as intertemporal law issues in general. A few departures in certain "land-boundary sectors" from the legal standards otherwise generally applied are also difficult to understand. Much more to be faulted, because of its concrete consequences for the adjudication, is, however, the inability of the Judgment in the "island dispute" aspect of the case to distinguish, as it should, the effects of an operation of the *uti possidetis juris* principle from those consequent upon the application of a different principle or rule of law. Lastly, I am in complete disagreement with the Judgment's interpretation of the scope of the "island dispute" and of the "maritime dispute" referred to the Chamber under Article 2, paragraph 2, of the Special Agreement.

I. The Land Boundary Dispute

A. General Questions

(a) *The 1821* uti possidetis juris *principle as applicable law*

8. The provision of the Special Agreement on the applicable law (Art. 5) — common to the land, island and maritime aspects of the case — totally excludes any *ex aequo et bono* solutions. The Parties have asked the Chamber to render a decision according to "international law", namely a *de jure* decision. In contrast with other well-known cases of boundary or territorial disputes among Spanish-American Republics, the Parties to the present case did not empower the Chamber, even subsidiarily, to

decide the dispute or some aspects of it in accordance with considerations of mere "equity" going beyond the *infra legem* equity inherent in the application of the law. Neither did they provide in the Special Agreement for territorial or other kinds of "compensation" in any hypothesis, as has been the case in certain Spanish-American arbitrations. In this respect the Chamber is placed by the Special Agreement in a situation rather similar to the Chamber of the Court which dealt in 1986 with the *Frontier Dispute (Burkina Faso/Republic of Mali)* case. However, the Special Agreement of this latter case restricted the scope of the "international law" to be applied by providing that the settlement of the dispute should be based in particular on "respect for the principle of the intangibility of frontiers inherited from colonization". Such a singling-out is alien to Article 5 of the Special Agreement of the present case. This Article refers, in the plural, to "the rules of international law". The only limitation contained in Article 5 of the Special Agreement is a *ratione personae* restriction, namely that the rules of international law should be rules "applicable between the Parties". Even the reference to "the provisions of the General Treaty of Peace", by which Article 5 of the Special Agreement ends, is qualified by the words "where pertinent", leaving the appreciation of such pertinence to the Chamber.

9. Thus, while under the Special Agreement the Chamber is not allowed to apply "equity" or any other subsidiary criterion, the Chamber is certainly empowered by the Special Agreement to have recourse to the rules of "international law" as a whole insofar as applicable between the Parties. On the other hand, the Chamber did not depart from one stated wish of both Parties that, at least in the case of the disputed land-boundary sectors, the controversy be solved taking fully into account the *uti possidetis juris* principle, qualified by the Parties during the proceedings as the "fundamental" norm to be applied. There can be no doubt that the Parties, both of which recognized it as a principle of international law binding them, expected the application by the Chamber of the *uti possidetis juris* principle to their land boundary dispute. The Chamber did just that, without ignoring, either, the relevant conduct of the Parties since their independence and its legal effects under principles of international law other than that of *uti possidetis juris*, which principles Article 5 of the Special Agreement allows it also to apply.

10. But the mere fact of having concluded without difficulty as to the applicability of the *uti possidetis juris* to the land boundary dispute did not solve the different question of the "definition" of the *uti possidetis juris* to be applied. Should it be the *uti possidetis juris* principle, as customarily given by the Spanish-American Republics and recognized by international jurisprudence and doctrine, or a kind of conventional, agreed *uti possidetis juris* formula, as in certain arbitrations? The question arose because of the different explanations given by the Parties as to the rela-

tionship between Article 5 of the Special Agreement and Article 26 of the General Treaty of Peace, and in particular because of the Salvadorian "formal title-deeds to commons" argument. Such a composite argument, developed with particular force at the hearings, touches indeed upon not only the law of evidence governing international judicial proceedings and the Spanish historical law in America as a fact in the case, but also the very definition of the applicable *uti possidetis juris*, the *modus operandi* of this principle and its relationship with other principles and rules of international law.

11. One of the greatest merits of the Judgment is that it does give the appropriate answer to the "formal title-deeds to commons" argument so far as the definition of the *uti possidetis juris* applicable to the case is concerned. By doing so, the Judgment restored the meaning, contents and purpose of the *uti possidetis juris* principle binding Spanish-American Republics, including the Parties to the case, as it has been expressed in frequently quoted passages of international jurisprudence and writings of Spanish-American diplomats and jurists (see, for example, Alejandro Alvarez, *Le droit international américain*, Paris, Pedone, 1910, p. 65; L. A. Podestá Costa and José María Ruda, *Derecho Internacional Público*, Buenos Aires, 1979, Vol. I, p. 206). It follows that the Judgment is primarily concerned with determining the boundary line between the Spanish colonial administrative entities established by the Spanish Crown as at the critical date of 1821, in territories belonging thereafter to the Republic of Honduras and to the Republic of El Salvador respectively. By virtue of the Spanish-American Republics' *uti possidetis juris* principle the colonial administrative boundaries of Spanish *virreinatos*, *capitanías*, *intendencias* or *provincias* became international boundaries between neighbouring Spanish-American States as from the very date of independence. This also means that "possession" was *not* defined in terms of effective possession or occupation but by reference to the former Spanish legislation as ascertainable through the relevant *Reales Cédulas*, *Providencias*, *Ordenanzas*, etc., or indirectly from Spanish colonial documents recording "colonial *effectivités*", namely the exercise of territorial jurisdiction by Spanish colonial authorities. It therefore confers preference on *"el derecho"* (the Spanish legislation) over *"el hecho"* (effective possession or occupation). Thus the concept of "possession" embodied in the *uti possidetis juris* principle of the Spanish-American Republics is the concept of the right to possess according to Spanish legislation ("title") and not a reflection of factual situations of usurpation by former Spanish colonial authorities, such as might have existed, or of the fact of occupation or control by this or that Spanish-American Republic following independence (the *de facto* situations). This distinguishes the *uti possidetis juris* from the Brazilian *uti possidetis* or from the so-called *uti possidetis de facto*. The principle also excludes reliance on principles concerning acquisition of *territorium nullius* or titles *jure belli*.

12. It follows from the above that the resurrection of limits of ancient "formal title-deeds to commons" of former Indian communities cannot be the object and purpose of an exercise aiming at determining an *uti possidetis juris* boundary line between Spanish-American States. The documents described as "formal title-deeds to commons" by El Salvador cannot be anything more than one element of evidence, among others, in the process of ascertaining the ancient "colonial administrative boundaries" whose determination constitutes the very object and purpose of *uti possidetis juris* as a principle of international law applicable between Spanish-American Republics, including the Parties to the present case. To proceed in this respect on any other basis would have amounted to a redefinition of *uti possidetis juris* such as may be realized solely by agreement or conventional means. On the level of principle, the Judgment made all this plain. The "land boundary dispute" adjudicated by the Chamber is an "international dispute" between the Republic of Honduras and the Republic of El Salvador, not a dispute about the land limits of Indian communities. The limits of lands belonging to former Indian communities may or may not have constituted the origin or occasion of some of the controversies before the Chamber, but the controversies about those land limits can certainly not be identified or equated with the international dispute existing between the Republic of Honduras and the Republic of El Salvador regarding the delimitation of their common frontier in the disputed land sectors referred to the Chamber. It may be added, as a general proposition, that the Ibero-American Republics did not consider the Indian population a factor in delimiting their boundaries whether by direct settlement or by arbitration (see, for example, L. M. D. Nelson, "The Arbitration of Boundary Disputes in Latin America", *Netherlands International Law Review*, XX, 1973, at pp. 278-279).

13. Lastly, I wish to stress that to the extent that the need to reply to arguments of the Parties or other considerations may occasionally have given rise in the reasoning of the Judgment to answers which could be read as implying, in one way or another, a departure from the meaning, contents and purpose of the *uti possidetis juris* principle which governs relations between Spanish-American Republics, the passages concerned are not read by me in the same manner or do not reflect my personal position as to the definition of the *uti possidetis juris* principle applicable to the present case. I have been guided in the current proceedings, so far as the *uti possidetis juris* is concerned, exclusively by the definition of the principle customarily given by Spanish-American Republics. It follows from this caveat that, while acknowledging contemporary developments of the *uti possidetis juris* principle within the realm of general international law following decolonization of the African continent, I have applied to the present case the Spanish-American *uti possidetis juris* principle, both Parties being Spanish-American

Republics and because of the wording of Article 5 of the Special Agreement.

14. Ultimately, therefore, for the present "land boundary dispute", the object and purpose of any *uti possidetis juris* determination cannot be other than to ascertain the 1821 administrative boundaries of the former Spanish colonial *intendencias* of El Salvador and of Honduras — administrative units introduced in the Captaincy-General of Guatemala in 1786 — in the land sectors in dispute between the Republic of El Salvador and the Republic of Honduras, namely in the sectors referred to the Chamber by virtue of Article 2, paragraph 1, of the Special Agreement (the zones or sections *not* described in Article 16 of the General Treaty of Peace).

15. The *intendencias* or *intendencias/provincias* of the former Spanish Captaincy-General of Guatemala, in whose respective territories the Central American Republics were established in 1821, were themselves the result of a "historical evolution" as underlined with reference to Honduras and Nicaragua in the following passage of the Arbitral Award made by the King of Spain on 23 December 1906:

> "the Spanish provinces of Honduras and Nicaragua were gradually developing by historical evolution in such a manner as to be finally formed into two distinct administrations (intendencias) under the Captaincy-General of Guatemala by virtue of the prescriptions of the Royal Regulations of Provincial Intendants of New Spain of 1786, which were applied to Guatemala and under whose régime they came as administered provinces till their emancipation from Spain in 1821" (United Nations, *Reports of International Arbitral Awards*, Vol. XI, at p. 112).

The above Arbitral Award was found to be "valid and binding" on the Republic of Honduras and the Republic of Nicaragua by the Judgment of the International Court of Justice of 18 November 1960 (*I.C.J. Reports 1960*, pp. 192 ff.) as between these two Republics and executed by them accordingly. In that Arbitral Award the territory of the Spanish *intendencia/provincia* of Honduras was authoritatively defined by the King of Spain and the Spanish Council of State assisting him in the arbitration as follows:

> "by virtue of this Royal Decree the Province of Honduras was formed in 1791, with all the territories of the primitive province of Comayagua, those of the neighbouring Province of Tegucigalpa and the territories of the bishopric of Comayagua, thus comprising a region bordering on the south with Nicaragua, on the south-west and west with the Pacific Ocean, San Salvador, and Guatemala; and on the north, north-east, and east with the Atlantic Ocean, with the exception of that part of the coast inhabited at the time by the Mosquito, Zambos, and Payas Indians, etc." (United

Nations, *Reports of International Arbitral Awards*, Vol. XI, at p. 112).

"the demarcation fixed for the Province or District of Comayagua or Honduras, by virtue of the Royal Decree of the 24th July, 1791, continued to be the same at the time when the Provinces of Honduras and Nicaragua achieved their independence, because though by Royal Decree of the 24th January, 1818, the King sanctioned the re-establishment of the chief municipality of Tegucigalpa with a certain degree of autonomy as to its administration, said chief municipality continued to form a district of the Province of Comayagua or Honduras, subject to the political chief of the province; and in that capacity took part in the election, 5th November, 1820, of a Deputy to the Spanish Cortes and a substitute Deputy for the Province of Comayagua, and likewise took part together with the other districts of Gracias, Choluteca, Olancho, Yoro with Olanchito and Trujillo, Tencoa and Comayagua, in the election of the Provincial Council of Honduras, said election having taken place on the 6th of November of the same year, 1820" (*ibid.*, p. 114).

(b) *The* uti possidetis juris *principle and the rule of evidence in Article 26 of the General Treaty of Peace*

16. Article 5 of the Special Agreement provides that, when delivering its Judgment, the Chamber will take into account the rules of international law "including, where pertinent", the provisions of the General Treaty of Peace. Three provisions of the Peace Treaty could be seen as potentially relevant in this respect: Article 6 (previous bilateral and multilateral treaties), Article 26 (documents and other evidence and arguments) and Article 37 (status quo of 14 July 1969). Some references were made by the Parties to Article 37, but the provision of the Peace Treaty which attracted their attention more, by far, and was discussed by them at length in the current proceeding was Article 26, namely the Article of the Peace Treaty indicating the documents and other evidence and arguments that the Joint Frontier Commission was instructed to take into account as a basis of its own work under the Peace Treaty. There were two reasons for that. Having failed to single out expressly the *uti possidetis juris* principle in Article 5 of the Special Agreement, the Parties found in the wording of Article 26 of the Peace Treaty a convenient way of confirming to the Chamber their understanding that, in the solving of their "land boundary dispute", they would like the *uti possidetis juris* principle to be applied by the Chamber as the fundamental norm. Secondly, Article 26 of the Peace Treaty was frequently discussed before the Chamber by the Parties because of the "formal title-deeds to commons", "human" and *"effectivités"* arguments advanced by El Salvador.

17. The Judgment also gives the correct legal answer to those arguments of El Salvador as they may relate to the question of the relationship

between Article 26 of the Peace Treaty and Article 5 of the Special Agreement. In the light of the very language of Article 26, it is difficult, to say the least, to assert that it sets forth a substantive or material "conventional rule" of any kind, call it *uti possidetis juris*, argument of a human nature, *effectivités* or otherwise. Article 26 does not mention, still less define, any conventional substantive rule of international law. According to its own words, the provision confines itself to instructing the Joint Frontier Commission to take as a basis for its work certain "documents" delivered by Spanish colonial authorities, both civil and ecclesiastical, and also other "evidence" and "arguments" of various kinds (legal, historical, human, any other) brought before the Joint Frontier Commission by the parties and *admitted under international law*. One is here, as recognized by the Judgment, in the presence of a clear-cut "rule of evidence" imposed on the said Commission by the parties for the purpose of the performance of its tasks — the controlling international law rule governing the task of the Commission being "the consent of both Governments" as provided for in Article 27 of the Peace Treaty. But the task of the *Chamber* is not controlled by that principle. The task of the Chamber is to settle the dispute by applying the *rules of international law* binding the Parties. Such an objective law is to be found in customary international law and, certainly, in treaty provisions applicable between the Parties, but in the latter case if, and only if, such treaty provisions set forth substantive rules susceptible of taking the place of the corresponding customary principle or rule applicable.

18. This is not, however, the case with Article 26 of the Peace Treaty. It refers only to "evidence" agreed upon by the Parties in order to prove in a given environment certain principles and rules, including the *uti possidetis juris* principle. Like any other rule of "evidence", it has the purpose of defining the means of assisting the concrete application of a given substantive rule or rules of law and not of replacing the latter. Moreover, the "evidence rule" of Article 26 of the Peace Treaty is, of course, subject to the rules on interpretation of treaties codified at present in the 1969 Vienna Convention on the Law of Treaties. As such, it is not controlled by the unilateral interpretations of any one of the Parties to the Peace Treaty and to the present case, particularly if those interpretations proceed by ignoring one or another half of the conventional text to be interpreted or by underlining some given terms in the first or in the second sentences of Article 26 to the detriment of others which are also part and parcel of the sentence concerned. The Peace Treaty, it should not be forgotten, is a conventional bilateral instrument adopted through a "mediation procedure" in which both Parties participated.

19. I conclude, therefore, as the Judgment itself does, that, so far as the "substantive law" that the Chamber is called upon to apply is concerned,

Article 26 adds nothing except for indicating indirectly, namely through the reference contained therein to certain elements of "evidence", the wish of the Parties that certain rules of international law be applied by the Chamber. In this respect, it has reassured the Parties during the proceedings and has also been helpful for the Chamber itself in view of the lack of specificity in Article 5 of the Special Agreement as to individual rules of international law. Article 26 does not, however, define any applicable substantive principle or rule of law. The Article is not even specifically referred to in the definition of the "applicable law" contained in Article 5 of the Special Agreement. Thus I share the proposition that land limits — limits of real property rights belonging either to communities or individuals — cannot transform themselves into international frontiers by virtue of Article 26 of the Peace Treaty, just as they cannot do it either by an application of the *uti possidetis juris* principle as customarily defined by Spanish-American Republics or on the basis of the Spanish Laws for the Indies.

20. The pertinence of Article 26 of the Peace Treaty to the tasks of the Chamber has been real, but it has had nothing to do with the definition of the rules of international law to be applied by the Chamber to the case. Its pertinence concerned the proof of the facts alleged by the Parties. In this respect the Chamber, and I concur with it, gave full effect to Article 26 of the Peace Treaty, because the Parties accepted during the current proceedings that the rule on evidence they gave to the Joint Frontier Commission in that Article applies also in the proceedings before the Chamber, and they have so pleaded. This should, however, be understood without prejudice to the general powers granted the Chamber in matters of evidence under the Statute of the Court. This would seem also to represent the Parties' interpretation of the legal situation on evidence, otherwise the request made by El Salvador at the hearings pursuant to Article 44, paragraph 2, and Article 50 of the Statute of the Court would be difficult to understand.

(c) *The* uti possidetis juris *principle and the* effectivités

21. A few remarks on the question of *effectivités* are now in order with a view to clarifying further my position on the very concept of the *uti possidetis juris* of the Spanish-American Republics and other possible applicable principles or rules of international law. There has been quite a lot of confusion at the current proceedings between "applicable law", "argument" and "evidence", the statement in the 1986 Judgment of the Chamber of the Court in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case quoted in paragraph 61 of the reasoning of the Judgment being the object of various interpretations.

22. To a certain extent it may be said that both Parties agreed that in the case of the "land boundary dispute" the *uti possidetis juris* should prevail

over the *effectivités*, without prejudice, of course, to the different positions adopted by them on the kind of evidence they might rely upon to prove the 1821 *uti possidetis juris* situation and the question of the relationship of Article 26 of the Peace Treaty and Article 5 of the Special Agreement. The Parties, however, failed to define with any degree of precision the *effectivités* concept they had in mind. In fact, they have referred to various possible kinds of *effectivités*, within quite different legal contexts. A distinction which should, however, be always borne in mind is that between the so-called *effectivités coloniales* and the State's *effectivités*. This distinction is made in the aforesaid 1986 Judgment on the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, in which the Chamber of the Court refers, first, to the "colonial *effectivités*" in order to describe the conduct of the colonial authorities as proof of the effective exercise of territorial jurisdiction during the colonial period and, secondly, to the *effectivités* as effective possession and/or administration by a State other than the one possessing the title or irrespective of that title.

23. The first of these two kinds of *effectivités* does not give rise to any norm of international law. It could only be an element of interpretation or confirmation of the *uti possidetis juris*, an element related to the testing of that principle in concrete situations. The second kind of *effectivités* mentioned, namely effective administration by a State other than the one possessing the *uti possidetis juris* title or irrespective of title, may be relevant to the identification of the "applicable law". The "principle of effectiveness" may indeed, other circumstances concurring, be at the origin of territorial rights. Thus it cannot be altogether excluded *a priori* that such *effectivités* could be of some relevance also to the definition of the law applicable to the case. What seems to me, however, a legal impossibility is a *simultaneous* application of the *uti possidetis juris* principle of the Spanish-American Republics and of a rule of international law construed upon the basis of the concept of "State *effectivités*".

24. In this respect, the Judgment, while distinguishing the above-mentioned matters correctly at the level of principle, is not immune to a certain degree of confusion through failing to make a clear-cut distinction between admissible evidence under the applicable *uti possidetis juris* principle and admissible evidence when other principles or rules of international law are involved. Admissible evidence under the first and second hypotheses should have been clarified further in the Judgment in order to dispel the confusion made in the Parties' pleadings between "applicable law" and "evidence". The treatment in certain well-defined hypotheses of post-independence *effectivités* as possible "evidence" of *uti possidetis juris* rights should not be allowed to impinge, in any way, on the definition, contents and purpose of that principle as applicable between the Spanish-American Republics, including the Parties to the present case. As the Judgment has stated, the *uti possidetis juris* principle is essentially retrospective. It is also a principle the implementation of which is grounded, basically or mainly, in "retrospective evidence", namely in legislation or

documents issued by Spanish civil or ecclesiastical colonial authorities. Such documents could be of various kinds, including as with most of those submitted in the present case documents describing the exercise of territorial jurisdictions by the Spanish colonial authorities, namely describing "colonial *effectivités*". The best proof of this is the very language of Article 26 of the Peace Treaty, with its reference to "documents issued by the Spanish Crown or by the Spanish colonial authorities". But Article 26 of the Peace Treaty does not mix up such "documents" with the evidence referred to in the second sentence of that Article. Both kinds of evidence are kept separately, and so they should be, because of the very definition of the *uti possidetis juris* principle applicable between the Parties to the present case *qua* Spanish-American Republics.

25. For a determination in the present case of a given *uti possidetis juris* situation, "post-1821 *effectivités*" in the nature of conduct cannot be equated with "colonial *effectivités*" or be treated more favourably than the cautious and qualified evidentiary treatment given to the republican land titles in the Judgment. To weigh up, *at once*, all the *effectivités*, by conduct, both pre- and post-independence, in order to arrive at a conclusion as to the position of an 1821 *uti possidetis juris* boundary, does not make much sense if one is applying the *uti possidetis juris* principle. In none of the specific hypotheses dealt with in the quoted passage of the *Frontier Dispute (Burkina Faso/Republic of Mali)* Judgment is there any confusion between the *uti possidetis juris* (with its normal and natural means of evidence) and *effectivités* by conduct of the State or States subsequent to their independence. In none of them are either of the said kinds of *effectivités* equated in evidentiary value to the colonial documents, colonial *effectivités* documents included, on which the implementation of the Spanish-American Republics' *uti possidetis juris* principle is grounded. To determine the relationship, if any, between States' post-independence *effectivités* by conduct and the *uti possidetis juris* principle in a given case it is necessary *in the first place* to determine the *uti possidetis juris* situation through colonial documents and to stop there, so far as the *uti possidetis juris* determination is concerned, if the indicated operation yields a reliable *uti possidetis juris* line. This is also, it seems to me, the meaning of the dictum of the *Frontier Dispute* Chamber, in the *Burkina Faso/Republic of Mali* African case. This is, of course, without prejudice to the evidentiary value of *effectivités* by subsequent State conduct for the purpose of applying a rule of international law other than the *uti possidetis juris* principle.

26. On the other hand, the Judgment is absolutely right when distinguishing the two kinds of *effectivités* referred to above from the "human argument" of Article 26 of the Peace Treaty. The "human argument" cannot be equated either with the so-called "colonial *effectivités*" or with "States' *effectivités*". It is not "colonial" because it does not relate to the conduct of colonial authorities and it is not a "State's *effectivités*" because it does not refer back to acts or functions of organs of the State, or attributable to the State, but to the conduct of private persons, nationals of a given country. The "human argument" has, in fact, nothing or very little to do with the definition of the "applicable law", particularly where the *uti possidetis juris* is concerned. The same conclusion applies, in my opinion, to the "community-rooted" argument which, as presented by El Salvador, appears to be just another way of expressing the "human argument". I would add, in that respect, that no evidence has been submitted to the Chamber as to the existence of any kind of "community", defined in terms of ethnicity or otherwise, different from the "communities" represented by the expression "Salvadorian nationals" or "Honduran nationals".

27. It follows from the above that my general approach to evidence has been one which is wide, but without losing sight of the object and purpose of the legal operation in which the Chamber was actually engaged. It is one thing for the Chamber to make a legal determination aimed at establishing an 1821 *uti possidetis juris* line, which should be its first task, and quite another thing for it to determine whether or not such a line was modified by the subsequent conduct of the Parties or by other rules or legal considerations, as may have occurred in certain instances. The evidence submitted by the Parties should have been weighed and given the effect that it deserves *in concreto*, bearing in mind whether the Chamber was within the first or the second stage of the suggested *démarche* which, essentially, corresponds *mutatis mutandis* to the one followed in the 1933 Arbitral Award on the *Honduras Borders* case between Guatemala and Honduras. It is also, mainly, for that reason that I consider all Spanish colonial land-grant titles or documents to be perfectly admissible evidence in the present "land boundary dispute", as well as other relevant elements of evidence emanating from the Parties themselves, such as "diplomatic correspondence", "official communications", "internal resolutions", etc., without excluding furthermore "official records" of "negotiations", "conferences", "mediation procedure" and "mixed boundary commissions" since independence (as well as relevant "treaties", "agreements" and "understandings" arrived at by the Parties before the Special Agreement of 1986), to the extent that all such evidence might be admissible *in concreto* under the principle or norm of international law which is applied.

(d) *The* uti possidetis juris *principle and the* títulos ejidales *invoked by the Parties*

28. As stated above, the object and purpose of an *uti possidetis juris* determination of a given frontier line in the present case consists of ascertaining the "administrative colonial boundaries" of the former Spanish *intendencias/provincias* of Honduras and of El Salvador in the sectors of the land frontier between the Republic of Honduras and the Republic of El Salvador in dispute. However, the "formal title-deeds to commons" argument of El Salvador has also raised an issue related to the historical Spanish Laws for the Indies (namely to the *Leyes de los Reynos de Las Indias* as named in the *Recopilación* of 1680), which requires me to present some comments because the Judgment does not consider it necessary to do so, notwithstanding the fact that this historical Spanish law is a fact in the case, in accordance with the jurisprudence of the Court as confirmed in 1986 by the Judgment of the Chamber of the Court in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case. The question of Spanish historical law raised by the aforesaid Salvadorian argument (I would describe it briefly for convenience as the "*títulos ejidales* argument" [1]) derives from El Salvador's assertion that certain land titles or related documents, the so-called "formal title-deeds to commons" granted by the Spanish colonial authorities to Indian communities, had a greater probative value for an *uti possidetis juris* demonstration because, *inter alia*, certain such grants supposedly had the effect of modifying, in one way or another, the "administrative colonial boundaries" between the former Spanish *intendencias/provincias* of Honduras and of El Salvador.

29. This proposition is unacceptable. The "administrative colonial boundaries" between the territorial jurisdictions of the various colonial administrative units were decided exclusively by the Spanish Crown through the *Consejo de Indias* or other central authorities in Spain or, in specific situations, by special instructions from the Crown to its highest executive authorities in the main Spanish-American territorial unit concerned, the Captain-General and the Audiencia of Guatemala in the instant case. The *títulos ejidales* of the Indian communities have nothing to do with the definition of the "administrative colonial boundaries" of the various territorial jurisdictions existing in Central America. This is, however, what El Salvador ultimately pleaded and asserted before the Cham-

[1] Expressions such as *"títulos ejidales"* (described by El Salvador in English as "formal title-deeds to commons"), *"ejidos de reducción"* and *"ejidos de composición"* are alien to the Spanish Laws for the Indies, which used the term *"ejido"* in reference to the *ejido* assigned by law to a newly-founded town.

ber. I will briefly explain below some of the main reasons why under the Spanish Laws for the Indies the matter could not be as presented by El Salvador. I would add that the Chamber need not have adopted so diffident an approach to this question of Spanish historical law, because the answer is a very simple one and could easily have been ascertained from the *cédulas reales* before the Chamber as well as from the very text of the *títulos ejidales* themselves. Moreover, I am not at all sure, some statements to the contrary in the Judgment notwithstanding, that the want of an answer to this issue in the Judgment might not have had some untoward repercussions on the frontier line determined by the Chamber in certain specific instances.

30. In order to put the matter in perspective, I would begin by recalling that the "original title" of the Spanish Crown in its American territories, the only "original title" existing under international law in the present case, was "dual" in character. By that international title the Spanish Crown acquired "sovereignty" over the American territories concerned as well as "ownership" of the land, soil, subsoil, mines, waters, mounts, pastures, etc. This "ownership" was not considered as a "private" ownership of the King, but as a "Crown" or "State" ownership designated by the term *"regalia"* (*tierra realenga* when applied to the land). The Spanish Crown was therefore, at the same time, absolute sovereign and sole public proprietor of Spanish America (subject to prior indigenous properties as recognized by Spanish laws). The political, administrative and judicial system of government as well as the Laws for the Indies in general reflected this "dual" aspect of the Spanish Crown's original title over its American territories. The title was used for acts adopted *"à titre de souverain"* as well as for the granting of private property rights over land. It was used indeed both ways in relation to the Indian population as well as with respect to the Indian towns and communities established and organized by the Spanish authorities as from the beginning of the colonization period which followed the period of discovery and conquest.

31. On the occasion of the establishment of *new* Indian towns, for the purpose of consolidating colonization as well as the Christianization of the Indians, pieces of land were assigned, always *gratis*, through political decisions of the "Superior Government" of the Captaincy-General of Guatemala (the Captain-General and the Audiencia acting as an advisory body in matters of government), which were generally known as *reales acuerdos*. These decisions were adopted pursuant to the *Ordenanzas para los descubrimientos, nuevas poblaciones y pacificación* enacted by Phillip II in 1573, incorporated into the 1680 *Recopilación*, as well as to subsequent legislation on the political organization of territory, such as, the 1618 *Ordenanzas para el buen gobierno de los Indios de las provincias de Paraguay*. None of the so-called "formal title-deeds to commons" invoked by

El Salvador was issued by Spanish authorities under this kind of legislation. All those *títulos ejidales* were granted to Indian communities of Indian towns *(reducciones)*, founded a long time before, pursuant to legislation of a different kind, described generally as legislation on the composition of Crown lands *(tierras realengas)*. This kind of legislation had, as its very object, the grant of private property rights over land to communities and to individuals. The first piece of this legislation on composition was enacted by Phillip II in 1591. It was the subject of a first adaptation by Charles II in 1692 and of a second and last one by Charles III in 1754. The *títulos ejidales* invoked by El Salvador in connection with its "formal title-deeds to commons" argument were issued under either the 1692 or the 1754 versions of that legislation.

32. The legislation for the composition of *tierras realengas* was concerned exclusively, as indicated, with forms of acquisition of property rights over land through various legal means, including composition in its strict sense but also through free gift, ordinary sale and prescription. Constituted Indian communities were initially to acquire property rights over land *under this legislation* through free gift (land was supposed to be reserved for this purpose) and as from about 1646 also by "composition", understood as a means of acquiring property rights over land. The legislation on acquisition of private rights in land varied in its different versions, but it was always a judicial/administrative procedure as reflected in the *títulos ejidales* submitted to the Chamber. The "superior government", as the executive branch of government, was not involved in that procedure. This confirms that only "property", not "jurisdiction", was involved, because a judicial/administrative procedure is not a proper conduit for the grant of "jurisdiction". The Spanish Laws for the Indies were no exception in this respect. All the above suggests that the assignment of land for the establishment of Indian towns *(reducciones)* which was carried out by the "superior government" when territorially organizing the dispersed Indian population had nothing to do with the subsequent grant to the Indian communities which lived in those towns *(reducciones)*, with communal property, of land needed both for their subsistence and for their ability to pay the Crown their annual tribute.

33. This Spanish legislation and the related procedures suffice in themselves to provide the obvious answer to the question of Spanish historical law here considered. Under the said legislation and procedures it could not be a question of granting territorial jurisdiction. It follows that the payment or non-payment by the Indian communities for the *títulos ejidales* granted them is as such quite irrelevant to any demonstration of

uti possidetis juris rights. Such titles cannot, by definition, affect "administrative colonial boundaries", to ascertain which is the object and purpose of any *uti possidetis juris* determination. I find, therefore, that the distinction between the so-called *ejidos de reducción* and the so-called *ejidos de composición* — so much argued over by the Parties at the current proceedings — had little relevance to the task that the Chamber was called upon to perform. If the *ejidos* concerned had been assigned to Indian towns as part and parcel of their municipal territorial jurisdiction, matters could be looked at differently. However, none of the documents concerned relate to the *ejido* of an Indian town, but only to land granted as communal property to Indian communities under legislation and procedures dealing with private-law matters. Even counsel for El Salvador recognized that the *títulos ejidales* so-called *de reducción* granted to Indian communities involved the payment of judicial fees. The Spanish Laws for the Indies do not provide for payment of judicial fees in order to obtain municipal territory or municipal territorial jurisdiction! How could it be otherwise? The only thing that could have had a bearing on the task to be performed by the Chamber was not present in the instant case because, as indicated, none of the documents concerned relates to the establishment of a new Indian town with its corresponding legally protected *ejido*, which was part and parcel of the municipal *término* of the town. Following the granting of a *título ejidal* of the kind described by El Salvador as "formal title-deeds to commons", the Indian community did not move at all to the granted land. It remained settled in the Indian town where it was previously registered and to whose Indian community the *título ejidal* concerned had been granted.

34. When the land granted was *not* for the establishment of an Indian town with its legally defined and protected *ejido (reducción)* (pursuant to legislation of the kind of the 1573 *Ordenanzas para los descubrimientos, nuevas poblaciones y pacificación*), the land concerned by the title or document cannot be equated, under Spanish colonial law, with the municipal territory of an Indian town. The land concerned in the titles invoked by the Parties was not subject to the régime of *resguardos*, namely of an area legally protected by law, as was the case with the *ejido* of the Indian towns which were subject to that régime of *resguardos*. This explains, in turn, why, in several instances, the titles in question granted land in areas far away from the town of the corresponding Indian community, including areas located in other provinces; how the size of the land granted appears, in most of the cases, to be more extensive than the "one league" assigned by legislation to the *ejido* of an Indian town *(reducción)*; and how a number of the titles themselves refer to property rights without making them conditional on any particular provision concerning the inalienability of the land, or without attaching to the granted land any particular condition as to the form of its economic exploitation by the Indian community, as was

the case with the *ejido* of the Indian town *(reducción)* under the *resguardo* régime mentioned above. In the absence of a *resguardo* régime, one cannot talk about municipal territory or municipal territorial jurisdiction.

35. In fact, El Salvador admitted at the hearings that the invoked "formal title-deeds to commons" did not effect an "automatic modification" of jurisdictional boundaries of the colonial provinces. If so, and if the Spanish law did not contain general provisions attaching such an effect to that kind of title, if the titles granted to the Indian communities provided for property rights in land only, if the councils of the Indian towns could not modify their own municipal territory *(término)* which includes the *ejido* of the town, and if the Spanish territorial authorities in control of the Indian towns (i.e., *corregidores*) were not empowered to modify by themselves the territorial jurisdiction of their districts, how then could the territorial jurisdictions defined by the "administrative colonial boundaries" of the provinces or intendencies possibly be modified as a result of the granting of such "formal title-deeds to commons" to Indian communities? To prove that such a modification did take place notwithstanding the above, one would have to adduce and show an executive decision of the Crown or of the "superior government" of the Captaincy-General of Guatemala in that sense, but, as indicated, no such action has been documented by El Salvador. Needless to say, El Salvador's contention has never been borne out by arbitral tribunals or in cases before the International Court of Justice. The tribunal of the 1933 Arbitration on the borders of Guatemala/Honduras did not in its Award make a *single application* of the *administrative control* concept which El Salvador asked the Chamber to apply as from the very moment that it admitted that the granting of "formal title-deeds to commons" did not effect, after all, any "automatic modification" of the provincial administrative boundaries under the Spanish Laws for the Indies.

36. "Formal title-deeds to commons", like other colonial documents submitted, are perfectly admissible evidence of colonial *effectivités* within the context of an *uti possidetis juris* demonstration, but, as the Judgment rightly indicates, they are not Spanish colonial law documents concerning the definition of the administrative boundaries of the colonial provinces or intendencies of Honduras or of El Salvador. None of these "formal title-deeds to commons" has either such a purpose or such an effect. They may provide only circumstantial evidence of the boundaries of an administrative kind which alone are of interest for an application of the 1821 *uti possidetis juris* between the Parties to the present case.

37. In the light of the above, as should be clear by now, the *títulos ejidales* called by El Salvador "formal title-deeds to commons" do not have

any prior evidential value over other colonial documents submitted. There is nothing inherent in them, or provided for in the Spanish Laws for the Indies, justifying any special treatment by the Chamber of such documents from the standpoint of evidence of the 1821 *uti possidetis juris*. They do not have any particular pre-eminence over other colonial documents referred to in Article 26 of the General Treaty of Peace. Furthermore, El Salvador's contention appears to be in complete contradiction to general international judicial law and the practice of international courts and tribunals. This general law and practice are adverse to any municipal law concept of a "best evidence rule".

B. Specific Observations on the Frontier Line Defined by the Judgment in Some of the Disputed Land Sectors

38. The Judgment defines the land frontier between the Republic of Honduras and the Republic of El Salvador, in the six sectors referred to the Chamber, on the basis of the *uti possidetis juris* principle or alternatively, wherever pertinent, on the basis of concurrent subsequent conduct of the Parties. The overall results of the application of that law to the sectors in dispute, in the light of the evidence submitted by the Parties, appears to me satisfactory. In any case, and beyond any subjective appreciations that one may have, the land frontier between the two Republics is now definitely established all along their common border. This is, without a doubt, one of the merits of the Judgment.

39. As could be expected in so complex a land-boundary dispute, it is only normal that I am unable to share in every one of the grounds expounded in the reasoning of the Judgment in support of its decisions on the course of the frontier line in the various sectors. For example, in the fifth sector (Dolores), I would have given more weight to the San Miguel de Sapigre evidence as well to as the conduct of the Parties subsequent to 1821. But the reasoning of the Judgment is certainly a coherent and *uti possidetis juris* founded explanation which yields, in any case, what I consider to be the correct *de jure* line in the sector. I would also say, to give another example, that in the second sector (Cayaguanca) the *quebrada* Copantillo segment of the frontier line of the Judgment is the result of a construction of the Salvadorian republican Dulce Nombre de la Palma title which offers room for discussion. The line corresponding to that segment in the interpretation made by Honduras of the said land-title is also for me a perfectly possible and justified interpretation. In any case, the segment of the frontier line immediately after the *quebrada* Copantillo is the obvious line to follow, as is done in the Judgment. In the sixth sector (Goascorán), the Goascorán river line defined by the Judgment as the frontier between the two Republics is also the obvious *uti possidetis juris* line. That frontier line as defined in the Judgment disposes, of course, of some argument of El Salvador relating to the constitu-

ent territorial units of the Republic of Honduras. The frontier line or segments of frontier line defined for other sectors by the Judgment are likewise, for me, in most cases *de jure* lines, by virtue of the 1821 *uti possidetis juris* or by the consent derived from concurrent conduct of the Parties following independence, or by both. By way of illustration I will mention, for example, the Sazalapa river line and the line which follows the eastern limit of the Arcatao title until Las Lagunetas or Portillo de Las Lagunetas in the third sector, the Río Negro line in the Naguaterique sub-sector of the fourth sector, the line between Cerro Montecristo and Talquezalar in the first sub-sector of the Tepangüisir sector, etc. In fact, I have no observations or reservations to make on the land-frontier line defined by the Judgment except in connection with the Talquezalar/Piedra Menuda segment (first sector), Las Lagunetas/Poza del Cajón segment (third sector) and Las Cañas river segment (fourth sector). These observations will be summarized below.

(a) *The first sector of the land boundary (Tepangüisir)*

40. In this sector the Judgment does not give all the weight to be expected to the 1821 *uti possidetis juris* situation in the area between Talquezalar and Piedra Menuda. The 1776 Citalá title concerned lands under the territorial jurisdiction of Gracias a Dios (Honduras) and, as explained in paragraphs 28 to 37 above of this opinion, it is a legal impossibility that under the Spanish Laws for the Indies a document of the kind of the 1776 Citalá title could have had the effect of altering, directly or indirectly, the administrative boundaries of the colonial provinces. It is true, and here I have no reservations, that the Parties by their own conduct accepted as from the 1881 negotiations that the frontier between the two Republics should run somewhere through the area where the north-east limit of the 1776 Citalá title was supposed to be located. In the light of that concurrent conduct, it was not possible to come back to the 1821 *uti possidetis juris* line, namely, to the east, south and west limits of the 1776 Citalá title. The frontier must run, therefore, from Talquezalar to Piedra Menuda and El Zapotal, but should it do so in a straight line, or passing through the Ocotepeque Tepangüisir marker located to the south of that straight line?

41. The Judgment adopts the straight-line solution. I consider this a questionable solution in the light of the evidence before the Chamber. That evidence and the law applicable suggest, in my opinion, that the frontier line should pass through the Ocotepeque Tepangüisir marker on its way from Talquezalar to Piedra Menuda and El Zapotal. The colonial *effectivités* of Honduras, represented by the 1817-1818 survey and title of Ocotepeque lands undertaken by the Spanish authorities of Gracias a

Dios (Honduras), confirms that at the critical date (1821) the area of the so-called "Ocotepeque triangle", whatever its size might be, was under the territorial jurisdiction of that colonial province, as indeed was the whole of the area covered by the 1776 Citalá title itself. On the other hand, the broad consent given by Honduras to the north-east limit of the 1776 Citalá title as from the 1881 negotiations, cannot — for reasons mentioned below — be understood as including a straight line between Talquezalar and Piedra Menuda which would ignore the Tepangüisir marker of the 1817-1818 Ocotepeque triangle. The conclusion is an obvious one. If there is no consent of Honduras to a straight line between Talquezalar and Piedra Menuda, the 1821 *uti possidetis juris* should prevail and the frontier line should run from Talquezalar to the Ocotepeque Tepangüisir marker, and from there to Piedra Menuda and El Zapotal. In any case, the post-1821 concurrent conduct of the Parties does not provide a basis for a straight line Talquezalar/Piedra Menuda/El Zapotal as a *de jure* line. A line of this kind should have passed through the Ocotepeque Tepangüisir marker, with a corresponding indentation.

42. The Judgment overcomes this problem by concluding that, after all, the 1817-1818 Ocotepeque title did not penetrate into the lands covered by the 1776 Citalá title; a conclusion that the Judgment based upon some geographical considerations and an interpretation of the documentary evidence that I do not share. I have, therefore, reservations on this conclusion of the Judgment. The excursions made, this time, by the reasoning into the realm of the Spanish Laws for the Indies are in any case quite unfounded. The records of the 1817-1818 Ocotepeque title show that there was no oversight or mistake at all. Indian communities could lose land rights granted by title for a variety of reasons, *inter alia*, through leaving the land uncultivated. This is what was alleged by Juan de Dios Mayorga in the prolonged lawsuit which gave rise, ultimately, to the delivery to the Ocotepeque community of its 1817-1818 title. Moreover, the question at issue is not the land rights of Indian communities but the exercise of "colonial *effectivités*" reflected in the submitted evidence.

43. I have also to dissociate myself from the use made in the Judgment of the records of the 1914 Honduran republican title to the land of San Andrés de Ocotepeque (Reply of Honduras, Ann. I.4, pp. 47-60). My reading of those records leads me to a conclusion opposite to that apparently reached by the Judgment in its reasoning. This piece of evidence confirms, in my opinion, that the 1817-1818 Ocotepeque triangle remained outside the scope of the shared views of the Parties in 1881 to adopt the north-east limit of the 1776 Citalá title, broadly speaking, as the area where they should establish the frontier line. The 1914 surveyor located the Tepangüisir marker of Ocotepeque at 63° S 33′ W in relation to

Piedra Menuda and at a distance of 1,902 m. He indicated that the Tepangüisir marker was, at the moment of his survey *(en virtud de quedar hoy)*, "in Salvadorian territory" (Reply of Honduras, Ann. I.4, p. 59) so as to explain why he left out of account that Ocotepeque boundary marker of Honduras. At the time of the survey there was no established frontier between the two States allowing one to speak in a legal sense of the "territory" of one or another Republic. The term "territory" used by the surveyor thus cannot be read as bearing such a legal meaning. The surveyor, who crossed the Pomola river and reached Peñasco Blanco to the south of Talquezalar, made the remark concerned when describing his itinerary from Peñasco Blanco to Piedra Menuda. In his final report to the provincial authorities he explained his omission of the "Tepangüisir marker" as follows:

> "The only line which was traced in ignorance of the separation deed was that corresponding to Citalá, Republic of El Salvador, as the Mayor of that village had refused to make the deed available; however, the Political Governor of that department also sent me instructions from the President of the Republic to keep to the recognized line, without entering into discussion on the real line as I did here. It is regrettable that the dividing lines are being disregarded, because as will be seen in the former dossier there is a marker at Tepangüisir which belongs to Honduras; and today it has disappeared without our knowing how or why." (*Ibid.*, p. 52.)

44. The records also explain very clearly the reasons for the instructions given to the surveyor by the superior authorities. The provincial authorities, for example, explained the matter as follows:

> "In regard to the boundary line of the Republic of El Salvador too, the municipality of Citalá was not represented, although it had been summoned to appear; but the geometrician Nuñez Casco delimited this section in accordance with the present state of ownership by the two countries, and the surveyor in question, as he maintains in his report, followed the instructions received from the President of the Republic of Honduras, so as not to become involved in discussions concerning those dividing lines which are to be defined and established by a joint committee responsible for the boundary between the two States" (*ibid.*, p. 56);

while the central authorities observed that:

> "As regards the part of the land of San Andrés which adjoins the Republic of El Salvador, the limitation presents no difficulty, because the boundaries indicated in the resurvey of the community

> of natives in 1818 are the boundaries considered as being the dividing lines between the two provinces and they were recognized by the Convention of 28 September [1886] which came into effect after implementation of the corresponding course by the Joint Boundary Commission for Honduras in 1889. The engineer Nuñez Casco marked the boundary along this frontier from the rock of Cayaguanca up to the Piedra Menuda marker, without having touched the following marker of Tepangüisir, which according to this Commission is at 63° SW at a distance of 1,912 m from Piedra Menuda. According to Nuñez Casco's survey this Tepangüisir marker has remained on Salvadorian territory. When the boundary line with El Salvador is definitively established, it will be necessary to correct the survey of San Andrés, extending it up to the aforesaid marker. For the time being the present status quo should be respected." (Reply of Honduras, Ann. I.4, pp. 58-59.)

45. Thus the reasons for the surveyor's instructions lay in the status quo established by the 1886 Zelaya-Castellaños Convention concluded following the non-ratification by Honduras of the 1884 Cruz-Letona convention. Those instructions were furthermore issued without prejudice to the frontier line which was to be "definitively established" by the two Republics. At that moment, namely when that frontier was eventually established, the 1914 Ocotepeque title was supposed to be extended up to the "Tepangüisir marker". It was consequently a question of maintaining *de facto* "possession" by each Republic under the existing status quo pending final settlement of the frontier between the two States. This is confirmed, furthermore, by the further passage contained in the records:

> "It should be mentioned that in the decision taken in this connection, this approval is provisional insofar as the boundary line with El Salvador is concerned, a boundary which is to be definitively fixed by the Frontier Commission which will take the ultimate decision." (*Ibid.*, p. 59.)

46. Finally, in 1916 the President of the Republic of Honduras delivered the Ocotepeque title concerned with the following express caveat:

> "to approve without prejudice to third parties the procedure connected with the resurveying of the land of San Andrés [Ocotepeque], pointing out that the boundary line with El Salvador will definitely be the one which is to be fixed by the Joint Frontier Commission" (*Ibid.*, p. 60).

In the light of all the above, I really cannot see how the remark made by the surveyor in 1914 could be an element of proof of any supposed acquiescence by the responsible authorities of the Republic of Honduras to the "Tepangüisir marker" of Ocotepeque being in the "territory" of the Republic of El Salvador in 1914-1916.

47. I made the observations above for reasons of principle as well as to put straight the records as I perceive them. The matter, however, was not of such proportions as to have justified on my part a negative vote on this segment of the frontier line, bearing in mind the understanding of the Parties in 1881 to the effect that the frontier Talquezalar/Piedra Menuda/El Zapotal be established somewhere in the area of the north-east limit of the 1776 Citalá title, not to mention the fact that I fully agreed with the line defined by the Judgment for the segment between Cerro Montecristo and Talquezalar.

(b) *The third sector of the land boundary (Sazalapa/La Virtud)*

48. In this sector, the frontier line defined by the Judgment is certainly an 1821 *uti possidetis juris* line as from the boundary marker of the Pacacio to Las Lagunetas or Portillo de Las Lagunetas (a tripoint first and a quadripoint later on of the lands Arcatao/Lacatao/Gualcimaca/Nombre de Jesús). From Las Lagunetas down to Poza del Cajón the line is a matter of choice between several possible interpretations of the relevant colonial and republican titles or documents. The Parties themselves eventually recognized this at the current proceedings. The Judgment has, of course, made its own choice. It is a choice with respect to which I have some reservations, although I admit that the administrative boundary of the colonial provinces in the area does not appear, on the basis of the documents available, as having been defined with sufficient clarity. Here an example is provided by the dispute recorded, in colonial times, between sub-delegate land judges or surveyors of Lacatao lands and the owners of the Hacienda of Nombre de Jesús.

49. I agree with the point of departure adopted by the Judgment when it considers as established that the line of the 1821 *uti possidetis juris* in this sub-sector corresponds to the boundary between Nombre de Jesús and San Juan de Lacatao properties and that this boundary ran from the Las Lagunetas tripoint (quadripoint) in a general south-eastward direction to a point on the river Gualcuquín or El Amatillo. I agree also that the point to be identified on the Gualcuquín or El Amatillo river coincides with the confluence with that river of a small *quebrada* flowing into the river from its right (south-western) bank and that the boundary coincided generally with the course of the *quebrada* for the last part of its own course down to the river Gualcuquín or El Amatillo, and therefrom followed this latter river down to Poza del Cajón.

50. However, the main problems came thereafter. There are quite a number of small *quebradas* in the area (i.e., Lajas, Las Marías, Turquín or Palo Verde, etc.) and the names and identification of these *quebradas* as well as of rivers in the area (i.e., El Amatío, El Amatillo) give additional cause for confusion. All these *quebradas* flow into the Gualcuquín or El Amatillo river but, of course, *at different points*, some rather near to the

upstream course of the Gualcuquín, some near to the downstream course of the Gualcuquín. It seems also that there are certain places called Lagunetas in the area, a fact which could also create some confusion with the Portillo de Las Lagunetas mentioned above. The Judgment, in its own choice, selects a *quebrada* (Quebrada de la Montañita/Quebrada de León) which merges with the upper waters of the Gualcuquín or El Amatillo river practically at the site of its headwaters. Apparently, the Judgment takes the Quebrada de la Montañita/de León as being the *quebrada* Lajas referred to in certain titles, but whose location is not identifiable in the submitted evidence. This is the subject of my first reservation. The second one concerns the location the Judgment assigns to Cerro La Bolsa, which in 1837 the owners of Nombre de Jesús recognized as being the boundary between their *hacienda* and the surveyed lands of the 1838 Honduras republican La Virtud title. The demonstration made by the Judgment as to the location of Cerro La Bolsa provides an explanation, but I am inclined to think, in the light of other pieces of evidence, that Cerro La Bolsa was probably farther to the south of Portillo de Las Lagunetas than indicated in the Judgment. As a result of this Cerro La Bolsa choice, another controlling factor of the administrative colonial boundary, namely Barranco Blanco, has practically disappeared from the scene. This, as I said, gives rise to my second reservation. Thirdly, the fact remains that, according to the evidence before the Chamber, quite a number of colonial and post-colonial *effectivités* of Honduras took place in areas to the west of the river Gualcuquín or El Amatillo. It is really difficult to visualize, particularly in the light of the information concerning the colonial surveys of Lacatao, in the 1837 Honduran republican survey of La Virtud and the 1843 Honduran republican survey of El Palo Verde, how all of this could have happened in areas situated to the east of the line defined by the Judgment. This is the subject of my third reservation. Finally, information before the Chamber indicates the existence of some Honduran settlements in the area to the west of the Gualcuquín or El Amatillo river, as the Judgment itelf recognizes in the case of El Palmito. This gives rise to my fourth reservation.

51. All these and other considerations would suggest a *uti possidetis juris* line in the area reaching the Gualcuquín or El Amatillo river much farther to the south. At the same time, the reasoning of the Judgment does provide, as indicated, an explanation of the choice made, and I admit that there is room for different constructions of the 1821 *uti possidetis juris* line in the area. Thus, having made the above observations and reservations, I do not pursue them to the point of dissociating myself from the other members of the Chamber in the voting, bearing particularly in mind that the frontier line defined by the Judgment for the rest of the third land sector is definitely an 1821 *uti possidetis juris* line and, therefore, a *de jure* solution.

(c) *The fourth sector of the land boundary (Naguaterique/Colomoncagua)*

52. I consider the whole of the frontier line defined by the Judgment for this sector as an 1821 *uti possidetis juris* line *except* with respect to the segment of the line represented by the Las Cañas river line, particularly to the south of the Torola lands. Along the western border of Torola/Colomoncagua lands, the "Las Cañas line" of the Judgment possesses its justification in the sense that it represents a possible interpretation of colonial documents, particularly, although not exclusively, of the 1743 Torola re-survey. The "Las Cañas line" and the "Masire line" could both, in my opinion, constitute, through interpretation, the 1821 *uti possidetis juris* line in the area. The information in the case-file provides elements in support of both alternatives. The Chamber made the choice reflected in the Judgment on grounds explained therein. In so doing, it had to disregard altogether some main controlling factors of the line indicated in the colonial documents concerned, the Torola title included, in particular La Cruz (Quecruz or Los Picachos), whose geographical location is reconstructed by the Judgment. Having said that, I have no more observation to make on the "Las Cañas line" in that segment, namely in the area covered by the 1743 Torola re-survey, except to add that in any case the frontier line does not reach El Alguacil Mayor, leaving the Las Cañas river at Las Piletas.

53. The situation seems to me quite different so far as concerns the "Las Cañas line" running south from the Torola lands to the Mojón of Champate. I have been unable to find any 1821 *uti possidetis juris* justification for this segment of the "Las Cañas line" defined by the Judgment. The surveyor of the 1743 Torola lands indicated clearly in his survey that, once he reached Portillo of San Diego, he changed his course from south to north and with 40 cords reached a place called Las Tijeretas, and along the same path with 24 cords he came to a ravine-like bank of the Las Cañas river — reaching finally Monte Redondo. At that point of his description, the surveyor added the following to the text: "to here I have been bordering on the lands of Colomoncagua". In other words, the 1743 Torola land surveyor is telling us in the text of the re-survey that, in his itinerary from Las Tijeretas to Monte Redondo he was bordering on Colomoncagua lands. What is the only possible conclusion to be drawn from the above reference in the 1743 Torola re-survey? That to the south of a line going from Las Tijeretas to the ravine-like bank of the Las Cañas river there were Colomoncagua lands all the way. Now, if the Colomoncagua lands reached the place called Las Tijeretas, how could the "Las Cañas line" between the Torola lands and Mojón of Champate be the 1821 *uti possidetis juris* line? To me this is an impossibility. Moreover, the fact that the Colomoncagua lands reached Las Tijeretas is fully confirmed by several colonial titles and documents in addition to the 1743 Torola re-survey

itself: the 1662-1663 and 1665 surveys of the *estancia* and the *sitio* of Santa Ana; the 1694 survey of the lands of the Indians of Colomoncagua at Las Joyas and Los Jiconguites; the 1766-1767 survey of the *ejidos* of Colomoncagua by Cristóbal de Pineda; the 1767 reconnaissance of the boundary markers of Colomoncagua by Miguel García Jalón; and the 1790-1793 re-survey of the *ejidos* of Colomoncagua by Andrés Pérez. Furthermore, Honduras has provided the Chamber with some information concerning its *effectivités* in the area (Reply of Honduras, Ann. IX, pp. 733-798). In these circumstances, to my regret, I cannot give my support to that segment of the "Las Cañas line" defined by the Judgment as being a frontier line between Honduras and El Salvador.

54. Because no-one can explain the impossible, the reasoning of the Judgment fails altogether, in my opinion, to provide a reasonable *de jure* explanation for the above-mentioned segment of the "Las Cañas line", basing itself on the 1844 Salvadorian republican re-survey and title of the Torola lands and drawing from it certain conclusions which, if they prove anything, prove only the contrary to what it was attempted to prove. The 1844 evidence, which is in any case questionable evidence (El Salvador itself made a disclaimer thereon at the hearings), cannot provide justification for a "Las Cañas" line which is not concerned with Torola lands, namely, the only lands for which Judge Espinoza was commissioned by Salvadorian authorities. Moreover, reference is also made in the reasoning of the Judgment to a so-called document of 1804. This is hardly acceptable, bearing in mind the very nature of that paper and the circumstances surrounding the composition and production of it. At this point, I must add that the evidentiary value attached by the Judgment to this 1844 Salvadorian documentation contrasts sharply with the caveats which, too lightly in my opinion, the Judgment attaches to the evidentiary value of the *colonial* documentation submitted by Honduras and referred to in the preceding paragraph of this opinion. In the context of an 1821 *uti possidetis juris* demonstration, I see the matter exactly the other way round. I dissociate myself completely, therefore, from the considerations put forward in paragraphs 237 to 242 of the reasoning of the Judgment.

55. The 1821 *uti possidetis juris* line in the area under consideration is, in my opinion, the line submitted by Honduras, namely, the line Champate marker/Portillo Blanco marker/Obrajito/Laguna Seca/Las Tijeretas and from Las Tijeretas to the ravine-like bank of Las Cañas river of the 1743 Torola re-survey. I regret that the Chamber has been unable to accept that line, namely the *uti possidetis juris* line in 1821. My vote in favour of the operative paragraph of the Judgment relating to the boundary line in the fourth sector as a whole, therefore, is to be understood as encompassing that reservation.

II. The Island Dispute

A. The Question of the Definition of the Islands "in Dispute". The "Non-Existing Dispute" Objection Submitted by Honduras

56. Honduras asked the Chamber *to declare that only Meanguera and Meanguerita were in dispute* between the Parties and that the Republic of Honduras had sovereignty over them. El Salvador maintained that the Chamber should declare that sovereignty over all the islands within the Gulf (except Zacate Grande and the Farallones), and in particular over the islands of Meanguera and Meanguerita, belonged to El Salvador. Only Honduras, therefore, requested the Chamber to make a finding on the definition of islands "in dispute" as a *preliminary* to the determination of sovereignty over them, through a "non-existing dispute" objection. El Salvador's submission simply presumed that all the islands of the Gulf of Fonseca were "in dispute", Zacate Grande and Los Farallones excluded.

57. That the "dispute" must be a real one is a basic tenet of international judicial law, one also incorporated in the Statute of the International Court of Justice. According to the jurisprudence of the Court and doctrine, the "dispute" must exist in order to be susceptible of adjudication. Nothing would be more detrimental to the development of "judicial settlement", and more disruptive to the stability of international relations in general, than to allow adjudication on "phantom disputes". International courts and tribunals have the duty to remain vigilant in this respect, particularly at a moment when States appear to be more ready than in the past to have recourse to "judicial settlement" as a peaceful means of solving their "real disputes". As borne out by the Permanent Court of International Justice, "the existence of . . . a dispute" has to be "established" before proceedings are instituted (*Electricity Company of Sofia and Bulgaria, Preliminary Objection, P.C.I.J., Series A/B, No. 77*, p. 83. See also *Pajzs, Csáky, Esterházy, P.C.I.J., Series A/B, No. 68*, p. 61). This represents also the jurisprudence of the present Court, in whose eyes whether a dispute exists or not is a matter of fact for objective determination by the Court itself, one dependent neither upon a subjective statement by one party that a dispute exists, nor upon an equally subjective denial by the other (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 74; *South West Africa, Preliminary Objections* cases, *I.C.J. Reports 1962*, p. 328; *Northern Cameroons* case, *I.C.J. Reports 1963*, p. 27). This jurisprudence was recently reaffirmed by the Court in its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (*I.C.J. Reports 1988*, p. 27). The existence of a dispute is, therefore, a prerequisite for adjudication which must stand objectively and, consequently, be appraised by the Court taking into account all the circumstances of the case, independently of the pleadings, arguments and submissions of the Parties and of the head or title of jurisdiction concerned.

58. None of these circumstances, either of fact or law, including any questions relating to the interpretation of jurisdictional instruments or clauses, to the admissibility of a claim or even to the seisin of the Court, are *a priori* alien to a determination whether or not an "international dispute" exists. But the question of whether a dispute exists cannot be wholly subsumed under the headings of jurisdiction or admissibility, particularly when a "non-existing dispute" objection becomes the subject of a formal submission by a party. In answering a submission of this kind, jurisdiction and admissibility may form elements to be considered, but not necessarily or exclusively. All other circumstances relevant *in casu* must also be assessed by the Court. Moreover, the disposal of a non-dispute objection is, normally, *preliminary* to any discussion as to the scope of jurisdiction.

59. I do not see in the instant case any ground for the Chamber to have proceeded otherwise. The Chamber should have appraised whether or not the constitutive elements of an adjudicable dispute in the case of islands other than Meanguera and Meanguerita were objectively present. The jurisprudence of the present Court, since 1950, reveals that what is important in this respect is the existence of a "conflict of legal views" on the matter at issue. The Court has thus established a sharp distinction between that condition and the mere "conflict of interests" also mentioned by the Permanent Court in its 1924 Judgment in the *Mavrommatis Concessions* case (*P.C.I.J., Series A, No. 2*, p. 11). Today, therefore, the constitutive element *par excellence* of an "international dispute" susceptible of adjudication is a "conflict of legal views"; namely two conflicting juridical positions, which must furthermore be plainly and clearly established and manifested by the contending States *before proceedings are instituted* (see, for example, *I.C.J. Reports 1950*, p. 403; *I.C.J. Reports 1957*, pp. 148-149; *I.C.J. Reports 1959*, pp. 20-22; *I.C.J. Reports 1960*, pp. 33-36; *I.C.J. Reports 1962*, p. 328; *I.C.J. Reports 1963*, p. 27; *I.C.J. Reports 1972*, pp. 61-69; *I.C.J. Reports 1974*, pp. 259-263 and 463-467). In the present case, to make a judicial finding on the question raised by the Honduran submission, the Chamber should have enquired if it might be said that, before the conclusion and notification of the Special Agreement, there was objectively a manifest and established dispute as to sovereignty over islands other than Meanguera and Meanguerita between the Parties. This, and only this, was the question at issue for a judicial answer to be given to the "non-existing dispute" objection of Honduras.

60. The Judgment follows, however, a different path. It disposes of the Honduran question by combining the real issue, namely whether there was an "existing dispute" on sovereignty over islands other than Meanguera and Meanguerita before the institution of proceedings, with the different matter of the scope of the jurisdiction vested in the Chamber by virtue of paragraph 2 of Article 2 of the Special Agreement. As a result of

this combination, the reasoning of the Judgment is, as could be expected, far from clear and leads, ultimately, to quite an embarrassing procedural situation where its conclusion on El Tigre island is concerned. To imply, for example, that at the date of the Special Agreement (24 May 1986) all the islands were, at least formally, in dispute is, indeed, quite surprising, on the objective basis of the information contained in the case-file from an "existing dispute" standpoint. The case-file shows, to say the least, that there was at no moment any manifested conflict of legal views between the Parties concerning sovereignty over the Nicaraguan Los Farallones or over Salvadorian islands such as Conchagüita, Punta Zacate or Martín Pérez. Moreover, this conclusion begs the question at issue here, because that question is not to determine what islands were "formally" in dispute, but what islands were "actually", or "really" in dispute, as to sovereignty, when the Special Agreement was concluded and notified to the Court. The surprise increases when the Judgment itself distinguishes very rightly between "jurisdiction" and "exercise of jurisdiction", and between a "formal claim" and a "real claim", in order to put aside El Salvador's sovereignty claim with respect to islands which have not even been the object of pleading before the Chamber, notwithstanding the Chamber's finding on the scope of the jurisdiction over the island dispute vested in it by Article 2, paragraph 2, of the Special Agreement. To have made this distinction already implied the necessity of preserving the difference between the "scope of jurisdiction" question and that of the "existence of a dispute". If a dispute is not an "existing dispute" it should not be made the subject of adjudication even if it would be said to fall within the scope of the competence granted under the head of jurisdiction concerned.

61. For reasons of its own, the Judgment, however, prefers to adopt the scope of jurisdiction as its general point of departure: a point which creates thereafter a number of contradictions between the "broad" initial conclusion as to the said scope of jurisdiction and the "narrow" conclusion which follows as to the islands really "in dispute". In fact, the Judgment finally adds *a single island*, El Tigre, as being in dispute to the two islands that both Parties considered to be in that condition, namely Meanguera and Meanguerita, concluding therefore that only *three islands* are the subject of a "real dispute" notwithstanding its broad interpretation of the wording of Article 2, paragraph 2, of the Special Agreement. Moreover, any extension of the island dispute to islands other than Meanguera and Meanguerita is supposed to have taken place as from 1985 only, namely as from the Notes exchanged by the Parties in January and March of that year. Before 1985 Meanguera and Meanguerita were, according to the case-file and apparently also the Judgment, the only islands "in dispute" between the Parties. Now, it happens that, as the Judgment recognizes, the same form of words, namely *"la situación jurídica insular"*, is

used in the 1980 General Treaty of Peace. What does this suggest? It suggests that in 1980 the Parties to the Peace Treaty did not see the need to use a "more precise expression" than *la situación jurídica insular* in order to describe a dispute over two islands (Meanguera and Meanguerita) only. The relationship established by the Judgment between the number of islands "in dispute" and the alleged requirement of a "more precise expression" seems, therefore, unconvincing, to say the least.

62. The question is not whether the expression used in the Special Agreement *("la situación jurídica insular")* precludes either Party from exempting a particular island from consideration by the Chamber. The real challenge raised by the objection of Honduras lies in the point that, whatever the intentions of the Parties when adopting such an expression might have been, *the Chamber itself* cannot adjudicate except as to islands whose sovereignty is *really* "in dispute" between the Parties, and this must be objectively ascertained on the basis of all the elements provided by the case-file, Special Agreement and Peace Treaty included. Moreover, we are not here in the presence of a case, such as *Polish Upper Silesia* (*P.C.I.J., Series A, No. 6*, p. 14), in which the background conventions concerned allowed recourse to the Court as soon as one of the Parties considered that it had "a difference of opinion". Not at all. The preamble of the 1986 Special Agreement and Article 31 of the 1980 Peace Treaty both refer to existing "differences" or "controversies" between the Parties as the subject of the present litigation. A "difference of opinion" is not enough to form the substance of adjudication in the present case. It is necessarily with respect to an "existing dispute", namely "a manifested conflict of legal views" between the Parties as to sovereignty over each or any of the islands, that the Chamber is empowered to make an adjudication.

63. Except for the islands of Meanguera and Meanguerita, however, no such existing dispute emerges from the case-file before the Chamber. No dispute as to the sovereignty over other islands, nor any established and manifest conflict of legal views thereon, appears to exist on that basis. The attempt made by El Salvador in its Note of 24 January 1985, namely some years after the conclusion of the Peace Treaty, to extend the dispute to other islands, particularly El Tigre, was nothing more than a tactical move. The Honduran Note of 11 March 1985 clearly and categorically excludes any admission by Honduras of the existence of a "dispute" over islands other than Meanguera and Meanguerita, and the Note of El Salvador of January 1985 alone is unable *by itself* to create such a dispute, given the prior recognition by El Salvador, expressly and by conduct, of the sovereignty of Honduras over El Tigre and its other islands in the Gulf.

64. El Salvador has argued that Honduras, when concluding the Special Agreement in May 1986, was aware of the position of El Salvador concerning El Tigre and other islands within the Gulf of Fonseca and that, nevertheless, Honduras accepted the word *"insular"* ("of the islands") in

Article 2, paragraph 2, of the Special Agreement. This Salvadorian argument is far from persuasive. It applies, in any case to El Salvador itself, which in May 1986 was also aware of the Honduran Note of March 1985 and of its own recognition since 1854 of El Tigre and other islands as belonging to Honduras; particularly so, because Article 2, paragraph 2, of the Special Agreement does not mention either "all the islands" and/or "El Tigre island", but just says "of the islands" in general. The "lack of specification" argument is indeed quite contrary to El Salvador's position, because the general reference to "the islands" or the Spanish word *insular* in a special agreement notified to the Court can only refer to islands "in dispute" between the parties. El Salvador has not offered the Chamber proof that islands other than Meanguera and Meanguerita were in this legal situation in May 1986, a proof which exists in the case of Meanguera and Meanguerita.

65. As a matter of fact, the submission of El Salvador does not correspond at all with its arguments and submitted evidence, which concentrated on Meanguera and Meanguerita, namely on islands in dispute before and after the conclusion of the 1980 Peace Treaty. If there is any empty "formal" question before the Chamber, it is the very submission of El Salvador that the Judgment reconstructs, unwarrantedly in my opinion, by in fact equating the "all islands claim" with an "El Tigre claim". With all due respect, I do not think that this is a task which properly falls to a Chamber of the Court. El Salvador is not asking for sovereignty over El Tigre, but for sovereignty over all the islands in the Gulf of Fonseca except Zacate Grande and Los Farrallones. It is not the role of the Chamber to reformulate the submissions of the Parties. The only distinction that, in the light of the wording of the submission, the Chamber is entitled to draw is between, on the one hand, Meanguera and Meanguerita, and on the other hand the rest of the islands claimed, because of the words "and in particular". But the Chamber is not entitled to narrow the submission down to one confined to Meanguera and Meanguerita plus El Tigre.

66. In any case, until January 1985 there is not the slightest information in the file as to the existence of any "island dispute" going beyond the question of sovereignty over Meanguera and Meanguerita, pending as from 1854. Why and when did this alleged "new" island dispute arise between the Parties? There is no answer from El Salvador to this question. It is indeed peculiar that, in the middle of implementing a peaceful means of settlement in execution of an obligation assumed in a Peace Treaty concluded through a long procedure of mediation aiming to put an end to "existing" disputes between the Parties, "new" disputes came into being because of a single diplomatic note of one of the Parties, so as to add new islands to those in dispute before. It must be added that the Salvadorian Note of January 1985 left unspecified, except for El Tigre, the number and denomination of the islands supposedly "in dispute" and that El Salvador has not been more specific since, not even in the proceedings before the Chamber. Neither does the "all islands" claim in the submission of El Sal-

vador specify the islands in dispute, not even El Tigre island, apart from Meanguera and Meanguerita.

67. The lack of argument on the alleged *"all islands"* existing dispute claim (Zacate Grande and Los Farallones excluded) suffices in itself to set aside this claim of El Salvador as the Judgment actually does. On the "all islands" claim taken as such there was no specific, still less comprehensive argument, there was no argument or evidence at all! It was, on the other hand, a submission conducive to results manifestly absurd or unreasonable, as it would be for the Chamber to have adjudicated on sovereignty over islands situated even in the Bays of Chismuyo or San Lorenzo or in the eastern part of the Gulf of Fonseca! And, above all, it was a submission which found no support in the circumstances, historical or otherwise, of the "island dispute" as it evolved between the Parties. The Judgment, in its own way, ultimately reaches a correct conclusion where the existence or not of an "all islands" dispute is concerned and therefore, indirectly, on the "undetermined zone" argument advanced by the Salvadorian Note of 24 January 1985, a concept that in the case of the island dispute was alien to both the Special Agreement and the Peace Treaty.

68. Unfortunately, the Judgment fails to apply that conclusion to El Tigre island, namely one of the islands included in that very claim. It is true that, in the pleadings and at the hearings, El Salvador pressed its claim to El Tigre with arguments in support, and it is likewise correct that El Tigre was specifically mentioned, in addition to Meanguera, in the Salvadorian Note of 24 January 1985. Consequently, the explanation of "lack of argument" by El Salvador cannot, by itself, dispose of the matter so far as El Tigre is concerned. But other considerations should have led the Chamber to reach with respect to El Tigre the same finding as that in the case of the alleged "all islands" dispute. In the first place, to give an answer to the "non-existing dispute" objection of Honduras with reference to El Tigre — if one accepts the proposition as the Judgment does that it is procedurally possible to detach that island from the "all islands" claim of El Salvador — it would first have been necessary, in any case, to examine the matter in a *preliminary manner*, because of the "nature" of the Honduran objection as well as of the counter-arguments of Honduras which, as recognized by the Judgment, were directed to showing that there was no dispute over El Tigre, and to nothing else. All the evidence and argument relating to El Tigre island were certainly to be considered in the reasoning of the Judgment, but for a purpose different from the one advanced by that reasoning, namely for the purpose of determining whether a "real dispute" existed between the Parties as to sovereignty over El Tigre. Then, *but only then*, could the Judgment eventually have entered into the substantive question of sovereignty over El Tigre. In this connection, I

must say that I do not understand the statement to the effect that Honduras had not presented its contention that Meanguera and Meanguerita alone were in dispute as a "preliminary" to the adjudication of sovereignty over the islands in dispute. The fact remains that the proper context for testing the possible interaction of this contention with the terms of Article 2, paragraph 2, of the Special Agreement was consideration of the "preliminary question" itself, which the Chamber should not have treated mainly as a matter of interpreting the Special Agreement for the purpose of establishing the scope of the jurisdiction vested in it: Honduras had not raised an objection as to the "scope of jurisdiction" but a "non-existing dispute" objection.

69. If the Chamber had respected that context, as required by the preliminary character of the objection of Honduras, the conclusion would have been inescapable, because of successive recognitions by El Salvador of Honduran sovereignty over El Tigre, beginning with the Note of 12 October 1854 from the Foreign Minister of El Salvador to the Foreign Minister of Honduras, as recognized by the eminent Salvadorian Santiago Barberena, as well as, for example, in an 1874 communication of the Deputy Chief of the Salvadorian Army and in the 1884 unratified Cruz-Letona convention. El Tigre was, furthermore, as recognized by El Salvador itself, taken into account as "Honduran coast" for the purpose of tracing the equidistance line of the 1900 maritime delimitation between Honduras and Nicaragua, a delimitation that the Judgment rightly concludes to have been acknowledged or recognized by El Salvador. Furthermore, in the present proceedings, a final formal submission of El Salvador asks the Chamber to determine that the legal situation of the maritime spaces within the Gulf of Fonseca *corresponds* to the legal position established by the Judgement of the Central American Court of Justice of 9 March 1917. Now, this Judgement states expressly that the 1900 Honduras/Nicaragua delimitation is part and parcel of the legal situation of the maritime spaces within the Gulf of Fonseca, as indeed the present Judgment also does. In these circumstances, the statement in El Salvador's Note of January 1985 to the effect that *"parmi les autres îles se trouve celle du Tigre, qui est salvadorienne et sur laquelle le Honduras a des prétentions"* is not, under international law, an act capable of negating all the previous and present recognitions so as to establish thereby a "new" dispute concerning El Tigre island susceptible of a judicial determination.

70. The sovereignty of Honduras over El Tigre has also been recognized by third States as from the 19th century, as is proved by the episode of the British intervention in the islands of the Gulf of Fonseca (1848-1849). Honduras, on the other hand, always considered that El Tigre belonged to it and acted thereon *à titre de souverain* since inde-

pendence in 1821, as proved by the submitted evidence analysed in the present Judgment. There is no longer, therefore, any sovereignty around to be adjudicated by the Chamber in the case of El Tigre island. The matter was decided by the 1821 *uti possidetis juris* over 170 years ago as well as by the recognition of El Salvador and third Powers over 140 years ago. If adjudication of so-called "formal disputes" is always to be excluded, the adjudication of a "formal dispute" without an "object" is an even less acceptable proposition.

71. In the light of the above, I uphold the Honduran submission that the only islands "in dispute" are Meanguera and Meanguerita. I have voted, consequently, against the decision of the Judgment which declares El Tigre to be an island "in dispute" in the present proceedings. Likewise, I have voted against the operative subparagraph of the Judgment which decides that the Parties, by requesting the Chamber in Article 2, paragraph 2, of the Special Agreement "to determine the legal situation of the islands", conferred upon the Chamber jurisdiction to determine, as between the Parties, the legal situation of all islands in the Gulf of Fonseca irrespective of whether or not they were actually "islands in dispute". In pronouncing this decision the Chamber is answering itself, because none of the Parties has requested the Chamber to make any such judicial pronouncement. This is the result of not having dealt properly with the "non-existing dispute" objection submitted by Honduras. The Chamber's reasoning has led it to the awkward situation of having to adjudicate sovereignty over El Tigre island to Honduras without having been requested by that Party to do so, thus providing a kind of "confirmation of sovereignty". But the fact remains that the Chamber was not entitled to deliver this "confirmation", because that island was not an island "in dispute" between the Parties and was not, therefore, susceptible of adjudication by the Chamber. Last but not least, the reasoning of the Judgment, while asserting that the Chamber had been given jurisdiction to determine the legal situation of "all the islands" in the Gulf of Fonseca through Article 2, paragraph 2, of the Special Agreement, as read in a certain way, completely fails to state the grounds for this exegetical conclusion. The rules of international law governing treaty interpretation are not even mentioned! What the Judgment offers is simply a certain textual reading of the relevant provision of the Special Agreement, not a legal interpretation of the provision concerned. I will revert to this question of how the Special Agreement should be interpreted in the part of this opinion devoted to the "maritime dispute".

B. The Question of the "Applicable Law"

72. Throughout the proceedings, the Parties have been deeply divided concerning the "law" applicable to the "island dispute". Honduras has

consistently claimed that this aspect of the case should also be decided by the Chamber on the sole basis of the 1821 *uti possidetis juris*. The attitude of El Salvador has been less consistent. There were fluctuations and ambiguities in El Salvador's presentations of the law applicable to the island dispute. The doctrinal distinction between "attribution of sovereignty" and "territorial delimitation" has been referred to by El Salvador in order to make the Chamber apply to the "island dispute" a law different to the one applied to the "land boundary dispute", notwithstanding the fact that no distinction is made in this respect by Article 5 of the Special Agreement and the generally accepted proposition, recognized by the Judgment in its introduction to the land boundary dispute, that the *uti possidetis juris* principle is susceptible of application to frontier delimitation disputes as well as to attribution of territory disputes. I therefore read with surprise the statement in the Judgment to the effect that El Salvador's claim *"on the basis of the* uti possidetis juris *is that it is the successor of the Spanish Crown in respect of all the islands of the Gulf"*! (Paragraph 330 in the reasoning; emphasis added.) The Judgment here takes upon itself a *reformulation* of El Salvador's argument on the law applicable to the island dispute, a proceeding that in my submission is more than questionable in a contentious case.

73. In fact, El Salvador asked the Chamber to apply to the "island dispute" the principle of *"historic title"* and the principle of *"peaceful and continuous exercise of State authority"*. It was so summarized at the hearings in a *mise au point* made by the Agent of El Salvador. It may be arguable that these would be the only principles applicable to the island dispute, but the statement by the Agent of El Salvador was no doubt a clarifying statement. However, at further public sittings certain statements by counsel reintroduced into the picture the original obscurity of the pleadings of El Salvador on the matter. Thus, a few days later, counsel for El Salvador alleged the existence of a link between the "historic title" alleged by El Salvador and the 1821 *uti possidetis juris*. As counsel put it:

> "El Salvador is able to rely on effective possession of the islands as the basis of its sovereignty thereof on the grounds that this is a case where sovereignty has to be attributed; *equally*, El Salvador is able to rely on historical Formal Title-Deeds as unquestionable proof of its sovereignty of the said islands *in accordance with the principle of the* uti possidetis juris *as it operated in 1821*." (C4/CR 91/33, p. 10; emphasis added.)

74. The first query raised by this assertion is, of course, why was El Salvador not just asking for the application of the 1821 *uti possidetis juris*? But the answer to this query is not the point to be considered now. The point is the relationship between the "historic title" alleged by counsel, essentially the *Reales Cédulas* of 1563 and 1564, and the 1821 *uti possidetis juris*, when the counsel concerned admitted, thereafter, the possibility of an evolution

in Spanish colonial law, as well as that such an evolution did take place *in casu*. I have to confess that I am absolutely incapable of reconciling the resulting contradiction. The norms of international law not being elaborated unilaterally by a party in the course of a judicial procedure, one would be entitled to believe, phraseology excepted, that counsel was then suggesting that El Salvador was coming back to the 1821 *uti possidetis juris* invoked by Honduras. This sentiment was, however, evanescent, because, soon after, another counsel for El Salvador made the following statement:

> "the Chamber must examine whether it is merely to apply to the islands the principles of the Latin American *uti possidetis juris* that it applied in the first part of the case concerning the land frontier disputes or *whether other legal standards are to be used*" (C4/CR 91/33, pp. 62-63; emphasis added)

— and this counsel concluded that the Chamber should follow the second alternative. The Chamber has, of course, to apply the norms of international law applicable between the Parties to the island dispute. Again, however, this is not the point at the moment. The problem is: how to reconcile this second statement by counsel with the first statement by counsel, and both statements with the previous statement by the Agent of El Salvador?

75. The contradiction in the statements referred to above, with its resulting perplexities, is certainly not the kind of explanation which could be expected in order to clarify the meaning of the *"historic title"* and the *"peaceful and continuous exercise of State authority"* referred to by the Agent of El Salvador. Furthermore, El Salvador did not ask the Chamber to apply these principles as such, whatever the meaning attached to them by El Salvador might be, but a *"system of law"* of its own making. The need to have recourse to this concept of "system" derived, in all probability, from the fact that neither of the said two principles are in international law *autonomous* means of acquiring territory. They may serve, in certain circumstances, for that purpose, but applied *separately* from each other they are unable to yield sovereign rights over territory vis-à-vis another State, particularly when, as in the instant case, the other State — as will be considered below — has *uti possidetis juris* rights in the islands concerned. It follows that the need to construct a "system of law" was an obvious consideration which El Salvador tried to satisfy by stating that the principles invoked gave each other mutual support. But this would not be enough either. In order to be able, under international law, to convey sovereign rights over territory to a given State, and to do so even in the legal and factual circumstances of the present case, the two principles *must at least combine*, they must operate together *in casu*. Furthermore, the "system" of law proposed by El Salvador contains an important gap: what to do if one of the two principles yields results which contradict results yielded by the other? This is not a theoretical hypothesis, but a real one in the light of

El Salvador's claim to "all islands" (Zacate Grande and Los Farallones excluded). El Salvador *presupposes* that there would not be such a contradiction. This begs the question. A judicial body is not entitled, however, to apply the *a priori* assumptions or presuppositions of a party, but objective norms as defined by international law or by both parties to the case. This lacuna alone would be enough, in my opinion, to dispose of the applicable law construction of El Salvador concerning the "island dispute" as a "system". But there is more to the matter.

76. The two principles constituting the applicable law system proposed by El Salvador do not correspond to the legal or *de facto* situation existing in all the islands that El Salvador is asking for in its submission. The evidence in the case-file is crystal clear. It is also evidence in the "public domain". For example, El Salvador is not exercising any peaceful and continuous State authority, or any other kind of authority, in the Honduran islands which it is asking for except one, namely Meanguera. Two alternative conclusions logically follow. The first: might not El Salvador, after all, be asking the Chamber to apply separately each of the two principles invoked by it according to the legal or *de facto* situation which may exist in each of the islands concerned? An affirmative reply to this question would not only destroy the suggested "system", but would also imply the unwarranted proposition that the Chamber should apply different principles or rules selectively to each and every one of the islands claimed by El Salvador. The second alternative would be to ask oneself: is there, after all, an indirect but clear admission by El Salvador that not "all the islands", which the submission of El Salvador presupposed to be in dispute, are actually or really islands "in dispute" between the Parties, even in the eyes of El Salvador? An affirmative answer to this second question would rejoin the conclusions of this opinion on the "non-existing dispute" objection of Honduras (paras. 56-71 above). If the replies to the questions are negative, one cannot but conclude that *"historic title"* and *"peaceful and continuous exercise of State authority"* are principles that El Salvador calls on the Chamber to apply to all the islands which may be in dispute, with all the ensuing legal consequences whatever they may be.

77. The applicable law system suggested by El Salvador with regard to the island dispute is extremely fragile in addition to having, in my opinion, scant operative value, if any, in the circumstances of the present case. One could have expected, therefore, a much clearer pronouncement on the matter in the Judgment. The reasoning of the Judgment fails however to address the subject in a straight and clear-cut way as it should. I dissociate myself, therefore, from the manner in which this important question of the definition of the "law applicable" to the island dispute is treated in that

reasoning. It is true that, as requested by Honduras, the Judgment begins by referring to the *uti possidetis juris* principle, but it does so essentially in a merely descriptive manner without even analysing the incomplete list of colonial documents recorded. How could the *uti possidetis juris* principle be put aside, for all practical purposes, in the island dispute, in the light of the wording of Article 5 of the Special Agreement and the interpretation given by the Parties, in the context of the land boundary dispute aspect of the case, to the expression therein: *"the rules of international law applicable between the Parties"*? If the Judgment had pursued its initial attempt with respect to the application of the *uti possidetis juris* to the islands in dispute right through to its unavoidable judicial conclusions, much concerning the applicable law would have been clarified, including the merits of the system proposed by El Salvador as an alternative to the 1821 *uti possidetis juris* proposed by Honduras. These grave shortcomings in the reasoning of the Judgment leave me no alternative but to develop in detail below my own views on the matter with respect to the three main principles or elements invoked by the Parties, namely the "historic title", the *"uti possidetis juris"* and the "peaceful and continuous exercise of State authority".

(a) *The "historic title" invoked by El Salvador*

78. The bases of the "historic title" invoked by El Salvador are the *Reales Cédulas* of 1563 and 1564 concerning the Gobernación of Guatemala. In the words of counsel for El Salvador these *Reales Cédulas* constitute the "original colonial title" which is the foundation of the claim of El Salvador to sovereignty *over all the islands within the Gulf of Fonseca.* The *Reales Cédulas* concerned place the Gulf of Fonseca area, including Choluteca and Nacaome, under the jurisdiction of the *Gobernación of Guatemala.* Both were adopted in connection with the decision of the Crown to divide the territories of the first Real Audiencia of Gracias a Dios/Guatemala between the Real Audiencia of Nueva España (Mexico) and the Real Audiencia established thereby in Panama. This situation lasted a few years only, namely until the Real Audiencia of Guatemala was definitely re-established in Santiago de Guatemala (1568) and the Captaincy-General or Kingdom of Guatemala consolidated itself as the main administrative unit of the Spanish Crown in Central America.

79. The Gobernación of Honduras and the Gobernación of Guatemala had been created in the 1520s, the second a few years later than the first, and the territorial scope of the original Gobernación of Honduras comprised, *inter alia*, the areas not only of Tegucigalpa, Choluteca and Nacaome, and the islands of the Gulf of Fonseca discovered in 1522, like the Gulf itself, by Andrés Niño, a member of the expedition of Gil González Dávila (the first holder of the Gobernación of Honduras by virtue of a *Cédula Real* of 1524), but also areas to the south-west of the present territory of the Republic of Honduras in the region. It was within the territori-

ally ill-defined areas of the original *"Gobernaciones"* granted by the Crown to the first *conquistadores/gobernadores* that the Crown carved out, once discovery and conquest were accomplished, the administrative territorial sub-divisions of the Captaincy-General of Guatemala (not to be confused with the former Gobernación of Guatemala) and of the Audiencia of Guatemala, namely the various *"provincias"*, *"alcaldías mayores"*, *"corregimientos"* *"districts"* and *"alcaldías ordinarias"* established in the 16th and 17th centuries within the area of Central America concerned in the present case. Furthermore, these latter territorial administrative subdivisions evolved during the three centuries of Spanish administration in accordance with successive decisions of the Crown. That evolution was consolidated during the second part of the 18th century on the occasion of the introduction of the régime of *intendencias* in Central America, as is so well explained in the Arbitral Award made by the King of Spain on 23 December 1906 between Honduras and Nicaragua (see para. 15 above).

80. The geographical location of the territories concerned was a major preoccupation in the historical evolution indicated. The ecclesiastical jurisdictions of the Bishoprics also played an important role in the consolidation of the process. El Salvador acquired a Bishopric after independence in 1842, having been until that date under the ecclesiastical jurisdiction of the Bishopric of Guatemala. Comayagua or Honduras, however, had as from 1539 its own Bishopric, which exercised its ecclesiastical jurisdiction in the Province of Comayagua as well as over the Alcaldía Mayor de Minas of Tegucigalpa established in 1578 and, since 1672, over the town of Choluteca and the villages under its jurisdiction which were detached that year from the Bishopric of Guatemala. The town of Choluteca (founded in 1535 by a lieutenant of Alvarado, the conqueror of Guatemala) and the villages under its jurisdiction had already for a long time, namely from 1580, been subject to the civil jurisdiction of the Alcaldía Mayor de Minas of Tegucigalpa. The 1791 *Real Cédula* defined the territory of the Intendencia of Honduras as comprising all the territories belonging to the Comayagua or Honduras Bishopric, including therein, therefore, the Province of Comayagua and the Alcaldía Mayor of Tegucigalpa, together with Choluteca and the area under its jurisdiction. It should be noted that the *Real Cédula* of 1791 used the denomination of "Alcaldía Mayor" of Tegucigalpa and not the old original denomination, namely "Alcaldía Mayor de Minas" of Tegucigalpa, which in the meantime had been modified.

81. To examine the "historic title" invoked by El Salvador it is not necessary to go further into this broad description. All the relevant data are recorded in the case-file. It is a historically established fact that, in the first part of the 16th century, the Gulf of Fonseca and its area were a "crossroads" for the ambitions of those then conquering and governing in Mexico, Guatemala, Honduras and Panama, and that the Crown did not yet possess at that time a precise picture of the geographical features

of the region. The conflict of ambitions of the early *conquistadores/gobernadores*, in the region of the Gulf of Fonseca and its neighbourhood, or the Crown's interventions to put an end to the conflicts resulting from their wars and private arrangements between themselves, or the measures adopted by the Crown to find a convenient way of communication between both oceans, are well-known stories which have no relationship at all with the determination by the Chamber of the legal situation of the islands in the Gulf of Fonseca in dispute between the Parties, *unless* it be found that the concept of "historic title" invoked by El Salvador is an admissible legal proposition under Article 5 of the Special Agreement, namely a principle of international law applicable between the Parties in the case.

82. It was, however, necessary to introduce some broad historical references at the beginning, because in El Salvador's presentation the *Cédulas Reales* of 1563 and 1564 are described not only as "historic title" but also as "original colonial title". If, in the context of the present case, the concept of "original colonial title" has any meaning — I think it has none — it should correspond to the first titles issued by the Crown in the relevant area following the discovery of the Gulf of Fonseca by Andrés Niño in 1522, namely the "Gobernaciones of Honduras" granted by *Reales Cédulas* of the King in 1524 and 1525 to Gil González Dávila and to Diego López Salcedo respectively, both *Cédulas* embracing not only the Gulf of Fonseca but also the region of San Miguel to the east of the Lempa River. Alvarado, on the other hand, acquired, by the 1527 *Real Cédula* his "Gobernación of Guatemala". Once this point has been put in its actual historical perspective, one should then answer the issue of international law raised for the Chamber by El Salvador's invocation of "historic title".

83. In order to conclude whether or not the "historic title" alleged by El Salvador constitutes a *title of international law* that the Chamber should apply to the island dispute, it is necessary to answer a simple general question, namely: could it be said that the Republic of El Salvador and/or the Republic of Honduras are in possession of any "historic title" of the kind invoked by El Salvador because of the *Reales Cédulas* of 1563 and 1564 or of any other *Real Cédula* or *Provisión* prior to 1821? I have the greatest difficulty in understanding how such *Cédulas* or *Provisiones Reales*, namely Spanish domestic law, may constitute a "historic title" of the Republic of El Salvador or of the Republic of Honduras under international law. In my view neither of them are in possession of an international law "historic title" because of such Spanish domestic law. If they are not in possession of an international law title of that kind, they obviously cannot invoke it in the current proceedings.

84. There is no other original "historic title" around — as the concept is

understood and defined by international law — than the "historic title" of the Spanish Crown which lapsed with the recognition by Spain of the Spanish-American Republics. The Republic of El Salvador and/or the Republic of Honduras are not exceptions. The "titles" that these two Spanish-American Republics might have vis-à-vis each other are not the (lapsed) "historic title" under international law of the Spanish Crown, or any international title of Spain's making, but only and exclusively the title or titles to sovereignty over territory vested in them either by the *uti possidetis juris* or by any other norms of international law governing succession of States which might be applicable.

85. Beyond that, there are no "titles", original, historic, colonial or otherwise, that could be invoked by or apply to the Parties in the present case. Under the "colonial régime", the original title of the Spanish Crown was an international law title, but it was not *shared* by the Spanish colonial administrative units in America. Such units did not participate in such a title. It is quite inappropriate, therefore, to invoke in the present case the concept and principle of "historic title" in international law or to use equivocal expressions which could convey the idea that there is floating around some original "historic title" that the Chamber, if so inclined, could apply to the "island dispute" dividing the Parties.

86. As the Arbitral Award of 23 January 1933 concerning the *Honduras Borders (Guatemala/Honduras)* case so rightly states when defining the *uti possidetis* of 1821 applicable to that case:

> "Prior to independence, each colonial entity being simply a unit of administration in all respects subject to the Spanish King, there was no possession in fact or law, in a political sense, independent of his possession. The only possession of either colonial entity before independence was such as could be ascribed to it by virtue of the administrative authority it enjoyed. The concept of '*uti possidetis* of 1821' thus necessarily refers to an administrative control which rested on the will of the Spanish Crown." (United Nations, *Reports of International Arbitral Awards*, Vol. II, p. 1324.)

If the Spanish administrative colonial entities in Spanish America had not even a "possession" of their own, it is difficult, *a fortiori*, to admit that they could have had an original "historic title" or that they participated in the "historic title" under international law of the Spanish Crown. It is for this fundamental reason — there are others — that, in my opinion, the jurisprudence of the *Minquiers and Ecrehos (France/United Kingdom)* case is alien to the island dispute of the present case. In that case, the original "historic titles" invoked were mediaeval titles held subsequently by the Kings of England or the Kings of France, as independent sovereigns and nations.

87. The *Reales Cédulas* of 1563 and 1564, internal Spanish legislation, are also of no use for the determination by the Chamber of the legal situation of the islands in any other respect. They were superseded by more than two-and-a-half centuries of Spanish law and administration. They provide, therefore, no clue for an application by the Chamber, to the island dispute aspect of the case, of the 1821 *uti possidetis juris* or any other norm of State succession. Changes in administrative territorial units occurred during that long colonial period in Central America, as is proved by the aggregate information contained in the case-file, and the Judgment had to take such changes into account in adjudicating the island dispute as it did with respect to the land boundary dispute. The original *gobernaciones* did not become administrative territorial units of the subsequently established Captaincy-General or Kingdom of Guatemala whose main administrative sub-divisions were first the *provincias* and *alcaldías mayores* and then the *intendencias*. The territorial jurisdiction exercised by these *provincias, alcaldías mayores* and *intendencias* on the territories concerned — on which the Republic of El Salvador and the Republic of Honduras were established in 1821 — are the only "colonial administrative units" relevant in the present case, not the *gobernaciones*. The original *gobernaciones* have nothing to do with this determination. To proceed on another basis would be perfectly arbitrary in the light of the definition of the applicable law made by the Parties in Article 5 of the Special Agreement. There is no rule of international law applicable between the Parties attracting for its application those ancient *gobernaciones*.

88. The weakness of its 1563 and 1564 *Reales Cédulas* argument with respect to both the "historic title" and the *uti possidetis juris* principle, prompted counsel for El Salvador to try to give a *technical answer* to a more than probable objection. It consists in bringing into the picture the modern constitutional or administrative law concept of the *acte contraire*. *Reales Cédulas* could not have been modified or repealed, except by other *Reales Cédulas*. The concept of the *acte contraire* is, however, alien to Spanish colonial law. *Cédulas Reales* could also be modified by other forms of general legislation or *ad hoc* decisions of the Crown and/or by decisions of authorities vested by the Crown with the necessary powers to do so. Furthermore, there were of course after 1563 and 1564 quite a number of relevant *Reales Cédulas* modifying those then promulgated.

89. There is no further issue before the Chamber involving Spanish colonial law than the one concerning the proof of the 1821 *uti possidetis juris* situation, which admits the evidence provided for by the Spanish colonial documents submitted by the Parties. Such evidence is, however, irrelevant so far as the so-called "original colonial title" is concerned. This title was a "historic title" of the Spanish Crown with no participation

herein of the various administrative units established by the Crown in its American territories. It cannot, therefore, be applied by the Chamber without more ado or as a kind of all-embracing residual rule susceptible of defining the sovereignty of the Parties over the islands in dispute in the present case.

90. In conclusion, I agree fully with the finding in the reasoning of the Judgment which rejects in principle the "historic title" invoked by El Salvador as a principle susceptible of having a bearing on the adjudication by the Chamber of the island dispute as between the Parties. Unfortunately, the Judgment fails to draw from this conclusion its unavoidable legal consequences. Confusion is in fact maintained; and the definition and *modus operandi* of the *uti possidetis juris* principle suffer accordingly.

(b) *The* uti possidetis juris *principle invoked by Honduras*[1]

91. The *uti possidetis juris* principle is a rule of international law applicable to both territorial questions and boundary delimitation disputes in relations between Spanish-American Republics. There cannot be, therefore, *a priori*, any valid legal reason to put aside the *uti possidetis juris* principle, as it operated in 1821, when deciding the "island dispute" aspect of the case between the Parties. Moreover, if the Parties considered themselves, as they did, to be bound by this principle on the mainland, it must also be so on the islands in dispute in the Gulf of Fonseca. Why stop applying the 1821 *uti possidetis juris* when leaving the Goascorán sector of the land boundary dispute? Furthermore, both the "islands" and the "mainland" are physically "land territory". To exclude the *uti possidetis juris* as applied between Spanish-American Republics of Central America because of the doctrinal distinction between "attribution of sovereignty" and "delimitation" has no justification in general or in the circumstances of the present case. The distinction made by authors may be useful to describe the contents of the *petita* of successor States, but the distinction *is not in itself a rule of international law* and has not been conceived by doctrine as restricting in any way the normal operation and field of application of the *uti possidetis juris* principle.

92. Furthermore, both Parties have recognized, all through the proceedings, that the "rules of international law" applicable between them, referred to in Article 5 of the Special Agreement, included, in the first place, the *uti possidetis juris* principle as it operated in 1821. This Article,

[1] I am referring here to the *uti possidetis juris* principle and its means of proof as defined in the relevant considerations set forth in this opinion (see "I. The Land Boundary Dispute" — "A. General Questions").

on the other hand, does not limit the application of the *uti possidetis juris* to any one of the three aspects of the case, to the exclusion of others. On the contrary, it requests the Chamber "when delivering its Judgment" — the whole Judgment and not one aspect or part thereof — to take into account the rules of international law applicable between the Parties including, "where pertinent", the provisions of the General Treaty of Peace.

93. The only task of the Chamber in this respect is, therefore, to pronounce on whether the rule on evidence of Article 26 of the Peace Treaty should be applied *as such* to the island dispute aspect of the case. The Parties have entered into some argument about this. However, the whole issue seems to me beyond the point. The fact of applying or not applying Article 26 of the Peace Treaty *as such* to the "island dispute" is without practical consequences for the task to be accomplished by the Chamber. If Article 26 as such were not to be applied — a matter that the Chamber in any case is entitled to decide by virtue of Article 5 of the Special Agreement — the Chamber could not but proceed as provided for in the Statute and Rules of Court, and in general judicial international law, which happens to be quite open so far as the admission of evidence is concerned as well as alien to the "best evidence rule" concept of certain municipal law systems. It follows that there is no justification for admitting certain documentary evidence of the 1821 *uti possidetis juris* in the island dispute to the exclusion of other such evidence. The situation in this respect presents itself in the same terms as that regarding the land boundary dispute. No *Cédula Real* or other general legislation was submitted by either Party indicating to which of the colonial administrative units concerned the exercise of territorial jurisdiction in the islands which are the subject of the present dispute corresponded. But, just as in the case of the land boundary dispute, the Parties submitted a considerable number of documents issued by Spanish civil or ecclesiastical authorities recording colonial *effectivités*. A comparison of the evidence provided for by these documents of the colonial period allows one, in my opinion, to reach an *uti possidetis juris* conclusion concerning the islands in dispute which is much more convincing than in the case of certain segments of the boundary in the disputed mainland sectors. I will, therefore, proceed below to a determination of the legal situation of the islands in dispute on the basis of a comparison of the colonial *effectivités* recorded in the said documents, supplemented if necessary by evidence of the 1821 *uti possidetis juris* in the disputed islands provided for by the *related* post-1821 documentation, in the same way as is done in the Judgment for the land-boundary aspect of the case.

94. Where a principle such as *uti possidetis juris* is concerned, it is obvious that civil and ecclesiastical documents reflecting the colonial *effectivités* at a moment in time near to the critical date, 1821 in the present case, are likely to evidence that situation better than documents on colonial

effectivités one or two centuries older, independently of the form adopted by the oldest documents. Some of the submitted ecclesiastical documents of the colonial period are particularly pertinent with respect to an *uti possidetis juris* determination of the situation of the islands in dispute at the said critical date. The pertinence of such ecclesiastical documents results, ultimately, from a well-known general rule of Spanish Laws for the Indies contained in the *Royal Ordinance of 1571*, and incorporated in the 1680 *Recopilación* (Book II, Title II, Regulation 7), which has been applied in such international arbitrations as that leading to the Award made by the King of Spain on 23 December 1906 in the Honduras/Nicaragua boundary case, where its meaning is explained as follows:

> "in fixing the manner as to how the division of the discovered territories was to be made, [the rule] ordained that it should be carried out in such a manner that the secular division should conform to the ecclesiastical, and that the Archbishoprics should correspond with the districts of the Courts of Law *[Audiencias]*, the Bishoprics with the Governorships and chief municipalities *[provinces and alcaldías mayores]* and the parishes with the districts and District Councils *[corregimientos and alcaldías ordinarias]*." (United Nations, *Reports of International Arbitral Awards*, Vol. XI, at p. 113.)

95. The Judgment has upheld the Honduran proposition that the *uti possidetis juris* principle applies also to the island dispute aspect of the case. But its concrete application of the principle to the islands is particularly poor, notwithstanding the evidence submitted on colonial *effectivités*. It is not surprising, therefore, that it reaches no conclusion as to the situation of the islands in 1821 from the standpoint of the *uti possidetis juris* principle. To my regret, I must disagree entirely with the inconclusiveness of the reasoning of the Judgment in this respect and will give below my own conclusions as to which of the Parties the two islands in dispute (Meanguera and Meanguerita) belonged to in 1821 as a result of the operation of the *uti possidetis juris* principle on the basis of the evidence on civil or ecclesiastical colonial *effectivités* as well as of the Parties' relevant conduct in the years following independence.

(c) *The "peaceful and continuous exercise of State authority" invoked by El Salvador*

96. The second element of the applicable law system put forward by El Salvador in the island dispute is the one expressed by the descriptive heading of "peaceful and continuous exercise of State authority". This is certainly a valid element deserving careful examination, because of the role played by effectiveness in international law generally as well as in

decisions of international courts and tribunals on competing claims concerning territory. However, the "peaceful and continuous exercise of State authority" is not in itself a principle of international law, but a manifestation of a given unilateral conduct of the State concerned, whose eventual legal effects ought to be defined *in concreto* in the light of the various circumstances and, first of all, of the operating norm of international law relevant in final analysis to the said unilateral conduct. Hence, in defining the legal effects to be attached *in casu* to a proven "peaceful and continuous exercise of State authority", a connection between that conduct and a given norm of international law is of paramount importance. This conclusion is particularly relevant in the instant case because, as indicated, the Judgment has rejected the existence of the "historic title" invoked by El Salvador.

97. Another element that in the present context needs to be produced, in order judicially to ascertain any legal effects of the *principle of effectiveness* with respect to sovereignty over the islands in dispute, is the basic status of the islands under international law. This, in the present case, cannot by definition, and particularly since the *uti possidetis juris* principle is admitted by the Judgment as applicable law, be the status of *terra nullius*. This is moreover a proposition accepted, though via different arguments, by both Parties. That being so, the well-known *Island of Palmas* dictum to the effect that the peaceful and continuous exercise of State authority is "as good as title" is a maxim subject to caution: one needing close examination and careful analysis. Certainly, a judicial body must take cognizance of a State's presence on the ground, but the legal issue before the Chamber was one not of satisfying itself that this or that Party was present in a certain island in dispute, but of deciding the different matter of the "sovereignty" over the island concerned.

98. A third element that should have been borne very much in mind in connection with the allegations of peaceful and continuous exercise of State authority in the present case was the temporal factor. As from what moment could such a manifestation of *effectivités* on the part of the State of El Salvador be judicially considered an established fact? The answer is relevant for several reasons and, among them, for the purpose of identifying the principle or norm of international law that, all other circumstances concurring, might be activated by the said State *effectivités* so as to convey sovereign territorial rights. It is obvious, for example, that in a situation such as the one in the present case, *effectivités* which could be related to the legal situation existing in the islands in dispute at the critical date of 1821, cannot be measured by reference to the same international law principle or norm as *effectivités* either unrelated to such a critical date or subsequent

to the establishment of the dispute as to sovereignty over the island concerned.

99. El Salvador has not invoked *acquisitive prescription*, namely occupation followed by *bona fide* effective possession during a certain period of time, a highly controversial concept which, for my part, I have the greatest difficulty in accepting as an established institution of international law. What El Salvador did was to invoke the "historic title" examined above, namely a principle which has no reality in the circumstances of the present case. But, in doing so, El Salvador hinted that its looked-for support for the *effectivités* alleged in the island dispute were principles or norms of international law defining the legal situation of the disputed islands *at the critical date of 1821*. But these principles or norms boil down essentially, between the Parties, to the 1821 *uti possidetis juris*, namely the principle of international law invoked by Honduras. It would, therefore, be necessary to determine in the first place whether or not the *effectivités* argued for by El Salvador in one of the two islands in dispute (Meanguera) could be linked in one way or another to the process of determining the 1821 *uti possidetis juris*. This is an additional reason why the endeavour to determine the 1821 *uti possidetis juris* should precede examination of the alleged Salvadorian *effectivités* in the perspective of, or in relation to, any other rules of international law applicable between the Parties in the matter.

100. The Judgment has dealt with this problem in some sectors of the land boundary dispute aspect of the case, inspired by a certain interpretation of the dictum of the Chamber in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case so far as the assessment of some post-independence *effectivités* of one or another Party is concerned. In the island dispute, however, the evidence submitted regarding the *effectivités* manifested by El Salvador in Meanguera cannot be treated as an element of confirmation or interpretation of the 1821 *uti possidetis juris*. It is not possible to conclude otherwise because, as will be seen below, El Salvador has been unable to produce before the Chamber any proof of colonial *effectivités* in any of the two disputed islands on the basis of which *uti possidetis juris* rights of El Salvador could be upheld. It was not, therefore, without reason that El Salvador refrained from pleading the 1821 *uti possidetis juris* in plain words in the island dispute. In fact, the period of time over which the peaceful and continuous exercise of State authority over Meanguera invoked by El Salvador took shape *in concreto* prevents these *effectivités* from being taken as an element for the application or interpretation of the 1821 *uti possidetis juris*.

101. However, in the case of Meanguera, the conduct of Honduras when confronted historically with El Salvador's accumulation of *effectivités* on the island cannot but have certain effects under international law. To establish, obtain or have title and to maintain it are not necessarily the same thing under international law. Title may be eroded by the operation

of other principles or norms of international law applicable between States, particularly when territorial rights are at stake. Territorial sovereignty also connotes obligations and, in the first place, the obligation to maintain and protect it by observing a vigilant conduct towards possible inroads by other States. International law is particularly inimical to prolonged situations of "abstract territorial sovereignty" or of "territorial sovereignty by mere title" when a competing territorial sovereignty claim of another State, accompanied by *effectivités* of that State on the ground, is not challenged as it should be at the relevant times. All depends, ultimately, on the particular circumstances of the case concerned, but the position of principle of international law on the matter seems clear to me. It follows in the case of Meanguera that I am unable to uphold the Honduran contention as to the "exclusiveness" of the 1821 *uti possidetis juris* as applicable law in determining today the legal situation of that island as between the Parties.

102. I hold, in this respect, the same position in regard to the "islands" in dispute as in the "land boundary" dispute. Under the rule of Article 5 of the Special Agreement the *uti possidetis juris* principle is applicable to the case, and this should not be ignored when adjudicating the island aspect of it. But, as indicated in the introductory paragraphs of this opinion ("The Case"), the conduct adopted by the Parties, in various forms, during more than 170 years of independence, may also have legal consequences for the judicial determinations to be made by the Chamber on any of the three aspects of the present case. At the same time, of course, an erosion of territorial *uti possidetis juris* rights in Meanguera cannot be the result of mere assertions on the part of a State with a competing claim. It must be proven. Consequently, the evidence submitted must be the object of detailed analysis within the context of all the relevant circumstances and, in the present context, with respect to each of the two islands in dispute.

103. In conclusion, the *uti possidetis juris*, as it operated in 1821, is the principle of international law which the Chamber had to apply, in the first place, to the "island dispute". The contents, object, purpose and proof of this principle do not change because the dispute concerns sovereignty over islands and not land-frontier delimitations. But the 1821 *uti possidetis juris* is not *necessarily* the only norm of international law that the Chamber may apply in deciding today the island dispute or any other aspect of the case. The peaceful and continuous exercise of State authority (State *effectivités*) over the islands in dispute invoked by El Salvador is, in the circumstances of the case, a valid legal argument when clearly proven, as in the case of Meanguera. But, State *effectivités* alone, particularly late *effectivités*, cannot confer sovereign rights over islands that, in the present case, have furthermore the status of territory *"avec maître"*. To produce the legal

effect sought by El Salvador, the proven *effectivités* in Meanguera need to be supplemented with or articulated around a principle or norm of international law capable of conveying territorial sovereign rights over that island. This means that, to make a judicial determination today on the sovereignty over Meanguera, it is necessary likewise to verify the conduct of Honduras during the relevant period vis-à-vis the *effectivités* of El Salvador in Meanguera. This conduct, in so far as it might be said to reflect an implied consent, may provide the complement that the proven *effectivités* of El Salvador would require in order to produce territorial sovereignty effects.

104. I agree, therefore, with the general proposition as to the relevance of the peaceful and continuous exercise of State authority invoked by El Salvador as an element of the law to be applied to the dispute over Meanguera island, as well as with the verification of the related conduct of Honduras at the relevant period. I disagree, however, with the reasoning of the Judgment in so far as it is not preceded by the same careful determination of the legal situation of Meanguera and Meanguerita from the standpoint of the *uti possidetis juris* as it operated in 1821. This, in my opinion, has, furthermore, had untoward consequences on the adjudication of Meanguerita, an island where El Salvador has neither *uti possidetis juris* rights nor proven State *effectivités*.

C. The Legal Situation of Meanguera and Meanguerita

(a) *From the standpoint of the 1821* uti possidetis juris

105. Once the question of the "historical title" or "original colonial title" invoked by El Salvador has been settled (see paras. 78-90 above), the determination of the legal situation of Meanguera and Meanguerita may be examined — in all its simplicity — on the basis of the relevant *uti possidetis juris* evidence submitted by the Parties. None of the *Cédulas Reales* mentioned by the Parties contain any specific reference to Meanguera and/or Meanguerita or indeed to any other island of the Gulf of Fonseca. An *uti possidetis juris* determination ought, therefore, to be made on the basis of the circumstantial or indirect evidence provided by the colonial *effectivités* recorded in the Spanish documents submitted, which — in the case of Meanguera and Meanguerita — have an ecclesiastical as well as a civil origin. Once this is done, account could also be taken, for confirmation or interpretation purposes, of *post-1821 conduct* of the Parties in so far as that conduct has a link with the Parties' understanding of the 1821 *uti possidetis juris* in Meanguera and Meanguerita. An 1821 *uti possidetis juris* determination on the described basis is perfectly feasible in the instant

case, as it has been carried out by the Judgment with respect to the land boundary sectors in dispute. The islands of Meanguera and Meanguerita, together with the other islands of the Gulf of Fonseca, were never organized by the Spanish authorities as a distinct administrative subdivision or unit of the Captaincy-General of Guatemala. Even during periods in which they were inhabited, the islands were placed under the territorial jurisdiction of neighbouring mainland administrative subdivisions of the Captaincy-General of Guatemala, as well as under the jurisdiction of ecclesiastical authorities on the mainland. Thus the question of the jurisdictional relationship, in colonial times, of Meanguera and Meanguerita either with Choluteca in the Alcaldía Mayor of Tegucigalpa and the Bishopric of Comayagua (Honduras), or with the Alcaldías Mayores of San Miguel and San Salvador and the Bishopric of Guatemala, has been central to the Parties' argument.

106. Generally speaking, El Salvador admits that at a certain time the islands of the Gulf, including Meanguera and Meanguerita, were under the jurisdiction of Choluteca. It denies, however, that the joining of Choluteca after the 1563 and 1564 *Reales Cédulas* to the Alcaldía Mayor de Minas of Tegucigalpa and, ultimately, to the Intendencia of Honduras would have carried with it jurisdiction over the islands, including those of Meanguera and Meanguerita. So far as the ecclesiastical jurisdiction over the islands is concerned, El Salvador adopts, apparently, the same interpretation. The incorporation of Choluteca into the Bishopric of Comayagua is said to have been without effect so far as the islands of the Gulf were concerned: they continued to be under the jurisdiction of the Bishopric of Guatemala, being administered by religious orders in charge of the *guardanía*, or convent, of Nacaome, which was controlled, furthermore, from San Miguel.

107. The position of Honduras is quite different. Meanguera and Meanguerita is said to have continued to be under the jurisdiction of Choluteca following its incorporation into the Alcaldía Mayor de Minas of Tegucigalpa, this Alcaldía Mayor being incorporated thereafter, with all its territorial jurisdiction, into the Intendencia of Honduras as provided for in the *Real Cédula* of 1791. The jurisdiction of the Alcaldía Mayor of Tegucigalpa, which included the town of Choluteca within its jurisdiction, is said to have covered, furthermore, the area of Nacaome. Ecclesiastical jurisdiction over Meanguera and Meanguerita also followed the incorporation of Choluteca with its jurisdiction, the Nacaome area included, into the Bishopric of Comayagua or Honduras in 1672. With the establishment of the Intendencia of Honduras, defined by the said *Real Cédula* of 1791 by reference, *inter alia*, to the territorial jurisdiction of the Bishopric of Comayagua (Honduras), the whole historical administrative process was, according to Honduras, definitively consolidated.

108. Honduras stresses the distinction between the regular ecclesiastical jurisdiction, namely the parish of the diocese, and the competence, in indoctrination of the Indian population, of the *guardanías*, convents, administered by religious orders (Franciscan, Dominican, Mercedarian, etc.), but that were territorially located within a given diocese. On the other hand, El Salvador underlines the distinction between *"alcaldías mayores"*, like those of San Miguel and San Salvador, and *"alcaldías mayores de minas"*, like (originally) that of Tegucigalpa. El Salvador recognizes, however, that in the 18th century the *"Alcaldía Mayor de Minas of Tegucigalpa"* became an *"alcaldía mayor"*. What El Salvador apparently denies is that the area of Nacaome had ever been integrated into the Bishopric of Comayagua, or Honduras. Moreover, El Salvador gives an interpretation of the *Real Cédula* of 1818 (re-establishment of the *"Alcaldía Mayor of Tegucigalpa"*) which would seem to contradict the findings of the King of Spain and the Spanish Council of State in the 1906 Honduras/Nicaragua boundary arbitration, which findings the present Judgment, with its decision on the frontier line in the disputed sector of Goascorán, has upheld.

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109. Having examined the evidence submitted by the Parties, I found the information contained in several of the documents provided by El Salvador quite irrelevant to the determination of the legal situation of Meanguera and Meanguerita from the standpoint of the 1821 *uti possidetis juris*. I am referring to those documents concerning towns, villages or places located on the Salvadorian mainland (i.e., Meanguera, Amapala, Las Nieves de Amapala) which, as such, have nothing to do with the islands in dispute or other islands within the Gulf of Fonseca. No documents of that kind will be taken into account in the considerations below. I do not, however, exclude from the review colonial documents or information that, although directly concerned not with Meanguera and/or Meanguerita but with other islands in the Gulf, could conceivably throw light on the legal situation in 1821 of the islands in dispute or which have been the subject of particular comment by the Parties.

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110. A certain amount of the documentary evidence turns on the question of the *competences of the Alcaldía Mayor de Minas of Tegucigalpa*, created with this denomination in 1578, into which the *town of Choluteca "with its jurisdiction"* was incorporated in 1580. El Salvador stressed the distinction between a "special" or "functional" competence, on *minas* in the case, and the competences of an *alcaldía mayor tout court*. This distinction may well have obtained *in general* in the 16th and 17th centuries in Spanish-America. But was it actually valid for the *Alcaldía Mayor de*

Minas of Tegucigalpa? Since its creation, that Alcaldía Mayor was vested expressly with broad jurisdictional powers going far beyond mining matters, as well as wide jurisdiction over the town of Choluteca and the villages of its jurisdiction. Furthermore, the original competences of the *Alcaldía Mayor de Minas of Tegucigalpa* developed rapidly during the 17th century so as to make of it one of the *main administrative subdivisions* of the Captaincy-General of Guatemala. This issue is, on the other hand, of little relevance *in casu* because by the 18th century, in any case, the evidence before the Chamber proves beyond any reasonable doubt that the *Alcaldía Mayor de Minas of Tegucigalpa*, which in the meantime had become an *alcaldía mayor tout court*, exercised the same range of territorial jurisdictional powers as had any main administrative subdivision of the Captaincy-General of Guatemala before the introduction into Central America, in 1786, of the system of *intendencias*.

111. For example, documents before the Chamber dated 1675, 1677 and 1682 (Reply of Honduras, Ann. VII.8.A-D, pp. 397 ff.) provide information on administrative, police and criminal jurisdiction exercised by the *Alcalde Mayor de Minas* of Tegucigalpa. They relate to contraband in English goods, the protection of the manufacture of indigo ink, and the prohibition of exporting corn outside the territory of the Alcaldía Mayor. Choluteca and Goascorán are referred to in these documents as being under the territorial jurisdiction of the *"Alcaldía Mayor de Minas of Tegucigalpa"*, and the latter is described as a "jurisdiction". The exercise of jurisdiction in 1678 by Alonso de Salvatierra, the *Alcalde Mayor de Minas* of Tegucigalpa, in a criminal case involving specifically the island of Meanguera (Memorial of Honduras, Ann. XIII.2.16, p. 2302) is particularly illustrative of the territorial jurisdictional competences of the *Alcalde Mayor* of Tegucigalpa, in spite of the formal denomination still prevailing at that time of *Alcalde Mayor de Minas*. The culprit in that case, who had abducted a minor, was arrested on Meanguera island by order of the *Alcalde Mayor de Minas* of Tegucigalpa and transferred to Linaca, a village located on the mainland of his Alcaldía Mayor, to the south of the town of Tegucigalpa.

112. It is also interesting to observe that the document concerning the above-mentioned criminal case rightly distinguished between the *Alcalde Mayor de Minas* of Tegucigalpa and the *Alcalde* of the *town* of Tegucigalpa. I make this observation because the suggested original distinction between the *Alcaldes Mayores* of San Salvador and of San Miguel and the *Alcalde Mayor de Minas* of Tegucigalpa is far less important than the distinction between those three *Alcaldes Mayores* and mere *alcaldes* or "(local) mayors", the latter having municipal jurisdiction solely in their respective town or village (they were also known by the name of *alcaldes ordinarios*). There should be no confusion in this respect. In a document of

the end of the 16th century submitted by El Salvador it is a question of the delegation of certain powers of the *Alcalde Mayor* of San Salvador, San Miguel and Choluteca (who happened to be one and the same person) to the *alcaldes ordinarios* of San Miguel and of Choluteca because of the "distance" between his residence at San Salvador and the territories of San Miguel and Choluteca. For a determination of the *uti possidetis juris* the competences of mere *alcaldes* or "mayors" of villages or towns is not the issue.

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113. The Chamber has also at its disposal documents concerning *taxation and tax collection* by the *Alcalde Mayor de Minas* of Tegucigalpa. One, dated 1660 (Reply of Honduras, Ann. VII.13.A, p. 420), relates to the service of the tax called *tostón*. It contains an account under oath of an official of the Treasury to the President of the Royal Financial Judges of the Royal Treasury at Guatemala City. La Miangola, a village on Miangola or Meanguera island, is there listed among the villages of the district of the jurisdiction of Choluteca town incorporated since 1580 into the *Alcaldía Mayor de Minas of Tegucigalpa.* In the 1673 *juicio de residencia* to Diego de Aguileta, former *Alcalde Mayor de Minas* of Tegucigalpa, the relevant document (*ibid.*, Ann. VII.13.B, p. 422) lists *fines* imposed by him on the capitular/vicar of the town of Choluteca as well as on Indians of villages situated in the mainland area of Choluteca/Nacaome/Goascorán as well as on Miangola island. This is without prejudice to particular tasks entrusted to *alcaldes mayores* and other local authorities by the Royal Treasury. Documents of 1674 and 1677 submitted by El Salvador record, for example, that authorities of San Miguel were entrusted with the task of "collecting" certain royal tributes in San Miguel and Choluteca (Counter-Memorial of El Salvador, Anns. IX.6 and X.4).

114. The identity of the collectors of tributes or certain taxes has as such, in my view, little probative value, because the whole operation was placed under the direct authority of the Royal Treasury Officials of the Crown. Local authorities were mere "collectors by delegation" of the Royal Treasury, and the task could even be entrusted to private individuals. A file before the Chamber, established in 1687 at the Real Audiencia of Guatemala (Memorial of Honduras, Ann. XIII.2.7, p. 2284), clarifies somewhat the situation concerning *collection* of "royal taxes or tributes" in the "district" of Choluteca. It appears from that information that before 1687 the *Alcalde Mayor* of San Salvador had had responsibilities in the collection of such royal taxes and tributes in San Salvador and San Miguel, as well as in the "district" of the jurisdiction of Choluteca town which, as said in the document, belonged to the *"Alcaldía Mayor of Tegucigalpa"*. It was the *Alcalde Mayor* of San Salvador himself who

asked to be relieved of the task of collecting the said taxes and tributes in Choluteca

> "since that district belongs to another jurisdiction and is more than eighty hours' journey distant from the place of my official residence, although I have given charge to many different persons, resulting in more expenditure than profit for the royal treasury".

115. The 1687 document referred to above also contains an attestation of Antonio Ayala, *Alcalde Mayor de Minas* of *Tegucigalpa and of the town of Choluteca and its jurisdiction*, delivered in connection with a petition of Royal Treasury officials in the Alcaldía Mayor, in which it is said that the villages named in that petition "are those of the aforesaid jurisdiction of Choluteca and are at present in poor condition" and uninhabited because of piratical incursions, listing among those villages Nacaome. The *Alcalde Mayor de Minas* of Tegucigalpa adds specifically, furthermore, that the inhabitants of the island of La Miangola "have not grouped themselves into villages and are scattered". The interest of the Royal Treasury in such matters is evident. The Indians must pay their annual tribute, but the collection of the tribute was effected through the villages where they were assigned by census. The disappearance of an Indian village was not only a political and human problem. It was also a matter of preoccupation for the Royal Treasury. The 1687 document commented upon here is also of interest concerning the point, made above, as to "special assignment" in the task of collecting royal taxes and tributes. The *Alcalde Mayor* of San Salvador, for example, replied to the Royal Treasury, when requested to collect tributes in the villages of Tenancingo and Santo Domingo Guisapa, that the latter village "is not of this province, not of the one of San Miguel, not of Choluteca", and that he did not know in which territorial jurisdiction Guisapa was located.

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116. El Salvador has underlined, with a considerable degree of emphasis, the evidence provided by a document of 1667 concerning *Jueces Reformadores de Milpas* (Counter-Memorial of El Salvador, Ann. X.3). My reading of the document does not allow me to reach the same conclusion as El Salvador. The *Jueces de Milpas* concerned, a special jurisdiction for matters relating to the growth of maize by the Indians, were at the same time *Jueces de Milpas* of the Alcaldía Mayor of San Miguel and of the town of Choluteca and its jurisdiction (incorporated in 1580 into the *"Alcaldía Mayor of Tegucigalpa"*). These *Jueces* therefore exercised their special jurisdiction within territories belonging to two different *alcaldías mayores.*

117. According to the *first* episode described in this document, the

"Superior Government" of the Provinces of Guatemala (in the plural) decided in 1658 and 1659 that the mandate of *two newly appointed "Jueces de Milpas"* for both San Miguel and Choluteca would not have jurisdiction over the Indians of Conchagua, Teca and Miangola and of other islands within the Gulf of Fonseca, a *Real Provisión* exonerating those Indians from *milpas* dues having been previously adopted by the Real Audiencia. A few years later, a *third "Juez de Milpas"* was appointed and his letter of appointment, apparently, did not make the reservation in respect of those island Indians. The principals of the villages of Conchagua and Teca (both on the island called at present *Conchagüita*) appealed to the "Superior Government" of Guatemala. They recalled the previous decisions denying jurisdiction over their villages to the *Jueces de Milpas.* The "Superior Government" ordered the said *third "Juez de Milpas"*, in 1662, not to intervene in the villages *(pueblos)* of the island of Conchagüita (Conchagua and Teca), because of lack of jurisdiction. The decision also adopted, at the request of the Indians, the form of a *Real Provisión.* In this first episode the Indians of Miangola (Meanguera) did not participate.

118. The second episode occurred in 1666. A *fourth appointee* Juez de Milpas sent a notification to the "Superior Government" of Guatemala, *done at the island of La Conchagua (Conchagüita),* asking for clarification as to *his milpas* jurisdiction over the villages in the islands, including La Miangola situated on Meanguera island. *While in the island of La Conchagua (Conchagüita)* (he did not visit Meanguera island), the *Juez de Milpas* was requested by the Indian mayors of the villages of La Conchagua, La Teca and La Miangola to stop his actions. They showed to the *Juez de Milpas* the *Real Provisión* of 1662. In his notification to the "Superior Government", the *Juez de Milpas* suggested that the reservation as to island villages contained in the letters of appointment of other *Jueces de Milpas* should not concern him, and he declared that if so ordered by the "Superior Government" he was ready to carry out his task in the islands, without salary, just — as he put it — to take a look at the pretensions of these villages to which justice did not reach at all because of their being islands and lying within the sea.

119. The notification of the *Juez de Milpas* was presented in Guatemala at the Real Audiencia together with a petition of the Indian Mayors of La Conchagua, La Teca and La Miangola recalling their exoneration from *Jueces de Milpas* jurisdiction. This petition, after enumerating the names of the Indian Mayors and their respective villages, adds *"in the jurisdiction of the Alcaldía Mayor of the City of San Salvador, and San Miguel".* This reference is what prompted counsel for El Salvador to elaborate at the hearings (C4/CR 91/33, p. 54) on the so-called *Jueces de Milpas* evidence. The elaboration missed, however, the fact of the geographical location of the three Indian Mayors concerned when drafting the petition. It is obvious that they were *"in" ("en")* the island of La Concha-

gua (Conchagüita) *where* they met with the *"Juez de Milpas"*. But Conchagüita is not an island in dispute before the Chamber. Nobody is questioning in the current proceedings that Conchagüita belonged to the jurisdiction of the *Alcaldía Mayor of San Miguel* at colonial times. It is, therefore, quite unwarranted to imply that by the quoted reference the Indian Mayor of La Miangola village recognized that the island of Meanguera belonged to the jurisdiction of the *Alcaldía Mayor of San Miguel and/or San Salvador.* In Spanish, at least, there is quite a difference between saying *"en la jurisdicción de"* and saying *"de la jurisdicción de"*.

120. Once more the "Superior Government" confirmed the exemption enjoyed by the Indians of La Conchagua, La Teca and Miangola and ordered the *Juez de Milpas* to refrain from visiting the islands. There is no reference in the proceedings concerned to the territorial jurisdiction or jurisdictions to which the islands of the villages in question belonged. It follows from the above considerations that the *Jueces de Milpas* argument of El Salvador is not pertinent in the present case, except as a confirmation that the island of Conchagüita, an island which is not in dispute, was under the jurisdiction of the *Alcaldía Mayor of San Miguel and/or of San Salvador.*

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121. Much more important, I would say quite *conclusive*, for an *uti possidetis juris* determination of the islands in dispute, as well as of the competences exercised by the *Alcalde Mayor de Minas* of Tegucigalpa thereon, is the evidence of 1684 concerning the resettlement of the Indian survivors from Miangola or Meanguera island, following invasions and devastations by pirates (Memorial of Honduras, Anns. XIII.2.18 and 19, pp. 2305 and 2308). The Indians concerned applied to the "Superior Government" of Guatemala asking to be authorized "to go to the mainland in the vicinity of the village of Coloma" in the *Alcaldía Mayor de Minas of Tegucigalpa*, in a place with the status of *tierra realenga.* El Salvador has argued that the Miangola Indians did not address themselves to the *Alcaldía Mayor de Minas of Tegucigalpa*, but to the authorities in Guatemala. This argument ignores the Spanish colonial law governing such kinds of petition. Competence for the resettlement of a village belonged exclusively to the "Superior Government" of the Captaincy-General or Kingdom of Guatemala. It did not belong, nor was it delegated to the inferior administrative units where the petitioning village was located. Neither was resettlement a matter of *ejidos* under the competence of the *Juez Privativo de Tierras* of the Real Audiencia of Guatemala. It was considered an important political executive competence of the "Superior Government". *Alcaldes mayores, alcaldes mayores de minas* or *corregidores* were simply not competent to decide that kind of matter. Furthermore, the Indians of Miangola island had applied, in the same petition, for dispensation from

payment of arrears of royal tribute: another matter outside the competence of *alcaldes mayores, alcaldes mayores de minas* or *corregidores.*

122. What is highly relevant, in the context, is that the Indians of Miangola island expressly requested, in their application to the "Superior Government" of the Captaincy-General of Guatemala, that this highest authority should instruct the *Alcalde Mayor* of Tegucigalpa with respect to the place on the mainland near Coloma village where they would prefer to be relocated

> "while indicating the land required for the new population and the requirements for the crops to be grown by the inhabitants, as also the land granted for the population as a whole".

These Miangola island Indians of the late 17th century certainly knew how to distinguish between the competences of the "Superior Government" and those of the *Alcalde Mayor de Minas* of Tegucigalpa or, for that matter, any other *alcalde mayor*!

123. The "Superior Government" of the Kingdom or Captaincy-General of Guatemala decided: (1) that relocation on the mainland of the Indians of Miangola island was in order; (2) that the wells on Miangola island should be made useless; (3) that, thereafter, the petition of the Indians to be transferred to the mainland could be granted; (4) that the *alcalde mayor* concerned should survey the area referred to by the Indians for their relocation; (5) that the Indians of Miangola island were dispensed from payment of their arrears of tribute and that, in addition, they would also be exempted from such tribute while building on the mainland their new village and its church (two years of dispensation). Who was for the "Superior Government" of Guatemala the *alcalde mayor* concerned?

124. The answer to this query is given in plain words by Don Enrique Enriques de Guzmán, Captain-General, Governor and President of the Real Audiencia of Guatemala, in the document before the Chamber: the *Alcalde Mayor de Minas* of Tegucigalpa, Antonio Ayala. Why so? Because, as expressly stated in the document, *the island of Santa Maria Magdelena, called La Meanguera, belonged to the jurisdiction of the* Alcalde Mayor de Minas *of Tegucigalpa.* This is not a statement made in the 18th or 19th centuries, but in 1684! The Chamber knows, therefore, that, as from 1684 at the latest, the *Alcaldía Mayor de Minas of Tegucigalpa* was the *Alcaldía Mayor* of the Captaincy-General or Kingdom of Guatemala which had territorial jurisdiction on the island of Meanguera.

125. Moreover, the above statement and recognition of Don Enrique Enriques de Guzmán was followed by execution of the instructions in the

field. The *Alcalde Mayor de Minas* of Tegucigalpa surveyed the place near Coloma and proceeded with some other administrative acts required in compliance with the orders received from the "Superior Government". He made the requested survey. Bearing in mind the conclusions of his survey and the specific instruction of Don Enrique Enriques de Guzmán to the effect that the Indians should not, "owing to the enemy", have communication with the sea, the *Alcalde Mayor de Minas* of Tegucigalpa, Antonio Ayala, recommended resettlement of the Meanguera Indians in the village of Nacaome instead of the place originally requested by the Indians (Memorial of Honduras, Anns. XIII.2.20, p. 2310, and XIII.2.24, p. 2315). This was done on 1 December 1684 by a decree of Antonio Ayala, and the Indians of Meanguera, together with Indians of Nacaome, were relocated in the village of Nacaome "having been put in possession and given land for sowing". Ayala likewise gave instructions, in the presence of the mayor and elders of the village of La Meanguera, to destroy wells and houses on Meanguera island. A commission to that effect was delivered the same day by the *Alcalde Mayor de Minas* of Tegucigalpa (*ibid.*, Ann. XIII.2.22, p. 2313). It was executed on the island of Meanguera in January 1685.

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126. Other documents, of about the same time, namely of 1685 and 1686 (Memorial of Honduras, Anns. XIII.2.24, p. 2315, and XIII.2.25, p. 2316), confirm the normal territorial competence, *including competence on Meanguera*, exercised by the *Alcalde Mayor de Minas* of Tegucigalpa. The document of 1685 contains a request addressed by the "Superior Government" of Guatemala to the *Alcalde Mayor* of Tegucigalpa for information on the needs of the Indians of the villages under the jurisdiction of the town of Choluteca. That of 1686 concerns the *juicio de residencia* addressed by Antonio Ayala, *Alcalde Mayor de Minas* of Tegucigalpa, to his predecessor in the same office, Alfonso de Salvatierra. Reference is made in this document to certain abusive and illegal burdens imposed by Salvatierra on the Indians of the village of Meanguera. Likewise, there is also evidence before the Chamber suggesting that Indians of the villages of La Conchagua and La Teca of Conchigüita island were relocated in the mainland area, under the jurisdiction of the *Alcaldía Mayor of San Miguel*, nearby the villages of Amapala, Las Nieves de Amapala and/or Miangola. It was surely the successive pirate invasions which prompted the evacuation of the Indian inhabitants of the islands of the Gulf of Fonseca. These invasions determined also the adoption by the "Superior Government" in Guatemala of "preventive measures" of defence as reflected in a document of 1685 submitted by El Salvador (Reply of El Salvador, Ann. 34) which discusses the co-operation to that end of the *alcaldes mayores* in the area of the Gulf of Fonseca, including the *Alcalde Mayor*

de Minas of Tegucigalpa, Antonio Ayala, "with the companies of his jurisdiction".

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127. The scant documentary elements of evidence suggesting the non-exercise by the *Alcalde Mayor de Minas* of Tegucigalpa of the territorial jurisdiction of an *alcalde mayor* in the relevant area does not extend, approximately, beyond the middle of the 17th century. Such information is superseded completely by evidence posterior in time and quite uniform. Thus the letter of appointment of Captain Sebastián de Alcega states:

> "it is my will that you be my *Alcalde Mayor de Minas y Registros dellas* of the Province of Honduras and that of Apacapo and Choluteca town in the Province of Guatemala" (Memorial of Honduras, Ann. XIII.2.6., p. 2283).

But this is a document of 1601 ! This also explains why in a document of 1588, and in another undated one submitted by El Salvador, one and the same person appears appointed as *Alcalde Mayor* of San Salvador, San Miguel and the town of La Choluteca and its jurisdiction (Reply of El Salvador, Anns. 29 and 30). The document of 1625 concerning an *encomienda* of Isabel Recinos "in the islands of Amapala" submitted by El Salvador is also irrelevant. *Encomiendas* did not entail territorial jurisdiction on the part of the *encomendero* (Counter-Memorial of El Salvador, Ann. X.2, p. 3). A 1643 document relating to a military appointment made in consideration of the defence of the "port of Amapala", within the jurisdiction of San Salvador, does not concern the islands in dispute (Reply of El Salvador, Ann. 36). A further document of 1698, a petition to join in a single village the Indians of Miangola and of Las Nieves de Amapala, likewise relates to villages on the Salvadorian mainland (Reply of Honduras, Ann. VII.12, p. 415).

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128. It is also clear that the area of the Gulf of Fonseca was the subject, from time to time, of projects of the Crown in respect of which local authorities took a position. In a document of 1590, the *Cabildo* of the town of San Miguel, for example, petitioned the King, in connection with the technical survey entrusted to Francisco de Valverde, Bautista Antonilli and Diego López de Quintanilla, in order to find the best way *(camino)* between the Bay of Fonseca and Puerto Caballos on the Atlantic coast, "to move and become neighbour in the area that Your Mercy points out for the city and population of the *Contratación* of Perú" (Reply of El Salvador, Ann. 28). On the other hand, in a further undated document, but

one certainly of the 18th century (reference is made therein to the *"intendencias"*), it is the *Ayuntamiento* (municipal council) of Comayagua which, in connection with the restitution to Honduras of the ports of Omoa and Trujillo on the Atlantic, asked that the territory of the Province of Honduras be extended to the area on the east of the Lempa River, so as to make that river the boundary between Comayagua and San Salvador (Reply of El Salvador, Ann. 33). There is no evidence that petitions of this kind were ever approved by the Crown or the "Superior Government" of the Captaincy-General of Guatemala.

129. What appears, generally, from an overall study of the evidence submitted is that the Crown almost continuously maintained the *Alcaldía Mayor of San Miguel* and the *Alcaldía Mayor de Minas of Tegucigalpa* as separate jurisdictions having both a coastline along the Gulf of Fonseca and islands within the Gulf. The same applies in the 18th century to the Intendencia of San Salvador and that of Honduras, each also having jurisdiction over different parts of the coasts and islands of the Gulf of Fonseca. A decisive element for the "distribution" of territorial jurisdictions in the area was, certainly, the establishment in 1578 of the *Alcaldía Mayor de Minas of Tegucigalpa* and the incorporation therein in 1580 of the town of Choluteca with its jurisdiction. These decisions, the subsequent administrative evolution of this Alcaldía Mayor and, finally, its incorporation into the *Intendencia of Honduras* in the 18th century, left matters much as they were before the *Reales Cédulas* of 1563 and 1564. The development as a whole is very much related to geographical considerations. The area of the Gulf of Fonseca and, in particular, Choluteca was far away from Guatemala City, while Comayagua and Tegucigalpa towns were nearer to the area. This, together with the importance of the *minas* and *communications* between the Gulf of Fonseca and the Honduran ports on the Atlantic, did the rest. It was considered a sound administrative policy to progressively join up the *Alcaldía Mayor of Tegucigalpa* and Choluteca, Nacaome included, and, later on, to join these and the *Province of Comayagua* to the *Intendencia of Honduras*: there is no evidence at all that, on the occasion of those successive joinings, the islands in the Gulf of Fonseca under the jurisdiction of the *Alcaldía Mayor of Tegucigalpa* were detached therefrom.

130. Furthermore the initiative of this development came frequently from central authorities in Guatemala and/or from the local authorities in San Salvador itself. Reference has been already made to the request of the *Alcalde Mayor* of San Salvador of 1687 (Memorial of Honduras, Ann. XIII.2.7, p. 2284) to transfer his tax-collecting assignment in Choluteca district to the Royal Treasury officials of Honduras. The same happened a few years before (1672) with the incorporation of Choluteca and its jurisdiction into the Bishopric of Comayagua or Honduras. It was the Bishop of Guatemala who took this initiative after a pastoral visit to the area (*ibid.*, Ann. XIII.2.8, p. 2286). The contents of the documentation concerned make one aware of all the importance which geographical dis-

tances had in those initiatives, and, ultimately, in the Crown's successive decisions on territorial administration in the area of the Gulf of Fonseca.

131. What happened was as follows: the Bishop of Guatemala, Juan de Santo Mathia, after ascertaining in his pastoral visit the spiritual and religious situation in Choluteca (it was the first time for over 80 years that a pastoral visit had taken place!), asked the King in July 1670 to incorporate Choluteca with its *benefits* (namely the *"dima"*) into the Bishopric of Comayagua or Honduras, since the latter Bishop could visit the area of Choluteca "more easily". The royal decision, in December 1672, approved the request of the Bishop of Guatemala "inasmuch as it was fitting to order that steps be taken to join the said parish to the town of Choluteca in the way proposed" (Memorial of Honduras, Ann. XIII.2.10, p. 2291), but not without first studying the question of the *"dima"* (*ibid.*, Ann. XIII.2.8, p. 2287). The *Real Audiencia of Guatemala* as well as the Bishops concerned were informed (*ibid.*, Anns. XIII.2.9, p. 2288, and XIII.2.10, p. 2291). The corresponding Papal Bull was also requested by the Crown (*ibid.*, Ann. XIII.2.11, p. 2292). As already indicated, El Salvador did not have a Bishopric of its own during the colonial period. It belonged until 1842 to the Bishopric of Guatemala.

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132. The *parish of Choluteca* was, therefore, transferred in 1672 to the Bishopric of Honduras. The task of analysing the evidence concerning ecclesiastical jurisdiction is somewhat confused by the existence in the area of the *guardanía* of Nacaome belonging to the Franciscan Order, but the issue is no less clear than that of the civil jurisdiction. In 1675, the Bishop of Honduras informed the King that on "one of the canals of the town of Jerez de la Choluteca" there was a large Franciscan *guardanía*, called "Nacaome", located more than 100 leagues from the City of Guatemala, and that

> "it does not seem possible that its bishop could travel so far just to visit this village, and whenever the Bishop of Honduras visits Choluteca, all the inhabitants and parishioners of Nacaome flock to see him" (Memorial of Honduras, Ann. XIII.2.12, p. 2294).

He petitioned that the *guardanía* be annexed to the Bishopric of Honduras *(ibid.)*. The King decided, on July 1678, after considering the matter in the Council of the Indies, that

> "no novelty is to be made of this aggregation and we beg and charge you [the Bishop of Guatemala] to visit this guardianship and

inform [me] of the knowledge thus gained" (Reply of El Salvador, Ann. 31).

The question of the *"dima"* was very much a factor in this episode.

133. This decision on the Franciscan *guardanía* of Nacaome has been invoked by El Salvador in connection with its argument that the transfer of Choluteca and its jurisdiction to the Bishopric of Guatemala did not carry with it Nacaome or, by implication, the islands of the Gulf. This is, however, an argument of little or no significance where determination of the legal situation in 1821 of the islands in dispute is concerned. The territorial scope of the *"guardanía"* or "convent" of a religious order, entrusted with the task of indoctrinating the Indian inhabitants, is as such irrelevant to the 1821 *uti possidetis juris*. What may be of probative value in regard to the *uti possidetis juris* is the indirect evidence which may be contained in ecclesiastical documents, including those relating to religious orders, as to the limits or scope of the diocese and parishes of a Bishopric and of the civil administrative jurisdictions concerned. In this respect, in addition to the already noted evidence from the 16th and 17th centuries on the jurisdiction exercised by the *Alcaldía Mayor de Minas of Tegucigalpa* in the area, including its islands, one should add the further evidence contained in an old document of 1590 in which it is said that the town of Choluteca and its jurisdiction included Nacaome among its villages. Furthermore, the same document also contains a specific entry on "The Islands", which reads as follows:

> "*Island of La Comixagua*: It has two villages, one of which is known as La Teca and the other as La Comixagua. There are 110 Indians and maize is grown. The villages are at the entrance of the port.
>
> *La Miangola*: This island has a village which comes *within the jurisdiction of Choluteca*, with 20 Indians. They eat maize." (Memorial of Honduras, Ann. XIII.2.14, p. 2299; emphasis added.)

134. The "memorial" or "account" by Francisco de Valverde, a document authenticated by the Archivo General de Indias in Sevilla ("new document" submitted by Honduras), contains a list of "all the villages" *("pueblos")* in the jurisdiction of San Miguel and in the jurisdiction of Choluteca (described as a region or *"comarca"* of the port of Fonseca and of the Province of Honduras). The document is, moreover, particularly precise as to the "distances" between the various towns and villages as well as the "number of Indians" living in each town or village. Those of San Miguel are listed first. Then come the villages on the *Camino Real* coming to Comayagua from Fonseca and its *comarca* and an entry entitled "The Islands", as well as villages of Choluteca. Last come the villages of the "Province of Honduras" on the *Camino Real*. Under the heading "The Islands" the following is stated:

> "In the island of Conchagua there are two villages, the one called

> La Teca and La Conchagua with 110 Indians who harvest maize and are on the mouth of the port. *La Meanguera* is an island with a village *in the jurisdiction of Choluteca.* They harvest maize." (Emphasis added.)

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135. The evidence that the island of Meanguera was under the civil jurisdiction of Choluteca and, therefore, of the *Alcaldía Mayor de Minas of Tegucigalpa* is clear and consistent. In no part of any of the colonial documents submitted by either of the Parties is there any reference to the effect that Meanguera was under the civil jurisdiction of San Miguel or of San Salvador. The 1678 decision of the King concerning the administration of the *guardanía* of Nacaome by the Bishopric of Guatemala changed nothing in this respect. It is furthermore necessary to bear in mind two things: (1) that the *"guardanías"* and/or "convents" of any religious order should not be confused with a "parish"; the Dominican, Franciscan, Mercedarian, etc., monks in charge were not parish priests; (2) each religious order had its own internal organization, the subdivisions of which were frequently called "provinces"; but the "provinces" of any religious order must not be confused with the "parishes" of a "diocese" of a Bishopric or with the "provinces" or *"alcaldías mayores"*, which are civil administrative units.

136. In his description of the visit he paid in 1586 to the area of the Gulf of Fonseca (Counter-Memorial of Honduras, Ann. IX.3, p. 273), Fray Alonso Ponce refers to the village of Indians in Miangola island as dependent on the Franciscan Convent of Nacaome *"in the Bishopric of Guatemala"*. However at that time, Choluteca parish had not yet been transferred to the Bishopric of Honduras, although it had already, since 1580, been incorporated from a civil point of view into the *Alcaldía Mayor de Minas of Tegucigalpa.* Moreover, Fray Ponce refers also to the convent of Santa Ana de Choluteca described by him as belonging to the *Custodia of Honduras* notwithstanding the above. A *"custodia"* was a group of convents or *guardanías* in a given province of a religious order. These visits took place after Ponce had been in the villages of La Teca and Conchagua on the island of Conchagüita. The report of the trip also contains reference to islands of the "Province of Guatemala". My understanding of the text is that Fray Ponce was describing the "Province of Guatemala" of the Franciscan Order. The same applies, no doubt, to a *document of 1713*, qualified by counsel for El Salvador as a *Cédula Real* (I find no indication in the document that it was so named) relating to a "vacancy" with respect to which the following description is given:

> *"Doctrina del partido de Nacaome de la provincia de San Miguel de la administracion de la religion del Señor San Francisco de la Provincia del Santisimo Nombre de Jesús de Guatemala."* (Emphasis added.)

It is clear that in this so-called 1713 *Real Cédula* the "province of San Miguel" and the "Province of the Santisimo Nombre de Jesús of Guatemala" referred to are not the civilian administrative units called *"Alcaldía Mayor of San Miguel"* and *"Province of Guatemala"*, respectively. The term "provinces", in the 1713 document, relates to "provinces" of the religious order concerned.

137. The Chamber also knows, from the 1704 description of the *Custodia de Santa Catalina de Honduras* by Father Vasques (Reply of Honduras, Ann. VII.10, p. 404), that a *"custodia"* belonging to a given "religious order" could have "convents" or *"guardanías"* under different Bishoprics, as well as being located under territorial jurisdictions of different civil colonial administrative units. Situations of this kind could give rise to problems about the "benefits" (the *"dima"* or others), as happened in fact, according to submitted evidence, between the parish priest of Choluteca and the Franciscan convent in Nacaome, moved later on to Goascorán.

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138. The recognition by members of the religious orders concerned that the village of Nacaome was under the jurisdiction of the *Alcaldía Mayor de Minas of Tegucigalpa* is, on the other hand, proved by other documents also before the Chamber. See, for example, the application on the *"Hacienda"* Nuestra Señora del Rosario, submitted in 1678 by the Guardian Father of the Convent of San Andrés de Nacaome to Fernando de Salvatierra, *Alcalde Mayor* of Tegucigalpa, concerning an act of "donation" (Counter-Memorial of Honduras, Ann. IX.4, p. 276). The same applies with respect to the pleading in defence of the parish priest of Choluteca in proceedings instituted by a *doctrinero* priest of Goascorán (Reply of Honduras, Ann. VII.9, p. 401). When a parish priest was unable to visit his parish (Choluteca was an extensive parish and had an indigenous population), a *coajutor* priest was appointed, a role which, as indicated above, might fall to a monk of a religious order. This happened, for example, with Father Manuel Bedaña of the Mercedarian Order of the Convent of Choluteca, who was authorized by the parish priest of Choluteca to visit the islands of the Gulf.

139. Moreover, and independently of the above, there is also clear evidence before the Chamber of the exercise of ecclesiastical jurisdiction by the Bishopric of Honduras over the Nacaome area. In 1678, after the incorporation of Choluteca and its area of jurisdiction into the Bishopric of Honduras, for example, the Bishop of Honduras, Vargas y Abarca, divided the old *guardanía* of Nacaome into two parts. Nacaome with its villages became a "secular parish" and Goascorán became a Franciscan *guardanía*. The *guardanía* as such was administered from Guatemala City, but the area was territorially within the ecclesiastic jurisdiction of

the *Bishopric of Honduras* and the civil jurisdiction of the *Alcalde Mayor de Minas of Tegucigalpa.* El Salvador insisted that ecclesiastical jurisdiction in the area of Nacaome, particularly in its "convents" and/or *"guardanías"*, belonged to the *Bishopric of Guatemala* and was administered *as from* San Salvador or San Miguel. There is, however, no proof of that, but only of the administration of certain "convents" and *"guardanías"* as from Guatemala City by the Bishopric of Guatemala and, more probably, by the Principal of the religious order concerned resident in Guatemala City, who could happen to be at the time the Bishop of Guatemala. There is, on the other hand, no evidence originating with the local ecclesiastical authorities of San Salvador or San Miguel mentioning that the islands in dispute in the Gulf of Fonseca, namely Meanguera and Meanguerita, belong to the ecclesiastical jurisdiction of the *Bishopric of Guatemala* and/or to the civilian jurisdiction of the *Alcaldía Mayor of San Miguel* or *of San Salvador.*

140. Honduras denies that the information contained in a *document of 1733* recording a visit of the Bishop of Guatemala to Nacaome, could have referred to a pastoral visit, because, since 1678, the former *guardanía* of Nacaome had belonged to a "secular parish" of the *Bishopric of Honduras.* Honduras considers that the visit was probably to the Franciscan convent of Goascorán and not to the parish of Nacaome.

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141. Coming back to civilian colonial documents, El Salvador has submitted a *Relación Geográfica* of the "Province of San Salvador" by Manuel de Gálvez, *Alcalde Mayor* of that Province, written in 1742, hence well into the 18th century. The *Relación* contains two detailed lists of the *pueblos* of the *Alcaldía Mayor of San Salvador* and that *of San Miguel.* There is no reference to the islands of the Gulf of Fonseca in dispute in either of these lists. The only statement relating to the Gulf of Fonseca reads as follows:

> "25. The one from Santiago Conchagua [village], with the same direction of the southeast, its distance from the capital is 58 leagues (which is 14.5 kms.), its population is of seventy four indians who are *taking care of the canoes for the passage of the inlet that divides this Province of the one from Nicaragua* and they keep continuous vigilance on this port, having the growing of corn and cotton." (Counter-Memorial of El Salvador, Ann. X.8, p. 155, point No. 25; emphasis added.)

142. El Salvador has also stressed that several documents concerning appointments, such as those of José Villa (1765) and Cardinanos (1791), or descriptions of the "Province of Honduras", such as that of Baltasar Ortiz

and Letona (1743), contain no references to the islands of the Gulf of Fonseca either. On the other hand, El Salvador denies as relevant evidence the decree for the appointment of Juan de Vera (1745). Some importance is attached by El Salvador to a document of 1752 addressed to the President of the *Real Audiencia of Guatemala* in which it is said that the "Province of Honduras" does not have a sea "port" in the Gulf of Fonseca. There are not enough elements in the reference to determine whether this was intended to mean *"ports"* in general or *"natural ports"* or *"man-made ports"* and the like, and the reference is to the *"Province of Honduras"* (Comayagua) and not to the *"Alcaldía Mayor of Tegucigalpa"*. All this and other arguments of El Salvador aimed to prove that the *Real Cédula* of 1791, whereby the *Alcaldía Mayor of Tegucigalpa* was integrated into the *Intendencia of Honduras*, did not carry with it jurisdiction over the islands of the Gulf of Fonseca. But of that El Salvador has not been able to produce a shred of proof capable of overcoming the clear evidence to the contrary before the Chamber.

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143. The time has now come to consider in some detail a piece of evidence with which El Salvador tried to convince the Chamber of the aforesaid contention, namely the *proceedings relating to Lorenzo de Irala's application for composition of* "realenga *lands*" *situated on an island of the Gulf.* The date of this document is 1766 (Counter-Memorial of El Salvador, Ann. X.9, pp. 172 ff.). El Salvador placed considerable emphasis on this piece of evidence (as with the *Jueces Reformadores de Milpas*). Contrary to the case of the said Judges of *Milpas*, the present one belongs to the second part of the 18th century, though prior to the *Real Cédula* of 1791. It could, therefore, be of some value in support of El Salvador's thesis. It is also the only document before the Chamber concerning composition of *tierra realenga* on an island of the Gulf at the colonial period, a topic familiar to the Chamber because of the "land boundary dispute". It is not, however, a document belonging to the category of those called by El Salvador "formal title-deeds to commons". The application was made by a private individual.

144. For reasons explained below, I consider that the Irala proceedings are completely irrelevant to the determination of the legal situation of the islands in dispute. To begin with, they do not relate to the islands of Meanguera and Meanguerita. Counsel for El Salvador identified the island concerned as Exposición. But Exposición is *not* for the Chamber an island "in dispute". Furthermore, the island concerned in the Irala incident was not, in fact, Exposición, but *Zacate Grande*, namely an island which, for El Salvador itself, was not "in dispute" before the Chamber. It is Zacate Grande because the documents say so. The original *application* of Irala described the "island" as follows:

> "that in the coastline of the village and port of Conchagua facing the lands[1] or territory of Nacaome Province of Tegucigalpa, and pertaining apparently to the latter[2], is found and seen an island between the one that is called 'Cerro del Tigre', and the land named island of 'El Sacate' or 'isla del Ganado', which is desert and uninhabited . . ." (Counter-Memorial of El Salvador, Ann. X.9, p. 172, and for the Spanish text, p. 184).

But the *powers* given by Irala to Francisco Chamorro Villavicencio of Guatemala City to represent him in the proceedings before the *Juez Privativo de Tierras* of the Real Audiencia modified the description in the original application as follows:

> "to measure and to recognize the island that is denounced, called it 'del Zacate' or 'del Ganado' that is in a *realengo* condition, desert and uninhabited seawards" (the original Spanish says *"y dentro de la mar"*) (*ibid.*, p. 174, and for the Spanish text, p. 188).

It is, therefore, clear that the island to which the proceedings and, subsequently, the land granted to Irala related was *Zacate Grande*, an island of the Gulf excluded by El Salvador's submission from its claim in the present "island dispute".

145. Notwithstanding the above, the document could still have some probative value for the island dispute if it proved that the Sub-delegate Land Judge of San Miguel exercised jurisdiction in matters concerning composition of *tierra realenga* located in the islands in general or in some islands of the Gulf which could be the subject of the present "island dispute". The evidence provided by the documentation does not, however, uphold this proposition. First, the Sub-delegate Land Judge of San Miguel, Pedro del Valle, to whom Irala, a resident in San Miguel, submitted his original application doubted his own competence to effect the requested measurement of the land concerned. He expressed his doubts in the following terms:

> "that in attention that the denounced island, it is doubtful if it corresponds to this jurisdiction of San Miguel or to the one of Tegucigalpa, for not been in a litigation of jurisdiction and for not make a mistake in the determination, this person must concur to [the *Señor Juez Principal del Real Derecho de Tierras*], so that his be so served to deliver his special despatch, so that in this Province must bring to the practice the said diligence and not binding any obstacle by judges of other territory" (*ibid.*, p. 173, and for the Spanish text, p. 186).

[1] The term "lands" *(tierras)* has been substituted by me in order to follow the Spanish original. The Salvadorian English translation uses the word "islands".

[2] The expression "and pertaining apparently to the latter" *(y perteneciente según aparece a ésta)* has been substituted by me. At this point the English translation provided by El Salvador reads: "pertaining as appears over here".

146. Thus the Sub-delegate Land Judge of San Miguel himself asked for a "special despatch" from the *Juez Privativo* of the Real Audiencia of Guatemala. And the *Juez Privativo* gave Pedro del Valle that "despatch" as follows:

> "to deliver the despatch of assignment to the Judge Subdelegate of the jurisdiction of San Miguel, so that can be put in practice all the diligencies that correspond to practice in lands with a *realengo* condition, about the which, will be neither obstacle nor some embarrass to any person" (Counter-Memorial of El Salvador, Ann. X.9, p. 177, and for the Spanish text, p. 193).

El Salvador claims (see C4/CR 91/33, p. 50) that this decision of the "highest judicial authority of the Real Audiencia of Guatemala" recognized the jurisdiction of the Land Judge of San Miguel over the islands of the Gulf of Fonseca, *destroying* the alleged sovereignty of Honduras over the islands of the Gulf!

147. A few comments only on that statement: the decision of the *Juez Privativo de Tierras* of the Real Audiencia by no means embodied the recognition alleged by El Salvador. On the contrary, he authorized by a "despatch" the Sub-delegate Land Judge of San Miguel to proceed with the specific matter concerned, the composition of *tierra realenga.* No such authorization would have been needed if the Judge of San Miguel had been acting within his own territorial jurisdiction. There is no confirmation or definition of the territorial jurisdiction of the local land judge concerned in the decision of the *Juez Privativo de Tierras,* but a special assignment derogating for the purposes of the particular case from whatever territorial jurisdiction another sub-delegate land judge might have. This was precisely what was requested by the Judge of San Miguel, a "special despatch" *("especial despacho").* The *Juez Privativo de Tierras* of the Real Audiencia was not empowered to decide on or to modify territorial jurisdictions, but he could always solve practical problems, as in certain examples relating to the "land boundary dispute", by way either of an *allanamiento* of the jurisdiction of a given local land judge or, as in the Irala example, by an authorization amounting to an *allanamiento* in the event that another local land judge raised territorial jurisdictional problems. Thus the whole episode confirms, ultimately, the reverse proposition to the one alleged by El Salvador (apart from being of no relevance to the islands of Meanguera and Meanguerita). Further evidence before the Chamber, concerning subsequent years, shows the regular exercise of jurisdiction over Zacate Grande by the authorities and judges of the *Alcaldía Mayor of Tegucigalpa.* An example is the documentation concerning the "succession" of Juan Antonio Bonilla in 1787 (Reply of Honduras, Ann. VII.14, p. 424). This documentation also confirms, conclusively, that the land Irala acquired by *composición* was situated on the island of Zacate Grande, namely an island not in dispute in the present case.

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148. The *letters of appointment* of *Intendants* and/or *Alcaldes Mayores* of Honduras and Tegucigalpa respectively, as well as of San Salvador and San Miguel, did not enumerate the islands of the Gulf of Fonseca under their respective jurisdictions. Nevertheless, those before the Chamber concerning Honduras and Tegucigalpa are quite specific as to a series of villages belonging to the Province and Alcaldía Mayor in question. The names of the villages of Nacaome, Mineral de San Martin, Goascorán, Langue, Aramesina, Pespire, valleys of San Antonio and San Juan, etc., are consistently repeated in the corresponding letters of appointment. Moreover, the "new village" *(nueva población)* of Zacate appears on the list together with the other villages in documents of the 18th century. The "new village" of Zacate was on the island of Zacate Grande, i.e., on the island where Irala got his *hacienda* for cattle in 1766. It was the establishment of this "new village" in the island which caused Zacate to be specifically listed in the letters of appointment. The conclusion is crystal clear. The islands appear listed where they were inhabited and villages had been set up thereon.

149. This does not mean, however, that the islands without population or villages were not placed under a given territorial jurisdiction. The islands of the Gulf of Fonseca were *not*, during the colonial period, a kind of *no man's land* between two territorial jurisdictions or directly dependent on the central government of the Captaincy-General of Guatemala. There were some under the territorial jurisdiction of the neighbouring *Alcaldía Mayor of Tegucigalpa* and some under the territorial jurisdiction of the neighbouring *Alcaldía Mayor of San Miguel.* The general criterion for assignment of the islands between the two Alcaldías Mayores which prevailed appears quite clear, in the light of the evidence.

150. The island of Conchagüita and other islands off the mainland coast in the Gulf of San Miguel appear to have been under the jurisdiction of this Alcaldía Mayor. Thus the map of the *Curato de la Conchagua* of the Report of the Bishop Cortés y Larraz of 1770 (Counter-Memorial of Honduras, Chap. XII, Sec. II, C, Fig. 1) shows clearly that the island of Punta Zacate or Zacatillo belonged to the parish of San Miguel. The map is confirmed by the following description in the report:

> "In this bay there are a few small islands and on one of them, which has a good deal of soil, there is a cattle ranch belonging to this parish [Conchagua] and bearing No. 33." (Memorial of Honduras, Ann. XIII.2.28, p. 2319.)[1]

There is also evidence to the effect that when in 1706 the inhabitants of the village of La Teca, on the island of La Conchagua or Conchagüita, left because of the destruction of their village by pirates, they turned to the

[1] It is to be noted that Cortés y Larraz did not mention in 1770 as belonging, in any respect, to the "parish of Conchagua", the lands acquired by Irala on Zacate Grande in 1766, likewise for the purpose of "raising cattle".

authorities of San Miguel in order to acquire new land on the mainland. The village of La Teca is expressly referred to in the document concerned as *"of the jurisdiction of the town of San Miguel"* (Memorial of Honduras, Ann. XIII.2.26, p. 2317). This should be contrasted with the evidence considered above relating to the resettlement of the Indians of the village of La Miangola, on Meanguera island, who in a similar situation asked for and got new land in the area of Nacaome because the village of La Miangola, as was stated by the Captain-General of Guatemala, was *"of the jurisdiction of the Alcaldía Mayor of Tegucigalpa"*.

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151. In contrast to the islands of Conchagüita and Punta Zacate or Zacatillo and others off the mainland coasts of San Miguel, the islands in the central part of the Gulf of Fonseca, such as Meanguera, Meanguerita, El Tigre and Zacate Grande, were under the jurisdiction of the *Alcaldía Mayor of Tegucigalpa* and remained under that jurisdiction till the 1821 critical date. There is no possible doubt about this in the light of the submitted evidence, either individually or taken as a whole. In 1821, these islands and the mainland areas of Choluteca, Nacaome and Goascorán were under the territorial jurisdiction of the *Alcaldía Mayor of Tegucigalpa*, itself a part of the *Intendencia of Honduras* as decided by the *Real Cédula* of 1791 and under the ecclesiastical jurisdiction of the *Bishopric of Honduras* since 1672. El Salvador's argument that the *Real Cédula* of 1818 had the effect of transferring the *Alcaldía Mayor of Tegucigalpa* to the old *Gobernación of Guatemala*, as defined furthermore by the *Cédulas Reales* of 1563 and 1564, is an untenable argument in itself as well as in the light of the findings as to the effects of this *Real Cédula* made by the King of Spain, Alfonso XIII, and the Spanish Council of State in the already mentioned 1906 Arbitration on the Honduras/Nicaragua Boundary. From 1786 onward the overall internal organization of the Captaincy-General or Kingdom of Guatemala was based upon the "régime of the *Intendencias*" alien to the early *Gobernaciones* of the 16th century superseded, in any case, by the establishment in the last part of that century and during the 17th century of the *"provincias"* and *"alcaldías mayores"* as main administrative subdivisions of the Captaincy-General of Guatemala. El Salvador's argument is in contradiction with the political and legal realities of the Spanish colonial administration when in 1821 the Republic of El Salvador and the Republic of Honduras emancipated themselves from Spain.

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152. The submitted documentation corresponding to the early years of the 19th century confirm those political and legal administrative realities

of 1821. The 1804 Report by the Governor and Intendant of Honduras, Ramón de Anguiano, for example (Counter-Memorial of El Salvador, Ann. X.10, p. 195), enumerates as forming part of the *Intendencia of Honduras* the *Tenencia of Nacaome*, with its parishes of Nacaome and Goascorán, and the parishes of the *Tenencia of Choluteca*. The islands of the Gulf of Fonseca are not listed in that report because they did not constitute an autonomous administrative "district". This is clearly reflected, so far as ecclesiastical jurisdiction over the islands of the Gulf is concerned, in the brief history of the "Parish of Choluteca" by Fray Manuel Bedaña of 1816 (Memorial of Honduras, Ann. XIII.2.13, p. 2296). El Salvador objected to this document, alleging that Fray Bedaña was not an ecclesiastical authority and, therefore, that the document did not fulfil the second condition as to admissible evidence laid down by Article 26 of the General Peace Treaty. I will simply remark that this appeal by El Salvador to that Article of the Peace Treaty is quite surprising in the light of that Party's general opposition to the applicability to the "island dispute" of the 1821 *uti possidetis juris* and consequently of the first sentence of Article 26 of the Peace Treaty. It constitutes, in a way, an admission that, after all, that norm of international law has *quand même* something to tell us in the "island dispute". As to the general question of admissible evidence in the island dispute aspect of the case, see my observations in paragraphs 93 to 95 of this opinion above.

153. In his history of the "Parish of Choluteca", Fray Manuel Bedaña explains that at the time of the separation of the Parish of Choluteca from the Bishopric of Guatemala, in order for it to be annexed to the Bishopric of Honduras, the Bishop of Honduras, Brother Alonso de Vargas, left the parish in the hands of parish or secular priests and the *guardanías* to religious orders. And Fray Bedaña continues as follows:

> "From the geographical point of view, the *parish of Choluteca* includes the capital of Choluteca, which has the status of city, and the villages Texigua, Linaca, Oroquina, Yusguare, and the valleys of Colón Guazaule, Oropoli and the *minerales* of El Corpus *and all the islands of the Gulf of Conchagua or Amapala; the administration of these islands and their natives is in the charge of a priest and of Mercedarian friars, who share the visits to the islands of Sacate, Amapala Mianguera, the largest, where there are hermitages, according to the records of the fraternities which have been established on their haciendas, and which are administered both by the priest and by the Mercedarian Order.*
>
> The Mercedarian friars used to stay on the islands from the beginning of January until March or April, dwelling at *Amapala* at the *casa de hacienda*, and at *Mianguera*, at the hermitage which they had been able to build with the help of the parishioners who are all of them seafarers. These are boatmen who, starting from San Carlos in the Province of San Miguel undertake transport activities to the destination of Nicaragua.

> *During the rest of the year, the islands are isolated from the parish because of the currents and tempests; in the months, however, during which the Mercedarian friars visit them, they take the opportunity to verify their taxes and carry out a census of the numerous mestizos.*" (Memorial of Honduras, Ann. XIII.2.13, p. 2296; emphasis added.)

154. The above description speaks for itself. It dispels the confusion introduced into the otherwise clear picture through the so-called "ecclesiastical argument" of El Salvador. The description of Bedaña also confirms the contents of a prior letter, dated 20 September 1803, addressed by Fray Jacinto de la Paz to the Provincial Principal Father of the Mercedarian Order. This letter, submitted as a "new document" by Honduras, has, *inter alia*, the merit of referring expressly to the two islands in dispute, namely to Meanguera and Meanguerita. The letter of Fray Jacinto de la Paz, later elected commander of the Convent of the Mercedarian Order in the town of San Miguel[1], refers to a trip to Meanguera and Meanguerita *authorized by the parish priest of Nacaome.* The text reads as follows:

> "I have, Father Superior, done my duty of relating to you the journey my companion and I have performed through *the islands of the Gulf of Conchagua*, as also did some members of the Guillen family, who have a little, 35-*varas*-long boat with 30 oars and sails for the carriage of goods from the port of Pedregal, jurisdiction of the town of Comayagua, to San Carlos, jurisdiction of the town of San Miguel, and El Viejo, jurisdiction of the town of León, *putting in at the island of El Tigre, otherwise known as Amapala, five leagues from Pedregal and from Amapala to Meanguera is two leagues, from San Cristobal one league, and half a league from Mianguera to Mianguerita. We are carrying out this visit with the authorization of the curate of Nacaome, these islands having always belonged to his cure*; they have not received any visits for a long time because *they had no inhabitants any longer, but a while since they were peopled anew; given the dimensions of the islands and of the cure, the curate does not visit them . . .*" (English translation by the Registry; emphasis added.)

155. Finally, the documents concerning the presence of "insurgent ships" in the Bay of Fonseca (Reply of Honduras, Ann. VII.11, p. 409), an event which took place on the eve of independence in April 1819, prove

[1] Afterwards, he asked to be discharged from the Order for reasons of health and executed a last will in favour, *inter alia*, of the Convent of the Mercedarian Order in Choluteca. This evidence confirms what has already been said as to the need to avoid confusion between the control over "convents" or *"guardanías"* and the control by Bishops over their "diocese".

the exercise of jurisdiction as from Tegucigalpa, including Choluteca and Nacaome, over coasts and islands in the Gulf. Some islands in the Gulf, i.e., Conchagua or Conchagüita, Martín Pérez, Punta Zacate, El Tigre and Los Farallones, are specifically referred to in the documents concerned, but this is not the case with Meanguera and Meanguerita.

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156. The early Constitutions of the Republic of Honduras confirm that its territory reaches the Gulf of Fonseca and that there are Honduran islands in the Gulf. The early Constitutions of El Salvador mentioned that the territory of the Republic reaches the creek *(ensenada)* of Conchagua. But the expression *ensenada de Conchagua* is also used in further Honduran Constitutions to refer to the "Gulf of Fonseca". The expression *ensenada de Conchagua* is, consequently, ambiguous, as it may refer either to the coasts of San Miguel or to the Gulf off the coasts of San Miguel. The "constitutional nominalist argument" is not, therefore, conclusive, although a certain broad interpretation of the 1821 *uti possidetis juris* is, no doubt, ascertainable through the expressions used in those early Constitutions of the Parties in so far as they show, near the critical date, a different degree of sensitivity about the Gulf of Fonseca and its islands.

157. At the end of the colonial period most of the islands of the Gulf of Fonseca including Meanguera and Meanguerita, were sparsely populated or uninhabited. This and the existence of other, more urgent political tasks for newly independent States explained the relatively small attention paid, during the first years of independence, by the Governments concerned to the islands of the Gulf. This should not of course be represented as if those Governments altogether ignored the islands of the Gulf or were indifferent to "sovereignty" over them. After all, as indicated, the early Constitutions referred to the "Gulf of Fonseca" and/or the *ensenada of Conchagua*, namely to the "maritime space" within which the islands are situated.

158. Furthermore, to speak of the Governments' silence on the islands during the first years of independence is not an accurate representation of the facts. That of Honduras adopted a series of administrative and legislative actions concerning El Tigre and other islands in the Gulf of Fonseca. These actions, which took place well before the British intervention in the Gulf of 1848-1849, are also part and parcel of the case-file of the "island dispute", as recorded in the Judgment in connection with El Tigre island. They were actions carried out in the normal course of events, not by way of demonstrating any "claim", and they began years before the Republic of El Salvador began to act with respect to certain islands in the Gulf. The policy and actions of both Republics were to converge by the middle of the 19th century (in 1854) on a particular island of the Gulf, the island of

Meanguera, which, as a result, became an island in "dispute" between them. But before that date there are some pieces of evidence of post-independence conduct of the Republic of Honduras confirmatory of the 1821 *uti possidetis juris* situation of Meanguera and Meanguerita resulting from the submitted Spanish colonial documents analysed above, such as the revealing evidence of the Honduran project to sell land in the islands of the Gulf, including Meanguera, the evidence provided for by the 1852 application to the Honduran Government of Echeline, Rojas and Mora Company, and the survey carried out in the island of Meanguera. There is no evidence in the case-file of any post-independence conduct of the Republic of El Salvador between 1821 and 1854 with respect to Meanguera. The allegations of a so-called "agreement" of 1833 have not been substantiated before the Chamber.

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159. In the light of the above, I conclude that, from the standpoint of the *uti possidetis juris*, sovereignty over Meanguera and Meanguerita belonged in 1821 to the Republic of Honduras, which has proved this clearly during the current proceedings on the basis of documentation reflecting *colonial effectivités*. Not a single civil or ecclesiastical Spanish document submitted to the Chamber upheld the contrary proposition. This conclusion is confirmed by the conduct of the Parties in the years following independence until 1854. I am, therefore, in total disagreement with the inconclusive finding *of the Chamber* as to the *uti possidetis juris* situation of Meanguera and Meanguerita in 1821, recorded in paragraph 367 of the reasoning of the Judgment. This finding contradicts, *inter alia*, the statement made by the Captain-General of the Captaincy-General or Kingdom of Guatemala in 1684 to the effect that the island of Meanguera belonged to the jurisdiction of the *Alcaldía Mayor of Tegucigalpa* (see paras. 121-125 above). It is quite surprising, indeed, that such an important piece of *uti possidetis juris* evidence has not been subjected to legal analysis in the reasoning of the Judgment.

(b) *From the standpoint of the conduct of the Parties subsequent to 1854*

(i) *Meanguera*

160. The origin of the development of conflicting views and claims of the Parties on Meanguera island is not unconnected with the interest that, for a while, the islands aroused in the chancelleries of certain great Powers, namely the United Kingdom and the United States. This explains the episode of the British and American diplomatic intervention through consular officers as well as the short British military occupation of El Tigre (1848-1849) as a guarantee for the reimbursement of debts by

Honduras. But the very fact that El Tigre was one of the islands of the Gulf occupied by British forces makes it very clear that it was not the presence or absence of State *effectivités* by one or other Central American Republic in the islands of the Gulf which furnished the raison d'être of the short British occupation. El Tigre was precisely one of those islands in which the *effectivités* of the Republic of Honduras were by that time established and manifested. But Honduras did not establish or manifest *effectivités* so early and so intensively with respect to the island of Meanguera. One must, however, point out that until 1854, namely five years after the British intervention, El Salvador did not make any public claim to Meanguera island either.

161. As already explained, El Salvador's first claim of "sovereignty" over Meanguera was put forward in October 1854 and was prompted by a commencement of exercise by Honduras of effective State authority on the island — which the Government of Honduras had always considered to belong to the Republic of Honduras by virtue of the 1821 *uti possidetis juris*. Following the 1854 Salvadorian claim, the Government of Honduras considered that Meanguera was an island "in dispute" between the two Republics. This position of the Government of Honduras did not change after the rejection by the Congress of Honduras of the unratified 1884 Cruz-Letona convention which, *inter alia*, allocated Punta Zacate, Martín Pérez, Conchagüita and Meanguera to El Salvador and Zacate Grande, El Tigre, Exposición and Inglesa to Honduras.

162. During the last quarter of the 19th century, a Salvadorian presence in the island of Meanguera began to manifest itself mainly by the granting of land, and during the first years of the 20th century that conduct began to find expression in Salvadorian legislation and/or State *effectivités* of El Salvador on the ground. In the current proceedings, El Salvador has produced a witness and submitted documentary evidence, mainly on: birth and death certificates; taxation; census; land rights decisions; civil and criminal proceedings; licences; postal services; health services; education; public works; military appointments and discharges; appointments of local judges and the holding of elections. This has variable probative value as to State *effectivités* but, taken all together, I consider it to be a sufficient indication of State *effectivités* by El Salvador in Meanguera island, particularly during the last decades. These *effectivités* prove, in any case, what the *de facto* situation is in the island of Meanguera, described in the title of the Salvadorian "Meanguera dossier" submitted at the current proceedings "as the status quo" on the island of Meanguera.

163. This situation — call it status quo or otherwise — is certainly proof of the present effective possession by El Salvador of Meanguera island. It proves the very fact of present State *effectivités* by El Salvador on the island. But, in international law, these *effectivités* are not *in themselves*

capable, in the circumstances of the present case, of conveying sovereignty over Meanguera to El Salvador (see paras. 103-104 above). They could do so only, if at all, through the activation of an independent norm of international law applicable between the Parties. If cause is found to apply such a norm, one may have to decide whether it prevails over the *uti possidetis juris* norm "as it operated in 1821". If it is held to prevail, the "sovereignty" over Meanguera resulting from application of the latter might be seen to have been displaced or modified in favour of El Salvador. Otherwise the *uti possidetis juris* definition of the "sovereign" of Meanguera must hold good, even over and despite the present existing and proven "State *effectivités*" of El Salvador.

164. This appears to me the correct approach because, in the circumstances of the present case, any construction according to which the existing State *effectivités* of El Salvador in Meanguera could be used as a means of interpreting the 1821 *uti possidetis juris* constitutes an unwarranted proposition. These *effectivités* of El Salvador were actually established and manifested very late indeed with respect to the 1821 critical date. The Party which first took the initiative of manifesting itself in the island as "sovereign", pursuant to the 1821 *uti possidetis juris*, was, as just mentioned above, Honduras and not El Salvador. The State *effectivités* of El Salvador developed, furthermore, after Meanguera became an island "in dispute" or, in any case, long after El Salvador's first claim — in 1854 — of "sovereignty" over Meanguera. The Parties are in disagreement as to *when* the dispute on Meanguera definitely crystallized, but there is no clue in the case-file to suggest that it arose before 1854.

165. The existence at different times between 1854 and 1986 (the date of the Special Agreement) of conventional status quo obligations for the Parties and, at times, even conventional obligations on peaceful settlement proceedings add to the present situation elements of appreciation that cannot be altogether ignored when establishing the original interpretation of the 1821 *uti possidetis juris* by the Parties. Concerning certain *very* belated State *effectivités* of El Salvador, the obligation assumed by the Parties under Article 37 of the 1980 General Peace Treaty has also to be implemented. Moreover, the rule that might conceivably be applied on the basis of the *effectivités* concerned is not the conventional norm of a treaty between the Parties, as in the later Argentine-Chilean arbitrations, but a customary norm of international law. In the light of all these circumstances, I consider that the State *effectivités* of El Salvador cannot be taken as a means of interpreting the 1821 *uti possidetis juris*. They cannot be made an expression of the 1821 *uti possidetis juris* through "interpretation". Hence an independent norm of international law is required in order to reach the conclusion that the said State *effectivités* do result in a change of "sovereignty" over Meanguera.

166. "Peacefulness" and "continuity" in the exercise of a State's

authority are not the only elements involved here. "Good faith" is also part and parcel of the picture. One may question, as El Salvador does, that the dispute started in 1854, but it is undoubtedly clear that a dispute on sovereignty over Meanguera existed by the time of the 1884 Cruz-Letona negotiations, and the proven State *effectivités* of El Salvador begin far later than 1854 and even, for all practical purposes, 1884. Moreover, there is the difficulty represented by the basic legal status of Meanguera. None of the Parties claim that Meanguera was in 1821, 1854, 1884, or at any moment thereafter, *terra nullius*. In the circumstances of the case, what appears in fact and law to be the decisive factor is not the characterization of El Salvador's *effectivités* in Meanguera as such but the evaluation of Honduras's conduct with respect to them and to their gradual development.

167. According to the evidence before the Chamber, the actual conduct of Honduras subsequent to 1854 up to the middle of the 20th century does not show that intensity of opposition to El Salvador's presence in Meanguera which would be expected for an island which had been "in dispute" since 1854. Honduras should, for example, have reacted more strongly on the occasion of El Salvador's survey of land on Meanguera island in 1878-1879, or in connection with the capture of General Sáenz in Meanguera in 1894, or with respect to the 1893 Salvadorian legislation concerning the creation of a school for girls in Meanguera, and, in particular, on the establishment in 1916 by El Salvador through legislation of the *commune* of "Meanguera del Golfo". Neither do the Cruz-Letona negotiations or the unratified 1884 convention, or certain matters quoted in the 1917 Judgement of the Central American Court of Justice, not to mention other events, show over a considerable number of years that vigilant conduct on the part of Honduras with a view to protecting its *uti possidetis juris* rights in Meanguera, in the face of the presence and actions of El Salvador in the island, which could have been expected under international law.

168. It follows from the above, on the basis of the evidence contained in the case-file as a whole, that the Honduran past conduct, at the relevant period, together with the development of the State *effectivités* of El Salvador in Meanguera, modified at a certain moment the legal situation in Meanguera in favour of El Salvador's claim on that island. I therefore broadly concur with the Judgment when appreciating the effects of the State *effectivités* of El Salvador in Meanguera and the conduct of Honduras related thereto. But it is through *the interplay of the two elements* that a new legal situation arises in the relations between the Parties with respect to Meanguera, which does not correspond to the one resulting from the application of the 1821 *uti possidetis juris* mentioned in paragraph 159 above, and not merely because in 1854 El Salvador asserted a claim to the island and, years later, took effective possession and control of Meanguera. In this respect the conclusion of the Chamber as drafted in paragraph 367 of its reasoning is certainly defective, because Meanguera was

an island *avec maître* and that *maître* had since 1821 been the Republic of Honduras. Thus it cannot be said that the past conduct of Honduras, at the relevant period, made "definitive" the sovereignty of El Salvador over Meanguera. El Salvador's sovereignty over that island remained non-existent right up to the very moment when the acquiescence of Honduras could be deemed as established under international law and exists only as from that point in time.

(ii) *Meanguerita*

169. The 1821 *uti possidetis juris*, on the other hand, must needs prevail in the case of Meanguerita. In this second island in dispute, there are neither "State *effectivités*" of El Salvador nor any evidence of acquiescence or consent by conduct on the part of Honduras. Thus there is no norm of international law applicable to Meanguerita capable of conveying sovereign territorial rights other than the *uti possidetis juris* of Honduras.

170. El Salvador has not proved any physical or material State *effectivités* in Meanguerita or performed any formal act of "sovereignty" with respect to Meanguerita. Neither is there any evidence of El Salvador having assumed any administrative responsibility with respect to or in Meanguerita. Thus a determination of the legal situation of Meanguerita from the standpoint of the "State *effectivités*" of El Salvador and related past conduct of Honduras leads nowhere. Some information contained in the evidence submitted on the "maritime spaces dispute" refers to "navy patrols" in waters near Meanguerita, but by both Parties and, to state the obvious, these activities did not take place on Meanguerita but on the sea, however near the island.

171. No attempt has been made by either of the Parties to prove "State *effectivités*" concerning the island of Meanguerita. Those attempts would in any case have been, to say the least, venturesome, simply because there have been no post-1821 "State *effectivités*" on Meanguerita. The dispute between the Parties as to the "sovereignty" over Meanguerita has, therefore, a legal dimension of its own. It is a case of attribution of sovereignty over an island which is, by definition, an island *avec maître* and with respect to which no post-independence "State *effectivités*" of one Party and related consent by conduct of the other Party has taken place. El Salvador has not created any status quo or *de facto* situation concerning Meanguerita, as it has in the case of the island of Meanguera. No Salvadorian physical or formal acts of apprehension of "sovereignty" over Meanguerita have been reported to the Chamber. In these circumstances, "sovereignty" over Meanguerita must needs continue to be governed exclusively by the 1821 *uti possidetis juris* of Honduras.

172. Meanguerita is, certainly, a much smaller island than Meanguera. But there are many still smaller islands within the Gulf of Fonseca, such as

Los Farallones, which are placed under different "sovereigns". Meanguerita is indeed located next to Meanguera, but this is *in casu* no reason to avoid determining "sovereignty" over Meanguerita *on its own merits.* The concepts of "distance" and/or "proximity" as such are irrelevant in determining sovereignty over Meanguerita in the circumstances of the case. Furthermore, a mere glance at any political map of the world suffices to make one appreciate that "sovereignty" over islands is not subject to such broad concepts as "distance" or "proximity". There is here no dispute on "maritime delimitations" but a "land dispute" concerning islands. This dispute, on the other hand, is not defined by the Special Agreement by reference to "archipelagoes", "groups of islands" or "maritime zones" within the Gulf of Fonseca.

173. The "island dispute" before the Chamber was a dispute over *two individual islands* within the Gulf. It is the legal situation of each of those islands *on its own merits* and not the "archipelago" formed by them that should have been the subject of the Chamber's determination. The mention, for example, that *"occupation"* of a *"principal island"* must also be deemed to include therein small islands, islets and rocks of the same archipelago, or around the said "principal island", is quite beside the point in the light of the factual and legal circumstances of the present case. The "appendage" thesis relied on by El Salvador, whatever its legal significance in certain situations, is of no operative value in the present one, any more than "distance" or "proximity", except — and only except — within an application of the 1821 *uti possidetis juris*, in that it is a matter of common sense that, if Spanish authorities placed Meanguera under the jurisdictions of the *Alcaldia Mayor of Tegucigalpa* and the *Bishopric of Comayagua* (Honduras), the very geographical location of Meanguerita provides a strong clue as to the civil and ecclesiastical jurisdiction to which it was assigned by the said authorities, as proved on the other hand by the evidence indicated in paragraph 154 above.

174. The principles and rules of international law applicable to the present "island dispute" are not those concerning acquisition of sovereignty through "occupation" of *terra nullius* islands, principal or otherwise, followed by effective administration. Not at all. They are the *uti possidetis juris* and, eventually, the "State *effectivités*" of one Party and related conduct of the other Party. Such *effectivités* and conduct are simply missing in the case of Meanguerita. The fact that the "appendage" thesis could operate in certain situations pursuant to a given principle or norm does not at all allow one to conclude that it must also operate in determinations made in accordance with other legal principles or norms.

175. Moreover, the geographical location, physical features and conditions for human habitation afforded by Meanguerita do not warrant a

determination *in casu* based upon the "appendage" thesis. There is natural vegetation on Meanguerita. The island is at present uninhabited. There is, therefore, no human argument to be pondered. On the other hand, the Chamber knows that the island is not uninhabitable. It has been said that there is a problem concerning the availability of a source of fresh water on the island, but this circumstance, if verified, could be remedied in these present-day times. In any case, "sovereignty" over an island with vegetation and the possibility of sustaining normal life is not conditional in international law on the existence or non-existence of fresh water, or of a particular kind of fresh water, on the island concerned. There are certainly better conditions for the sustenance of human life to be found in Meanguerita than in other islands of the Gulf.

176. The application of the "appendage" thesis to an island like Meanguerita would have been open to challenge even in cases attracting the application of the rules governing acquisition of *terra nullius*. To attempt to apply it in a different international law environment, namely in a case where the island concerned is a territory *avec maître* and does not present any abnormality from the standpoint of its geographical location, its physical features and/or its conditions for sustaining human life is, so far as I can see, totally unprecedented. Yet the Judgment does just that, on three grounds, namely *(a)* inconclusiveness as to the *uti possidetis juris* position of Meanguera in 1821 on the basis of colonial titles and *effectivités*; *(b)* characterization of Meanguerita as a "dependency" of Meanguera in the sense of the relevant jurisprudence of the *Minquiers and Ecrehos* case; and *(c)* impossibility of considering that the *legal* position of Meanguerita could have been other than identical with that of Meanguera (paragraph 367 of the reasoning of the Judgment). I reject as unfounded these three propositions. Consequently I have voted against the corresponding operative subparagraph, which I cannot uphold in the circumstances of the present case and of the law applicable to it. El Salvador did not assert any claim to Meanguerita in 1854, neither has it since taken effective possession and control of that island. That being so, it is an impossibility for Honduras to have acquiesced in the exercise of sovereignty by El Salvador on the island of Meanguerita.

D. Overall Conclusion

177. In the light of the above, my overall conclusion on the two islands in dispute between the Parties, namely Meanguera and Meanguerita, is that the sovereignty over Meanguera belongs at *present* to the Republic of El Salvador on the basis of its "State *effectivités*" in the island and the related past conduct of Honduras at the relevant period. A modification of the rights of Honduras derived from its 1821 *uti possidetis juris* on Meanguera has, therefore, been effected by the operation of other rules of international law which are also applicable in the present case by virtue of Article 5 of the Special Agreement. Such a modification has not taken

place, however, concerning the 1821 *uti possidetis juris* of Honduras on Meanguerita. Consequently, today, as in 1821, sovereignty over Meanguerita belongs, in my opinion, to the Republic of Honduras.

III. The Maritime Dispute

A. The Régime of the Gulf of Fonseca and Its "Historic Waters". Entitlement to Maritime Spaces in the Pacific Ocean Seaward of the Closing-Line of the Gulf of Fonseca

178. I have no observations to make on paragraphs 381 to 420 of the reasoning of the Judgment. I accept them *in toto* and have voted in favour of operative paragraph 432, subparagraphs 1 and 3. 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 waters of the Gulf are "historic waters", their "historic" status being in existence when the "successorial event" took place[1]. This means 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. It follows therefore that the waters of the Gulf which had not been divided by Honduras, El Salvador and Nicaragua subsequently to 1821 remain held in sovereignty by the three Republics jointly, pending their delimitation.

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[1] As stated in the 1917 Judgement of the Central American Court of Justice:

> "The historic origin of the right of exclusive ownership that has been exercised over the waters of the Gulf during the course of nearly four hundred years is incontrovertible, first, under the Spanish dominion — from 1522, when it was discovered and incorporated into the royal patrimony of the Crown of Castile, down to the year 1821 . . ." (*American Journal of International Law*, 1917, Vol. 11, p. 700.)

This statement reflects correctly the legal situation of the waters of the Gulf of Fonseca in 1821. The waters of the Gulf were then under the exclusive sovereignty or jurisdiction of Spain. As described in the present Judgment, the Gulf was discovered by the Spanish navigator Andrés Niño in 1522, who named the Gulf after Juan Rodríguez de Fonseca, Bishop of Burgos (appointed President of the *Consejo de Indias* by the King in 1524), the patron of his expedition, which had been organized by Captain Gil González Dávila. By naming the Gulf as he did, Andrés Niño complied with the provisions in the Spanish Laws for the Indies which ordered the naming of newly discovered places (see, for

(continued on next page)

179. 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" belonging to the three States of the Gulf. These three States, on the other hand, have themselves accepted freely the condition of "successor States". 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

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example, Law 8, Book IV, Title I of the *Recopilación*). The naming of newly discovered places was also at that period viewed by the law of nations as a symbolic act of possession. Naming was but one of the accepted forms of symbolic acts of possession. The performance of such acts was restricted by no means to mainland areas or places. They were also accepted and performed with respect to rivers, islands and maritime spaces. For example, as is well known, when in 1513 Nuñez de Balboa crossed the isthmus of Panama and reached for the first time, coming from the west, the Pacific Ocean, he took possession of the sea, that he named *Mar del Sur*, on behalf of the Crown of Castile, by performing symbolic acts of possession. Andrés Niño discovered the Gulf of Fonseca only a few years later (1522), coming, precisely, from Panama by navigating through the said *Mar del Sur* along the coasts of Central America in a general north-westerly direction. The Spanish Laws for the Indies left at the discretion of the discoverer the choice of the particular form of the act of symbolic possession to be performed. They were supposed to perform *"los actos que convinieran, los quales traigan en pública forma, y manera, que hagan fee"* (Law 11, Book IV, Title II of the *Recopilación*). The acts of symbolic possession described were effected in application of the overall international title then bestowed upon the Crown of Castile as expressed in the Law enacted by the Emperor Charles I on 14 September 1519 (namely three years before the discovery of the Gulf of Fonseca) entitled "De el Dominio y Jurisdicción Real de Indias", and whose opening words read as follows:

> *"Por donación de la Santa Sede Apóstolica, y otros justos y legítimos títulos, somos Señor de las Indias Occidentales, Islas y Tierra Firme del Mar Oceáno, descubiertas y por descubrir, y están incorporadas en Nuestra Real Corona de Castilla . . ."* (Law 1, Book III, Title I of the *Recopilación*.)

In the case of the Gulf of Fonseca, there is no record of any challenge by other nations before 1821 of the *"dominio y jurisdicción"* of the Crown of Castile over the Gulf. The Spanish authorities in Central America regularly submitted to the King and the *Consejo de Indias* reports on the situation in the areas of their respective territorial jurisdiction. This was also done with respect to the Gulf of Fonseca. The exclusive jurisdiction of the Spanish Crown over the Gulf of Fonseca is likewise recorded clearly in Spanish colonial general legislation as, for example, in the *Cédulas Reales* of 1563 and 1564 referred to in connection with the "island dispute". This exclusive jurisdiction is confirmed by the cartography of the times — for example, by a map of 1601 entitled "Descripción de la Audiencia de Guatemala" of the *Cronista y Cartógrafo Oficial* for the Indies, Antonio de Herrera y Tordesillas, submitted to the Arbitral Tribunal in the *Honduras Borders (Guatemala/Honduras)* case in 1929-1933. Herrera y Tordesillas is the author of the work entitled *Historia General de los Hechos Castellanos en las Islas y Tierra Firme del Mar Oceáno* published in Madrid in 1601.

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[1].

180. The individual elements composing at present the said "particular régime" of Fonseca as a "historic bay" certainly vary in nature. Some result from the succession exclusively, others from subsequent agreement or concurrent conduct (implied consent) of the three nations of the Gulf as independent States. The Judgment is declaring all of them as they stand at this moment, account having been taken of evidence and argument submitted by the Parties and the intervening State. The decision of the Judgment is not, therefore, a piece of judicial legislation and should not be read that way at all. The Judgment declares "the legal situation of the waters of the Gulf of Fonseca" established at present with its successorial and consensual elements without modifying them in any respect. Due account has been taken by the Chamber of the 1917 Judgement of the Central American Court of Justice in the process of ascertaining the present legal situation of the waters of the Gulf, but the present Judgment is not, and should not be taken as, a judgment on the interpretation and/or application of the said 1917 Judgement. Conversely, the 1917 Judgement is not an element for the interpretation or application of the present Judgment, which stands on its own feet.

181. 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 of 1917 or before, the Judgment clarifies a certain number of legal issues that, because they were described in the 1917 Judgement by reference to the old law, have been at the bottom of misunderstandings, perplexities and quite a lot of confusion. The Judgment does that with respect, for example, to the "internal" character of the waters within the Gulf, the meaning of the "one marine league" belt of exclusive jurisdiction, the "baseline" character of the closing-line of the Gulf, and the determination of those States which participate as equal partners in the "joint sovereignty" over the undivided waters of the Gulf. Passages in the 1917 Judgement concerning directly or indirectly those or other legal issues are not, therefore, supposed to interfere with the application

[1] The concept of "historic waters" and the concept of "historic bay" are not synonymous inasmuch as "historic waters" may exist without the waters concerned belonging to a "historic bay". However, it is not in my opinion correct to hold, conversely, that waters can belong to a "historic bay" without being "historic waters". The waters of a "historic bay" are "historic waters", as in the case of the Gulf of Fonseca. This is corroborated by the title given by the First United Nations Conference on the Law of the Sea and by the General Assembly to the topic ("Historic waters, including historic bays") referred by the latter to the International Law Commission for codification.

and/or interpretation of the conclusions and decisions of the present Judgment.

182. The "maritime belt" of exclusive jurisdiction or sovereignty of "one marine league" is considered by the Judgment as forming part of the "particular régime" of Fonseca as a "historic bay", but the present Judgment is not a judgment dealing with — or effecting — delimitations of "maritime belts" *as at present established.* The "maritime belt" of exclusive jurisdiction or sovereignty is one of those elements of the "particular régime" of Fonseca which possess a "consensual" origin. It does not proceed from the objective law on succession. The scope of the States' present consent to the "maritime belt" has not been pleaded in the case. Any problem which might arise concerning entitlements to and delimitations of "maritime belts", their location, etc., is a matter to be solved by agreement among the riparian States. The "one marine league" of maritime belt agreed upon by the concurrent conduct of the three States would, in the light of evidence and argument submitted, appear established as the accepted breadth in respect of their mainland coasts on the Gulf, but whether they have agreed to apply it unconditionally, generally and uniformly to their non-mainland coasts within the Gulf is a matter which has not been pleaded before the Chamber. Still less has any submission been filed thereon. Yet within the Gulf there are not only "islands" in the proper sense but also "islets", "rocks", etc., and two of the "islands" (Meanguera and Meanguerita) have been in dispute in the present case. Moreover, the "historic" as well as the "internal" general character of the waters in the Gulf, as recognized in the Judgment, precludes the possibility of settling that kind of matter by invoking the mere operation of the general law of the sea. Thus, here too, agreement among the States of the Gulf offers the obvious solution.

183. The rights 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 are fully recognized by the present Judgment and this is, for me, a ground of particular satisfaction in the light of some argument at the current proceedings aimed at occluding Honduras at the back of the Gulf. Consequently, Honduras holds sovereignty jointly with El Salvador and Nicaragua over all the waters of the Gulf subject to "joint sovereignty", wherever they may be located, including the central portion — as defined by the Judgment — of the Gulf's closing-line, these waters of the Gulf held by the three States in "joint sovereignty" being of course susceptible of division through delimitation. A second reason for satisfaction is that the status of Honduras as a Pacific Ocean coastal State is also fully confirmed by the Judgment, which recognizes Honduras's entitlement to a territorial sea, a continental shelf and an exclusive economic zone seawards of the said central portion of the closing-line of the Gulf in the open waters of the Pacific Ocean, as well as corresponding

entitlements of El Salvador and Nicaragua, delimitation having to be effected in those maritime spaces *by agreement on the basis of international law.*

B. The Question of the Competence of the Chamber to Effect Maritime "Delimitations". The Plea of Non-Competence Submitted by El Salvador. "Mootness" of the Issue

184. Having found, as indicated above, that the waters of the Gulf of Fonseca are held in sovereignty by the Republic of El Salvador, the Republic of Honduras and the Republic of Nicaragua jointly (subject to defined exceptions) and that entitlements to territorial sea, continental shelf and exclusive economic zone in the Pacific Ocean seawards of the central portion of the closing-line of the Gulf of Fonseca appertains to the said three Republics, the Chamber cannot, in my opinion, proceed to any "delimitation" of the maritime spaces concerned, within or outside the Gulf, for the simple reason that this would amount to delimiting maritime spaces in which the Judgment has recognized the existence of rights and entitlements of the Republic of Nicaragua. Although granted by the Chamber a limited intervention in the case, the Republic of Nicaragua has not, by virtue of this authorization, become a "party" to the case because, *inter alia*, the Parties to the case did not give their consent for the Republic of Nicaragua to participate in the proceedings as a "party". Furthermore, following the Chamber's granting it a non-party intervention under Article 62 of the Statute of the Court, the Republic of Nicaragua declared that, in the light of the conditions attached to its participation in the proceedings as an intervening State, the Judgment would not have for it the *res judicata* force provided for in the case of parties by Article 59 of the Statute. Given this situation, the question of the competence of the Chamber to effect delimitations in the maritime spaces concerned in the present case — an issue which has divided the Parties so much at the current proceedings — has become a "moot" issue. It is so because, independently of the competence vested in the Chamber by the Parties under their Special Agreement, the Chamber is not now entitled to delimit maritime spaces in which rights and entitlements of the Republic of Nicaragua have been recognized by the Judgment.

185. This supervening "mootness" is consequent upon decisions reached by the Chamber itself. Procedurally, however, the consequences are identical to those in cases of "mootness" resulting from circumstances external to the proceedings. A perusal of operative clauses of judgments and orders of the Court reveals that when submissions or claims made by the parties or a party become "moot" the fact that the cause of such "mootness" is internal or external to the proceedings is irrelevant. In both hypotheses, the Court has held consistently that it is no longer called upon to give a judicial decision on the submission or claim concerned, the

rationale behind this being that the said submission or claim is as from that moment without object and, therefore, pointless. Pronouncements of the Court in that sense may be found, for example, in the following cases: *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954*, pp. 32-34); *Interhandel* (*I.C.J. Reports 1959*, p. 26); *Northern Cameroons* (*I.C.J. Reports 1963*, pp. 36-38); *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits* (*I.C.J. Reports 1974*, pp. 19-20); *Nuclear Tests (Australia* v. *France)* and *(New Zealand* v. *France)* (*I.C.J. Reports 1974*, pp. 270-272 and pp. 476-477); *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya)* (*I.C.J. Reports 1985*, pp. 221 and 230).

186. This is the course of action that, in my opinion, should also have been followed by the Chamber in the present instance in responding to the plea of El Salvador that the Special Agreement had not vested the Chamber with jurisdiction to effect "delimitations" in the maritime spaces either inside or outside the Gulf of Fonseca. For reasons of its own, however, the Judgment, following a different path, has made a judicial determination on the issue in subparagraph 2 of its operative paragraph 432. This determination leaves me no option but to explain below my disagreement with the merits of a finding which, in any case, concerns, as indicated above, an issue which, as the result of the Chamber's determination of other points of law, has become "moot".

187. The non-competence plea of El Salvador referred to in the preceding paragraph being in contradiction with the submissions of Honduras, an interpretative dispute arose between the Parties concerning the meaning of the expression *"determinar la situación jurídica . . . de los espacios marítimos"* contained in Article 2, paragraph 2, of the Special Agreement. The dispute revolved very much on the verb *"determinar"* ("to determine") and on the words *"la situación jurídica"* ("the legal situation"). Did the use of this verb and these words bar the Chamber from jurisdiction to delimit the "maritime spaces" concerned? The Chamber was, of course, fully empowered to decide the issue pursuant to Article 36, paragraph 6, of the Statute of the Court, and neither of the Parties challenged its powers to do so.

188. The law on the basis of which the above interpretative dispute falls to be decided comprises the rules governing the interpretation of treaties which have been codified by the 1969 Vienna Convention on the Law of Treaties (Arts. 31 and 32). It is generally recognized that these Articles of the Vienna Convention reflect the customary law in the matter. The Judgment of the Court of 12 November 1991 on the *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)* contains a statement inspired by that proposition (*I.C.J. Reports 1991*, p. 69, para. 48). It may also be added that the corresponding draft articles were prepared by the International Law Commission as codification of existing law in the light of the relevant jurisprudence of the present Court and of the Permanent Court, and they were unanimously adopted at the plenary by the United Nations Confer-

ence on the Law of Treaties, following rejection at the committee level, by quite large majorities, of some amendments initially submitted. I concur, therefore, with the reference made in the Judgment to the "general rule on interpretation" (Art. 31) and to the rule on "supplementary means of interpretation" (Art. 32) of the Vienna Convention. At this point, however, unfortunately, I part company with the Judgment as to the matter under consideration, for reasons of principle as well as on account of the application made *in casu* of treaty interpretation rules. I can share in this respect neither the reasoning nor the decision of the Judgment which I, of course, respect.

189. The reasoning of the Judgment begins by recalling that no reference is made in Article 2, paragraph 2, of the Special Agreement to any "delimitation" by the Chamber of the maritime spaces referred to therein and that for the Chamber to have the authority to delimit maritime boundaries, whether inside or outside the Gulf of Fonseca, it must have been given a mandate to do so either in express words or "according to the true interpretation of the Special Agreement" (paragraph 373 of the reasoning of the Judgment). This is, of course, absolutely correct. But the problems lie elsewhere, namely in how to reach a "true interpretation" of the Special Agreement under present rules on treaty interpretation. In this respect, I consider that the first proposition to be borne in mind is that the said rules of treaty interpretation disregard any intentions of the parties to the treaty as a subjective element distinct from the text of the treaty. Subjective intentions alien to the text of the treaty, particularly *a posteriori* subjective intentions, should play no role in the interpretation. This does not at all mean, however, that existing interpretation rules endorse *literalism* as the object and purpose of treaty interpretation. What constitutes the object and purpose of the intrepretation process today is *the elucidation of the intentions of the parties as expressed in the text of the treaty*, presumed to be the authentic expression of the intention of the parties. In this objective environment, the object and purpose of the interpretation is not the "words" but the "intentions" of the parties as reflected in the terms used in the text of the treaty. It is in this sense, and in this sense only, that the prevailing rules of treaty interpretation are based upon the textual approach. The whole exercise is concerned, therefore, with ascertaining the intentions of El Salvador and of Honduras as reflected in the text of the Special Agreement *through an application of rules of treaty interpretation* now prevailing and not with ascertaining the meaning of individual words or expressions used in the Special Agreement.

190. To determine objectively the intentions of the Parties as reflected in the Special Agreement, one must certainly start as provided for in the Vienna Convention, namely from the "ordinary meaning" of the terms used in the provision of the Special Agreement which is the subject of the interpretation, that is, paragraph 2 of Article 2 in the instant case. But not in isolation. For treaty interpretation rules there is no "ordinary meaning" in the absolute or in the abstract. That is why Article 31 of the Vienna Con-

vention refers to "good faith" and to the ordinary meaning "to be given" to the terms of the treaty "in their context and in the light of its object and purpose". It is, therefore, a fully qualified "ordinary meaning". In addition to the said "good faith", "context" and "object and purpose", account may be taken, together with the "context", of the other interpretative elements mentioned in Article 31, including "subsequent practice" of the parties to the treaty and the "rules of international law" applicable between them. Furthermore, recourse to "supplementary means of interpretation" (preparatory work; circumstances of conclusion) is allowed for the purposes defined in Article 32. The elucidation of the "ordinary meaning" of terms used in the treaty to be interpreted requires, therefore, that due account be taken of those various interpretative principles and elements, and not only of words or expressions used in the interpreted provision taken in isolation.

191. If I say that, it is not because the "ordinary meaning" of the verb *"determinar"* or of the words *"legal situation"* creates any problem in Spanish. But I intend to remain faithful to the rules governing treaty interpretation as codified in the Vienna Convention, whose essential characteristic is that all its interpretative principles and elements form "an integrated whole", including the "ordinary meaning" element. As Sir Humphrey Waldock, Expert Consultant at the Conference and former Special Rapporteur of the International Law Commission, stated at the United Nations Conference on the Law of Treaties just before voting:

> "As far as Article 27 [31] is concerned, the intention has been to place *on the same footing* all the elements of interpretation therein mentioned." (United Nations Publication, Sales Number: E.68.V.7, p. 184, para. 72; emphasis added.)

In such a succinct manner, Sir Humphey Waldock summarized the illuminating explanation contained in this respect in the commentary of the International Law Commission on the draft articles which became Articles 31 and 32 of the Vienna Convention (United Nations Publication, Sales Number: E.70.V.5, p. 39, para. 8). The application of the rule of interpretation mentioned in Article 31 of the Vienna Convention is a single combined operation. As the International Law Commission said:

> "All the various elements, as they were present in any given case, would be thrown into the crucible, *and their interaction would give the legally relevant interpretation.*" (*Ibid.*; emphasis added.)

One is indeed very far away, not only from *"literalism"* but also from the "ordinary meaning" of terms in the abstract or in isolation. As to the rela-

tionship between the "general rule of interpretation" (Art. 31) and the "supplementary means of interpretation" (Art. 32), it is also clear that the fact that they are presented as two different Articles does not at all mean that there are two interpretative processes. The interpretative process is a single one and, the interpreter is free at any moment to turn his attention to the supplementary means of interpretation concerned without waiting for completion of the application of the general rule of Article 31.

192. But let us begin with the question of the "ordinary meaning", because the Judgment finds it difficult to see how one can equate "determination of a legal situation" with "delimitation of the maritime spaces" concerned, the context suggesting, according to the reasoning of the Judgment, a negative response. In the words of the Judgment, the question must be "why", if delimitation of the sea was intended, did the Special Agreement use 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 "determin[ing their] legal situation"? The Parties were very much divided as to the "ordinary meaning" of the verb *determinar* ("to determine"). In El Salvador's view *determinar* would exclude *delimitar*, while in that of Honduras *delimitar* was not excluded by the verb *determinar*, used in Article 2, paragraph 2, of the Special Agreement. This first aspect of the interpretative dispute has been decided by the Judgment in favour of the Honduran contention. As stated in paragraph 373 of the reasoning, the word *determinar* ("to determine") can be used to convey the idea of "setting limits". I fully agree with this initial finding of the Judgment. In Spanish, the original language of the Special Agreement, *determinar* does not in any way exclude *delimitar*. One may *determinar* by several means and one of these means may be *delimitar*. In Spanish dictionaries *"fijar los términos o los límites de una cosa"* is but one of the ordinary meanings of *determinar*. *Delimitar* is, therefore, one of the ordinary meanings of *determinar*. It follows that the verb *determinar* used in the Spanish text of Article 2, paragraph 2, of the Special Agreement does not exclude as such *delimitar*, or to effect a *delimitation*, from the standpoint of the "ordinary meaning" element of the general rule governing treaty interpretation. But, immediately after reaching this correct conclusion on the sense of *determinar*, the reasoning of the Judgment negates its effects for the interpretation owing to the fact that in Article 2, paragraph 2, of the Special Agreement "the object of the verb 'determine' is not the maritime spaces themselves, but the legal situation of these spaces" — and the Judgment concludes, on the basis of this grammatical construction, that "no indication of a common intention to obtain a delimitation by the Chamber can therefore be derived from this text as it stands". I am unable to follow the majority of the Chamber in this respect. To accept such a reasoning one must be ready to admit that "determination" through "delimitation" can never be a "determination" of a "legal situation". I cannot see how, once it is admitted that *determinar* may convey the idea of setting limits, a "delimitation" of spaces would not be a "determi-

nation of the legal situation" of the spaces concerned. In Spanish one may *determinar* through *delimitar* or otherwise all kinds of things, including spaces and lines, and for the most various purposes, including findings on legal situations. For example, the Spanish text of Article 3 of the Montego Bay Convention on the Law of the Sea uses the expression *"determinadas de conformidad con esta Convención"* with reference to the "baselines" from which the breadth of the territorial sea is measured. Now, if a State pursuant to such an Article of the Montego Bay Convention establishes such a "baseline", could it be said that by doing so the State concerned is not determining the "legal situation" of the maritime spaces on one or the other side of the "baseline"? Certainly, the tracing of the "baseline" determines the legal situation of the maritime spaces concerned. Thus delimitation through a line or lines of a space, maritime or otherwise, is not an operation which ought to be excluded from the ordinary meaning of the expression "to determine the legal situation" used in Article 2, paragraph 2, of the Special Agreement. The reasoning of the Judgment would appear to assume that *to effect delimitation of a space* is an operation which cannot be equated from the standpoint of the "ordinary meaning" element of interpretation with *a determination of the legal situation of the space concerned* and, ultimately, that *to determine a delimitation* can never be deemed to be *to determine a legal situation.* I reject this assumption on the basis of the ordinary meaning of the terms used in Article 2, paragraph 2, of the Special Agreement, interpreted in their true context and in the light of the object and purpose of the Special Agreement. A delimitation of a given space is always a clear-cut determination of the legal situation of the areas situated on both sides of the delimitation line. The Judgment would have the ordinary meaning of "to determine the legal situation of the maritime spaces" include "régime" and "entitlement" but exclude "delimitation". For my part, I do not see how this can be true from the standpoint of the "ordinary meaning" element, ascertained through an application of the rules governing treaty interpretation, even if the expression is grammatically construed as in the Judgment.

193. To delimit the maritime spaces concerned being one of the "ordinary meanings" of "to determine the legal situation of the maritime spaces", the proposition that in Article 2, paragraph 2, of the Special Agreement that expression excludes a delimitation can only be true if it happens to have been used in that provision with a "special meaning". But to establish that this was the intention of the Parties expressed in the text of the Special Agreement the onus would be on El Salvador's side and not, as stated in the Judgment, on Honduras's side (Art. 31, para. 4, of the Vienna Convention). However, El Salvador has not pleaded its case on the basis of any "special meaning" of *determinar* or of any other word used in Article 2, paragraph 2, of the Special Agreement. In fact, counsel for El Salvador "expressly" invited the Chamber to take the "words" in Article 2 of the Special Agreement, all the "words", in their "ordinary

meaning", as the Judgment also does in its own way. Important as the dichotomy between "ordinary meaning" and "special meaning" is for interpretation, the question itself appears to me in the present case to be of rather an ancillary character in the reasoning of the Judgment. The basis of the conviction reflected in the Judgment's reasoning lies elsewhere.

194. It is to be found, not in the meaning of the terms used in the "text" of Article 2, paragraph 2, of the Special Agreement as such but in their *context.* The Chamber has proceeded, in fact, to an interpretation by *context.* But it is an interpretation by context in which "context" is confined to its *minimum minimorum* expression, represented only by Article 2 of the Special Agreement. It is Article 2 as "context" which provides the rationale behind the reasoning of the Judgment. It is the contrast in Article 2 of the Special Agreement between the expression "to delimit the boundary line" in paragraph 1 and the expression "to determine the legal situation" in paragraph 2 which appears to be the main controlling factor of the interpretation given by the Judgment. However, there is no legal justification, under the prevailing treaty interpretation rules, for narrowing "context" down to a single article or a single line in an article of the Special Agreement in any case, and particularly when the tasks to be performed by the Chamber under the first and second paragraphs of Article 2 are not identical tasks; those under paragraph 2 being wider in nature and scope than the delimitation task of paragraph 1. I therefore find the relevant passages in the reasoning of the Judgment quite unpersuasive. The use of different expressions in each of the paragraphs of Article 2 is quite necessary and fully justified bearing in mind the subject of the litigation as a whole. The various tasks requested of the Chamber under Article 2, paragraph 2, cannot be covered by the "ordinary meaning" of the expression "to delimit the boundary line". This expression refers to a single task, while the expression "to determine the legal situation" embraces or may embrace several tasks of various kinds, including effecting a delimitation of the maritime spaces concerned.

195. If I concurred in the interpretative method followed by the Judgment, I would stop my observations here but, as indicated above, I intend to remain faithful to the rules of treaty interpretation codified with the unanimous support of States. I do not consider that under such rules a "true" interpretation is provided by applying each of the recognized interpretative principles and elements independently of each other or in a selective way. The "integrated whole" criterion referred to above is paramount and should prevail in the interpretation. To use Article 2 of the Special Agreement as "context" for ascertaining the meaning of the verb "to determine" or the expression "to determine the legal situation of the maritime spaces" in its paragraph 2 is, of course, admissible *providing* that one does not forget the remaining parts of "context" and other principles and elements incorporated in the general rule of treaty interpretation. "Context" comprises, *inter alia, the whole text of the treaty,* including its *preamble,* as well as *any agreement relating to the treaty which was made*

between all the parties in connection with the conclusion of the treaty (Art. 31, para. 2, of the Vienna Convention) without necessarily considering these agreements to be an integral part of the treaty subject to interpretation. As was pointed out by the International Law Commission, for the purpose of interpreting a treaty, the documents recording the said agreements should not be treated as mere evidence to which recourse may be had for resolving an ambiguity or obscurity, but *as part and parcel of the context for the purpose of arriving to the ordinary meaning of the terms of the treaty* (United Nations Publication, Sales Number: E.70.V.5, p. 41, para. 13). Then come other elements of interpretation "to be taken into account, together with the context" and, among them, "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3, of the Vienna Convention).

196. "Context" is, therefore, in the first place *the whole of the text of the treaty* to be interpreted, *preamble* included. Now the text of the 1986 Special Agreement makes an express reference to Articles 16, 19, 31 and 34 of the 1980 General Treaty of Peace concluded between the Parties, as well as a *renvoi* to the Peace Treaty as a whole in connection with the law to be applied by the Chamber to the case "when delivering its judgment". This relationship between the Special Agreement and the Peace Treaty results, therefore, from the very text of the Special Agreement. One does not need to look outside the Special Agreement to find the Peace Treaty. The Preamble and Articles 1, 2 and 5 of the Special Agreement are the provisions which establish that legal nexus for an interpretation. The 1980 Peace Treaty is, therefore, "context" for the purpose of interpreting the Special Agreement by virtue of the very text of the Special Agreement itself. One does not need to go further — for example, to the agreements referred to in paragraph 2 *(a)* of Article 31 of the Vienna Convention — to reach such a conclusion. On the basis of the Special Agreement and the general rules of treaty interpretation I take it, therefore, that the Peace Treaty is "context" for the purpose of an interpretation of the said Special Agreement.

197. The Peace Treaty, as part and parcel of the "context", is moreover an element of the greatest relevance to defining the *object and purpose of the Special Agreement*, namely to defining a further interpretative element requisite for the ascertainment of the ordinary meaning of the terms used in the Special Agreement, because the meaning of such terms has also to be established "in the light of" that "object and purpose". Now the Preamble of the Special Agreement provides that the latter was concluded considering that within the period of time envisaged by Articles 19 and 31 of the Peace Treaty no direct agreement had been reached regarding *the differences* (in the plural) relating to the existing boundaries in respect to the

remaining land areas in dispute and *relating to the juridical status of the islands and maritime spaces.* It follows that the 1986 Special Agreement between the Republic of El Salvador and the Republic of Honduras is not a special agreement which stands alone like those mentioned in paragraph 380 of the reasoning of the Judgment. The 1986 Special Agreement is in fact and in law an instrument in execution of a previous binding jurisdictional conventional undertaking in force, embodied in Article 31 of the Peace Treaty, which reads as follows:

> "If, upon the expiring of the period of five years laid down in Article 19 of this Treaty [the Peace Treaty], *total agreement has not been reached on frontier disputes* concerning the areas subject to controversy [the land boundary areas in dispute] or *concerning the legal situation in the islands or maritime areas*, or if the agreements provided for in Articles 27 and 28 of this Treaty have not been achieved, *the Parties agree that, within the following six months, they shall proceed to negotiate and sign a special agreement to submit jointly any existing controversy or controversies to the decision of the International Court of Justice.*" (Emphasis added.)

Articles 32 and 33 of the Peace Treaty could not be more precise as to the disputes that the Parties undertook to submit to the Court or a chamber of the Court either by notifying a special agreement or, after the expiration of a given deadline, through a unilateral application. These Articles of the Peace Treaty read as follows:

> *"Article 32*
>
> The Special Agreement referred to in the preceding Article shall include:
>
> *(a)* the submission of the Parties to the jurisdiction of the International Court of Justice so that it may settle the controversy or controversies referred to in the preceding Article;
> *(b)* the time-limits for the presentation of documents and the number of such documents;
> *(c)* the determination of any other question of a procedural nature that may be pertinent.
>
> Both Governments shall agree upon the date for the joint notification of the Special Agreement to the International Court of Justice but, in the absence of such an agreement, any one of them may proceed with the notification, after having previously informed the other Party by the diplomatic channel.
>
> *Article 33*
>
> If, within the period of six months laid down in Article 31, the Parties have not been able to reach agreement on the terms of the Special Agreement, any one of them may submit, in the form of a unilateral

application, the existing controversy or controversies to the decision of the International Court of Justice, after having previously informed the other Party by the diplomatic channel."

198. The 1986 Special Agreement is supposed, therefore, according to the Peace Treaty, to be a special agreement submitting to the Court or to one chamber of the Court *"any existing controversy or controversies" concerning* the boundary in the disputed land sectors and *the legal situation in the islands and maritime spaces at the time of the expiry of the period of five years laid down in Article 19 of the Peace Treaty.* What were, at that date, and indeed during the present proceedings, the "existing controversies" between the Parties concerning the determination of the legal situation in the maritime spaces? The reply to this question is provided by the evidence in the case-file. It appears from that evidence that the Republic of El Salvador and the Republic of Honduras understood the expression "to determine the legal situation of the islands and maritime areas" of Article 18 of the Peace Treaty (an expression similar to the one in Article 2, paragraph 2, of the Special Agreement) when defining the "functions" of the Joint Frontier Commission, established on 1 May 1980, as including "delimitation" of the maritime spaces concerned. Delimitation proposals were in fact submitted to the consideration of the Joint Frontier Commission and discussed, as well as directly at the highest level of representation. There cannot be any reasonable doubt thereon in the light of the said evidence, the so-described "conciliatory" proposal of President Duarte being particularly revealing in this respect.

199. Neither is there room to question, as counsel for El Salvador did at the hearings, that there exists any dispute between the Parties as to the delimitation of waters of the Gulf of Fonseca, on the basis of the argument that such waters were in *condominium* as defined in the 1917 Judgement of the Central American Court of Justice in the controversy between El Salvador and Nicaragua concerning the Bryan-Chamorro Treaty. How could it be so, so far as the present case between El Salvador and Honduras is concerned, in the light of the pleadings and submissions of the Parties and their previous application and interpretation of their 1980 Peace Treaty? The very object of the dispute before the Chamber as to the legal situation of the maritime spaces within the Gulf of Fonseca revolves on the question of *condominium without delimitation* (El Salvador's thesis) or *community of interests with delimitation* (Honduras's thesis)! This is precisely the subject of the controversy on the Gulf of Fonseca before the Chamber. The Judgment has now settled the matter by declaring the existence of "joint sovereignty" of the three States of the Gulf over its undivided waters *but without excluding thereby the possibility of delimitation of the waters of the Gulf.* There is not, therefore, any inherent legal incompatibility, for the dispute between the Parties when concluding the Special Agreement comprised, as to the Gulf, both a dispute on the condominium issue and a dispute on the delimitation issue. This is borne out by events. All along,

the history of the relations between the Parties, involved "delimitation" of the maritime spaces in dispute; from the conclusion of the unratified 1884 Cruz-Letona convention, which embodied a delimitation within the Gulf of Fonseca, down to the present proceedings, not forgetting, as already said, the Joint Frontier Commission (May 1980- December 1985).

200. That the dispute between the Parties concerning the legal situation of the maritime spaces within the Gulf of Fonseca, as also in the maritime spaces in the Pacific Ocean seaward of the closing-line of the Gulf, included a "delimitation" aspect cannot reasonably be questioned, and a true interpretation of Article 2, paragraph 2, of the Special Agreement proves that *that dispute* and no other was the dispute referred by the Parties to the Chamber for adjudication. The contrary proposition would amount to admitting that when negotiating and concluding the Special Agreement the Parties reformulated the subject of the dispute existing between them since the beginning of the present century in the case of the Gulf of Fonseca, and as from about 1974 in the case of the maritime spaces outside the Gulf. There is not the slightest proof of any such reformulation in the evidence submitted by the Parties to the Chamber, neither does it emerge from any interpretation of the Special Agreement performed in accordance with the prevailing rules of treaty interpretation.

201. In fact, the practice of the Parties subsequent to the 1986 Special Agreement confirmed that the scope of their dispute on the legal situation of the maritime spaces remained the same as before. The pleadings, argument and submission of Honduras speak for themselves in that respect. In the eyes of Honduras, Article 2, paragraph 2, of the Special Agreement empowers the Chamber to effect "delimitations" in the maritime spaces without excluding other determinations. And, in fact, the same results from the very conduct of El Salvador itself at the current proceedings, notwithstanding its rejection of the interpretation of Honduras, based *inter alia* upon "constitutional" considerations. If the conduct of El Salvador at the present proceedings is analysed closely, one sees that the denial of "delimitation" is not confirmed by some of its arguments and submissions. Albeit with caveats and restraint, El Salvador also has pleaded to, and made submissions on "delimitation" aspects of the maritime dispute, inside the Gulf of Fonseca in particular. What El Salvador refused to do was to discuss in detail the delimitation lines proposed by Honduras, covering itself with the plea of "non-competence". This is, in final analysis, a procedural situation contemplated in Article 53 of the Statute of the Court, whose provisions apply not only to non-appearance situations but also to situations when a party fails to defend its case. One of El Salvador's formal submissions, for example, requests the Chamber to adjudge and declare that the legal situation of the maritime spaces within the Gulf of Fonseca corresponds to the legal position established by the 1917 Judgement of the Central American Court of Justice. Now, in that Judgement, to which Honduras is not party, it is a question not only of *condominium* but also of *maritime delimitations* within the Gulf (the one marine league littoral zone; the inspection zones; and the 1900 Hon-

duras/Nicaragua delimitation). Moreover, the *condominium* submission itself implies *ex hypothesi* the existence of a line distinguishing the maritime spaces within the Gulf from those outside the Gulf. El Salvador even referred in the current proceedings to a new line of its own making, namely to a line dividing the so-called inner and outer sectors of the Gulf. Littoral zones of islands, including islands "in dispute", have also been very much present in Salvadorian arguments. El Salvador has, therefore, like Honduras, pleaded to delimitation matters and lines. This subsequent conduct of the Parties, as reflected in the current proceedings, is no doubt also relevant to the interpretation of Article 2, paragraph 2, of the Special Agreement. It cannot be put aside by the Chamber when interpreting that provision. El Salvador did not exclude "delimitation" under the Special Agreement, but only "certain delimitation matters" or "delimitation in certain maritime areas".

202. The affidavit of the former Foreign Minister of El Salvador submitted in order to prove the lack of consent on the part of El Salvador, when concluding the Special Agreement, to the conferment upon the Chamber of jurisdiction to effect "maritime delimitations" cannot be admitted as an element of interpretation of Article 2, paragraph 2, of the Special Agreement under existing rules of treaty interpretation. It was not, when the Special Agreement was concluded, accepted by Honduras as a document related to that Agreement. To justify attaching to it the interpretative value sought by El Salvador, the affidavit should have been embodied in a document or instrument (i.e., a plenipotentiary instrument) at the time of that conclusion, and communicated to and accepted by Honduras. Nothing of this kind has been reported to the Chamber. In this connection, and with all due respect, I am obliged also to recall here the latest jurisprudence of the Court on affidavits of Ministers of parties to a case (*I.C.J. Reports 1986*, p. 43, para. 70).

203. I must confess that I have difficulty following the conclusion drawn in the Judgment from the explanation given by Honduras for the Parties having chosen the formula used in Article 2, paragraph 2, of the Special Agreement, which follows closely El Salvador's own explanation. For an interpretation of the provisions in question, the only relevant thing to be extracted from that explanation is that the formula was taken almost word for word from the 1980 Peace Treaty, under which the existing controversy between the Parties as to the "maritime spaces" embraced "delimitation", as well as other determinations, and nothing else. What matters for the purpose of deciding the interpretation dispute between the Parties is *exclusively* the scope of their consent to jurisdiction *as expressed in Article 2, paragraph 2, of the Special Agreement.* The motivations for choosing the formula are alien to the interpretation except as a possible "supplementary means" linked to the circumstances of its adoption. They are, in

any case, subjective elements distinct from the actual text of the Special Agreement. The method followed in this respect by the Judgment would seem to be based upon reasonings of the Court concerning determinations of the scope of consent to jurisdiction deriving from declarations made pursuant to Article 36, paragraph 2, of the Statute. But the Chamber is not supposed to determine in the instant case the area of coincidence of consents given by parties in separate unilateral instruments. It must simply interpret a provision of a *treaty*, namely the Special Agreement. This does not allow it to consider separately the consent given by each Party to the Special Agreement, or to set up the consent of one Party against the consent of the other; both consents, as reflected in the text of the Special Agreement, constitute a single unity for the purpose of interpretation. It is this meeting of minds which is the only thing that counts in the present instance. If through the interpretation process such an expressed meeting of minds is unclear or leads to unreasonable results (for example, the total exclusion of a main tenet of the position of one of the Parties), there remains recourse to the "supplementary means" of treaty interpretation which, in the present case, would mean examining the circumstances leading to the conclusion of the Special Agreement and, consequently, to Articles 31 and 32 of the Peace Treaty. *A posteriori* explanations cannot form a substitute for the intentions of the Parties as expressed in the text of the Special Agreement at the time of conclusion in 1986. I have already said that the "controversy" existing at that moment involved "delimitation" of the maritime spaces and that the expression "to determine the legal situation of the maritime spaces" in itself, as well as in the context of the Special Agreement and in the light of its object and purpose, does not exclude the Chamber's effecting a delimitation of the maritime spaces concerned.

204. In this connection it is also worth recalling that the fact that the treaty to be interpreted is in the present case a "special agreement" *(compromis)* does not change by one iota the interpretation rules to be applied, which remain the same as in the case of any other kind of treaty. It was agreed at the United Nations Conference on the Law of Treaties that, for interpretation purposes, no distinctions should be made on the basis of the various possible classifications of treaties, with the single exception of the additional rules for "multilingual treaties" (Art. 33 of the Vienna Convention). Special agreements *(compromis)* are no exception, as the Court recently confirmed in its Judgment of 12 November 1991 on the *Arbitral Award of 31 July 1989 (Guinea Bissau* v. *Senegal)* (*I.C.J. Reports 1991*, pp. 69-70, para. 48). Old theories about the so-called "restrictive" interpretation of conventional instruments providing for the jurisdiction of international courts and tribunals do not correspond to present rules of treaty interpretation. They were consciously left out of those rules when the latter were codified by the Vienna Convention. No longer does restrictiveness in treaty interpretation govern *a priori* in any way the act of treaty interpretation of such kinds of conventional instrument. The subject-matter

of the treaty as such is not an element of the general rule on interpretation of treaties. I see no reason therefore to try to establish any relationship whatsoever between the operation of interpreting Article 2, paragraph 2, of the Special Agreement and the principle of the consensual jurisdiction of the Court. This latter principle is not supposed to be thrown into the crucible in order to arrive at the legally relevant interpretation of that provision of the Special Agreement. To do otherwise, as the reasoning of the Judgment does, begs in fact the interpretative question at issue. It does not provide an answer to it. In fact, the Judgment quite unwarrantedly, in my opinion, equates the efforts of the Parties to find a *"neutral formula"* in order to overcome constitutional problems with the different matter of their intentions, or their common intention, in adopting such a formula in Article 2, paragraph 2, of the Special Agreement, the meaning of which should be ascertained through an interpretation performed in accordance with the rules of treaty interpretation now prevailing.

205. I point out the foregoing, *inter alia*, because the Judgment rejects a contention by Honduras based upon the principle of effectiveness *(effet utile)* apparently because in interpreting *a text of this kind* (a reference presumably to the Special Agreement) the Chamber must primarily consider not evidence as to the general intentions of the Parties in relation to the dispute, but the common consent expressed in the "words" of the Special Agreement. We have already explained the meaning of the expressions used in Article 2 of the Special Agreement. It suffices, therefore, to recall here that the maxim *ut res magis valeat quam pereat*, in so far as it reflects a true general rule of interpretation, is embodied, as explained by the International Law Commission, in Article 31, paragraph 1, of the Vienna Convention, which requires that a treaty be interpreted in *good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose* (United Nations Publication, Sales Number: E.70.V.5, p. 39, para. 6). Within these limits, the contention of Honduras is a perfectly valid legal argument where good faith interpretation of Article 2, paragraph 2, of the Special Agreement is concerned, particularly when no evidence has been submitted to the Chamber to the effect that the "object" of the controversy between the Parties existing before 24 May 1986 was altered by the Special Agreement and no such evidence emerges either from its text, its context, or its object and purpose.

206. It is really difficult to understand the scant attention paid by the Judgment, in dealing with this interpretation dispute, to the whole text of the Special Agreement and to the Peace Treaty as part of its "context". Context is by no means Article 2 of the Special Agreement alone. The flat statement in paragraph 374 of the reasoning of the Judgment to the effect that the interpretation given by the majority of the members of the Chamber of the expression "to determine the legal situation" is also confirmed if the phrase is considered in the "wider context", first of the Special Agree-

ment as a whole, and then of the 1980 General Treaty of Peace to which the Special Agreement refers, is certainly no substitute for a reasoned explanation. Still less when the Judgment itself seeks support for its own interpretation by referring to terms generally or commonly used to convey the idea that "delimitation" is intended. In treaty practice one may find all kinds of terms, and the present interpretation, as indicated above, is not one dependent on any "special meaning" of the terms used in Article 2, paragraph 2, of the Special Agreement, since the "ordinary meaning" of "to determine the legal situation of the maritime spaces" also conveys "to effect a delimitation of the maritime spaces concerned". The same applies *mutatis mutandis* to the Judgment's neglect of the "object and purpose" of the Special Agreement, which is an instrument drawn up in execution of Article 32 of the Peace Treaty. An interpretation which puts aside, for all practical purposes, the "object and purpose" of the instrument containing the terms or expressions to be interpreted is *not* an interpretation made in accordance with the prevailing general rule of treaty interpretation (Art. 31 of the Vienna Convention).

207. In the light of the above, I reject the submission of El Salvador to the effect that the formula used in the text of the Special Agreement *("que determine la situación jurídica de los espacios marítimos")* bars the Chamber from having jurisdiction to effect *"delimitación"* in the maritime spaces referred to it. The Chamber is empowered to do so under Article 2, paragraph 2, of the Special Agreement in so far as the scope of its jurisdiction is concerned. It should not, however, exercise its jurisdiction to delimit because, as indicated in paragraphs 184 to 186 above, this interpretation dispute has become a "moot" issue as a result of the judicial decisions of the Chamber recorded in subparagraphs 1 and 3 of operative paragraph 432 of the Judgment. I most regretfully disagree, therefore, with the decision of the majority of the Chamber on the non-competence submission of El Salvador, as well as with the procedural treatment of the matter in the Judgment.

C. The Question of the Effects of the Judgment for the Intervening State

208. I agree with the finding of the Judgment that "in the circumstances of the present case, this Judgment is not *res judicata* for Nicaragua" (paragraph 424 of the reasoning). There remains, however, the question of the effects of the Judgment other than that of *res judicata* (Art. 59 of the Statute) on a non-party State intervening under Article 62 of the Statute. In this respect, I concur with the statement contained in the declaration of Vice-President Oda appended to the Judgment. My position is based upon the fact that I cannot, as a general proposition, conceive of rights without obligations as well as upon the general economy of the institution of intervention as embodied in Articles 62 and 63 of the Statute of the Court. Interventions under Article 63, for example, are non-party inter-

ventions and nevertheless the intervening State is under the obligation set forth in that Article. *Mutatis mutandis*, an obligation of that kind also exists, in my opinion, for a non-party State intervening under Article 62, notwithstanding the fact that that Article does not say so in plain words. My reading of the *travaux préparatoires* of the 1920 Statute of the Permanent Court of International Justice as well as of the observations of the British Government signed by the British Agent, Cecil J. B. Hurst, concerning the original Application of the Government of Poland for permission to intervene in the *S.S. "Wimbledon"* case under Article 62 (*P.C.I.J., Series C, No. 3*, Vol. I, pp. 105-108), confirms rather than negates the above conclusion.

(Signed) Santiago TORRES BERNÁRDEZ.